

FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED.

(Court No. 2)

Original Application No. 53 of 2014Thursday the 10th day of September, 2015

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

Ex-Corporal Praveen Kumar (793139-H), Radio Fitter, of 27 Squadron Air Force, C/o 56 APO (located somewhere in U.P.), SON OF Shri Shivjee Mahto, resident of Village Bakerganj (Kaliasthan), Post Laheriasarai, District Darbhanga (Bihar) – 846001.

..... Applicant

By Shri P.N. Chaturvedi, counsel for the applicant.

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi-110 011.
2. Chief of the Air Staff, Integrated Headquarter of the Ministry of Defence (Army), Sena Bhawan, DHQ PO, New Delhi-110 011.
3. Air Officer Commanding-in-Chief, Central Air Command, Bamrauli, Allahabad-211 012.
4. Commanding Officer, 27 Squadron Air Force, C/o 56 APO.
5. Judge Advocate of District Court Martial at the trial of the appellant, HQ Central Air Command, Bamrauli, Allahabad-211 012.

..... Respondents.

By Shri Devendra Kumar, counsel for the respondents, & Wing Cdr. S.K. Paney, Departmental Representative.

ORDER

1. This is an appeal under Section 15 of the Armed Forces Tribunal Act in which the applicant has prayed for the reliefs of quashing/setting aside the findings of guilty on the first and second charges by DCM, Sentence passed by DCM on 13.8.2015, quashing/setting aside the order of the confirming authority dated 13.9.2013, quashing/setting aside the promulgation order dated 16.9.2013, quashing/setting aside the orders dated 7.1.2014 of the Chief of the Air Staff rejecting the post-confirmation petition and to reinstate the applicant with effect from 16.9.2013.

2. The facts of the case, in brief, are that the applicant was enrolled in the Indian Air Force on 17.6.2002 in the trade of Radio Fitter and eventually he was promoted to the rank of Corporal. On 25.10.2010 he was posted to 27 Squadron Air Force where he was tried by District Court Martial (DCM) on three charges, which are as follows :

“The accused, 793139-H Cpl Praveen Kumar Rdo Flt of 27 Squadron C/o 17 Wing, Air Force, an airman of the regular air force, is charged with:-

First Charge
Section 39 (b)
AF Act, 1950

**WITHOUT SUFFICIENT CAUSE OVERSTAYING
THE LEAVE GRANTED TO HIM**
in that he

At 27 Sqn, AF, having been granted leave of absence from 16 Jun 12 to 08 Jul 12, without sufficient cause overstayed the said leave till he reported back at Main Guard Room, 17 Wing, AF at 0600h on 20 Jul 12.

Second Charge
Section 38 (1)
AF Act, 1950

DESERTING THE SERVICE
in that he

at 2130h on 29 Jul 12 absented himself from 27 Sqn, AF till he surrendered himself to 904604 Cpl SK Chaurasia

IAF(P) at 0800h on 21 Jan 13 at Main Guard Room 17 Wg, AF.

Third Charge
Section 39 (A)
AF Act, 1950
(Alternative
to second
charge)

*ABSENTING HIMSELF WITHOUT LEAVE
in that he
at 27 Sqn, AF, absented himself without leave from
2130h on 29 Jul 12, till he surrendered himself to
904604 Cpl SK Chaurasia IAF (P) at 0800h on 21
Jan 13 at Main Guard Room, 17 Wg, AF.”*

In DCM the applicant was found guilty of the first and second charges and was awarded punishment of two months detention, dismissal from service and reduction to ranks. The sentence was confirmed by the competent authority, i.e. AOC-in-C, Central Air Command, vide his order dated 13.9.2013 in which he remitted the unexpired sentence of detention while confirming rest of the punishment. The punishment was promulgated on 16.9.2013 and the post-confirmation petition was rejected on 7.1.2014.

3. The applicant was represented by Shri P.N. Chaturvedi. The applicant was granted five days' leave with effect from 18.6.2012 to 22.6.2012 on the ground of his mother being unwell and on the applicant's request the said leave was extended till 8.7.2012. He sought further extension of leave since the condition of his mother deteriorated. The applicant has annexed copies of telegram as Annexure 'A-2' to the O.A. He states that he could not join the Unit after expiry of leave period but he joined voluntarily on 20.7.2013. It has further been stated that due to mother's ill-health he had to leave the Unit on 29.7.2012 and once the health condition of his mother improved, he rejoined on 21.1.2013, meaning thereby that the absence of the applicant from his duties was on account of unavoidable compulsion. After rejoining, the applicant was charged under Air Force Act Section 38(1), i.e. the charge of desertion. The applicant challenged this charge as he did not have the

intention to desert since he rejoined voluntarily and, therefore, this charge, according to the applicant deserves to be quashed.

