

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TA 1496 of 2010

WEDNESDAY 19TH DAY OF OCTOBER, 2011

“Hon’ble Mr. Justice Janardan Sahai, Member (J)
Hon’ble Lt. Gen. P R Gangadharan, Member (A)”

Baljit Singh No. 14414195 L. Ex-Gunner
(SPWL) Son of Sri Puran Chand, R/o
Village and Post Office Pandu Pindara,
Tahsil and District : Jind (Haryana)

.....Applicant

By Legal Practitioner Shri I P Yadav, Advocate.

Versus

1. Government of India, Ministry of Defence, New Delhi through its under Secretary.
2. Commanding Officer, 68, Field Regiment (Parbat Ali) Meerut Cantt. C/o 56 APO.
3. Senior Record officer, Topkhana Abhilekh Artillery Records, Nasik Road, Camp 422102
4. Additional Directorate General Discipline and Vigilance DV. 3, Adjutant General’s Branch, Army Headquarters, New Delhi 110011.
5. Commander in Chief Army Headquarters, New Delhi.
.....Respondents

By Legal Practitioner Shri S K Rai, Ld. Sr. Standing Counsel.

ORDER

“Hon’ble Mr. Justice Janardan Sahai”

1. The applicant was enrolled as Gunner (SFWL) in the Indian Army on 25.02.1995. He was tried upon a chargesheet dated 29.07.1999 in which there were two charges against him as quoted

below :

First Charge

AA Section 39

(b)

WITHOUT SUFFICIENT CAUSE

OVERSTAYING LEAVE GRANTED TO

HIM

In that he,

At MFFR having been gtd leave of absence from 21 Apr 99 to 24 Apr 99 failed without sufficient cause to rejoin unit on expiry of the said leave till he voluntarily rejoined the unit on 29 May 99 at about 1800 hours.

Second Charge

AA Sec 38 (1)

DESERTING THE SERVICE

In that he,

At Meerut Cantt at about 1000 hours on 13 Jun 99, absented himself from the Regiment, until apprehended by

the Civil Police at Jind at about 0915 hours on 13 Jul 99.

2. In the Summary Court Martial held on 03.08.1999, he pleaded guilty to the charges and was convicted with a sentence of two months RI in Civil Jail and dismissal from service. His application u/s 164 of the Army Act was dismissed. Then he filed a Writ Petition no. 5554 of 2003, papers of which have been transmitted to the Tribunal.

3. We have heard Shri Inder Prasad Yadav on behalf of the applicant and Shri S K Rai, Sr. Standing Counsel for the respondents. Before the trial, the summary of evidence was recorded in which two witnesses were examined, Havildar Shyam Kumar P.W. -1 and Nb. Subedar C Murugesan P.W. -2. PW - 1 Hav. Shyam Kumar has stated that he was performing the duties of Battery Havildar Major and that Baljit Singh, the applicant had absented without leave from 13.06.1999 and on 16.07.1999 the witness was informed by the Regiment HQ that the applicant had been apprehended by police and handed over to 11 Mech Inf and the witness was instructed to detail an escort party which later brought the applicant to the unit at Hissar. P.W. 2, Nb. Subedar C Murugesan has stated that he was performing the duties of Senior JCO of Headquarter Battery and on 13.06.1999 (Sunday) he noticed that the applicant Gunner Safaiwala

was not in the lines and after enquiring with others he informed Capt. S P Sahu who had advised him to wait till 2200 hours as it was Sunday but when Gnr Baljit did not return, he reported the matter of his absence. He has also stated that on 16.07.1999 he was informed by the Regiment that the applicant was in custody. The submission of counsel for the applicant about the first charge is that the overstayal on leave was not without sufficient cause. Ld. Counsel for the applicant referred to the averment in the Writ petition in which he has stated in para 3 that his sister Sheela Devi had fallen ill due to pain of pregnancy and that the applicant stayed at home so that he could look after and take care of her health. He has also stated therein that the applicant's sister and baby were treated in Jind Nursing Home (Haryana). The Photostat copy of the prescription given by the Doctor has been filed as Annexure 1 to the petition. It is not the case of the applicant, even in the Writ Petition that any application for extension of leave had been sent by him. Moreover, Counsel for the applicant could not refer to any averment in the petition that there was no other family members to look after his sister. In para 5 of the rejoinder affidavit however the petitioner has stated that there was no one to look after her. This ^{is} averment at the stage of the rejoinder is an improvement made by him and appears to be an after thought. Moreover, the illness referred to does not appear to be any serious illness to justify the overstayal of

more than a month. That apart the applicant has pleaded guilty in the Court Martial Proceedings. The prosecution was therefore deprived of the opportunity to establish its case by leading evidence in the trial. In case the applicant ^{is} wanted to bring any material in support of his case it was open to him ^{to} have not pleaded guilty and ^{is} led ⁱⁿ defence evidence. The original Court Martial Proceedings have been placed before us. There is certificate of the Commanding Officer as required under section 115 (2) to this effect. The said certificate is as follows :-

"Before recording the plea of guilty offered by accused the court explained to the accused the meaning of the charge(s) to which he had pleaded guilty and ascertained that the accused had understood the nature of the charge(s) to which he had pleaded guilty. The court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understand the charge(s) and the effect of his plea of guilty accepts and records the same. The provisions of Army Rule 52(2) of 115(2), are complied with.

Sd/-
(Signature of the accused)

Station : Place (Meerut)
Dated: 03 Aug 199

(B C Mohanta)
Colonel
Commanding Officer"

The aforesaid certificate bears the signature of the applicant and of the Commanding Officer. In view of the plea of guilty the conviction for the first charge does not suffer from any illegality.

4. The second charge against the applicant is in respect of desertion. It is settled law that the mere absence without leave is not tantamount to desertion. In order to constitute the offence the intention to leave the army service or altogether or to avoid a particular Military duty must exist. In this case there is nothing in the statement of PW -1 and PW -2 in the summary of evidence to indicate that any Military duty was assigned to the applicant or he wanted to avoid any Military duty. Neither of the witnesses ^{have} ~~has~~ stated anything to indicate that there was intention on part of the applicant to quit the Army Service. The only material which could be referred by the Sr. Standing Counsel who appears for the respondents in support of the contention that the applicant intended to quit the Army Service is based upon the statement of the applicant himself in the summary of evidence. To appreciate the contention we are re-producing the statement:

"3. I proceeded on C/L from 21 Apr to 24 Apr.99.
During leave, my sister fell ill. So I stayed at home W/o requesting for any extension of leave. I wanted to quit

the Army and decided not to rejoin the unit. However fearing police harassment, I rejoined the unit voluntarily on 29 May 99 at about 1800 hrs.

4. A court of inquiry on my overstay of leave was in progress when again I decided to quit lines. I left Meerut at about 1000 hrs. on 13 Jul 99.

5. On 13 July 99 at about 0930 h the police apprehended me at my home and I was taken to Hissar the same evening. At about 2000 hrs. I was put in 11 Mech Inf. Bn Quarter Guard. On 21 July, 99. At 1330h, I was brought from Hissar under unit escort and arr in unit at 0830h on 22 July 99.

6. I do not wish to continue in the service any more.

7. The above statement has been read over to me in a language I understand and I sign it as correct."

5. No doubt in para 3 of his statement in the summary of evidence the applicant has stated that he wanted to quit the Army but that was in reference to the first charge relating to overstay of leave from 25.04.1999 to 29.05.1999. The applicant had thereafter rejoined the unit voluntarily on 29.05.1999. He has not been charged for desertion in respect of his absence from 25.04.1999 to 29.05.1999. So far as the second charge is concerned, the applicant had stated in para 4 ^X that quoted above that a court of enquiry regarding overstay was in progress when again he decided to quit lines. It appears ² that the applicant is a Sepoy

Safaiwala and it does not appear probable that the refined expression deciding "to quit lines" in his recorded statement is a reproduction of his words. It rather appears to be a translation in the language of the Presiding Officer who recorded the summary. Even otherwise the expression "to quit lines" when read in contrast with the previous expression in para 3 of quitting the Army may not be interpreted as having the same meaning. Otherwise there was no necessity of using two different expressions. Moreover the expression 'to quit lines' is capable of flexible interpretation and is consistent with having the meaning^{yx} to leave quarters. The learned Sr. Standing Counsel relied upon para 6 of the statement in which the applicant has stated that he does not wish to continue in the service any more. What is to be established by the prosecution is the intention to quit the army service on the date of the absence and not his intention on a subsequent date when^{yx} his statement in the summary of evidence was recorded. The ~~overstay~~^{overstay} of leave and absence without leave is by itself an independent offence under section 39 of the Army Act. Every overstay and absence without leave cannot be treated as a case of desertion while every desertion would be a case of overstay or absence without leave. In this case we have found that there is nothing in the prosecution evidence recorded in the summary of evidence to the effect that

the applicant intended to leave army service or wanted to avoid Military duty.

6. The distinction between the offence of desertion and absence without leave is subtle. There is nothing to show that the applicant who is a safaiwala was aware of this subtle distinction. The prosecution evidence in summary of evidence does not contain any evidence of desertion. In such circumstances the Presiding officer would have done well to advise the applicant to withdraw the plea ^{he} which did not. We therefore, find it difficult to uphold the conviction on the second charge. The question which now is to be considered is whether punishment of two months RI and dismissal from service was proportionate to the gravity of the charge. The Chennai Bench of the Tribunal in TA No. 65 of 2009 Shaik Karimulla Vs. The Secretary, Govt. of India and Ors. decided on 10.06.2010 where the petitioner was charge^d for offence of overstaying of leave for a period of 64 days and had awarded the punishment of dismissal found that the punishment awarded to him was disproportionate. In ~~Ranjit Thakur Vs. Union of India and others~~ ^{gk} ~~Vs. Union of India and Ors~~ 1987 (4) SCC 611 the punishment awarded by the Court Martial was quashed and was found disproportionate. However in that case the offence with which the appellat^{was}ant was charge^{cat} of disobeying the order to ^{eat}each food. In Sayed [^]Zaheer Hussain Vs. Union of India JT 99 (1) SC 319, Civil Appeal

No. 6074 of 1998 punishment of dismissal for unauthorized absence
from the service of about 6 days was found disproportionate. In
Madan Lal Vs. Union of India TA 879 of 2010 decided on 11.08.2011
by the Regional Bench, Lucknow which was also a case of
overstayal of leave for a period of 47 days and the applicant had
been awarded RI of four months and dismissal from service, the
Tribunal found the punishment to be disproportionate and set aside the
punishment of dismissal and has directed that the applicant shall be
deemed to have been continued in service for his normal tenure of
engagement as a Sepoy for pensionary purposes but would not,
however, be entitled to any emoluments for the period following the
date of dismissal. In the facts of the present case too we find the
punishment disproportionate. We are of the view that the
punishment of two months rigorous imprisonment together with
deprivation of the applicant from emoluments for the period
between date of the dismissal ^{of} and till today is sufficient considering
the gravity of the offence. No doubt in Sayed Zaheer Hussain Case
the Supreme Court has granted 50% back wages from the date of
dismissal. In that case the appellants appear to have been a Sorting
Assistant. There is nothing to indicate that he was in disciplined
force. The overstayal of leave in a disciplined force ^{of} cannot be
treated at par with a Civil Department which is also clear from the
fact that the overstayal leave and absence without leave is not a
punishable offence under ordinary criminal law. The period of

absence in Syed Hussain was only six days. It was observed by the Apex Court in that context that punishment which will involve substantial monetary loss to the appellant will meet the ends of justice. In the result, the punishment of dismissal of service is set aside. The applicant will be re-instated into service with continuity of service for pensionary purpose. He will not, however, be entitled to any back wages.

7. Transferred Application is partly allowed.

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

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(Justice Janardan Sahai)
Member (J)