

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No 3
JUDGMENT RESERVED

Transferred Application No. 128 of 2010

Tuesday the 19th day of May, 2015

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

No. 14807242-H Ex Sep(Dvr)(MT) Mohitosh Mondal son of Late
Ananda Mondal Ex 5031 ASC Bn, C/O 56 APO.

..... Applicant.

By Col(Retd.) Ashok Kumar and Shri Rohit Kumar, counsel for the
applicant.

Versus

1. Chief of the Army Staff through OIC Legal Cell (Army), HQ
Allahabad Sub Area, Allahabad.
2. GOC-in-C, Central Command Controlling/ Through ASC
Centre (N) Paharpur.
3. Commandant-cum-CRO, ASC Centre (S) & Records,
Bangalore.
4. CCDA (Pensions) Draupadi Ghat Allahabad.
5. IC-30384-P Lt Col Mohan Kumar Adm Bn Cdr ASC Centre
(South) Through Officer-in-charge Legal Cell (Army) Carriappa
Road, Allahabad.
6. Union of India, Through Secretary, Ministry of Defence, New
Delhi.

..... Respondents.

By Shri R.S. Mishra, counsel for the respondents, along with Capt.
Ridhishri Sharma, Departmental Representative.

ORDER

1. This Transferred Application has been filed by the petitioner seeking the following reliefs:-

“(i) Issue a writ, order of direction in the nature of mandamus commanding the respondents to treat the petitioner as having continued in colour service with all the consequential benefits to the petitioner.

(ii) Issue a writ, order or direction in the nature of certiorari summoning the records of the impugned Summary Court Martial and impugned actions of the respondents anterior to the verdict as well as posterior to the verdict, including the rejection order of the Chief of the Army Staff dated 5th July, 2001, and order rehabilitation of the petitioner in colour service with all the consequential benefits.

(iii) Issue any other writ, order or direction consider expedient and in the interest of justice and equity.

(iv) Award exemplary cost to the petitioner, because of the vivid malfeasance committed by the respondents.”

2. The factum matrix is that the petitioner was enrolled on 26.2.1993. In October 1998, he was posted to 5031 ASC

Battalion in Jammu and Kashmir. He was granted leave with effect from 18.10.1998 to 01.11.1998. After expiry of the leave, he did not rejoin his unit and surrendered at ASC Centre(South), Bangalore on 4.8.2000 after overstaying leave by 642 days. He was tried by Summary Court Martial on 15.12.2000 and was found guilty and sentence of dismissal from service was awarded to him. He filed statutory petition under Section 164 (2) on 22.01.2001 which was rejected vide an order dated 5.07.2001. Thereafter he filed writ petition no. 33597 of 2001 at Allahabad High Court which was transferred to this bench of the AFT and re-numbered as Transferred Application No. 128 of 2010.

3. The petitioners' case is argued by his counsel Shri Rohit Kumar and Col.(ret'd.) Ashok Kumar. The petitioner stated that while he was on leave he suffered loss of memory resulting in incoherent behavior. He got himself treated by Dr. Samir Dhar and thereafter by Dr. S.S. Nag till 16.07.1999 when he was declared fit to resume his normal duties with effect from 19.07.1999 vide certificate given by Dr. S.C. Nag, Consultant Psychiatrist of Burdwan. This Certificate was signed on 16.07.1999. The Petitioner then travelled to Bangalore and reported to ASC Centre (South) Bangalore on 04.08 1999 but

was not permitted to join the Unit. He was forced to sleep at Railway Station and also worked as Portor/ Coolie to make both ends meet. The Petitioner claims that during this period his head was shaven by the authorities of ASC Centre(South) Bangalore but he was not permitted to join the duty. He ran short of money and returned home from where he was sent back to the Centre again by his family members second time . The petitioner produces Railway Tickets for travel from Howrah to Bangalore on 18.09.1999, 20.12.1999, 13.2.2000, 10.4.2000 and 18.06.2000. There are two tickets for travel on 13.02.2000 for which he claims that his mother accompanied him to Bangalore on 13.02.2000 . On 4.8.2000, he surrendered at ASC Centre (South) Bangalore in uniform. Thereafter he was tried under Army Act Section 38 and was dismissed from service on the following charge:-

“ARMY ACT
SECTION 38 (1)

DESERTING THE SERVICE

In that he,

At field, on 02 Nov 98, while on active service and having been granted leave of absence from 18 Oct 98 to 01 Nov 98 to proceed to home did not rejoin at field on the expiry of the said leave but absented himself with intent to avoid such active service.”

