

AFR
gaut

FORM NO. 4
[See rule 11(1)]
ORDER SHEET

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
TA 211 of 2009

.Petitioner

Liladhar

By Legal Practitioner for Applicant

Versus

Union of India and others.

By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p><u>14.05.2010</u> <u>Hon'ble Mr. Justice Janardan Sahai, Member (J)</u> <u>Hon'ble Lt.Gen. P.R. Gangadharan, Member (A)</u></p> <p>Present: Shri R C Singh, counsel for the petitioner and Shri R N Singh, Sr. Standing Counsel for the respondents.</p> <p>This Transferred Application was received by the Tribunal from the Allahabad High Court, Lucknow Bench.</p> <p>The applicant has challenged the punishment of dismissal and RI for a period of five years by modification made by the confirming authority under section 154 of the Army Act. By an order dated 19.04.2010 we had granted bail to the applicant. By means of this application, the applicant has prayed for suspending the sentence awarded to the applicant during the pendency of the Transferred</p>

Self

Self

Application. A Single Judge of the Himachal Pradesh High

Court in Vikram Anand V Rakesh Singh reported in AIR 1995 HP 130 has relied upon an order of the apex court that grant of bail in appeal pre-supposes the suspension of sentence. The order of the Supreme Court has been quoted in that decision which is as follows :

“Pending Criminal Appeal No.185 of 1988, this Court by an order dated 10-1-1989 in Criminal Misc. Petition No.4707 of 1988 directed that the appellants shall be released on bail subject to certain conditions. Counsel for the appellants has now filed a Misc. Application by which he requests that this Court should clarify that as a result of the order granting bail, the sentence on the appellants will remain suspended during the pendency of the appeal. It is clear from the language of Sec.389 of the Code of Criminal Procedure that when bail is granted to an accused, the sentence on him remains suspended during the period of bail. In fact, Sec.389 (1) of the Code of Criminal Procedure specifically requires the Court to suspend the sentence and release the accused on bail. Sub-section (3) of Sec.389 of the Code also makes it clear that when an accused is released on bail his sentence remains suspended during the period of bail. We, therefore, agree with the learned counsel for the appellants that, by the order granting bail, the sentence of the appellants will remain suspended during the pendency of the appeal.

It appears that the appellants seek this clarification because he intends to stand in the assembly elections in the forthcoming elections. We, therefore, make it clear that we express no opinion on the question whether any disqualification, which the appellants may be suffering from, as a result of the conviction would stand removed by the clarification given by us. That will be a matter for the Election Officer to consider in the light of the appropriate

sd/-

sd/-

law. We also make it clear that all the conditions, subject to which bail was granted, will continue to be in force till the disposal of the appeal.

With these observations, the application is ordered. A copy of this order may be given dasti to the counsel for both the parties."

Ld. Counsel for the applicant, however, submits that the order passed by us requires clarification. While the sentence of imprisonment awarded by a Court Martial can be suspended by the Tribunal u/s 15(6)(e) of the Act it is a matter requiring consideration whether the Tribunal can grant bail after conviction by a Court Martial, hence the need for this application for suspension of sentence. In these circumstances it has become necessary for us to examine the powers of the Tribunal in the matter of release during the pendency of an appeal of a person convicted by Court Martial or during the pendency of a transferred application or in an original application directed against conviction by a Court Martial. Section 3(o) of the AFT Act defines service matters and the definition would cover convictions by a Summary Court Martial where sentence of dismissal or of rigorous imprisonment of more than three months is awarded and in such cases whether or not an appeal lies an original ^{Matter of} ~~single~~ application ~~would~~ lie under section 14. It is to be noted that sub section 6 of section 15 relates to the powers of the Tribunal. It does not contain any restrictive words which may confine its application to an appeal. It would apply to an original application, a

sd/-

sd/-

transferred application as well as to an appeal. Ld. Counsel for the applicant submits that in the circumstances, a specific order for suspending the sentence of imprisonment has to be passed before granting bail. There is no specific provision for grant of bail in an appeal. Section 15 (3), however provides for grant of bail in the following terms :

“(3) The Tribunal shall have power to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary.

Provided that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.”

The expression ‘The Tribunal shall have power to grant bail to any person accused of an offence and in military custody’ indicates that the section contemplates that the accused has yet not been convicted for any offence. This meaning also appears to flow out of the language of the proviso to sub-section (3) of Section 15. Moreover the provision would be applicable if the accused is in Military Custody and not in custody of a criminal court. The question that then arises is whether the power of bail can be exercised under the provisions of Section 15(6)(d),(e) or (f).

Clause (d) of sub-section (6) of Section 15 provides for the release of the ^{convict} ~~appellant~~, if sentenced to imprisonment on parole with or without conditions. This leads us to examine the distinction between an order of bail on the one hand and parole on the other hand. Bail has a

sd/-
sd/-

well known connotation. Bail under the general law can be granted at the investigation stage or during the pendency of the trial under the provisions of Section 439 of the Code of Criminal Procedure. Bail can also be granted under the general law during the pendency of an appeal in view of section 389 of the Code of Criminal Procedure. The literal meaning of the word 'bail' is 'surety'. A temporary release of a prisoner on furnishing surety is termed as bail. In law even while a person is on bail he remains under the constructive custody of the court either through the surety or if he has been released on personal bond under the terms and conditions of the bond. The word 'parole' has its origin in military law where it was used for release of a prisoner of war on promise to return to custody vide State of Haryana V Mohender Singh AIR 2000 SC 890. The word 'parole' does not have any mention in the Code of Criminal Procedure. The grant of parole, however, was introduced in administrative instructions/rules regarding release of prisoners. An incident of parole which has become well recognized is that the period undergone during parole has to be counted in the sentence awarded to the parolee. The distinction between bail and parole has been exhaustively considered by the Apex Court by a Constitution Bench in AIR 2000 SC 1023 Sunil Fulchand Shah Vs. Union of India.

Ordinarily release of a person in custody on parole

sd/-

sd/-

would not require him to furnish surety. If the Tribunal therefore intends to release a convict temporarily during the pendency of appeal or application on his furnishing sureties or does not intend that period of release should be counted against the sentence, grant of parole would not serve the purpose unless conditions are imposed in the order. It is to be noticed that the decision of the Constitution Bench in the Sunil Fulchand Shah case was rendered in the context of a law of preventive detention namely, COFEPOSA. A person in custody as a measure of preventive detention on the one hand and a person taken into custody to serve out the sentence on conviction on the other hand stands on different footing. A person who has been convicted has to serve out the sentence awarded to him as a punishment. The Court may not direct his temporary release during the pendency of an appeal or original application to be counted in the sentence. The purpose of preventive detention is to prevent the detenu from committing an offence or unlawful act during the period given in the order.

Clause(e) of Sub section 6 of Section 15 empowers the Tribunal to suspend a sentence of imprisonment in which case the period of release shall be excluded ^{of} ~~on~~ counting the sentence vide section 24 of the AFT Act. If a sentence is suspended without any further conditions, it would mean immediate release of the convict. However, the power of suspension of sentence can also be exercised conditionally and it is open to the Tribunal to impose conditions and one of the conditions may well be that the

Sd/-

Sd/-

release shall be subject to the appellant furnishing surety. In legal connotation this would really mean 'bail'.

We now come to clause (f) of sub section 6 of section 15 which gives power to the Tribunal to pass any other order as it may think appropriate. The Tribunal can therefore, pass an order of bail even under sub clause (f) of sub section 6 of section 15. In view of the aforesaid discussions, we are of the view that all conditions which are peculiar to a 'bail' may be imposed under clause (e) and (f) of sub section 6 of section 15. The conditions are compendiously described as 'bail' a word which has a well known connotation. In these circumstances, we are of the view that it is open to the Tribunal to pass an order of bail without a specific order suspending the sentence.

In the circumstances, in our view an order of bail can be passed under clause (f) of sub section 6 of section 15 even without ^{any} specific order of suspension of sentence. It is not necessary therefore to pass any specific order suspending the sentence. Application is disposed of.

Put up on 20.05.2010.

Sd/-

(Lt Gen R.R. Gangadharan)
Member (A)

Sd/-

(Justice Janardan Sahai)
Member (J)