

Court No. 1
RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 315 of 2018

Friday, this the 1st day of April, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

No. 628315-B Sgt Anand Kumar Yadav IAF/P of 16 Wing, AF attached to 33 Wing, Air Force
R/o House No. 80, Lane No. 4, Ashok Nagar, Post – Ashok Nagar, District – Etawah (UP)

..... Applicant

Ld. Counsel for the Applicant : **Shri Yashpal Singh**, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence (Army), New Delhi-11.
2. The Chief of Air Staff, Air Force Headquarters, Vayu Bhawan, Rafi Marg, New Delhi.
3. Air Officer Commanding-in-Chief South Western Air Command, Indian Air Force, Vayu Shakti Nagar, Lekawada, Gandhi Nagar (Gujrat)-382042.
4. Air Officer Commanding, 33 Wing, Air Force, AF Stn, Jamnagar.
5. Director of Air Veterans, Air HQ, AFRO Building, Subrato Park, New Delhi.
6. Officer-in-Charge, Air Force Records Office, AFRO Building, Subrato Park, New Delhi.

..... Respondents

Ld. Counsel for the Respondents : **Dr. Shailendra Sharma Atal**,
Central Govt Counsel

ORDER

1. The instant Original Application has been filed on behalf of the applicant 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 reinstate the petitioner/applicant by quashing the speaking order no. 01/2018 dated 23.01.2018 passed by R.K. Dhir, Air Marshal, Air Officer Commanding-in-Chief, South Western Command, Indian Air Force (Respondent No. 3) which was communicated by Sanjay Chauhan, Air Commodore, Air Officer Commanding, 33 Wing Air Force (Respondent No. 4) vide their letter dated 30.01.2018 (collectively annexed as Annexure No. A-1).
- (b) Issue/pass an order or direction of appropriate nature converting the dismissal of applicant into discharge with all consequential benefits.
- (c) Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case..
- (d) Allow this application with costs.”

2. The applicant was enrolled in the Indian Air Force on 01.04.1997. The applicant while on leave on 17.10.2014 was arrested by Crime Branch of Jamnagar under Section 65 and 66 of Bombay Prohibition Act, 1949 for keeping illegal possession of 63 bottles and 10 liters lose IMFL. A FIR was lodged by the Local Crime Branch vide FIR No. 8699/14 dated 17.10.2014. In pursuance to FIR, the applicant was sent to jail, however, on 20.10.2014, he was granted bail. On 21.10.2014, after grant of bail, the applicant reported for duty at 33 Wing Air Force. Thereafter, an application under Section 475 of Code of Criminal Procedure was filed on behalf of 33 Wing Air Force for handing over of the applicant and subsequent trial by Court Martial. Thereafter, a Show Cause Notice under Section 20(3) of Air Force Act, 1950 read with Rule 18 of Air Force Rules, 1969 was issued to the applicant. The applicant replied the Show Cause Notice (SCN)

vide reply dated 08.09.2017. The competent authority without considering the facts and circumstances and reply to the SCN has passed an illegal and arbitrary order of dismissal vide order No. 1/2018 dated 23.01.2018 under Section 20(3) of Air Force Act, 1950, read with Rule 18 of the Air Force Rules, 1969. The mercy petition of applicant dated 31.01.2018 and representation dated 23.02.2018 were considered by the Chief of Air Staff in its entirety and were rejected being devoid of merit and lacking in substance. Being aggrieved, the applicant has filed the present Original Application to convert order of dismissal into discharge.

