

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

**Reserved**

**Original Application (A) No. 461 of 2018**

Monday, this the 15<sup>th</sup> day of May, 2023

**Hon'ble Mr. Justice Ravindra Nath Kakkar, Member (J)**  
**Hon'ble Vice Admiral Atul Kumar Jain, Member (A)**

Gajendra Tripathi, son of Sri K.N Tripathi, R/o Vill- Ballipur, H. No. A/64, Post Ballipur, PS- Gosaiganj, Distt – Sultanpur (U.P) present address H. No. 11/74 Bahar CMA, Sahara State, Jankipuram, Distt – Lucknow , U.P.

.....Appellant

Ld. Counsel for Appellant: **Shri G.C Verma, Advocate**

Versus

1. The Union of India, through the Secretary, Ministry of Defence, New Delhi.
2. The Chief of Air Staff, Air HQ (Vayu Bhawan), New Delhi.
3. Air Officer in Chief Training Command, Indian Air Force, Bangaluru.
4. District Court Marshal, Head Quarter Training Command, Indian Air Force, Bangaluru.

.....Respondents

Ld. Counsel for the :  
Respondents

**Dr. Shailendra Sharma Atal,**  
**Central Govt Counsel**

## **ORDER**

**“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”**

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs:-

*(i). quash the orders dated 27.07.2018 & 18.09.2018 passed by opposite parties No. 4 & 3 respectively where by the applicant has been dismissed from service, reduced from ranks and awarded the imprisonment.*

*(ii). Direct the Opposite parties to treat the applicant in service by ignoring the impugned orders and, all the service benefits be provided to the applicant by allowing the application.*

*(iii). Direct the respondents to release the applicant immediately from imprisonment and provide all the Articles to the applicant which have been taken from him when the applicant was apprehended as per list contained as Annexure no. 9.*

*(iv) Pass any other order/orders as deem appropriate by this Hon’ble Tribunal in the facts and circumstances of the present case.*

2. The undisputed factual matrix on record is that the appellant was enrolled in the Indian Air Force on 12.04.2000. He served at different places and lastly, he was posted at AFS Yelahanka, Bangaluru. Due to untoward incidence, he applied for leave. Leave was sanctioned wef 23.12.2014 to 31.12.2014. On expiry of leave, he failed to join duty. Apprehension Roll

was issued and appellant was apprehended on 18/19.05.2018 with the aid of police Jankipuram Lucknow and appellant was kept in custody at Yelahanka. Court Martial proceedings initiated and appellant was awarded punishment of 03 months imprisonment, dismissal from service and deduction in rank. The appellant filed pre-confirmation petition which was rejected vide order dated 18.09.2018. Being aggrieved, applicant has filed instant petition with the prayer to quash the punishment of reduce to rank and dismissal from service and treat the applicant in service by ignoring the impugned orders with all consequential benefits.

3. Learned counsel for the appellant submitted that appellant was enrolled in Air Force on 14.12.2000. He was promoted to the rank of Sergeant in the year 2011. He was relieved from AFS Memora, Lucknow on 14.12.2014 to join duty at AFS Yelahanka, Bangaluru. He retained the quarter at Lucknow upto 31.03.2015. While posted at AFS Yelahanka, Bangaluru, he applied for leave which was sanctioned w.e.f. 23.12.2014 to 31.12.2014. On expiry of leave, the appellant could not join duty at Yelahanka on 01.01.2015 due to domestic problems. He informed the matter to Air Force Record Office, New Delhi through letter dated 03.03.2015 but the Air Force

Record Office has shown the appellant absentee vide letter dated 30.03.2015. Apprehension Roll was issued and appellant was apprehended by Jankipuram, Lucknow Police on 18/19.05.2018. Learned counsel for the appellant further stated that appellant could not join duty as there was no body to look after his ailing mother and minor children. His wife was missing and was traced out in very measurable condition. Because of these reasons the appellant could not rejoin his duties after expiring of leave sanctioned to him. District Court Marshal proceeding was initiated against the appellant U/s 38(1) of the Air Force Act 1950 in which the plea raised in defence on behalf of the appellant was not considered and appellant was awarded the punishment for imprisonment of six months, dismissal from service and deduction in rank. However, the imprisonment was reduced to three months. Ld. Counsel for appellant prayed that appellant has completed about 14 years of service and he has not committed any offence on his own will but due to compelling circumstances he was not in a position to join his duty on expiry of the sanctioned leave.

