



**RESERVED**

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

**ORIGINAL APPLICATION No. 388 of 2021**

Friday, this the 23<sup>rd</sup> day of September, 2022

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

No 14396419P Ex Gnr Arvind Kumar, son of late Vishwanath Sharma, resident of Netaji Subhash Nagar, Shrai Dhela, District-Dhanbad, Jharkhand.

..... Applicant

Ld. Counsel for the : **Shri Ram Kumar Verma**, Advocate.  
Applicant

Versus

1. Union of India, represented by Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. Chief of the Army Staff, IHQ of MoD (Army), South Block, New Delhi-110011.
3. Officer-in-Charge, Arty Records, PIN-908802.
4. Commanding Officer, 122 SATA BTY, C/o 56 APO.

.....Respondents

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

## **ORDER**

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

*(i) Quash the Appellate order dated 30.12.2014 communicated to the petitioner vide letter dated 5<sup>th</sup> January 2015 contained as Annexure No 1 to this O.A.*

*(ii) Quash the SCM proceedings including the applicant's illegal dismissal order dated 27.07.1998 contained as Annexure No 2 to this O.A., after summoning the same and reinstate him in service with all consequential benefits.*

*(iii) Pay the back wages from the date of applicant's illegal discharge till he is reinstated in service with 18% interest.*

*(iv) Pay the amount of Rs 61,427/- on account of AFPP fund balance which is due to the applicant and admitted by the respondents by means of the letter dated 22.03.2007 with 12% interest.*

*(v) Any other order which this Hon'ble Tribunal deems fit in the facts and circumstances of the case.*

*(vi) Cost of the application be awarded in favour of the applicant.*

2. Brief facts of the case are that the applicant was enrolled in the Army as Driver (Mechanical Transport) on 12.09.1986 through Branch Recruiting Office (BRO), Dhanbad. While serving with 122 SATA Battery he was granted 62 days annual leave w.e.f. 04.11.1988. After availing the said leave he again requested for leave within a month which was granted w.e.f. 04.02.1989. After rejoining from leave he requested for 20 days casual leave, due to his domestic problems, which was granted w.e.f. 03.05.1989. On expiry of leave he rejoined the unit. Thereafter, he absented himself without leave (AWL) for

the period 01.06.1989 to 18.07.1989 (48 days) and was awarded 28 days rigorous imprisonment under Section 39 (a) of the Army Act, 1950. In the year 1991, the applicant again absented without leave for the period 13.11.1991 to 10.12.1991 (28 days) and was awarded 28 days rigorous imprisonment under Section 39 (a) of the Army Act, 1950. On 29.05.1994 he was sent on Extra Regimental Employment (ERE) to 3 Sector Rashtriya Rifles. While serving on ERE he was awarded 14 days rigorous imprisonment under Section 63 of the Army Act, 1950 for an act of prejudicial to good order and military discipline in that he while at guard duty failed to carry out his duties and negligently allowed civilian to cut trees in the area of his responsibility. After expiry of ERE tenure at Rashtriya Rifles he was reverted back to his parent unit i.e. 122 SATA Battery on 10.05.1997. On 24.05.1998 while performing sentry duty at MT Park he hit his Guard Commander Hav KK Pillai with a wooden stick causing serious injury. After the incident, duty officer, Subedar Major, Adjutant and the Commanding Officer reached the spot and on query he confessed his mistake. On 25.05.1998 summary of evidence was recorded by Maj R Nair, Adjutant and on the advice of DJAG, Summary Court Martial (SCM) proceedings were ordered under Section 40 (a) of the Army Act, 1950 for using criminal force to his superior officer. The applicant was sentenced to 03 months rigorous imprisonment in civil prison and dismissed

from service. He was then handed over to Superintendent Central Jail, Dehradun on 27.07.1998.

