* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision : 05th November, 2020**

\+ W.P. (C) 8313/2020, CM APPL. 26934/2020 (for stay) & CM APPL. 26936/2020 (seeking permission to file lengthy list of dates and events)

GROUP CAPTAIN SUMAN ROY CHOWDHURY .....Petitioner
Through: Mr. Ankur Chhibber, Advocate.

versus

UNION OF INDIA AND ORS. .....Respondents
Through: Mr. Syed Hussain Adil Taqvi, GP. Group Captain Atul Kumar Command Judge Advocate HQ Western Air Command.

AND

\+ W.P.(C) 8320/2020, CM APPL. 26977/2020 (for stay) & CM APPL. 26979/2020 (seeking permission to file lengthy list of dates and events).

WING COMMANDER SHYAM NAITHANI ..... Petitioner
Through: Mr. Ankur Chhibber, Adv.

versus

UNION OF INDIA AND ORS. .....Respondents
Through: Mr. Vikram Jetly, CGSC with Group Captain Atul Kumar Command Judge Advocate HQ Western Air Command.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE ASHA MENON

1. These two writ petitions have been filed under Article 226 of the Constitution of India against the common orders of the Armed Forces Tribunal (AFT) dated 9th October, 2020 and therefore the two petitions are being disposed of by this common judgment.

2. The facts as are relevant for the disposal of the present petitions, in brief, are that almost contemporaneous to the Indian Air Force air strike at Balakot, Khyber Pakhtunkhwa, Pakistan, in the early hours of 26th February, 2019, an air accident took place on 27th February, 2019, at Srinagar Air Force Station in which an Air Force Mi 17 Chopper was completely destroyed and six officers of the Indian Air Force and one civilian lost their lives. A Court of Inquiry (CoI) was constituted in accordance with the Air Force Act, 1950 and the Rules and Regulations framed thereunder.

3. Both the petitioners were notified under Regulation 790 of the Air Force Regulations, firstly under Regulation 790(a),(b),(c) and subsequently also under Regulation 790(e). At this point, both the petitioners sought the supply of the copies of the entire proceedings of the CoI. A Signal was issued in respect of petitioner Wg Cdr Shyam Naithani dated 16th January, 2020 communicated vide letter dated 22nd January, 2020 regarding his attachment for initiation of disciplinary proceedings. He approached the learned AFT with Original Application bearing O.A.

No.211/2020 seeking the setting aside of the said Signal/order as well as the supply of the entire proceedings of the CoI qua the accident. A similar Signal dated 23rd January, 2020 was issued for the attachment of Gp Capt. Suman Roy Chowdhury for disciplinary proceedings. He filed O.A. No.212/2020 before the learned AFT for the setting aside of the said order as well as directions to the respondents to supply to him the entire proceedings of the CoI to investigate the air accident. Separate orders were passed on 29th January, 2020 in these Applications recording therein that the decision was yet to be taken by the Chief of Air Staff on the requests made by the petitioners for supply of the CoI proceedings and initiation of the proceedings under Rule 24 had been deferred for the time being. For good measure the learned AFT also passed the following order in both the Applications:

> *"We make it clear that the provisions of sub-Rule (8) of Rule 156 should be complied with by the respondents in its letter and spirit."*

4. It appears that both these O.As. No. 211/2020 & 212/2020 came up for hearing before the learned AFT on 9th September, 2020. Orders in the following words were passed in both the Applications separately:

> *"3. We find that accordingly, the applicant is entitled to be supplied a copy of the unclassified portion of the CoI. Further, he is entitled to inspect the entire CoI proceedings, including classified portion, based on which charges against him have been framed. The respondents have, in their reply as also in the letter dated 13.08.2020, expressed their willingness to make available the CoI proceedings for inspection by the applicant and have*

suggested timings for the same during the hearing today.

4. With these observations, the O.A is disposed of directing the respondents that the CoI proceedings in entirety, including classified portion, be made available for inspection by the applicant at 11.00 a.m. on 11.09.2020 and on two subsequent working days viz. 12.09.2020 and 14.09.2020, as required."

