

HIGH COURT AT CALCUTTA

In the Circuit Bench At Jalpaiguri

CONSTITUTIONAL WRIT JURISDICTION

Present:

THE HON'BLE JUSTICE JAY SENGUPTA

WPA 779 of 2022

Colonel Partha Pratim Dubey

Versus

The Union of India & Ors.

For the petitioner : Mr. Srijib Kumar Chakraborty
Mr. Pankaj Agarwal
Mr. Debajit Kundu
...Advocates

For the Union of India : Mr. Sudipto Kumar Mazumdar
Mr. Ajoy Kumar Singhanian
Mr. Debanjan Das
Mr. Saptak Sarkar
...Advocates

Lastly heard on : 22.04.2022

Judgment on : 22.04.2022

JAY SENGUPTA, J.:

1. This is an application under Article 226 of the Constitution of India, *inter alia*, praying for setting aside of the order of attachment dated 25th March, 2022 issued by the respondents, the movement order dated 25th

March, 2022 as well as the orders dated 2nd April, 2022 and 5th April, 2022 regarding handing over charge by the petitioner to his superior in the Army establishment.

2. Learned counsel appearing on behalf of the petitioner submits as follows. First, on the question of maintainability of this application, it is submitted that the present application is being moved before this Court as the learned Armed Forces Tribunal is lying vacant. On this, reliance is placed on a decision of a Hon'ble Division Bench of this Court in Colonel Nikhil Pareek vs. Union of India & Ors. in MAT 19 of 2021 with IA No. CAN 1 of 2021. The petitioner is a colonel in the Indian Army. He is a meritorious officer who had also served under extreme conditions in Arunachal Pradesh. In June 2021, he was sent to his posting in question at 33 Corps Intelligence Battalion. He was posted as the Commanding Officer of the said battalion. During the course of his employment, the petitioner came across several unfortunate instances of corruption and espionage in the Army establishment. He investigated into all these, collected necessary information and evidence, took steps in some cases and prepared files in respect of the same. He was also perturbed with the apparent influence that a politically significant civilian was exercising on some officers. In effect, he was enquiring into alleged indiscretions committed by a few officers in the Army, some of whom were superior in rank to him. In the meantime, a pseudonymous complaint was filed before the Headquarter of the Corps alleging wrongdoings by the petitioner. The guidelines of CVC are quite clear that no action was required to be taken on a pseudonymous complaint.

Thereafter, another complaint was made against the petitioner in regarding misuse of GS funds, which is meant for payment to sources and the like and is not a subject matter of audit. There was no complaint whatsoever about use of any public fund. Yet, a Court of Enquiry was needlessly instituted on the two complaints. No papers were supplied to the petitioner although the petitioner was allowed to participate in the enquiry by cross-examining witnesses. On 14.02.2022 the Court of Enquiry was concluded. However, no communication was made in this regard to the present petitioner. Thereafter, a purported order of attachment was passed. The order was not in conformity with Army Instruction Nos. 29 and 30 as notified in August 1996. There is no recording in the order that a *prima facie* case was established against the petitioner. Moreover, the petitioner was supposed to continue with the same post even after attachment. In fact, the petitioner was practically forcibly moved out of the Unit. His family was threatened and his house was seized. Yet, the petitioner complied with the directions, without prejudice. Soon thereafter on 02.04.2022, another order was passed directing the petitioner to go back to the 33 Corps and hand over the relevant documents including the confidential ones. This would mean handing over all the materials collected during investigation to the superior personnel in the same Corps although some superior officers of the said Corps were being investigated by the present petitioner. During the Court of Enquiry, the petitioner had written a letter to the Brigadier, Operations of the said Corps broadly enumerating the matters which were being investigated by the petitioner. In view of the above, the orders directing

attachment of the petitioner to another unit and the subsequent orders including the one directing the petitioner to hand over sensitive documents to his superiors ought to be set aside.

3. Learned counsel appearing on behalf of the respondents files a notice dated 4th April, 2022, which is taken on record. He submits as follows. The present writ application is not maintainable as the Armed Forces Tribunal would start functioning from 9th May, 2022 as would be evident from a notice dated 4th April, 2022 issued by the Registrar-in-Charge of the Court in this regard. Secondly, in *Union of India and Ors. Vs. Lieutenant Colonel Dharamvir Singh*, (2019) 15 SCC 793, the Hon'ble Supreme Court categorically held that the assumption of jurisdiction by a High Court in a writ petition under Article 226 of the Constitution was misconceived. The writ petitioner here was being enquired into in respect of serious charges. This justifies the order of attachment. The petitioner was directed to hand over documents and arms to the highest officer in the Corps. This would not amount to interfering with investigations that were being conducted by the petitioner. In the alternative, while the arms may be returned to the superior officer of the said unit, relevant documents can be handed over to the highest office of the Eastern Command, if so required in the interest of justice. Once those arms are returned for the earlier engagement, arms would be issued in respect of the new unit. Therefore, a direction may be passed upon the petitioner to hand over the documents mentioned in order dated 2nd April, 2022 to an officer designated by the Major General, General Staff stationed at the Fort Williams within a stipulated time. The other