3. Against the aforesaid punishment the applicant submitted petition dated 03.10.1998 to GOC-in-C, Western Command with a copy to Chief of the Army Staff (COAS). This petition was received by the unit from Discipline and Vigilance Directorate (DV Dte) who asked certain documents which were supplied vide letter dated 20.11.1998. However, the same were returned unactioned vide letter dated 26.11.1998 which were rectified and submitted on 14.12.1998. Meanwhile, the applicant filed writ petition No 39121 of 1998 before the Hon'ble High Court of Judicature at Allahabad. In this regard, requisite documents were forwarded to Allahabad Sub Area for contesting the case. Later, it was transferred to Hon'ble High Court at Nainital and the same was dismissed vide order dated 29.07.2008 with direction to the applicant to avail alternative remedy.

4. The record reveals that 122 SATA Battery communicated all details to Headquarters 14 Artillery Brigade on 20.12.2008 but Headquarter 14 Artillery Brigade intimated that record of the case is not available with them since over 10 years. Thereafter, applicant submitted representation dated 25.11.2013 to Chief of the Army Staff which was rejected vide order dated 30.12.2014. This O.A. has been filed before this

Tribunal challenging the order dated 30.12.2014 passed by the Chief of Army Staff (COAS) and re-instate him in service with all consequential benefits.

5. Learned counsel for the applicant submitted that the applicant was enrolled in the Army on 12.09.1986. He further submitted that on 24.05.1998 the applicant was detailed for guard duty in Mechanical Transport Park Area. During the course of his duty Hav KK Pillai was the Guard Commander and Hav Balwinder Singh came to that area. Hav KK Pillai asked the applicant as to why he had challenged him from such a close range, and Hav Balwinder Singh told Hav KK Pillai that the applicant does not know much about the Army and the procedure for challenging, even though the applicant had nearly 12 years of service. To teach the applicant the art of challenging, Hav Balwinder Singh asked the applicant to hit him. Thereafter Hav KK Pillai pulled the applicant and caught him and during the struggle Hav KK Pillai got injured while Hav Balwinder Singh ran away from the scene.

6. Learned counsel for the applicant further submitted that the applicant did not attack or injure Hav KK Pillai, and the entire episode lasted for a few seconds and the injury caused to Hav KK Pillai was due to the fact that he fell down during the struggle with the applicant in the demonstration of challenge. It was further submitted that the applicant was directed to

accept his guilt by the superiors, and he was informed that in case he pleads guilty, he will be let off with a very minor punishment, but the applicant all along submitted that at no point of time he had used force against his superior, and Hav KK Pillai and Hav Balwinder Singh were drunk at the time of the incident, and it is they who under the garb of teaching the applicant the art of challenge, wanted to assault the applicant, and the applicant only caught the stick of Hav KK Pillai to prevent from being injured, which led to struggle in which minor injury was caused to Hav KK Pillai.

7. Further submission of learned counsel for the applicant is that the entire SCM proceedings were conducted in English language which he did not understand and he was forced to sign. It was further submitted that even after pressure of the Commanding Officer he signed as 'Not Guilty'. Applicant further submitted that no medical examination of Hav KK Pillai was carried, and there was no medical report available on record, nor was any medical report relied upon by the prosecution to prove that there were injuries on Hav KK Pillai. In the absence of any evidence of injuries on how Hav KK Pillai was injured, the charge on assault on Hav KK Pillai cannot be proved and the applicant has been convicted only on the basis of conjectures without there being any evidence on record. It was further submitted that the punishment given to the applicant of 03 months rigorous imprisonment along with

dismissal of service is a very harsh punishment which does not commensurate with the gravity of offence.