4. On the issue of plea of 'guilty', the applicant states that since he had stated that his mother's health condition was poor, therefore, his plea of 'guilty' should have been changed to plea of 'not guilty'. The applicant claims that he was not allowed to make any statement during DCM, as such the finding of DCM is wrong and the consequent sentence awarded to him is legally not sustainable. The applicant further states that he had gone to look after his ailing parents and on account of poor health condition of his parents he had applied for 'discharge' earlier in the month of March, which request had been turned down by the authorities.

5. The respondents are represented by Shri Devendra Kumar, learned Standing Counsel, duly assisted by Wing Cdr. S.K. Pandey, Departmental Representative.

6. On behalf of the respondents it has been stated that the applicant had been granted five days' leave from 18.6.2012 and that leave was further extended by 16 days. Even thereafter the applicant failed to report back to his Unit, on expiry of the leave period, he was declared 'deserter' with effect from 9.7.2012. The charge trial for the applicant was scheduled on 13.7.2012 but the applicant absented himself with effect from 29.7.2012 until he reported to the Unit on 21.3.2013.

7. Following the procedure laid down in Air Force Rules 24, a Summary of Evidence was ordered, in which the applicant made a statement

requesting 'discharge' to look after his ailing parents. No defence witnesses were also called. Thereafter, on the order of AOC-in-C, Central Command, DCM was ordered, which was conducted on 13.8.2013, in which charge No. 3 was withdrawn by the prosecution under the provisions of Air Force Rules 60(3). The argument of the applicant regarding his absence was that since he was morally and socially bound to look after his parents he could not join his duties timely. The court advised him to withdraw his plea of 'guilty' on this ground and plead 'not guilty'. However, the applicant continued to maintain 'guilty' and he gave this in writing also. Due procedure of law was followed by the court. The confirming authority subsequently while considered the issues and rejected the petition of the applicant. Similarly, the Chief of the Air Staff also rejected the petition after considering all the relevant factors.

8. The respondents stated that they had received a telegram dated 28.7.2012 from the father of the applicant, which was received in the Unit on 9.8.2012, well after the applicant had absented himself from the Unit. The respondents state that during the period he remained absent, he was not capacitated, yet he did not inform any service authorities the reason for his absence. On reporting back to the Unit on 21.1.2013 he again requested that his case of 'discharge' be considered sympathetically. It implies, therefore, that the applicant had no intention to join the Unit. He reported on 21.3.2013 only to get himself 'discharged'. Therefore, according to the

respondents, the charge under Section 38(1) of the Air Force Act is valid and the O.A. deserves to be dismissed.

9. Heard learned counsel for the parties and scrutinized to the documents.

10. Section 38(1) of the Air Force 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 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.”

11. The difference between desertion and being absent without leave is the intention, or lack of it, to rejoin. Also, the person so accused be either apprehended by civil police and brought to the Unit, or it be proved that he remained absent to avoid an important duty. In the instant case the applicant had reported back voluntarily which clearly indicates that he did not have any intention to desert the service or had no intention to avoid any important Air Force service. Therefore, the charge under Section 38(1) of the Act appears to be on loose ground and the charge under Section 39 of the Act, which is for absence without leave, would have been appropriate and legally valid. We are of the view that the charge under Section 38 of the Act is legally unsustainable.

12. While the procedure during investigation and trial by DCM is as provided in law, the court, the confirming authority and the Chief of the Air Staff indeed should have taken into consideration the applicant's repeated pleas for discharge from service and mitigation of punishment on account of his patents' illness. In the telegram that he has annexed with his O.A. mother's illness has been indicated. The telegram that his father had sent on 28.7.2012 also mentions the fact that his mother was unwell.

13. The applicant had applied for discharge from service on 20.3.2012.

The discharge application reads as under :

"1. I have the honour to state the following few lines for your kind consideration and sympathetic action.

