

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No. 3**Transferred Application No. 111 of 2011**Tuesday the 14th day of July, 2015

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

Madhu Sudan Singh, son of Shri Mohan Singh, resident of Village Bagahi, P.O.
 Said Raza, District Varanasi.

..... Applicant/Petitioner

By Shri Rohit Kumar, Counsel for the applicant.

Versus

1. Union of India through the Ministry of Defence, New Delhi.
2. Chief of Army Officer, New Delhi.
3. Commanding Officer, 9 Guards Match Hinsar, Haryana.

..... Respondents.

By Shri Rajesh Kumar, counsel for the respondents, with Capt. Ridhishri
 Sharma, Departmental Representative.

ORDER

1. This Transferred Application has come to this Regional Bench of the Tribunal on transfer from the Hon’ble High Court, Allahabad, where the petitioner filed Writ Petition No. 9756 of 1997, and renumbered as T.A. No. 111 of 2011.
2. The petitioner, through this writ petition, seeks the following reliefs :

- “1. issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 12.8.1994 passed by respondent No. 3 (Annexure No.) to this writ petition.
2. issue a writ, order or direction in the nature of mandamus commanding the respondent to treat the petitioner in service and pay the entire newmiration and other benefit available to the petitioner.
3. issue, other suitable writ order or direction which this Hon’ble court may deem fit and proper under the present circumstances of the case.
4. award the cost of writ petition.”

3. The facts of the case, in brief, are that the petitioner was enrolled in the Army on 8.4.1980. In 1994 he was serving in 9 Guards at Hissar when he was granted leave from 13.1.1994 to 22.1.1994. At the expiry of the said leave he did not rejoin on due date until he reported on his own accord on 3.8.1994 after absence of 194 days. He was tried by SCM on the following charge :-

“CHARGE SHEET

The accused, Number 13680315 M Rank Gdsm Name Madhu Sudan Singh of 9th Bn. Brigade of the Guards Mech, is charged with :-

DESERTING THE SERVICE. AA Sec. 38 (1)

In that he, at filed on 13 Jan, 94 having been granted leave of absence from 13 Jan. 94 to 22 Jan. 94 to proceed to home, did not rejoin at field on the expiry of the said leave but absented himself without sufficient cause, until he reported at his own accord on 3 Aug 94 at 1600 h.”

4. The petitioner was found guilty of the charge and was awarded the sentence of dismissal from service on 12.8.1994.
5. Learned counsel for the petitioner, while arguing the case, stated that the petitioner had an impeccable record of service. He stated that the petitioner had

valid reason for the absence as he had been given something to eat by a co-passenger, whereupon he was not in a fit state of mind and for which he got himself treated and was unable to rejoin his Unit. Learned counsel for the petitioner argued that the petitioner had, after the period of absence, reported voluntarily and, therefore, he cannot be charged under Section 38 of the Army Act which is for the offence of desertion and since he had voluntarily rejoined his duties, he should have been, if at all, charged under Section 39 of the Army Act and not under Section 38 of the Army Act and, therefore, on this count alone the SCM proceedings are vitiated. It has also been stated that the SCM proceedings were over within 30 minutes. He cites several cases wherein the Hon'ble Supreme Court has said that SCM cannot be finished in such a short time, which brings out that due process of law was not followed for conducting the trial under SCM. Learned counsel for the petitioner, during hearing, also stated that the petitioner on the day of trial, i.e. on 12.8.1994, had 14 years and 127 days of service and in another few months' time he would have been eligible for pension. The Commanding Officer had not taken this into consideration while awarding him punishment. Learned counsel for the petitioner prays that the reliefs, sought for by the petitioner, be granted.

6. The respondents' case was argued by Shri Rajesh Kumar duly assisted by Capt. Ridhishri Sharma, Departmental Representative. The respondents stated that the petitioner on two previous occasions was punished for offences under Section 39(b) of the Army Act which were recorded in his conduct sheet as red ink entries. The Departmental Representative also stated that the petitioner had

been punished for an offence under Section 63 of the Army Act and was awarded pay fine. On the issue of the petitioner being in confused state of mind the respondents stated that he has not produced any proof of medical advice or medication to establish that he was in a confused state of mind and, therefore, he is guilty of the offence. The respondents stated that the petitioner had absented himself from field and thus was guilty of constructive desertion. The fact that he rejoined voluntarily does not take away the fact that he was avoiding some important duty and, therefore, the charge under Section 38 of the Army Act is valid and sustainable. The respondents further stated that though he had put in 14 years and 127 days' of service, the fact is that he acted in a manner which is contrary to the accepted norms and discipline in the Army and, therefore, the punishment awarded to the petitioner is appropriate and just. The respondents prayed that the petition be dismissed being devoid of merit.

7. Having heard both the sides and scrutinized the documents we find the trial was concluded in 30 minutes since the petitioner had pleaded guilty and after reading the Summary of Evidence the court had come to the conclusion that he was guilty and had awarded the punishment. Though the period of 30 minutes to conclude the SCM does seem to be on the lower side, we find no infirmity in this. However, we are of the opinion that the court could have more deliberate and given more time to the petitioner to defend himself. We also note that the punishment under Section 63 of the Army Act to which the Departmental Representative referred to was a black ink entry and not red ink entry.

8. The petitioner has failed to produce any evidence to suggest that he was under some medication and that he had consumed some Tablet which induced the ailment claimed by him. Therefore, this argument of the petitioner justifying his absence is not found to be sustainable. We are of the view that he should have reported to the Unit in time.

9. On the issue of relevant section of the Army Act under which the petitioner should have been charged, we find that Section 38 of the Army Act was not the appropriate charge under which he has been charged. Section 38 of the Army Act reads as follows :

“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.

10. The petitioner had been granted leave when the Unit was at Hissar, which is not an operational area. He reported back to the Unit, presumably when it was

still at Hissar and, therefore, his absence cannot be construed as constructive desertion. The appropriate charge under which the petitioner should have been tried was under Section 39 of the Army Act which deals with cases of being absent without leave. On this ground we find that the SCM is flawed and, therefore, is liable to be set aside. Consequently, the punishment awarded by SCM too is liable to be set aside.

11. The petitioner had completed 14 years and 127 days of service. After taking into account the cumulative period of absence, he would have been eligible for pension in a matter of few more months. We are of the view that the court should have taken this fact into consideration while awarding him punishment. We are of the view that a soldier who has worn the uniform of the Army for such a large number of years deserves to live with dignity after leaving the Army and pension does assist in living with dignity.

12. In view of the above the Transferred Application is partly allowed and the SCM proceedings conducted on 12.8.1994 awarding dismissal from service is set aside. However, reinstating the petitioner in service at this stage is not a practical proposition and, therefore, the respondents are directed to treat the petitioner notionally in service till he attains the service which makes him eligible for grant of pension and thereafter he shall be granted pension with all consequential retiral benefits. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

PG.