

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Reserved
(Court No. 2)

Original Application No. 483 of 2012

..... the day of August, 2015

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

Ex No. 6492086A SEP/ASH Kulbeer Singh, aged about 37 years, Son of Shri Vinod Singh, Village Sampla Begumpur, Post Office Sarsawa, District Saharanpur (U.P.)

..... Applicant.

By Shri Y.R.Sharma, Counsel for the Applicant.

Versus

1. Chief of the Army Staff, Army Headquarters, South Block, New Delhi-110011
2. General Officer Commanding in Chief, HQ Central Command, PIN-900450, C/O 56 APO
3. General Officer Commanding HQ Madhya Bharat Area, PIN-901124 C/O 56 APO
4. Commandant, ASC Centre (North), PIN-900493, C/O 56 APO
5. Commanding Officer, HQ Wing ASC Centre (North), PIN-900493, C/O 56 APO
6. Union of India through Secretary, Ministry of Defence, New Delhi-110011.

..... Respondents.

By Shri Prakhari Kankan, Central Government Counsel, assisted by Capt. Ridhishri Sharma, Departmental Representative.

ORDER

1. This Original Application has been filed seeking relief of setting aside the Attachment Order dated 19.09.2008 issued by the Commandant, Army Service Corps Centre, Paharpur, Gaya, to quash/set aside Summary Court Martial Proceedings held on 12.11.1998, quash/set aside the orders of General Officer Commanding, Madhya Bharat Area dated 13.04.1998 and to reinstate the petitioner with all consequential benefits.

2. Facts of the case are that the petitioner was enrolled in the Army on 25.04.1996. In November, 2007 he was posted out from 514 A.S.C. Battalion to 874 A.T Battalion. He was to join the new Unit on 22.11.2007, but he did not do so and reported to A.S.C. Centre, Gaya on 18.09.2008, thus overstaying by 302 days. He was attached with Head Quarter Wing A.S.C. Centre by the Commandant, A.S.C. Centre, Gaya whereafter he was tried by Summary Court Martial on 12.11.2008. The sentence awarded to him was dismissal from service. The petitioner filed a review petition dated 17.05.2010, which was rejected by the General Officer Commanding, M.B Area vide his order dated 13.04.2011.

3. The petitioner was represented by Mr. Y.R.Sharma, his learned counsel. The petitioner states that when he reached home, he found that his land and house had been grabbed by his uncle. He started running from Tehsil to District Headquarters and after about ten months he got his land and house back from his uncle. He claims he had informed 514 ASC Battalion, who had assured him that his new unit will be kept informed. After the house and land problem was solved, he claims he went to 514 ASC

Battalion and was advised to report to ASC Centre, Gaya, where he was illegally attached with HQ Wing and was tried by Summary Court Martial, which was without jurisdiction.

4. According to the learned counsel for the petitioner, there are several infirmities in the proceedings of Summary Court Martial and the actions taken by the respondents before the Summary Court Martial. The learned counsel for the petitioner referred to the Attachment Order dated 19.09.2008, signed by Brigadier P.P.Singh, Commandant ASC Centre, Gaya, attached as Annexure A-1 to the O.A. In this Attachment Order, references have been made to Army Order 07/2000, para 381 of Regulations for the Army, Army Act Section 8 and Army Head Quarter AG's Branch letter dated 24.12.1999. The learned counsel for the petitioner states that the Commandant, ASC Centre was not authorized to issue the Attachment Order which as it should have been obtained from Formation Commander of the parent unit of the petitioner, as provided for in the Army Order 7/2000. Para 381 of the Regulations for the Army provides that the disciplinary proceedings may be initiated only when the person is properly attached, which according to the petitioner, could only be done under the orders of the Formation Commander of the parent unit of the petitioner. Army Act, Section 8, according to the learned counsel for the petitioner, does not give him the authority to attach a person to another unit for the purposes of disciplinary proceedings. The letter of the Army Head Quarter AG's Branch cannot rank above an Army Order, hence, according to the petitioner, the Attachment Order is illegal and consequently, the Summary Court Martial is a nullity. The learned counsel cited the judgment of the

Delhi High Court in the case of “*Mahipal Singh versus Union of India and others*” passed in **Writ Petition No. 3286 of 1991**.

