

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

% *Judgment Reserved On: 11th March, 2011*
Judgment Delivered On: 17th March, 2011

+ **WP(C) 10009/2009**

VINAY KUMAR SHARMA Petitioner
Through: Mr.Barun Kumar Sinha, Advocate
with Ms.Pratibha Sinha, Advocate

versus

UNION OF INDIA & ANR. Respondents
Through: Ms.Preeti Dalal, Advocate with
Ms.Tanu Goswami and
Ms.Maneesha Dhir, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. Charge-sheet dated 07.5.2007 was served upon the petitioner Ct.Vinay Kumar on 10.5.2007 alleging the following 2 misdemeanours:

"Charge-01

Constable Vinay Kumar of force no.832310144 posted at CISF Unit Udaipur Airport, whose earned leave was sanctioned from 06.11.2006 to 03.12.2006, had deliberately illegally stayed beyond the sanctioned leave from 04.12.2006 to 16.12.2006 for a total of 13

days. The above act of the member of the force indicates his serious bad conduct, indiscipline and ignorance towards his duties.

Charge-02

When Constable Vinay Kumar of force no.832310144 of CISF Unit Udaipur Airport was on earned leave from 29.12.2006 to 14.01.2007, an FIR no.02/07 was lodged against him on 03.01.2007 under section 307/302 IPC at P.S. Refinery District Mathura. However, he deliberately hid this fact from the Unit. The above act of the member of the force is the indicator of serious bad conduct, indiscipline and the act of hiding the actual fact."

2. The petitioner submitted a reply on 19.5.2007, not denying overstaying leave by 13 days from 04.12.2006 to 16.12.2006 as also overstaying leave with effect from 15.1.2007 and not joining at the unit till date. However, he denied the leave being unauthorized and by way of justification pleaded that he fell ill and informed the unit on 4.12.2006 as also 7.12.2006, in respect of which plea he relied upon 2 postal certificates evidencing dispatch of 2 letters through post under certificate of postal. For the stated absence with effect from 15.1.2007 he pleaded that on 13.1.2007 he had sent a telegram informing his being unwell and seeking extension of leave by 30 days. Since it was an ingredient of charge No.2 that he deliberately hid the fact of his being an accused in FIR No.02/2007, he pleaded by way of defence that his brother had sent a telegram on 17.1.2007 informing that he had been arrested in FIR No.02/2007.

3. It is apparent that the factual aspect of the dispute required the defence to succeed for the reason the petitioner

admitted overstaying leave by 13 days from 4.12.2006 to 16.12.2006 and also admitted not reporting for duty after 2nd leave period was over i.e. on 15.1.2007 till date and he also admitted FIR No.02/2007 registered against him for offences under Section 307/302 IPC but denied having withheld this fact from the Unit by pleading that his brother had sent a telegram to the department.

4. As the petitioner was in Judicial Custody at District Jail Mathura, U.P, notice dated 27.06.2007 was served upon him informing that preliminary hearing would be conducted by an Inquiry Officer on 20.07.2006 in the jail premises. Accordingly, the Inquiry Officer went to District Jail, Mathura to conduct the preliminary hearing on the said date when petitioner pleaded that he was under acute mental pressure as he was in jail and prayed that the inquiry be withheld till he was released. This request of the petitioner was forwarded to the competent authority which directed that the inquiry must proceed, information whereof was given to the petitioner vide communication dated 31.8.2007, informing further that the Inquiry Officer would examine the prosecution witnesses and one court witness on 28.9.2007.

5. On 28.09.2007 the petitioner submitted a written submission once again stating that he was under physical and mental pressure and would not be able to present his case in a proper manner and once again requested that the inquiry be withheld till he was released from jail. The Inquiry Officer recorded as aforesaid and did not examine any witness.

6. On 04.12.2007 the Inquiry Officer under instructions from the Disciplinary Authority directed petitioner to get himself examined from a Government Medical Practitioner regarding his stated physical and mental incapacity to be present at the inquiry proceedings and furnish a report which should specify that petitioner was unfit to take part in the Departmental Inquiry. Petitioner was directed to furnish the report within 07 days of receipt of the letter. It was highlighted that failing which, the Departmental Inquiry would commence according to rules and regulations.