5. On the same day, the petitioners filed two fresh O.As. bearing Nos. 1209/2020 (on behalf of Wg Cdr Shyam Naithani) and 1210/2020 (on behalf of Gp Capt. Suman Roy Chowdhury) with the following identical prayers:

"RELIEF(S) SOUGHT

In view of the facts and circumstances mentioned and the grounds raised in this O.A., the Applicant humbly prays that this Hon'ble Tribunal may be pleased to allow the present application by passing the following orders and directions:

a. Quash the Court of Inquiry proceedings convened pursuant to Terms of Reference dated 07.03.2019 being contrary to Para 49 of the Air Force Order 08/2014.
b. Quash the Findings and Opinion dated 12.07.2019 of the CoI being an outcome of an illegal CoI conducted without competent members in violation of Para 48(b)(iv) of AFO 08/2014 and held in contravention of the mandatory provision of Rule 156(2) of Air Force Rules, 1969.
c. Set aside order dated 19.08.2020 and 27.08.2020 being contrary to Rules 156 of the Air Force Rules, 1969;
d. Quash any other order that may be passed pursuant to the findings and opinion dated 12.07.2019 of the Court of

Inquiry being contrary to the mandatory provisions of law.

e. Pass any other order or directions as may be deemed appropriate in the facts and circumstances of the case.

6. Interim relief of a restraint on the respondents from taking any action against the petitioners on the basis of the findings dated 12th July, 2019, including, though not limited to, the initiation of proceedings against them under Rule 24 of the Air Force Rules, 1969 was also prayed for.

7. The record discloses that when the Applications came up for hearing on 14th September, 2020, the learned AFT directed that till the next date of hearing, all further actions on the CoI report, save as permitted by the orders dated 9th September, 2020 in O.A. No.211/2020 & O.A. No.212/2020, were to be kept in abeyance. The respondents filed their counter affidavits and the petitioners filed rejoinders thereto. The respondents also filed miscellaneous applications in both matters seeking modification of the restraint order passed by the learned AFT on 14th September, 2020. Upon a consideration of the counter affidavits and the miscellaneous applications, and the submissions of both counsel, vide the common impugned order dated 9th October, 2020 the learned AFT found it fit to modify its earlier order and permit the respondents to proceed with the action initiated, in accordance with law and conclude it as per law, subject to its further orders or directions in the matters.

8. Aggrieved thereby, the present petitions have been filed with the following identical prayers:

"a) Issue a writ of Certiorari or any other appropriate writ, order or direction to quash the order dated 09.10.2020 passed by the Hon'ble Armed Forces Tribunal, Principal Bench, New Delhi, in M.A. No.1552/2020 in O.A. No.1210 of 2020; and

b) Issue a writ of Mandamus or any other appropriate writ, order or direction restraining the Respondents from taking any action including initiating disciplinary proceedings against the Petitioner based on the impugned Order dated 09.10.2020 and the Court of Inquiry challenged by the Petitioner before the Hon'ble Armed Forces Tribunal, New Delhi in O.A. No.1210/2020; and

c) Pass any such orders as the Hon'ble Court may deem fit in the light of above mentioned facts and circumstances of the case."

9. We have perused the record and heard learned counsel for the parties at length, but do not find any ground to interfere with the orders of the learned AFT or go further and restrain the respondents from proceeding with the follow up to the CoI proceedings. The Original Applications were filed by the present petitioners against disciplinary proceedings that were to be initiated against them. The scope of judicial review in respect of departmental proceedings is very limited. The Court under its power conferred by Article 226 of Constitution of India, can interfere in the matter of disciplinary proceedings if the enquiry or disciplinary proceedings are being conducted in violation of the prescribed procedure or against principles of natural justice. It will intervene only to correct errors of law or procedural errors which lead to manifest injustice. The Supreme Court has laid down the parameters for judicial review of departmental proceedings in a large catena of cases. In

the case of ***Indian Oil Corpn. Ltd. v. Ashok Kumar Arora***, (1997) 3 SCC 72 the Supreme Court has held as under:

> *"20. At the outset, it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are based on no evidence, and/or the punishment is totally disproportionate to the proved misconduct of an employee. There is a catena of judgments of this Court which had settled the law on this topic and it is not necessary to refer to all these decisions. Suffice it to refer to a few decisions of this Court on this topic viz. State of A.P. v. S. Sree Rama Rao [(1964) 3 SCR 25 : AIR 1963 SC 1723 : (1964) 2 LLJ 150], State of A.P. v. Chitra Venkata Rao [(1975) 2 SCC 557 : 1975 SCC (L&S) 349 : (1976) 1 SCR 521], Corpn. of the City of Nagpur v. Ramchandra [(1981) 2 SCC 714 : 1981 SCC (L&S) 455 : (1981) 3 SCR 22] and Nelson Motis v. Union of India [(1992) 4 SCC 711 : 1993 SCC (L&S) 13 : (1993) 23 ATC 382 : AIR 1992 SC 1981]."*

