

RESERVED

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

TRANSFERRED APPLICATION No. 1053 of 2010

Monday, this the 30th day of May, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Smt Kalawati Devi W/o Late Ex No 6806033 Sep/AA Pitambar Datt Nainwal, R/o Village-Kot, P.O.-Bachhuaban Chamoli, Garhwal now at present residing at 46, Khuldabad, Allahabad.

..... Petitioner

Ld. Counsel for the : **Shri SK Singh**, Advocate.
Petitioner

Versus

1. The Chief of Army Staff, Sena Bhawan, New Delhi.
2. Secretary, Ministry of Defence, Sena Bhawan, New Delhi.
3. Director General A.F.M.S., New Delhi.
4. Record Officer, Sena Chikitsa Corps Abhilekh, Army Medical Corps Records, Lucknow-II.

.....Respondents

Ld. Counsel for the
Respondents.

Shri Ashish Kumar Singh, Advocate
Central Govt. Counsel

ORDER

1. Civil Misc Stay Application No 143547 of 2005 was filed by husband of the petitioner in the Hon'ble High Court of Judicature at Allahabad which was transferred to this Tribunal under Section 34 of Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 1053 of 2010. The following prayers were made:-

(i) Issue a writ, order or direction in the nature of mandamus commanding the respondent officers if the re-instatement of the petitioner in service is not possible he may be provided pension on humanitarian ground other he bound to take bowl in hand on the road.

(ii) Issue any other writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iii) Award the cost of the petition to the petitioner.

2. Brief facts of the case are that husband of the petitioner was enrolled in Army Medical Corps (AMC) on 07.05.1962. While service in the Army on 06.11.1974 he committed an offence under Section 39 (b) of Army Act, 1950 and was punished under Section 41 (2) of Army Act, 1950. On 09.11.1974 he committed another offence for which a tentative charge sheet was framed under Section 41 (2) of the Army Act, 1950 but his punishment was withheld as he was an essential witness in a Court of Inquiry being conducted at Division level. On 25.05.1975 the petitioner was put on charge for the aforesaid offence and was ordered by the Commanding Officer to be tried by Summary Court Martial (SCM) on 29.03.1975.

On 25.03.1975, he committed another offence under Section 41 (2) of the Army Act, 1950 for disobeying the lawful command of his superior officer in the field area. He was put on charge for the said offence on 26.03.1975 and was again ordered by the Commanding Officer to be tried by Summary Court Martial. Accordingly, Summary of Evidence (SoE) was recorded on 26.03.1975 and a copy of charge sheet and SoE was handed over to him vide receipt dated 26.03.1975. He was thereafter, tried by SCM for both the offences on 26.03.1975 and awarded 'to suffer rigorous imprisonment for 06 (six) months and to be dismissed from service.' The sentence of rigorous imprisonment was undergone in Sabarmati civil jail. On 16.04.1975 when SCM proceedings were submitted to the GOC 11 Infantry Division, he remitted unexpired portion of sentence. 30 years after award of punishment husband of the petitioner had filed civil misc writ petition No 51342 of 2005 in the Hon'ble High Court of Judicature at Allahabad on 19.07.2005. During pendency of writ petition, petitioner's husband died on 18.04.2015 and his legal heirs were substituted vide order dated 30.01.2019. In this petition petitioner has prayed for quashing of SCM proceedings and grant of family pension of her deceased husband.

3. Submission of learned counsel for the petitioner is that petitioner's husband was dismissed from service on a trivial

offence which was liable to be pardoned keeping in view of his good conduct and length of service. He further submitted that petitioner's husband had rendered 13 years unblemished service in the Army but due to malafide intention on the part of unit authorities his SCM was held without providing him opportunity of hearing and no documents were made available to him so that he could defend himself. His further submission is that against order dated 26.03.1975 he submitted a representation dated 30.03.2000 to DGAFMS (Annexure 2) and a reminder to this effect was also sent on 12.07.2000 but to no avail.

4. His other submission is that the deceased soldier made constant representations but he could not obtain the SCM proceedings during his life time. In this regard his counsel had also written a letter dated 04.10.2004 to AMC Records but the records were not made available, instead it was informed that the records were destroyed as per rules. He pleaded that since the SCM was carried out without following due procedure, its proceedings be set aside keeping in view of remission of balance sentence by GOC 11 Infantry Division and petitioner be granted Family Pension.