3. The submission of the learned counsel for the applicant is that applicant was promoted to the rank of Sergeant on 01.04.1997. The applicant has also been granted extension of 12 years service. The applicant has good record of service except two minor punishments and accordingly he has been awarded various medals and decorations during his 34 years and 10 months long service in the Indian Air Force. The applicant's leave was sanctioned from 07.10.2014 to 24.10.2014 and on 17.10.2014 when he was at a hired room at Defence Colony, Jamnagar, some local Crime Branch policemen came in civil dress and took to him at his office at Jamnagar and arrested him under Section 65 and 66 of Bombay Prohibition Act, 1949 for keeping illegal possession of 63 bottles and 10 liters lose IMFL. A report was lodged by the Local Crime Branch vide FIR No. 899/14 dated 17.10.2014. The applicant informed the personnel of Crime Branch that he has arranged above quantity of liquor for marriage ceremony of his daughter and showed invitation

card of marriage but the plea of the applicant was not accepted by the personnel of Crime Branch. In pursuance to FIR, the applicant was sent to jail, however, on 20.10.2014, he was granted bail. On 21.10.2014, after grant of bail, the applicant informed to MWO OP Singh, Assistant Adjutant 33 Wing Air Force and as instructed by him, he reported to Orderly Room of 33 Wing Air Force for duty. Thereafter, an application under Section 475 of Code of Criminal Procedure was filed on behalf of 33 Wing Air Force for handing over of the applicant and subsequent trial by Court Martial.

4. Learned counsel for the applicant further submitted that the 3rd Additional Civil Judge and Judicial Magistrate, First Class, Jamnagar vide order dated 08.09.2015 allowed the application and ordered that accused persons (1 to 9) and original case be handed over to the authorized officer of 33 Wing Air Force on behalf of Sanjay Nimesh, Air Commodore, AOC for Court Martial proceedings after receipt of acknowledgement under Section 475 of Code of Criminal Procedure. Thereafter, a Show Cause Notice under Section 20(3) of Air Force Act, 1950 read with Rule 18 of Air Force Rules, 1969 was issued to the applicant after lapse of about two years from taking over the case from civil authority. The applicant replied the Show Cause Notice (SCN) vide reply dated 08.09.2017. The competent authority without considering the facts and circumstances and reply to the SCN has passed an illegal and arbitrary order No. 1/2018 under Section 20(3) of Air Force Act, 1950, read with Rule 18 of the Air Force Rules, 1969 without jurisdiction and without applying the mind in the present case. In para 10(f) of speaking order of dismissal, the competent authority

has recorded the reasons as “Your further retention in service is not desirable”. The discharge of the applicant was to be carried out under Rule 15 and not as per Rule 18 of Air Force Rules, 1969.

5. Learned counsel for the applicant submitted that it is also relevant to mention that Rule 18 is only applicable where the conduct of an applicant subject to Air Force Act had led to his conviction by a Criminal Court or by a Court Martial. Since in the instant case neither the criminal court has completed the trial in Criminal Case No. 8699/2014 nor Air Force authorities after taking the accused persons in their custody, tried them by a court martial and hence, the dismissal of applicant is illegal, arbitrary, bad in law and unjustifiable. He also submitted that punishment of dismissal from service awarded to the applicant is not proportionate and against the law laid down by the Hon’ble Apex Court, various High Courts as well as Armed Forces Tribunals. The Court of Inquiry found the applicant for illegal trading of liquor and unlawfully acquiring liquor, however, no witness has been produced by the Air Force authorities in Court of Inquiry to establish the factum of illegal trade of liquor. It is also submitted that other co-accused have been given lenient and lesser punishment, none of them have been dismissed or removed from service while applicant has been dismissed. The applicant has heavy responsibility over his shoulders for marriage of his one girl, education of his son and looking after his family members. Due to dismissal from service, applicant is also unable to secure any alternate job to earn bread and butter for his family. Therefore, he pleaded that dismissal order of the applicant be converted into discharge with all consequential benefits.

6. Learned counsel for the respondents submitted that a Court of Inquiry was conducted to inquire into the circumstances under which the applicant was arrested by local Crime Branch, Jamnagar for illegally possessing of large quantity of unauthorized IMFL (63 bottles and 10 liters of loose liquor) and applicant was found blameworthy by the said Court of Inquiry. The Court of Inquiry had recommended that the case may be taken over under concurrent jurisdiction as per Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1978 and suitable disciplinary action may be initiated against the applicant.

7. Learned counsel for the respondents further submitted that the competent authority, i.e. AOC-in-C HQ SWAC, IAF held the view that applicant was involved in undesirable activities which were illegal and prejudicial to service discipline, norms and ethos and were unbecoming of a member of a combatant force like IAF. The AOC-in-C was of the opinion that while trial of a Court Martial was inexpedient but his further retention in the Air Force was undesirable. Consequently, a Show Cause Notice dated 23.08.2017 was served under Section 20(3) of AF Act, 1950, read with Rule 19(1) of the AF Rules, 1969 for his act of misconduct. The AOC-in-C SWAC, IAF issued speaking order No. 01/2018 dated 23.01.2018 and accordingly, applicant was dismissed from service w.e.f. 30.10.2018. Subsequently, AOC-in-C, SWAC has also accorded his approval in terms of Para 163 of AFO 03/2008 to return the criminal case that

was taken over under the concurrent jurisdiction, to the civil authoritative for trial in accordance with law. Accordingly, the subject case was returned to Additional Civil Judge & Judicial Magistrate, District Court, Jamnagar vide 33 Wing, AF letter dated 09.04.2018 to ensure that the accused persons in this case do not escape the attention of the law. The mercy petition of applicant dated 31.01.2018 and representation dated 23.02.2018 were considered by the Chief of Air Staff in its entirety and were rejected being devoid of merit and lacking in substance. He pleaded for dismissal of O.A.

8. We have heard learned counsel for the parties and perused the material on record including recommendations of Court of Inquiry.

9. Learned counsel for the applicant has pointed out some procedural irregularities in the arguments, but there is no argument as to how his defence has been prejudiced by such procedural irregularities, unless and until any prejudice is caused, every irregularity cannot be a ground to justify the interference of court.

10. The Hon'ble Supreme Court in the case of **Major G.S. Sodhi vs. Union of India** (1991) 2 SCC 382) has observed in para 21 as under :

"It must be noted that the procedure is meant to further the ends of justice and not to frustrate the same. It is not each and every kind of defect preceding the trial that can affect the trial as such."

11. The aforesaid view expressed by the Hon'ble Supreme Court in the case of Major G.S. Sodhi (supra) has again been followed by the Hon'ble Apex Court in the case of **Union of India & ors vs. Major A. Hussain** [1998] (1) SCC 537], wherein the Hon'ble Apex Court has observed as under :

“In G.S. Sodhi's case this Court with reference to Rules 22 to 25 said that procedural defects, less those were vital and substantial, would not affect the trial. The Court, in the case before it, said that the accused had duly participated in the proceedings regarding recording of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the accused.”

12. Now we come to the alternative arguments of the learned counsel for the applicant, which is on the point of disproportionate punishment. Learned counsel for the applicant has also argued that the dismissal order dated 23.01.2018 passed by AOC-in-C has only inflicted the punishment of dismissal from service and has not inflicted any other punishment, therefore, keeping in view the long service of approx 35 years of the applicant, entire good service record except two minor punishments and nature and gravity of offence for keeping illegal possession of 63 bottles and 10 litres loose IMFL for his daughter's marriage, the punishment of dismissal from service is too harsh. In support of his arguments, learned counsel for the applicant has placed reliance on the pronouncement of Hon'ble Supreme Court in the case of **Major G.S. Sodhi vs. Union of India** (Criminal Misc. P.No.8905 of 1990) decided on 19.03.1991, wherein the Hon'ble Supreme Court has held as under :

“3. A similar order was also passed in Religious Teacher Ex N. Sub. R.K. Sharma v. The Chief of the Army Staff and Ors. (Cr. M.P. No. 349/80 in W.P. (Crl.) No. 244/80 dated 29.4.80), by a Bench of two Judges of this Court. While dismissing the writ petition, the Bench observed that "the Court Martial has not inflicted a punishment on him of forfeiture of pension or other service benefits and counsel for the other side has assured the Court that whatever the pension and other service benefits are permissible to the petitioner under the law will be given to him.”

4. In the instant case also, the Court Martial has not inflicted any other punishment of forfeiture of pension or other service benefits of the petitioners. Therefore they are also entitled to these benefits. Accordingly the respondent is directed to pay the entire pension, gratuity and provident fund under the rules to each of these petitioners within three months from the date of receipt of this order. Both the criminal miscellaneous petitions are accordingly disposed of.”

13. Reliance has also been placed in the pronouncement in the case of **S. Muthu Kumaran vs. Union of India & others** [Civil Appeal No.352 of 2017] decided on 17.01.2017. In this case, the applicant was involved in the recruitment racket in Jammu and in that background, the Hon'ble Supreme Court has observed in para 11 as under :

“11. No doubt, the dismissal order passed against the Applicant was within the powers of the concerned authorities. However, as far as the dismissal from service is concerned, it is an extreme punishment imposed against the applicant. 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 applicant, so as to claim any re-instatement into service. Even if he was discharged from service, in lieu of dismissal from service, the applicant cannot seek for any 6 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 applicant would get the benefits like gratuity and other attendant benefits for the service rendered by him and the applicant would also get an opportunity to lead honourable life in the society.”

14. In the instant case, there is no dispute to the fact situation that except the punishment of dismissal, no other punishment was inflicted on the applicant. The applicant was found in possession of illegal liquor in Crime Branch raid and was arrested. Thereafter, a Court of Inquiry was convened by the Air Force authorities and a Show Cause Notice was issued and thereafter, order of dismissal was passed by the AOC-in-C as per Air Force Act, 1950. The applicant has pleaded that liquor found in his possession was collected through other persons of the unit and was kept for utilization during marriage ceremony of his daughter for which he produced some proof for upcoming marriage. The witnesses in Court of Inquiry have also conceded that they have given the liquor bottles to the applicant for

his daughter's marriage for which they were paid the cost of bottles and they were not for sale or for any other purpose.

15. We feel and focus on the following three main points :-

(a) A Court of Inquiry was convened and it had recommended for suitable disciplinary action to be initiated against the applicant. Air Force nevertheless proceeded administratively and dismissed him from service.

(b) The applicant was dismissed administratively under Section 20(3) of AF Act, 1950, read with Rule 19(1) of the AF Rules, 1969 as it was considered impractical and inexpedient to conduct Court Martial of the applicant. Thus, neither charges were framed nor any trial conducted.

(c) The respondents have stated that they have returned the case to Additional Civil Judge & Judicial Magistrate, District Court, Jamnagar vide letter dated 09.04.2018 with a view to proceed against the accused persons in this case in accordance with law, for the reason that unauthorised possession of 63 bottles and 10 liters of loose liquor is violative of provisions of Section 65 and 66 of Bombay Prohibition Act, 1949, which proceedings have not attained finality.

For all these reasons, we feel that the offence committed by the applicant for keeping liquor bottles does not seem to be of so grave a nature and, therefore, punishment of dismissal awarded to the applicant seems excessive. In any case the accused may still face

the consequences for violating Section 65 and 66 of Bombay Prohibition Act, 1949 in due course.

16. Keeping in view the pronouncements of the Hon'ble Supreme Court, mentioned above, and the facts and circumstances of the case including good service record and length of service of the applicant, these aspects of the case are an important distinguishing features which renders the punishment of dismissal from service to be harsh and disproportionate to the offence committed by the applicant.

17. Resultantly, the Original Application deserves to be partly allowed and is hereby partly allowed. The order of dismissal from service of the applicant awarded by the Air Officer Commanding-in-Chief, South Western Command, Indian Air Force dated 23.01.2018 and communication order of the Air Officer Commanding, 33 Wing, Air Force dated 30.01.2018 are hereby modified only to the extent that the order of dismissal shall stand converted into the order of discharge with consequential benefits.

18. In the circumstances of the case, there shall be no order as to costs.

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

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: April, 2022
SB