

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL
BENCH, LUCKNOW****ORIGINAL APPLICATION No. 307 of 2016**Thursday, this the 19th day of May, 2022**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

JC-634603A Sub Jagirman Rai, S/o Prem Bahadur Rai, R/o Vill-Garhi Cantonment, Takeshwar Road, P.O. & P.S.-Garhi Cantonment, District-Dehradun (Uttarakhand), Pin-248003, presently R/o Race Course, 2nd Farlang, House No. 17, PO-Dilkusha Road, Pin-226002, Lucknow (UP).

..... Applicant

Ld. Counsel for the : **Shri Parijaat Belaura**, Advocate
Applicant

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delhi-110011.
2. Chief of Army Staff, Army Headquarters, Ministry of Defence, Government of India, New Delhi-110011.
3. General Officer Commanding-in-Chief, Eastern Command, Fort William, Kolkata-700021.
4. General Officer Commanding, Bengal Area, Kolkata-700027.
5. Commanding Officer, 12 Engineer Regiment, Kanchrapara, PO-Kanchrapara, PS-Kanchrapara, District-24 Parganas (North), PIN-743145.
6. The Commanding Officer, 56, Bengal Battalion NCC, Lokepur, Bankura, West Bengal, PIN-722102.

.....Respondents

Ld. Counsel for the: **Shri Asheesh Agnihotri**, Advocate
Respondents. Central Govt. Counsel

ORDER

1. Being aggrieved with Charge Sheet dated 11.08.2012 by which General Court Martial proceedings started on 23.08.2012 and findings recorded on 23.08.2012, the applicant had filed O.A. (A) No. 04/2015 in AFT (RB) Kolkata which was dismissed vide order dated 26.09.2016 with liberty to file fresh O.A. at Lucknow. Accordingly this O.A. was filed in this Tribunal on 29.11.2016 for the following reliefs:-

(a) To quash the order dated 11.08.2012 by which GCM proceedings has been convened and entire GCM proceedings which started on 23.08.2012 and findings ordered dated 22.10.2012.

(b) To quash the order of conferment of GCM after summoning the same as it has not been provided to the applicant till today.

(c) To issue order or direction to the respondents to re-instate the applicant from the date of his dismissal with all consequential benefits including promotion to the rank to his juniors has been promoted.

(d) To pay arrears of his salary with 12% interest till it is actually paid.

(e) Any other relief as considered by this Hon'ble Tribunal is awarded in favour of the applicant.

2. Brief facts of the case are that the applicant was enrolled in the Army on 28.03.1989. During the course of his service he was promoted to the rank of Subedar. While posted with 56 Battalion

NCC, it was alleged that the applicant absented without leave for two days i.e. from 06.02.2011 to 08.02.2011 and stayed in Hotel Mohit at Howrah along with Cadet Shashwati Chakraborty. On reporting to unit on 08.02.2011 at 2130 hours he was interviewed by the Commanding Officer (CO) in which he accepted that he had stayed in Hotel Mohit at Howrah from 06.02.2011 to 08.02.2011. After that a Court of Inquiry was ordered on 11.02.2011 pursuant to which disciplinary action was initiated against the applicant. Charge Sheet was made on 11.08.2012 and Summary of Evidence was recorded in which 08 witnesses participated including Cadet Shashwati Chakraborty as witness No 3 who denied having stayed with the applicant. He pleaded 'guilty' and thereafter findings were recorded on 22.10.2012 and sentence was pronounced on the same day to be 'dismissed from service' under Section 39 (a) and Section 45 of Army Act, 1950. Applicant has filed this O.A. to set aside GCM proceedings and re-instate him in service with all consequential benefits.

3. Learned Counsel for the applicant submitted that the applicant while serving with 56 Bengal Battalion NCC at Bankura was assigned duty as Primary Instructor (PI). He led the contingent to New Delhi to participate in 2011 Republic Day Parade alongwith contingent commander Col Himansu Ratna. He further submitted that on 06.02.2011 while at Howrah, the applicant felt tired of parade and decided to take rest. He went to room No 404

of Hotel Mohit, Dobson Road, Howrah where he stayed for about 02 days upto 0955 hours on 08.02.2011 from where he went to his unit 56 Bengal Battalion NCC at Bankura and reported at 2130 hours. His further submission is that on 09.02.2011 he was interviewed by the Commanding Officer where he told the truth and even after this, a Court of Inquiry was convened and he was inflicted punishment of dismissal from service. His other submission is that there was no complaint from Cadet Shashwati Chakraborty and the allegation that the applicant stayed with her in a hotel, was denied by witness No 3 in the Court of Inquiry. He further submitted that under Section 109 of the Army Act, 1950 the GCM ought to have been convened by the Central Govt or by the Chief of the Army Staff or any other officer empowered in his behalf by warrant but contrarily it was convened by the Officiating General Officer Commanding, Bengal Area who is not empowered to convene the GCM. His further submission is that the charges were framed on 09.08.2012 and convening order of GCM was passed on 11.08.2012 but the applicant was not provided any paper related to the GCM till the commencement of trial on 23.08.2012 to enable him to defend himself which is bad in the eyes of law. He was forced to plead guilty to the charges in violation of Rule 115 (2) of the Army Rules, 1954. He submitted that at pre confirmation stage he preferred an application on 13.05.2013 under Section 164 (1) of Army Act which has not been decided till date. He pleaded that be quashed being too harsh keeping in view of levity of offence.