10. Much earlier, in ***D. P. Maheshwari v Delhi Administration and Others*** (1983) 4 SCC 293, the Supreme Court had cautioned on how proceedings could be stalled for years by parties raising preliminary issues and bringing them before High Courts and there after challenge the decision of the High Court before the Supreme Court resulting in inordinate delay in deciding the real issues. Though the remarks were made in the context of industrial disputes, the observations are worth

repeating here for guidance:

> *"1. ... After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeyings up and down. It is also worthwhile remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."*

Similarly, in ***Special Director and Another v Mohd, Ghulam Ghouse and Another*** *(2004) 3 SCC 440,* the Supreme Court observed:

> *"5. ... Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."*

11. The argument of Sh. Chhibber is that the learned AFT had wrongly concluded that adherence to Rule 156(2) was the only issue whereas the petitioners had raised several issues beginning with the faulty reference to the CoI, to the faulty constitution of the CoI without a Technical Member

from the Air Traffic Control, to the fact that even as per the Regulation 790, once it was invoked against the petitioners, they became entitled to attend all the hearings whereas they were not allowed and nor have they been provided the copies so as to enable the petitioners to form their defence. It is his contention that all these factors had been considered by the learned AFT when interim protection was granted on 14th September, 2020 and the situation had not undergone a change since then. It is his further submission that the respondents were clearly going to initiate disciplinary proceedings against the petitioners and if punishment was also meted out to them, irreparable injury would be caused to them as the foundation itself was faulty. He also submitted that the Regulations were not statutory and could not limit the statutory provisions. Hence he pressed for interim protection till the matters were finally decided by the learned AFT.

12. Since the Regulations are not under challenge in these petitions and the petitioners themselves rely on them to point out the shortcomings in the CoI, we need not detain ourselves on the question of the interplay of the provisions of the Act, Rules and Regulations.

13. The courts have not yet defined what *"full participation"* means. But it stands to reason that the standard of a criminal trial taking place only in the presence of the accused would be applicable at the court martial and not at a pre trial stage or at a preliminary fact finding enquiry. It is not in dispute that the petitioners were initially examined as witnesses (Nos. 7 & 14 respectively). It was when testimonials affecting the "character and professional reputation" of the petitioners came before

the CoI that they were notified under Regulation 790(a),(b) & (c) on 15th March, 2019 & 5th April, 2019. But the evidence after the application of Regulation 790(a),(b) & (c) led to the formation of the opinion that "blame apparently attaches" to them. The petitioners were then notified under Regulation 790(e) on 5th June, 2019. At that stage, the petitioners were entitled to be shown the entire proceedings. With regard to supply of the copies of the CoI at this stage, under Rule 156 (7) the Chief of Air Staff is the competent authority to take a decision thereon. At a court martial, on the other hand, under Rule 156(8) the copies have to be supplied. The provisions reflect that while there is a mandatory obligation under Rule 156(8), there is some discretion under Rule 156(7). Since the learned AFT has yet to decide the matter, we refrain from discussing this issue further. But we would nevertheless note, as has the learned AFT in paras 15 & 16 of the impugned order, that on both occasions, the petitioners were able to cross examine witnesses and make their additional statements. In other words, Rule 156 (2), and not merely Regulation 790, has been complied with.

14. The proceedings under Rule 24 had been deferred as recorded in the order dated 29th January, 2020 and a court martial under Rule 27 is several stages later. The CoI now completed and the validity of which the petitioners have questioned vide the Applications still pending before the learned AFT, is not one under Rule 24, as it was a general inquiry in which the petitioners were also examined as witnesses. It is only with the reading of the charge that proceedings under Rule 24 will commence. By vacating the stay granted to the petitioners on 14th September, 2020, the

learned AFT has only allowed the respondents to commence the proceedings under Rule 24 and conclude them as per law which could be action under Rule 24 (3) of the summary disposal of the case and to argue as the learned counsel for the petitioners has, that punishment would be inevitable, would be speculative to say the very least. By saying so, we are merely echoing the words of the Supreme Court in ***Union of India v Kunisetty Satyanarayana*** *(2006) 12 SCC 28,* which are reproduced below:

> *"14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.*
>
> *15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.*

> *16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."*

15. The learned AFT has clearly referred to the arguments of Sh. Chhibber as aforementioned in para no.11 above and has also recorded that all issues have been left open to be finally decided. The follow up action of the respondents has also been made subject to the directions and orders of the learned AFT. Therefore, we have no hesitation in concluding that the absence of any interim protection as sought by the petitioners will not cause prejudice, leave alone irreparable harm to them. In any case, courts are slow to stop any proceeding preceding initiation of disciplinary action and rather encourage speedy disposal of such matters.

16. No case is made out to take a view different from that of the learned AFT.

17. Dismissed.

ASHA MENON, J.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 05, 2020