IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

T.A NO. 346 OF 2009
(WRIT PETITION (CIVIL) NO. 6373 OF 2001, HIGH COURT OF DELHI)

MAJ. K.P DUTTA ...APPELLANT

V.

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MR. ANIL SRIVASTAVA FOR APPELLANT
LT. COL. NAVEEN SHARMA FOR RESPONDENTS

CORAM

HON'BLE MR. JUSTICE S.S KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S DHILLON, MEMBER

J U D G M E N T
05.10.2010

1. The petitioner, by filing this Writ Petition in Delhi High Court, challenged the General Court Martial proceedings, whereby he was held guilty of the offence under Section 69 of the Army Act (the Act, in short) and sentenced him to take rank and precedence as if his

appointment as substantive Major bore date 7.7.1993 and to forfeit 15 years past service for the purpose of pension. On appeal to COAS under AA Section 164(2), he remitted the sentence "to forfeit 15 years of past service for the purpose of pension. On formation of this Armed Forces Tribunal, this case was transferred to the Tribunal for disposal. In this case, the petitioner (hereinafter referred to as 'the appellant') challenged the conviction by the Court Martial by filing a Writ Petition. On transfer, it has been treated as an appeal under Section 15 of the Armed Forces Tribunal Act, 2007.

2. The facts leading to this case in a nutshell are: the appellant joined the Army on 20.3.1959 and was commissioned as a Special List Officer (Quarter Master) on 25.7.1977. He was promoted to the rank of Captain on 25.7.1983 and was posted to Indian Military Academy as Assistant Quarter Master on 1.6.1986 and remained there till 11.11.1989. On 25.8.1989, the appellant reported against his immediate superior officer, Lt. Col. B.S Rathore, and other principal staff officers to the Commandant alleging irregularities in drawing ration from contractors for the trainees of the Indian Military Academy and in lieu thereof, receiving cash benefits. Subsequently,

on account of the complaint, Lt. Col. Rathore started harassing and humiliating the appellant. He withdrew service benefits like Office Peon and Clerks working with the appellant in his office. Therefore, the appellant wrote another letter to the then Commandant, Lt. Gen. NPS Bal, to conduct an inquiry into the matter. Instead of conducting inquiry, Lt. Gen. Bal transferred the appellant from IMA to 16 Light Cavalry, HQ 10 Infantry Division. As per Para 866 of Defence Service Regulation, an officer holding charge of Government stores is moved out only after his Commanding Officer duly verifies the stores held on his charge. But Lt. Gen. Bal directed to hand over complete charge and documents pertaining to IMA furniture to Lt. Col. Rathore. Therefore, any omission to give a certificate that the stores correspond with ledger balances and books are complete and correct, would hold the relieving officer responsible for his predecessor's liabilities. When Nb. Sub. Sheodan Singh, Furniture JCO was posted out from IMA, deficiency was detected in the furniture stores while handing over charge to the newly posted JCO Nb. Sub. Vinod Kumar. A Court of Inquiry was held to inquire into the circumstances under which some items of MES furniture were found deficient in the IMA. Alleging lack

of supervision in carrying out the duties of Assistant Quarter Master and for accepting privately manufactured furniture in lieu of MES furniture, five Courts of Inquiry were held against the appellant one after the other. As a consequence to the first Court of Inquiry, the appellant was awarded the punishment of 'severe displeasure' (to be recorded) by Lt. Gen. Bal. In the second Court of Inquiry, no punishment was awarded against the appellant. In the third Court of Inquiry, the appellant was ordered to pay Rs.42,246/- towards cost of MES furniture. In the fourth Court of Inquiry, the appellant was exonerated of the alleged negligence on his part. And in the fifth Court of Inquiry, the GOC-in-Chief ordered deduction of Rs.38,755/-, which was subsequently set aside by the Government of India, as is evident from the communication dated 1.6.1996. On 15.9.1992, a charge sheet was issued to the appellant, which reads:

> **<u>First Charge</u>**
> **Army Act Section 63**
>
> **AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE,**
>
> **in that he,**

at Dehradun, towards the end of Sept/beginning of Oct 89, while performing the duties of Assistant Quarter Master of Indian Military Academy and well knowing about the existing deficiencies in the furniture store, improperly brought the following locally made non-MES pattern furniture to the QM Section towards the said deficiencies:-

(a)	**Metal Shelving bookshelf**	**- 02**
(b)	**Almirah Food**	**- 02**
(c)	**Bin Soil Linen Small**	**- 07**
(d)	**Dressing Table**	**- 13**
(e)	**Bookshelf Wooden**	**- 10**
(f)	**Table Writing**	**- 12**

<u>Second Charge</u>
Army Act Section 63

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE,
in that he,

at Dehradun, on or about 21 may 91, when examined as a witness before a Court of Inquiry stated, "on 06 Oct 88 Nb Sub Vinod Kumar and Nb Sub Shivdan Singh came to me and Nb Sub Vinod Kumar put up a fresh handing taking over to me in the same file, wherein the sentence 'there are deficiencies at Appx 'J' attached' was replaced by, 'there are no deficiencies/surpluses of any kind or nothing to report' or words to that effect", which statement, as he well knew, was false.

<u>Third Charge</u>
Army Act Section 63

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE,

in that he,

at Dehradun, on or about 21 May 91, when examined as a witness before a Court of Inquiry stated, "Nb Sub Vinod Kumar was caught getting some furniture items made from old MES furniture at old GD lines. I asked him what was going on there. He said that these are the items which were deficient and got burnt in his office fire and the material he got from the MES .... I personally saw some furniture items in Nb Sub Vinod Kumar's stores. When i asked him about that, he told me that the furniture items which appear to be new, were those which were made up in due course of time by Nb Sub Shivdan Singh, before he went on posting. The other two items were for replacement of the items of furniture which were burnt in the fire in JQM's office", or words to that effect, which statement, as he well knew, was false.

The appellant was tried by the General Court Martial on the above three charges. On 7.7.1993, the GCM found the appellant guilty of all the charges and sentenced him to (a) take rank and precedence as if his appointment as substantive Major bore the date the seventh day of July 1993; and (b) to forfeit fifteen years of past service for the purpose of pension. Being aggrieved, the appellant submitted a post confirmation petition dated 14.2.1995 to the Central Government through the Chief of Army Staff. The COAS erroneously held that the

appellant was tried on three charges under Section 69 of the Army Act, though the appellant was tried for the offences under Section 63 of the Army Act. Section 69 of the Army Act deals with civil offences of a grave nature and the punishment therefore is even upto death or imprisonment for life. On the other hand, the punishment under Section 63 of the Army Act is maximum upto seven years of imprisonment. While confirming the findings of the GCM 'under AA Section 69', the COAS accepted the contention of the appellant that the punishment was disproportionate to the gravity of the offence alleged against him and so remitted the portion of sentence to forfeit fifteen years of past service for the purpose of pension. The post confirmation petition was rejected without granting any relief to the appellant. Hence the appeal.

3. It is contended by counsel for the appellant that the appellant has been falsely implicated in this case. He was not the custodian of the furniture and for the lapses noticed in the first court of inquiry, he was punished. Successive courts of inquiry were illegal since they were conducted only to harass him. He was not accountable either for the shortage or replacement of furniture. The

appeal is barred by limitation. The GCM arbitrarily held the appellant guilty under the influence of his superior officers and the findings are based only on conjectures and surmises.

4. The appeal is resisted by the respondents contending, inter alia, that there was ample evidence to prove the culpability of the appellant. He was liable since he was in charge of the store. He cannot escape merely because there were other officials subordinate to him in whose custody the furniture were kept. He was a party to the replacement of the furniture. His intention is decipherable from the material evidence on record. The proceedings are not barred by limitation and there is no estoppel in initiating courts of inquiry in succession when new facts come to the notice of the authorities concerned.

