Court No. 1 (E Court)
AFR

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 298 of 2017

Tuesday, this the 29th day of March, 2022

"Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)"

Ex Rect Gyan Prakash Gupta (Army No. 15446568X) son of Shri Rameshwar Prasad, Resident of Vill & Post-Repura, Tehsil-Sadar, Distt-Ballia (UP), PIN-277401.

….. Applicant

Ld. Counsel for the Applicant : **Shri Alok Kirti Mishra**, Advocate

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi.

2. Chief of the Army Staff, Integrated Headquarters of Ministry of Defence, South Block, New Delhi-110001.

3. General Officer Commanding-in-Chief, Central Command Lucknow.

4. Commandant AMC (Army Medical Corps), Centre and College and Officer-in-Charge Records, Record Office, AMC, Pin-900450, C/o 56 APO.

.....Respondents

Ld. Counsel for the Respondents. : **Shri Rajiv Pandey**, Advocate
Central Govt. Counsel

ORDER

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs :-

> *(a) To issue/pass an order or direction of appropriate nature to the respondents to set aside/quash not only the SCM proceedings (Annexure No 3) but the entire disciplinary proceedings from the very inception be quashed/set aside because of several legal informalities and lack of jurisdiction.*
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> *(b) To pass an order or direction to the respondents to reinstate the applicant in service w.e.f. 15.04.2015 with all service and monetary consequences.*
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> *(c) To issue/pass an order or direction to appropriate nature to set aside the order dated 01.06.2016 passed by the Chief of Army Staff being the end product of non-application of mind and passed without appreciating the vital aspects raised by the applicant in his petition dated 05.05.2015.*
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> *(d) To issue/pass any other directions in the interest of justice.*
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> *(e) Allow this application with costs.*

2. In brief the facts of the case may be summarised as under:

The applicant was enrolled in the Indian Army on 20.03.2014 and was tried by SCM and dismissed from service on 15.04.2015 for an offence committed under Section 44 of the Army Act, 1950. Against award of punishment, applicant had submitted petition dated 05.05.2015 under the provisions of Section 164 (2) of the Army Act, 1950 to the Chief of the Army Staff (COAS) which was rejected vide order dated 01.06.2016 with direction that ‘considering the case in its entirety, I remit the ‘sentence of dismissal from service’ to ‘discharge from service’. Applicant has

filed this O.A. to quash SCM proceedings, order dated 01.06.2016 passed by the COAS and re-instate him into service.

3. Learned counsel for the applicant submitted that the applicant was enrolled in the Army as recruit by Director Recruiting, Varanasi on 20.03.2014. At the time of enrolment, certain forms related to enrolment were filled up by the clerk to whom the applicant gave the details correctly including a pending criminal case but the clerk concerned did not fill up enrolment form properly, with the result the applicant was subjected to disciplinary action by way of Summary Court Martial (SCM) on 15.04.2015 (Annexure No 3) on a charge under Section 44 of Army Act, 1950 and dismissed from service. After dismissal from service he preferred an appeal dated 15.05.2015 to the COAS which was rejected vide order dated 01.06.2016. His other submission is that though he was provided copy of tentative charge sheet dated 27.02.2015, Summary of Evidence containing 06 pages and final charge sheet dated 06.04.2015 but he was not provided copy of SCM proceedings which he was entitled to receive under Rule 147 of Army Rules, 1954. His further submission is that he received copy of SCM proceedings on 11.03.2016 through AMC Centre and College and thereafter, on receiving rejection order of the COAS, has filed this O.A. He submitted that order passed by the COAS is not sustainable in accordance with Chapter V of Indian Evidence Act, 1872.

4. It was further submitted that Shri Munna Shahu had filed a FIR under Section 323, 325, 504 and 506 IPC which later he was

told by the complainant, was false. Later, he was acquitted by Learned Judicial Magistrate, Ballia vide order dated 03.03.2015. He submitted that during the course of SCM trial, applicant had disclosed that he has been acquitted vide order dated 03.03.2015 and on this submission he was granted 02 days leave to bring copy of order dated 03.03.2015 which he produced but the said order, by which he was acquitted, was given no cognizance and he was dismissed from service w.e.f. 15.04.2015 arbitrarily. He pleaded for quashing of SCM proceedings, order dated 01.06.2016 passed by the COAS and re-instate him into service with all monetary benefits.

5. Per contra, a preliminary objection has been raised by the respondents stating that the applicant under the provisions of Section 164 (2) of Army Act, 1950 had submitted petition dated 05.05.2015 to the COAS against award of punishment by SCM which was rejected vide order dated 01.06.2016 with direction to convert his dismissal into discharge. It was further stated therein that ‘considering the case in its entirety, I remit the ‘sentence of dismissal from the service’ awarded to the petitioner with the condition that he shall be deemed to have been ‘discharged from the service’ from the date his ‘dismissal’ became effective. If the conditional remission is not accepted by the petitioner, the punishment of ‘dismissal shall stand and will remain operative’. It was further submitted that since the applicant has approached this Tribunal directly without submitting the acceptance/non-acceptance, this O.A. be rejected at the initial stage.

6. Learned counsel for the respondents further submitted that at the time of enrolment at Varanasi on 20.03.2014 when he appeared before Enrolling Officer for the purpose of being enrolled for service in the Army, to a question put to him in the prescribed manner as recorded in Enrolment Form at Para 8 (g) 'has any complaint or report been made against you to the Magistrate or Police for any offence'? answered 'No' and also in Verification Roll at Para 15 (g) 'if any case pending against you in any Court of Law at the time of filling up this verification roll'? answered 'No'. He further submitted that during the course of his Technical Training it came to the knowledge of the respondents that some case was pending against the applicant prior to enrolment in the Army. On query it was denied by the applicant and he gave an undertaking dated 10.01.2015 (Annexure CA-3) that no case was pending against him. He further submitted that on submitting verification roll to the District Magistrate, Jaunpur (UP), it was intimated that the applicant was involved in a case No 72/2012 under Section 323, 325, 504 and 506 of IPC and he was on bail. It was further intimated that the aforesaid case was subjudice at Ballia Court. His submission is that since this fact was concealed by the applicant at the time of enrolment, disciplinary proceedings were started against him for giving false answer at the time of enrolment in accordance with policy letter dated 29.06.1990 (Annexure CA-6) and he was tried by SCM under Section 44 of the Army Act, 1950 by following due procedure.

7. It was further submitted by learned counsel for the respondents that on having committed an offence under Section 44 of the Army Act, 1950 approval for disciplinary proceedings were taken from the appropriate authority and he was served with a tentative charge sheet dated 27.02.2015 under Rule 22 (Exhibit R-8) and hearing of charge was done on 05.03.2015. He further submitted that during the course of hearing two prosecution witnesses were heard in presence of two independent witnesses and the applicant declined to cross examine the prosecution witnesses and refused to make any statement or call any witness in his defence. Thereafter, Officiating Commander No 1 Technical Training Wing, AMC Centre and College ordered 'evidence to be reduced to writing' by order dated 27.02.2015. Summary of Evidence was recorded by Lt Col Sanjeev Chawla as per Army Rule 23 and SCM proceedings commenced on 15.04.2015 at 1200 hrs as per rules and concluded on same day. During SCM trial the applicant pleaded guilty and thereafter, the trial Court found him guilty after complying with the provisions of Army Rule 115 (2) and sentenced him to be dismissed from service. Accordingly he was dismissed from service w.e.f. 15.04.2015. He pleaded for dismissal of O.A. on the ground that the SCM proceedings were conducted as per rules.

8. Heard Shri Alok Kirti Mishra, learned counsel for the applicant and Shri Rajiv Pandey, learned counsel for the respondents and perused the material placed on record.

9. It is not disputed that the applicant was enrolled in the Army on 20.03.2014 and was dismissed from service w.e.f. 15.04.2015 due to concealment of fact during the enrolment process at Army Recruiting Office Varanasi. The applicant was asked whether he was involved in any case, to that he answered No. We have perused the enrolment form (Annexure CA-1) and found that in said form two questions were put i.e. 8(h) –has any complaint or report been made against you to the magistrate or police for any offence? to which he answered No, and 15(g)-if any case pending against you in any Court of Law at the time of filling up this verification roll? to which he also answered No.

10. During the course of applicant's Technical Training, verification roll was received on 26.11.2014 from District Magistrate, Jaunpur (UP) mentioning therein that the applicant was involved in case No 72/12 under Section 323, 325, 504 and 506 of IPC and he was on bail. It was also mentioned in the verification roll that his case was subjudice at Ballia Court. We notice that the applicant had not disclosed this fact at the time of enrolment. Thus, he had committed an offence under Section 44 of the Army Act, 1950 which stipulates -"Making at the time of enrolment a wilfully false answer to a question set forth in the prescribed form of enrolment which was put to him by the Enrolling Officer before whom he appeared for the purpose of being enrolled."

11. When it came to the knowledge of the respondents that the applicant was involved in a criminal case, he was asked to give an undertaking that he was not involved in any case which he gave on

10.01.2015 (Annexure CA-3). We find that the above undertaking is false as he was involved in a criminal case since the year 2012 and in that case he was on bail when he was enrolled in the Army. Thus, concealment of fact is established at the time of enrolment for which his services were terminated under Section 44 of Army Act, 1950

12. Now we proceed to examine the intention and purpose of recording of evidence under Army Rule 22 (1) which learned counsel for the applicant in para 5.2 of O.A. has stated that there was a violation of said rule and hence all proceedings vitiated. Army Rule 22 finds place in Chapter V titled – 'Investigation of Charge and Trial by Court Martial'. A plain reading of this Rule shows that the charge is only an accusation. It is contained in a charge sheet and the charge sheet is the formal charge sheet drafted against an accused which may contain several charges. Thus, the evidence under Army Rule 22 (1) is only with regard to charge and not the charge sheet. It is only when the Commanding Officer on the basis of the evidence heard by him under Army Rule 22 (1) forms an opinion that there is adequate material that the accused should be tried, then for the said purpose, the evidence has to be recorded in writing, as provided under Army Rule 22 (3) which is commonly called "Summary of Evidence".

13. In this regard we would like to refer to the judgment of the Hon'ble Delhi High Court in the case of ***Lance Dafedar Laxman Singh vs Union of India & Ors*** decided on 01.08.1992 wherein

the Hon'ble Court has considered the distinction between charge and charge sheet and has held in paras 9 and 10 as under :

> *"(9). ..... The scope of investigation which is preliminary in nature to be conducted under the Army Rule 22 has strictly to be adhered to. The word 'Charge' came up for interpretation before the Division Bench of this Court in the case of* ***Ex Sappy Rajbir Singh Vs. Union of India & Ors*** *in Crl.W. No.43/1985 decided on 27th May, 1988. It was pointed out that the word 'charge' referred to means a simple complaint or allegation against the soldier concerned. The rules lay down a clear distinction between the 'charge sheet' and the. 'charge'. Charge has been defined in subrule (2) of Rule 28 under this very chapter. It reads as under:*
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> *"(10) The "charge-sheet" has to be framed after the preliminary investigation during which the statements of the witnesses and the plea of the accused are not to be recorded in writing. However, the nature of the offence has to be made known to the accused and the witnesses are to be examined in support of those allegations in his presence. The accused has also to be given full liberty to cross examine those witnesses deposing against him. The Commanding officer after holding the preliminary investigation has been given three options in sub-rule (3) of Rule 22. If the Commanding officer is satisfied then the case should proceeded. He will adjourn it for purposes of having the evidence reduced into writing. The procedure for recording evidence is laid down in Army Rule 23.*

14. Thus, virtually Army Rule 22 (1) is only an investigation stage and on the basis of the statements of the witnesses, heard, the CO has to form an opinion whether the case has to be proceeded with. It is clear from the rules that the statements of the witnesses so heard are not used in the subsequent proceedings. This fact finds support from the provisions of the Army Order 7/2000, wherein it has been provided that it is not necessary that all the witnesses of the prosecution should be heard under Army Rule 22 (1). If the Commanding Officer is prima facie satisfied after hearing some of the witnesses that matter deserves to be proceeded against him, then there is no requirement under Rules or Army Order to further

record the evidence of all the witnesses. Thus, the purpose of the Legislature to hear the prosecution witnesses under Army Rule 22 (1) is very limited.

15. In support of his contention learned counsel for the applicant has also relied upon AFT, Regional Bench, Kolkata order dated 28.08.2014 passed in T.A. No. 214 of 2010, ***Ex Nk Umakanta Dash vs Union of India & Ors***. We have perused the aforesaid judgment and we find that facts of the said case are different to the case in hand. In that case the petitioner was charged for violation of lawful command given by his superior officer but in the instant case he was charged for an offence committed under Section 44 of the Army Act, 1950.

16. It is clear from the record that the applicant had concealed the fact at the time of enrolment. He was tried under Section 44 of the Army Act, 1950 by following due procedure, therefore SCM cannot be said to be in violation of the Army Act or the Rules because the record itself justify such resort. There seems to be no illegality in conducting of SCM.

17. The arguments of the learned counsel for the applicant is that the procedure was not strictly complied with and on the strength of this submission, he has submitted that the subsequent proceedings were void. It is true that the provisions of Army Rule 22 (1) are mandatory and if in a given case, it is concluded that the provisions of Army Rule 22 (1) have been violated, then it will vitiate further proceedings. But so far as other infirmities and irregularities in the procedure are concerned, it does not vitiate the trial or subsequent

proceedings. The applicant will have to show that his defence has been prejudiced by lapses in following the procedure, only then he can get the benefit. In the instant case, no such argument has been advanced before us that the applicant's defence has been prejudiced by not following due procedure. In the instant case 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. At this juncture, 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.*

18. A perusal of the aforesaid Rule shows that the Court Martial would not be held to be invalid, even if there was an irregular procedure where no injustice was caused to the accused. During course of argument, learned counsel for the applicant has nowhere argued that the applicant's defence has been prejudiced by any

such irregularity in the procedure. The Hon'ble Supreme Court in the case of ***Union of India vs Major A. Hussain*** decided on 08.12.1997 has also observed as under :

> *"When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court martial unless it is shown that accused has been prejudiced or a mandatory provisions has been violated. One may usefully refer to Rule 149 quoted above.*

19. We have already discussed that there is no requirement of law that the evidence under Army Rule 22 (1) must be reduced into writing. This is the main ground of challenge of the learned counsel for the applicant. Applicant has fully participated in the proceedings. Even otherwise, Army Rule 22 (1) is only a pre-trial/investigation stage, therefore, keeping in view the pronouncement of Hon'ble Supreme Court that if there is sufficient evidence, then any irregularity in the pre-trial or the investigation stage becomes immaterial, this argument pales into significance.

20. Now we come to the other limb of the argument of the learned counsel for the applicant that the COAS has not applied his mind while rejecting appeal of the applicant. We have perused the order dated 01.06.2016 passed by the COAS and we find that while deciding his appeal the authority concerned has taken a liberal view keeping in view of his young age and has converted dismissal into discharge subject to his acceptance. For convenience sake Paras 6 and 7 of the order dated 01.06.2016 are reproduced as under:-

> *"6. And whereas, considering the young age of the petitioner and the facts that the petitioner was acquitted by the Court of Judicial Magistrate-second, Ballia and that the punishment of dismissal from the service would adversely affect the entire life of the petitioner, the effect of the sentence of 'dismissal from service' needs to be mitigated.*
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> *7. Now, therefore, considering the case in its entirety, I remit the sentence of 'dismissal from service' awarded to the petitioner with the condition that he shall be deemed to have been 'discharged from service' from the date his 'dismissal' became effective. If the conditional remission is not accepted by the petitioner, the punishment of 'dismissal' shall stand and will remain operative. Subject to the aforesaid relief, I reject the petition dated 05 May 2015 submitted by Number 15446568X Ex Recruit/Ambulance Assistant Gyan Pradkash of 1 Technical Training Wing, AMC Centre and College, Lucknow, the same being devoid of merit and substance.*

21. The evidence led by the prosecution, was fully proved and there was sufficient evidence in support of the charge with regard to concealment of fact at the time of enrolment even though he submitted copy of his acquittal during the course of his trial.

22. Additionally, the Hon'ble Apex Court in its recent judgment in ***State of Rajasthan & Ors vs. Chetan Jeff***, Civil Appeal No. 3116 of 2022, decided on 11.05.2022 has held in paras 6,7,8 & 9 that suppression of material fact by a person in respect of his criminal antecedents and making a false statement in the enrolment form will result cancellation/rejection of his candidature or dismissal from service. The relevant paras for convenience sake, are reproduced below :-

> *"6.1 At the outset, it is required to be noted that the post on which the writ petitioner is seeking the appointment is the post of constable. It cannot be disputed that the duty of the constable is to maintain law and order. Therefore, it is expected that a soldier should be honest, trustworthy and his*

integrity is above board and that he is reliable. An emp loyee in the uniformed service presupposes a higher level of integrity as such a person is expected to uphold the law and on the contrary any act in deceit and subterfuge cannot be tolerated. In the present case the applicant has not confirmed to the above expectations/ requirements. He suppressed the material facts of his involvement in criminal antecedents. He did not disclose in the enrolment form that against him a civil/criminal case/FIR is pending. On the contrary, in the enrolment form, he made a false statement that he is not involved in any civil/criminal case and not facing any trial. Therefore, due to the aforesaid suppression, his candidature came to be rejected by the appropriate authority. Despite the above, the learned Single Judge allowed the writ petitioner and directed the State to consider the case of the original writ petitioner for appointment as a constable mainly on the ground that the offences we4re trivial in nature and the suppression of such offences should have been ignored. The same has been confirmed by the Division Bench.

6.2 The question is not whether the offences were trivial in nature or not. This question is one of suppression of material fact by the applicant in respect of his criminal antecedents and making a false statement in the enrolment form. If in the beginning itself, he has suppressed the material fact in respect of his civil/criminal antecedents and in fact made an incorrect statement, how can he be appointed as a constable. How can he be trusted thereafter in future? How it is expected that thereafter he will perform his duty honestly and with integrity?

6.3 Therefore, as such the authorities were justified in rejecting the candidature of the respondent for the post of constable.

7. Applying the law laid down by this Court in the aforesaid cases, it cannot be said that the authority committed any error in rejecting the candidature of the original writ petitioner for the post of constable in the instant case.

8. Even otherwise it is required to be noted that subsequently and during the proceedings before the learned Single Judge as well as the Division Bench, there are three to four other FIRs filed against the original writ petitioner culminating into criminal trials and in two cases he has been acquitted on the ground of compromise and in one case though convicted, he has been granted the benefit of Probation of Offenders Act. One more criminal case is pending against him.

Therefore, the original writ petitioner cannot be appointed to such a post of constable.

9. In view of the above discussion and for the reasons stated above, both, the learned Single Judge as well as the Division Bench have erred in directing the State to consider the case of the respondent for appointment as a constable. The judgment and order passed by the High Court is unsustainable, both, on facts as well as on law. Under the circumstances, the same deserves to be quashed and set aside and is accordingly quashed and set aside. It is held that the candidature of the respondent - original writ petitioner for the post of constable had been rightly rejected by the appropriate authority. Present appeal is accordingly allowed. In the facts and circumstances of the case, there shall be no order as to costs."

23. In view of above, we find that the offence committed by the applicant for not disclosing the information of his involvement in civil/criminal case in enrolment form during his recruitment in the Indian Army is not of a trivial nature but it is a serious offence. Suppression of such material facts at the time of enrolment or after recruitment cannot be ignored and therefore, in view of aforesaid judgment of the Hon'ble Apex Court, applicant has rightly been dismissed from service by the respondents.

24. We further take a note that while rejecting applicant's appeal dated 15.05.2015, the COAS passed order dated 01.06.2016 in which his dismissal was converted into discharge subject to acceptance of his remission. It is further noticed that the applicant has not accepted the remission provided by the COAS by challenging his dismissal which has put an embargo to convert his dismissal into discharge, even then we hold that keeping in view of his young age and acquittal from Civil Court he will be deemed to be discharged from service.

25. In view of the above discussions, we do not find any procedural illegality or irregularity in conducting the SCM and finding recorded on the basis of the evidence is also in accordance with the rules. Also, order dated 01.06.2016 passed by the COAS is speaking and reasoned based on the fact that the applicant suppressed material fact at the time of recruitment.

26. In view of the discussions made above, we do not find any merit in the present O.A.

27. Thus, this O.A. lacks merit, deserves to be dismissed and is hereby **dismissed**.

28. Pending application (s), if any, stands disposed of.

29. No order as to costs.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 29.03.2022
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