

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

T.A. NO.243 of 2010

W.P.(C) NO.14191 OF 2006 OF DELHI HIGH COURT

IN THE MATTER OF:

SUSHIL KUMAR SHARMAAPPLICANT

Through: Mr. Alok Kishore, counsel for the applicant

VERSUS

UNION OF INDIA AND OTHERSRESPONDENTS

Through: Mr. Ajai Bhalla, counsel for the respondents

CORAM:

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

JUDGMENT

Date: 30.04.2012

1. The applicant initially filed W.P.(C) No.14191/06 before the Hon'ble High Court of Delhi on 08.09.2006 challenging the rejection of his representation vide order dated 05.05.2006 (**Annexure P-1**). After promulgation of the AFT Act, 2007 it was transferred to this Tribunal and registered as T.A. No.243/10 on 13.01.2010.

2. Vide this petition, the applicant has sought quashing of the orders dated 05.05.2006 and 08.05.2006 (**Annexure P-1**) vide which the respondents have rejected his representation dated 29.10.1997 (**Annexure P-16**) and conveyed the outcome of the said

representation in pursuance of the order of the Hon'ble Delhi High Court dated 10.11.2005 passed in W.P. (C) No.6278/2004 (**Annexure P-2**) regarding the representation related to document dated 26.08.21997 postal certificate stating that no telegram has been received from the respondents and delivered to the applicant. He has also sought quashing and setting aside of the sentence awarded by the summary court martial dated 29.06.1994 and its findings vide which he was dismissed from service, stating being a case of no evidence, in the light of said postal certificate. The applicant has further prayed to reinstate him alongwith full back-wages and consequential benefits.

3. The brief facts of the case are that the applicant was enrolled in the Indian Army on 29.07.1988 as clerk. After completing his training, he was transferred to the Corps of Engineers on 10.01.1992 and was posted to 201 Engineers Regiment.

4. It is submitted by the applicant that in 1993 the applicant was granted 30 days of advance annual leave from 09.09.1993 to 09.10.1993. The leave was accordingly published in Part II Order dated 15.10.1993. Again in 1994, the applicant applied for 60 days Annual Leave plus four days journey period which he was entitled as per rules (Annexure P-3). The leave was sanctioned on 11.02.1994 by Major S.C. Gaur (respondent No.6). It is alleged that in the Leave Register, the leave availed by the applicant during 1993 was clearly

mentioned on the same sheet. Accordingly, he proceeded on leave. He was issued with a Railway Warrant and a Leave Certificate (Annexure P-4 colly).

5. It is further alleged that however, before expiry of the said leave period, the applicant received a private letter from one Head Clerk (respondent No.5) asking him to report back on 10.04.1994 (Annexure P-5). He averred that no official letter regarding cancellation of his leave was received by him. Since his father was seriously sick and was being medically treated at Meerut, the applicant spoke on telephone with the Adjutant Major A.B. Menon and Second-in-Command of the Unit, Lt. Col Pritam Singh requesting him that although he has been granted 30 days advance leave, it may be confirmed that sanction for advance leave stands and he could join the unit only on expiry of total leave sanctioned. The Adjutant Major confirmed that 15 days advance leave has been sanctioned and the applicant could join on expiry of period of leave sanctioned. The said telephone message was recorded in the telegram log book on 09.04.1994 by the duty clerk (respondent No.5).

6. The respondent No.5 thereafter has stated that it is alleged that a telegram was sent to the applicant by respondents that his request for extension of leave has not been granted which was never received by the local post office. A copy of "postal certificate" dated

26.08.1997 received from the postal authorities in this respect is at Annexure P-7.

7. It is alleged that since the applicant was assured by the Adjutant as well as by the Second-in-Command to continue on leave, the applicant stayed at home till the leave period sanctioned to him had expired and reported back accordingly on 28.4.1994. However, the applicant was put under arrest in the Quarter Guard and was charged with falsifying official documents and false declaration under Section 57 of Army Act for obtaining the leave. The applicant was released on next date i.e. 29.4.1994.

