IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)

T.A NO. 512 of 2009
(WRIT PETITION (CIVIL) NO. 4539 of 1999)

IN THE MATTER OF:

Ex. Lt. Col. B.K. Mall .....APPLICANT

Through : Shri G.K. Sharma, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...RESPONDENTS

Through: Shri Anil Gautam, counsel for the respondents

CORAM:

HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT

Date: 22.09.2011

1. The case was registered as WP(C) No.4539 of 1999 in the Hon'ble High Court of Delhi on 26.7.1999 and was subsequently transferred to the Armed Forces Tribunal on 10.12.2009.

2. The applicant vide his petition has prayed for quashing of the Government of India, Ministry of Defence order dated 14.2.1997 (Annexure P-1) which terminated the services of the applicant and to re-instate the applicant in service w.e.f. 06.03.1997, the date from which the applicant was removed from service with all consequential financial benefits. The applicant has also sought quashing the Ministry of Defence's letter dated 18.5.1998 (Annexure P-2) for forfeiture of entire pensionary benefits which was entitled to him having put in 27

years of physical commissioned service. The applicant has also sought quashing of the Station HQ Bhatinda's letter dated 25.7.1994, HQ Western Command Letter dated 12.9.1994 which directed him to deposit an amount of Rs.41899.53 in order to make good the losses that accrued to the respondents and be directed to refund the same.

3. The applicant was commissioned into the Army service on 22.12.69. On 27.8.1988 he was posted as the Station Staff Officer (SSO) in the rank of Major at Bhatinda. Col. R.C.D. Joshi was posted to the same place as the Administrative Commandant.

4. As per the Standard Operating Procedure (SOP), the SSO the applicant was appointed as the Canteen Officer. One Col. M.C. Singla, a retired officer, who was reemployed was attached to the Station HQ Bhatinda and he was deputed to look after the CSD Canteen and to assist the SSO.

5. On 21.12.1990, the applicant was promoted as Lt. Col. Time Scale (TS). On 5.5.1991, the applicant was posted to 116 GL Section on relieve by Major K.A. Singh. During the handing/taking over, all the stocks in the Canteen were checked and found to be correct.

6. It is revealed from the record that there were some allegations of financial irregularities in Canteen management. On 30.7.1993, a Court of Inquiry (COI) was convened to investigate the same in which the applicant was called as a witness. Army Rule 180 was not applied. On

completion of the COI in October 1994, the applicant alongwith some others were held responsible for the losses which were detected during the COI. Consequently, the applicant was directed to deposit vide order dated 29 Sep 1994 a sum of Rs.41899.53, which was deposited by him. No further action was suggested at that time.

7. On 30.1.1996, consequent to the recommendations of the COI, a show cause notice was issued to the applicant asking him as to why his services should not be terminated (Annexure-P-9). He replied to the show cause notice on 23.5.1996 in which he agitated that he had already made up the deemed losses by depositing a sum of Rs.41899.53 and therefore, he was already punished and thus, the show cause notice was irrelevant. In his reply, he also made an averment that he was in supervisory capacity which was consequent to his designation as the SSO and therefore, was not directly responsible for the deemed losses. He further stated in the reply that he had only one year left before he would superannuate on 30.6.1997. The respondents considered his reply to the show cause notice but did not find satisfaction and his services were terminated by the MOD vide their order dated 14.02.1997 (Annexure P-1).

8. On 22.10.1997, another show cause notice was issued by the MOD (Annexure P-10) to the applicant which sought reasons for why his pensionary benefits that were admissible to him, had he retired from the service on the same date in the normal course, should not be

forfeited. The applicant replied to this second show cause notice on 07.11.97 (Annexure P-11). In reply to this show cause notice, the applicant made an averment that he had already deposited Rs.41,899.53 with the Government in order to make up the deemed losses. Further, that his services have been terminated w.e.f. 06.03.1997 by the MOD vide their letter dated 14.2.1997. This letter of 14.02.1997 did not mention forfeiture of pensionary benefits. In case the pensionary benefits are forfeited, the applicant would have suffered three times penalty for the same cause of action.