5. The petitioner states that during the hearing of the charges under the provisions of Army Rule 22, no witness was examined and the respondents had no way of knowing as to on what date the petitioner was Struck Off Strength (SOS) from the previous unit, since no witness from the previous unit had been examined. Going further, the petitioner claims that the provisions of Army Act Section 34 were not complied with and that he was not given copies of Summary of Evidence and charge-sheet, which were later given to him on 08.07.2009. Learned counsel for the petitioner states that this entire proceeding was conducted in a mechanical manner. The petitioner also claims that the plea of ‘guilty’ was wrongly recorded; though he did plead ‘guilty’ during the Summary Court Martial, it should have been recorded as ‘not guilty’ in view of the statement given by him during the Summary of Evidence, thus disregarding the provisions of Army Head Quarter Letter No. B/25119/AG/DV-1(P) dated 27.09.1999. The petitioner claims that he was told that if he pleads guilty, only a minor punishment will be awarded. The Summary Court Martial also violated the provisions of Army Act Section 143. Since the petitioner had made reference to a civil official, the matter was not referred to the said civil official. The learned counsel for the petitioner also pointed out that in the Summary Court Martial proceedings, the date on the certificate under provisions of Army Rule 115(2) was in the same hand-writing, indicating that the petitioner had been made to sign this document without understanding its import since he

was not well-versed in English language. The petitioner, in view of the forgoing, requests that the reliefs sought for by him be granted.

6. The respondents were represented by Shri Prakhar Kankan, Central Government Counsel, assisted by Capt. Ridhishri Sharma, Departmental Representative. The respondents state that the petitioner was posted to 874 A.T Battalion and had been granted journey period and joining time till 21.11.2007, but after overstaying 302 days he reported to A.S.C. Centre Gaya on 18.09.2008. He was attached with Head Quarter Wing of the A.S.C Centre by the order of the Commandant, A.S.C. Centre, Gaya, who was well within his power to do so. The charge was heard under Army Rule 22 and Summary of Evidence was recorded by Head Quarter Wing, A.S.C. Centre, Gaya. Copies of Summary of Evidence and charge-sheet were handed over to the petitioner on 25.10.2008 and the Summary Court Martial proceedings were conducted on 12.11.2008. Thus, the provisions of Army Rule 34 were complied with. The sentence awarded to him was dismissal from service. The petitioner was not made to sign on any blank paper, neither was any promise of lenient punishment, made to him, if he would plead guilty. After the Summary Court Martial he was asked if he desired to have copy of Summary Court Martial proceedings. He declined and said that he did not want any such copy. Subsequently, in response to his request, copies of all relevant documents including Summary Court Martial Proceedings were sent to him on 08.07.2009. The Summary Court Martial was conducted in a totally free and fair manner without any bias and all provisions of law were followed. The respondents also said that the petitioner had incurred one red-ink entry under Army Act Section 39 (b) for

being absent for 140 days in March, 2007. The respondents also say that there is no record of his either informing 514 A.S.C. Battalion or reporting to the said Battalion as claimed by him.

7. Heard both sides and scrutinized the original proceedings provided by the respondents.

8. We note that the unit to which the petitioner was posted i.e. 874 A.T Battalion was in active counter insurgency area in Jammu and Kashmir and he was taken on strength (TOS) by 874 A.T.Battalion on 11.11.2007. There is a receipt signed by the petitioner dated 25.10.2008, which shows that copies of charge-sheet and Summary of Evidence were handed over to him on that date. During hearing of the charge on 23.10.2008 under Army Rule 22, two witnesses were examined and the petitioner was given an opportunity to cross-examine them but he declined to do so. We also find that there is a certificate signed by the petitioner that he was not desirous of obtaining a copy of Summary Court Martial proceedings. Thus, we find that the arguments of violation of Army Rules 22 and 34 (1) and non-provision of Summary Court Martial proceedings have no legs to stand and they are hereby rejected.

9. The learned counsel for the petitioner, during the course of hearing, focused his argument on Attachment Order, the thrust being that the attachment could only have been ordered by the Formation Commander of the parent unit. Army Order 07/2007 deals with "*Attachment of Service Personnel other than Officers to Units and Formations nearest to the place of their trial in a Criminal Court or for Progressing Disciplinary/Vigilance Case under the Army Act.*" Para 7 of the said Order deals with "*Attachment*

of Personnel for Progressing Disciplinary/Vigilance Cases under the Army Act". The learned counsel for the petitioner emphasised on this para, which reads as follows:

"7. Where attachment is visualized in progressing disciplinary/vigilance cases under the Army act, including the cases which have been taken over from the Civil (Criminal) Courts for trial under the said Act, the procedure outlined in Para 3 above will be invoked by the competent authorities as specified therein. During attachment the individuals will continue to be held against the strength and appointment of the parent unit and no replacement will be made until completion of disciplinary proceedings. This power, however, shall not be exercised merely to change the command with a view to secure award of enhanced punishment/penalty e.g. for a trial by Summary Court Martial."

