

**Reserved
Court No. 1**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW
Original Application No. 311 of 2016**

Monday, this the 13th day of May, 2019

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

No. 4086992-F Ex-L/Nk Dinesh Chandra Singh of 'B' Coy, 5 Platoon, 14 Garhwal Rifles, C/O 56 APO, son of Shri Dev Singh, resident of village Sunau, Post Office Sunau, Tehsil Tharali, district Chamoli, Uttarakhand Pincode – 246482.

.....Applicant

Ld. Counsel for the applicant: **Shri KKS Bisht, Advocate.**

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army) South Block, New Delhi – 110011.
3. Directorate General of Infantry/Infantry-6 (Pers) General Staff Branch, Integrated Headquarter of MoD (Army), DHQ PO New Delhi – 110011, PIN-900256, C/O 56 APO.
4. General Officer Commanding, Headquarter 6 Mountain Div (A), PIN 908406, C/O 56 APO.
5. Commander, HQ 99 Mountain Brigade, PIN-908099, C/O 56 APO.
6. Commanding Officer, 14 Garhwal Rifles, PIN – 910714, C/O 56 APO.
7. Officer-in-Charge, Records, Records the Garhwal Rifles, PIN 900400, C/o 56 APO.

.....Respondents

Counsel for the Respondents : **Shri Bhanu Pratap Singh,**
Addl Central Government Counsel.

ORDER.**“Per Hon’ble Mr Justice SVS Rathore, (Member-J)”**

1. The applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

“(a) Issue/pass an order or direction of appropriate nature to the respondents to quash/set aside the impugned direction passed by the respondent no. 5 dated 18 Nov 2016 (Annexure No. A-1(i), and also to quash set aside the illegal dismissal of the applicant being arbitrary and illegal.

(b) Issue/pass an order or direction of appropriate nature to the respondents to reinstate the applicant with effect from the date of his dismissal i.e. with effect from 18 Nov 2016 with all service and monetary consequences.

(c) Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.”

2. In brief, the facts of the case are that the applicant was enrolled as recruit (GD) in the Garhwal Rifles on 22.01.2003. During his service period, he was posted at different places in field and peace areas. Marriage of the applicant was solemnized with Smt. Savita Devi on 24.04.2008. From the wedlock, a girl child was born. The girl child died in July 2009. On 21.08.2010 the wife of the applicant fell ill and was taken to the Government Hospital, Tharali where she was declared ‘brought dead. Post mortem of the deceased was conducted and in the opinion of the autopsy doctor, the cause of death was unknown. The brother of the deceased lodged a complaint with Naib Tehsildar and an FIR was registered under Sections 498-A, 304-B and 120-B of the Indian Penal Code by the Revenue Police, Patwari Circle Devrada, Tehsil Tharali, district Chamoli against the applicant and his father. The applicant was arrested on 25.10.2010 and subsequently on 28.02.2011, he was enlarged on bail by Hon’ble Uttarakhand High Court. Thereafter, the applicant reported to his Unit 48 RR. The applicant was tried by the Sessions Judge, Chamoli and was

convicted in Sessions Trial No. 27 of 2010 State vs Dev Singh and ors. He was sentenced with 10 years' rigorous imprisonment with fine of Rs. 4000/- each, and in default of payment of fine, to undergo further imprisonment for four months. The applicant preferred Criminal Appeal No. 207 of 2015 before the Hon'ble High Court of Uttarakhand at Nainital and was granted interim bail on 07.07.2015 till the next date of listing of the appeal. On 22.07.2015, the applicant and his father were granted regular bail. Admittedly, the conviction of the applicant has not been stayed by the Hon'ble High Court of Uttarakhand at Nainital nor the Criminal Appeal preferred by the applicant has yet been allowed meaning thereby that, still the applicant is a convicted soldier for the dowry death of his wife.

3. Submission of learned counsel for the applicant is that since no order of dismissal was passed against the applicant, therefore, dismissal of the applicant from service is illegal and he deserves to be reinstated. Denial of reinstatement of applicant in service by the respondents is illegal. However, during course of hearing, learned counsel for the applicant has fairly conceded that the applicant is still a convict for the dowry death of his wife and the Criminal Appeal preferred by the applicant has still not been disposed of. Nonetheless, submission of learned counsel for the applicant is that the applicant has been dismissed from service without following due procedure of law and without passing a formal order of dismissal, the dismissal of the applicant cannot be sustained.

