

FORM NO. 4
(See Rule 11 (1))
ORDER SHEET
COURT NO. 2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

7
TA 378/2009
Writ Petition (Civil) No. 2243/1997

Sqn. Ldr. B.S. Sharma **Petitioner**

Versus

UOI & Ors **Respondents**

For petitioner : None
For respondents : Mr. Adarsh Kumar Adv. Proxy for Mr. Ankur Chhibber, Advocate.

CORAM:-
HON'BLE MR. JUSTICE SUNIL HALI , MEMBER.
HON'BLE AIR MARSHAL J.N.BURMA, MEMBER.

ORDER
29.11.2013

Notes of the Registry	Orders of the Tribunal
29.11.2013	Vide separate judgment passed, the petition allowed. Respondents to pay costs of Rs. 5 Lac to the petitioner.

(SUNIL HALI)
MEMBER (J)

(J.N. BURMA)
MEMBER(A)

New Delhi
29.11.2013
Brh

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

Court No.2

TA 378/2009
Writ Petition (Civil) No.2243/1997

Sq. Ldr. B.S.SharmaPetitioner

Versus

Union of India & Ors.Respondents

For Petitioner : In person
For Respondents : Mr. Ankur Chhibber Advocate

CORAM:
HON'BLE MR. JUSTICE SUNIL HALI, MEMBER (J)
HON'BLE AIR MARSHAL J.N.BURMA, MEMBER (A).

JUDGMENT
29.11.2013

Air Marshal J.N.Burma, Member

1. Squadron Leader B.S.Sharma filed WP(C) 2243/1997 before the Delhi High Court and subsequent CM 1443/2001 seeking for an interim order directing the respondents to promote the petitioner to the select rank of Wing Commander from 1997. The respondents in their counter affidavit had stated that due to negative marks for 'severe reprimand' awarded by the Court Martial, the petitioner could not be cleared for promotion. The petitioner states that the sentence awarded by the Court Martial was commuted from 'forfeiture of one and half year of service for the purpose of promotion to 'severe reprimand'. However,

such commutation was effected retrospectively and not prospectively. The respondents should have considered the petitioner in the Promotion Board for the year 1994 and 1995 which they did not do. The petitioner was considered for promotion only in the year 1996. Hon'ble High Court of Delhi did not pass any interim order since *prima facie*, the said issue was connected with the subject matter of the Writ Petition 2243/1997. On 14.09.2009 Hon'ble High Court of Delhi directed, 'In view of constitution of Armed Forces Tribunal, in terms of Section 34 of the Armed Forces Tribunal Act, 2007, the case shall stand transferred to the Tribunal and it is ordered accordingly'.

2. As per Writ Petition transferred to this Court (TA 378/2009) the questions raised by the petitioner to be considered by the Tribunal are as follows :

(a) Whether subjecting the petitioner to face trial by General Court Martial (GCM) for alleged disobedience of an illegal order was just and fair.

(b) The petitioner was singled out and meted a discriminatory treatment vis-a-vis a similarly situated officer who was tried and convicted at the same Station on identical charges and same facts and awarded almost similar punishment. In the case of the latter the post confirmation authority on separate appeals

quashed the proceedings of GCM and completely exonerated him, Whereas in the case of the petitioner, the conviction was retained and the sentence was commuted to a new punishment of 'severe reprimand'. Whether such an attitude of the respondents amounted to a malafide and violative of the principle of equality before law.

(c) Whether it was discriminatory and vindictive for the post confirmation authority to pass detailed speaking order in one case and not in the case of the petitioner.

(d) Whether it was lawful for the respondents to effect a penal deduction from the pay and allowances of the petitioner even before his trial by GCM commenced and without resorting to the prescribed procedure.

(e) That the petitioner was eligible to be considered for promotion to the rank of Wing Commander by the Promotion Board 1994 onwards. But he was not considered due to the operation of the sentence earlier awarded by the GCM which was subsequently commuted to severe reprimand by the Central Government. After the commutation of punishment, the petitioner became entitled to be considered for promotion from the year 1994 onwards. However, he was considered by the Promotion Board in 1996 and 1997. Although, his punishment

had been commuted to 'severe reprimand' he was denied promotion as the commuted punishment carried negative marks. The petitioner has prayed the following :

(i) Quashing the proceedings of GCM which tried the petitioner on 27.04.1993 and subsequent days and also the sentence awarded by the said GCM, which was subsequently reduced to 'severe reprimand' by the respondent No.1 and was discriminatory vis-a-vis Sqn. Ldr. M.C.Srivastava.