9. Ld. Counsel for the applicant also argued that the GOC-in-C had recommended in the court of inquiry for disciplinary action on 27.04.1994 which was besides the penal deduction in order to make good the losses. However, for the reasons best known to the respondents, no disciplinary action was taken but on the other hand his services were terminated as part of administrative action after having served him the show cause notice.

10. In the show cause notice issued on 31.1.1996 (Annexure-P-9), para 5 clearly states that :-

"In consideration of the fact that the case has become time barred for disciplinary action by way of Court Martial; and in view of your confirmed weak moral fibre and unreliability in financial matters, the Chief of the Army Staff has decided that your further retention in service is not desirable."

11. This clearly shows that the reason for taking administrative action instead of disciplinary action was because the case was getting time barred.

12. Ld. Counsel for the applicant further argued that the dismissal order was issued by the Central Government on 14.2.1997 (Annexure P-1) is not a speaking order and without having considered the averments and pleas made by the applicant in his reply to the show cause notice of 30.1.1996.

13. Ld. Counsel for the applicant also argued that no document was supplied to him alongwith the Show Cause Notice. Therefore, the applicant was restricted in giving his reply and was unable to prepare his defence adequately.

14. Ld. Counsel for the applicant also stated that in the court of inquiry which was conducted in August 1993, the applicant was only called as a witness. Army Rule 180 was not applied and therefore, to call upon the applicant to deposit the money for the deemed losses and subsequently using the same material for issuing a show cause notice for dismissal of service is prejudicial and violative of laws laid down by the various Courts. Ld. Counsel for the applicant cited **AIR 1991 SC 471 between Union of India and Ors. Vs Mohd. Ramzan Khan**. In this case, it was observed as under:-

"Disciplinary inquiry is quasi-judicial in nature. There is charge and a denial followed by and inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. With the Forty Second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his conclusion with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding a of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusions, rules of natural justice would be affected."

15. Ld. Counsel for the applicant further cited **Mil LJ 2007 Del 151 in the matter of Lt Gen S.K. Dahiya Vs Union of India and Ors**., in which the Hon'ble High Court of Delhi held that Rule 180 is mandatory in character due to the word ***'must'*** used in the Rule. Court of Inquiry proceedings vitiated on account of violation of Rule 180.

16. Ld. Counsel for the applicant further cited **2008(3) SLR in the matter of Surendra Kumar Sahni Vs Chief of Army Staff (Delhi)** in which the Hon'ble High Court (DB) *maintained that compliance to the requirements of Rule 180 is mandatory. The language of the Rule is certain and unambiguous, capable of only one interpretation i.e. that to*

afford a full opportunity in terms of this provision is the responsibility of the competent authority. This obligation and burden is incapable of being shifted at the initiated stage. Once an opportunity is affirmed at his initial stage then it is for the concerned Officer whose character or military reputation is being affected or is likely to be affected, to exercise the option in regard to what defence, if any, he to give, which witnesses he wishes to cross-examine and what defence, if any, he wishes to lead.

17. Ld. Counsel for the applicant further cited several cases as quoted in **Study and Practice of Military Law by Cols. G.K. Sharma and M.S. Jaswal 7th Edition 2010** which give out the rationale for a reasoned order.

18. Ld. Counsel for the applicant also cited **All India Services Law Journal 1982 (2) Page 120 in the matter of Major Harbhajan Singh Vs The Ministry of Defence and others.**

19. Ld. Counsel for the applicant also argued that now the applicant has been punished three times for the same action. In the first action taken by the respondents, the applicant was ordered to pay Rs.41899.53 towards making up the deemed losses, which the applicant pay, as directed. Second, he was issued a show cause notice dated 30.1.1996 and his services were terminated by order dated 14.2.1997. The third time, a second show cause notice was issued on 22.10.1997 and consequently his pensionary benefits were forfeited vide order dated 18.5.1998 which is clear that all the three

punishments are consequent to just one action, the losses which has been made good by the applicant. As such, the actions by the respondents seem to be rather severe.