8. Learned counsel for the applicant further submitted that during the SCM proceedings the applicant repeatedly made a statement before the summary of evidence that Hav KK Pillai and Hav Balwinder Singh were drunk at the time they came to the petitioner while he was on guard duty. This statement of the petitioner was not recorded during the summary of evidence as well as by the Commanding Officer during the SCM wherein he clearly mentioned that Hav KK Pillai and Hav Balwinder Singh were drunk at the time they came to the petitioner. It was also submitted that the law mandates that the verbatim statement made during the court-martial are to be recorded and these statements should not be changed by the Presiding Officer while recording the same, therefore, there is serious infirmity in the entire proceedings for which the whole trial deserves to be vitiated. He pleaded for setting aside order dated 30.12.2014 rejecting applicant's petition by the COAS and order dated 27.07.1998 passed in SCM and reinstate him in service with all consequential benefits.

9. On the other hand, learned counsel for the respondents submitted that the applicant while on duty at Mechanical Transport Park Area in 122 SATA Battery hit Hav KK Pillai on 24.05.1998 by a wooden stick causing serious injury to him.

After the incident, the Duty Officer, Subedar Major, Adjutant and the Commanding Officer reached the site within 10-15 minutes of the incident and the applicant who was present confessed his mistake. Accordingly, summary of evidence was recorded and SCM was ordered under Section 40 (a) of the Army Act, 1950 for using criminal force to his superior officer and subsequently awarded the sentence of rigorous imprisonment for three months in civil prison and dismissal from service w.e.f. 27.07.1998.

10. Learned counsel for the respondents further submitted that applicant's writ petition No 39121 of 1998 was dismissed by the Hon'ble High Court of Nainital vide order dated 29.07.2008 on the ground of non availing the alternative remedy. Thereafter, representation dated 25.11.2013 submitted by the applicant was rejected by Chief of the Army Staff vide order dated 30.12.2014 which was communicated to him on 01.03.2015 at the given address. He pleaded for dismissal of O.A. on the ground that SCM proceedings were held in accordance with rules/regulations/act on the subject.

11. We have heard learned counsel for both the sides and perused the material placed on record. We have also scrutinised the original records related to the matter including SCM Proceedings by which applicant was dismissed from

service in addition to rigorous imprisonment for 03 months in civil jail.

12. No. 14396419P Gunner (DMT) Arvind Kumar was enrolled in the Army on 12.09.1986. While serving with 122 SATA Battery he absented without leave for 48 days and for this offence he was awarded 28 days rigorous imprisonment under Section 39 (a) of the Army Act, 1950. Again, in the year 1991 he absented without leave for 28 days and he was awarded 28 days rigorous imprisonment under Section 39 (a) of the Army Act, 1950. Further, while serving on ERE with 3 Sector Rashtriya Rifles (3 RR) he was awarded 14 days rigorous imprisonment under Section 63 of the Army Act, 1950 on 13.03.1996 for an act prejudicial to good order and military discipline in that he, while at guard duty, failed to carry out his duties adequately and negligently allowed civilians to cut trees in the area of responsibility.

13. Writ petition No 39121 of 1998 filed against dismissal from service was dismissed by the Hon'ble High Court Nainital vide order dated 29.07.2008 on the ground of non availing alternative remedy. Thereafter, applicant submitted representation dated 25.11.2013 to Chief of the Army Staff which was rejected by speaking and reasoned order dated 30.12.2014. For convenience sake, the said order is reproduced as under:-

"ORDERS OF CHIEF OF THE ARMY STAFF ON THE PETITION DATED 25 NOVEMBER 2013 UNDER SECTION 164 (2) OF THE ARMY ACT, 1950 SUBMITTED BY NUMBER 14396419P EX GUNNER (DRIVER MECHANICAL TRANSPORT) ARVIND KUMAR OF 122 SURVEILLANCE AND TARGET ACQUISITION BATTERY

1. WHEREAS, in exercise of the powers conferred on me vide Section 164 (2) of the Army Act, 1950, I have examined the petition, dated 25 November 2013, submitted by Number 14396419P ex Gunner (Driver Mechanical Transport) Arvind Kumar of 122 Surveillance and Target Acquisition Battery against the 'Finding' and 'sentence' awarded by the Summary Court-Martial (SCM) which tried him on 27 Jul 1998.

