

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8901 OF 2013

Sandeep Tukaram Udmale,
Aged : 42 years, Occ. Nil,
(Ex UDC, National Defence
Academy, Khadakwasala, Pune)
R/a: Abhishek, Netra Kiran
Co-op Hsg. Society, At & Post
Shivane, Taluka: Haveli,
District : Pune 411 023.

.. Petitioner

Vs.

1. Union of India
Through the Secretary
To the Government of India
Ministry of Defence,
Raksha Bhavan,
New Delhi – 110 001

2. The Commandant General
The Directorate of Military Training
General Staff Branch,
Army Head Quarters,
DHQ, PO – New Delhi 110011

3. The Commandant
HQ Integrated Defence Staff,
Ministry of Defence,
Government of India,
Directorate of Personnel,
Room No. 48, South Hutments,
Kashmir House, Rajajimarg,
New Delhi – 110 001

4. The Commandant
National Defence Academy
PO – NDA, Khadakwasla,
Pune – 411 023.

.. Respondents

Ms.Seema Sarnaik, for the Petitioner.
Mrs.Neeta Masurkar a/w Ms.Nisha N. Valani, for Respondent
No.1 – Union of India.

**CORAM : SMT. V.K.TAHILRAMANI &
M.S.KARNIK, JJ.**

**RESERVED ON: 07th APRIL, 2017
PRONOUNCED ON : 17th APRIL, 2017**

JUDGMENT (PER M.S.KARNIK, J) :

. The petitioner seeks to challenge an order dated 15/03/2013 passed by the Central Administrative Tribunal, Bombay Bench, Mumbai. By the impugned order, the Tribunal was pleased to dismiss the Original Application filed by the petitioner. Before the Tribunal, the petitioner challenged the order dated 17/11/2006 compulsorily retiring him from the post of Upper Division Clerk with effect from 23/10/2006.

2. The petitioner was appointed as Lower Division Clerk in July 1993 in Administrative Branch of NDA, Pune and promoted as Upper Division Clerk in November, 2003.

According to the petitioner, he remained absent from the office on the ground of ill-health. He was charge-sheeted under Rule 14 of the CCS (CCA) Rules, 1965 for failure to maintain devotion to duty in that :

(a) He remained absent from duty from 21 Jul 2005 continues to be so absent.

(b) He failed to produce Pathological report from Sasoon General Hospital, Pune, as asked for vide letter No. 185904/E-2 dated 28 Jul 2005 and 185904/E-2 dated 18 Nov 2005, in support of his sickness.

(c) He had obtained loan amounting to Rs.50,000/- on 03 Dec 2002 from Vidya Sahakari Bank Ltd., Kothrud Branch, Pune by submitting forged pay slip for the month Oct 2002 and counterfeit details of pay and allowance and forged signatures on Salary Certificate dated 18 Nov. 2002.”

3. The petitioner did not remain present before the Inquiry Board and also failed to intimate his whereabouts to them. The Inquiry therefore proceeded exparte. The Inquiry Officer after taking into consideration all documents and other evidence produced before him by the Presenting Officer held all the charges as proved. A copy of the Inquiry Report was sent to the petitioner vide Registered A.D. No. 185403/390/E-2 dated 18/07/2006 to enable him to make submission or representation, if any, before passing final order. The said registered letter was received back undelivered from the postal

authority with endorsement “not claimed in stipulated limit, hence returned.”

4. The Disciplinary Authority after taking into consideration the Inquiry Officer's report and the fact that registered A.D. in respect of supply of the Inquiry report to the petitioner to enable him to make representation was received back undelivered from the postal authority with endorsement “not claimed in stipulated limit”, imposed the penalty of compulsory retirement of the petitioner. The petitioner was however granted full compensation pension as per rule 40 of the CCS (Pension) Rules, 1972. The order of the compulsory retirement was passed on 25/09/2006.

5. The petitioner preferred Appeal against the order dated 25/09/2006 before the Appellate Authority. The Appellate Authority by order dated 19/02/2010 and for the reasons recorded therein was pleased to reject the Appeal and confirmed the order of compulsory retirement of the petitioner.