20. Ld. Counsel for the respondents stated that the Court of Inquiry which was held was of a general nature to find about the losses that accrued in the CSD Canteen, Bhatinda. The applicant was called by the Court of Inquiry just to give evidence. It is only on the conclusion of the Court of Inquiry that the authorities have realised that the applicant was responsible for the losses to a certain extent by virtue of poor supervision/negligence. In order to support his contentions, Ld. Counsel for the respondents produced the original convening order of Court of Inquiry. Having examined the convening order of Court of Inquiry, we are convinced that the convening Order for the Court of Inquiry was of a general nature and did not name any person.

21. Ld. Counsel for the respondents further argued that the Army Rule 180 was not invoked. He further stated that the Show Cause Notice was issued which gave out the detailed gravamen of the charges against the applicant.

22. Ld. Counsel for the respondents submitted that the Show Cause Notice in itself was detailed and gives out all the charges which were mentioned against the applicant. However, had the applicant asked for the COI procedings, the same would have certainly been supplied to

him. Since the applicant did not seek the copy of the Court of Inquiry, it was not given to him. It has also been stated that the applicant had not agitated on this issue when he replied to the Show Cause Notice.

23. Ld. Counsel for the respondents in support of issuance of notice for forfeiting the pensionary benefits cited **(2002) 1 SCC 405 in the matter of Union of India and another Vs P.D. Yadav**. These are bunch of cases in front of the Hon'ble Supreme Court in which Hon'ble Apex Court have opined as under:-

"Merely because punishment is not imposed under Section 71(h) or (k) and other punishments are imposed, it does not mean that the President is deprived of his power and jurisdiction to pass an order under Regulation 16(a); so also the Central Government under Regulation 15(2) of the Navy (Pension) Regulations taking note of the punishment imposed under Section 81 of the Navy Act. In a case where punishment is imposed under Section 81(m) of the Navy Act forfeiting pension and/or gratuity, need for passing an order forfeiting pension under Regulation 15(2) of the Navy (Pension) Regulations may not arise. But that does not mean that in case of punishments imposed, which are covered by Regulation 15 of the Central Government is deprived of its power to pass appropriate orders under the said Regulation, when such power is specifically conferred on the Central Government under the vary Regulations, which enables granting of pension and/or gratuity."

24. Ld. Counsel for the respondents further argued that in view of the Supreme Court Judgment (supra), it is clear that the Central Government retained the option of granting the applicant pension and

gratuity and it should not be construed as an additional punishment. As regards the dismissal from service, it was consequent to the recommendations of the GOC-in-C who had recommended disciplinary action against the applicant. However, since the case was time barred, a conscious decision was taken to initiate administrative action. He produced the original documents and other details and the reasons that were considered by the respondents before deciding to initiate administrative action instead of disciplinary action. It was also contended that COI found the responsibility of applicant, therefore, he was directed to make good the losses, thus that also could not be treated as punishment.

25. Having heard both the parties at length and having examined the original records, we find that the convening Order of Court of Inquiry was of a general nature and no name of any person was listed in the Court of Inquiry for which Army Rule 180 could have been applied from the very beginning.

26. The nature of the Court of Inquiry and the tasking for the Court of Inquiry was such that perhaps it would not have been possible at the initial stages to incorporate the names of all the people involved. The names would have emerged only during the deposition by the witnesses. It was, therefore, required that the Court should have summoned the individuals for compliance of Army Rule 180, in whose case character and military reputation was involved. Provisions of

Army Rule 180 should have been complied with as and when individuals were named and involved. In this case during COI the name of the applicant came and he was found involved and at that stage Army Rule 180 should have been applied.

27. The very fact that the COI did not comply with the provisions of Army Rule 180 is evident from the respondents' counter affidavit which state that the Convening Authority of the COI had passed strictures against the Presiding Officer of the Court for not having been complied with the provisions of Army Rule 180 in this case. Even at this stage, this illegality could have been rectified but that too was not done.

28. We are of the opinion that though COI is a fact finding body and any discrepancy in its proceedings as long as substantial compliance has been carried out and the investigation does not prejudice the accused in the subsequent trial proceedings, the infirmities can be over-looked. However, in this case, the subsequent action of the respondents to punish the applicant has been based totally on the COI proceedings. Copy of the COI proceedings even have also not been supplied to the applicant alongwith the ntoice. The SCN issued on 31.01.1996 for termination of services (Annexure P-9) clearly states that during the aforesaid COI proceedings "*Irrefutable evidence of the under-mentioned functional lapses were found.....".* Further it states that *"And therefore the aforesaid Court of Inquiry has found you culpable of having embezzled the amount of Rs.93,110.06 in*

connivance with the Canteen Clerk.....". Meaning thereby, the entire evidence was based on COI, the proceedings of which were flawed.