(ii) A direction/order to respondent No.2 to refund the penal rent charged from the petitioner with penal rates of interest from the date of recovery of rent which was contrary to the statutory provisions of the Section 25 and 91 of Air Force Act, 1950.

(iii) A direction to the respondents 1 & 2 to ignore the AARs of the petitioner raised at Air Force Station, Bhuj, Gujarat and then consider the petitioner alongwith batchmates in the year 1999 or after moderating these reports these reports raised at Air Force Station, Bhuj in line with the petitioner's past performance.

(iv) Award cost of this writ petition in favour of the petitioner and against the respondents.

(v) Any other such relief or further relief as this Hon'ble Court deems fit in the facts and circumstances of the case.

3. The facts of the case are as given in the succeeding paragraphs:

4. The petitioner was commissioned in the IAF on 23.01.1976 and in due course was promoted to the rank of Squadron Leader w.e.f. 23.01.1987. The petitioner was posted to a lodger unit administratively under Air Force Station, Bhuj, Gujarat w.e.f. 14.01.1991. Initially, the petitioner was allotted a non-status Service Married Quarter (SMQ) at the unit and subsequently, a status SMQ was allotted to the petitioner. Another officer Sqn. Leader MC Srivastava posted to petitioner and w.e.f. 12.05.1991 occupied non status SMQ at Unit Complex. The said officer was allowed to change his SMQ to non-status SMQ No.405/1 in the Station Complex on grounds of sickness of his old mother. On 13.08.1991, the petitioner applied for change of SMQ to the Station Complex on grounds of sickness of his five year old daughter who was suffering from acute asthma and in fact the petitioner's family was the only family staying in the entire officers complex at the Unit.

Medical facilities were available at the Station Complex at Bhuj and not at the petitioner's unit which is located approximately 12 km away from the Station. The petitioner, being in an operational unit, used to be away from the base for days together. A second application dated 22.08.1991 for change of SMQ supported by Medical Certificate and duly recommended by appropriate medical authorities was arbitrarily rejected by the Station Commander. In the same communication Sqn. Ldr. MC Srivastava was directed to shift back to unit location in the interest of service. This was an illegal order since once an eligible officer occupies an allotted SMQ, he cannot be asked to vacate until he is posted out. Sqn Ldr. MC Srivastava represented against this order and was permitted to occupy the same SMQ after reconsidering the medical grounds advanced by him. When the health of petitioner's daughter aggravated due to frequent asthmatic attack and since he was being discriminated, he submitted a statutory complaint on 10.02.1991 under the Air Force Act, 1950. This time, after reconsidering the petitioner's case on medical grounds, he was duly allotted SMQ 409/3 on 02.01.1992 within the Station Complex. The medical opinion given on the petitioner application dated 10.12.1991 is reproduced below :

“The daughter of Sq. Ldr. BS Sharma is an old case of chronic bronchitis and gets exacerbated symptoms during Winter requiring medication. His request for allotment house in camp area is recommended”

5. The petitioner shifted to SMQ 409/3 on 14.01.1992 in accordance with the provisions of Air Force Order 228/77. Pursuant to the allotment of SMQ to Sqn. Ldr. MC Srivastava and the petitioner at the Station Complex, all the officers belonging to the petitioner's unit were accommodated at the Station Complex.

6. Petitioner states that as per Para 31 of Air Force Order 228/77 which was in force then, “once an eligible officer occupies a quarter he is to be permitted to continue to occupy it or another quarter during his stay at the station, unless vacation of quarter is ordered on disciplinary or administrative grounds by the Station commander”. The respondents vide 2700/5142/2/09 dated 02.07.1992 directed the petitioner to vacate the allotted SMQ by 12.07.1992 failing which damage rate of interest would be recovered from the petitioner. The petitioner sought interview with higher authorities against the said order but the same was not granted. Respondent No.4 through another direction vide 2700/C514/1/org

dated 28.09.1992 directed the petitioner to vacate SMQ by 07.10.1992 failing which disciplinary action would be initiated against the petitioner. Following reasons were given for the vacation :

- (a) That SMQ is required for officer posted at the station;
- (b) Operational necessity warranted that the petitioner stay at unit location;
- (b) The medical grounds are no longer valid