The petitioner, therefore, approached the Tribunal by filing Original Application. The Tribunal by the impugned order was pleased to dismiss the Original Application.

6. Learned Counsel for the petitioner challenged the impugned order principally on the ground that the inquiry is vitiated as the same is conducted behind the back of the petitioner. Learned Counsel for the petitioner contended that there is no material on record to indicate that there was due service of notice upon the petitioner. According to her, the petitioner due to illness had applied for leave on medical ground from 21/07/2005 to 18/08/2005 but leave was not sanctioned. The memo dated 28/07/2005 sent by NDA asking the petitioner to report to Sassoon General Hospital, Pune for pathological test and medical examination was not received by the petitioner and it seems to have been returned to the office undelivered. The memos dated 24/10/2005 & 18/11/2005 asking the petitioner to report for duty were not received by him. The petitioner during this period was suffering from mental imbalance and was

treated by Psychiatrist.

7. According to the learned Counsel for the petitioner as he was not in his senses, he could not report to the office. The family of the petitioner was also worried and they were trying hard to see that the petitioner recovered soon. The petitioner was taken to several exorcists at different places because they felt that the medical treatment was not giving the expected result. The petitioner was declared fit to resume duty from 03/08/2007 by the Doctor who issued the medical certificate dated 03/08/2017. It is only after he received a reply dated 30/07/2007 to the legal notice sent by him that he came to know about his termination.

8. Learned Counsel for the petitioner further urged that the charge-sheet dated 29/12/2005 was not served on the petitioner by the administration. The summons sent by the Inquiry Officer were also not served and were returned to the office undelivered. The Inquiry Officer conducted the inquiry

ex-parte and submitted his report to the Disciplinary Authority. The Disciplinary Authority presumably sent a copy of the Inquiry Report to the petitioner at his local address but the same was not received by the petitioner and it was returned to the office undelivered. It is contended by the learned Counsel for the petitioner that even the order passed by the Disciplinary Authority was not received by the petitioner.

9. Learned Counsel for the petitioner has vehemently contended that only a show of completing the inquiry was made and no efforts were made by the authority to take steps for effective service upon the petitioner.

10. Learned Counsel for the petitioner urged that the absence of the petitioner from the duty was not willful and deliberate but it was on account of his illness in respect of which he later submitted a medical certificate though belatedly. According to the learned Counsel for the petitioner, unauthorised absence for a period from 21/07/2005 to

29/12/2005 (date of charge-sheet) is not long enough and alleged misconduct cannot be said to be grave enough to warrant imposition of harsh punishment of compulsory retirement. The appellant has already repaid the loan in full to the bank.

11. Learned Counsel for the respondents on the other hand supported the order passed by the Tribunal. Learned Counsel for the respondents invited our attention to the findings of the Appellate Authority while confirming the order passed by the Disciplinary Authority. Learned Counsel for the respondents submits that though the petitioner had requested for sanctioning medical leave of 29 days with effect from 21/07/2015 to 18/08/2005 stating that he was suffering from Hepatitis 'C' and fever, the Administration was fully justified in directing the petitioner to obtain pathological investigation reports pertaining to the Hepatitis 'C' and fever. The communication dated 28/07/2005 of NDA addressed to the petitioner with a copy to the Sassoon General Hospital, Pune sent to the residential

address of the petitioner was returned undelivered by the postal authorities. The petitioner was required to resume the duty on 19/08/2005 but he failed to rejoin the duty on the due date and remained absent continuously.

12. Learned Counsel for the respondents invited our attention to the findings recorded by the Appellate Authority to contend that the petitioner was deliberately avoiding the receipt of most of the communications from NDA sent through the postal authorities which were consequentially returned undelivered. Learned Counsel for the respondents further submitted that the NDA authorities also approached the local police to get the memorandum of charge-sheet delivered to the petitioner. The police authorities have also confirmed that the NDA communication was handed over to the mother of the petitioner. The Appellate Authority has recorded a finding that the petitioner was not co-operating with the inquiry and avoiding the receipt of summons relating to the inquiry. The Inquiry Officer was therefore left with no option but to conclude