8. It is contended that the Commanding Officer, Col. S.K. Pawar heard the charge under Rule 22 of the Army Rules from 29.4.1994 onwards. After hearing the charges, the CO dismissed the charge exercising power under Rule 22(2) of the Army Rules since the evidence did not show that any offence had been committed under the Act. It is contended that the record pertaining to the hearing and rejecting of the charge by the CO is not available with him but it should have with the respondents.

9. It is further contended that on 28.05.1994, there was change in the CO with Col S.K. Pawar being posted out of the Unit and respondent No.3 Col A.S. Deshpande took over the charge as the new CO. The applicant submitted his non-statutory complaint on 24.06.1994 against non-promotion to the post of Naik and complaint

against respondent No.4 Capt L. Harsha who was harassing the applicant for everything. The non-statutory complaint was submitted to the Adjutant and within a couple of hours, it is alleged that the applicant was again put under arrest and was put inside the Quarter Guard without assigning any reason. Again a SCM was initiated against him on same allegations, the applicant was charged under Section 63 of the Army Act i.e., an act prejudicial to good order and military discipline. The charge against the applicant is as under:-

“At field, on 11 Feb 94, while performing the duties of Head Clerk 15 Field Company, 201 Engineer Regiment, got for himself 64 days Annual Leave for 1994 sanctioned by knowingly suppressing with intend to defraud the fact of his having availed 30 days Advance of Annual Leave for 1994 during 1993 from 09 Sep to 08 Oct 93.”

10. It is further alleged by the applicant that on 27.06.1994, respondent No.3 issued order for trial of applicant by the SCM. On 28.06.1994, respondents No.4 and 5 took the applicant out of the Quarter Guard at about 2300 hours and threatened him with dire consequences if he did not sign on blank sheet in SCM proceedings. The applicant has averred that the plea of guilty is fake and has been entered falsely and it is evident from the fact that it is in different handwriting.

11. The applicant was tried by the SCM on 29.06.1994 and it is alleged that without giving opportunity to produce any defence witnesses or cross examine the prosecution witnesses, awarded sentence of dismissal from service on the basis of forged and fake “plea of guilt” (Annexure P-10).

12. The applicant filed a statutory complaint under Section 164 of the Act on 09.08.1994 (Annexure P-11). Since the respondents did not dispose off this statutory complaint dated 09.08.1994 within stipulated time, therefore, the applicant approached the Hon’ble High Court of Delhi vide WP(C) No.804/95. The Hon’ble High Court vide its order dated 08.03.1995 directed the respondents to consider the statutory complaint and to dispose of within a period of two months (**Annexure P-12**).

13. The respondents vide their order dated 07.07.1995 rejected the statutory complaint (Annexure P-13). The applicant again filed CWP No.3044/95 before the Hon’ble High Court for setting aside the SCM proceedings and order of dismissal, which was dismissed vide order dated 18.07.1996 (Annexure P-14).

14. It is further submitted that against the said order of dismissal of writ petition by the Hon’ble High Court, the applicant preferred a SLP before the Hon’ble Apex Court which was again dismissed vide order dated 10.01.1997 (Annexure P-15). In this way sentence and finding given in SCM dated 29.06.1994 were maintained. These facts

are related to previous litigation. They have been narrated for the just disposal of the present matter in issue.

15. Thereafter, the applicant obtained a "Postal Certificate" (Annexure P-7) from the Post Office vide letter dated 26.08.1997 which conveyed that there were no telegram or letter received for the applicant during the period 10.04.1994 to 25.04.1994. As such, this was alleged to be a new evidence against the charge, which was not raised earlier due to non-availability. The learned counsel for the applicant contended that in fact the charge was of overstaying of leave and for that this document was most relevant, though charge was framed under Army Act Section 63, an act prejudicial to good order and military discipline and under that he was held guilty and sentenced. Accordingly, a detailed representation was made by the applicant to the Chief of Army Staff vide his letter dated 29.10.1997 (Annexure P-16). Since no reply was forthcoming, the applicant sent a reminder dated 20.04.1998 to the MOD and copy to COAS (Annexure P-17) followed by legal notice also (Annexure P-18). He received a response vide order dated 19.02.2004 conveyed in the most terse manner that respondents would not consider the said representation of the applicant, as it had already considered and rejected earlier. The applicant was thus again forced to recourse the legal remedy and he came before the Hon'ble High Court vide CWP No.6278/2004. The Hon'ble High Court vide its order dated 10.11.2005 disposed of the petition (Annexure P-2). The relevant portion is reproduced as under:

“6. Taking the factors enumerated above into account, we are of the view that without expressing any opinion about the plea whether a petition can be again presented under Section 164(2), the facts of the present case indicate that a direction is required to be given to the respondents to consider the petitioner representation in the light of the documents dated 26th August, 1997 sought to be adduced by him. The said consideration shall be accorded on or before 28th February 2006. The petition stands disposed off accordingly.¹

We make it clear that the re-consideration shall only be on the basis of the pleas arising from document dated 26th August, 1997 and no other plea of the petitioner shall be considered. We are not expressing any opinion on the merits of the matter. In case the order passed after the petitioner's plea arising from the aforesaid document dated 26th August, 1997 is against the petitioner, the petitioner will be entitled to assail the said order in accordance with law.”

16. It is submitted that the applicant received a letter dated 08.05.2006 containing the rejection order passed by the Chief of the Army Staff on 05.05.2006 (**Annexure P-1**) on the issue of document dated 26.08.1997 pertaining to the certificate of non-receipt/non delivery of telegram dated 10.04.1994. Thus, the applicant filed the present petition WP(C) No.14191 of 2006 again before the Hon'ble Delhi High Court which was later on transferred to this Tribunal.

17. Learned counsel for the applicant again challenged the SCM proceedings held earlier and argued that during the proceedings before the SCM, the applicant applied for defence witnesses but it was not accepted and was not allowed. He had also sought a legal defence counsel but was not provided. Therefore, the applicant had to continue with the officer detailed by the CO as the friend of the accused.

18. Learned counsel for the applicant further argued that the charge against the applicant was of an act prejudicial to good order and military discipline and in that respect since he had not received the said telegram which was purported to be sent by the respondents which was never received by the applicant.

19. Learned counsel for the applicant further argued that the SCM did not follow the principles of natural justice and hence it was bad in law. Though, it is said that the applicant had shown pleaded guilty but his statements were taken under threat and especially the fact that he has not received the telegram purportedly to be sent by the respondents, his plea should have automatically changed to that of 'Not Guilty'.

20. Learned counsel for the applicant further argued that the allegations of the respondents that the applicant had withheld the information and thus suppressed the fact of taking prior Annual Leave in advance which implies that he told a lie. Learned counsel for the applicant argued that in 1993 the applicant had availed 30 days of

advance leave against the authorisation in 1994. It was, therefore, the responsibility also of the Company Commander to ensure that in 1994 he would have availed only 30 days and not 60 days of leave. Even if 60 days of leave was granted by mistake, 30 days from the next year could have also been deducted since the applicant was in dire need of leave because of the circumstances at home. In support of his contentions, learned counter for the applicant cited the judgment passed in **Ex. Hav. Ratan Singh Vs. Union of India & Ors.** AIR 1992 SC 415. This case is related to the scope of seeing the nature of offence. He also relied on the judgment passed in **Commander Ranvir Kumar Sinha Vs. The Union of India & Ors.** 1991 CrL L.J. 1729. In this case it was observed that where a specific provision applies a catch-all provision like Section 74 should not be applied. He also cited the judgment passed by this Tribunal in T.A. No.87/2009 “**Col. GLN Keshav Vs. Union of India & Ors.** on 25.02.2010, **Mohinder Singh Gill Vs. Chief Election Commissioner** AIR 1978 SC 851 (858), **Prithpal Singh Vs. Union of India & Ors.** 1984 (3) SLR 675 & **L/k Vijendra Kumar Sharma Vs. Union of India & Ors.** T.A. No.671/2009 decided on 11.05.2010 by Principal Bench, Armed Forces Tribunal.