4. On behalf of the respondents, along with the counter affidavit, several documents have been filed whereby it is borne out that after conviction of the applicant, the authorities have recommended for dismissal of the applicant from service. Ultimately, the applicant was dismissed from

service and Part-II order to this effect was also published on 18.11.2016. Copy of the Part-II order has been annexed along with the counter affidavit. A perusal of the same shows that the applicant was dismissed with effect from 18.11.2016. Submission of learned counsel for the respondents is that show-cause notice was issued to the applicant on 29.10.2016 to which the applicant submitted his reply and thereafter the applicant was dismissed from service with effect from 18.11.2016 in exercise of powers under Section 20 of the Army Act, 1950. The submission of learned counsel for the applicant is that the procedure provided under Rule 17 of the Army Rules, 1954 has not been followed. Rule 17 of the Army Rules, 1954 is reproduced as under:-

5. Rule 17 of the Army Rules, 1954 provides as under:-

“17. Dismissal or removal by Chief of the Army Staff and by other officers.—Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under subsection (1) or subsection (3), of section 20, unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service :

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may, after certifying to that effect, order, the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government.”

6. The question which requires our consideration in the circumstances mentioned hereinabove is, ‘whether the order of dismissal can be set aside on the ground that due procedure has not been followed and the order of dismissal could not be produced by the respondents?’

7. The settled position of Rule 17 of the Army Rules, 1954 is that before passing order of dismissal, a person is to be given an opportunity to defend himself. In the case in hand, the applicant was issued show cause notice to which he submitted his reply and only thereafter recommendation by appropriate authority for dismissal of service of the applicant was made followed by consequential order of dismissal and publication of Part-II order dated 18.11.2016 dismissing the applicant from service with effect from 18.11.2016 itself. Furthermore, on the issue, whether due procedure is to be followed in cases where dismissal from service is based on the ground of conviction and sentence by a competent Court for a criminal charge, Article 311 of the Constitution of India provides as under:-

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or the State.-

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply

- (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or*
- (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or*

(c) *where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry*

(3) *If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”*

(underlined by us)

8. Proviso (a) appended to Article 311 (2) of the Constitution of India explicitly excludes orders of dismissal which have been passed on the ground of conviction on a criminal charge. The respondents have published Part-II order, a copy of which has been filed along with the counter affidavit, which shows that formal order was passed though the same has not been brought on record. Even if for arguments sake it may be presumed that there was any procedural irregularity in passing the dismissal order, the moot question to be answered remains, whether it would entitle the applicant for his reinstatement in spite of the fact that the conviction and sentence by the competent criminal Court is still in force and has not been stayed. During course of arguments, we had made a query to learned counsel for the applicant as to what prejudice has been caused to the applicant when admittedly the applicant is a convicted person in a case of dowry death and whether a convicted person can be reinstated in service to which learned counsel for the applicant could not give any satisfactory reply. Since Part-II order was published and keeping in view the provisions of Article 311 of the Constitution of India, due procedure can be waived off in cases of dismissal from service on the ground of conviction on criminal charges. Constitution of India is the supreme law of the land and all laws derive force from the Constitution of India and therefore, keeping in view

the aforesaid spirit of the Constitution of India, we do not find any substance in the arguments of learned counsel for the applicant.

9. In *Dy. Director of Collegiate Education (Admn.) vs. S. Nagoor Meera*, reported in (1995) 3 SCC 377, Hon'ble the Apex Court has considered the controversy whether, when a person is convicted by a criminal court, the disciplinary authority would still await the outcome of the case and observed that once the accused is convicted, it forms basis for taking the action under proviso to Article 311 (2) of the Constitution of India. Thus, the right to be reinstated in service, or the entitlement to be so considered, would arise upon a conviction being aside in appeal and cause of action would accrue to seek reinstatement only when the conviction is set aside. Relevant para-9 of the decision of Hon'ble Apex Court in the case of *Dy. Director of Collegiate Education (Admn.)* (supra) is reproduced as under:-

“9. The Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of, action under clause (a) of the second proviso to Article 311(2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311(2) once a government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the government servant- accused is acquitted on appeal or other proceeding, the order can always be revised and if the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The, other course suggested, viz., to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. It should be remembered that the action under clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2).....”.

10. In the case of *Karam Singh vs. State of Punjab & ors*, reported in (1996) 7 SCC 748, the facts of the case were that the appellant, who was a policeman, was convicted under Sections 302, 323 and 324 IPC and in appeal, his conviction

was reduced to conviction under Section 323 IPC and he was released under the provisions of Probation of Offenders Act, 1958. The appellant on this basis claimed for his reinstatement which was denied by the competent authority. Their Lordships of Hon'ble Apex Court dismissed the Special Leave Petition preferred by the appellant holding that where a convicted employee is released on probation, conviction constitutes one part and the release constitutes another part of the facts to be taken into consideration for taking a decision on the question whether the employee concerned could be reinstated in service. Hon'ble the Apex Court in said case refused the prayer of the appellant for reinstatement in service. In the instant case, the applicant has been convicted for dowry death of his wife, which is not only much more heinous offence, but is also an immoral offence.

11. A conceptous of our above observations is that the applicant has not been able to make out a case and the petition deserves to be dismissed.

12. It is accordingly **dismissed**.

No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated: May , 2019
anb