4. On the other hand, learned counsel for the respondents submitted that the applicant was posted to 56 Bengal Battalion NCC Bankura since 23.04.2010 as Primary Instructor. He was detailed to proceed with a NCC contingent to go to Delhi for the Republic Day Parade. On termination of Parade, the contingent came back to Kolkata for dispersal and deketting. The JCO took permission from Col Himanshu Ratna, OC 46 Bengal Battalion NCC, Contingent Commander on 06.02.2011 at 0900 hours to proceed back to his unit which was accorded. Col Himanshu Ratna on 07.02.2011 enquired if the applicant has reported back to the unit but he was absent from duty. The applicant reached unit location on 08.02.2011 at 2130 hours. During the interview, the applicant informed that he had stayed in Hotel Mohit, Howrah from 06.02.2011 to 08.02.2011 and after which a Court of Inquiry was ordered, pursuant to which disciplinary action was taken against the applicant. It came to light during the interview that he stayed at Howrah in a Hotel alongwith a lady. A team of two officers, one JCO and the applicant was sent to Hotel Mohit wherein it came to light that the applicant had stayed in the Hotel with a lady whom he had introduced to the receptionist as his wife and whose name was entered as Smt Shashwati Rai. He further submitted that the Court of Inquiry was conducted in proper manner in accordance with rules on the subject and punishment was awarded thereafter following due process.

5. His other submission is that the remand of the applicant for trial by GCM was carried out after conducting the hearing of charge and perusal of the Summary of Evidence by the Commanding Officer. His further submission is that during the process of investigation it was proved that the lady stayed with the applicant in Hotel Mohit between 06.02.2011 to 08.02.2011 and after that the Commanding officer recommended disciplinary action against the applicant and subsequently he was tried by GCM and dismissed from service. He pleaded for dismissal of O.A.

6. Heard Shri Parijaat Belaura, learned counsel for the applicant and Shri Asheesh Agnihotri, learned counsel for the respondents and perused the material placed on record.

7. A General Court Marital (GCM) under the Army Act, 1950 was convened to try the applicant holding the rank of Subedar in the Army on the following charges:-

"Charge Sheet"

First Charge
Army Act, Sec 39 (a)

Absenting himself without leave

in that he,

At Bankura, absented himself without leave from 06.02.2011 to 08.02.2011.

Second Charge
Army Act, Sec 45

Being a Junior Commissioned Officer in a manner unbecoming his position and the character expected of him

in that he,

at Howrah, between 06.02.2011 to 08.02.2011, improperly stayed with Cadet Shashwati Chakraborty of 46 Bengal Battalion NCC in room No 404 of Hotel Mohit, Howrah.

Place: Kanchrapara
Date: 09 Aug 2012

Sd/-
(Varadan Kumar)
Col
Commanding Officer
12 Engineer Regiment

To be tried by General Court Martial.

Station: Kolkata
Dated: 11 Aug 2012

Sd/-
(JD Suri)
Brigadier
Officiating General
Officer Commanding
Bengal Area”

8. Section 39 (a) and Section 45 of the Army Act 1950 reads as under:-

“39 (a)-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.”

“45. Unbecoming conduct. Any officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and the character expected of him shall, on conviction by court martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned.”

9. After conclusion of the GCM proceedings the applicant was held guilty of the charge and was awarded dismissal from

dismissed from service by order dated 22.10.2012 and the sentence was confirmed by GOC-in-C, Eastern Command on 30.04.2013 and the promulgation was carried out on 22.07.2013 as required under the Act.

10. The applicant was found guilty of both the charges i.e. absent without leave and behaving in a manner unbecoming his position and the character expected of him. We find no fault in application of Army Act and Army Rules while conducting GCM but the applicant has alleged that the whole proceedings of GCM were predetermined to hold him guilty, as such, it is liable to be set aside. In regard to his innocence it is averred that the lady, with whom he was alleged to have stayed in Hotel Mohit, did not lodge any complaint against him, and also refused this fact in Court of Inquiry. In support of his contention that punishment inflicted upon the applicant is disproportionate, learned counsel for the applicant has cited the Hon'ble Supreme Court judgment in the case of ***Union of India & Ors vs R Karthik***, Criminal Appeal No 831 of 2015 decided on 21.01.2020 and ***Union of India & Ors vs AK Pandey***, Civil Appeal No 6181 of 2002 decided on 16.09.2009.