2. AND WHEREAS, the petitioner was tried by SCM on a charge under Army Act Section 40 (a) for 'USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER', the particulars thereof averring that 'he, at Dehradun, on 24 May 98 at about 2230 h struck with a wooden stick on the head of No 14482931X Hav (Svyr) KK Pillai on the same unit'. The petitioner pleaded 'Not Guilty' to the charge. The Court after due trial found him 'Guilty' of the charge and sentenced him to suffer rigorous imprisonment for three months in civil prison and to be dismissed from the service.

3. AND WHEREAS, the petitioner in his petition has mainly contended that :-

(a) The charge under Army Act Section 40 (a) was made against him on a false complaint.

(b) He, while on sentry duty, challenged Havildar KK Pillai and Havildar Balwinder Singh as per procedure and that he did not hit Havildar KK Pillai. Although Havildar KK Pillai was intoxicated, no action was initiated against him.

(c) He pleaded 'Not Guilty' to the charge but was not heard. The Defence Witnesses were not given enough opportunity to defend him and were arbitrarily directed to sit down. Time and again he pleaded that he was innocent and prayed that the case be considered sympathetically but his cry fell on deaf ears.

(d) The Dismissal Order against him was passed arbitrarily without due consideration and assigning any reasons, whereas, as per law, failure to give reasons amounts to denial of justice. There is nothing in his record to show that he had ever misbehaved with his superiors or anybody else.

(e) Due to his dismissal, his family members are in a great financial stringency and are literally starving for their bread and butter. Education of his children has come to a standstill. The dismissal order/sentence may, therefore, be set aside and he be reinstated in service with all back wages and increments.

4. AND WHEREAS, perusal of the SCM proceedings and connected documents reveal that :-

(a) The petitioner, on 24 May 1998, at about 2230 hours, while performing sentry duty, hit Havildar KK Pillai with a stick. There is nothing on record to show that Havildar KK Pillai had any previous animosity with the

*petitioner which prompted him to lodge a fake complaint against the petitioner.*

*(b) Havildar KK Pillai was examined as prosecution witness No 1 (PW-1) at the trial. He had categorically deposed that when he went to check the Guard, the petitioner did not follow the correct challenging procedure. He, therefore, demonstrated the procedure to him and asked him to repeat the same. The petitioner however, suddenly hit him with a wooden stick repeatedly. PW-1, during cross examination, denied that he was drunk. Even otherwise, there is nothing on record to show that PW-1 was drunk. The contention of the petitioner is, therefore, contrary to the record.*

*(c) Consequent to the plea of 'Not Guilty', offered by the petitioner, the Court examined four PWs, whom the petitioner cross examined. He made a detailed statement in his defence and also examined two witnesses in his defence. The Court after due consideration of evidence on record, found the petitioner 'Guilty' of the charge. The conviction was based on cogent and reliable evidence of witnesses who have withstood the test of cross-examination. The contention of the petitioner is, therefore, misconceived.*

*(d) There is no provision under the law which mandates that a SCM shall record reasons in support of its findings. The record reveals that the petitioner had been punished thrice before the instant trial. The Court, keeping in view the gravity of the offence and past blemished record of the petitioner, sentenced him 'to suffer RI for three months in civil prison and to be dismissed from service.*

*(e) The petitioner has submitted the present petition on 25 November 2013, more than 15 years after his dismissal. The sentence awarded to the petitioner is legal, just and commensurate to the gravity of the offence. No interference with the proceedings is hence, warranted.*

*5. NOW, THEREFORE, considering the case in its entirety, I reject the petition dated 25 November 2013 submitted by Number 14396419P Ex Gunner (Driver Mechanical Transport) Arvind Kumar of 122 Surveillance and Target Acquisition Battery, being devoid of merit and substance.*

*Signed at New Delhi on this 30<sup>th</sup> day of December, 2014.*

*sd- x x x*

*General*

*Chief of Army Staff"*

14. The COAS while rejecting applicant's representation has categorically mentioned that in view of gravity of the offence and past blemished record, his sentence is legal, just and commensurate to the gravity of the offence.