7. On 10.12.2007 the petitioner informed the Inquiry Officer in writing that in jail no medical practitioner was available to examine his mental state and expressed his willingness to be got examined by the department.

8. On 20.12.2007, a notice was served upon the petitioner and he was informed that on 27.12.2007 the Inquiry Officer would visit the jail and would examine the prosecution witnesses. Accordingly, the Inquiry Officer reached District Jail Mathura on 27.12.07 to conduct the Inquiry and accompanying him were Insp.Jai Prakash, SI S.K.Ghosh, SI Ajay Nema and HC Roop Chand, the four prosecution witnesses and Insp.Imran Khan, a court witness.

9. On 27.12.2007 only two witnesses i.e. SI S.K.Ghosh and SI Ajay Nema were examined. It may be noted that SI S.K.Ghosh was examined as PW-2 and SI Ajay Nema as PW-3 for the reason their names were at serial No.2 and 3 of the list of witnesses.

10. SI S.K.Ghosh PW-2 deposed that after taking leave from 06.11.2006 to 03.12.2006, petitioner was supposed to report back for duty on 4.12.2006. The petitioner did not report back on duty and a call notice Ex.PW-2/P (Exhibit-1) dated 7.12.2006 was sent to his paternal house. The petitioner did not reply to the call notice and reported back on duty on 17.12.2006. He again went on leave for 15 days and was supposed to return back for duty on 15.1.2007 but he did not do so. On 16.1.2007 a telegram Ex.PW-2/P (Exhibit-2) was received in the CISF Unit, Udaipur in which it was written 'SELF SICK AND UNDER TREATMENT OF DOCTOR. HE ADVISED FOR BED REST. KINDLY EXTEND 30 DAYS LEAVE'. On the same day, a call up notice was sent to him declining his request for extension of leave and requiring him to report back on duty immediately. The said letter could not be delivered to the petitioner as he was not present at his house. That on 19.1.2007 another telegram Ex.PW-2/P (Exhibit-3) was received in the CISF Unit, Udaipur sent by the brother of petitioner in which it was written 'CONST.VINAY KUMAR S/O GIRAWAR SINGH HAS BEEN ARRESTED IN FALSE ALLEGATION ON 14.1.2007'. He deposed that with regard to the telegram received on 19.1.2007, SI Ajay Nema was detailed to go to the petitioner's village to verify the facts relating to the extended leave taken by the petitioner. On 19.1.2007 itself SI Ajay Nema proceeded to Mathura.

11. The petitioner cross examined SI S.K.Ghosh PW-2 and questioned him whether the department received the letters along with medical certificate send through UPC on

4.12.2006 and 7.12.2006 pertaining to his ill-health, to which PW-2 answered that no such letters were received by the Unit. When further questioned as to when were the telegrams sent by the petitioner and his brother, dated 13.01.2007 and 14.01.2007 respectively, received by the Unit he answered that said telegrams were received on 16.01.2007 and 19.01.2007 respectively and clarified that he had already deposed said fact in his statement.

12. SI Ajay Nema PW-3 deposed that on 19.1.2007 he left for petitioner's paternal home to verify the facts about the telegram received on the same day. On 20.1.2007 he reached Mathura. There he contacted Const.S.S.Yadav who told him about the news in the local newspaper 'Dainik Jagran' dated 4.1.2007 and 15.1.2007 in which petitioner's involvement in criminal activities were reported. He went to police station, Refinery, Janpad, Mathura and there he was told about the FIR lodged against the petitioner. He was further told that the petitioner was kept in judicial custody. Over the telephone he gave the said information to the Unit Commander.

13. On being questioned during cross-examination by the petitioner whether he enquired about the incident from the persons in the house of the petitioner, SI Ajay Nema stated that he did not think it was necessary for him to do so.

