

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI**

**T.A NO. 234 OF 2010
(WRIT PETITION (C) NO. 5638 OF 2006)**

JASWINDER SINGH, S/O KARAM CHAND
R/O VILLAGE MIAN PUR
POST OFFICE: JEOLI VIA LALRU
TEHSIL: DERABASSI, DIST: PATIALA, PUNJAB.

THROUGH: MR. ASHIM AGARWAL, ADVOCATE

.. PETITIONER

VS.

1. UNION OF INDIA THROUGH ITS SECRETARY
MINISTRY OF DEFENCE, SOUTH BLOCK,
NEW DELHI.
2. THE CHIEF OF ARMY STAFF,
ARMY HEADQUARTERS,
SOUTH BLOCK DHQ, NEW DELHI-110 011.
3. LIEUTENANT COLONEL A.S PATIYAL
SD BRANCH, HQ WESTERN COMMAND
CHANDIMANDIR, DIST: PANCHKULA, HARYANA.

THROUGH: LT. COL. NAVEEN SHARMA

.. RESPONDENTS

CORAM

HON'BLE MR. JUSTICE S.S KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S DHILLON, MEMBER

JUDGMENT

11.05.2010

1. This writ petition has been filed by the petitioner seeking to set aside the Summary Court Martial (SCM) proceedings of 11.3.2004, whereby he was sentenced to be dismissed from service. He is also aggrieved by the order of the Chief of the Army Staff (COAS) of 3.1.2006 rejecting his statutory appeal under Army Act Section 164(2).

2. The petitioner pleaded that at a very young age of 20 years, he opted for serving the Nation and joined the territorial army in October 2001 as a volunteer. His battalion was "embodied" and deployed in Kashmir in 2004 when the petitioner was dismissed from service after a very brief, abrupt and illegal SCM, which lasted 15 minutes. The main contention of the petitioner is that being in the Territorial Army, which is different from the "Regular Army", he should not have been tried under the Army Act. Chapter I Para 1 of Regulation for the Army clearly

states that the Army comprises of three components i.e. Regular Army, Army Reserve and the Territorial Army. Therefore, to include him as part of the regular Army was illegal. Furthermore, the petitioner contended that even according to Army Act Section 3(xxi), "Regular Army", as defined therein, means, ***"officers, junior commissioned officers, warrant officers, non-commissioned officers and other enrolled persons who, by their commission, warrant, terms of enrolment or otherwise are liable to render continuously for a term military service to the Union in any part of the world, including persons belonging to the Reserve Forces and the Territorial Army when called out on permanent service"***. Therefore, when he was not on permanent service as mentioned in the Army Act, he could not be construed to be part of the Regular Army. The aspect of permanent staff has been defined at Para 21A of the Territorial Army Rules as under:

"21-A. Service on the Permanent Staff—(a) Every enrolled person who volunteers with the written consent of his employer, if any, for employment of the permanent staff of a Territorial Army unit, may, if found suitable by the Commanding Officer of the unit, be embodied under the orders of the Officer Commanding the Area/TA Group Commander in which the unit is located for such period as he is required to fill a vacancy on the permanent staff of the unit."

3. The petitioner contends that he could not be tried by the SCM as Army Act Section 116 clearly stipulates that SCM may be held by the Commanding Officer of any Corps, department or detachment of the Regular Army. The petitioner's unit was that of "Territorial Army" and not 'Regular Army' and consequently, the Commanding Officer of such a unit could not be the Commanding Officer of the regular Army, thereby rendering the SCM proceedings illegal and without jurisdiction. The Territorial Army is a part time volunteer force consisting of individuals who are not professional soldiers, but civilian citizens of the society who undertake to receive military training for a few days in a year in their spare time, so that in case of a war or any national emergency, they can be called out for national service. Ipso facto, it implies that Territorial Army personnel are not part of the Regular Army.