11. Submission of learned counsel for the respondents, that the accused had duly participated in the proceedings regarding recording of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the

accused, is sustainable in the eyes of law as we find no illegality while conducting GCM.

12. The applicant had put in about 24 years of service when he was dismissed from service by GCM which seems to be too harsh as the punishment was inflicted on two charges i.e. absenting without leave and behaving in a manner unbecoming his position and the character expected of him. In this regard we are of the view that the applicant could not have been dismissed from service on being absent without leave for 02 days. Further, there being no complaint from Cadet Shashwati Chakraborty and her denial that she did not stay with the applicant at Hotel Mohit for the period 06.02.2011 to 08.02.2011, punishment of dismissal should not be inflicted upon the applicant.

13. In the case of ***Brijesh Chandra Dwivedi (dead) (through legal heirs) vs Sanya Sahayak & Ors***, Civil Appeal No 7382 of 2021 decided on 25.01.2022, their Lordships of the Hon'ble Supreme Court has converted the dismissal into compulsory discharge keeping in view the harsh punishment awarded to the employee. In this case the employee ***Brijesh Chandra Dwivedi*** (supra) was a driver posted at the 12th Battalion, P.A.C. at Fatehpur. While he was on duty driving a truck carrying the P.A.C. personnel from Fatehpur to Allahabad on Kumbh Mela duty, he was involved in a motor accident with a jeep. He was charged for having caused the accident by dashing his truck on the back side

of the jeep while driving under the influence of alcohol. On medical examination conducted on the same date, i.e. 02.02.2000, he was found to have been under the influence of alcohol. A departmental enquiry was initiated against him. On completion of the departmental enquiry, Inquiry Officer proposed punishment of dismissal. A Show Cause Notice was issued by the disciplinary authority and after considering his reply thereto the punishment of dismissal was awarded which was confirmed by the Appellate Authority. The operative portion of the aforesaid judgment is reproduced as under:-

“11. Even otherwise, driving a vehicle under the influence of alcohol is not only a misconduct but it is an offence also. Nobody can be permitted to drive the vehicle under the influence of alcohol. Such a misconduct of driving a vehicle under the influence of alcohol and playing with the life of the others is a very serious misconduct. There are also other misconducts earlier committed by the employee.

12. However, at the same time, considering the statement of the employee at the time of the enquiry and the explanation given by him that on going to duty on taking the vehicle from battalion, he had not consumed the liquor and after the accident with the objective to suppress the fear on coming to battalion and on parking the vehicle, he went directly to bus terminal, Ghazipur and consumed 100 ml of country made wine, though has not been accepted but that might be plausible and considering his 25 years of long service and fortunately it was a minor accident which resulted into some loss to the vehicle and considering the fact that the employee has since died, we find that the punishment of dismissal can be said to be too harsh and may be treated one for compulsory retirement.

13. In view of the above and for the reasons stated hereinabove and in the peculiar facts and circumstances of the case, narrated hereinabove, the award of punishment of dismissal can be said to be too

harsh, the punishment of dismissal is directed to be converted into compulsory retirement of the employee. As the employee has since died, and on converting the punishment of dismissal to that of compulsory retirement, death-cum-retirement benefits as also the benefit of family pension, if any, shall be paid to the legal heirs of the deceased employee in accordance with law and bearing in mind that punishment of dismissal has now been converted into one of compulsory retirement. The present appeal is partly allowed to the aforesaid extent.”

14. In the instant case the applicant absented without leave for two days. The GCM was conducted on the alleged grounds that the applicant absented without leave for two days and stayed in Hotel Mohit for the period 06.02.2011 to 08.02.2011 alongwith Cadet Shashwati Chakraborty of 46 Bn NCC who during Court of Inquiry proceedings denied that she stayed in hotel with the applicant on aforesaid dates. Thus, keeping in view of the service rendered by the applicant and levity of offence, punishment awarded to the applicant seems to be too harsh in view of the Hon'ble Apex Court judgment in the case of **Brijesh Chandra Dwivedi (dead)** (supra).

15. In view of the above, we are of the view that the punishment of dismissal of the applicant is disproportionate which needs reconsideration. Therefore, punishment of dismissal is converted into compulsory discharge from service to enable the applicant to earn service pension.

16. Impugned orders dated 11.08.2012, 23.08.2012, 22.10.2012 and 22.07.2013 are set aside. The respondents are directed to

treat the applicant as discharged from service w.e.f. the date of his dismissal from service and pay due pension and consequential benefits along with arrears within a period of four months from today. Default will invite interest @ 8% p.a.

17. No order as to costs.

18. Miscellaneous application(s), pending if any, stand disposed of.

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

Dated : 19.05.2022

rathore