5. The first and foremost argument advanced by learned counsel for the appellant with regard to Charge No.1 i.e. having brought improperly locally made non-MES furniture to make good the deficiencies, is that there is no evidence on record to establish that charge against the appellant. Further, there could be no reason for

him to take such a step when he was not accountable for the alleged shortage in the furniture. Moreover, the deficiency in the furniture was reported much before his joining IMA Dehra Dun, which is evident from the evidence of PW 1 Col. V.V Mathews, who conducted the COI some time in the month of Sept 1990. He examined as many as 30 witnesses and finally came to the conclusion that:

> "the Court is unable to pinpoint the responsibility for the losses, as the origin of the deficiencies is prior to 1986, for which relevant documents are not available in the ACC Wing. Since some previous Commanders have gone on pension, the culpability cannot be pinpointed. The Court, therefore, recommend that the loss to be borne by the State."

Such finding recorded in the COI by PW 1 Col. V.V Mathews would clearly show that the appellant was not even prima facie responsible for such deficiency. Moreover, the deficiencies were detected in 1986, before the joining of the appellant. Therefore, he cannot be held liable for such loss or deficiency.

6. In that backdrop, the evidence adduced by the Prosecution is to be scrutinised, to prove how far the appellant can be

held guilty for the alleged charge of improperly arranging locally made furniture not in accordance with MES to make good the deficiency. PW 2 L/Nk M Krishnan was posted in the Indian Military Academy in October 1988 and was the NCO (Furniture) in Quarter Master Section. At that time, Nk. Sub Vinod Kumar was the Junior Commissioned Officer (Furniture) and it was his duty to (a) issue and receive furniture for the Passing Out Parade, Som Nath Stadium, Ladies Welfare Centre, Officers Mess and Golf Ground; and (b) to replace the furniture of JCOs and Other Ranks Quarter which was brought to him. According to him, during the period between last week of September 1989 and first week of October 1989, the appellant told him two-three times to go to his residence at Vasant Vihar in a vehicle and bring some furniture which was lying there. On getting a spare vehicle, as directed by the appellant, he went to the residence of the appellant. The appellant also followed him. On reaching there at the residence, he noticed some furniture lying unpolished and some was being polished. The appellant got the ready furniture loaded into vehicle brought by PW 2 Krishnan. The appellant instructed PW 2 to keep the furniture on a cemented plinth near the QM's office. Around 5-5.30 p.m, while he

was in his living room, the appellant asked him to come to the QM office where the furniture was unloaded by him. He noticed that some other furniture was also brought there. The appellant then told him that with the furniture now brought by him, he had completed the deficiencies of Hav. Mohan Singh and Nb. Sub. Shivdan Singh and that the appellant had spent Rs.28,000/- for the furniture. Next day, the appellant told Nb. Sub. Vinod Kumar to take charge of the furniture. But, Nb. Sub. Vinod Kumar refused to take charge of the furniture without obtaining approval from MES. The testimony of this witness was assailed stating that he himself was in-charge of the furniture. PW 2 Krishnan was accomplice for bringing the furniture from the house of the appellant and unloading it at the cemented plinth near QM office. The law is well settled that the Court looks with some amount of suspicion on the evidence of accomplice witness, which is a tainted evidence and even Section 133 of the Evidence Act clearly provides that the evidence of accomplice witness should not be accepted unless it is corroborated. At the same time, it must be remembered that corroboration must be in respect of material particulars. The requirement of corroboration is also rule of prudence, which itself is

the satisfying test of the reliability of an accomplice (see **C. Chellappan** v. **State of Kerala** – AIR 1979 SC 1761 and **Philip M Prasad** v. **State of Kerala** – 1979(4) SCC 312). Though PW 2 agreed to having brought the furniture, he failed to give the number of the vehicle and the name of the driver. The driver of the vehicle was also not examined by the prosecution to corroborate the testimony of this witness.