4. Learned counsel for the appellant further submitted that wife of the appellant submitted an application with prayer to initiate proceedings against the appellant at Lucknow which

was accepted by the respondents but the appellant was denied to defend himself. He submitted that the charge framed against the applicant is u/s 38 which pertains to desertion while the matter is of over staying or absent without leave which comes under the purview of section 39 of the Act of 1950. The opposite parties have taken action in utter violation of the Act. Opposite party No 3 passed the order dated 18.09.2018 by which imprisonment was reduced from 6 months to 3 months. The appellant was apprehended on 18/19.05.2018, since then he was in confinement under the opposite parties. Petitioner was awarded punishment for 3 months whereas he had undergone imprisonment for more than 4 months. The defending officer provided to the appellant submitted in writing on 26.07.2018 that entire action against the appellant was illegal as the charge itself has wrongly framed U/S 38 while the applicant was on leave, the charge cannot be framed U/S 38. The impugned order was passed by District Court Martial on 27.07.2018 subject to confirmation by the competent authority by which the appellant was held guilty of the charge in the finding of Court Martial Proceedings. In the Court Marshal proceedings plea of the appellant was not considered. Appellant has completed about 14 years of service. By

dismissing the appellant from service, respondents have not only taken away the source of lively hood of the appellant but have also caused the stigma upon him without providing opportunity of hearing. Learned counsel for the appellant pleaded that keeping in view 14 years of service rendered by the appellant, punishment of dismissal be changed into discharge and appellant be granted service pension.

5. On the other hand, learned counsel for the respondents submitted that appellant was promoted to the rank of Sgt on 18.12.2013. The appellant while posted with 47 SU, overstayed leave granted to him and declared absent without leave wef 0001 hrs on 10.03.2006 to 1330 hrs on 25.03. 2006. He was awarded punishment of Severe Reprimand on 28.03.2006. Further while posted at 21 Wing, he absented himself from duty wef 0001 hrs on 22.06.2009 till reported to Leh Dett at 0700 hrs on 17.07.2009. He was awarded punishment of reprimand on 25.09.2009 by AOC 21 Wing. He reported on posting to AFS Yelahanka on 14.12.2014. He was granted 09 days Annual leave from 23.12.2014 to 31.12.2014 on compassionate ground. After expiry of said leave appellant did not report back to AFS Yelahanka and remained permanently absent until apprehended on 19.05.2018 from

House No. 11/74, Sahara Estate, Jankipuram, Lucknow. DCM found him guilty of the charge and awarded punishment on 27.07.2018. He was sentenced RI for six months, dismissal from service and reduction to the rank. While confirming the findings and sentence of DCM on 17.09.2018, the AOC-in-C HQ TC, IAF had remitted the sentence of six months of RI to three months RI. As per AFT, Lucknow Bench order dated 08.10.2018, appellant was released on bail on 18.10.2018 and the dismissal order passed by DCM was given effect on 26.10.2018. Ld. Counsel for the respondents urged that the appellant was afforded with full opportunity to defend himself during DCM proceedings. He absented himself for a period of more than three years and four months and he was not willing to return on duty. So, he was charged u/s 38(1) of Air Force Act 1950. There was no violation of the Act on part of the respondents.

6. Learned counsel for the respondents further submitted that after expiry of the leave, applicant was supposed to rejoin his duties but he remained absent. Therefore, letter dated 24.02.2015 was sent to his father at two known addresses as per his service documents. Another letter dated 03.03.2015 was also sent to the father of the appellant. So, the contention