21. He also argued that the punishment awarded in this case was excessive and not commensurate with the gravity of offence. In support of his contentions, learned counsel for the applicant quoted the judgment of Hon’ble Apex Court in the matter of **Ranjit Thakur Vs**

UOI & Ors. reported AIR 1987 SC 2386 and **NK Sardar Singh Vs Union of India** AIR 1992 SCC 417 which lays down that the punishment should be commensurate with the gravity of offence.

22. Learned counsel for the applicant also contended that thereafter when he came to learnt the fact that the said telegram was not received by the postal authorities he obtained the postal certificate dated 26.08.1997 and submitted representation dated 29.10.1997 to the respondents, but the said representation and reminder thereafter were not properly examined with open mind and without considering the material facts, despite the direction of Hon'ble Delhi High Court passed in Writ Petition No.6278/2004 decided on 10.11.2005, his representation was rejected vide impugned order dated 05.05.2006 and conveyed to him on 08.05.2006, they are thus liable to be quashed with consequential relief.

23. Learned counsel for the respondents vehemently opposed the contentions of the learned counsel for the applicant and also raised preliminary objections and submitted that the present case suffered from delays and latches. The original incident happened in 1994 and the present writ petition was filed only in 2006 again disputing the SCM proceedings and dismissal order, which was already agitated earlier by way of writ petition No.3044 of 1995 and that was disposed of vide Hon'ble High Court order dated 18.07.1996 and SLP has also been rejected on 10.01.1997.

24. Learned counsel for the respondents also argued that this case has been adjudicated by the Hon'ble High Court of Delhi in all its aspects while filing writs one after another that have already been argued on merits by the learned counsel for the applicant. The order of Hon'ble High Court of Delhi dated 18.07.1996 is (Annexure P-14). In addition, the applicant had gone up to the Hon'ble Apex Court vide SLP No.1095/97 which was also dismissed on merits on 10.01.1997 (Annexure P-15). The applicant has agitated the same, therefore, now he is not entitled to raise the same as that has attained finality. It became *res judicata*.

25. Learned counsel for the respondents further stated that the applicant once again approached to the Hon'ble High Court by filing WP(C) 6278/2004 and this time seeking same remedy since he had obtained a certificate from the postal authorities that he had not received the telegram and was permitted to make a representation to the respondents vide Hon'ble High Court order dated 10.11.2005 (Annexure P-2) and again that consideration was restricted to document dated 26.08.1997. Accordingly, the applicant made a representation to the COAS which was turned down by a speaking order on 05.05.2006 (Annexure P-1).

26. Learned counsel for the respondents further argued that while at the time of giving the sentence after the SCM found him guilty, the officer holding the Court had gone through his previous record. It

was revealed that he had been punished twice earlier, once for overstaying of leave and secondly for using insubordinate language and disobedience of superior authority. All this was within his service period of five years and one month. Besides, the applicant was the clerk in the unit HQ and he was responsible for keeping the records faithfully, but he did not maintain that discipline. In Army service one has to maintain high standard of discipline. As such, it was submitted that the punishment given to him by the SCM is appropriate and in terms of laws and deserves to be maintained.

27. Having heard both the parties at length and having examined the record as well as the judgments and orders passed by the Hon'ble High Court and the Hon'ble Apex Court in this case and the judgments cited by the applicants' side. Now the main issue remains for consideration whether the impugned order dated 05.05.2006 has been passed after duly considering the representations dated 29.10.1997 containing the issue of document 'postal certificate' dated 26.08.1997 in accordance with the directions of Hon'ble High Court dated 10.11.2005. It is revealed from the records that the applicant was performing the duties of Head Clerk 15 Field Company, 201 Engineer Regiment and he had availed 30 days advance annual leave in 1993 from 09.09.1993 to 09.10.1993. Again he had knowingly this fact of availing advance leave, applied for 60 days annual leave including 30 days advance annual leave in 1994 and got it sanctioned. On the basis of that, it was found an act prejudicial to good order and military

