

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Reserved.
(Court No. 3)

Transferred Application No. 1233 of 2010

Tuesday the 6th day of January, 2015

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

No. 13950892-H Ex. Sep/AA Lal Babu Singh, son of Late Inder Deo Singh, resident of Village and Post Majhariya, BUXAR (BHOJPUR).

..... Applicant

By Shri K.K. Mishra, counsel for the applicant.

Versus

1. Chief of Army Staff through OIC Legal Cell (Army), M.H. Compound, New Cantt., Allahabad.
2. GOC-in-C, Central Command through OIC Pension Cell (Army), HQ Allahabad Sub Area, Allahabad.
3. Chief Controller of Defence Accounts (Pension), Allahabad.
4. Lt. Col. S.C. Mohanty, Commanding Officer, 423 Field Ambulance, C/o 99 APO.
5. AMC Centre & Records, Lucknow (U.P.)

..... Respondents

By Shri D.K. Pandey, counsel for the respondents.

ORDER

1. The petitioner filed Civil Misc. Writ Petition No. 28096 of 1998 in the High Court of Judicature at Allahabad, Allahabad, which was subsequently received in this Tribunal by means of transfer under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as Transferred Application No. 1233 of 2010. In the writ petition (now Transferred Application) the petitioner prayed the following reliefs :

“(a) To issue writ order or direction in the nature of mandamus Commanding the Respondents to treat the Petitioner as having continued in colour service for 15 years (from 11 September 1980 to 31 August 1995), and payment of provisional pension.

(b) To issue Writ order or direction in the nature of mandamus commanding the Respondent No. 3 to release the dues of the petitioner treating him to have been discharged on completion of 15 years colour service.

(c) To issue a writ order or direction in the nature of certiorari summoning the records of fabricated Summary Court Martial Proceeding by the Respondent No. 5 dated 18th March 1995 including rejection order dated 3rd, March 1998 (Annexure-10) and quashing the same with all the consequential benefits to the petitioner and fixing the accountability of the respondent No. 5 based on the case Law reported in AIR 1996 SC 3538.

(d) To issue any other writ order or direction considered expedient and in the interest of justice and equity.

(e) To award cost to the petitioner.”

2. The respondents raised the issue of jurisdiction of this Tribunal, which was decided by this Tribunal, vide order dated 10.4.2013.

The operative part of the order reads as under:

“07- In view of above, we are of the opinion that the Tribunal has jurisdiction to entertain this T.A. and decide the case on merits. The pleadings are complete. List this case for hearing on 23.7.2013.”

3. The facts of the case, in brief, are that the petitioner was enrolled in the Army Medical Corps on 11.9.1980. On 23.7.1994 he was granted leave till 27.7.1994. Upon expiry of this leave, the petitioner did not report back to the Unit in accordance with the existing provisions and Apprehension Roll was issued on 9.8.1994, a Court of Inquiry under Section 106 of the Army Act was held and the petitioner was declared ‘absconder’. The petitioner rejoined the Unit voluntarily on 6.2.1995, after an absence of 195 days. The investigations were carried out in accordance with Rule 22 of the Army Rules. A Summary of Evidence was recorded and he was tried by the Summary Court Martial (called ‘SCM’ for brevity) on 18.3.1995 for an offence under Section 39(b) of the Army Act. During SCM proceedings, the petitioner pleaded ‘guilty’, was found ‘guilty’ by the court and was sentenced “to be dismissed from service”. The petitioner filed a statutory petition dated 18.9.1995 under Section 164(2) of the Army Act against “illegal/fabricated SCM”. When he did not get any response, he filed the aforementioned Writ Petition in the High Court of Judicature at Allahabad, in the year 1997 and the Hon’ble High Court, vide its order dated 28.10.1997, directed the respondents to decide the statutory

petition within three months from the date of receipt of that order. The petition was examined and was rejected by the Chief of the Army Staff (COAS), vide order dated 3.3.1998. Feeling aggrieved, the instant Writ Petition No. 28096 of 1998 was filed in the High Court of Judicature at Allahabad, which was subsequently transferred to this Tribunal on 13.8.2010.

