IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH

NEW DELHI

T.A NO. 242 OF 2009
(Writ Petition (Civil) No. 2626 of 1990)

JAMEEL AHMAD, 2875183,
S/O. EX. HAV. SULEMAN KHAN,
VILLAGE & P.O: NAI,
TEH. FEROZPUR, JHIRKA
DISTT. GURGAON (HARYANA).

THROUGH: M/S. C.M KHAN & VIKAS SINGH, ADVOCATES

... PETITIONER

VERSUS

1. UNION OF INDIA
THROUGH SECRETARY,
MINISTRY OF DEFENCE, GOVT. OF INDIA,
NEW DELHI

2. CHIEF OF ARMY STAFF,
ARMY HEADQUARTERS, SOUTH BLOCK,
NEW DELHI-110001

3. COMMANDING OFFICER
NO. 3 RAJ RIF,
C/O. 56 APO.

THROUGH: MS. JYOTI SINGH, ADVOCATE
ASSISTED BY LT. COL. NAVEEN SHARMA

... RESPONDENTS

CORAM:
HON'BLE MR. JUSTICE S.S KULSHRESHTHA, MEMBER
HON'BLE LT. GEN. S.S DHILLON, MEMBER

JUDGMENT
DATED 29TH JANUARY 2010

1. The petitioner is agitated about his Court Martial on 2nd January 1990, whereby he was dismissed from service and also awarded four months' rigorous imprisonment. The petitioner states that this was done most arbitrarily and was blatantly unfair and unduly harsh, especially because he had valid reasons for being on leave and also because he had about 12 years of service on this day – which has been rendered fruitless on account of his dismissal.

2. The petitioner contends that he had been serving with all dignity and grace in the Army for about twelve years upto September 1989. At this time, he was posted with RAJ RIF Training Centre at Delhi when he was transferred to his unit 3 RAJ RIF at Poonch (C/o 56 APO) in Jammu & Kashmir. He was given orders to move on 2nd September 1989 to his unit and although he had not got any leave or break journey, since he belonged to Gurgaon which was very close to New Delhi, he

decided to go home and drop his heavy baggage before proceeding to his unit at Poonch. While in Gurgaon, the petitioner fell very sick, in fact he contacted typhoid and was admitted in hospital from 3rd September 1989 to 12th October 1989. Being very sick, the petitioner could not approach his authorities for granting of leave and it was only when his father, who was an ex-serviceman, returned home after attending the religious ceremonies on 30th September 1989, that his father sent a telegram to his unit on 30th September 1989 that his son was suffering from Typhoid and could not attend office and also applied for leave on his behalf. The petitioner's father contends that CO 3 RAJ RIF to which the petitioner belonged, granted 30 days leave to the petitioner and he requested the CO to give him 10 more days leave from the next year's entitlement of leave. As the petitioner recovered on 12th October 1989, he left for his unit the next day, i.e. 13th October 1989 and joined duties on 16th October 1989. However, nobody listened to his pleas and he was court martialled, awarded a harsh sentence and dismissed from service.

3. The petitioner has further contended that after release from Jail, he sent an appeal to the Chief of Army Staff on 25th April 1990 as

well as a reminder on 27th May 1990, to which he has not received any reply.

4. The petitioner also indicated various legal infirmities during the pre-trial and trial stage. He was not given the summary of evidence and charge-sheet 96 hours before his trial, as is mandated by law and his admission in hospital was not taken into account by the Court Martial during its proceedings. During the trial, certificate as required under Army Rule 115(2) was not given and the trial finished in a period of 30 minutes, which is too short a time for any fair and methodical trial. The petitioner also contends that under Army Rule 124, he has been given a double sentence, which is not permitted by Army law and he could have been awarded either rigorous imprisonment or dismissal, but not both. This is borne out by Sections 71 and 73 of the Army Act. In accordance with Army Rule 54(5), the Court should have altered the plea of 'guilty' to 'not guilty'. Lastly, it was stated that the SCM proceedings had not been sent for review to higher HQ as per Army Rule 133.

5. Counsel for the respondents were of the view that notwithstanding the fact that most of these arguments/issues were not pleaded in the writ but were an after-thought, it was a clear case of being absent without leave for no reason whatsoever and all this hospitalisation, etc. was a big hoax/fraud which the petitioner was now playing with the Court. The petitioner had been given a movement order which clearly specified that he is to report directly to the unit and was not given any leave whatsoever. In fact, the order stated that not only he was not given any leave, but he was given 'NIL' days joining time enroute. In fact, the movement order records/endorses the remark "The individual is unwilling to serve in the Regimental Centre". There was absolutely no reason for the petitioner to proceed to his house to supposedly drop his heavy baggage. Such journey to his house was not permitted at all and was done arbitrarily and constituted a blatant violation of the Army's disciplinary character.

6. With regard to hospitalisation, counsel for the respondents contended that the petitioner was not admitted in any hospital – whether Military/Government or Private. In fact, from 4th September to 30th September 1989, the petitioner sent no intimation to anyone regarding

his illness or hospitalisation. Even when his father comes home on 30th September and sends a telegram asking for leave for his son he regrets not admitting him in any Government hospital. Counsel also stated that it was ludicrous that the petitioner could go from Delhi to Gurgaon to drop his luggage without permission but could not undergo a return journey from Gurgaon to Delhi to get free quality medical treatment despite being "severely" sick! It is also inexplicable as to why the petitioner, being from a humble background, chose to spend huge sum of money supposedly to get medical treatment in civil hospitals for over a month, when the best military hospital of the country was a few kilometres away. Further the supposed medical chit given by the petitioner is a fake as it does not bear the letter-head of the doctor nor his registered number. The rubber stamp is somewhat faded and this "so called chit" refers to his being treated for dysentery and typhoid without mentioning the name of the hospital and stating "admission Typhoid Fever Ward" on 14th September 1989 "according to rule of civil hospital"! The language and tenor of the medical chit does not inspire any confidence with regard to its authenticity. In any case, it was illogical and absurd for the petitioner, belonging to a poor family as stated by them, that being so close to Delhi he should get admitted in

any civil hospital and incurred heavy expenses involved in such treatment and not prefer free medical treatment in Army hospital, which was a few kilometres away.