14. Relevant would it be to note that the testimony of SI S.K.Ghosh and that of SI Ajay Nema pertains to both articles of charge and highlights the fact admitted by the petitioner of not reporting back for duty on 4.12.2006 and remaining absent till 16.12.2006. With respect to the UPC certificates relied

upon by the petitioner, the testimony of SI S.K.Ghosh brings out that no letter claimed to have been sent by the petitioner pertaining to the petitioner being sick and hence not in a position to report for duty till 16.12.2006 were received at the Unit. Relevant would it be to further note that the testimony of the two witnesses establishes a fact, even otherwise admitted by the petitioner that on the second occasion, being on leave from 29.12.2006 till 14.1.2007, petitioner did not report back and that he was named as an accused in FIR No.02/2007 dated 03.1.2007 in which he was arrested on 14.1.2007. The testimony of SI S.K.Ghosh admitted what was stated by the petitioner in defence that two telegrams, one sent by the petitioner seeking leave to be extended on the ground of sickness was received on 16.1.2007 and the second sent by petitioner's brother informing petitioner's arrest was received on 19.1.2007.

15. It is apparent that till 27.12.2007, the inquiry proceeded with the participation of the petitioner and the record prepared evidences the mental agility of the petitioner, which clearly oozes from the cross-examination conducted by the petitioner on the two witnesses.

16. Two more witnesses i.e. Insp.Jai Prakash PW-1 and HC Roop Chand PW-4 were examined on 28.12.2007, a date on which the petitioner did not appear before the Inquiry Officer and now claims that he was in the jail hospital and in respect whereof we find that the petitioner has annexed a medical certificate to this effect.

17. At the hearing held on 28.12.2007, Insp.Jai Prakash PW-1 deposed that on 2.11.2006 the petitioner applied for leave for 27 days i.e. from 6.11.2006 to 2.12.2006 as per leave application Ex.PW-1/P (Exhibit-1) which were sanctioned requiring the petitioner to report back for duty on 4.12.2006. The petitioner failed to report back on time. Said information was recorded in DD No.112 Ex.PW-1/P (Exhibit-3) at 14:30 hours. On 17.12.2006 the petitioner reported back for duty after availing unauthorized leave for 13 days. On 28.12.2006 petitioner again applied for leave for 15 days from 29.12.2006 to 14.1.2007 as per application Ex.PW-1/P (Exhibit-6) which was sanctioned, requiring the petitioner to report back on 15.1.2007, but the petitioner did not do so.

18. Relevant would it be to note that Insp.Jai Prakash PW-1 deposed fact which were even otherwise admitted by the petitioner and were not in dispute.

19. HC Roop Chand PW-4 deposed that with respect to the first leave period, requiring to report back for duty on 4.12.2006, petitioner reported back on 17.12.2006 and for the second period, being required to report back on 15.1.2007, petitioner never reported back.

20. Relevant would it be to note that HC Roop Chand deposed facts which were admitted by the petitioner.

21. Insp.Imran Khan CW-1 deposed that the petitioner was arrested on 14.1.2007 and sent to judicial custody, a fact admitted by the petitioner.

22. It is apparent that the evidence recorded on 28.12.2007, pertained to facts admitted by the petitioner and even ignoring the same, it would hardly matter as regards the indictment.

23. The Inquiry Officer submitted his report on 4.1.2008. He held that the petitioner could not establish the defence of having sent any letters under the certificates of posting relied upon seeking leave to be extended beyond 16.12.2006. The Inquiry Officer opined that the telegram sent by the petitioner i.e. Ex.PW-2/P (Exhibit-1) which was received by the Unit on 16.1.2007 showed an attempt made by the petitioner to hide the truth inasmuch as the telegram sent on 13.1.2007 conveyed the message of the petitioner being sick, as against the fact that the petitioner was an accused in a serious offence i.e. offences punishable under Section 307/302 IPC and the petitioner was arrested on 14.1.2007. Though not expressly stated by the Inquiry Officer, the underline signature tune of the reasoning is that the petitioner knew that he was an accused and was likely to be arrested. He hid the said information by sending a telegram recording wrong facts. Maybe the petitioner thought that he would manage bail and report back to the unit in a short period. This did not happen and this became the necessity for his brother to send the telegram informing petitioner being arrested for a serious offence.

24. Furnishing the report of the Inquiry Officer to the petitioner and considering the written response of the petitioner and finding the same to be inadequate and holding

that the charges stood proved, the Disciplinary Authority imposed the penalty of dismissal from service vide order dated 31.1.2008 against which appeal filed by the petitioner was dismissed vide order dated 24.7.2008. Revision petition filed by the petitioner was rejected vide order dated Nil.11.2008.