4. On the other hand, learned counsel for the respondents submitted that the deceased soldier was enrolled on 07.05.1962 and he was tried by SCM under Section 41 (2) of

the Army Act, 1950 and dismissed from service on 26.03.1975. His further submission is that the deceased soldier was tried by SCM under Section 41 (2) of the Army Act, 1950 and dismissed from service on 26.03.1975 after rendering 12 years, 10 months and 19 days service in the Army and as such he was not entitled for service pension, in view of Para 113 (a) of Pension Regulations for the Army, 1961 (Part-I). His other submission is that since SCM proceedings and connected record were destroyed on 28.11.1979 in terms of para 592 of Regulations for the Army, 1987 (Revised Edition), no comments can be offered to the petitioner in this regard. He, however, submitted that charge sheet and SoE were handed over to him on 26.03.1975 and a receipt was obtained (Exhibit R-5). In reply to petitioner's contention that the order of punishment was set aside by remission of sentence, learned counsel for the respondents submitted that it is based only on surmise as in case his punishment had been set aside, he would not have waited for justice for a period of 30 years. His submission is that on 06.11.1974 the petitioner committed an offence under Section 39 (b) of the Army Act, 1950. On 09.11.1974 he committed another offence under Section 41 (2) of the Army Act, 1950 for disobeying the lawful command of his superior officer, in that he, at 411 Medical Battaion when ordered by Hav KK Kadam of the same unit to march off from Commanding Officer's orderly room after an award of punishment by his

Commanding Officer under Section 39 (b), he refused to do so saying 'I will not move out of the orderly room and will not accept the punishment awarded or words to that effect'. Therefore, he was finally put on charge sheet on 25.03.1975 and dismissed from service by following due process of law. His submission is that he was tried by SCM for both the offences on 26.03.1975 and was awarded to suffer rigorous imprisonment for 06 months and to be dismissed from service. Accordingly, he was sent to Sabarmati Jail and the proceedings of SCM were forwarded to the General Officer Commanding, 11 Infantry Division. On 16.04.1975, the General Officer Commanding 11 Infantry Division passed his directions that 'I remit the unexpired portion of the sentence, and dismissal to stand'. Hence the SCM proceedings are just and legal. Since the petition was filed in the Hon'ble High Court after 30 years, learned counsel for the respondents averred that it is not maintainable as held in the case of **Abdul Haleem vs Union of India & Ors**, WA No 1129 of 2007. He submitted that in that case the Hon'ble High Court did not entertain the petition which was filed after an elapse of 44 years. He pleaded for dismissal of O.A.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. No. 6806033 Sepoy (Ambulance Assistant) was enrolled in the Army on 07.05.1962. During the course of his service he

was tried by SCM and awarded punishment under Section 41 (2) of the Army Act, 1950 in which he was dismissed from service w.e.f. 26.03.1975 and also awarded 06 months rigorous imprisonment in civil jail. While the deceased soldier was in civil jail, the General Officer Commanding 11 Infantry Division had remitted unexpired portion of sentence and SCM was not set aside.

7. It is not disputed that all documents have been destroyed after lapse of stipulated retention period of three years in terms of para 592 of Regulations for the Army, 1987 (Revised Edition). Petitioner's contention that the SCM was not held as per procedure and the deceased soldier was not provided with an opportunity of hearing, is not sustainable as he was provided copy of charge sheet and SoE on 26.03.1975 prior to his SCM, therefore, it cannot be said that no documents were made available to him and he was not given opportunity of hearing.

8. As far as providing family pension to the petitioner is concerned, we find that petitioner's husband was dismissed from service on 26.03.1975, as such he was not in receipt of service pension in terms of para 113 (a) of Pension Regulations for the Army, 1961 (part-I). For convenience sake Para 113 (a) of the aforesaid regulation is quoted as under:-

"113(a) An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service."

9. In view of the above we are of the view since petitioner's husband was not in receipt of any service pension, no family pension can be granted to the petitioner.

10. In view of the above, the O.A. being devoid of merit is **dismissed**.

11. No order as to costs.

12. Pending miscellaneous applications, if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: 30.05.2022
rathore