

Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transfer Application No. 59 of 2009

Monday, this 09th day of January, 2017

Hon'ble Mr. Justice D.P.Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Jai Nath Singh, son of Sobhnath Singh, resident of village
Gajanpur, P.O. Gajanpur Doaria, District Sultanpur.
..... Petitioner

By Legal Practitioner Shri S.K.Upadhyay, Advocate

Versus

1. Union of India, through Secretary Defence, New Delhi.
2. Directorate General of Artillery Army Headquarter
DHQ PO New Delhi.
3. Headquarter Artillery Western Command, 91 Field
Regiment C/o 56 A.P.O
4. Colonel, CO 91 Field Regiment Adjutant General Army
Headquarter C/o 56 A.P.O.
5. Colonel, Deputy Judge Advocate General Headquarter,
10 Corps at Bikaner.

..... Respondents

By Legal Practitioner Shri R.K.S.Chauhan, Learned
Counsel for the Respondents, assisted by Col Kamal Singh,
OIC Legal Cell

ORDER

1. Being aggrieved with his dismissal from service vide
impugned order dated 08.05.1990, the petitioner preferred a

writ petition bearing No. 8455 of 2007 in the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench and in pursuance to the power conferred under Section 34 of the Armed Forces Tribunal Act, 2007, the same has been transferred to this Tribunal and now registered as T.A.No. 59 of 2009.

2. We have heard Shri S.K.Upadhyay, learned counsel for the petitioner and Shri R.K.S.Chauhan, learned counsel for the respondents, assisted by Col Kamal Singh, OIC Legal Cell and perused the record.

3. The petitioner was enrolled in the Indian Army on 22.12.1978. He was detailed on adventure course, which was to commence from 02.10.1989 to 12.11.1989 at Artillery Centre, Nasik Road Camp. He was dispatched in time but reported late by 9 days. On account of aforesaid delay, the petitioner was returned to Unit by Artillery Centre, Nasik Road Camp on 14.10.1989, but again he failed to report to the Unit on due date and remained absent without leave for 174 days. Consequent to the said misconduct, the petitioner was subjected to Summary Court Martial proceedings and was dismissed from service vide impugned order dated 08.05.1990.

4. According to the petitioner's counsel, a statutory complaint (Annexure-3 to the petition) was filed against the impugned order dated 08.05.1990, but it was not decided. However, while filing the counter affidavit, the respondents have pleaded that no such statutory complaint was filed. Being aggrieved with the impugned order of dismissal, the petitioner preferred the writ petition in the Hon'ble High Court, as mentioned above, in the year 2007 i.e. after 17 years from the date of arising of cause of action. Submission of learned counsel for the petitioner is that the petitioner was waiting for disposal of his statutory complaint, but due to unavoidable circumstances and the financial crunch faced by him, he could not prefer the writ petition at an early date. However, the fact remains that not only the petitioner had preferred the aforesaid writ petition with such a long delay, but he also remained absent from duty without leave, firstly for 09 days and then for 174 days. In the Hon'ble High Court, an objection was raised on 02.01.2008 that the writ petition has been filed after a lapse of 17 years and is not maintainable. However, the petition remained pending in the Hon'ble High Court and was never admitted, and now transferred to this Tribunal in pursuance of the statutory mandates.

5. Learned counsel for the petitioner asserts that since the affidavits have been exchanged between the parties, this petition be admitted and decided on merits. His further submission is that the respondents have weeded out the record so that the illegalities committed by them during the course of SCM proceedings could not be pointed out by the petitioner.

6. In response, learned counsel for the respondents submits that the petitioner had preferred the writ petition after 17 years of delay. His further submission is that the absence without leave during the course of assignment or duty is a serious misconduct under Section 39(a) and (g) of the Army Act.

7. For convenience, Section 39(a) and (g) of the Army Act are reproduced as under:

“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)-----

(c)-----

(d)-----

(e)-----

(f)-----

(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.”

8. A plain reading of the provisions contained in Section 39(a) and (g) of the Army Act shows that in case an army personnel is absent without leave from his superior officer or without due cause, absents himself from any training when duly ordered to attend there, he may be convicted by court-martial and shall be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in the Act mentioned. In the present case, learned counsel for the petitioner has attributed the folly on the part of the respondents on account of weeding out of original record. Nevertheless the copy of SCM proceedings has been filed by the respondents though a supplementary affidavit. As per SCM proceedings, the petitioner was provided all opportunities to defend himself and after due trial, he was awarded punishment of dismissal from service with three months' R.I.

9. The factum of absence from duty for the periods mentioned above, i.e. 09 days and then 174 days, has not been disputed by the petitioner while preferring the petition. However, it is submitted by learned counsel for the petitioner that for compelling reasons the petitioner was absent from

duty. No plausible reason or circumstance has been specifically indicated or pleaded by the petitioner with regard to the aforesaid absence from duty while he was detailed for undergoing training. The argument/submission made by the respondents in response seems to be correct that absence without sanctioned leave in Army is an act of indiscipline and serious misconduct on the part of an army personnel.

10. It has been vehemently argued by learned counsel for the petitioner that the petitioner was assaulted in his village, hence he failed to attend duty for such a long period. Submission is that looking to his inability to attend duty in such a circumstance, he deserves a lenient view in the matter. The argument advanced by petitioner's counsel seems to be misconceived and cooked up for the reason that in the mid of training, how he could have gone to his village without sanctioned leave. In case he had gone to his village without sanctioned leave, then he may face the consequences of his own fault. We are of the view that since the factum of absence without leave is an admitted fact, any circumstance or explanation showing cause with regard to absence, which is not convincing, does not make out a case to interfere with the impugned order of punishment. Otherwise also, absence without leave or deserting the army means deserting the

nation and it being a serious misconduct, no leniency can be taken by the Court, authority or Tribunal. For the aforesaid misconduct, the petitioner was subjected to SCM proceedings as per law and awarded punishment of R.I for three months alongwith dismissal from service, though looking to the seriousness of the charge, he deserved punishment of R.I for a maximum term as provided under the Act. The Legislature, to their wisdom, for overstaying the leave used the words “*sufficient cause*” but with regard to absence without leave under clauses (a) and (g) of Section 39, no such adjective has been used, which may make out a ground for lenient view. As such, the punishment awarded to the petitioner seems to be a lenient one. We, therefore, decline the request of the petitioner for taking a lenient view as regards the punishment awarded to him.

11. In view of above, we are of the view that the impugned order dated 08.05.1990 does not call for any interference. The T.À lacks merit and is hereby dismissed.

12. No order as to costs.

(Air Marshal Anil Chopra)

Member (A)

Dated : 09 Jan 2017

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(Justice D.P.Singh)

Member (J)