In Para 7 reference has been made to Para 3 of the said Army Order. The relevant extract of Para 3 is as follows:

".....The unit/station HQ or Formation HQs to which such person reports on release on bail, will intimate the date of his arrival/reporting to his parent unit. To avoid delay, the attachment in such cases shall be got formalized by the immediate Formation HQ of the parent unit, not below Sub Area HQ or equivalent as the case may be by empowering and authorizing the Sub Area HQ (or equivalent HQ) or higher Headquarters concerned, in writing, under whose jurisdiction such attachment is required to be made to attach the said individual w.e.f. the date of his joining/reporting. The latter shall, thereupon and accordingly, attach the individual anywhere under the command keeping in view the administrative convenience as also to facilitate the civil investigation/trial. The above notwithstanding no unit/station HQ or Formation HQs shall refuse to allow such person to join on establishing his identity/bonafide. Further, such attachment shall not be denied awaiting written request from the parent unit/Fmn HQs of the individual."

10. Seen in the backdrop of Army Order 07/2007, the petitioner had not been released on bail. Secondly, the Army Act Section 8, as admitted by the learned counsel for the petitioner, equates Centre Area Commandant to a Sub Area Commander. Therefore, we find no infirmity in the Attachment Order signed by him since he was empowered to do so.

11. Para 381 of the Regulations for the Army deals with the trial of deserters. The petitioner was not a deserter. However, this para also states as follows:

“Para 381. Trial of Deserters:- Under the normal circumstances trial by Summary Court Martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column 1 of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and is taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by Summary Court Martial by the OC of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counter insurgency operation or active hostilities or Andaman and Nicobar Islands.

In no circumstances will a man be tried by Summary Court Martial held by a CO other than the CO of the unit to which the man properly belongs; a unit to which the man may be attached subsequent to commission of the offence by him will also be unit to which the man properly belongs.

TABLE

<i>Column One</i>	<i>Colum Two</i>
<i>Armoured Corps Regiments</i>	<i>Armoured Corps Centre and School</i>
<i>A unit of Artillery</i>	<i>Regimental Centre concerned</i>

<i>A unit of Engineers</i>	<i>Headquarters Engineers Group concerned</i>
<i>A unit of Signals</i>	<i>Signal Training Centre Jabalpur</i>
<i>Infantry Battalions</i>	<i>Regimental Centre concerned</i>
<i>ASC Unit</i>	<i>ASC Centre concerned</i>
<i>RV Corps</i>	<i>RVC Centre</i>

This rule is not intended to limit the power of any convening officer, who at his discretion may order trial be General, Summary General, or District Court Martial at any place, if such a course appears desirable in the interest of discipline.”

12. In the instant case, the petitioner had reported to the A.S.C. Centre, Gaya, and according to Column one of Table in Para 381, the personnel of ASC unit, if they report to ASC Centre concerned, will be deemed to be part of the unit to which they have reported and, therefore, here again we find no infirmity in the Attachment Order.

13. As regards the AG’s Branch letter dated 24.12.1999, this letter too deals with the trial of deserters. This letter inter alia answers a point as to whether attachment of an individual (PBOR), who deserts from field area or enroute his posting to field area and subsequently surrenders or is apprehended and handed over to Regimental Centre, is necessary before disciplinary action is initiated against him. The Army Head Quarter in this letter went on to clarify the issue in terms of Para 381, which is as follows:

“...Hence the Commandant Regimental Centre has to issue a formal order attaching the deserter to any battalion/unit of the Centre for processing the disciplinary case.”

14. This letter also clarifies that when a person deserts, a Court of Inquiry is held by the concerned unit and thereafter he is struck off strength of that unit and is taken on the supernumerary strength of Regimental Centre or Depot concerned. In the instant case, the petitioner was taken on strength by 874 A.T Battalion and since the day he deserted i.e. 10.11.2007, he was not on supernumerary strength of ASC Regimental Centre, Gaya.

15. The citation quoted by the petitioner is the case of "*Mahipal Singh versus Union of India and others*" in **Writ Petition No. 3286 of 1991**, decided by the Delhi High Court on 23.03.1994. In this case, the petitioner was tried by CO of a unit to which he did not belong. The order of the Delhi High Court says that a N.C.O or a Sepoy cannot be attached to another unit for the purpose of trial by SC except as provided in para 381 of the Army Regulations. In the instant case, we find that the attachment was under the provisions of Para 381. Also as stipulated in Para 381, the petitioner's unit was Regimental Centre Gaya, hence we find no infirmity in trial by a CO of unit to which he was properly attached.