7. The petitioner represented against the order on 05.10.1992 pointing out the illegality of issuing the order dated 28.09.1992 against Air Force Order 22/77 issued by the Chief of Air Staff. It was submitted that the rules did not provide that one officer must be asked to vacate married accommodation to accommodate another officer. Operational necessity could not be a ground for getting a married accommodation vacated from one officer and giving it to another; nor did the Air Force Order 228/77 list operational necessity as one of the reasons for getting married accommodation vacated. Moreover, when the said order was passed, the functional equipment of petitioner's unit was deployed nearly 300 km away from the unit. Hence, there was no operational necessity for getting the married accommodation of the petitioner vacated. Petitioner also submitted that the daughter of the petitioner was never

examined by the doctor before giving his opinion that medical grounds were no longer valid. Petitioner submitted yet another application seeking once again an interview with senior officer in-charge, Administration, Headquarters South Western Air Command, but the same was not granted.

8. When the petitioner and Sqn Ldr. MC Srivastava failed to comply with the illegal, arbitrary and unlawful order of vacating the accommodation occupied by them, they were attached to the unit of Respondent No.4 w.e.f. 08.10.1992 for trial on the charge of disobedience of lawful command. Besides, initiation of disciplinary action against the petitioner for not vacating allotted SMQ by 07.10.1992, damage rate rent (penal) was recovered from the petitioner w.e.f. 12.07.1992. This act of the respondents was illegal, malafide and vindictive aimed at causing financial hardship and embarrassment to the petitioner. During the month of February, 1993, the petitioner was not paid even a single paise out of his pay and allowances. Penal deductions were so heavy that his pay slip showed debit of Rs.1737/-. This action was illegal in terms of Section 25 and 91 of Air Force Act, 1950 and in contravention of the policy laid down vide Air HQ/25660/D Accts dated 21.08.1991 wherein recovery only to be extent of allowances was permissible.

In the face of continued victimization and threats from his Commanding Officer that the petitioner's Annual Appraisal Reports would be spoiled if he did not vacate the allotted accommodation, the petitioner had sought an interview with the Chief of Air Staff but the same was not granted. The petitioner moved by way of a Writ Petition with Hon'ble Delhi High Court (1904/93) praying for intervention since the respondents were bent upon carrying and the illegal trial of the petitioner by the GCM without redressing his grievances. Hon'ble High Court of Delhi was pleased to pass the following order on 15.04.2013.

"The main grievance of the petitioner is that he filed statutory complaints under Section 27 of the Air Force Act, to respondent No.1 long back, but these have not been so far considered and decided. We direct the respondents No.1 (CAS) and 2 (AOC in C SWAC) to consider and decide the statutory complaints, if any, of the petitioner within one month from today. In view of this the petition is disposed off".

9. Notwithstanding the orders of the High Court, trial of the petitioner commenced on 27.04.1993. On 14.05.1993 the petitioner was informed that his statutory complaints and application dated 14.01.1993 for interview with the CAS had been considered and rejected by the Chief of the Air Staff. The petitioner and Sqn. Ldr. MC Srivastava were ultimately tried by GCM on identical charges for

disobedience of alleged lawful command. The charges, sentence, finding, promulgation against Sqn. Ldr. MC Srivastava and the petitioner are tabulated below for comparison:

Sqn Ldr MC Srivastava General Court Martial from 24.02.1993 and subsequent days	Sqn Ldr B S Sharma (Petitioner) General Court Martial from 27.04.1993 and subsequent days
First Charge Under Section 41(2) AF Act, 1950	First Charge Under Section 41(2) AF Act, 1950
DISOBEYING A LAWFUL COMMAND GIVEN BY HIS SUPERIOR OFFICER	DISOBEYING A LAWFUL COMMAND GIVEN BY HIS SUPERIOR OFFICER
In that he	In that he
At 27 Wing, AF when ordered by Gp Capt DN Pandit, Station Commander 27 Wing, AF vide letter No.27 W/C/514/Org dated 28.09.1992 to vacate the SMQ allotted to him at 27 Wing AF by 07.10.1992 did not vacate the said SMQ as ordered.	At 27 Wing, AF when ordered by Gp Capt DN Pandit, Station Commander 27 Wing, AF vide letter No.27 W/C/514/Org dated 28.09.1992 to vacate the SMQ allotted to him at 27 Wing AF by 07.10.1992 did not vacate the said SMQ as ordered.
Second Charge Under Section 65 AF Act, 1950	Second Charge Under Section 65 AF Act, 1950
AN OMISSION PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE	AN OMISSION PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE
In that at	In that at
At 27 Wing, AF when ordered by Gp Capt DN Pandit, Station Commander 27 Wing, AF vide letter No.27 W/C/514/Org dated 28.09.1992 to vacate the SMQ allotted to him at 27 Wing AF by 07.10.1992 did not vacate the said SMQ as ordered.	At 27 Wing, AF when ordered by Gp Capt DN Pandit, Station Commander 27 Wing, AF vide letter No.27 W/C/514/Org dated 28.09.1992 to vacate the SMQ allotted to him at 27 Wing AF by 07.10.1992 did not vacate the said SMQ as ordered.
Finding The court found the accused 'Guilty' of First Charge and 'Not Guilty' of the Second Charge	Finding The court found the accused 'Guilty' of First Charge and 'Not Guilty' of the Second Charge
Sentence (i) To forfeit Seven Years past service for the purpose of promotion (ii) To be severely reprimanded	Sentence (a) to forfeit three years past service for the purpose at promotion
Confirmation	Confirmation

The findings and Sentence of the Court were confirmed by AOC in C/SWAC, IAF on 29.05.1993 who while confirming the sentence remitted five years and six months past service from the punishment to "To forfeit seven years past service for the purpose of promotion"	The findings and Sentence of the Court were confirmed by AOC in C/SWAC, IAF on 11.06.1993 who while confirming the sentence remitted one year and six months past service from the punishment to "To forfeit three years past service for the purpose of promotion"
Promulgation	Promulgation
The findings and the Sentence of the Court as confirmed by AOC in C, SWAC, IAF were promulgated to the accused on 13.06.1993.	The findings and the Sentence of the Court as confirmed by AOC in C, SWAC, IAF were promulgated to the accused on 13.06.1993.
Authy : HQSWAC, IAF letter No.SWAC/C3406 388 dated 11.06.1993 and GCM Proceedings.	Authy : HQSWAC, IAF letter No.SWAC/C3406 388 dated 11.06.1993 and GCM Proceedings.

10. Aggrieved by the conviction by GCM both the petitioner and Sqn. Ldr. MC Srivastava submitted statutory petitions under Section 161(2) of Air Force Act, 1950 to the Central Govt. (respondent No.1) in November 1993. The petitioner submitted another application on 25.05.1994. The petitioner was not cleared for promotion as per the promotion board results declared on 13.05.1994. He submitted another representation on 16.06.1994 to Respondent Number Two.

11. Respondent No.1 after examining the evidence recorded before the GCM and other material available on record came to the conclusion that the findings of the GCM which tried Sqn. Ldr. MC Srivastava were not in order. Hence, vide Govt. of India, Ministry of Defence letter No.2215/Dir

(Air II) dated 22.05.1995, respondent No.1 set aside the proceedings of the GCM as well as the sentence awarded to Sqn. Ldr. MC Srivastava in toto. Respondent No.1 also ordered that penal market rate of rent collected from Sqn. Ldr. MC Srivastava be refunded to the officer. The petitioner was informed vide 503SU/C 957/1P1 dated 20.05.1996 that in his case, respondent No.1 had commuted the punishment awarded by GCM to "severe reprimand" and ordered the penal rent recovered from the petitioner to be refunded.

12. Aggrieved by the discriminatory treatment meted out to the petitioner by Respondent No.1, the petitioner submitted an appeal on 06.01.1996. The petitioner also submitted an application to respondent No.2 for non-consideration of the Annual Appraisal Reports raised during his tenure with respondent No.4 as the reports were likely to be coloured due to the vindictive approach of his superiors. Since no disposal was communicated to the petitioner on his appeal dated 06.06.1996, the petitioner submitted an application to respondent No.1 on 26.09.1996 for review of their order passed on the statutory petition of the petitioner. The petitioner was informed vide 50350/657/1/P1 dated 18.10.1996 that on reconsideration, the Central Government has reiterated their earlier decision.

13. The petitioner was due for consideration for the promotion to the rank of Wing Commander for the first time in the year 1994 but was not considered due to the consequential effect of the sentence of forfeiture of one year six months past service for the purpose of promotion awarded by the GCM. Therefore, even though the sentence awarded by GCM as confirmed by the appellate authority has been commuted to “severe reprimand”, the petitioner has already suffered the consequences of forfeiture of “one year six months past service for the purpose of promotion” since the petitioner was not considered for promotion by the promotion boards held in 1994 and 1995.

14. Because of victimization, petitioner was given very low grading in his Annual Appraisal Reports which lowered the overall grading of the petitioner from the year 1988 to 1992. Between 1988 to 1992 the petitioner average grading was only 5.7 as against the group average of 6.9 and the highest in the group 7.7. Petitioner’s pleas for not considering his reports for the year 1991 and 1992 on account of bias were not considered by the respondents and he was not cleared for promotion in the promotion boards held in 1996 and 1997.

15. The respondents in their counter stated that in view of the provision of Para 31 of AFO 228/77, an officer can be asked on disciplinary

grounds or administrative grounds to vacate the SMQ allotted to him. Sqn. Ldr. MC Srivastava had been allowed to continue to occupy the same SMQ (in AF Station) on medical grounds on 31.12.1991. The petitioner was allotted SMQ 409/3 on January 1992. The petitioner had been asked to vacate the said SMQ 409/3 on administrative grounds in accordance with Para 3 of AFO 208/77 as the medical grounds on which the SMQ had been allotted ceased to exist. Married accommodation for the officers of the Unit of the petitioner was built at the location of the Unit which was nearly 12 kms from Air Force Station, Bhuj. The petitioner was allotted service Married Accommodation at Air Force Station, Bhuj on medical grounds and also because accommodation was lying vacant. It was also informed to the petitioner that as and when the accommodation was required for officers of 27 Wing AF, the petitioner will have to vacate the accommodation allotted to him. When the petitioner was issued the order dated 28.09.1992, the medical officer had confirmed vide 2700/1277/1/Med dated 23.01.1992 that none of the petitioner's family members was under active medication for any acute or chronic ailments requiring constant medical attendance. The petitioner had failed to comply with the orders of the Station Commander issued in accordance with Para 31 of AFO 228/77 vide 27W/C514/1/org dated 28.09.1992. Disciplinary proceedings were initiated against the petitioner within the provisions of the Air Force Act, 1950 and read with Air Force Rules 1969.

Petitioner was attached to 12 Forward Base Support Unit (FBSU) for compliance of Rule 24 by the Station Commander so that he could get unbiased hearing. The officer detailed to record Summary of Evidence, Sqn Ldr Harsh Vardhan was designated as Assistant Provost Marshal, (IAF police official) for Air Force Station, Bhuj. The power of APM was given to the officer for exercising the same within AF in Bhuj only. Once the officer moved out Air Force Station, Bhuj, he no longer had any power of APM and was merely an Air force officer and therefore, he ceased to be a police officer, the moment he left Air Force Station, Bhuj. The petitioner had failed to vacate the married accommodation by 12.07.1992 as ordered. He was, therefore, charged damage rate of rent in accordance with the existing rules. However, the same was ordered to be refunded by the Central Government. It has been confirmed from AFCAO vide their letter number AF CAO/10203/ 1473/OPS/23 dated 15.01.1998 that the damage rent recovered from the officer has been refunded and credited to the officers IRLA in January 1998. The petitioner's application for interview with the Chief of the Air Staff was rejected on 13.05.1993. The contention of the petitioner that he was threatened by his Commanding Officer and that petitioner's Annual Appraisal Reports would be spoilt was incorrect. The petitioner had filed a Writ Petition No.1904/93 before the Hon'ble High Court of Delhi. The High Court while directing the respondents to consider and decide on the statutory complaint submitted by the petitioner within

one month, did not interfere with the disciplinary proceedings initiated against the petitioner. The statutory complaint was considered by the Chief of Air Staff on 13.05.1993 and his directions were conveyed to the petitioner on 18.05.1993. When the petitioner was due for consideration for the rank of Wing Commander in the year 1994, the sentence of one year and six months forfeiture of service awarded to the petitioner by the Court Martial was still subsisting. Hence, he was rightly not considered by the Board. Even after the 'appellate authority' commuted the sentence to "severe reprimand" the petitioner did not make the grade for promotion to the next higher rank based on merit. The respondents maintain that the petitioner was never harassed or victimised. Hence, he was tried by a Court Martial as per the provisions of the Air Force Act, 1950 and Air Force Rules, 1969 as he had disobeyed a lawful command. It was also submitted by the respondents that the appraisal reports of the petitioner for the year 1991 and 1992 were assessed as per his demonstrated performance during the period.