grievances that the petitioner might have regarding the Court of Enquiry or the consequent orders of attachment and the like may be agitated by the petitioner before the Armed Forces Tribunal, which would become operational from 9th May, 2022.

4. I have heard the submissions of the learned counsels appearing on behalf of the parties and have perused the writ petition, the notice filed on behalf of the respondent and the written notes of submissions filed on behalf of the parties.

5. It is settled law that a High Court ordinarily ought not to entertain a writ application under Article 226 of the Constitution regarding matters that are within the domain of the Armed Forces Tribunal when the said Tribunal is functioning. However, it was clearly held by a Division Bench of this Court in the case of Colonel Nikhil Pareek (*supra*) that when the Armed Forces Tribunal is not functioning or if there is a doubt about whether it is functioning, it shall be open to this Court to invoke the powers under Article 226 of the Constitution to do justice even in matters that relate to the jurisdiction of the said Armed Forces Tribunal. The facts of the case in Union of India & Ors. Vs. Lieutenant Colonel Dharamvir Singh (*supra*), are quite different. A general principle was laid down there that a High Court ought not to exercise writ jurisdiction to deal with service matters and matters pertaining to Army discipline that are within the domain of the Armed Forces Tribunal. There it was not the case that the concerned Armed Forces Tribunal was not functioning.

6. Therefore, since the Arm Forces Tribunal, Kolkata is not functioning as on date, this Court can exercise its jurisdiction under Article 226 of the Constitution to deal with matters, especially those which are of exigent nature, which would have otherwise been dealt with by the said Tribunal had it been functioning. However, a final disposal of this application would require exchange of affidavits, by which time the Tribunal would become functional.

7. At present, this Court is more concerned with the order directing the petitioner to go back to the 33 Corps and hand over all the sensitive documents and files that pertained to the petitioner's investigation into serious issues like corruptions and espionage. These pertain to the security of the nation. If the petitioner is to be believed, these documents may involved names of individuals who are superior in rank to the present petitioner. Although the petitioner's other grievances regarding the Court of Enquiry, the attachment order and the consequential orders can wait till the Armed Forces Tribunal becomes functional, the issue of handing over the above referred sensitive documents is of such exigent nature that the same has to be dealt with at the earliest.

8. This Court is convinced with the fairness of the alternative proposition mooted by the learned counsel appearing on behalf of the respondents that if required, such documents can be handed over to a superior officer of the Eastern Command at the Fort Williams.

9. Therefore, without strictly going into the issue whether handing over the sensitive documents by the petitioner regarding investigation into cases of corruption and espionage in the Army to the senior most officer of the same Corps would lead to impairment of proper investigations or not, this Court finds it expedient to direct the petitioner to hand over the said documents to an officer of the Eastern Command at the Fort Williams as per the direction of the Major General, General Staff, Fort Williams within a stipulated time.

10. It is clarified that the merits of the application has not been gone into except for deciding the question of handing over of sensitive documents and files regarding investigations conducted by the petitioner, an intelligence officer of the Army, to the highest Office of the Eastern Command.

11. In view of the above, this Court passes the following directions-

- (a) Without prejudice, the petitioner shall hand over the files and documents as referred to in the order dated 2nd April, 2022 to an Officer of the Eastern Command, Fort Williams to be deputed for such purpose by the Major General, General Staff at the Fort William within fifteen days from this date.
- (b) The arms retained by the petitioner, if any, as an officer of the earlier unit shall be handed over to the Superior Officer of the earlier Unit within a month from this date.
- (c) The petitioner shall be at liberty to raise all the points taken up in this application in respect of the Court of Enquiry, the attachment

order and the consequent orders passed thereafter including the order directing handing over of files and documents, before the Armed Forces Tribunal after it starts functioning as proposed or before the appropriate forum, if the Tribunal does not start functioning as proposed.

12. With these observations, the writ application is disposed of.

13. Urgent Photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

14. All parties shall act on server copy of this order downloaded from the official website of this Court.

(Jay Sengupta, J.)

P. Adak