4. The petitioner in his writ petition (now Transferred Application) has stated that he sought extension of leave, but did not receive any communication from respondent no. 4. He stated that he voluntarily reported back to the Unit, whereupon investigations were carried out and certain acts of commission and omission were carried out, just to cut-short his service. According to the petitioner there were irregularities in the investigation by Lt. Col. S.C. Mohanty, Commanding Officer, 423 Field Ambulance, respondent no. 4. According to the petitioner, his signature was obtained on a form which was in English language, the petitioner did not know the contents thereof, and thereby, according to the petitioner, the documents were fabricated. Summary of Evidence was recorded by the Commanding Officer himself, who, later, tried him in the SCM. The SCM commenced at 1000 hours on 18.3.1995 and concluded at 1300 hours on the same day. The charge-sheet was issued on 18.3.1995 itself, which is against the provisions of Rule 34 of the Army Rules. Nb Sub S.M.S. Yadav, who was a witness during investigation, was made

Friend of Accused during the trial, which is improper. The petitioner claims that he had insisted that he be allowed to be defended by a defence Counsel, but no heed was paid to his request. He served the Army for 14 years and 188 days before his dismissal from service and has referred to the case reported in **AIR 1995 SC 215** wherein it has been observed that overstay on leave should have been regularized, was not done in his case.

5. During final hearing of the case, Shri K.K. Mishra, learned counsel for the petitioner, challenged the SCM on the ground that the provisions of Rule 34 of the Army Rules had not been complied with. He stated that on this ground alone the SCM would be found to be illegal and liable to be quashed. He would state that the charge-sheet filed along with the SCM is dated 18.3.1995, the date on which the SCM was held. Thus, the provisions of Rule 34 of the Army Rules, which requires that the charge-sheet be handed over to the accused at least 96 hours in advance, was violated. Learned counsel for the petitioner read out from a Supreme Court judgment substantiating his case that in case Rule 34 of the Army Rules is not complied with, the SCM deserves to be quashed. The petitioner received a charge-sheet and a copy of summary of evidence on 13.3.1995, as borne out from the copy of the receipt attached to the proceedings by the respondents. However, the charge-sheet against which he was tried, was dated 18.3.1995 and could not have been handed over on 13.3.1995, thus,

violating the statutory requirement of 96 hours. According to the learned counsel, the petitioner should have been given the same charge-sheet, on which he was tried on 18.3.1995, on 13.5.1995 or on a date before that, which was not done. Hence, this statutory provision has been violated. Learned counsel for the petitioner also stated that this Tribunal is not responsible for discipline of the Army, but only to pass orders based on legal validity of the trial. Learned counsel for the petitioner requested that SCM be quashed and the relief prayed for be granted to the petitioner.

6. The respondents in their counter affidavit admitted the basic facts, i.e. date of enrolment, leave and date of rejoining voluntarily, overstaying by 195 days. The absence of 195 days was investigated and Summary of Evidence was ordered by the Commanding Officer. The petitioner was informed about trial by SCM on 13.3.1995 vide 423 Field Ambulance letter dated 13.3.1995, which was handed over to him on 13.3.1995. A receipt to this effect is enclosed as Annexure '3' to the counter affidavit. The petitioner was also handed over a copy of charge-sheet and a typed copy of Summary of Evidence from pages 1 to 8. This fact also has been included in the receipt given, which is annexed as Annexure '3' to the counter affidavit. The respondents would state that there was no request for extension of leave received from the petitioner. The procedure as laid down in the Army Rules was strictly followed and the petitioner was afforded every opportunity to

cross-examine the witness during recording of Summary of Evidence. The statement of the petitioner was recorded under Appendix-A to the Army Order 70/84 in the presence of two independent witnesses. Nb Sub S.N.S. Yadav was merely present during the investigation and he was not a witness. The petitioner did not produce any witness/evidence in defence. The SCM was strictly in accordance with the laid down statutory provisions and was totally fair and impartial.

7. On the issue of charge-sheet not being handed over to the petitioner 96 hours in advance, the respondents would state that on 13.3.1994 a charge-sheet was handed over to the petitioner. However, it was discovered later that there was a clerical mistake and a fresh charge-sheet was made on 18.3.1995. The charge-sheet dated 13.5.1995 was on wrong form and this fact had been explained to their superiors. Capt. Priti Tyagi, Departmental Representative, also brought out that under the provisions of Rule 149 of the Army Rules if the charges have been approved by the Commanding Officer notwithstanding any defect or objection, technical or other, the finding and sentence of the Court Martial shall not be invalid by reasons only of a failure to administer an oath or affirmation to the interpreter etc. Rule 149 of the Army Rules also states that nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules.

8. Heard both sides and examined the documents.

9. While we agree that it is the responsibility of the authorities in the Army to ensure discipline, when an issue comes before a Court or Tribunal, it becomes responsibility of the Court to ensure that highest standard of discipline is maintained in the Army. The Tribunal also needs to examine whether or not the punishment awarded is fair.

10. According to learned counsel for the petitioner the sole ground on which SCM deserves to be quashed is non-compliance of Rule 34 of the Army Rules, which reads as under :

*“34. **Warning of accused for trial.** – (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.*

The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.

(2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.”

11. Before we examine the issue of Rule 34 of the Army Rules, we find that the investigations, recording of Summary of Evidence and SCM were conducted as statutorily laid down, therefore, there was no infirmities in the proceedings. During the Summary of Evidence, five witnesses were examined and the petitioner was given an opportunity to cross-examine them. He did not cross-examine any witness. He was also given an opportunity to make statement during recording of

Summary of Evidence but he did not make any statement. During the SCM also, he did not make any statement and he pleaded guilty to the charge. From the SCM proceedings, attached as Annexure '7' to the writ petition, we find that the petitioner was tried twice earlier for offences under Section 39(b) of the Army Act, the instant case being the third such offence.

12. Reverting to the issue of Rule 34 of the Army Rules, it requires that the interval between being informed of the charge and his arraignment should not be less than 96 hours. A copy of the charge-sheet has to be given to him. There is no stipulation that the same charge-sheet on which he was tried should be handed over 96 hours in advance. In the instant case receiving a copy of the charge-sheet and Summary of Evidence on 13.3.1995 is established by the receipt signed by him on 13.3.1995. Further, the issue of charge-sheet being handed over to him 96 hours in advance was also raised by the superior HQ, which is HQ 23 Inf Div (A Br), vide their letter dated 26.6.1995. In response to this letter 423 Field Ambulance in their letter dated 30.6.1995 stated as under :

“3.(d) Para 7 – The accused was handed over the “charge sheet”(erroneously typed on the body of offence report form (IAFD-901) instead of a plain paper) and copy of SOR on 13 Mar 95 that is 96 hours before the trial as required under AR 34 and receipt for the same has been obtained (copies of receipts enclosed for perusal). The error came to light just before the commencement of the trial on 18 Mar 95 for which proper charge sheet on plain paper was typed, but then since so many docus were signed on the same date due to oversight the charge sheet was also dated 18 Mar 95. The content of the charge being

the same as given in col 2 of the offence report/charge sheet served to him, the same may please be accepted. The oversight is regretted.”

The aforementioned response by the Unit was accepted by the higher HQ and the SCM proceedings were duly countersigned. In the rejoinder affidavit the petitioner chose not to challenge the details of charge being intimated to him, as are stated in paragraph 13 of the counter affidavit.

13. Capt. Priti Tyagi, Departmental Representative, and learned Standing Counsel vehemently stated that the case is covered under Rule 149 of the Army Rules, which reads as under :

*“149. **Validity of irregular procedure in certain cases.** – Whenever, it appears that a court-martial had jurisdiction to try and person and make a finding and that there is legal evidence or a plea of guilty to justify such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid, they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules.”*

14. It is evident that the petitioner was well aware that he would be tried on 18.3.1995 for the offences that he had committed. This information had been officially given to him on 13.3.1995 as required

by Rule 34 of the Army Rules. We, thus, find no infirmities in the compliance of the statutory provisions as given under Rule 34 of the Army Rules. The SCM proceedings suffer from no infirmity.

15. We note that the petitioner had served for 14 years 188 days as mentioned in the charge sheet before he was dismissed from service following award of sentence by the SCM. Undoubtedly, being absent without leave or overstaying leave is an act contrary to norms of discipline in the Army, and such tendencies need to be ruthlessly curbed. Punishment for such an offence must therefore be awarded accordingly. However, while awarding a punishment for the offence of overstaying of leave, the punishment awarding authority should consider the length of service of the accused and then award punishment which should be commensurate with the offence and also, the impact of the punishment on post-retirement life of the accused should be factored in. In the instant case, we find that had the petitioner been allowed to serve for another few months, he would have been eligible for pensionary benefits enabling him to lead a more dignified post- retirement life befitting the status of an ex-soldier. Accordingly, we consider the punishment of dismissal too harsh for the offence of overstaying considering the length of service of the petitioner. We are of the view that the punishment of dismissal deserves to be quashed.

16. Accordingly, the T.A. is partly allowed. We quash the punishment of dismissal awarded by the SCM to the petitioner. The

order of the COAS dated 03 March 1998 attached as Annexure VI to the Counter Affidavit too is quashed. The petitioner will be deemed to have been in service till he attained the service making him eligible for pension and related benefits which shall be granted to him within three months from today. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

PG.