AFR
Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application (A) No. 241 of 2016

Thursday this the 30th day of November 2017

Hon'ble Mr. Justice S.V.S.Rathore, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

No.14564820M Ex Sep Ranjeet Kumar.
Son of Late Ram Chandra Chaudhary,
Resident of House No.549/270, Alambagh,
Lucknow.

…….. **Applicant**

By Legal Practitioner: Shri Rohit Kumar, Advocate
Learned Counsel for the Appellant.

Versus

1. Chief of the Army Staff,
DHQPO, New Delhi 110011.

2. Commandant Cum Chief Record Officer,
EME Centre and Records,
Secunderabad.

3. Union of India through Secretary,
Ministry of Defence,
New Delhi.

…… **Respondents**

By Legal Practitioner: Shri Amit Jaiswal, Learned Standing Counsel for the Central Government assisted by Major Rajshri Nigam, Departmental Representative

ORDER

Per Hon'ble Mr.Justice S.V.S. Rathore, Member (J)

1. By means of this instant Original Application under Section 15 of the Armed Forces Tribunal Act 2007, the applicant has made the following prayers :-

> *"(a) For quashing the summary court martial proceedings held between 1000 Hrs to 1320 Hrs on 18 Nov 1995 including its verdict and promulgation with all the consequential benefits to the applicant.*
>
> *(b) For quashing the Chief of Army Staff rejection order on the statutory petition of the applicant preferred under section 164 (2) of the Army Act 1950 bearing no.C/06837/DV-3 dated 15 Mar 1999 with all consequential benefits to the applicant.*
>
> *(c) To issue any order or direction considered expedient and in the interest of justice and equity.*
>
> *(d) Award cost of the petition."*

2. Before proceeding further in this matter, we would like to mention here that initially the applicant filed Civil Misc. Writ Petition No.2565 of 1999 before the Hon'ble High Court at Allahabad with the prayer that a writ, order or direction be issued to the respondent no.1 to dispose of the statutory petition of the petitioner dated 26th August 1998 within a specified time. The said statutory petition admittedly has already been disposed of by the Chief of the Army Staff vide order dated 15th March 1999, but inspite of that, the writ petition remained pending. Virtually by the dismissal of the said representation, the writ petition had become infructuous. The said writ petition was transferred to this Tribunal and was registered as T.A.No.2 of 2016 which was ultimately dismissed as withdrawn with liberty to file afresh, if so advised. Thereafter, this O,A. has been filed in the year 2016 challenging his dismissal from service dated 18th Nov 1995.

3. In this case, it is pertinent to mention that learned counsel for the respondents have submitted that the original record pertaining to the SCM proceedings against the applicant has already been weeded out after expiry of the period of retention under the rules. The

submission of the learned counsel for the applicant is that since the writ petition was pending before the High Court of Judicature at Allahabad, therefore, the matter was sub judice and the record ought not to have been weeded out. We do not find any substance in this submission of the learned counsel for the applicant. Admittedly, the representation, for the disposal of which the writ petition was filed, was disposed of on 15th March 1999, therefore, no *lis* was pending between the applicant and the respondents thereafter. So we do not find any fault on the part of the respondents in weeding out the original record after expiry of the period of retention, after deciding the statutory representation. Since nothing survived in the said writ petition, so it was withdrawn by the applicant.

4. Learned counsel for the applicant has also argued that by means of this O.A., the applicant is challenging his dismissal from service awarded to him by the SCM, which took place on 18th November 1995. The submission of the learned counsel for the respondents is that this O.A. is highly barred by time as the period of limitation would run from the date when the statutory petition filed by the applicant was decided i.e. 15.03.1999 and this O.A. has been filed in the year 2016 without moving an application for condonation of delay.

5. Since in the order passed by this Tribunal in T.A.No.2 of 2016, a liberty was given to the applicant to file petition afresh, if so advised. Therefore, in compliance of the same, this O.A. was filed. We are also of the view that it was filed with a considerable delay of several years, but as this O.A. has already been admitted vide order dated 20th September 2016, therefore, we do not consider it appropriate to consider the point of limitation at this stage.

6. In brief the facts giving rise to the present case are that the applicant was enrolled in the Army on 16th February 1984 and after his training, he served in several Units/Stations. While the applicant

was serving in 7003 Comb Wksp on 15th July 1995, the applicant had requested for leave for the purpose of his son's illness and visiting temple in connection with promise based on a ritual. The leave was sanctioned. Inspite of the sanction of the leave, he was not permitted to proceed on leave due to extraneous considerations, whereas others were allowed to proceed on leave. Meanwhile, the applicant had premonition that some tragedy may happen, as such the applicant had brought his woes to the notice of CHM Hav Shiv Murti CN, who promised him to obtain clearance for his leave. The applicant waited for such clearance, but in the night the applicant had a dream that something untoward is likely to happen. So the applicant again approached the Hav Shiv Murti CN, who expressed his helplessness and suggested the applicant that leave having been sanctioned, the applicant may proceed on leave relying on the provisions of Paragraph 1338 of Defence Service Regulation (Regulations for Army), 1987 and return on expiry of the said leave. As such, the applicant had left for attending his son, who was seriously ill. The applicant arranged for the treatment of his son and also performed some rituals suggested by the Village Pandit and thereafter he reported back for duty on 15th August 1995. On return, the applicant had reported to CHM on duty Hav. Shiv Murti CN and charge of absence without leave was levelled against the applicant for his alleged absence of 31 days.

7. The argument of the learned counsel for the applicant is that there was no investigation under Rule 22(1) of the Army Rules, 1954. Army Order 70/84 (now No.24/94) was not complied with, which vitiated the entire follow up action. Regarding non compliance of Rule 22(1) of the Army Rules, 1954, reliance has been placed on the pronouncement of the Hon'ble Apex Court in the case of **Union of India & ors vs. Dev Singh** (Mil LJ 2003 SC 146). A perusal of summary of evidence (filed alongwith O.A.) reveals that opportunity to cross examine the witnesses and the fact that the

evidence was read over to the applicant in Hindi has also been made part of the statement of witnesses, which is apparent from the last two paragraphs of the deposition of the witnesses. In the SCM, the applicant was awarded punishment of dismissal from service.

8. The submission of the learned counsel for the applicant is that there was no record to prove that the provisions of Rule 22(1) of the Army Rules, 1954 was followed, which would vitiate the entire subsequent proceedings because the Hon'ble Apex Court in the case of Dev Singh (supra) has held that Rule 22(1) of the Army Rules, 1954 is a mandatory provision, which vitiate the subsequent proceedings. It has also been argued on behalf of the applicant that all the statements and all the proceedings are typed written. He has also argued that the fact that the statement of the witnesses was read over to the applicant, was written as part of the statement of witnesses, which was signed by the witness and not by the Commanding Officer conducting the SCM. Rules 46, 90 and 92 of the Army Rules, 1954 have not been followed.

9. Learned counsel for the applicant, in his written submission, has drawn our attention towards Rules 46, 90 and 92 of the Army Rules, 1954 in support of his submission that the evidence should have been hand written. We have gone through these Rules and we do not find any mandate of law whereby it is necessary for the Commanding Officer to reduce the statement of witnesses under his own hand. The only requirement under the Rules is that the evidence should be taken down in narrative which means that normally it should not be in question and answer form. Even if for the argument sake, any weightage is given to this submission of the learned counsel for the applicant, then he must show that any prejudice has been caused to him by adopting such procedure by the Commanding Officer. Law is settled on the point that it is not every irregularity in the procedure that would vitiate the whole proceedings, unless and until the accused has been prejudiced in his defence because of such

irregularity in the procedure. Learned counsel for the applicant has also filed a copy of the Army Order No.24 of 1994 with the subject 'Discipline: Hearing of a charge by the Commanding Officer'. It imposes a duty on the Commanding Officer to fill this form in every disciplinary case, but it also does not mandate that it must be filled up by the Commanding Officer under his own hand. The only legal requirement is that this form should be filled up correctly. It is the duty of the Commanding Officer to ensure that the said form has been completed correctly. Under Army Rule 125, a certificate to this effect has to be given by the Commanding Officer authenticating the correctness of the proceedings.

10. On behalf of the respondents, it has been argued that admittedly in this case, the record, after expiry of the period of retention has been weeded out. The submission of the learned counsel for the respondents has substance that since no *lis* was pending between the applicant and the respondents, therefore, there was no reason for the respondents to retain the said record as the writ petition had already become infructuous and when it came up for hearing before the Tribunal, the same was withdrawn by the applicant himself. He has also argued that the applicant at that time was posted in active service area and over staying from leave in active service area is considered a very serious matter. Keeping in view the previous conduct of the applicant, the punishment of dismissal from service has rightly been awarded. It has also been argued that there was no violation of any Army Rules in conducting the SCM and the applicant has filed this O.A. challenging the SCM for the first time in 2016 i.e. after about 21 years, while it was not challenged in the earlier writ petition filed in the year 1999 by him. It has also been argued that even at four earlier occasions, the applicant had remained absent without leave and was punished for the same period of such absence and punishment given is hereby quoted as under :

Sl No.	Army Act Section	Date of Offence	Date of Punishment	Punishment award
(a)	**AA Sec 39(b)** Without Sufficient Cause Overstaying Leave	03.11.1986	22.11.1986	14 days RI in military custody
(b)	**AA Sec 39(b)** Without Sufficient Cause Overstaying Leave	09.09.1989	14.09.1989	Five days pay fine.
(c)	**AA Sec 39(b)** Without Sufficient Cause Overstaying Leave	12.08.1991	22.08.1991	Three extra guard
(d)	**AA Sec 48 (intoxication)**		26.05.1995	Severe Reprimand

11. On behalf of the applicant, the copy of the SCM proceedings, which was provided to him, has been filed. With the help of the same, we are disposing of this O.A.

12. During the course of arguments, learned counsel for the applicant has fairly conceded that he has over stayed the leave. He has made the allegation of extraneous consideration, because of which he was not permitted to go on leave, but subsequently he went on leave on the asking of CHM Hav. Shiv Murti CN as he has seen a dream in preceding night that something adverse is likely to happen. Therefore, the allegation that for any extraneous consideration, he was not permitted to go on leave, inspite of sanction of leave, has absolutely no substance nor there is any material in support of such averment. It was nowhere the charge against the applicant that without the prior permission, he left the station, but the only charge against him was that he over stayed the leave and that is an admitted fact. The applicant in the summary of evidence had not pleaded guilty, but subsequently in the SCM, he had pleaded guilty. No reason for this over staying the leave was furnished by him during SCM proceedings.

13. The argument of the learned counsel for the applicant is that all the statements of the witnesses and all the proceedings were typed in English and are not handwritten. However, learned counsel for the applicant could not bring to our notice any rule, provision or case law, whereby the competent authority is expected to prepare the

record under his own hand or the statement must be recorded on his dictation by some other person in his hand writing. So in absence of any such provision if the statements of witnesses have been typed, then the applicant cannot claim any benefit, unless and until he can show that any prejudice has been caused to him. Procedure is meant only to meet the ends of justice and not to frustrate it. On this point, we may place the reliance of the Hon'ble Supreme Court in the case of **Major G.S.Sodhi vs. Union of India** (1991) 2 SCC 382), wherein the Hon'ble Apex Court has observed in para 21 as under :

> *"It must be noted that the procedure is meant to further the ends of justice and not to frustrate the same. It is not each and every kind of defect preceding the trial that can affect the trial as such."*

14. The aforesaid view expressed by the Hon'ble Supreme Court in the case of Major G.S.Sodhi (supra) has again been followed by the Hon'ble Apex Court in the case of **Union of India & ors vs. Major A.Hussain** [1998) (1) SCC 537], wherein the Hon'ble Apex Court has observed as under :

> *"In G.S. Sodhi's case this Court with reference to Rules 22 to 25 said that procedural defects, less those were vital and substantial, would not affect the trial. The Court, in the case before it, said that the accused had duly participated in the proceedings regarding recording of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the accused."*

15. The next submission of the learned counsel for the applicant is that the fact that the statements of the witnesses were read over to the witnesses form part of the statement of witness and this is not correct. Apart from it, the applicant declined to cross-examine the witness, has also been made part of the statement of witness and that is also not correct. This argument is correct. As stated earlier that in para 5 of the statement of CHM Hav. Shiv Murti CN, it was written that the accused declined to cross examine the witness and in para 6 of his statement, it is written that the above statement has been read over to the accused in Hindi and thereafter it is signed by the witness, but it is equally important to note that thereafter the certificate of the Commanding Officer conducting the SCM is appended, whereby it is certified that Rule 141 (2), (3), (4) of the

Army Rules, 1954 have been complied with and it has been duly signed by the Commanding Officer. The said paragraphs 5 and 6 ought to have been written after signature of the witness because it does not form part of the statement of the witness. But how applicant can claim that any prejudice has been caused to him by such mistake. Keeping in view that the fact that over stay from leave is admitted. It is nowhere the case of the applicant that he was not given any opportunity to cross examine the witness as the applicant has cross examined one witness during summary of evidence. In his O.A. the applicant has stated that he asked Shiv Murty for getting him permission to leave and thereafter it was Shiv Murty, who asked him to leave. So we would like to reproduce the statement of Shiv Murty recorded in summary of evidence, which reads as under :

> *"1. No.14547647X Hav (RM) Shiva Murthy CH, religion Hindu, having been administered the oath stated the following.*
>
> *2. I was on CHM duty on 15 Jul 95. That day, at approximately 1500 h, I had taken a Coy fall-in for organising some working. At that time, I learnt that No.14564820M Sep (Recovery) Mechanic) Ranjeet Kumar, was absent from the fall-in. After sending the present personnel on the allotted duties, I went to the Coy Office and got to know that No.14564820M Sep (Rec Mech) Sep Ranjeet Kumar had not been issued any movement order of leave certificate. I reported this matter to the Coy Senior JCO the same day at approximately 1600 h.*
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> *3. The same night, when carrying out my lights-out check at approximately 2130h, I noted that No.14564820M Sep (Rec Mech) Sep Ranjeet Kumar, was not present in his bed. I then reported him as "Absent Without Leave' to the Senior JCO immediately."*

This witness was not cross examined by the applicant. His statement does not at all support the story set forth by the applicant in his O.A.

16. As per the own version of the applicant, this witness was informed by him and ultimately he asked him to proceed without prior permission to leave as the leave has already been sanctioned.

17. Similar mistake has been pointed out towards the statement of PW 2 Hav A Sutradhar. He has also stated that in the night when he came back, then he found that Ranjeet Kumar is not in his bed and reported the matter to the Company as "lights out report." The applicant has declined to cross examine this witness also. Thereafter

the statement of PW 3 Lt Col Mathew Joseph was recorded. This witness has been cross examined by the applicant on the point as to why the other person of his Unit was permitted to go on leave. We would like to quote that part of his statement which reads as under :

> *"**Question No.1.***
>
> *(a) **Question** : Why was I denied leave when one NCO was sent on leave the same day?*
>
> *(b) **Answer** : Hav Munshi was sent on his annual leave for the year as his family was medically serious and his mother's operation had been scheduled for this period during his annual leave.*
>
> ***Question No.2.***
>
> *(a) **Question.** I too had informed you of my telephone call that my son was not well. Why was I not given leave ?*
>
> *(b) **Answer.** No.14564820M Sep (Rec Mech) Ranjeet Kumar had told me that his son was not well. He did not mention any severity necessitating his presence. He also told me of his wanting to visit a temple as per an earlier promise. I hereby produce the Coy Leave Sanction Register. (Extract attached to proceedings as Exhibit 'L')."*

Even in this O.A., the applicant has not filed any document, showing the seriousness of his son's health, which forced him to over stay the leave. To perform rituals as per the asking of Village Pandit, that too after expiry of the leave period, would not in any manner justify his over stay. His defence that his son's illness compelled him to over stay, is not supported by any documentary evidence. He had taken the plea that in the DCM, he had produced the same, but the same were not received. But it is strange enough that no such medical document regarding illness of his son has been filed.

18. We find substance in the arguments of the learned counsel for the respondents that in compliance of Rule 125 of the Army Rules, 1954, once the officer conducting the SCM, signs the proceedings, then it stands authenticated. Rule 125 of the Army Rules, 1954 reads as under :

> ***"125. Signing of proceedings**.— The court shall date and sign the sentence and such signature shall authenticate the whole of the proceedings."*

19. Since the applicant has challenged the SCM proceedings for the first time after a long lapse of 21 years, therefore simply on the basis

of loss of record after expiry of the period of retention, would not help him in any manner.

20. Learned counsel for the applicant has placed reliance on the pronouncement of Hon'ble Apex Court in the case of **Union of India vs. Sudershan Gupta** [2009 (6) SCC 298]. In that case, the appeal was mainly allowed on the ground that the original record was destroyed, but it transpires from perusal of the said judgment that in that case, the proceedings were challenged within time and not after 21 years as in the instant case. Such a huge delay on the part of the applicant himself has resulted into destruction of the record after expiry of the period of retention. Therefore, in the peculiar facts of this case, the applicant is not entitled to any benefit of this case law. On the same point, an order passed by the Coordinate Bench of this Tribunal in T.A.No. 339 of 2010 decided on 08th February 2016 has also been relied upon, but the applicant is not entitled to the benefit of the same on the grounds mentioned above. Learned counsel for the applicant has also filed a copy of the Government Order indicating the period of retention for the original record of the proceedings. At serial no.6, the SCM proceedings find place and the period of retention is only three years. As stated earlier, in this case SCM proceedings have been challenged after 21 years. Statutory appeal was dispensed of by the competent authority on 15th March 1999.

21. In support of his argument that Army Rule 22 has not been complied with, learned counsel for the applicant has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **Union of India & ors vs. Dev Singh** (Mil LJ 2003 SC 146). It is submitted that in this case, there was no compliance of Rule 22(1) of the Army Rules, 1954, hence the subsequent proceedings shall stand vitiated. We have examined the aforesaid judgment and perusal of the said judgment shows that the facts of that case were entirely different. In the facts of that case, the applicant had initially

challenged the non compliance of Rule 22(1) of the Army Rules, 1954 at the very initiation of the SCM proceedings. Inspite of that, the same was not rectified, but in the instant case, the applicant has nowhere shown us nor has he argued that he has raised any such objection at the time of initiation of the SCM proceedings. The applicant for the first time by means of this O.A. has challenged the SCM proceedings after lapse of 21 years. We would like to quote the relevant part of the judgment as under:

> *"In Hussain's case, no objection was taken as to the violation of the mandatory Rule 22 at the time when the Court Martial Proceedings were initiated. The concerned officer went through the Court Martial Proceedings and cross-examined the witnesses at that stage, therefore, this Court relying upon Rule 149 came to the conclusion that whatever irregularity that was there before the stage of initiation of Court Martial same did not vitiate the Court Martial Proceedings because the said proceedings were in accordance with law and the officer in that case had cross-examined the witnesses. Therefore relying on Rule 149 this Court held the irregularity, if any, in the preliminary proceedings would not prejudice to delinquent officer.*
>
> *In the instant case, it is to be noticed that on the initiation of Court Martial Proceedings itself, the respondent had raised the contention that the preliminary proceedings which directed the initiation of Court Martial being in violation of Rule 22 of the Rules, the Court Martial cannot be held against him. Therefore, the objection in this case as to the initiation of Court Martial has been taken by the respondent at the very beginning of the Court Martial Proceedings and if the objections were then to be considered by the Military Court then as per the law laid down by this Court in Prithi Pal Singh Bedi (supra) the proceedings had to be dropped."*

We would like to quote Rule 149 of the Army Rules, 1954, which reads as under:

> ***"149. Validity of irregular procedure in certain cases**,—Whenever, it appears that a court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilty to justify such finding, such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules."*

Thus, the above case law is of no help to the applicant.

22. Thus, keeping in view the fact that by means of this O.A., the SCM which was conducted in the year 1995 has been challenged and because of lapse of time, the documents have been destroyed after period of

retention. Therefore, the minor procedural irregularity would not vitiate the entire proceedings, unless and until the applicant is able to establish that he was adversely affected in his defence. In the facts of the instant case, it is admitted case of the applicant that he was over stayed the leave and he was posted in active service area.

23. Learned counsel for the applicant has submitted that the punishment of dismissal from service is disproportionate and in support of his submission, he has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **Ranjit Thakur vs Union of India & ors.** [1987 (4) SCC 611] and also on the pronouncement of Hon'ble Apex Court in the case of **Central Industrial Security Force & ors vs Abrar Ali** [AIR 2017 SC 200] and also on the pronouncement of the Hon'ble Apex Court in the case of **H.C.Sarin vs Union of India & ors.** [1976 (1) SCC 765].

24. Learned counsel for the respondents has submitted that on earlier four occasions, a lenient view was taken for over staying leave by the applicant, but in the present case, he over stayed leave in an active service area, which is considered to be a serious offence. It has also been argued on behalf of the applicant that because of the dismissal from service, the applicant would not be able to get any Government job or any other job. As per the date of birth of the applicant, at present he is about 50 years of age. It is pertinent to mention here that it has nowhere been mentioned in the O.A. that the applicant is not in any service.

25. It is clear from perusal of the record that the applicant had committed the similar offence at four earlier occasions and for which he was given minor punishment. During this trial, he has come with a specific defence that he was sanctioned leave due to the illness of his son and this fact is admitted by the witness in his cross examination. As per the submission of the learned counsel for the applicant, the illness of his son was the only reason due to which he had to over stay the leave. If we accept this entire defence of the applicant, then it would be a good ground to establish that the sentence awarded to the applicant was

disproportionate. Therefore, this O.A. deserves to be partly allowed only with regard to quantum of sentence. It is true that the stigma of dismissal from service would debar him from getting any other job during his life time. So we hereby consider it appropriate to modify the order of dismissal from service into discharge from service.

26. Accordingly, this O.A. is **partly allowed**. The findings of the SCM are confirmed. The sentence awarded to the applicant is hereby modified only to the extent that his dismissal from service is hereby converted into discharge from service. Applicant is not entitled to any other relief.

27. No order as to costs.

(Lt Gen Gyan Bhushan) Member (A)

(Justice S.V.S.Rathore) Member (J)

Dated: November , 2017.
PKG