8. PW 3 Sub. Hawa Singh, who was posted at the Indian Military Academy from 24 12.1986 to 22.3.1990, was JCO In-charge of Academy Guest Room from September 1989 to January 1990. According to him, in the month of September 1989, at the time when he took over charge of the Academy Guest Room, Nb Sub Beldev Singh, the then JCO in-charge of the Academy Guest House, brought to his notice deficiency of furniture. They prepared a list of deficient furniture. Nb Sub Bvaldev Singh told him that such deficiencies were there when he had taken over charge from Mohan Singh, then NCO In charge. Therefore, it is clear that the deficiencies of furniture were already there and the appellant had nothing to do with such deficiencies. At the time when he took over charge, he got the

deficiency certificate signed by Hav. Mohan Singh as Nb. Sub. Baldev Singh declined to sign it. This situation was brought to the notice of the appellant. On 14.10.1989, Nb. Sub. Baldev Singh told PW 3 that they should go to the QM along with the handing/taking over certificate. The certificate was placed before Lt. Col. Rathore for his counter signature. In the certificate, it was specifically stated that two furniture items were deficient since the time of Hav. Mohan Singh. The certificate signed by Hav. Mohan Singh was also placed before him. In their presence, Lt. Col. Rathore counter-signed the certificate. In October 1989, PW 3 again brought to the notice of the appellant the deficiency and told him that the ERE of Mechanised Infantry was going to be replaced by Punjab Regiment. When he brought the matter to the notice of Lt. Col. Rathore, he called the appellant and told him the necessity of settling the deficiency.

9. In the context of such statement of PW 3 Hawa Singh, it was argued by learned counsel for the appellant that the deficiency was there prior to 1986 and the same was within the knowledge of all concerned, as was quoted in the COI. Even when PW 3 took over charge, he reported such deficiency in furniture. The taking

over/handing over certificate was counter signed by Lt. Col. Rathore. Such deficiency was directed to be settled by Lt. Col. Rathore somehow or other. The appellant was not at all accountable, liable or responsible for any wrong if done by someone in providing locally made furniture furniture to make good the alleged deficiency. It is also contended that PW 2 and PW 3 were in charge of the furniture and the appellant was falsely implicated in this case. The holders of office were accountable for any act or omission and were required to account for. Any deviation from the path of rectitude by any of them amounts to breach of trust, instead of shifting the responsibility to one who was only having supervisory capacity. PW 4 Sub. Joginder Singh also deposed on the deficient furniture and he signed the handing/taking over certificate along with Nb. Sub. Vinod Kumar. PW 5 Maj. Jaipal Singh was an independent witness at the summary of evidence. He is a formal witness. PW 6 Sub Vinod Kumar took over charge as JCO Furniture, QM Section from Nb Sub Shivdan Singh. He has also stated with regard to the deficiency in the furniture and that was reported by him to the appellant. The position of this witness is also that of the accomplice and he is not inculpating himself in regard

to the deficiency in the furniture and put the blame on the appellant who was not in-charge of the stock.

10. PW 7 Brig. Ashok Johar was responsible for the complete administration in the Indian Military Academy. According to him, sometimes in the second week of September 1989, he received the posting order of the appellant. On getting the posting order, Lt. Col. Rathore apprised him that the deficiencies in the furniture had not been sorted out till then. Lt. Col. Rathore, who was in charge of the furniture, was examined as PW 8, who has stated that having noticed irregularities and deficiencies in the stock, he asked the appellant to sort it out before going on posting. PW 9 OC Dhyani and PW 10 Subhash Chandra Nijhawan have stated that the designs of the approved furniture and newly made furniture are different from each other. We do not find any cogent and convincing evidence to fix the culpability of the appellant on Charge No. 1. There is only the testimony of PW 2 Krishnan, that too does not inspire confidence as it is not getting corroboration from other materials on record. Some additional furniture was also found on the cemented plinth, but no

evidence as to how it came there has been given from the side of the prosecution.