15. Now we would like to ascertain the fact whether Summary Court Martial proceedings were held as per rules on the subject. The SCM proceedings were held under Section 40 (a) of the Army Act, 1950 for using criminal force or assaulting his superior officer. The said act with notes for convenience sake is reproduced as under:-

**“40. Striking or threatening superior officers. — Any person subject to this Act who commits any of the following offences, that is to say, —**

- (a) uses criminal force to or assaults his superior officer; or
- (b) x x x x x
- (c) x x x x x

*if such officer is at the time in the execution of his office or, If the offence is committed on active service, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and in other cases, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned. Provided that in the case of an offence specified in clause (e), the imprisonment shall not exceed five years.*

**NOTES**

1. Clause (a). Offences under this clause should not be dealt with summarily under AA.s.80, 83 or 84.

2. (a) For definition of 'force', using criminal force and 'assault', see IPC.ss.349, 350 and 351 (Part III). The difference between the offence mentioned in this clause will be clear from the following examples :-

- (i) A throws a stone at B. If the stone hits B, A has used criminal force, if it misses him, A has attempted to use criminal force.
- (ii) A, during an altercation with B, picks up a stone in a threatening manner. If A intends, or knows it to be likely, that this will cause B to believe that A is about to throw the stone at him. A commits an assault on B.

*An 'assault' is something less than the use of criminal force; the force being cut short before the blow actually falls. It seems to consist in an attempt or offer by a person having present ability, with force to do any hurt or violence to the person of another, and it is committed whenever a well founded apprehension of peril from a force partially or fully put in motion is created, e.g., when a person draws a bayonet or otherwise makes a show of violence against a superior but not when net is behind the bars or at such a distance as to rule out at the moment any actual use of criminal force An assault is thus included in every use of criminal force, and is an intermediate stage thereof.*

(b) *If the force be used in the exercise of the right of private defence, for instance if it be shown that it was necessary, or that at the moment the accused had reason to believe it was necessary for his actual protection from injury, and that he used no more force than was reasonably necessary for this purpose, he is legally justified in using it and commits no offence. See IPC.ss.96, 97—102 (Part III).*

(c) *x x x x x*

(d) *x x x x x*

3. *A joint charge under this clause can be sustained provided that the use of criminal force or assault was the result of a concerted action in furtherance of a common intent (IPC.s.34) though in some cases such concerted use of force may amount to an offence under AA. s.37(b) also.*

4. *When use of criminal force to a superior is accompanied by insubordinate language, the use of criminal force only should be charged (assuming that the evidence is satisfactory) and the language would be admissible in evidence to show the manner in which the offence was committed.*

5. *A person charged with using criminal force may be found guilty of an attempt to use criminal force or assault (AA.s.139(8) and (3)).*

6. (a) *Superior Officer.—See AA.s.3(xxiii).*

(b) *While framing a charge under this section, the name of the superior officer shut be set out in the particulars of the charge.*

(c) *The expression 'superior officer' in this section and in AA.s.41 means not only a superior in rank but also a senior in the same grade where that seniority gives power of command according to the usages of the service, but one sepoy can never be the "Superior officer" of another. The court should be satisfied, before conviction, that the accused knew the person, with respect to whom the offence was committed, to be a superior officer .If the superior did not wear the insignia of his rank, and was not personally known to the accused, evidence would be necessary to show that the accused was otherwise aware of his being his superior officer, or had reason to believe him, to be this superior officer. If such evidence is not available, the accused should be charged under AA.s.63 or 69.*

(d) *Where the accused is charged with an offence against a superior officer who is of the same grade, evidence must be adduced to show that the latter is senior to the accused.*

