

RESERVED
Court No.1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

O.A. No. 259 of 2018

Monday, this the 17th day of December, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Ex-Guardsman Chintamani No.13659427 son of Hanumat Giri,
resident of village Hagapur, Post Office Sagra, Police Station
Lalganj, Tehsil Lalganj Ajhara, District Pratapgarh.

.... Applicant

Ld. Counsel for the: **O.P. Kushwaha, Advocate.**
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence
(Army) West Block-2, R.K. Puram, New Delhi.
2. Chief of the Army Staff, Army Headquarters, New Delhi.
3. Record Officer/ Officer-in-Charge, Records, Brigade of the
Guards, Kamptee-441001.
4. Principal Controller of Defence Account, (Pension)
Allaabad-211014.

....Respondents

Ld. Counsel for the: **Dr Gyan Singh, Advocate.**
Respondents.

ORDER

“(Per Hon’ble Mr Justice SVS Rathore, Member (J))”

1. By means of this O.A. under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant prays for the following reliefs:-

“(i) set aside the impugned order letter dated 27.12.1983 passed by Assistant Record Officer/ Officer-in-Charge, Records, Brigade of the Guards, Kamptee-441001, which is contained as Annexure no.1 to this O.A.

(ii) issue order or direction thereby directing opposite parties to pay the service pension and gratuity to the applicant with arrears alongwith interest @ 18% in favour of applicant.

(iii) issue any other order or direction deemed just and equitable under the circumstances of the case in favour of applicant.

(iv) Allow the original application with consequential benefits.”

2. As per office report there is delay of more than 32 years in filing this O.A. but the said delay was condoned vide order dated 08.05.2018 on the ground that the applicant has wrongfully been denied the pension. Admittedly in this case because of long delay entire documents pertaining to service record of the applicant have been weeded out after expiry of period of retention and original documents are not available.

3. In brief the facts of the case as mentioned in O.A. are that the applicant was enrolled in the Army on 06.10.1963. During his service period the applicant was promoted up to the rank of Havildar and released from Army service on 01.07.1983 on fulfilling the terms and conditions of service. During the service period the applicant was sentenced by Summary Court Martial (SCM) with punishment of reduction to ranks for the charge under Section 38(1) of the Army Act, 1950. The applicant made several representations to the respondents for grant of pension but it was informed by the respondents that the pension of the applicant cannot be granted because he has been punished under Army Act under Section 38(1) and therefore he is not entitled to any pension or gratuity. Thereafter the applicant kept on making representations in the year 1989 but with no result.

4. It is submitted by the learned counsel for the applicant that the applicant had completed 19 years of service and he has been punished under Section 38(1) by the Court Martial and was demoted from the post of Havildar to Guard but Court Martial has not denied grant of pension as well as gratuity to the applicant. It is submitted that in the last year of service the son of the applicant suffered fever and since there was no one else to look after him therefore the applicant admitted his son in the hospital and after his recovery rejoined his duty. He was tried for overstaying leave and was punished by the respondents under Section 38(1) of the Army Act. The impugned order reads as under :-

“nwjHkk”k & 230 vfHkys[k dk;kZy;
fczxsM vkQ nh xkMZ~l
fjdkMZ~l] nh fczxsM vkQ nh xkMZ~l
dkeVh& 441 001
(egkjk”Vz^a)

13659427/9/ ,l0iu 27 fnlEcj 83
u0 13659427 ,Dl xkMZ~leSu fpUrke.kh
xzke& HkkxhjFkiqj] Mkd& y{e.kiqj
ftyk & izrkix<+ (m0iz0)

;kfpdk

1 vkidh ;kfpdk fnukad fuy ds lanHkZ
esaA

2 vkidks lwfpr fd;k tkrk gS fd vkidks
lsokfuo`fr isa'ku eUtwj djokus ds fy,
vkids dkxtr lh Mh , (ih) bykgkckn dks
fnukad 17 ekpZ 83 dks Hksts x;s FksA
fdUrq lh Mh , (ih) us os dkxtr bl
vkQhl dks okil Hkst fn;s gSaA D;ksafd
vkidks dksVZek'kZy ds Onkjk vkehZ ,DV
38(1) ds vUrxZr ltk feyh gSA blfy;s
vkidks dksbZ Hkh isa'ku o xzspqVh ykxw
ugha gSA

g0 ,l0jktu
ys0
lgk;d vfHkys[k
vf/kdkjh

(ds'kokuh) d`rs izoj
vfHkys[k vf/kdkjh”

5. On behalf of the respondents in the counter affidavit it has been pleaded that during his service period the applicant was granted leave from 19.09.1979 to 17.11.1979. On expiry of the said leave the applicant failed to rejoin from leave and remained absent from duty from 18.11.1979 to 22.10.1982. The applicant re-joined duty on 22.10.1982 at 20.00 hrs. The applicant was tried

by the Summary Court Martial and punishment of reduction to the ranks under Section 38(1) was imposed upon him. Subsequently he was discharged from service on 30.06.1983 under item 13(3) III (i) of Army Rules, 1954 on completion of his terms of engagement of the rank of Guardsman (Sepoy) after rendering 16 years, 07 months and 20 days of service in the Army, excluding 02 years, 11 months and 05 days of non qualifying service. It is also pleaded in the counter affidavit that since the pension was not granted to the applicant therefore his service documents were weeded out during the year 2010 under the provisions of Par- 592 to 596 of Regulations for the Army, 1987. It is further submitted that the record of the Summary Court Martial has also been destroyed during the year 1988 under the provisions of Para- 592 to 596 of Regulations for the Army, 1987. It has also been pleaded on behalf of the respondents that in view of Para-123 (a) (i) of Pension Regulations for the Army, 1961, Part-1 a person who has been guilty for desertion, vide section 38 of Army Act shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by the Court Martial. Therefore, the ground taken by the respondents is that since the applicant has been convicted under Section 38(1) of the Army Act therefore he has forfeited his service in view of the aforementioned Pension Regulation.

6. Learned counsel for the applicant has argued that though the applicant was charged under Section 38(1) of the Army Act

but the charge against him was of overstaying leave and not for desertion. Learned counsel for the applicant has drawn our attention towards copy of the charge- sheet which he has annexed with the O.A. as Annexure No.3.

7. On behalf of the respondents the claim of the applicant is denied only on the ground of delay and secondly on the ground of Pension Regulation- 123. While annexing the charge-sheet as Annexure No.3 to the O.A., the applicant has made the following averments in Para- 4.4 of the O.A. :-

“ That during the service period, the applicant was punished in proceedings under Section 38(1) of Army Act “without sufficient cause overstaying leave granted to him” and demoted on the post of Guardsman. The photocopy of charge sheet dated 18.11.1982 is being annexed as Annexure No.3 to this O.A.”

8. In reply to the aforementioned averments of the applicant in the O.A. the respondents in Para-15 of the counter affidavit have stated as under :-

“That the contents of the paras No.4.3 & 4.4 of the O.A. filed by the applicant/petitioner are not admitted as stated hence denied being incorrect and misleading. In reply thereto, the averments made in preceding para No.3 & 4 of this affidavit are reiterated.”

9. Therefore in this case it is no where the case of the respondents that the charge sheet filed alongwith this O.A. was fabricated and therefore we consider it appropriate to refer the

said charge sheet. The charge sheet on the basis of which the applicant was tried by the Summary Court Martial reads as under:-

“ **CHARGE SHEET** ”

The accused No 13659427Y Hav Chinta Mani of 9th Bn Brigade of the Guards, is charged with -

AA Sec 38(1) Without sufficient cause overstaying leave granted to him, in that he,

having been granted leave of absence from 19 Sep 79 to 17 Nov 79 to proceed to home failed without sufficient cause, to rejoin unit on expiry of the said leave until reported at his own accord at 2000 hrs on 22 Oct 82.

Station : Meerut
Dated : 18 Nov 82

Sd/-
(AK Leekha)
Lt Col
Commanding Officer
9th Bn Brigade of the Guards”

10. The perusal of the aforesaid charge sheet shows that though Section 38(1) of the Army Act was mentioned in the charge against the applicant but the body of the language used in the charge sheet shows that he was virtually charged under Section 39(b) of the Army Act and not under Section 38(1) of the Army Act. It transpires that the applicant after being declared deserter had voluntarily surrendered at 20.00 hrs on 22.10.1982. Admittedly the punishment awarded to the applicant was reduction to ranks and he was not dismissed from service. Applicant was tried by the Summary Court Martial in the year 1982 and he was discharged on 30.06.1983 after completion of

his term of service of 16 years, 07 months and 20 days of service to his credit, excluding non qualifying service of his absence period. This fact has been admitted by the respondents in their counter affidavit. Thus, the claim for grant of pension of the applicant was rejected only on the ground that he has been punished under Section 38(1) of the Army Act. No one ever tried to ensure as to what was the actual charge levelled against the applicant. A bare perusal of the charge sheet itself shows that Section 38(1) was wrongfully mentioned in the charge sheet because the facts of the charge sheet show that virtually the applicant was charged under Section 39(b) of the Army Act. Thus the denial of the pension to the applicant on the ground that he was punished under Section 38(1) of the Army Act has absolutely no substance. Virtually no one cared to look into the facts of the case.

11. First we will deal with the point of wrong mentioning of the Section. Sections 38 and 39 of the Army Act regarding which the controversy has been arisen, are being reproduced as under :

38. Desertion and aiding desertion.— (1) 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 on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and if he commits the offence under any other 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.

(2) Any person subject to this Act who, knowingly harbours any such deserter shall, on conviction by court-

martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(3) Any person subject to this Act who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

39. Absence without leave.— Any person subject to this Act who commits any of the following offences, that is to say,—

(a) absents himself without leave; or

(b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or

(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or

(e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place, prohibited by any general/ local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there;

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

12. Thus, so far as the submission of the learned counsel for the applicant is concerned that wrong section was mentioned in the charge sheet, is absolutely correct. The charge must have been

framed under Section 39 (b) of the Army Act. In the instant case, the language of the charge sheet is very clear, wherein the period for which he was granted leave, was mentioned and it is nowhere mentioned that he was a deserter as he attempted to desert and the language of the charge sheet, as quoted in the earlier part of the judgment, very clear and is not capable of any other interpretation. So far as the mistake of wrong section mentioned in the charge sheet is concerned, we would like to reproduce Section 464 of the Code of Criminal Procedure, which reads as under :

“64. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

13. On this point, we may also refer to the pronouncement of the Hon^{ble} Apex Court in the case of **State of A.P. V. Thakkidiram Reddy** (1998) 6 SCC 554 . There was no charge under Section 302 read with Section 149 IPC, but the accused was convicted with the aid of Section 149 IPC and Hon^{ble} Supreme Court in the circumstances held that no prejudice has been caused to the accused and held that it would not vitiate the trial.

14. Likewise, in the case of **Bajraje vs State of Maharashtra** (2010) 6 SCC 673, where the accused was convicted under Section 302 read with Section 149 IPC. However, he was convicted under Section 302 IPC simplicitor and in that case, the Hon^{ble} Supreme Court has upheld the conviction and on the basis of the mistake in the charge, was held to be not significant because from the very beginning, there was specific allegation that it was the accused, who had assaulted the deceased. In the instant case also, the language of the charge is very clear that he had overstayed the leave, therefore, mere mentioning of Section 38(1) in the charge sheet would not in any manner adversely affect the actual charge because description of the charge is very clear that he was charged for overstaying leave and not for desertion. Thus the denial of pension to the applicant on the ground that he has been punished under Section 38(1) of Army Act is illegal and incorrect. Thus it is clear that it is the actual

charge that is material and wrong mentioning of section shall not prevail over actual charge.

15. Thus the admitted fact situation is that the applicant was tried by the SCM for overstaying leave while the section in the charge was mentioned as 38(1) of the Army Act and on the basis of this mistake of section mentioned in the charge sheet the claim of the applicant for pension was denied at every level in view of the provisions of Pension Regulation- 123, which reads as under :-

“ 123.(a) A person who has been guilty of any of the following offences:

- (i) Desertion, vide Section 38 of the Army Act.
 - (ii) fraudulent enrolment, vide Section 34(a) of the Army Act, shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by court martial of the offence.
- (b) A person who has forfeited service under the provisions of the preceding clause but has not been dismissed shall, on completion of any period of three years further service in the colours and/or service in the reserve with exemplary conduct and without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity.”

16. Since the applicant was charged and was held guilty by the SCM only for overstaying leave, therefore, his punishment cannot be termed under Section 38(1) of the Army Act. Virtually his conviction ought to have been under Section 39(b) in view of the language used in the charge sheet. Thus, we are of the considered view that since the applicant was not convicted under Section 38(1) of the Army Act, therefore, the order of denial of his

pension has become unsustainable in the eyes of law and deserves to be set aside.

17. In view of the above, this O.A. deserves to be allowed and is hereby **allowed**. Impugned order is hereby set aside. The respondents are directed to release the pension of the applicant. However, since the applicant has filed this O.A. after a delay of 32 years, therefore, he shall be entitled for pension only from a date three years prior to filing this O.A. This O.A. was filed on 01.05.2017. The respondents are directed to calculate the arrears of pension and other benefits of the applicant and to ensure the payment of the same within a period of four months from the date of receipt of a certified copy of this order. The applicant shall not be entitled to any interest on this amount. However default in time frame of four months will invite interest @ 9% till the actual date of payment.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

Dated: December 17, 2018

JPT

(Justice SVS Rathore)
Member (J)