4. The facts of the case, as contended by the petitioner, are: On 18.2.2004, his mother fell sick. A telegram to this effect was received by his unit on 20.2.2004. Accordingly, the petitioner applied for leave. Since he did not get a quick response to his request for leave and was merely told that his leave would be sanctioned but it may take a few days since leave party was due to return shortly, he was very agitated and concerned about his mother's health and time and again

reminded his senior officers that he needed to go on leave at the earliest. Since he was dissatisfied with the slow process of grant of leave, he told his senior JCO, Sub. Ravinder Kaushik that if his leave was not sanctioned, he was ready to go on discharge. He was informed by Sub. Ravinder Kaushik that he could write an application for discharge within the next 15 minutes and he would give that application to his Company Commander. However, Sub. Ravinder Kaushik perceived the petitioner's language as insubordinate and produced him before the Commanding Officer for disciplinary action for using insubordinate language. He was accordingly awarded a summary disposal of 14 days confinement to lines and his discharge also was supposedly not approved. Being at his wit's end, he decided to leave the unit on 26 Feb, so that he could go home and look after his ailing mother. He remained so absent till he was apprehended from his village on 2.3.2004 thereby entailing an absence of six days. He, therefore, had reasonable ground to be absent because his mother was alone at home and there was no one to look after her.

5. The petitioner also pleaded that the SCM, which was held on 11.3.2004, was grossly illegal. Besides the fact that it had no jurisdiction to try him, it is amazing that the SCM could comply with Rules 106 to 133 of the Army Rules

1954 in a brief period of 15 minutes, find the petitioner guilty and sentence him to be dismissed from service. This was not possible as the affirmation of the Court, interpreter, arraignment of the accused, reading of charge sheet, including its explanation and translation, reading of the summary of evidence, including translation and giving the cautionary certificate under Army Rule 115(2) and subsequent questions and answers, filling up of the form, including character roll, etc. is time consuming and cannot be done in this short period. In any case, it definitely indicates a pre-meditated bias and non-application of mind. There was no immediate urgency or hurry which necessitated his trial by SCM and he could have been given a better and fair opportunity by being tried by some other form of court martial as SCM should only be resorted to in rare and emergent cases. The petitioner also stated that his Commanding Officer, Lt. Col. A.S Patiyal was biased against him since the petitioner had been witness to certain immoral activities of the said officer and had reported these activities to the senior officer, therefore, the entire SCM was pre-judged and tainted by personal bias and mala fides.

6. The petitioner is also aggrieved that the COAS, while rejecting the petition under Army Act Section 164(2) had carried out a minor conversion of dismissal into discharge, which has provided no effective or practical relief to the

petitioner, since at this young age of 24 years, he finds himself deprived of his livelihood and means of existence.

7. The respondents clarified that persons subject to the Act are listed at Section 2 of the Army Act. Army Act Section 2(e) specifies that “officers of the Territorial Army, when doing duty as such officers, and enrolled persons of the said Army when called out or embodied or attached to any regular forces, subject to such adaptations and modifications as may be made in the application of this Act to such persons under sub-section (1) of section 9 of the Territorial Army Act, 1948 (56 of 1948)”. The respondents emphasised that Para 1 Chapter 1 of Regulations for the Army had been incorrectly interpreted by the petitioner. While the Army may have three components, i.e. Regular, Reserve and Territorial Army; the Army Act and Rules were applicable to the “Army” and not only “Regular Army” and the Army, as accepted by the petitioner, includes all three components. Furthermore, “Regular Army”, as defined at Army Act Section 3(xxi), clearly includes Territorial Army. There is, therefore, no doubt that all ranks of the Territorial Army are part of the Army. In this case, the battalion of the petitioner, i.e. 102 TA Battalion, was ‘embodied’ as given at Para 22 of the Territorial Army Rules. The petitioner was deliberately attempting to confuse the issue of ‘Permanent Staff’ as envisaged at

