

ARMED FORCES TRIBUNAL REGIONAL BENCH, LUCKNOW

Original Application No. 183 of 2014

Tuesday, the 1st day of December, 2015

(Reserved)
(Court No. 2)

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

No. 913503T Ex Cpl Tuphan Kumar, Son of Amrendra Kumar Singh r/o
Indrajeet Kumar VGI 312, G.B. Nagar, Dadri 302025

..... Applicant/petitioner

By Shri Rohit Kumar, Counsel for the Applicant.

Versus

1. Chief of Air Staff, Vayu Sena Bhawan, Rafi Ahmad Kidwai, New Delhi-110011
2. Air Officer Commanding in Chief, Western Air Command, Subroto Park, New Delhi.
3. Commanding Officer, 12 Wing IAF, Chandigarh.
4. Union of India, Through Secretary, Ministry of Defence, DHQPO, New Delhi.

..... Respondents.

By Shri Mukund Tewari, Counsel for the respondents alongwith Wing Commander S.K.Pandey, Departmental Representative.

ORDER

1. This O.A has been filed seeking the relief of quashing the rejection order by the Chief of the Air Staff dated 9.1.2014, quash the proceedings of DCM held on 15.10.2013 and to award cost of the petition.

2. Facts of the case are that the petitioner was enrolled on 28.3.2006. In November, 2011, he was posted at 12 Wing, Indian Air Force, Chandigarh, which was supporting Army formations deployed in operational areas. He was granted casual leave with effect from 14.11.2011 to 16.12.2011 with prefix of 12 and 13 November and suffix of 17 and 18 December. On expiry of the said leave, he did not rejoin on due date until he reported to AF Station, Chandigarh on 25.8.2013 after an absence of one year eight months and six days. He was tried by a District Court Martial (DCM) on the following charges:-

*“First Charge
Section 38 (1)
AF Act, 1950*

DESERTING THE SERVICE

In that he,

at 12 Wg AF, having been granted leave of absence from 12 Nov 11 to 18 Dec 11, did not rejoin his unit on expiry of the said leave, till he surrendered to 925149-R Cpl B Ram IAF (P) of 12 Wg, AF, at Guard Room of AF Stn Chandigarh, on 25 Aug 13.

*Second Charge
Section 39 (b)
AF Act, 1950
(Alternative to
the first charge).*

*WITHOUT SUFFICIENT CAUSE OSVERSTAYING
LEAVE GRANTED TO HIM*

In that he,

at 12 Wg AF, having been granted leave of absence

from 12 Nov 11 to 18 Dec 11, overstayed the said leave without sufficient cause, until he surrendered himself to 925149-R Cpl B Ram IAF (P) of 12 Wg, AF, at Sub Guard Room of AF Stn, Chandigarh, on 25 Aug 13.”

3. The second charge, which was alternative to the first charge, was withdrawn by the prosecutor during the trial and the petitioner was tried on the first charge i.e. under Air Force Act Section 38(1), and was awarded the punishment of six months' R.I, which was later remitted to three months' R.I by Air Officer Commanding in Chief, Western Air Command, reduction to ranks and dismissal from service. After three months' R.I in Air Force custody, he was released on 14.1.2014 and was struck off strength with effect from 15.1.2014. His appeal under Section 161(2) of the Air Force Act was rejected by the Chief of the Air Staff.

4. The petitioner was represented by Shri Rohit Kumar, his learned counsel. The petitioner claims that he received information of illness of his mother and accordingly he proceeded on leave. He states that on expiry of leave, he reported back but was not allowed to rejoin until with great difficulty he rejoined on 25.8.2013 at Air Force Station Chandigarh. There he learnt that his desertion roll has been issued on 4.6.2012. The petitioner says that his trial for a charge of desertion is legally untenable since he had reported back to his Unit voluntarily. If at all, according to the petitioner, he should have been charged under Air Force Act Section 39 i.e. overstayal of leave and, therefore, the sentence

passed by the DCM is a nullity. The counsel for the petitioner submits that the plea of guilty by the petitioner during the trial is untenable in terms of Rule 62(3)(c) of the Air Force Rules, 1969. As the petitioner in his statement during the Summary of Evidence had stated that he could not rejoin his Unit on account of illness of his mother and some property dispute, the Court should have, according to the counsel for the petitioner, recorded this statement as plea of "*not guilty*" and then proceeded with the trial. The petitioner also claims that he was kept in close custody for a long period of time; a friend of accused and counsel of his own choice were not permitted. His petitions under Section 161 of Air Force Act and under Section 161(2) of the Air Force Act were rejected without due application of mind. In view of these illegalities and irrationalities, the petitioner pleads, he be granted the reliefs that he has asked for.

5. The respondents were represented by Shri Mukund Tewari, assisted by Wing Commander S.K.Pandey. The respondents admit the basic facts of grant of leave and state that once the petitioner did not report on expiry of the leave, he was declared a deserter with effect from 19.12.2011. Once he reported to the Air Force Station Chandigarh on 25.8.2013, he was kept in close arrest from 25.8.2013 to 15.10.2013. The respondents state that the provisions of Air Force Act Section 24 were complied with and the charge was heard on 27.8.2013, whereafter Summary of Evidence was recorded and then the trial by DCM on

15.10.2013 was held. The petitions submitted by the petitioner were carefully examined by the competent authorities. The Air Officer Commanding in Chief, Western Air Command took into account the period of close arrest of 51 days and had accordingly ordered that three months of the sentence be remitted and balance three months be spent in Air Force custody. The Chief of the Air Staff, after due application of mind, had rejected the petition of the petitioner.

6. The respondents further state that under the provisions of Air Force Act Section 107 (2), there was no illegality in trying the petitioner under Air Force Act Section 38(1). He had pleaded guilty voluntarily during the trial and also gave it in writing to the Court. He was advised by the Court to withdraw his plea of guilty. However, the petitioner stuck to his plea of guilty. The respondents state that surrendering itself is no conclusive proof against desertion. It is the intention that matters and the petitioner had failed to prove during the trial that he had no intention to desert.

7. As regards the defending officer, the respondents state that the defending officer was provided as requested by the petitioner. He had made no request for a friend of accused or a defence counsel. As regards setting off of the period of close arrest before trial, the respondents state that this period is not set off against the term of imprisonment.

8. Heard both sides and examined the documents.

9. The narrative that emerges is that the petitioner had less than six years of service in November 2011. He did not rejoin his Unit on termination of leave. In this brief span of less than six years, as stated by the respondents, he had been punished once earlier for an offence relating to absence without leave. During the period of absence of one year eight months and six days in the instant case, the petitioner did not make any attempt to either inform his Unit of his whereabouts or to rejoin the Unit. During the trial the petitioner pleaded guilty to the charge of desertion and was accordingly awarded punishment as stated above.

10. The petitioner's counsel has submitted that the charge under Section 38 is untenable. Section 38 of the Air Force Act states, "*Any person subject to this Act who deserts or attempts to desert the service shall on conviction by Court Martial..... if he commits the offence under any circumstances be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.*" Section 107(2) of the Air Force Act, which relates to Inquiry into absence without leave, states, "*If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.*" The stand of learned counsel for the petitioner was that since the petitioner had reported back to the Unit voluntarily, the charge under Section 38 of the Air Force Act is not valid. The petitioner's counsel quoted Army Act in support of his

arguments stating that Air Force Act is based on Army Act. In that, it has been provided that the charge of desertion is to be applied when a person either absents himself with a view to avoid an important operational duty or is apprehended by the police. In the instant case, the petitioner's counsel says that these two conditions do not apply. The Government Counsel, on the other hand, emphasizes the issue of intention. According to him, the petitioner's intention was to desert; he did not rejoin on due date until he chose to join duty after a very prolonged absence. Accordingly, he was tried for desertion. The petitioner had every opportunity during the trial to establish that he did not have any intention to desert, which he failed to do and, therefore the charge under Section 38 is legally valid. We find substance in the argument of the learned Government Counsel. The law is settled on this matter that for desertion, intention has to be proved. In the instant case, the petitioner pleaded guilty voluntarily during the trial and produced no evidence whatsoever to establish that his absence was on account of circumstance which were beyond his control. We, therefore, hold that the charge under Section 38 of the Air Force Act is perfectly valid.

11. As regards plea of guilty, the petitioner during recording of Summary of Evidence had stated, *"I could not report after the completion of my leave period due to illness of my mother and property dispute. Due to above mentioned reasons lot of time passed away and I realized my mistake of not report on time. Thereafter I reported back to*

unit (12 Wing, AF) sub guard room on 25 Aug 13 at 1115 hrs. I am very sorry for my act and will not repeat it.”

12. Here, it would be relevant to quote Para 60(2) of the Air Force Rules, 1969 which deals with the plea of guilty. It reads as under:-

“60 (2) If an accused person pleads “guilty” that plea shall be recorded; but before it is recorded, the officer conducting the proceeding, on behalf of the Court, shall ascertain that the accused understands the nature of the charge to plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence that the accused ought to plead ‘not guilty’.”

13. We have scrutinized the proceedings of DCM. The record shows that the Court had explained to the petitioner/accused the meaning, nature and ingredients of charge of deserting the service and implications of plea of guilty. The Court had advised the petitioner/accused that if he had any probable line of defence in respect of this charge, he should withdraw his plea of guilty. The petitioner/accused submitted during the trial that he fully understood the meaning, nature and ingredients of charge of deserting the service and he pleaded guilty to this charge after fully understanding the implications of plea of guilty. Plea of guilty made by the petitioner was

voluntary and unconditional. He also confirmed to the Court that he did not wish to rely on any line of defence. During the trial, this statement by the petitioner was confirmed by the defending officer. Thereafter the prosecutor withdrew the alternate charge which was under Section 39-B of the Air Force Act and the petitioner was charged on the offence of deserting the service. We are of the view that the petitioner had been given full opportunity to change his plea of guilty if he so wished. The implications of plea of guilty had been explained to him. However, he pleaded guilty voluntarily and unconditionally. Also during the trial he did not produce any defence in support of his statement given during the Summary of Evidence that he was unable to rejoin on account of his mother's illness and property dispute. We find that with this O.A too, the petitioner has not attached any document or any other evidence to establish that he indeed was unable to rejoin duty on account of his mother's illness or property dispute. Therefore, we are of the view that the trial under Section 38(1) of the Air Force Act was legally valid and we find no infirmity in it.

14. The scrutiny of documents reveals that the pre-trial procedure and trial by DCM was as laid down in Air Force Act. The sentence awarded by the DCM as modified by the confirming authority i.e. Air Officer Commanding in Chief, Western Air Command is appropriate for this offence considering that in a short span of less than six years of service, the petitioner had committed the offence relating to absence of leave and

desertion. Accordingly, we find no merit in the O.A which is dismissed.

No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

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