16. While dealing with this issue, we turn to the case of '*Raj Kumar versus Union of India and others*, **T.A.No. 48 of 2009**, decided by the Principal Bench, Armed Forces Tribunal on 21.01.2010, in which punishment of one year R.I and dismissal from service was awarded to the petitioner by the Commander, Administrative Battalion, Rajput Regimental Centre, Fatehgarh on a charge under Army Act, Section 39(b). The petitioner in this case was on the strength of 16 Rajput Regiment when he had proceeded on leave and had reported to Rajput Regimental Centre after overstay of nearly 4 years and 8 months. The Court held, "*Considering the*

totality of the circumstances and the fact that the petitioner has already spent more than seven months imprisonment, the ends of justice would be met by reducing the sentence of imprisonment to what he has already undergone. The rest conviction and findings of the Summary Court Martial are affirmed.” In the said case, the Court upheld the conviction and sentence of dismissal. The sentence of one year R.I was reduced to seven months. In the backdrop of this case too, we find no infirmity in trial by CO of HQ unit of ASC Centre in the instant case.

17. As regards Army Rule 116(4), it reads as follows:

“If from the statement of the accused, or from summary of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of “Guilty”, the Court shall alter the record and enter a plea of “Not Guilty” and proceed with the trial accordingly.”

The petitioner’s contention is that he did not understand the effect of plea of ‘Guilty’ and, therefore, the Court should have recorded a plea of ‘Not Guilty’. From the statement given by the petitioner regarding the summary of evidence and also the Summary Court Martial, we find no reason to infer that the petitioner was not aware of the consequences of plea of guilty. We have also noted that the signatures of the petitioner on all documents are in English and from the Sheet Roll we find that his civil qualification was 8th Pass. Therefore, we are of the view that the petitioner was well aware of the consequences of pleading guilty which has been correctly recorded by the court.

18. As regards violation of Army Act Section 143, this Section reads as follows:

“143. Reference by accused to Government Officer.

(1) If at any trial for desertion or absence without leave, overstaying leave or not rejoining when warned for service, the person tried states in his defence any sufficient or reasonable excuse for his unauthorized absence, and refers in support thereof to any officer in the service of the Government, or if it appears that any such officer is likely to prove or disprove the such statement in the defence, the court shall address such officer and adjourn the proceedings until his reply is received.

(2) The written reply of any officer so referred to shall, if signed by him be received in evidence and have the same effect as if made on oath before the court.

(3) If the court is dissolved before the receipt of such reply, or if the court omits to comply with the provision of this section, the convening officer may, at his discretion, annul the proceedings and orders a fresh trial.”

The scrutiny of summary of evidence reveals that the petitioner had stated that the case was reported to Sarpanch and Tehsildar. He goes on to say in his statement, *“The house was recovered from my uncle and handed over to the father.”* In this statement, there is no mention of his own role in the entire process of taking over house from his uncle. Also it was brought out during hearing that the petitioner’s father is not very old and was of age 45 years. The petitioner also has a brother who also could have been running around to recover the land and the house. His father was not old and infirm. The petitioner by overstaying avoided operational deployment. Since the petitioner’s statement did not make any mention of his own role in

recovering the land and the house, the court had no reason to stop the proceedings and refer the matter to the civil official. We are inclined to not view this act of court as violation of Section 143 of the Army Act.

19. We have carefully examined the investigation and the Summary Court Martial proceedings and find no infirmity in them. In his 12 years of service, the petitioner was punished in 2007 for an offence under Section 39(b), in which he had overstayed the leave granted to him by 140 days. The instant case was second such offence in which he was tried by Summary Court Martial. Undoubtedly, overstaying leave or absence of even a single day must be viewed very seriously in the Army. All acts of indiscipline must be punished appropriately. In the instant case, the petitioner may have had a problem at home. We also take note of the fact that he rejoined voluntarily thereby hoping for a lenient view and consequently to earn his pension. The punishment could have been such as to allow the petitioner to continue to serve in the Army and in due course be entitled to pension. Since the petitioner had already done 12 years of service, the punishment awarded to him, in our view, is harsh and deserves intervention.

20. Accordingly, the O.A is only partly allowed. While affirming the Summary Court Martial proceedings and the Attachment Order to be valid, we direct that the punishment of dismissal be quashed. The petitioner will be deemed to be notionally in service w.e.f. 12.11.2008 till he attains the service which entitles him to receive pension and thereafter he shall be granted pension with all consequential benefits. We clarify that the

petitioner shall not be paid salary during the period of notional service. No order as to costs

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

(Justice Abdul Mateen)
Member (J)

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