the inquiry ex-parte. The learned Counsel for the respondents further contended that the petitioner did not provide any credible documentary evidence of the treatment availed for his reported mental illness which he claims to have suffered for a long period of 23 months and which resulted into his total incapacity in communicating with the outside world including his superior officers. According to the learned Counsel for the respondents, even certificate dated 25/06/2007 issued by Consultant Psychiatrist indicated that petitioner was under his treatment as an outdoor patient for severe depression disorder psychotic features since 16/08/2005 to 25/06/2007 is in contravention of the statement given in Appeal Memo where the petitioner has stated in paragraph 5 of the Appeal Memo that family members took him to several exorcists at several places because they felt that the medical treatment was not giving the expected result. The Appellate Authority has relied upon the position taken by the petitioner in previous Original Application filed where there was no mention of treatment availed by other methods than that of Dr.Sawant the Psychiatrist. Learned

Counsel for the respondents submits that in these circumstances, the submissions regarding the mental sickness of the petitioner are unreliable and there was no convincing reason or material for unreasonable absence from duty.

13. Learned Counsel for the respondents also submitted as regards the charge of submitting a forged pay slip for the month of October 2012 and salary certificate dated 18/11/2002 to avail the loan of Rs.50,000/- from the bank, the said misconduct is duly proved and is of a serious nature. The petitioner cannot get over the same by simply submitting that the loan has been repaid. For all these reasons, according to learned Counsel Petition is devoid of any merit.

14. We have gone through the orders passed by the Disciplinary Authority, Appellate Authority as well as order passed by the Tribunal. We find that the Appellate Authority has given cogent reasons while dismissing the Appeal filed by the petitioner. It would be useful to reproduce the observations

of the Appellate Authority. In paragraph 7 of the order dated 19/02/2010, the Appellate Authority observed thus :

“7. And whereas the undersigned, as Appellate Authority, objectively considered the appeal based on the parameters prescribed under Rule 27(2) of the CCS(CCA) Rules, 1965. After detailed examination of the grounds of appeal, record of the evidence produced in support of the article of charges, findings of the Inquiring Authority and comments of the Disciplinary Authority on the appeal, the observations of the Appellate Authority are as follows :

(a) The appellant vide his application dated 21 July 2005 addressed to DAAG, NDA had requested for sanction of medical leave for a period of 29 days wef 21 Jul 05 to 18 Aug 05 stating that he was suffering from Hepatitis 'C' and fever. In support of the ailment he had produced the certificate issued by the Authorised Medical Officer. The administration was fully justified in directing the appellant to obtain pathological investigation reports pertaining to the Hepatitis 'C' and fever. The communication dated 28 Jul 05 of NDA addressed to the appellant with a copy to the Sasooj General Hospital, Pune sent to the residential address of the appellant was returned undelivered by postal authorities. The appellant was required to resume the duty on 19 Aug 05 but he failed to rejoin the duty on the due date and remained absent continuously. From the record produced by the Disciplinary Authority, it is observed that vide Registered/AD letter No. 185904/E-2 dated 25 Aug 05 the appellant was informed that his request for leave on medical grounds wef 21 Jul 05 had not been sanctioned and he was asked to resume the duties forthwith. In the said letter of NDA it was also stated that if the appellant fails to comply with the instructions to resume the duty the necessary action will be initiated against him. The said registered letter dated 25 Aug 05 was delivered to the appellant on 01 Sep 05 and he has acknowledged the receipt of the letter. It is, therefore, incorrect on the part of the appellant to state that he was never informed of the non sanction of the leave and the likelihood of the disciplinary proceedings on his continuous absence from duty from 21 Jul 2005. Either the appellant or any member of his family never forwarded any communication to the NDA authorities regarding the mental sickness of the appellant and the treatment he is undergoing for his mental sickness.