16. On the question of discrimination in the disposal of the cases of Sqn Ldr Srivastava and the petitioner, the respondents submitted that no two cases were alike. Each case is considered on its own merit. Though the proceedings of the GCM in the case of Sqn Ldr MC Srivastava had been set aside by the Central Govt, it had not been done in the case of the

petitioner. In the case of the petitioner, the sentence awarded by the GCM had been commuted to 'severe reprimand'. Even with the reduced sentence the petitioner did not make the grade for promotion to the rank of Wing Commander. On the issue of excluding the reports of 1991-92 on account of bias, the respondents state that there was no rule existing under which appraisal report once raised on the petitioner would not be considered for the Promotion Board and hence the request of the petitioner had been rejected by the respondents.

17. In his rejoinder the petitioner reiterated that an SMQ was allotted to the petitioner on medical grounds on 02.01.1992. No undertaking had been given by the petitioner that as and when the married accommodation was required by the officers of 27 Wing, he would vacate the SMQ. Daughter of the petitioner was never examined medically to ascertain whether the medical grounds actually existed or not before ordering him to vacate SMQ 409/3. Squadron Leader Harsh Vardhan was designated as the Assistant Provost Martial of 27 Wing in Air Force Station, Bhuj and the recording of Summary of Evidence in the petitioner's case by the said officer was done at Air Force Station, Bhuj which was the area of jurisdiction of Squadron Leader Harsh Vardhan as admitted by the respondents. Squadron Leader Harsh Vardhan did not cease to be a police officer when he recorded the Summary of Evidence. Hence, the

Summary of Evidence recorded by a police officer is *non est* in law and any subsequent action in relation to such a Summary of Evidence is also *non est* in law including the proceedings of the General Court Martial. The fact that the order of the respondents to the petitioner directing him to vacate the SMQ 409/3 by 12.07.1992 was patently illegal and malafide as has been upheld by the Central Government i.e. respondent No.1 in the case of similarly placed officer Squadron Leader MC Srivastava. For the same reasons, respondent No.1 has quashed the proceedings of the General Court Martial in his case. Hence, the order in the case of the petitioner cannot be legal when the same order in the case of Squadron Leader MC Srivastava has been held to be illegal. Though respondent No.2 has refunded the damage rent charged from the petitioner for not vacating SMQ No.409/3 on the orders of respondent No.1 after nearly five years, they were yet to pay interest on the damage rent illegally deducted from the pay of the petitioner. Squadron Leader MC Srivastava and the petitioner were charged for having committed exactly similar offence under exactly identical circumstances. Both were tried separately by General Court Martials and both after having been found 'guilty' were sentenced. Ironically, the sentence awarded to Squadron Leader MC Srivastava was more severe than the one awarded to the petitioner, yet, the respondent Number 1 set aside the proceedings of the General Court Martial in toto in the case of Squadron Leader MC Srivastava as being *non est* in law.

However, in the case of the petitioner the General Court Martial had pronounced a lenient sentence in comparison to that of Squadron Leader MC Srivastava. Respondent No.1 on the petition under Section 161(2) of the Air Force Act by the petitioner commuted the sentence awarded to him but allowed the conviction to remain and imposed a new sentence of 'Severe Reprimand'. Therefore, if setting aside of one set of proceedings of the General Court Martial on an identical charge and offence in the case of Squadron Leader MC Srivastava was found to be illegal, it does not stand to any logic or to the test of judicial scrutiny as to why in the case of the petitioner which was identical in all respects, the proceedings and the conviction by the General Court Martial be held to be legal. The petitioner submits that the respondents be directed to produce the relevant file and records in the case of the petitioner and Squadron Leader MC Srivastava for the perusal of the Hon'ble Court. It was submitted that the case of Squadron Leader MC Srivastava and the petitioner stood on the same plank in all respects and therefore both the cases should have been treated alike by the respondents. Since Squadron Leader MC Srivastava was given preferential treatment to that of the petitioner, the actions of the respondents were violative of Article 14 of the Constitution of India.

18. The Court heard the petitioner in person and the counsels for the respondents and perused all relevant documents produced before it.