(e) *The lower the rank of the superior the less is the gravity of the offence. Also see Regs Army para 450.*

#### NOTES

7. (a) *The offence under this clause or clauses (b) and (c) is punishable more severely if such superior officer was at the relevant time in the execution of his office or if the offence is committed on active service. Such aggravating circumstances should not be averred in the particulars unless the case warrants severe punishment and it is intended to try the accused by a GCM.*

(b) *It is difficult accurately to define the words 'in the execution of his office', but the military knowledge and experience of the members of a court-martial will enable them in most instances readily to determine whether the superior officer was or was not in the execution of his office. A superior officer in plain clothes may undoubtedly be in the execution of his office; but where the superior officer is in plain clothes, it becomes necessary to prove*

*some knowledge on the part of the accused at the time of the offence that the person who was assaulted or to whom criminal force was used was a superior officer and that he was known to the accused as such, which is not the case where the superior officer is in uniform. On the other hand, there may be circumstances in which a superior officer in uniform is not in the execution of his office. It may be taken in general that using criminal force to or assaulting any superior officer by a person subject to AA over whom it is, at the relevant time, the duty of that superior officer to maintain discipline, would be using criminal force to or assaulting him in the execution of his office.*

*(c) When the accused is charged, with using criminal force to or assaulting his superior officer who is at the time in the execution of his office or if the accused is charged with committing the offence on active service and the court is satisfied that the offence was committed but not on active service or that the superior officer was not then in the execution of his office, he may be found guilty under AA.s.139(7) of the same offence as having been committed in circumstances involving a less severe punishment.*

8.       *x x x x*
9.       *x x x x x*
10.      *x x x x x*
11.      *x x x x x*
12.      *x x x x x*
13.      *x x x x x*
14.      *x x x x x*
15.      *x x x x x*

16. We find that allegations levelled by the applicant have no substance as the SCM proceedings are self-explanatory to prove that he was given appropriate opportunity to defend and cross examine the witnesses in three hours non-stop proceedings. The applicant declined to cross examine the witnesses and was also asked to call any more defence witnesses, if any, but he declined. He was heard personally by the Commanding Officer for 15-20 minutes after he committed the offence on 24.05.1998 and he accepted his mistake. He was again heard formally in orderly room on 25.05.1998 at 1230 hours when the provisions of Army Rule 22 were complied

with. Thereafter, he was served with a tentative charge sheet and summary of evidence was recorded for preparation of defence on 18.07.1998 at 1330 hours when the applicant himself had received and affixed his signature on the receipt.

17. With regard to non application of Section 120 (2) of the Army Act, 1950 as contended by the applicant, we find that this section is applied for Sections 34, 37 and 69 of the Army Act, 1950 whereas the applicant was tried under Section 40 (a) of the Army Act, 1950.

18. We further take a note that the applicant had committed an offence in which he had allowed civilians to cut trees while serving in sensitive area of J&K (Rashtriya Rifles) for which he was awarded 14 days rigorous imprisonment. This minor punishment in our view was awarded leniently otherwise keeping in view of gravity of offence he would have been dismissed from service. Rashtriya Rifles is fighting with enemy sponsored terrorists to restore normalcy in the valley where there is every possibility that terrorists may come in military area in the guise of farmers and labours.

19. On the point of AFPP fund balance of Rs 61,427/- as contended by the applicant and admitted by the respondents vide letter dated 22.03.2007 (Annexure A-3) we find that this amount is payable to the applicant. The respondents ought to remit the balance amount of his AFPP in favour of the applicant.

20. In view of the above, we are of the view that the SCM was held in accordance with rules on the subject and no prejudice seems to have been caused to the applicant while dismissing him from service. Also, there seems no legal infirmity or error in awarding punishment to the applicant for the offence he committed under Section 40 (a) of the Army Act, 1950.

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

22. No order as to costs.

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

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

Dated: 23.09.2022  
rathore