

RESERVED

COURT NO.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 1278 of 2010

Friday, this the 7th day of September, 2018

**“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal BBP, Sinha, Member (A)”**

No 13964231-N Sep/NA V.V. Khedkar Rao, Military Hospital, Agra

.....Petitioner

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

Versus

1. Chief of the Army Staff, Army Headquarters, DHQ PO New Delhi.
2. Headquarters Central Command through Commandant-cum-CRO,
AMC Centre and Records, Lucknow.
3. CCDA (Pension), Allahabad.
4. Col HK Singh, Commanding Officer,
2016 Field Ambulance, C/o 56 APO.

.....Respondents

Ld. Counsel for the Respondents : **Shri Kaushik Chatterjee,
Addl Central Govt Counsel**

ORDER

“ Per Hon’ble Air Marshal BBP Sinha, Member (A)”

1. The matter in hand has come up before us by way of transfer under Section 34 of the Armed Forces Tribunal Act, from Hon’ble High Court of Judicature at Allahabad and renumbered as Transferred Application No. 1278 of 2010.

2. By means of the instant T.A., the petitioner had made the following prayers:-

“I. Issue a writ, order or mandamus directing the respondents to release the salary and allowances of the petitioner from 16th September 1994 onwards, and pay the salary to the petitioner of the rank which he had held, with penal rate of interest.

II. Issue any other writ, order or direction as this Hon’ble Court may consider appropriate in the interest of justice, fair play and equity.

III. Award cost of the petition to the petitioner.”

3. The facts draped in brevity are that the petitioner was enrolled in the Army on 22.08.1985. While posted at Kargil, he was granted 64 days Annual Leave commencing from 20.01.1994 to 24.03.1994. He left the unit on 08.01.1994 after depositing two boxes including the KIT. As per the standing orders for personnel leaving Northern Forward Area locations through airlift, they were required to be subjected to baggage checks at two points, one being at the unit location, the other one being at Leh, before boarding the Air Craft. After availing airlift and proceeding on leave, while on annual leave, the petitioner suffered fracture in his leg and

was admitted in Govt. Hospital Yeotmal, Maharashtra, and the unit was duly informed by the father of the petitioner. On 08.07.1994, the petitioner was discharged from Govt. Hospital Yeotmal, and then reported to 225 Transit Camp on 10.07.1994 from where, he was sent to AMC Centre, Lucknow on 11.07.1994. AMC, Centre, Lucknow sent the petitioner to Army Base Hospital, Lucknow. During hospitalisation period up to 04.08.1994, the petitioner was placed in low medical category and was diagnosed a case of incidental injury. After return from Army Base Hospital, Lucknow to the Adm Battalion, AMC Centre, Lucknow, the petitioner was tried by Summary Court Marshal (SCM) under Section 38 (i) of Army Act 1950 and under Section 54 (b) of the Army Act relating to desertion and loss by neglect and was awarded punishment of dismissal and for making good the loss of Rs 1191.05 of the articles found deficient as averred in the second charge. The petitioner filed statutory petition against the punishment by SCM which was rejected by the Army Commander.

4. Feeling aggrieved, petitioner approached the Hon'ble Delhi High Court by preferring Writ Petition No. 3474 of 1995 which upon hearing was disposed of vide order dated 04.04.1997 directing the Chief of the Army Staff to ensure that the grievance of the petitioner be considered and decided de novo. It was further directed that the respondents shall also take into consideration the ground of discrimination pleaded by the petitioner. Liberty was given to the petitioner to have the petition revived in case he is still aggrieved by the orders passed by the respondents. In

compliance with directions of Hon'ble Delhi High Court, the Chief of the Army Staff passed an order dated 27.11.1997 directing, to quote:

“I commute the sentence of dismissal. The sentence should be read as “To be put under stoppage of pay and allowance until he has made good the sum of Rupees one thousand one hundred and ninety one and paise five only in respect of articles found deficient and averred in the second charge.”

I reject the petition for all other purpose.”

5. The petitioner was, thereafter, reinstated in service on 14.03.1998 with pay and allowances from 27.11.1997, i.e. the date of passing of order by the Chief of the Army Staff. However, it appears that the respondents did not disburse the amount of pay and allowances of the intervening period i.e. from the date of dismissal from service i.e. 16.09.1994 till the passing of redressal order by the Chief of the Army Staff commuting the sentence of dismissal i.e. 27.11.1997, as such, the petitioner, instead of approaching the Hon'ble Delhi High Court in compliance of order dated 04.04.1997(supra) filed yet another Writ Petition in the Hon'ble High Court of Judicature at Allahabad bearing Writ Petition No. 28289 of 2000 which upon hearing was disposed of vide order dated 07.07.2000 with following observation:

“Heard learned counsel for the petitioner and Sri S Banerjee for the respondents.

It would appear from the letter dated 10.4.1998 that needful is being done for the release of pay and allowances to the petitioner as per rules. The petitioner was reinstated in service w.e.f. 27.11.1997. Since sufficient time has elapsed, it is provided that the competent authority shall take appropriate decision in respect of the petitioner's claim for release of his salary etc. as early as possible

preferably within two months from the date of production of certified copy of this order.

The writ petition is disposed of.”

6. It appears that thereafter the petitioner also preferred Contempt petition before Hon'ble High Court of Judicature at Allahabad on 19.01.2001 bearing Contempt Petition No. 4518 of 2000 which was dismissed on 11.03.2003.
7. From Annexure R-5 annexed to supplementary counter affidavit dated 13.01.2012 it is borne out that the petitioner's representation dated 28.04.2002 for payment of pay and allowances for the intervening period between the date of dismissal from service i.e. 16.09.1994 till the passing of redressal order by the Chief of the Army Staff commuting the sentence of dismissal i.e. 27.11.1997 was rejected by the respondents on 21.05.2002.
8. Feeling aggrieved, the petitioner preferred third Writ Petition before the Hon'ble High Court of Judicature at Allahabad (first before Hon'ble Dehi High Court and the second and third before Hon'ble High Court of Judicature at Allahabad) which upon establishment of the Armed Forces Tribunal has been transferred to this Tribunal and has come up before us for hearing.
9. The first limb of submission of learned counsel for the petitioner is that the respondents have not implemented the orders of the Chief of the Army Staff in letter and spirit. In that Chief of the Army Staff had commuted the punishment of dismissal from service to be put under

stoppage of pay and allowances until the petitioner has made good the amount in respect of article found deficient, the respondents have erred in stopping payment of salary and allowances applicable to the rank on which the petitioner was posted from the date of dismissal till the date when the Chief of the Army Staff had commuted the sentence of dismissal. Learned counsel for the petitioner further submitted that the petitioner has been subjected to hostile discrimination. Submission of learned counsel for the petitioner is that Article 14 of the Constitution provides that no one will be denied equality before law or equal protection of law. Denial of equal treatment would invalidate the decision taken. It is submitted that the petitioner was tried by the Summary Court Martial for the offence under Section 38 (1) i.e. desertion from Army and Section 54 (B), i.e. makes away or loses by neglect any property belonging to the Government, of the Army Act, 1950 and was punished with dismissal from service. Assertion of learned counsel for the petitioner is that in similar circumstances, other Army personnel have been tried by Summary Court Martial by the same Commander but have been given lesser punishments whereas the petitioner has been discriminated in the matter of punishment and has been awarded major punishment of dismissal from service. Lastly, learned counsel for the petitioner submitted that the undertaking for not claiming the pay and allowance for the intervening period was obtained by coercion and has no legal sanctity.

10. Respondents have placed reliance on Para 51(g) of the Pay and Allowances Regulations for JCOs, OR and NCOs of the Army, Revised

Edition 1979 which provides that a person subject to the Army Act, 1950 will forfeit his pay and allowances for every day of the period between dismissal and reinstatement on its being cancelled by the competent authority. It is submitted that in view of the said provision, the petitioner had knowingly submitted an undertaking forfeiting his claim of payment of pay and allowances for aforesaid period without any coercion, and as such, he is not entitled for pay and allowance for said period.

11. We have heard learned counsel for the parties and perused the record.

12. Admittedly, the Chief of the Army Staff had passed order on 27.11.1997 commuting the punishment awarded to the petitioner in compliance of the orders of the Hon'ble Delhi High Court. In **WHARTON'S LAW LEXICON, FIFTEENTH EDUTION**, the word "**Commutation**" has been described to mean:-

"Commutation, conversion; the change of a penalty or punishment from a greater to a less; or giving one thing in satisfaction of another-as commuting tithes into a rent-charge, copyhold services into money payments into one lump payment, as under the (English) Pensions Commutation Act, 1871 (34 & 35 Vict C.36)"

13. In **Black's Law Dictionary, Second Edition**, the word "**Commutation**" has been described as 'substitution of one punishment for another'.

14. In the case in hand, the Chief of the Army Staff by his order dated 27.11.1997 has commuted the sentence of 'dismissal' to that of 'stoppage of pay and allowances' until the petitioner has made good the sum of Rs. 1191.05 only in respect of the articles found deficient and averred in the

second charge. The change of a punishment from a greater to less is not a conditional pardon, but is the substitution of a lower for a higher grade of punishment and is presumed to be in favour of the beneficiary, i.e. the petitioner. Once the sentence was commuted by the authority empowered to do so, the legal consequence which would flow is that the original punishment of dismissal from service became non est in the eyes of law and it shall be presumed as if the order of dismissal was never passed. Thus, the respondents have fell in a grave error of law by refusing payment of pay and allowances to the petitioner on the erroneous assumption of1` Para 51(g) of the Pay and Allowances Regulations for JCOs, OR and NCOs of the Army, Revised Edition 1979. At the cost of repetition, it may be observed that since the order of dismissal was commuted by the competent authority under directions of Hon'ble Delhi High Court, as such, it could not have been acted upon by the respondents. The undertaking given by the petitioner, in the circumstances of the case when the petitioner was suffering the punishment of dismissal from service and his family was deprived of livelihood, obtaining of the undertaking by the respondents cannot be made a ground for denying the petitioner pay and allowances for the intervening period. It is admitted by learned counsel for the parties that the sum of rupees one thousand one hundred and ninety one and paise five only in respect of articles found deficient which was to be paid by the applicant has already been recovered from the salary of the applicant.

15. Based on the pleadings of learned counsel for both the sides, we arrive at the conclusion that the petitioner is legally entitled for payment of pay and allowances for the intervening period, i.e. from the date of passing the order of dismissal i.e. 16.09.1994 till the passing of redressal order by the Chief of the Army Staff commuting the sentence of dismissal i.e. 27.11.1997, as such, the other issues raised by the learned counsel for the petitioner lose significance and need not be gone into.

16. In the result, the T.A. is **allowed**. The impugned order denying disbursement of pay and allowances for the period 16.09.1994 till 27.11.1997 is set aside. The petitioner shall be paid pay and allowances admissible to him for the said period. The entire exercise shall be completed by the respondents within a period of four months from the date of production of a certified copy of this order failing which the petitioner shall be entitled to interest at the rate of 9% per annum till the date of actual payment.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated : 7th September, 2018
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