that the address was incorrect, is wrong and misleading. The appellant has not given the address of his quarter retained at AFS Memora, Lucknow in his leave application. Moreover, it was the responsibility of the appellant himself to join his duties after expiry of sanctioned leave. He was absent for more than 30 days, hence he was declared deserter. Wife of the appellant had submitted a RTI application wherein she sought the information about the disciplinary proceedings and its outcome. Appellant was afforded with full opportunity to defend himself and every plea of the appellant was considered during DCM. The DCM found him guilty of the charge and awarded punishment to suffer RI for six months, to be dismissed from service and to be reduced to ranks. While confirming the findings and sentence of DCM, Air Officer Commanding in Chief HQ TC, IAF had remitted the sentence of six months of RI to three months RI. The findings and sentence of court were promulgated to the accused. Honorable AFT (RB), Lucknow vide order dated 08.10.2018 directed to release the appellant on bail. The appellant was released from custody on 18.10.2018 and dismissal order was effective on 26.10.2018 (AN). Learned counsel for the respondents pleaded that

appellant is not entitled for any relief and instant appeal is devoid of merit and is liable to be dismissed.

7. We have heard learned counsel for the parties and perused the record.

8. On perusal of documents available on record, it transpires that appellant has rendered about 14 years of physical service before his dismissal. As far as condonation of delay of one years for grant of service pension is concerned, in a similar matter the Hon'ble Apex Court in the case of ***Union of India an Another Vs. Surender Singh Parmar*** in Civil Appeal No. 9389 of 2014 decided on 20.01.2015, (2015) 3 SCC 404 has held as under :-

*“8. In view of the aforesaid provisions the respondent is entitled to claim total period of service as 14 years for the purpose of calculation of pension. By Government of India, Ministry of Defense order dated 14<sup>th</sup> August, 2001 administrative power has been delegated to the competent authority under clause (a)(v) the competent authority has been empowered to condone shortfall in qualifying service for grant of pension beyond six months and upto 12 months. The said provision reads as follows :-*

*In view of the aforesaid provision, the respondent is also entitled to claim for condonation of shortfall in qualifying service for grant of pension beyond six months and upto 12 months. If the aforesaid power has*

*not been exercised by the competent authority in proper case then it was within the jurisdiction of the High Court or Tribunal to pass appropriate order directing the authority to condone the shortfall and to grant pension to the eligible person, which has been done in the present case and we find no ground to interfere with the substantive finding of the Tribunal.”*

9. We find that the present case is squarely covered by the above judgment. Further, as per Ministry of Defence, letter dated 14.08.2001, condonation of shortfall in qualifying service for grant of pension in respect of personnel below officers rank from six months upto 12 months is allowed.

10. In the instant case appellant has rendered about 14 years of service and another few months of service in the Army would have entitled him for grant of service pension. Due to illness of his family members, appellant could not join duty. Keeping in view that appellant has rendered about 14 years of physical service, it appears that punishment awarded to the appellant is too harsh the appellant deserves a sympathetic consideration and his dismissal is required to be converted into discharge. Without going into procedural irregularity in conducting of DCM, dismissal of petitioner is required to be converted into discharge and one year shortfall of service for grant of service pension is liable to be condoned.

11. Accordingly, this O.A (Appeal) is **partly allowed**. Shortfall of one year service for grant of service pension is condoned and dismissal order of the appellant is converted into discharge on humanitarian ground . It is directed that the appellant would be considered to be notionally in service till he reaches the service which entitles him to service pension, whereafter he shall be paid pension of Airman on regular basis as admissible in accordance with Pension and other Rules/Regulations in force. It is clarified that the appellant shall not be entitled to any back wages during the period he is considered to be notionally in service. We also hold that due to law of limitation held by Hon'ble Apex Court, while calculating the entitlement for grant of service pension, actual arrears shall be restricted to a period of three years prior to the filing of the present application. Original Application was filed on 03.10.2018. The respondents are directed to make the payment of service pension to the appellant within a period of four months from the date of production of a certified copy of this order, failing which, the amount shall carry interest @ 9% per annum from the date it fell due.

12. The Registry is directed to provide a copy of this order to learned counsel for the respondents for its onwards transmission and necessary compliance.

13. No order as to costs.

14. Pending applications, if any, are disposed off.

**(Vice Admiral Atul Jain)**  
**Member (A)**

**(Justice Ravindra Nath Kakkar)**  
**Member (J)**

Dated : 15 May, 2023

UKT/-