COURT NO 2
RESERVED
(Ser No 18)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION No 03 of 2017

Tuesday, this the 08th day of August, 2023

"Hon'ble Mr. Justice Anil Kumar, Member (J)
Hon'ble Maj Gen Sanjay Singh, Member (A)"

Sepoy MT Kamlesh Prasad, Army No-14801191K,son of Ram Das Pyasi, original resident of village and P.O.-Girwar, P.S.-Snodha, District-Sagar (Madhya Pradesh), locally residing at 112-B, A.D.A. Colony, Ashok Nagar, District-Allahabad.

…Petitioner

Counsel for the: **Shri Virat Anand Singh**, Advocate
Petitioner

Versus

1. Union of India (Ministry of Defence) through Chief of Army Staff, Army Headquarters, New Delhi.
2. Director General (Discipline & Vigilance), B-8, Adjutant General Branch, Army Headquarters, DHQ, PO-New Delhi.
3. Lt Col/Commanding Officer, Headquarter Wing, ASC Centre (S), Bangalore-7.

…. Respondents

Ld. Counsel for the : **Shri GS Sikarwar**, Advocate
Respondents Central Government Counsel.

ORDER

1. The petitioner had filed Civil Misc. Writ Petition bearing No. 36009 of 1999 in the Hon'ble High Court of Judicature at Allahabad which was transferred to this Tribunal under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 03 of 2017. The petitioner has prayed for the following reliefs:-

(a) *Issue a suitable writ, order or direction in the nature of certiorari quashing the dismissal order dated 24.11.1998 (Annexure-6).*

(b) *Issue a suitable writ, order or direction in the nature of certiorari quashing the order dated 19.06.1999 (Annexure-9) of the appellate authority upholding the punishment of dismissal from service of the petitioner.*

(c) *Issue a suitable writ, order or direction in the nature of mandamus commanding the respondents to take back the petitioner in service.*

(d) *Issue a suitable writ, order or direction which this Hon'ble court may deem fit and proper in the circumstances of the case.*

(e) *Award cost of the petition to the petitioner.*

2. Brief facts of the case are that the petitioner was enrolled in the Army Service Corps (ASC) as Mechanical Transport Driver (MT/Dvr) on 02.11.1988. While serving with 557 ASC Battalion, he was granted 64 days leave commencing from 08.04.1998 to 10.06.1998. On termination of aforesaid leave the petitioner overstayed leave for 79 days due to his wife's illness. The petitioner is stated to have sent a telegram to his Commanding

Officer and Adjutant for extension of leave but admittedly his leave was not extended and he was declared a deserter by a duly constituted Court of Inquiry (C of I). The petitioner voluntarily rejoined his duties on 28.08.1998 and after rejoining he was subjected to Summary Court Martial (SCM). During the SCM proceedings petitioner submitted his statement on 31.10.1998 and thereafter, charge sheet dated 11.11.1998 was served upon him. On 24.11.1998 SCM was conducted and his dismissal order was passed by respondent No. 3. Against his dismissal order petitioner preferred appeal dated 15.12.1998 which was dismissed vide order dated 19.06.1999, hence this petition was filed in Hon'ble High Court of Judicature at Allahabad which on transfer to this Tribunal was re-numbered as T.A. No. 03 of 2017.

3. Learned counsel for the petitioner submitted that having joined Army service on 02.11.1988 petitioner while serving with 557 ASC Battalion was granted 64 days leave commencing from 08.04.1998 to 10.06.1998. It was further submitted that while at home his wife Smt Rakhi went seriously ill and he took her for medical treatment to Dr. LS Chauhan (Homeopathic), Govt Medical Dispensary, Rajakhari, Sagar who advised him to

be present with his wife for proper treatment of '***Meningitis***' to which she was suffering for a long time.

4. Learned counsel for the petitioner further submitted that based on doctor's advice to be present with his wife he sent telegram for extension of leave to Army authorities and when his wife's condition improved he resumed his duty on 28.08.1998 and after rejoining duty he was subjected to disciplinary action through SCM which was held on 24.11.1998 and concluded on the same day dismissing him from service. It was further submitted that during the SCM proceedings petitioner submitted his statement on 31.10.1998 explaining the reasons for his overstay of leave but his plea was not considered and his services were terminated in most illegal manner. He further submitted that against dismissal order, appeal dated 15.12.1998 preferred by the petitioner was rejected vide order dated 19.06.1999 in an arbitrary manner.