7. The fact that no leave was granted to the petitioner is an established fact and has been admitted even by the petitioner himself. When he proceeded home on 3rd September 1989, instead of going to his unit, he was aware that not only had he not been granted any leave but that he had not been given any joining time either. In fact, between 3rd September and 30th September 1989, while over-staying leave, the petitioner did not take any action whatsoever to inform his unit about his "leave" or sickness. Despite the contention of the petitioner's father that CO 3 RAJ had accorded the petitioner 30 days leave, no such sanction letter/certificate or any other proof of leave has been produced by the petitioner. It also appears from the correspondence of the petitioner that in fact the petitioner had already availed of his entire leave entitlement for 1989 and was seeking advance leave of 1990 to regularise this period of absence. It is, therefore, evident that the petitioner and his father, who was an ex-serviceman, were clear that no officially sanctioned leave had been granted to the petitioner. To this extent, the Army disciplinary

record of the petitioner was produced, wherein on two earlier occasions, the petitioner had been absent for a period of 50 and 22 days, which indicates his attitude and also the fact that he had full knowledge of the illegality of his leave.

8. Counsel for the respondents clarified the seeming legal infirmities as indicated by the petitioner by rebuttal of the so-called infirmities. Copies of the summary of evidence and the charge sheet were handed over to the petitioner on 28th December 1989 and his signatures obtained in acknowledgment of such receipt. The SCM was held on 2nd January 1990, which enabled the petitioner to have more than the mandatory 96 hours to prepare his defence. During trial, the petitioner pleaded guilty to the charge and has signed in acknowledgment of this plea. He, therefore, cannot challenge the fact that he was guilty and the Commanding Officer holding the Court has certified that Army Rule 115(2) has been applied. Since the petitioner pleaded guilty to the only charge and did not make any statement when called upon to do so and neither did he call any witness to his character, the trial was concluded in 30 minutes without violating any legal provisions. Irrespective of the fact that the trial finished in 30 minutes,

the petitioner has not been able to indicate any legal inconsistency in the proceedings of the SCM. Counsel for the respondents also urged that there was no necessity to change the plea of ‘guilty’ to ‘not guilty’ in accordance with Army Rule 54(5) as all along there was consistency in the petitioner’s plea that he had no case for over-staying leave, that he was not interested in military service and desired to go home and start his own business. Therefore, the necessity of changing the plea by the Court on its own did not arise. Lastly, counsel for the respondents urged that Army Rule 124 refers to a single ‘sentence’ and not single ‘punishment’. There is difference between sentencing and punishment. Army Act 71 and 73 permit combining more than one punishment and there has been no violation of the legal provisions contained therein. The sentencing has been only one in accordance with Army Rule 124.

9. Proportionality of punishment is commensurate with the offence, especially considering the fact that he had absented himself on two earlier occasions and was almost what is referred to as a ‘habitual offender’ in military parlance. This has been justified in the memo under Army Order 309/73 given by the CO of his unit, wherein he states that the petitioner was a bad example to the unit and that the sentence of

dismissal from service and four months civil jail was appropriate to meet the ends of justice. It is also not a fit case where the Tribunal would interfere with the quantum of punishment imposed by the Court Martial. In **State of U.P** v. **Sheo Shanker Lal Srivastava and others** (2006 (3) SCC 276), it was held by the apex Court thus:

> "22. It is now well settled that principles of law that the High Court or the Tribunal in exercise of its power of judicial review would not normally interfere with the quantum of punishment. Doctrine of proportionality can be invoked only under certain situations. It is now well settled that the High Court shall be very slow in interfering with the quantum of punishment, unless it is found to be shocking to one's conscience."

In **Hombe Gowda Educational Trust and another** v. **State of Karnataka and others (**2006(1) SCC 430), the Supreme Court opined thus:

> "The Tribunal's jurisdiction under Section 8 of the Karnataka Private Educational Institutions (Discipline and Control) Act, 1975 is akin to one under Section 11-A of the Industrial Disputes Act, 1947. While exercising such discretionary jurisdiction, no doubt it is open to the Tribunal to substitute one punishment by another; but it is also trite that the Tribunal exercises a limited jurisdiction in this behalf. The jurisdiction to interfere with the quantum of punishment could be exercised only when, inter alia, it is found to be grossly disproportionate. Such interference at the hands of the

> Tribunal should be inter alia on arriving at a finding that no reasonable person could inflict such punishment. The Tribunal may furthermore exercise its jurisdiction when relevant facts are not taken into consideration by the management which would have direct bearing on the question of quantum of punishment."

10. The petitioner was neither granted leave nor had any justifiable ground to proceed on leave. The trial had been conducted in a fair and judicious manner, wherein the principles of natural justice have been adhered to.

11. In view of the above, the petition is dismissed.

(LT. GEN. S.S DHILLON)
MEMBER

(S.S KULSHRESHTHA)
MEMBER