

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No. 3
Judgment Reserved

Transfer Application No. 1227 of 2010

Monday the 16th day of February, 2015

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

Sepoy Madan Prasad (MT) S/O Ramjee Yadav, Service No-13886489,5009 Coy ASC (Comp) C/O 56 APO. Present Address – ADA Colony Neem Sarai, Segam Sarai, Allahabad (U.P.).

..... Applicant

By Shri S.K. Pandey, counsel for the applicant.

Versus

1. Union of India through the Chief of the Army Staff, Sena Bhawan, New Delhi.
2. The Chief of the Army Staff, Sena Bhawan, New Delhi.
3. The General Officer Commanding-in-Chief, (GOC-in-C), Mukhyalaya Madhya Kaman, Headquarters, Central Command, Lucknow - 226002.
4. Commanding Officer, 5009 Coy ASC (Camp), C/o 56 APO.
5. Commanding Officer, H.Q. Wing, Depot Coy (MT) ASC, Centre (South), Bangalore – 560007.

..... Respondents.

By Shri D.K. Pandey, counsel for the respondents, along with Capt. Priti Tyagi, Departmental Representative.

ORDER

1. This Writ Petition No. 3489 of 2002 was filed by the petitioner before the Hon'ble High Court at Allahabad. It has come on transfer before this Regional Bench at Lucknow and registered as Transferred Application No. 1227 of 2010. By means of this petition the petitioner has claimed the following reliefs :

"I. Issue a writ, order of direction in the nature of certiorari, quashing the impugned order dated 24/8/99 (Annexure-6 of the writ) and order dated 04-10-2001 (Annexure-7 of the writ) passed By Resp.no. 5 and 2 respectively.

II. issue a writ, order or direction as this Hon'ble court may deem fit, just and proper, in the fact and circumstances of the case in favour of petitioner.

III. award the cost of petition to petitioner."

2. The petitioner's case, in brief, is that he was enrolled on 4.1.1983 in Army Service Corps (ASC) as Mechanical Transport Driver. He served at various places in the country and had a fully satisfactory service record. There was no adverse entry in his records, he was not convicted by any Court Martial or Criminal Court and had never undergone any sentence of whatsoever in nature and had never been arrested for any offence. He was posted to 5009 CoyASC (Comp) in May, 1998. Respondent no. 4 was the Commanding Officer. The petitioner was granted annual leave from 8.11.1998 to 15.1.1999.

During his leave his wife fell ill and he, with full devotion, looked after her and arranged medical treatment and in the process he overstayed the leave granted to him. Therefore, according to the petitioner, he had sufficient cause to overstay the leave. Further, respondent no. 4 had powers to extend leave from the next year's annual leave quota. The petitioner had made a STD call on 13.1.1999 requesting for extension of leave, which was rejected and a letter telegram dated 18.1.1999 was sent by respondent no. 4. Immediately after getting his wife cured from ailment the petitioner claims that he returned on 18.2.1999 to the Unit at Joshimath and, thus, overstayed leave by 34 days. According to the petitioner this period of 34 days could have legally been regularized from the leave of 1999. However, according to the petitioner, he was not allowed to stay in Barracks of the Unit and he then came back home. Thereafter he went to Bangalore where he slept at the Railway Station for 13 days before he was allowed to join the ASC Centre (South), Bangalore. Disciplinary action was then initiated against him by respondent no. 5, which was, according to the petitioner, illegal as he should have been tried by respondent no. 4 and, therefore, the entire disciplinary proceedings are vitiated. Tentative charge-sheet was raised against the petitioner by respondent no. 5 under Section 39(b) of the Army Act on 8.7.1999, whereas respondent no. 5 had no power or authority to hear the charge and in this process respondent no. 5 exceeded his jurisdiction. The charge-sheet too, according to the

petitioner, is illegal since he had surrendered voluntarily and he had sufficient cause to overstay leave. The Summary of Evidence was not recorded in the prescribed manner.

3. Shri S.K. Pandey, learned counsel for the petitioner, during the pleadings, reiterated that respondent no. 5 did not have the power to try the petitioner and that the petitioner had sufficient cause to overstay leave and, therefore, the charge under Section 39(b) of the Army Act is not maintainable. He further argued that Note II of Section 120 of the Army Act lays down that Sepoy and Naik cannot be tried in an attached Unit. He further stated that this Note was removed in 2001. Learned counsel for the petitioner stated that no inquiry was conducted under the provisions of Section 106 of the Army Act and the charge was not heard under the provisions of Rule 22 of the Army Rules. He also claimed that Rule 34 of the Army Rules was not complied with as also the provision of Rule 115(2) of the Army Rules was also not complied with. The trial was conducted in a hasty manner and was over in 50 minutes. The trial had not been sanctioned by respondent no. 3 and the sentence awarded is disproportionate to the offence. Learned counsel for the petitioner cited several judgments in support of his case and submitted that the reliefs, as prayed for, be granted to the petitioner.

4. The respondents, vide their counter affidavit and pleadings by Shri D.K. Pandey, learned counsel for the respondents, along with

Capt. Priti Tyagi, Departmental Representative, presented the case of the respondents. In the counter affidavit the respondents have given parawise reply to all the issues raised by the petitioner. The counter affidavit admits that the petitioner was enrolled on 4.1.1983. The petitioner was a habitual offender as he had 4 red ink entries and one black ink entry before this trial. The details are as follows :

<u>Sl. No.</u>	<u>Army Act Section</u>	<u>Punishment Awarded</u>	<u>Date of Award</u>	<u>Period of Absence</u>
a).	63	03 days pay fine	13.7.87	-
b).	39(a)	28 days RI in	12.5.90	20 days
c).	39(b)	28 days RI and 14 days detention In military custody	10.12.90	11 days
d).	39(b)	07 days RI in Military Custody	17.11.95	07 days
e).	39(b)	Severe Reprimand and 14 days pay fine	28.8.98	150 days
f).	39(b)	To be dismissed from the service.	24.8.99	108 days

The petitioner had availed his full quota of annual leave of 1998 when he was granted leave upto 16.12.1998. On his request this was further extended till 15.1.1999 by granting him advance annual leave from the quota of 1999. The petitioner had telephoned requesting for further leave, which could not be granted to him as he had not served in the Unit even for a day in the year 1999 and, therefore, he had to come

back to the Unit. This was conveyed to the petitioner and a letter telegram to this effect was sent to him on 18.1.1999, annexed as Annexure-1 to the writ petition. The Unit was deployed in operational area in high altitude and the petitioner had not approached his CO with medical documents for the treatment of his ailing wife. The issue of his wife being ill appears to be an after thought by the petitioner. The respondents stated that there is no report, record or proof that the petitioner reported to the Unit on 18.2.1999. He voluntarily surrendered on 3.5.1999 at ASC Centre (South), Bangalore. In the statement, given by the petitioner at the Summary of Evidence, there is no mention of his reporting to the Unit on 18.2.1999. The Court of Inquiry under the provisions of Section 106 of the Army Act was held on 15.2.1999 to investigate the circumstances under which the petitioner overstayed leave. The court opined that the petitioner be declared deserter with effect from 16.1.1999. The petitioner's claim that he had no movement order when he went to ASC Centre (South), Bangalore, is untenable since he had overstayed leave and, therefore, couldnot have any movement order. The petitioner was attached legally to ASC Centre (South), Bangalore, Depot Coy (MT) after taking proper attachment order from the Formation Commander of the petitioner, as provided in Army Order 7/2000. The petitioner was handed over copies of charge-sheet and Summary of Evidence on 17.8.1999. Thus, the provision of Rule 34 of the Army Rules was fully

complied with as the trial was held on 24.8.1999. The trial by ASC Centre was just and proper and the petitioner's claim that respondent no. 5 did not have powers is not justified and rejected. The petitioner was given full opportunity to defend himself. He did not cross-examine any of the witnesses during the hearing of charge or Summary of Evidence. There was no defence witness during the SCM. As regards prior sanction of respondent no. 3 is concerned, the respondents have stated that no pre-trial advice is necessary in this case. As per policy letters on the subject and SAO-9/S/89 Centre Commandant is the competent authority to try a field deserter.

5. During the trial, according to the respondents, the petitioner had pleaded guilty and the provisions of the Army Act and the Rules were complied with. The respondents also stated that the minor punishments given to the petitioner for his earlier offences did not seem to have made any improvements and, therefore, he deserved to be treated more severely and, accordingly, the punishment awarded by SCM was just and appropriate. The respondents pleaded that the Transferred Application be dismissed being devoid of merit.

6. We have heard both the sides and examined the documents, produced by the respondents in original, and we find that the petition under Section 164(2) of the Army Act was rejected by the COAS on 4.10.2001. The sanction of Commander 9(1) Mountain Brigade was obtained as required, vide Army Orders 7/2000 for attachment with

Depot Coy (MT) ASC Centre (South), Bangalore, for finalization of the case against the petitioner and the sanction letter has been signed by Commander, 9(Indep) Mountain Brigade on 25.5.1999. The Court of Inquiry under the provisions of Section 106 of the Army Act was held on 15.2.1999 to investigate the circumstances under which the petitioner overstayed leave and the court had opined that he be declared deserter with effect from 16.1.1999. The charge was heard by the CO under the provisions of Rule 22 of the Army Rules on 8.7.1999 when the petitioner had declined to cross-examine any of the witnesses. The Summary of Evidence was recorded and the SCM was conducted by the CO HQ Wing Depot Coy (MT), ASC Centre (South), Bangalore, where the petitioner was attached.

7. On the petitioner pleading guilty, he was explained the implications of plea of guilt and the endorsement, as provided in Rule 115(2) of the Army Rules, was made in the SCM proceedings and the same has been signed by the petitioner.

8. We have gone through the citations provided by the learned counsel for the petitioner. In the case of **Union of India v. Maj Gen M.L. Yadav** reported in *AIR 1996 SC 1340* the witnesses were at Pune and the testimonies of the witnesses was essential for the case. Therefore, the trial was ordered to be conducted at Pune. In the instant case the petitioner surrendered at Bangalore and all material evidence was available at ASC Centre (South), Bangalore. Therefore, we find no

infirmity in the procedure and no equity with the above citation. Another case cited by the learned counsel for the petitioner is the case of **Ex Ln Vishav Priya Singh v. Union of India** reported in 147 (2008) DLT 202. Referring this judgment, learned counsel for the petitioner submitted that the petitioner could not be tried by the CO of attached Unit. Para 8 of this judgment is reproduced below :

“8. On the first question, two Single Benches of this Court have taken the view that an SCM cannot be held by the CO of a Unit to which the accused/delinquent did not belong. See Ex-Havildar Mahipal Singh v. Union of India and Hav. (AEC) S.K. Sharma v. Union of India 2002(1) Forces Law Judgment 308. The latter case was carried to the Division Bench by way of appeal and came to be reversed in Union of India v. S.K. Sharma. We have painstakingly perused this judgment of the Division Bench and, with respect, find that a rhetorical question has been raised but not answered. The discussion or dialectic is confined to these words –

“7. A bare reading of Regulation 381 and the operative words as set out in Regulation 381 makes it manifestly clear that the said regulation is only for the trial of deserters and in an eventuality where a deserter has to be tried by a Summary Court Martial, such deserter has to be tried by the Commanding Officer of that Unit only to which he belongs. How the procedure prescribed under regulation 381 for the trial of deserter can be applied for offences under Section 56(a) and Section 63 of the Act.”

9. Thus, we find that there is no equity in the instant case and the case cited by the learned counsel for the petitioner as the petitioner was not tried as a deserter. The other citations relate to there being no key

witness in the Summary of Evidence, non-compliance of Section 143 of the Army Act, violation of Rule 34 of the Army Rules, burden of proof, disproportionate punishment and non-compliance of Rule 115(2) of the Army Rules. We have scrutinized these too and find that these are not relevant to the instant case.

10. Reverting to the contentions and allegation raised by the petitioner and his counsel, we very carefully looked into each of these. The petitioner's contention that he never underwent any sentence of whatever nature and was never imprisoned is not sustainable as he had been awarded R.I. on three earlier occasions. This claim of the petitioner is, therefore, considered mischievous and to mislead the Court. Further the petitioner did not reveal the full truth when he stated that he had been granted annual leave till 15.1.1999 and had overstayed only for 34 days when he reported on 18.2.1999. The factual position is that the petitioner's leave was extended from 16.12.1998 to 15.1.1999 as advance leave from the quota of leave from the year 1999 and since he had not served a day even in the year 1999 he could not be given further leave from the quota of 1999. Incidentally he had only 30 days' balance of leave in 1999. Further there is no evidence brought on record that the petitioner did report to the Unit on 18.2.1999. The petitioner also failed to explain the time period between 18.2.1999 and 3.5.1999 when he eventually reported at the ASC Centre (South), Bangalore. We find that the petitioner has been economical with truth.

As regards 'sufficient cause' he has produced no proof or evidence to substantiate his claim regarding his wife's illness. Hence his argument on 'sufficient cause' is rejected. It is relevant to note the statement made by the petitioner in the Summary of Evidence, which is as follows :

"STATEMENT OF NO 13886489-M SEP/MT MADAN PRASAD

15. *I proceeded on B/A/L for 1998 from 08 Nov 98 to 16 Dec 98 to my home. I rang up my unit for 30 days adv of A/L of 1999 which was granted to me upto 15 Jan 99. Hence I was to report for duty in my unit on 15 Jan 99 at the evening roll call.*

16. *I did not go back to my unit on due date and became OSL due to my family's ill health. A big boil appeared on her right foot due to which her right foot had to be amputated. I then brought her home after her recovery. She is much better now. I have no medical documents of treatment of my wife.*

17. *I then left my home and came to Bangalore where I surrendered voluntarily on 03 May 99 at 1800 hrs at HQ Wing, ASC Centre (South) after remaining OSL for 108 days.*

18. *The above statement has been read over to the accused in the language he understands and he signs it as correct."*

11. It is clear from the statement that he had not made any attempt to report on 18.2.1999, as claimed by him in his petition and he has also not produced any document to support the claim that his wife was ill. The allegations raised by the petitioner with regard to non-compliance of Rules 34, 22 and 115(2) of the Army Rules are not sustainable. The entire disciplinary proceedings were conducted in the manner as prescribed by law and we find no infirmity in it. The punishment

awarded by the SCM is considered to be just and appropriate and not disproportionate to the offence. Accordingly, we find no merit in this petition. Accordingly, the Transferred Application is dismissed. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

PG.