5. Learned counsel for the petitioner also submitted that SCM was held on 24.11.1998 without affording sufficient opportunity of hearing and considering his statement given during the SCM proceedings. In support of his contention, learned counsel for the petitioner submitted that Havildar MK Soy, Havildar Amik Kumar,

Naib Subedar RB Thakur, Sepoy UK Kumar, Naik Ramesh Chand, Naik M Deo Raj, Sepoy RK Tewari and Havildar S Anand of the same unit were guilty of absent without leave but the respondent No. 3 took lenient view and imposed minor punishment for the same charges, but in the matter of petitioner respondent No. 3 took serious view for the reasons best known to him and did not consider the justification of overstaying leave by the petitioner and awarded major punishment of dismissal from service, hence this dismissal order passed against the petitioner is highly discriminatory and is hit by Articles 14 and 16 of the Constitution of India. He pleaded for setting aside order dated 24.11.1998, order dated 19.06.1999 and re-instate him into service.

6. Concluding his submission learned counsel for the petitioner submitted that the petitioner in C of I and also subsequently during the trial had mentioned about his wife's illness and this fact was communicated to the respondents vide communication dated 10.06.1998 through telegram, therefore, without investigation of this fact during trial, SCM proceedings are vitiated under Section 143 of the Army Act, 1950. It was also submitted that punishment of dismissal from service is disproportionate to gravity of offence which in fact was only overstay of leave on account of his wife's illness.

7. On the other hand, learned counsel for the respondents raised preliminary objection on maintainability of this petition stating that applicant was dismissed from service at Bangalore and he is a resident of District Sagar, Madhya Pradesh, therefore this petition having no jurisdiction is not maintainable. It was further submitted that the petitioner was enrolled in the Army on 02.11.1988 and he rendered 10 years and 22 days service at the time of dismissal from service. He further submitted that petitioner was granted 64 days annual leave commencing from 08.04.1998 and the said leave was to expire on 10.06.1998. After expiry of leave the petitioner failed to join his duty in the unit without any sufficient cause and as such he was declared a deserter by 557 ASC Bn w.e.f. 11.06.1998 as per existing rules. He voluntarily surrendered on 28.08.1998 after an absence period of 79 days. It was further submitted that on reporting he was subjected to disciplinary proceedings in which he was dismissed from service by SCM on 24.11.1998.

8. Learned counsel for the respondents further submitted that the petitioner is a habitual offender as he was very indisciplined soldier who prior to committing this offence had previously committed same offences on two occasions also for which he was inflicted two red ink entry

punishments in the years 1993 to 1995. It was further submitted that with regard to his wife's confinement to bed there is no evidence to prove that his wife was ever confined to bed, hence the story seems to be concocted and afterthought.

9. Learned counsel for the respondents further submitted that had the petitioner's wife been seriously ill, he would have taken her to Army Hospital, Sagar rather than getting medicines from Govt Homeopathic Dispensary at Sagar (MP) of which only two prescriptions have been produced which are insufficient to prove her seriousness. It was further submitted that the petitioner was supplied with copy of complete proceedings of SCM including summary of evidence and a receipt was obtained on 24.11.1998 as per rules. It was further submitted that the petitioner was afforded ample opportunities to mend his ways after award of two punishments but he failed to reform himself and overstayed leave for third time.

10. Learned counsel for the respondents further submitted that bar of Section 143 of the Army Act, 1950 does not apply in this case because the petitioner opted to get his wife treated by a Homeopathic Doctor and this fact was never communicated to the respondents during

the trial. The petitioner was posted in counter insurgency operational area and he overstayed leave just to avoid service in the operational area. It was submitted that the petitioner was dismissed from service for committing serious offences which are against the military law and basic structure of the Army. He pleaded for dismissal of T.A.

11. Heard learned counsel for the parties and perused the records.

12. With regard to jurisdiction of this petition, we find that appeal against dismissal order was filed when the petitioner was locally residing at Allahabad and order rejecting the appeal was received at his Allahabad address where petitioner filed this petition in the High Court, therefore this petition is maintainable as this was transferred to this Tribunal vide order dated 25.11.2016 and notice was issued on 13.02.2017.

13. No. 14801191K Sep Kamlesh Prasad was enrolled in the Army on 02.11.1988 as Driver (MT). While on annual leave for the period 08.04.1988 to 10.06.1988 (Annexure-1) his wife suffered from 'Meningitis'. He opted to get her treated at Govt Medical Dispensary, Rajakhari, Sagar (MP). In support of his contention prescription of Dr. LS Chauhan (Homeopathic) is on

record (Annexure-2) which shows that his wife was under treatment at the said Homeopathic Clinic. Petitioner's leave was to expire on 10.06.1998. He has stated that due to his wife's deteriorating condition, he sent two telegrams on 10.06.1998 (Annexure-3) to military authorities for extension of leave but respondents have denied receipt of any such telegram and declared him deserter. He voluntarily surrendered to military authorities where he was dismissed from service w.e.f. 24.11.1998 by a duly constituted SCM. During the summary trial applicant made his statement which for convenience sake is reproduced as under:-

> *"I was posted to 557 ASC Bn since Sep 95 and was granted 64 days of AL w.e.f. 08 Apr 98 to 10 Jun 98. While I was on leave my wife became ill due to meningitis and I had to get her treated. Therefore, I have requested for advance of AL for the year 99 through a telegram addressed to my Coy Cdr and CO, on 10 Jun 98. I hereby produce the telegram receipts of TO Sagar dated 10.06.1998, Ser No 5140 and 5141 respectively att as exhibits 'N' and 'O' since I have not received any reply from 557 ASC Bn, I have decided to stay on till my wife treatment is over. Thus I became OSL upto 28 Aug 98 i.e. for 79 days. I hereby produce the cert dated 20 Aug 98 i.e. for 79 days from Dr. LS Chauhan, Medical Officer, Govt Homeo Dispensary, Sagar, M.P., about the treatment of my wife."*

14. On perusal of telegram receipts and statement made by the petitioner during trial it appears that due to his wife's illness he requested military authorities for extension of leave by forwarding telegram which is permissible under rules. We find that after his wife

became normal he surrendered to military authorities on 28.08.1998. Since he surrendered voluntarily there seems to be no intention on the part of the petitioner to desert the Army service.

15. Referring Section 143 of the Army Act, 1950 learned counsel for the applicant submitted that if any trial for desertion or absence without leave or overstaying leave or not rejoining when warned for service, the person tried states in his defence any sufficient or reasonable excuse for his unauthorized absence, and refers in support thereof to any officer in the service of the Govt, the court shall address such officer and adjourn the proceedings until his reply is received. In the instant case since the petitioner is stated to have produced material with regard to his wife's treatment at Govt Homeopathic Clinic, therefore as per provisions of Section 143 of the Army Act, 1950 reference ought to have been made to the Govt officer and till such time its reply was received the SCM ought to have been adjourned, which being not followed the whole proceedings are liable to be vitiated. For convenience sake, the aforesaid act is reproduced as under:-

> *"143. Reference by accused to Government officer.*
> *(1) If at any trial for desertion or absence without leave, overstaying leave or not rejoining when warned for service, the person tried states in his defence any sufficient or reasonable excuse for*

> *his unauthorised absence, and refers in support thereof to any officer in the service of the Government, or if it appears that any such officer is likely to prove or disprove the said statement in the defence, the court shall address such officer and adjourn the proceedings until his reply is received.*
>
> *(2) The written reply of any officer so referred to shall, if signed by him be received in evidence and have the same effect as if made on oath before the court.*
>
> *(3) If the court is dissolved before the receipt of such reply, or if the court omits to comply with the provisions of this section, the convening officer may, at his discretion, annul the proceedings and order a, fresh trial."*

16. The other limb of argument advanced by learned counsel for the petitioner is that the petitioner overstayed leave for genuine case i.e. for treatment of his wife for which he produced relevant certificate showing cogent reasons for his absence. We find that the petitioner has sent two telegrams to military authorities for extension of leave on the ground of his wife's illness prior to termination of leave and has produced copies of relevant documents, respondents ought to have considered his plea in positive manner by awarding rigorous imprisonment in military custody for three months or less, rather than terminating his service when he had put in more than 10 years service. We feel that dismissal from service for the said offence was not warranted in view of the Hon'ble Delhi High Court judgment in the case of ***Ex Rect Lachhman vs UOI & Ors***, decided on 13.11.2002.

17. The question, therefore, is; whether the punishment awarded to the petitioner is disproportionate and very harsh?

18. It is an admitted fact that the petitioner was on sanctioned leave which he overstayed. The provisions contained in clause (b) of Section 39 show that absence without leave or without sanctioned leave under clause (a) of Section 39 of the Army Act may be serious but in case, Army personnel overstays leave, that too, for sufficient cause, as provided in clause (b) of Section 39, then, in such situation, lenient view should be taken instead of awarding exemplary punishment of dismissal from service. The Legislatures in their wisdom in clause (b) recites the phrase 'without sufficient cause'. It implies that in case sufficient cause was shown, then appropriate authority must take lenient view and pass appropriate order in proportion to overstaying the leave. In the present case, the petitioner has set up a defence that he overstayed the leave because of illness of his wife. If it is so the respondents ought to have instituted an inquiry and cross-examined the petitioner with regard to illness of his wife which seems to have not done in this case prior to his dismissal from service.

19. In the case reported in (2001) 2 SCC 386, ***Om Kumar v. Union of India*** **& Ors**, the Hon'ble Apex Court

has considered the applicability of the doctrine of 'Proportionality' in the context of Article 14 of the Constitution. Referring to the judgments in ***Ranjit Thakur vs. Union of India***, (1987) 4 SCC 611: (AIR 1987 SC 2386) their Lordships held:

> *"(1) In this context, we shall only refer to these cases**. In Ranjit Thakur v. Union of India**, this Court referred to "proportionality" in the quantum of punishment but the Court observed that the punishment was "shockingly" disproportionate to the misconduct proved. **In B.C. Chaturvedi vs. Union of India**, this Court stated that the Court will not interfere unless the punishment awarded was one which shocked the conscience of the Court. Even then, the Court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty. It was also so stated in Ganayutham's case (supra)."*
>
> xxx ...".
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> *22. In Director General, RPF v. Ch. Sai Babu, (2003) 1 SCR 729 the Supreme Court reiterated that the High Court should not ordinarily interfere with the discretion exercised by the disciplinary authority in the matter of imposition of punishment and observed:*
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> > *"Normally, the punishment imposed by a disciplinary authority should not be disturbed by the High Court or a Tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of the charges proved, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works."*

20. In the case of ***V. Ramana vs. A.P. SRTC*** reported in (2005) III LLJ 723 SC, the Hon'ble Supreme Court approved the views expressed by the Full Bench in the

matter of imposition of punishment and observed as under:-

> *"The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case (1948) 1 KB 223 the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision."*

21. It is a well-settled proposition of law that a Court sitting in judicial review against the quantum of punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty is not in dispute. However, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court, then the Court would appropriately mould the relief either by directing the disciplinary/appropriate authority to re-consider the penalty imposed or to shorten the punishment on the basis of documentary evidence produced in support of defence.

22. The Hon'ble Supreme Court in the case of ***S. Muthu Kumaran vs. Union of India and Ors***, (2017) 4 SCC 609, their Lordships have held that though punishment of dismissal was well within powers of authorities concerned,

but his unblemished long service record ought to have been considered by the competent authority before imposing punishment of dismissal. We feel it apposite to quote relevant portion of the decision as under:

> *"11. No doubt, the dismissal order passed against the appellant was within the powers of the authorities concerned. However, as far as the dismissal from service is concerned, it is an extreme punishment imposed against the appellant. The applicant has to thrive in civil life by doing an appropriate job suitable to his qualification. In the facts and circumstances of the present case, we are inclined to modify the punishment of dismissal from service into discharge from service. The modification of the sentence of dismissal from service into that of discharge will not change the position of the appellant, so as to claim any reinstatement into service. Even if he was discharged from service, in lieu of dismissal from service, the appellant cannot seek for any employment or re-employment into the Army. Therefore, there would not be any grievance for the respondents in the event of punishment of dismissal being modified into that of discharge. At the same time, interest of justice would be served as the appellant would get the benefits like gratuity and other attendant benefits for the service rendered by him and the appellant would also get an opportunity to lead an honourable life in the society."*

23. In the case on hand, the punishment has been awarded on the petitioner when he had put in more than 10 years service. It shocks our conscience and seems to be question of non-application of mind while dealing with the quantum of punishment awarded to the petitioner. In view of our observations made in the body of the order, we are of the opinion that quantum of punishment of dismissal from service seems to be excessive, unreasonable, unjust and disproportionate to the offence committed by the petitioner.

24. Thus, keeping in view petitioner's length of service and the fact that he overstayed leave on account of his wife's illness for which he made communication for extension of leave and his volunteer surrender before the Army authorities we are of the view that the petitioner should have been dealt with leniently so that he could have received pension for the services rendered to the organization. The quantum of punishment awarded to the petitioner seems to be disproportionate to the gravity of misconduct and is violative of the mandate of Article 14 of the Constitution.

25. For these reasons, we are of the considered opinion that applicant's dismissal order should be set aside and petitioner should be put notionally in service till the time he would have completed the qualifying service for grant of pension to meet the ends of justice. We are also of the view that no back wages shall, however be, admissible. However, due to law of limitation he will be entitled to pensionary benefits three years preceding the date of receipt of this petition to this Tribunal which is February, 2017. Since the petitioner was enrolled in the Army on 02.11.1988, he cannot be re-instated into service as he has already completed his terms of engagement.

ORDER

26. In view of the above, petition is **Partly Allowed** and the order of dismissal passed against the petitioner is hereby set aside. The petitioner shall be treated to have been in service notionally till the time he would have completed the qualifying service for grant of pension. No back wages shall, however, be admissible. Due to law of limitation the petitioner shall be granted pension w.e.f. three years preceding the date of receipt of this T.A. to this Tribunal which is February, 2017. The monetary benefits payable to the petitioner shall be released expeditiously but not later than four months from the date of this order. Default will invite interest @ 8% p.a.

27. No order as to costs.

28. Miscellaneous application(s), pending if any, stand disposed off.

(Maj Gen Sanjay Singh)
Member (A)

(Justice Anil Kumar)
Member (J)

Dated : August, 2023
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