4. The petitioner, through Supplementary Affidavit has re-summarized his case de novo. He states that there is nothing on record to suggest that Army Rule 22(1) was complied with. The Charge under Army Act Section 38(1) is not sustainable and illegal as he had surrendered voluntarily and his surrender was accepted by Lt. Col. Mohan Kumar, who, the petitioner claims, should have been an essential prosecution witness but was not. Instead, Lt. Col. Mohan Kumar ordered recording of Summary of Evidence and conducted the trial. Petitioner further states that one Capt. Pushkaran was thrust as Friend of the Accused who had no legal knowledge. Learned counsel for petitioner cites Special Appeal No. 726 of 1997 in the High Court of Allahabad decided on 21.8.2002 to support his case that he was not provided adequate legal assistance by way of a counsel. The petitioner states that the Summary Court Martial Proceedings were typed and during the trial merely blanks were filled up. Such a practice has been frowned upon by the High Courts, according to the learned counsel for the petitioner, and this is in violation of several judgments of AFT. The trial commenced at 1100hrs and finished at 1210hrs in a matter of mere 1hr and 10 minutes. The learned counsel for the petitioner said that Summary Court Martial has to pass through

several stages which cannot be completed in a matter of 1hr and 10 minutes.

5. On the issue of plea of guilty, the learned counsel for the petitioner stated that no certificate as laid down in Army Rule Section 115 (2) has been endorsed. In view of statement of the petitioner, a plea of non guilty should have been recorded and then the trial should have proceeded.

6. In view of the infirmities, the learned counsel for the petitioner prays that the Transferred Application be allowed.

7. The respondents have stated that the petitioner was granted leave from 18.10.1998 to 01.11.1998 from his Unit 5031 ASC Battalion which was deployed in High Intensity Counter Insurgency Area. When he did not rejoin on termination of the leave following due procedure of law he was declared deserter with effect from 02.11.1998. He surrendered at ASC Centre(South) on 4.8.2000. The tentative charge was heard under the provisions of Army Rules 22 on 29.8.2000 by CO of HQ Wing, ASC Centre (South) who ordered Summary of Evidence to be recorded. During the hearing of the charge the petitioner was given full opportunity to cross-examine the witness and also to call for defence witnesses. The petitioner declined to make any statement neither did he call any defence

witness. He was tried by Summary Court Martial on 15.12.2001 and was awarded sentence of dismissal. His statutory petition was rejected on 05.07.2001.

8. The respondents have also stated that in his short span of just over seven years of service, the petitioner had incurred one red ink entry under Army Act Section 39(b) and two black ink entries under the same Section of Army Act. Despite these punishments, the petitioner did not change his attitude and continued to remain a habitual offender. In the instant case, he deliberately avoided operational duty in complete disregard and disrespect for the Army discipline. His retention in the Army was considered detrimental to Military discipline and he was accordingly awarded the sentence. On the allegation of the Friend of Accused the respondents says that the petitioner at the time of trial did not raise any objection. The respondents further stated that the officer so nominated was fully aware of the procedures of Military Law.

9. The trial was conducted most efficiently and expeditiously as per laid down procedures and all provisions of law were meticulously followed. Respondents stressed that the time of 1hr and 10 minutes is more than sufficient to conduct a legal trial when the accused pleads guilty and there is no defence

witness which was the case in the instant SCM trial . In order to save time all forms are cyclostyled and kept ready. The respondents further stated that the petitioner has quoted AFT's judgments of 2009 and 2010 whereas trial had taken place in the year 2000 and therefore, the order passed in 2009 and 2010 cannot be made applicable in 2000. The respondents vehemently stated that if the petitioner had some medical problems, there are several military hospitals in close vicinity to his home town where he could easily get admitted for high quality medical treatment. It is apparent that he was intentionally avoiding Operational duties. During the period May to July 1999 OP VIJAY was on and the petitioner's Unit was actively engaged in combat operations. The charge under Army Act Section 38 therefore is entirely valid. The respondents pray that Transfer Application be dismissed as it lack merit.

10. Heard both sides and scrutinised the records.

11. The narrative that emerges is that the petitioners' unit was in Counter Insurgency Operational Area in 1999 the Unit was also contributing to the Operation and other activities in OP VIJAY. In his service of 7 years 9 months, the petitioner had been charged for offences under Army Act 39(b) on three

earlier occasions. He claimed that he was medically ill and therefore obtained treatment from civil a civil doctor. He overstayed the leave granted to him by 672 days, a period during which his unit was engaged in active operations.

12. We have gone through the original record produced by the respondents. We find that the common contents in the SCM Proceedings are cyclostyled and the proceedings are recorded in hand. The petitioner has pleaded guilty which is recorded in hand and which has been signed by the petitioner. The petitioner's answer to question "Do you wish to make any statement" is recorded in hand and his answer too is recorded in hand. Similarly the award of sentence is also recorded in hand. We find no infirmities in recording the Summary Court Martial Proceedings.

13. The tentative charge under Army Rule 22 was heard by the Commanding Officer on 29.08.2000 during which two witnesses were examined. The petitioner declined cross examination of witnesses. We also find that petitioner was attached with ASC Centre (South) as required by AO 89/81. The attachment order in terms of the said AO and Para 381 of Regulations for the Army was signed by Brigadier Dalvir Singh, Commander 31 Sub Area on 18.8.2000 attaching the petitioner

with Depot Company(MT), ASC Centre, Bangalore till finalisation of disciplinary action. The statutory petition was rejected by an order of 05.7.2001 by a reasoned speaking order. There is a memorandum in terms of Army Order 309/1973 by the Commanding Officer in which factum of leave, overstayed and surrender have been recorded. The memorandum mentions the reason given by the petitioner of being mentally ill and not allowed to surrender by Senior JCO at ASC Centre (South) Bangalore a concocted story that stands no ground. The memorandum says that the petitioner could have surrendered at any time at any Army unit near his home town or to his parent unit. The memorandum also mention that the petitioner is a habitual offender. The punishments awarded to the petitioner make a total absence of 675 days in short span of 7 years 9 months and 19 days of service. The memorandum says that in instant case , the petitioner deliberately avoided Counter Insurgency Operation and active Combat Operation during OP VIJAY. The memorandum also mentioned "His involvement with ante national elements and traitor cannot be ruled out due to his long absence/desertion." Therefore petitioner's retention in service is considered to be detrimental to the organisation.

14. As regards the petitioner's claim that he tried to surrender thrice, Subedar(MT) RS Pandi of ASC Centre (South), Bangalore in his statement during Summary of Evidence stated that the petitioner had come to the Centre to surrender thrice but on the first two occasions he was not present in the morning parade when he was to be marched up to the Commanding Officer of Headquarters Wing. On being asked reasons for this, according to the statement of Subedar (MT) Pandi, the petitioner stated the first time his money was finishing and therefore he went home, and second time he got scared when he learnt the defaulters are dealt with strictly . On the third occasion, his hair was cut and he was taken on the strength of ASC Centre (South), Bangalore.

15. As recorded in Surrender Certificate under the provisions of Army Act 142 (5), the petitioner surrendered to CHM S. Sinha of Headquarters Wing on 04.8.2000. He was in possession of his Identity Card dated 14.05.1993 issued by Commandant, ASC Centre, Gaya and was in uniform. This Surrender Certificate has been signed by the petitioner, CHM, Senior JCO and Commanding Officer Lt. Col. Mohan Kumar. The respondents have produced documents to establish that

the petitioner had been medically examined before trial by SCM.

16. The petitioner has cited two cases in support of his case. In CW2709 of 1997 in the High Court of Delhi in case of Mahavir Singh Vs. Union of India and Others, the accused belongs to BSF and the law relating to BSF was the basis of decision by the High Court. In the second citation ie. Special Appeal no. 726 of 1997 in Allahabad High Court in the case of Union of India and Others Vs. Ram Adhar Tiwari, the counsel for the respondents could not appear for the trial and medical certificate was sent by the counsel for adjournment for that day. The Commanding Officer did not grant adjournment and concluded the court martial proceedings on the same day. Also, Friend of the Accused was nominated on the day of the trial giving inadequate time to prepare defence. There were other reasons too for which the SCM was set aside. The facts and circumstances of this case are different from the instant case which has no parallel to the cases cited by the petitioner.

17. The learned counsel for the petitioner claimed that the provisions of Army Rules 64 were violated. Scrutiny of the Summary Court Martial Proceedings indicate that there was no violation of provisions of Army Rules 64 and allegations by the

petitioner counsel lack force. The procedure of conviction has been enumerated in Army Rules 64 which reads as follows:-

“Procedure on conviction.-(1) *If the finding on any charge is “Guilty” then, for the guidance of the court in determining its sentence, and of the confirming authority in considering the sentence, the court, before deliberating on its sentence, shall, whenever possible, take evidence of and record the general character, age, service, rank and any recognized acts of gallantry or distinguished conduct of the accused, any previous convictions of the accused either by a court-martial or a criminal court any previous punishments awarded to him by an officer exercising authority under section 80,83,84, or 85, as the case may be, the length of time he has been in arrest or in confinement on any previous sentence and any military decoration, or military reward, of which he may be in possession or to which he is entitled.*

(2) *Evidence on the above matters may be given by a witness verifying a statement which contains a summary of the entries in the regimental books respecting the accused and identifying the accused as the person referred to in that summary.*

(3) *The accused may cross-examine and such witness, and may call witnesses to rebut such evidence; and if the accused so requests, the regimental books, or a duly certified copy of material entries therein, shall be produced, and if the accused alleges that the summary is in any respect not in accordance with the regimental books, or such certified copy, as the case may be, the*

court shall compare the summary with those books or copy, and if it finds it is not in accordance therewith, shall cause the summary to be corrected.

(4) When all the evidence on the above matters has been given, the accused may address the court thereon and in mitigation of punishment.”

18. The provisions of Army Rules 64 were followed in the instant case.

19. Having examined the SCM Proceedings and having found no infirmities in them, the challenges on grounds of Section of the Army Act, time taken for conduct of trial and plea of guilty remain.

20. On the issue of the Army Act Section, Note (2) to Manual of Indian Military Law–Volume-II(IMIML) to Army Act 38 states:-

“2. Sub sec. (1).-Desertion is distinguished from absence without leave under AA, s, 38,; in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (Commonly known as constructive desertion) e.g. service applicable to the accused like a fire picquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient of the intention in (a) above

was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.”

In the instant case the petitioner was trying to avoid Operational Duty during active Counter Insurgency Operations and Combat Operations during OP VIJAY. When he was medically ill, as he claims, he and his family members could have conveniently taken him to the nearest Military Hospital where he could be provided quality medical treatment and also petitioner could have informed the civilian doctor who was treating him that he was an Army man who could have suggested to him to report to the nearest Military Hospital. The two visits to Bangalore to surrender show that he was vacillating and also he made no attempt to surrender to his parent unit. Since he was in possession of his Identity Card he could have conveniently reported to Transit Camp at Jammu who would have facilitated his move to his parent unit. He did not do so. Accordingly, we are of the view that he is guilty of Constructive Desertion and the charge under Army Act Section 38 is held to be valid and stands proven.

21. It is not laid down that the trial is to be over in a stipulated time. The stages mentioned by the petitioner are such that can

be completed within 1hr and 10 minutes on a plea of guilty and when there are no defence witnesses.

22. On the plea of guilty, petitioner's argument was that since he had provided a reason for overstaying leave, his plea of guilty should have been converted to 'not guilty' and then SCM should have proceeded as provided in Army Rule 116. We are of the view that this argument is not convincing as the petitioner could have got himself admitted to a military hospital or surrendered to an Army unit close by. Accordingly, we hold that plea of guilty required no interference.

23. In the back drop of discussion above, we are of the view that the petitioners' case lacks merit and deserves to be dismissed. We accordingly dismiss the petition.

24. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

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