discipline punishable under Section 63 of the Army Act, for that from the perusal of record, it is further revealed that he was tried by SCM and held guilty on the basis of “pleaded guilty” vide order dated 29.06.1994 and thereby his services were dismissed. Against that, his statutory complaint is also rejected by the Competent Authority vide orders dated 03.07.1995 (Annexure P-13). Thereafter, the applicant challenged the order of dismissal as well as rejection of statutory complaint before the Hon’ble High Court vide WP(C) 3044 of 1995 but the Hon’ble High Court by a detailed judgment, overruled his all contentions and rejected the writ petition vide order dated 18.07.1996 (Annexure P-14). SLP was filed against the said order and the SLP has also been disposed off on 10.01.1997 (Annexure P-15) and the following order has been passed:-

“The special leave petition is dismissed on merits”.

28. Keeping these all aspects of the case in mind, we have given our best consideration to the representation dated 29.10.1997 (Annexure P-16) containing the letter “Postal Certificate” dated 26.08.1997 stating that no telegram was received by the Postal Authorities (Annexure P-7). Though, from the perusal of certificate the date of certificate is not very clear, however, it appears that the said certificate was issued in 1997. It is contended by the respondents that in fact two telegrams dated 26.03.1994 and 10.04.1994 (Annexure R-1) were sent to the applicant followed by confirmation letter. In our

opinion, the telegrams in question were dated 26.03.1994 and 10.04.1994, the certificate dated 26.08.1997 authenticating that it was not received in April 1994 has a negative connotation and perhaps may not be correct. Besides the telegram, the applicant has conceded to the fact that a letter was received from his colleague who asked him to report back in time since the issue of advance leave had come to light and it was being construed that the applicant was not authorised to take 64 days of advance leave in 1994. Despite having known this through his colleague and personally having talk with officers, as alleged by himself, the applicant did not take any step. As such the receipt of telegram per se is irrelevant.

29. We have also noted that COAS has complied with the directions of Hon'ble High Court order dated 10.11.2005 in WP(C) No.6278/2004 and has passed the speaking order dated 05.05.2006, has analysed the facts in great detail. At para 4 of his order, the COAS has stated as under:-

"Whereas, examination of facts of the case in light of the available documents and the certificate dated 26 August 1997 now agitated by the petitioner discloses that the essence and gravamen of the charge for which the petitioner has been tried and convicted is in no way connected to the telegram. The petitioner was not tried for having overstayed leave but for obtaining annual leave for sixty four days without disclosing the true and complete facts of his already having availed advance of annual leave for the year 1994. Thus the receipt or

non-receipt of the impugned telegram is of no consequence as the subject matter of the charge was not the number of days of leave available by the petitioner.”

30. Notwithstanding the foregoing, we find that the charge against the applicant was not of overstaying of leave but was of under Section 63 of the Army Act- *“An act prejudicial to good order and military discipline”, in that he, at Field on 11.02.1994, while performing the duties of Head Clerk 15 Field Company, 201 Engineers Regiment, got himself 64 days Annual Leave for 1994 sanctioned by knowingly suppressing with intent to defraud the fact of his having availed 30 days advance of Annual Leave for 1994 during 1993 from 09.09.1993 to 08.10.1993.”*

31. The gravamen of the charge does not allude to the telegrams for recall from leave. Thus, the issue of non-receipt of telegram and the certificate issued by the postal authorities in 1997 has no much relevance.

32. On the basis of aforesaid discussion, we are of the opinion that the issue of document ‘postal certificate’ dated 26.08.1997 has been properly dealt with and no interference is required. The learned counsel for applicant though also agitated grounds with respect to SCM proceedings but as the same grounds were already overruled by the Hon’ble High Court of Delhi vide order dated 18.07.1996 and that order again got confirmed in SLP decided by the Hon’ble Apex Court

on merit and has attained finality, therefore, those grounds cannot be re-agitated and reconsidered and the judgments cited in this respect also do not help the applicant at this stage. Looking to the allegations even there is no need for any interference in the order of dismissal.

33. In view of the foregoing, we have no hesitation in dismissing the case. Accordingly, the TA is hereby dismissed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

**Announced in the open Court
on this 30th day of April, 2012.**