Para 21-A of the Territorial Army Rules with 'permanent service' as mentioned at Army Act Section 3(xxi). Permanent staff, as referred to at Para 21-A of the Territorial Army Rules, lays down the pre-conditions for being employed on the permanent staff of the Territorial Army. Such acceptance on permanent staff is executed by the volunteer being 'embodied' as given at Para 22 of the Territorial Army Rules. It is an admitted position that the petitioner was embodied, i.e. accepted on the permanent staff of the Territorial Army. Embodiment of a Territorial Army personnel equates him for all purposes with regular army personnel and there is no distinction in any legal aspect with regard to Army Act/Rules. Therefore, there is no doubt that the Territorial Army personnel constitute part of the regular Army and are subject to all the legal provisions contained in the Army Act/Rules except the exceptions made in Army Act Section 2(e), which is not relevant in this case.

8. It was also clarified that the Commanding Officer has been defined at Army Act Section 3(v), wherein the definition of the Commanding Officer has been given, which reads:

“3. Definitions.—In this act, unless the context otherwise requires,--

(i) xx xx xx xx

xx

xx

xx

xx

(v) 'commanding officer', when used in any provision of this Act, with reference to any separate portion of the regular army or to any department thereof, means the officer whose duty it is under the regulations of the regular Army, or in the absence of any such regulations, by the custom of the service, to discharge with respect to that portion of the regular Army or that department, as the case may be, the functions of a commanding officer in regard to matters of the description referred to in that provision;

(vi) xx

xx

xx

xx"

Therefore, the Commanding Officer of the Territorial Army enjoys as much power and authority as any other Commanding Officer under the Army Act /Rules.

9. It was clarified by the respondents that when the petitioner applied for leave to attend to his mother's illness on 20.2.2004, such leave was sanctioned. However, since a certain mandatory strength of personnel has to be maintained at all posts due to security reasons, the petitioner was asked to delay his move by a few days since some personnel were to return from leave very shortly. The petitioner was adamant and insisted that he required to proceed on leave immediately and accordingly submitted an application for discharge if not permitted to go on leave. While doing so, the petitioner used threatening language to his superior officers which is unbecoming of the conduct of a soldier and the

petitioner was produced before his officiating Commanding Officer for use of threatening language to his superior officer and was awarded 14 days confinement to lines from 24th February to 8th March 2004. It was while undergoing this punishment that the petitioner proceeded on unauthorised leave from the unit on 26.2.2004. Therefore, not only is it on record that leave was sanctioned and the authorities were quite compassionate to his request but it is also apparent that the petitioner was arrogant and adamant – against the norms of military discipline and good order. It was also clarified that mere giving an application for discharge from military service does not tantamount to its approval. In this specific instance of the petitioner, the discharge could only be sanctioned by the brigade/sub area commander under Army Rule 13(3)(v). Therefore, this aspect of submitting his application for discharge is merely being done to elicit sympathy and confuse the proceedings.

10. With regard to the SCM, it was clarified that the petitioner pleaded guilty and the testimony of all the four witnesses which were recorded in the summary of evidence could be read over to the individual within 15 minutes. The petitioner pleaded guilty to the one and only charge of absent without leave which was preferred against him and in acknowledgment of such plea, he has signed the

certificate under Army Rule 115(2). No reasons are required to be recorded by the SCM when it comes to any decision and the Court is only required to announce its verdict. While the SCM may have concluded its proceedings within 15 minutes, it is for the petitioner to point out any legal infirmities, which he has failed to do. Therefore, as long as the SCM proceedings have been conducted legally and the petitioner was afforded the opportunity to present his case, mere stating that the trial finished in 15 minutes cannot be a plea for setting aside or quashing of the proceedings. The COAS, in his response to the petition, has remitted the punishment of dismissal to discharge, thereby providing relief to the petitioner.

11. Keeping the above in mind, we do not find any merit in the petition. It is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER