

RESERVED
Court No. 1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

O.A. No. 109 of 2014

Tuesday, this the 04th day of September, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Mukesh Kumar (No 15329037P Ex Sapper), Son of Shri Krishna Pal, R/o Village- Tandasakoti PO: Sakoti, District Meerut- 250 223 (UP).

.... Applicant

Ld. Counsel for the: Shri R. Chandra, Advocate.
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence, Government of India, New Delhi.
2. The Chief of Army Staff, Integrated Headquarters, New Delhi – 11
3. General Officer Commanding HQ Central Command, Lucknow – 226002
4. The Officer- In- Charge, Records MEG, PIN- 900493, C/o 56 APO
5. Commanding Officer, 19 Engineer Regiment, PIN- 914019, C/o 56 APO

....Respondents

Ld. Counsel for the: Dr Shailendra Sharma Atal, Advocate.
Respondents.

ORDER

“(Per Hon’ble Mr Justice SVS Rathore, Member (J))”

1. By means of this appeal under Section 15 of the Armed Forces Tribunal Act, 2007, the applicant had initially made the following prayers:-

“(i) Call the Summary Court Martial Proceedings dated 08.12.2012 from the custody of respondents and be quashed and further the order dated 23.09.2012 (Annexure No.A-1) passed by the respondents No.2 be quashed.

(ii) To direct the respondents to re-instate the applicant in the service w.e.f. 08.12.2012 with all consequent benefits including arrears of salary with the interest of 18% per annum and continuity in service.

(iii) Any other appropriate order or direction which the Hon’ble Tribunal may deem just and proper in the nature and circumstances of the case.”

2. However, three applications for amendment of prayer clause were moved and vide order dated 30.11.2017 the prayer no.(i) was deleted and following prayer was substituted :-

“(i) Hon’ble Tribunal may be pleased to set aside Summary Court Martial Proceedings dated 08.12.2012, Discharge order dated 24.03.2012 (Annexure No. A-6) and order dated 23.09.2013 (Annexure No. A-1).”

3. The facts of the case as stated by the applicant in his O.A. may be summed up as under.

4. The applicant was enrolled in the Army in Madras Engineering Group as Equipment Repairer (Tradesman) on 18.10.2002. On 06.01.2011 the applicant was placed in medical category S3 (T-24) for Alcohol Dependence Syndrome. On

13.12.2011 a noting sheet was prepared by the respondent no.5 showing six red ink entries against the applicant and a show cause notice was issued to the applicant in accordance with the terms of AHQ letter dated 28.12.1988 as to why he should not be removed from service as undesirable soldier. The said show cause notice has been filed by the applicant as Annexure A-4. On 22.03.2012 discharge of the applicant was sanctioned by the Commander. On 24.03.2012 respondent no. 5 issued a formal discharge order with a copy to Record Office. Since applicant was struck off strength (SOS) on 01.05.2012 in this regard a Personal Occurrence regarding his discharge was published in Part II Order at serial no. 001 and further at serial no. 004 in the same Part II Order applicant was shown absent without leave (AWL) from 13.04.2012 to 30.04.2012 (after noon). Since the applicant had rejoined from AWL on 01.05.2012 in office hours, publication of it was done in same Part II Order at serial no. 006 that the applicant has been ceased (stopped) w.e.f. 01.05.2012. On 25.04.2012 applicant submitted his statutory complaint against the formal discharge order dated 24.03.2012 and punishment awarded on 19.07.2011 and 17.09.2011. On 26.04.2012 applicant submitted another statutory complaint against the punishments dated 20.12.2011 and 10.01.2012. On 28.05.2012 the respondent no. 4 raised an objection on Part II Order No. 0/0122/2012 dated 01.05.2012 that without publishing the Personal Occurrence (PO) regarding rejoining from AWL, how discharge order can be issued. On 03.11.2012 again a Part II Order was published regarding

cancellation of earlier Part II Order of the applicant and the applicant was taken on strength of the Army w.e.f. 27.10.2012 vide Part II Order dated 03.11.2012. On 08.12.2012 Summery Court Martial of the applicant was held and SCM awarded the punishment of dismissal to him from service. We find it appropriate to reproduce the show cause notice issued to the applicant in January, 2012, which is as under :-

“

HQ 416 Engr Bde
PIN-914416
C/O 56 APO

-----/A
Army No- 15329037P
Spr-SP Staff (ER), Mukesh Kumar
19 Engr Regt
PIN-914019
C/o 56 APO

Jan 2012

SHOW CAUSE NOTICE

1. You have earned six red ink entries during your entire service as per under mentioned details:-
 - (a) 03 Nov 2008 - 07 days RI and 07 days pay fine awarded by Co 19 ER under AA Sec 39 (a) for an offence of absent without leave.
 - (b) 06 Jul 2010 AER- 28 days RI and 14 days pay fine awarded by Co 38 under AA Sec 39 (a) for an offence of absent without leave.
 - (c) 21 Jul 2011- 28 days RI awarded by CO 38 AER under AA Sec 39 (a) for an offence of absent without leave.
 - (d) 16 Sep 2011- 28 days RI awarded by CO 38 AER under AA Sec 54 for an offence of loss of identity card.
 - (e) 22 Dec 2011- 05 days RI awarded by CO 19 ER under AA Sec 39 (a) for an offence of absent without leave.
 - (f) 10 Jan 2012- 05 days RI awarded by Co 19 ER under AA Sec 39 (a) for an offence of absent without leave.
2. Being an undesirable soldier, it is considered that your further retention in service is not appropriate for the org.
3. The competent auth proposes to discharge you from service in terms of IHQ MoD (Army) letter No A/13210/159/AG/PS2(c) dt 28 Dec 1988.
4. You are hereby directed to Show Cause as to why you should not be discharged from the service under Army Rule 13(3) table item* III(v). Your reply should reach the undersigned within fifteen days of the receipt of this

notice. If no reply is received by ----- (date), it will be assumed that you are having nothing to urge against the contemplated discharge.

Brigade Commander”

5. The SCM of the applicant was held on the following charges:-

“ **CHARGE SHEET**

The accused **No 15329037P** Rank/Trade Spr/Support Staff (ER) Name Mukesh Kumar of 19 Engr Regt is charged with:-

Army Act
Section 39 (b)

ABSENTING HIMSELF WITHOUT LEAVE

in that he,

at peace, absented himself wef 13 Apr 2012 (1200hrs) without leave from the Surgical ward-1 MH Meerut and remained so until surrendered voluntarily at 9 Inf Div Pro Unit at 1325hrs on 26 Oct 2012.

Total period of absence 197 days

(Shaibal Kumar)
Colonel

Station : Mil Stn Meerut Cantt
Dated: 12 November 2012

Commanding Officer
19 Engineer Regiment ”

6. In the SCM the applicant pleaded guilty and ultimately the order of dismissal from service was passed on 08.12.2012. The submission of the learned counsel for the applicant is that the earlier discharge order was not cancelled as per procedure since the discharge order was in existence, therefore there was no question of holding SCM as the applicant was not subject to the Army Act. It has also been argued that even otherwise there were material irregularities in conducting the SCM. The plea of guilty was recorded under pressure, the friend of accused was not given of his own choice and Army Rule 22 was not complied with.

7. On behalf of the respondents it has been argued that though the applicant has added the relief by way of amendment in his petition that the discharge order dated 24.03.2012 be set aside but there is absolutely no pleading to show as to how the said discharge order was illegal. It is only in the written synopsis filed on behalf of the applicant at the time of hearing of arguments, grounds challenging said discharge order have been raised. It is submitted that for want of specific pleadings the Tribunal cannot grant the said reliefs as the Tribunal cannot go beyond pleadings. Learned counsel for the respondents has placed reliance in support of his submission on the decisions of Hon'ble Apex Court in Civil Appeal No. 1763 of 1989 **Union of India vs. E.I.D. Parry (India) Ltd.** dated 01.02.2000, Appeal (Civil) 1622 of 2004 **Union of India vs. R. Bhusal** dated 12.07.2006 and Appeal (Civil) 5687 of 2000 **Union of India and others vs. Jai Prakash Singh and another** dated 08.03.2007 and also on a decision of Hon'ble High Court in Special Appeal No. 387 of 2010 **Hon'ble High Court of Judicature at Allahabad through its Registrar General and another vs. Diwakar Singh** and Special Appeal No. 388 of 2010 **Hon'ble High Court of Judicature at Allahabad through its Registrar General vs. Radhey Shyam Tiwari** dated 07.10.2010.

8. The gist of aforementioned cases is that a Court cannot travel beyond the pleadings and in the aforesaid cases the Hon'ble Apex Court and the Hon'ble High Court have held that a decision beyond pleadings is unsustainable. Since there is no

pleading challenging the discharge order, therefore, the applicant is not entitled to challenge the discharge order dated 24.03.2012. Simply by raising ground of challenge against the discharge order in the synopsis filed at the stage of final arguments the said order cannot be assailed. The synopsis filed at the stage of arguments does not form part of pleadings. Until and unless a ground is specifically pleaded in the O.A. and the other party is given due opportunity to file his reply to the said pleadings, that cannot be considered in view the aforementioned case laws cited by learned counsel for the respondents. That apart the respondents after cancelling the discharge order dated 24.03.2012 have conducted the SCM proceedings against the applicant and the punishment of dismissal was inflicted upon him. The applicant has availed the benefit of cancellation of his discharge order and has joined and now he is challenging the said order on the basis of which he was taken on strength. We are of the view that the said discharge order dated 24.03.2012 cannot be challenged in the peculiar facts of this case.

9. In view of this situation, we now confine ourselves to the sustainability and legality of the SCM proceedings only. It transpires from the perusal of the original record that during service from time to time the applicant was punished on six occasions. He was a case of Alcohol Dependence Syndrome. It also transpires from the perusal of the original record that the discharge order dated 24.03.2012 was passed against the

applicant but the same could not be implemented as the applicant absented himself w.e.f. 13.04.2012 from military hospital. The said discharge order was cancelled. Since the applicant absented himself from military hospital on 13.04.2012 without being discharged from the said hospital, the applicant was charged under Section 39(a) of the Army Act. The applicant re-joined after his absence from 13.04.2012 only on 26.10.2012 and pleaded guilty to the charge and therefore the order of dismissal was passed against him.

10. On behalf of the respondents it has been argued that there was absolutely no illegality in conducting the SCM, due procedure was followed and no mandatory provision was violated. The plea of guilty was voluntary and it was duly recorded. During course of arguments learned counsel for the respondents has drawn our attention to the statement of the applicant recorded during Summary of Evidence to show that it was a case of Alcohol Dependence Syndrome. Since that was a pre-trial statement, therefore, we confine ourselves to the proceedings of SCM only. In the counter affidavit it has been pleaded that the applicant was placed in low medical category w.e.f. 06.01.2011 for Alcohol Dependence Syndrome. It has also been pleaded that on 24.03.2012 the order of discharge of the applicant was passed. However, the same could not be implemented as the applicant absented himself w.e.f. 13.04.2012 and the said order of discharge was cancelled.

11. The submission made on behalf of the applicant that since the applicant was discharged and the discharge order was not duly cancelled, therefore, he was not subject to the Army Act has no substance. Virtually the applicant wants to take advantage of his own misconduct as he himself absented from military hospital, therefore, his discharge order could not be served upon him and it was cancelled. It was only after re-joining of the applicant that he was taken on strength. A Court of Inquiry was held and thereafter the competent authority ordered for his trial by SCM for the charge under Section 39(a) of the Army Act. Thus, when the applicant was taken on strength and as we have discussed earlier no ground to cancel the order of discharge was pleaded in the O.A., therefore, we are of the considered view that there was absolutely no illegality on the ground of earlier discharge order and in conducting the SCM because the discharge order dated 24.03.2012 had already been cancelled and the applicant was taken on strength.

12. We have also examined the original records. It transpires from the perusal of the original record that initially the discharge order was published on 01.05.2012 but thereafter again a Part II Order was published on 27.07.2012 wherein the order of discharge passed earlier with regard to the applicant was cancelled due to wrong publication. It further reveals that the applicant was declared 'illegal absentee' by the Court of Inquiry held at 19 Engineer Regiment C/o 56 APO on 17.05.2012. Thus, it

is clear that the earlier order of discharge was cancelled by further publication second Part II Order because the applicant himself was absent. There is yet another Part II Order dated 03.11.2012, which shows that the applicant re-joined on 26.10.2012. After his absence from 13.04.2012, the total absence of the applicant was of 197 days. Last Part II Order was published on 12.12.2012 regarding the dismissal of the applicant by the SCM. It transpires from the perusal of the original record that before commencement of SCM the Summary of Evidence was provided to the applicant. Maj Gurkirpal Singh was appointed the friend of the accused vide letter dated 12.11.2012. The Officer conducting the SCM informed the applicant to intimate the name of the Officer required by the applicant as friend of the accused. It transpires from the perusal of the record that thereafter vide letter dated 14.11.2012 the applicant was informed that Maj Gurkirpal Singh of 19 Engineer Regiment will be the friend of the accused during SCM. Thus, friend of the accused of the choice of the applicant was provided to him. In the presence of the friend of accused the applicant has pleaded guilty and his plea of guilty was duly signed by him. It also transpires from the perusal of the record that the applicant has signed the plea of guilty and thereafter a certificate in pursuance of Army Rule 115(2A) was also issued, which was duly signed by the applicant and also by the friend of the accused of his own choice. Therefore, now at this stage the applicant cannot say that he had not pleaded guilty or his plea of guilty is involuntary.

13. The main thrust of argument of learned counsel for the applicant is that since the order of discharge was not cancelled, the applicant was not subject to Army Act but we do not find any substance in this submission of the learned counsel for the applicant. Admittedly, the applicant was taken on the strength of the Army on 26.10.2012. Therefore, if the order of discharge was in existence then there was no question of the applicant being taken on strength. Applicant voluntarily went to join, so he was well aware at that time that discharge order if any stands cancelled. Thus from 26.10.2012 to 08.12.2012 the applicant remained on the strength of the Army. No other irregularity in conducting the SCM could be pointed out on behalf of the applicant. Any procedural irregularity prior to the commencement of SCM loses its significance. Hon'ble Apex Court in the case of **Union of India & others vs Major A. Hussain** (AIR 1998 SC 577) has considered this point and has observed that 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 provision has been violated.

14. At this stage we would like to reproduce Army Rule 149, 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 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 wilful or negligent disregard of any of these rules."

Thus, perusal of the aforesaid Rule clearly establishes that every procedural irregularity will not vitiate the court martial proceedings by itself. Law is settled on the point that the purpose of procedural law is only to reach the ends of justice and not to frustrate it. When in the facts of the present case the applicant has voluntarily pleaded guilty and the certificate under Army Rule 115 (2A) was signed by the friend of the accused then nothing remains in this matter and the applicant cannot claim that by any irregularity his defence has been prejudiced.

15. In the alternative, argument has also been raised regarding disproportionate punishment. It is submitted that because of the said dismissal order the applicant shall become disentitled to get any government job, apart from it being stigmatic and would also

create a hindrance in getting any other job. We find substance in this submission and accordingly we are of the view that a discharge of the applicant from the Army would have met the ends of justice.

16. Accordingly, this O.A. is **partly allowed**. The punishment of dismissal is modified to discharge from service. The applicant is not entitled to any other relief.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

Dated: September 04, 2018

JPT

(Justice SVS Rathore)
Member (J)