The respondents were not able to produce the Court Martial proceedings and the relevant file notings in respect of the petitioner and Squadron Leader MC Srivastava since they have been destroyed. Respondents in their affidavit produced before the Court have stated that they had destroyed the disciplinary proceeding file related to the petitioner and the GCM proceedings by a duly constituted Board of Officers (BOO) vide order dated 21.11.2010 and in terms of Rule 124 of Air Force Rules 1969 where in the proceedings of GCM of DCM were required to be preserved for seven and three years respectively. The instant TA No.378/2009 had been dismissed in default by the Hon'ble Tribunal on 23.03.2010. Thereafter, the applicant after a gap of about two years filed MA 48/2013 before the Hon'ble Tribunal on 30.06.2013 for restoration of TA. By then the proceedings had been destroyed. In the absence of the proceedings the Court examined the material facts placed before it. On a careful examination of Air Force Order 96/77 based on which the respondents had ordered the Court Martial of the petitioner, it is revealed that though vacation of married accommodation on administrative ground per se has not been defined, Para 22 of the AFO is relevant to understand the spirit and rationale that governs ordering of vacation of a married quarters in respect of any officer. Para 22 reads as follows :

"In case a quarter is reserved for a particular appointment cannot be occupied by the officer holding that appointment for any reason, it is to be

included in the appropriate pool for allotment in the normal manner as laid down in Para 23 and 24. If at a later date, the need for reservation of accommodation for the same appointment arises again, the officers occupying the quarter previously is not to be asked to vacate it."

19. In the case of the petitioner, he had been permitted to occupy the SMQ allotted to him at the AF Station Bhuj since the same was vacant. Later, the respondents have taken a plea that the house was to be given to officers posted to the Air Force Station, Bhuj and hence, the petitioner should vacate it. This view is akin to treating the accommodation at Air Force Station, Bhuj as reserved accommodation for officers posted to Air Force Station, Bhuj and hence the petitioner of the lodger unit was asked to vacate it. Though against the married accommodation policy of common pool; even if the respondents deemed the Station Accommodation to be reserved for station officers; even then the respondents violated the provision of AFO 16/77 (Para 22) when they asked the petitioner to vacate the accommodation already allotted to him and under his occupation. The appellate authority had rightly cancelled the orders for charging of penal rent since neither the petitioner nor Sqn Ldr Srivastava were unauthorised occupants. Thus, the Court finds that quashing of the Court martial proceedings in respect of Sqn Ldr Srivastava by the appellate authority was correct and since the case is similar to the petitioner's case in all respects, the same should have been done in

respect of the petitioner, and the court martial should have been quashed in respect of the petitioner also.

20. The penal rent charges have already been refunded to the petitioner. However, since there has been a delay of five years in refunding the penal rent charged due to an illegal order, the petitioner is entitled to be compensated for the illegal deduction by the respondents.

21. As regards the AAR, from the records produced before the Court it is evident that the AARs of the petitioner raised at Air Force Station, Bhuj were well below the officers average AR prior to the same period. When the AAR were produced before the Court, the Court observed that some of the AARs were incomplete. The RO had only filled half the columns. The columns pertaining to personal qualities had been left blank which was highly irregular. Be that as it may, any change in AAR all this belated stage after 20 years when the petitioner has already retired as a time scale the group captain would be an exercise in futility. The fact that the petitioner had not been considered in the promotion board for the year 1994 because of the conviction by a Court martial illegally and consequent sentencing of the petitioner had an adverse effect on the promotion prospects of the petitioner and the petitioner has retired as a time scale Group Captain. This has become a case of *justice delayed being justice denied*.

22. In view of the above, the Court directs as follows:

(a) The General Court Martial proceedings against the petitioner be quashed in totality. The punishment of severe reprimand by the appellate authority be expunged from the records of the petitioner;

(b) The petitioner be paid interest @ 12% per annum for five years on the amount recovered from him illegally on account of penal rent which was refunded to him after five years without interest.

(c). A cost of Rs.5 lakh is awarded to the petitioner for the injustice caused to him on account of the illegal Court martial ordered against him and the consequent losses and trauma the petitioner has suffered on account of the illegal acts of the respondents.

**(SUNIL HALI)
MEMBER (J)**

**(J.N.BURMA)
MEMBER (A)**

Dated : 29.11.2013
New Delhi
cs