29. It is evident that in the absence of the copy of COI having been given to the applicant, the applicant was not in a position to prepare his defence in a fair and adequate manner and thus he had been prejudiced.

30. On both the counts, the process of the inquiry and the subsequent action taken by the respondents is, therefore, infirm. In this respect the judgment of Hon'ble High Court of Delhi given in the case of **Major Harbhajan Singh Vs The Ministry of Defence and others (supra),** is relevant wherein the Hon'ble High Court of Delhi has held as under:-

> *".....A highly commendable provision is made in Rule 180 to give full opportunity of being heard even in this fact finding proceeding. When a Court of Inquiry affects the character or military reputation or a person, he is given full opportunity (i) of being present throughout the inquiry, (ii) making any statement, (iii) giving of any evidence, (iv) cross examining any witnesses and (v) producing any witnesses in defence of his character or military reputation. The Presiding officer of the Court is obliged by the said Rule to make the delinquent officer "fully understand his rights" under this rule.....*
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> *15. I, therefore, hold that the findings of guilt against the petitioner recorded by Court of Inquiry are vitiated by the facts that the relevant witnesses were not procured by the Court for*

ascertaining the existence of relevant facts and by denying the opportunity of citing defence witnesses to the petitioner. The evidence of other witnesses for prosecution was found sufficient by the Court of Inquiry for holding that the prosecution case was proved but the legal infirmity is that the defence evidence was not allowed and assessment was one sided.

16. Since the findings of the Court of Inquiry are vitiated and since they form the basis of Show Cause Notice, the Show Cause Notice also stands vitiated for this reason.

18. For the reasons stated above, the writ petition is allowed, with costs."

30. We have also considered the contentions and judgments given in the cases of **Maj G.S. Sodhi Vs UOI & Ors. (1991) 2 SCC 382; Maj Gen Inder Jit Kumar Vs UOI (1997) 9 SCC 1 and Maj Suresh Chand Mehta Vs Defence Secretary & Ors, AIR 1991 SCC 482** cited by the respondents wherein the Hon'ble Apex Court has ruled that the COI being preliminary fact finding body, any shortcomings in the investigation will not vitiate the trial as long as the accused get full opportunity to prepare his defence and has not suffered prejudice. Since in this case there was no consequent trial to the COI and the findings of the COI were the sole basis for issuing the SCN, besides the proceedings having not been provided to the applicant, clearly has infringed valuable right of defence of the applicant. We, therefore, feel that the COI being legally infirm, needs to be struck down and

consequently all the subsequent actions by the respondents are liable to be quashed.

31. In case of **Lt Gen Surender Kumar Sahni Vs UOI & Ors. TA No.34 of 2009,** passed by AFT Principle Bench, it has been held that the respondents were free to initiate disciplinary/administrative action or rectify the shortcomings of the COI.

32. We, therefore, quash the proceedings of the COI and all consequent actions i.e., order of termination of service dated 14.02.1997 and order of forfeiture of pension dated 18.5.1998. So far as order of deposition of money by the applicant is concerned, the same is upheld as the applicant has not made any protest against the said order at that time. The applicant will be deemed to be in service till his superannuation. All consequential benefits including pensionary benefits shall accrue.

33. The respondents are however free to initiate the departmental action and/or disciplinary action as deemed fit without taking recourse to the said COI. They are also free to take departmental and/or administrative action against the applicant after having rectified the legal infirmities in the said COI.

34. In view of the above, the order of termination of service dated 14.02.1997 and the order of forfeiture of pension dated 18.5.1998 are

hereby quashed with aforesaid observations. The present application is partly allowed.

35. The exercise to pay the monetary dues to the applicant be completed within 180 days failing which the amount will attract 12% interest till the date of payment. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this day of 22nd September, 2011.