(a) I was enrolled in Indian Air Force on 17 Jun 2002, now I am held on the posted strength of 27 Sqn, AF with effect from 25 Oct 2010.

(b) My elder brother Arvind Kumar, is married and living separately (copy of Affidavit attached) at Bhavnagar, Gujarat. He has been offered for appointment as a Section Officer in Center for Salt and Marine Chemical Research, Institute at Bhavnagar, Gujarat. (copy of Appointment is attached). He is neither taking care nor willing to accept any responsibilities of his old aged and ailing parents. Being the younger son, I am the only care taker of my aged and ailing parents.

(c) My elder sister Sharda Kumari, is married with Hariom Gami. He is a businessman (Rice Broking) and living at Barddaman, West Bengal with his family.

(d) My father, Shri Shivjee Mahto, age 61 Yrs, is retired from Bihar State Government Service as a Revenue clerk. He is getting pension after retirement. So he is not economically dependent on me. He is suffering from Diabetes and severe joint pain on both knees (Arthritics) and requires constant medical supervision and care. So I was living out with my parents for last one year to take care of them. He is getting treatment in AIIMS (All India Institute of Medical Sciences), New Delhi (copy of medical documents attached).

(e) *Unfortunately, situation has gone worse with my mother Smt. Parineeta “”Devi (Housewife), Age 52 Yrs, now detected with breast cancer. She is not able to undertake the routine job of family affairs. Her treatment is also going in AIIMS, New Delhi(copy of medical document is attached).*

(f) *There is nobody in home to look after my parents. My father is unable to walk normal because of severe joint pain in knees. So, he is not able to take all treatment process of self and my mother. They start feeling lonely and advised me to stay with us. My absence will endanger their lives.*

2. *Under these present conditions, my parents are insisting me to leave the service and fulfill their medical, emotional and social needs. It also becomes my moral and social responsibilities to look after their requirement in old days. My presence, there will also go a long way in improving my parents health and ensuring their medical treatment. Such situation fallen over me. So I am not able to concentrate on my service duties.”*

14. Subsequently, the applicant in his statement before the Summary of Evidence stated as follows :

“My parents’ health continuously going down day by day. Under such situation it’s my moral and social responsibility to look after them and ensure proper medical treatment. For this reason, I was absent without leave from 29 Jul 12 to 20 Jan 13. I had reported to Main Guard Room of 17 Wg, AF at 0800 hrs on 21 Jan 13. Keeping the above mentioned as a background my case should be considered sympathetically for discharge from service to look after my ailing parents.”

15. In his plea of litigation dated 13.8.2013 the applicant had made a similar plea i.e illness of his parents.

16. During DCM an officer witness, viz. Flt. Lt. M. Panwar Adjutant 27 Sqdn. Air Force, deposed before the DCM regarding the character of the applicant. It was stated that the applicant had no previous entry with regard

to indiscipline or Court Martial. His rate of good conduct was First Rate with effect from 17.6.2006 and Second Rate with effect from 17.6.2010.

17. Though the applicant brought no evidence in his support, undeniably it is established that the parents of the applicant were not keeping well and this plea the applicant had been taking since 20.3.2012 when he had submitted his discharge application which was turned down. The court as well as the Chief of the Air Staff took note of his request but rejected it since the applicant had brought no evidence to support his case.

18. We are of the view that the authorities should have taken note of the fact that the applicant's parents were not keeping well and should have allowed him to be discharge from service on ground of his parents' illness, particularly since his elder brother was unable to look after the parents and sister had been married and lived elsewhere with her family.

19. Accordingly, Charge No. 1 which was under Section 38(1) of the Act is held to be legally not sustainable and is hereby quashed. The only charge that remains against the applicant is absence of 12 days. i.e. from 8.7.2012 to 20.7.2012. Consequent to the above, the sentence awarded by DCM deserves interference. The sentence of reduction to ranks and detention as remitted by the confirming authority are held to be valid and only the sentence of dismissal from service is hereby quashed.

20. The O.A. is partly allowed. The trial and finding of guilt and the sentence awarded on the first charge is held to be valid. The trial and finding of guilty on the second charge is hereby quashed. The sentence of dismissal

is hereby quashed while the sentence of reduction to rank and the detention is upheld. We hereby direct that the applicant will be reinstated in service within one month from the receipt of this order. He shall be paid salary for the period from 16.9.2013 till date and the arrears of salary will be paid to him within three months from today. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

PG.