11. In defence, the appellant himself was examined as DW 1. According to him, he was posted in the month of June 1986 at Dehradun and was assigned the duties of QM. After the posting of Lt. Col. Daka, Lt. Col. PS Rathore was posted as QM. During that period, a fire accident took place in the store of Nb Sub Vinod Kumar. It was a massive fire and fire brigade from the town had to be brought to extinguish the fire. In the fire, some furniture in the store also got burned. Lt. Col. Rathore had given his consent to Nb Sub Vinod Kumar and L/Nk M Krishnan to make good the deficiency by their own arrangements. This fact is also borne out from the statement of PW 3 Hawa Sigh, wherein he stated that Lt. Col. Rathore told the appellant that since he was going out on posting, he should settle the deficiency one way or the other. It was made clear by this witness that consent was given by Lt. Col. Rathore to Nb. Sub Vinod Kumar and L/Nk M Krishnan to make good the deficiency. Even in the COI, it has come out that Nb. Sub Vinod Kumar and L/Nk M Krishnan were held liable for negligence. It is just probable that they had managed the locally made

furniture. In **Ramaphupala Reddy** v. **Stat of A.P** (AIR 1971 SC 460) and **Bhim Singh Rup Singh** v. **State of Maharashtra** (AIR 1974 SC 286), it has been said that to the principles laid down in Sanwat Singh case may be added the further principle that if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court. This, of course, is not a new principle. It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must

be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable.

12. The letters which were sent by him informing about the alleged malpractices were also produced by him in the COI vide Exhibit 'WW' and 'XX'. The testimony of this witness could not be assailed by the prosecution. He also denied having brought locally made furniture to make good the deficiency. While imputing mala fides and vice on the part of Lt. Col. Rathore, it was also stated that the complaint would obviously demonstrate prejudice on the part of Lt. Col. Rathore. Whatever be the misdemeanour or misconduct on the part of the appellant for Charge Nos. 2 and 3, it is asserted that the charges were not proved. The cumulative circumstances and the evidence would lead to the conclusion that the appellant has not brought locally made furniture to make good the deficiencies as he had nothing to do with it and neither was he answerable for the deficiency nor for lack of supervision, though he had already been administratively punished. Those who were in charge of the furniture alone were responsible Whatever be the factual position, the witness has stated about the

consent given by Lt. Col. Rathore to make good the deficiency somehow or other.

13. It has next been contended that the second charge pertaining to the offence under AA Section 63 was wrongly framed. The appellant has narrated the entire details regarding the information furnished by the persons who were in charge of the furniture. We do not find any reason to disbelieve the statement given by the appellant. So is said to be the position in respect of Charge No.3, with regard to getting the furniture items manufactured by the persons involved in the taking/handing over charge. There is no evidence on record to show that statement of the appellant was false or leading to an act prejudicial to good order and military discipline. The statement of the witness (in the COI) could be impeached by proof of other statement inconsistent with part of evidence (see **Mehmood Mohammed Sayeed** v. **State of Maharashtra**) AIR 2002 SC 382). This could not be established. The statement by him before the COI, which could not otherwise be rebutted by evidence to be false, cannot be construed to be misconduct. The appellant has not committed any misconduct by violating any of the rules. Even if he

counter-signed the certificate, it can at the most be said to be misconduct or carelessness, for which he has already been punished. The word "misconduct" is defined in Black's Law Dictionary, 6th Edition at page 999 as "any unlawful behaviour by a public officer in relation to the duties of his office, wilful in character. The term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act".

14. In view of the aforesaid discussion, we hold that the impugned findings and punishment are not sustainable. The appeal is allowed setting aside the impugned order. We hold that the appellant is not guilty of any of the charges.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER