

Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 284 of 2010

Thursday, this the 16th day of February, 2023

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Atul Kumar Jain, Member (A)

Umesh Kumar Chourasia (Signalman Driver), No. 1539041P
S/o Jangilal Chourasia
R/o Village – Belha, PO – Handia,
Distt – Allahabad (UP)

.... **Petitioner**

Ld. Counsel for the Petitioner : **Shri Raj Kumar Mishra**, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. General Officer Commanding-In-Chief, Southern Command, Pune.
4. Commanding Officer, 21 Corps Air Support Signal Unit, C/o 56 APO.

... **Respondents**

Ld. Counsel for the Respondents : **Shri G.S. Sikarwar**,
Central Govt Counsel

ORDER

1. The petitioner, preferred Writ Petition No. 297 of 2005 (S) before the Hon'ble High Court at Jabalpur which has been transferred to this Tribunal and has been registered as T.A. No. 284 of 2010. By means of this T.A., the petitioner has prayed for the following reliefs:-

- “(i) to issue a writ of certiorari to respondents to quash/set aside the Summary Court Martial proceedings (Annexure P-8) and the order by General Officer Commanding-in-Chief Southern Command Pune (Annexure P-4).
- (ii) a writ of Mandamus to the Respondents to reinstate the Petitioner in service with all consequential service and financial benefits accruing thereof.
- (iii) a writ of Mandamus to Respondents to place the Petitioner at par with his batch-mates and grant him seniority, service and financial benefits accruing thereof.
- (iv) a writ of Mandamus to grant a compensation of Rs. 3 lakhs to the Petitioner for causing him serious harassment.
- (v) to grant any other relief deemed fit in the circumstances.”

2. Brief facts of the case are that the petitioner was enrolled in Indian Army on 22.08.1995. The petitioner was posted from 15 Corps Engineering Signal Regiment to 21 Corps Air Support Signal Unit vide posting order dated 13.04.2002. The petitioner was relieved to proceed to his new unit on 07.07.2002 with 37 days part of annual leave cum posting. The petitioner was to report to his unit 21 Corps Air Support Signal Unit on 21.08.2002 but he failed to report there on due date. After a long period of fifteen months, the petitioner reported at the Depot Regiment of Corps of Signals, Jabalpur on 01.12.2003, thus he overstayed leave for a period of 15 months. A Court of inquiry was conveyed vide 21 Corps Air Support Signal Unit order dated 24.09.2002 to investigate the circumstances under which the petitioner overstayed leave. The petitioner was declared deserter w.e.f. 21.08.2002 (AN). The apprehension order was issued vide 21

Corps Air Support Signal Unit letter dated 25.09.2002 to apprehend the petitioner. On 01.12.2003, the petitioner surrendered at Depot Regiment (Corps of Signals), Jabalpur which was intimated to his parent unit, i.e. 21 Corps Air Support Signal Unit vide signal dated 08.12.2003. The petitioner was brought to the unit on 29.12.2003 and was marched up to the Commanding Officer on 30.12.2003 for hearing of the charge under Army Rule 22 and the proceedings were recorded. The petitioner declined to make any statement. The Summary of Evidence was recorded on 03.01.2004. The charge sheet, copy of Summary of Evidence and daily order Part I Order No. 305/2004 dated 14.01.2004 were given to the petitioner on 14.01.2004. Thereafter, Summary Court Martial was held on 21.01.2004 in which the petitioner pleaded guilty, therefore, he was awarded the sentence 'to be dismissed from the service' by the SCM. The petitioner submitted a petition dated 30.02.2004 to GOC-in-C, Southern Command, Pune against award of punishment of dismissal by SCM which was rejected vide order dated 23.04.2004. The petitioner submitted another petition to Chief of the Army Staff on 30.07.2004 which was not accepted by the respondents vide order dated 16.09.2004, there being no provision to accept further appeal under Army Act 164(2). Being aggrieved, the petitioner has filed the present Transferred Application to set aside his dismissal order and to reinstate him into service with all consequential benefits.

3. Learned counsel for the petitioner submitted that petitioner was enrolled in the Army on 22.08.1985. The petitioner was granted leave-

cum-posting to 21 Corps Air Support Signal Unit from 15 Corps Engineering Signal Regiment vide Movement order dated 06.07.2002. During leave period, the petitioner fell sick and applied for grant of extension of leave but the same was not sanctioned. Therefore, he kept on taking treatment from a local Doctor and also from a Vaidya and he informed to his Commanding Officer about his sickness and treatments. When the petitioner felt slightly better, he reported to the unit in July 2003, though he was still under treatment, but he was not allowed by the JCO Incharge of rear location of the unit to join the unit. Thereafter, petitioner rejoined duty at Depot Signal Regiment on 01.12.2003 and from there, he was taken to 21 Corps Air Support Signal Unit on 28.12.2003.

4. Learned counsel for the petitioner further submitted that no Court of Inquiry for his absence without leave was held as required vide Section 106 of Army Act, 1950. No mandatory hearing of the charge under Army Rule 22 read with Army Order 24/94 was carried out before ordering the Summary of Evidence. During recording of Summary of Evidence, the petitioner was not administered mandatory caution under Army Rule 23 (3) and he was not provided opportunity to put forward his defence in the Summary of Evidence as required vide Army Rule 118. On 14.01.2004, the petitioner was handed over a charge sheet and during the trial by SCM under Army Act Section 39(b) for 'without sufficient cause over staying leave granted to him', again he was not provided opportunity to put forward his defence. Petitioner's plea that he was sick and was under treatment of a

Doctor/Vaidya during the alleged absence was not recorded and respondent No. 4 arbitrarily recorded the plea of guilty. The petitioner requested for the services of an Advocate to help him in his defence which was denied to him and 'Friend of the Accused' under Army Rule 129 was not provided to him, however, Sub Anar Singh was forced on the petitioner, who did not know the provisions of Army Act and Army Rules. The statement of the accused during the trial was also not recorded and the trial by SCM was completed within a half hour by awarding illegal order of dismissal from service.

5. Learned counsel for the petitioner further submitted that petitioner submitted a petition dated 03.02.2004 against his illegal dismissal from service but the same was rejected illegally by the GOC-in-C, Southern Command, Pune vide order dated 23.04.2004. The petitioner also forwarded a medical certificate for his treatment during the alleged absence without leave but the same has not been considered by the respondents. The petitioner also came to know that about 15 to 20 persons who had been AWL for even 2 years, they were retained in the service and no punishment of dismissal was awarded to them.

6. Learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in Civil appeal No. 6886 of 2014, **Jaswant Singh vs. Union of India & Anr**, decided on 10.12.2018 and submitted that since provisions of Rule 129 of Army Rules, 1954 to provide assistance of a civil advocate to the petitioner

has been denied, order of dismissal from service being on the ground of violation of the principles of natural justice be set aside.

7. In view of aforesaid, learned counsel for the petitioner pleaded that order of dismissal passed by the respondents be set aside being harsh and discriminatory without following relevant Army Act/Army Rules and petitioner be reinstated into service granting seniority and consequential benefits.

8. On the other hand, Ld. Counsel for the respondents submitted that petitioner was enrolled in Indian Army on 22.08.1995. The petitioner was posted from 15 Corps Engineering Signal Regiment to 21 Corps Air Support Signal Unit vide posting order dated 13.04.2002. The petitioner was relieved to proceed to his new unit on 07.07.2002 with 37 days part of annual leave cum posting. The petitioner was to report to his unit 21 Corps Air Support Signal Unit on 21.08.2002 but he failed to report there on due date. After a long period of fifteen months, the petitioner reported at the Depot Regiment of Corps of Signals, Jabalpur on 01.12.2003, thus he overstayed leave for a period of 15 months. Before this, a letter dated 01.09.2002 was sent by the respondents to the father of the petitioner to advise his son to rejoin duty but no communication received from his father/petitioner. A Court of inquiry was conveyed vide 21 Corps Air Support Signal Unit order dated 24.09.2002 to investigate the circumstances under which the petitioner overstayed leave. The petitioner was declared deserter w.e.f. 21.08.2002 (AN). The

apprehension order was issued vide 21 Corps Air Support Signal Unit letter dated 25.09.2002 to apprehend the petitioner. On 01.12.2003, the petitioner surrendered at Depot Regiment (Corps of Signals), Jabalpur which was intimated to his parent unit, i.e. 21 Corps Air Support Signal Unit vide signal dated 08.12.2003. The petitioner was brought to the unit on 29.12.2003 and was marched up to the Commanding Officer on 30.12.2003 for hearing of the charge under Army Rule 22 and the proceedings were recorded. The petitioner declined to make any statement. The Summary of Evidence was recorded on 03.01.2004. The charge sheet, copy of Summary of Evidence and daily order Part I Order No. 305/2004 dated 14.01.2004 were given to the petitioner on 14.01.2004. Thereafter, Summary Court Martial was held on 21.01.2004 in which the petitioner pleaded guilty, therefore, he was awarded the sentence 'to be dismissed from the service' by the SCM. Thereafter, the petitioner submitted a petition dated 30.02.2004 to GOC-in-C, Southern Command, Pune against award of punishment of dismissal by SCM which was rejected vide order dated 23.04.2004. The petitioner submitted another petition to Chief of the Army Staff on 30.07.2004 which was not accepted/rejected by the respondents vide order dated 16.09.2004, there being no provision to accept further appeal under Army Act 164(2).

9. Learned counsel for the respondents further submitted that order of dismissal has been passed by the SCM following the provisions of relevant Army Act/Army Rules and after considering the

complete records of SCM proceedings, appeals of the petitioner were rejected by the competent authority as per rules, hence, there is no illegality or irregularity in holding of SCM and awarding of punishment of dismissal. The contention of the petitioner that he reported at the rear location of the unit but he was not allowed to join duty is baseless and rejected as there was no one left in the rear location, the complete unit was at Babina. All laid down procedure for conduct of Court of Inquiry, hearing of the charges as per Army Rule 22, the recording of Summary of Evidence and conduct of SCM were followed which are legally tenable and there is no irregularity on the part of the respondents. The hearing of charge was carried out on 30.12.2003 and petitioner was heard and he was given full liberty to cross examine the witness in presence of two independent witnesses but the petitioner declined to make any statement or call any witness. The petitioner was cautioned as required vide Army Rule 23(3) before recording of his statement by giving him complete freedom to put forward his case.

10. Learned counsel for the respondents further submitted that petitioner's statement that he was under treatment from 26.08.2002 to 30.11.2003 is concocted and false as he has not produced any documents nor mentioned about his illness during the recording of the Summary of Evidence or during the SCM proceedings. Before recording the plea of guilty, the court had explained to the petitioner to the charge to which he had pleaded guilty and thus provisions of Army Rule 115(2) have been complied with. Under the provisions of

Army Rule 129, Subedar Anar Singh was detailed as the 'Friend of Accused' (Petitioner) and petitioner never made any request to change the 'Friend of Accused'. Court of Inquiry was done under Section 106 of Army Act 1950, and hearing of charge was carried out under Army Rule 22 and Summary of Evidence was recorded in accordance with Army Rule 23.

11. Learned counsel for the respondents summarised his submission that petitioner overstayed leave without any proper/valid reason for a period of fifteen months. The petitioner displayed utter disregard to military discipline and responsibility/duty as a soldier. Therefore, the award of dismissal from service is very lenient and justified as per rules and not disproportionate to the gravity and quantum of the offence as alleged by the petitioner. He pleaded for dismissal of the petition being bereft of merit and substance.

12. We have heard learned counsel for the respondents and perused the material placed on record.

13. Before adverting to rival submissions of learned counsel of both sides, it is pertinent to mention that judgment relied upon by the applicant in Para 6 referred to above is not relevant in the present case being not similar in nature. In the case of **Jaswant Singh** (supra), the provisions of Rule 129 of Army Rules, 1954 to provide assistance of a civil advocate as 'Friend to Accused' has been denied by the court/respondents and order of dismissal from service being on the ground of violation of the principles of natural justice was set

aside. However, in the present case, Subedar Anar Singh was detailed as the 'Friend of Accused' (Petitioner) under the provisions of Army Rule 129, and petitioner never made any request to change the 'Friend of Accused' or to provide assistance of a civil Advocate. Therefore, applicant cannot be given the benefit of aforesaid judgment.

14. Admittedly, in the present case, the petitioner overstayed leave w.e.f. 21.08.2002. Accordingly, as per rules, an apprehension roll was issued and after clear 30 days of absence, a Court of Inquiry was held and he was declared a deserter w.e.f. 21.08.2002. The apprehension order was issued vide order dated 25.09.2002. The petitioner surrendered at Depot Regiment (Corps of Signals) Jabalpur on 01.12.2003 after more than fifteen months of overstaying leave. In absence of any reliable explanation for absence, the only conclusion was that petitioner deserted the service voluntarily and intentionally. The petitioner was brought to the unit on 29.12.2003 and he was marched up to the Commanding Officer on 30.12.2003 for hearing of the charge under Army Rule 22 and the proceedings were recorded. The petitioner declined to make any statement before the court. The Summary of Evidence was recorded on 03.01.2004. The charge sheet, copy of Summary of Evidence and Part I Order were given to the petitioner on 14.01.2004. Thereafter, Summary Court Martial was held on 21.01.2004 in which the petitioner pleaded guilty, therefore, he was awarded the sentence 'to be dismissed from the service' by the SCM. Thereafter, the petitioner submitted a petition dated

30.02.2004 to GOC-in-C, Southern Command, Pune against award of punishment of dismissal by SCM which was rejected vide order dated 23.04.2004.

15. In this regard para 22 of Army Order 43/2001/DV is relevant which for convenience sake is reproduced as under:-

“22. A person subject to the Army Act or a reservist subject to Indian Reserve Forces Act, who does not surrender or is not apprehended, will be dismissed from the service under Army Act Section 19 read with Army Rule 14 or Army Act Section 20 read with Army Rule 17, as the case may be, in accordance with instructions given below :-

- (a) After 10 years of absence/desertion in the following cases:
 - (i) Those who desert while on active service, in the forward areas specified in Extra Ordinary Gazette SRO 172 dated 05 Sep 77 (reproduced on page 751 of MML Part III) or while serving with a force engaged in operations, or in order to avoid such service.
 - (ii) Those who desert with arms or lethal weapons.
 - (iii) Those who desert due to subversive/espionage activities.
 - (iv) Those who commit any other serious offence in addition to desertion.
 - (v) Officers and JCOs/WOs (including Reservist officers and JCOs, who fail to report when required).
 - (vi) Those who have proceeded abroad after desertion.
- (b) After 3 years of absence/desertion in other cases.
- (c) The period of 10 years mentioned at subpara (a) above may be reduced with specific approval of the COAS in special cases.”

16. In the case reported in (1986) 2 SCC 217, **Capt Virender Singh vs. Chief of the Army Staff**, the Hon'ble Apex Court has held as under:-

“Sections 38 and 39, and Sections 104 and 105 make a clear distinction between 'desertion' and 'absence without leave', and Section 106 prescribes the procedure to be followed when a person absent without leave is to be deemed to be deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion if the procedure prescribed by Section 106 is followed. Since every desertion

necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the animus. If there is animus deserendi the absence is straightaway desertion.

17. The petitioner was charge sheeted on 14.01.2004 for his overstaying of leave, which is reproduced as under :-

“CHARGE SHEET

The accused No. 15390419P Rank Signalman Trade Dvr MT-II Name Umesh Kumar Chaurasiya of 21 Corps Air Support Signal Unit, is charged with :-

<u>Army Act</u>	<u>WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE</u>
<u>Section 39(b)</u>	<u>GRANTED TO HIM</u>

In that he,

At Babina on 22 Aug 2002, having been granted leave of absence from 09 Jul 2002 to 21 Aug 2002 by 15 Corps Engineering Signal Regiment vide their movement order No. 266/O2/Sigs/PO-Out dated 06 July 2002 while proceeding on permanent posting to 21 Corps Air Support Signal Unit through 213 Transit Camp, failed without sufficient cause, to join 21 Corps Air Support Signal Unit at 0001 hours on 22 Aug 2002, on the expiry of the said leave and voluntarily surrendered to Depot Regiment (Corps of Signals) at 1300 hours on 01 Dec 2003 at Jabalpur.

Station : Babina

Sd/- x x x x x x

(S K Lohani)

Dated : 14 Jan 2004

Lt Col

Commanding Officer

21 Corps Air Support Signal Unit”

18. Another Certificate dated 21.01.2004, signed by the petitioner and countersigned by the Commanding Officer of the unit in which petitioner pleaded guilty, the same is reproduced as below :-

“CERTIFICATE

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

Signature of the accused ____ sd/-x x x x x x

(No 15390419p Signalman umesh Kumar Chaurasiya)

Station : Babina

Dated : 21 Jan 2004

Sd/- x x x x x x

(S K Lohani)

Lt Col

Commanding Officer

21 Corps Air Support Signal Unit

"THE COURT"

19. In 'Proceedings on a Plea of Guilty', the petitioner replied to Question No. 3, 'Do you wish to make any statement in reference to the charge or in mitigation of punishment? – **'Nahin'** and in reply to Question No. 4 'Do you wish to call any witnesses as to character?', the petitioner **'Declined'**.

20. It is seen from the records that when the petitioner did not rejoin the unit from leave, an apprehension roll was issued and later a Court of Inquiry was ordered by the Commanding Officer of the unit. The petitioner was declared deserter and on his surrender to the Depot Regiment of Corps of Signals at Jabalpur, he was taken to his unit. The hearing of the charge against the petitioner in terms of Army Rule 22 was carried out by the Commanding Officer of the unit in the presence of two independent witnesses. The accused (petitioner) declined to cross examine the prosecution witnesses and also did not call any defence witnesses. Accordingly, the Summary of Evidence was recorded wherein provisions of Army Rule 23 (3) were complied with. Statement of two witnesses were taken in the presence of the petitioner and he was given an opportunity to cross examine them which he declined. The Commanding Officer informed the petitioner that he would be tried by a Summary Court Martial (SCM) to be held on 21.01.2004 and all above actions/proceedings were done as per procedure prescribed under Army Act/Army Rules.

21. We also find that the SCM of the petitioner commenced on 21.01.2004 and the accused (petitioner) pleaded 'guilty' before the court. Before recording the plea offered by the accused (petitioner), the court explained the meaning of the charges and the general effect of his plea and thus, provisions of Army Rule 115(2) were complied with. Proceeding ahead, the Summary of Evidence was read over to the accused (petitioner) who once again declined to call any witness or cross examine anyone. Thereafter, the court sentenced the petitioner to be dismissed from service. The same day, the petitioner was explained his right to petition or appeal against his conviction by his Commanding Officer. Copies of the SCM proceedings were handed over to the petitioner the same day which has been acknowledged by him. The petitioner's signatures are seen appended at all the relevant pages of the Summary of Evidence proceedings as well as the Summary Court Martial proceedings (IAFD-907). The summary of evidence was also read over and explained to the petitioner after he pleaded guilty of the charge. We find that the disciplinary proceedings against the petitioner from the time of his overstaying of leave till his dismissal has been carried out by the Respondents as per the Army Act and Army Rules and no illegality has been committed by the authorities.

22 Considering our discussions in the earlier paragraphs, we are of the view that the SCM was conducted as per laid down rules and regulations and there is no infirmity in the SCM proceedings. We do not find the sentence of 'Dismissal' disproportionate to the offence

committed. On the contrary, the respondents have been lenient considering the overall security environment when the petitioner overstayed leave. We do not find anything to support the various allegation made by the petitioner regarding the Court of Inquiry, Summary of Evidence or the Summary Court Martial proceedings. Competent authorities have exercised their powers as per existing orders. Therefore, we are of the considered opinion that the respondents have acted as per the law and there is no requirement for us to interfere in this case.

23. Resultantly, we do not find any illegality or irregularity neither in procedure in holding of SCM nor in award of punishment of dismissal from service. In the Army discipline cannot be overlooked in such matters. Therefore, reliefs prayed in the Transferred Application are rejected being misconceived. Accordingly, Transferred Application having no substance deserves to be dismissed. It is, accordingly **dismissed**.

24. No order as to costs.

25. Pending Misc. Application(s), if any, shall stand disposed off.

(Vice Admiral Atul Kumar Jain)
Member (A)

Dated: 16th February, 2023

SB

(Justice Umesh Chandra Srivastava)
Member (J)