

ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

**Court No. 3**

**Transferred Application No. 80 of 2011**

Monday the 5<sup>th</sup> day of May, 2014

“Hon’ble Mr. Justice Abdul Mateen, Member (J)  
Hon’ble Lt. Gen. A.M. Verma, Member (A)”

Shri Subhash Kushwaha, son of Ramjit Kushwaha, resident of  
Gahmar Village & Post Patti Khemanrai, Police Station Gahmar,  
District Ghazipur (U.P.)

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Petitioner

By Shri R. Chaubey, counsel for the applicant.

Versus

1. Union of India, Ministry of Defence, Raksha Bhawan, New Delhi, Rep. by its Secretary.
2. Chief Army Officer, Army Headquarter, New Delhi.
3. Vice Chief of Army Staff, Army Headquarter, New Delhi
4. Commanding Officer, No. 4, TRG Bn. (MT), ASC Centre and College, Bangalore-560 007.

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Respondents

By Ms. Deepti Prasad Bajpai, counsel for the respondents, &  
Major Narender Singh, Departmental Representative.

**ORDER**

**Hon’ble Lt. Gen. A.M. Verma.**

1. The petitioner in his writ petition has prayed for the following reliefs :

*“(i) Issue a writ in the nature of certiorari quashing the impugned order of dismissal bearing No. 6230/13887588/4TB/ST-12 dated 14.03.2005 passed by the 4<sup>th</sup> respondent vide Annexure-D to the writ petition; under the facts and circumstances of the case.*

*(ii) Issue a writ in the nature of mandamus directing the respondents to reinstate the petitioner back into service with continuity of service and all other consequential benefits, including back wages from the date of dismissal till the date of reinstatement; under the facts and circumstances of the case.*

*(iii) Issue any appropriate writ, orders or directions as this Hon’ble Court may deems fit to grant by considering the facts and circumstances of the case; and an order as to costs to meet the ends of justice.”*

2. The facts of the case are that the petitioner was enrolled on 17.11.1983 as Soldier. On 17.7.2004 he absented himself without leave until he joined voluntarily on 29.10.2004. After investigation he was tried by Summary Court Martial (for short called the ‘SCM’) on 14.3.2005 and was awarded sentence of dismissal from service. The petitioner filed Writ Petition No. 58520 of 2005 in the High Court of Judicature at Allahabad which was dismissed by order dated 25.10.2007 for want of territorial jurisdiction. The petitioner thereafter filed Writ Petition

No. 3273 of 2009 in Karnataka High Court which transferred the case to the Kochi Bench of the Armed Forces Tribunal vide its order dated 26.3.2010 and was renumbered as Transferred Application No. 187 of 2010. The Kochi Bench of this Tribunal by order dated 31.3.2011 ordered that the case be placed before the Chairperson of this Tribunal for considering the request to transfer the case before the Lucknow Bench of this Tribunal. The Principal Bench of this Tribunal vide order dated 12.5.2011 transferred the case to this Bench and the case has been renumbered as Transferred Application No. 80 of 2011.

3. The applicant through the writ petition and the pleadings put forth by learned counsel for the applicant, Shri R. Chaubey, stated that he was enrolled on 17.11.1983 and as Driver and served in different parts of the country satisfactorily. In July, 2004 he applied for leave which was not granted to him. His mother was seriously ill and his father was admitted in Command Hospital, Udampur, on 17.6.2004. Forced by the circumstances, he proceeded home without leave. Once conditions of his parents improved, he reported for duty on 29.10.2004 at ASC Centre and College, Bangalore, since he had not been permitted to rejoin the Unit. The petitioner stated that his mother subsequently died on 25.5.2005. The petitioner was tried by SCM on 14.3.2005 which

awarded sentence of dismissal from service. The petitioner pleaded that the punishment was too severe and was disproportionate to the alleged gravity of misconduct and requested that the reliefs, as prayed for, be granted to him.

4. The respondents, through their counter affidavit and pleadings of learned Standing Counsel as well as Major Narender Singh, Departmental Representative, stated that the petitioner had absented himself without any leave. The respondents also stated that the petitioner is a habitual offender and had been earlier punished on four occasions, which are as follows :

AA SEC	Punishment awarded	Dt of award	Total period of absence
39(b)	28 days RI & 14 days pay fine.	19 Sep 87	26 days
39(b)	28 days RI & 14 days pay fine.	30 Jul 90	324 days
63	28 days RI & 14 days pay fine.	02 Aug 92	-
39(a)	Severe reprimand & 14 days pay fine.	09 Jun 04	24 days

5. These punishments seem to have had no deterrence effect on the petitioner and he committed the same offence of being absent without leave in July, 2004. The petitioner was detailed on 9.7.2004 with his Ambulance vehicle for conveyance of patients from 92 Base Hospital, Srinagar to Jammu. On 17.7.2004 he absented himself without leave from 250 Transit Camp at

Udhampur and his Ambulance vehicle was found standing in the convoy ground. Later, the petitioner surrendered voluntarily to ASC Centre and College, Bangalore, on 29.10.2004.

6. After following the due procedure and investigations the petitioner was tried by SCM on 14.3.2005. The court, after going through the record of the service of the petitioner and having found that the applicant had failed to justify the unauthorized absence, had no hesitation in awarding the sentence "to be dismissed from service".

7. The petitioner was habitual offender and the fact that he had proceeded on unauthorized leave was admitted by him. He produced no documents in support of the illness of his mother. His father was admitted in Command Hospital where visitors are permitted only for one hour in the evening every day. The respondents state that it is not understood how did the petitioner contribute to his father's care by becoming absent without leave. While awarding punishment the court had taken into account the fact that the petitioner was not only a habitual offender but was also undesirable as he had four red ink entries while serving in Counter Insurgency areas in the Army.

8. Heard both sides and perused the documents.

9. The petitioner in his prayer has requested quashing of the order of dismissal and to reinstate him in service. The SCM

proceedings have not been challenged. Also the charge-sheet has not been challenged. We, therefore, infer that the charge-sheet was correctly framed and the SCM proceedings were in accordance with the laws and procedure and there was no infirmity in them.

10. The petitioner has been punished four times earlier, three of which were under Section 39 of the Army Act which relates to offences of unauthorized absence. The petitioner showed no improvement. The Commanding Officer in his "Memorandum" in terms of Army Order No. 309 of 1973 has noted as under :

*"7. In spite of having been punished four times earlier as described at para 6 above, the punishments did not have any deterrent effect on him and he continued to repeat the same offence without any regard for consequences. The NCO, by committing the offences repeatedly has dared to question the authority of the establishment and was sending a wrong message to his peers and subordinates to indulge in such acts of indiscipline.*

*8. No. 13887588-F Nk/MT Subhash Kushwaha was therefore tried on the fourteenth day of March 2005 by a duly constituted SCM. After going through the evidence on record and his acceptance of offence during he conduct of the SCM proceedings, it was necessary in the interest of justice to hand out an exemplary punishment to him. The NCO was remorseless during the conduct of the SCM and declined to make any statement or plea for mitigating of punishment. His history sheet read in conjunction with his present offence and displayed defiant attitude have all made the court to arrive at the conclusion that his continued service will be detrimental to the discipline and*

*well being of the Indian Army and consequently to the State of India. The Court therefore had no hesitation in awarding No. 13887588-F Naik/Driver (Mechanical Transport) Subhash Kushwaha, the punishment “to be dismissed from the service”; an award that would sufficiently meet the ends of justice”*

11. In the case of **Vidya Prakash v. Union of India and others** reported in *AIR 1988 SC 705* wherein the appellant had been absent from duty without leave and had been punished for the same offence on four earlier occasions, was punished with dismissal from service. The Hon’ble Supreme Court held *“The submission that the punishment is disproportionate to charge is wholly unsustainable.”* and upheld the punishment awarded to the appellant.

12. The petitioner in the instant case by absenting himself from duty in a field area and abandoning the vehicle on his charge committed a serious act of indiscipline and showed utter disregard to not only his duty but also towards the patients that he was charged to transport from Srinagar to Jammu. Dereliction of duty indicates his utter lackadaisical attitude towards service. The punishments awarded earlier seem to have had no impact on his conduct. He was a NCO and, therefore, should have shown greater responsibility in his behaviour. He was serving in an intense operational area which makes the offence of absenting

himself without leave and abandoning his vehicle even more serious. There is no justification for seeking leniency for such a serious act of indiscipline and we find no merit whatsoever in the applicant's case.

13. Accordingly, the Transferred Application is dismissed without any order as to costs.

(Lt. Gen. A.M. Verma)  
Member(A)

(Justice Abdul Mateen)  
Member (J)

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