(b) From the record produced by he Disciplinary Authority,

it is observed that the appellant was deliberately avoiding the receipt of most of the communicating from the NDA sent through the postal authorities which were consequentially returned undelivered. The Disciplinary Authority had, therefore, no option but to initiate disciplinary proceedings by serving the memorandum of articles of charges for conducting the inquiry under Rule 14 of the CCS (CCA) Rules, 1965. The memorandum of charge-sheet was also received back undelivered as the appellant was avoiding to receive the same. The NDA authorities, therefore, also approached the local police to get the memorandum of charge-sheet delivered to the appellant. The police authorities have also confirmed that the NDA communication was handed over to the mother of the Shri ST Udmale, the appellant. Therefore, it is quite evident that the appellant was given due notice of the disciplinary proceedings initiated against him for his unauthorised absence and other acts of misconduct of submitting forged salary certificate dated 18 Nov 2002 to the Vidya Sahakari Bank Ltd. Pune.

(c) From the inquiry report it is observed that the Inquiry Officer had sent three communications dated 19 Apr 06, 16 May 06 and 12 Jun 06 to the appellant asking him to appear before the Inquiry Officer on 06 May 06, 10 June 06 and 11 Jul 06 respectively and all the three communications were received back undelivered from postal authorities. Therefore, the plea of the appellant that the Disciplinary Authority has not ensured the effective service of the communication regarding disciplinary proceedings is devoid of merit.

(d) Since the appellant was not co-operating and avoiding the receipt of summons relating to the inquiry, the Inquiry Officer was left with no option but to conclude the inquiry ex-parte. The inquiry was completed after following the procedure prescribed under Rule 14 of CCS(CCA) Rules, 1965. The Disciplinary Authority had also forwarded a copy of the Inquiry Report to the residential address of the appellant to provide him due opportunity but the same was returned undelivered. The Disciplinary Authority also ensured to forward the Speaking Order dated 25 Sep 06 imposing penalty on the appellant to the residential address of the appellant by Registered /AD post. This was also returned undelivered. The claim of the appellant that the principles of natural justice in conducting the inquiry and imposition of penalty have not been complied with is totally incorrect and is devoid of merit.

(e) From the record it is observed that prior to filing the OA before CAT Mumbai, the appellant had sent one legal notice dt.25 Jun 07 through his Advocate. However, it is not understood why the appellant had thought it necessary to send a legal notice dt. 25 Jun 07 to Commandant, NDA to treat him as continuing in Service and to allow him to resume duties in NDA when he got treatment cum fitness certificate only on 25 Jun 07 to join the duties on 26 Jun 07. The appellant has also acceded in the said legal notice that he came to know about his Compulsory Retirement on 25 December 06, then it is not explained why he waited till 25 Jun 07 to issue the notice by Advocate and again till 14 Aug 07 to file the OA in CAT, Bombay Bench, Mumbai.

(f) The appellant has not provided any credible documentary evidence on the treatment availed for his reported mental illness which he claims to have suffered for a long period of 23 months and which resulted into his total incapacity in communicating with the outside world including his superior officers in NDA.

(g) The certificate dated 25 Jun 07 given by Dr.SR Sawant, Consultant Psychiatrist is indicating that the appellant was under his treatment as an outdoor patient for severe depression disorder psychotic features since 16 Aug 2005 to 25 Jun 2007 and the appellant is found fit to join the duties wef 26 Jun 2007. This certificate is in contravention of the statement given in his present appeal where the appellant has stated in para 5 of the appeal that his family members took him to several exorcists at several places as they felt that the medical treatment did not give the expected result. Whereas earlier in the OA filed before the Hon'ble CAT Bombay Bench, Mumbai the appellant had taken the position that he was undergoing treatment of Dr.SR Sawant and there is no mention of treatment availed by other methods than through a Psychiatrist. It is, therefore obvious that the appellant is resorting to incogruous, inconsistent and unreliable statements regarding his mental sickness. The appellant has, therefore, failed to provide convincing reasons for his long unauthorized absence from the duty.

(h) The appellant has not put up any defence on the serious charge of submitting a forged pay slip for the month of Oct 02 and salary certificate dated 18 Nov 2002 to Vidya Sahakari Bank Ltd. Pune to avail the loan of Rs.50,000/- from the Bank. In his appeal the appellant has simply

glossed over this serious act of misconduct of forgery of both the documents by simply stating that he has already paid the loan in full to the Bank. Submission of a forged pay slip and salary certificate with an undertaking on behalf of the employer amounts to not only a gross moral misconduct but also proves that the appellant is untrustworthy to be employed in the sensitive Defence establishment like NDA.

(j) As regards the plea of the appellant that the penalty of compulsory retirement amounts to “capital punishment” and is disproportionate to the offence is not sustainable and devoid of merit. It has been proved beyond doubt that the appellant is guilty of the acts of misconduct as indicated in the Article of Charges and statement of imputation of misconduct. The appellant is guilty of violation of Rule 3(1) of the CCS (Conduct) Rules, 1964. The penalty of compulsory retirement is commensurate with the gravity of acts of misconduct proved against him. The Disciplinary Authority on humanitarian grounds has rightly considered the length of service put in by the appellant and has ensured not to deprive the benefits due to the appellant by imposing the penalty of compulsory retirement from service. There are no extenuating factors to provide any relief in this regard.”

15. The Tribunal has duly considered the findings recorded by the Appellate Authority and observed that as per the postal department, if a registered letter is to be delivered to a specific person who is not present to receive it from the postal authorities approaching the residence, the postal official leaves a written message at the address informing the said person to collect the documents from the post office within a stipulated period which is generally 4 -7 days. The remark of the postal authority explains that the petitioner was not available at his

given address for receiving the communication from the respondents or to claim it later by approaching post office within given period. The Tribunal has observed that registered memos sent to him have returned back as 'not claimed' within stipulated time which shows that he was not available at his declared residence and had not informed the office about any change in address. The Tribunal has also considered the fact that the petitioner did not provide any credible documentary evidence about the treatment availed by him for his mental illness. Even the Psychiatrist who was treating him has indicated that the applicant was only outdoor patient with him. The Tribunal has observed that the petitioner had failed to establish credibility to his illness through a government hospital and the consequence of the notices sent by office going back as 'unclaimed'.

16. We find that the Appellate Authority has after considering the material on record arrived at the finding that the petitioner was deliberately avoiding the receipt of most of the communications from NDA sent through postal authorities

which were consequentially returned undelivered. The finding that the petitioner was not co-operating and avoiding the receipt of summons relating to inquiry and that the Inquiry Officer was left with no option but to conclude the inquiry ex-parte cannot be faulted with in the fact situation of the present case. The finding of the Appellate Authority that the petitioner failed to provide convincing material justifying his absence for such a long span is a finding of fact based on the materials on record which does not call for any interference in the exercise of our writ jurisdiction.

17. Reliance placed by learned Counsel for the petitioner on the order of this Court dated 14/10/2011 in Civil Application No. 1979 of 2011 in First Appeal (St.) No. 13185 of 2011 in the case of the **New India Assurance Co. Ltd. Versus Smt.Nasibunnisa Mohd.Israr Khan and ors.** can have no application to the facts of the present case. This Court dealt with the various modes of service of summons provided by Rules 9 and 9A of Order 5 of Code of Civil Procedure, 1908. In

the present case, the Appellate Authority has recorded a finding that the petitioner was deliberately avoiding the receipt of most of the communications sent through postal authorities which were consequentially returned as undelivered. The law as regards the scope of interference in the exercise of writ jurisdiction as regards the findings recorded by Disciplinary & Appellate Authority is well settled. We are of the view that in the facts, the view taken by the Disciplinary Authority as well as the Appellate Authority cannot be said to be perverse or unreasonable. In this case based on the materials on record, the Disciplinary Authority has come to the conclusion that the misconduct is duly proved. We do not find any reason to interfere with the order passed by the Disciplinary Authority and the well reasoned order of the Appellate Authority upheld by the Tribunal by giving cogent reasons.

18. We also note that the Disciplinary Authority on humanitarian grounds having considered the length of service put in by the petitioner has ensured that the petitioner is not

completely deprived of the benefits due to him and has imposed the penalty of compulsory retirement from service and thereby granted full compensation pension as per rule 40 of the CCS (Pension) Rules, 1972. The order passed by the Tribunal therefore does not warrant any interference. Writ Petition is accordingly dismissed with no order as to costs. Rule is discharged.

(M.S.KARNIK, J.)

(SMT. V.K.TAHILRAMANI, J.)