25. Instant writ petition challenges the penalty imposed upon the petitioner and during hearing of the writ petition, two contentions were pressed into aid. Firstly that a fair hearing was denied to the petitioner who was in the jail hospital on 28.12.2007 and thus the evidence recorded on said date falls to the prejudice of the petitioner who was denied an opportunity to cross-examine the three witnesses. Extending this submission, learned counsel urged that the petitioner was denied the right to lead defence evidence. The second contention urged is that the second limb of charge No.2 i.e. of deliberately hiding the fact of petitioner being an accused in FIR No.02/2007 for offences under Section 307/302 IPC was not proved inasmuch as the witnesses of the department admitted receipt of the telegram sent by the brother of the petitioner in which information of petitioner being arrested was given to the department.

26. At first blush, the pleas look very attractive, but at a closer scrutiny would reveal the hollowness thereof.

27. As noted by us hereinabove the petitioner did not deny not reporting back for duty on 17.12.2006 and overstaying leave by 13 days. He gave a justification of his being sick and claims having sent two letters under certificate of posting and in respect of which period and subject matter of

justification, we have the testimony of SI S.K.Ghosh and SI Ajay Nema who were examined on 27.12.2007. We ignore the testimony of Insp.Jai Prakash PW-1 and that of HC Roop Chand PW-4 for the reason the two witnesses merely duplicated what was deposed to by SI S.K.Ghosh and SI Ajay Nema. We highlight that with respect to the defence taken by the petitioner, it is only the testimony of SI S.K.Ghosh PW-2 which is relevant. The defence was that being unwell, petitioner had posted 2 letters under certificate of posting seeking extension of leave. Now, U.P.C. certificates can be easily managed, we highlight that SI S.K.Ghosh has been cross-examined on this issue and has denied that the department received any letters.

28. Thus, on the issue of charge No.1 we find no prejudice caused to the petitioner by continuing with the inquiry. It is settled law that unless it is established that an illegality committed during inquiry proceedings has caused a prejudice to the defence, a defect, deficiency or illegality committed would be meaningless.

29. On the second point urged, it is relevant to note that an FIR was registered against the petitioner as an accused for having committed murder and having attempted to murder another victim. This was registered on 3.1.2007. It was apparent that the petitioner was on the run. He knew that the police was looking after him. Facing the heat of the police and failing in an attempt to secure anticipatory bail, which we presume petitioner must have attempted and must confess that there is no evidence to establish the same, on 13.1.2007 the petitioner sent a telegram falsely stating that he was sick

and under treatment of a doctor. His endeavour to have the leave extended was not only a desperate attempt, but is clearly an attempt to hide the truth from the employer. Thus the charge of the petitioner deliberately hiding a serious and a relevant fact from the Unit i.e. charge No.2 is clearly established. Both limbs of charge No.1 are clearly established. That petitioner's brother sent a telegram informing petitioner's arrest was the result of the situation of necessity and was not a voluntary disclosure of the truth. It is apparent that the petitioner sent a telegram to hide the truth and when he was arrested, it became the necessity for his family to come clean.

30. Now, the petitioner is responsible for having messed up his life and from the fact that he repeatedly took leave in the month of December 2006 and did not report back after second leave period was over on 16.12.2006, it can be inferred that the petitioner was desperately attempting to settle something and there is strong presumptive material before us wherefrom, within the confines of a domestic inquiry jurisprudence, one can infer that the something attempted to be settled was a personal feud. As a member of a discipline force, it was expected from the petitioner that he would not even attempt to come near a situation or play with a situation which could explode.

31. For the facts noted hereinabove and our reasons recorded hereinabove, we find no infirmity in the view taken by the department and the resultant penalty levied upon the petitioner. In taking the view, we are conscious of the fact that the petitioner is still facing trial for the offence he was charged

of way back in the year 2007, but we highlight the fact that the first charge of petitioner availing unauthorized absence has been fully proved and so has the second charge of the petitioner deliberately hiding a very important fact from the Unit. Having become an accused for serious offences it would be most undesirable to retain petitioner as a member of an Armed Central Para-Military Force.

32. The writ petition is dismissed.

33. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

MARCH 17, 2011
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