**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

**T.A NO. 453 of 2009
(WRIT PETITION (CIVIL) NO. 1664 of 1999)**

IN THE MATTER OF:

Ex. NK Jit Ram .....APPLICANT
Through : Shri S.M. Dalal counsel for the applicant

V.

UNION OF INDIA AND OTHERS ...RESPONDENTS
Through: Shri Ajai Bhalla, counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 08.09.2011

1. The petition was first filed before the Hon'ble High Court on 22.3.1999 and subsequently it was transferred to the Armed Forces Tribunal on 06.10.2009 on its formation.

2. The applicant vide the Civil Writ Petition has prayed for quashing of the impugned conviction order dated 31.1.1998 (Annexure P-1) passed by Summary Court Martial whereby he was sentenced to dismissal from service and reduction in rank and order dated 04.04.1998 (Annexure-P-2) passed by review authority maintaining the sentence passed by CO. The applicant also prayed for his re-instatment in service alongwith all consequential service benefits.

3. Brief facts of the case are that the applicant was enrolled in the Army on 07.1.1984. In due course of time he was promoted to the rank of Naik. He was subsequently posted at 8, Mountain Div. Signals Regiment on 11.12.1993. On 07.10.96 he was sent on a temporary duty to COD, Agra to deposit some equipment. On completion of the task, he was sanctioned 15 day's leave. On 22.10.96, having completed the job, he informed his officer in HQ at 8, Mountain Div. Signals Regiment and proceeded on sanctioned leave (Annexure-P-9).

4. The applicant further averred that while on leave, his parents were seriously ill during which time his father also expired. He reported back to the transit camp on 3.1.1997 after an absence of 67 days. He was sent by the transit camp to report to his unit. In the unit, he was not permitted to join duties and therefore, he was advised to go back to the transit camp but again was not allowed to join. He was left with no option except to go home. During this period his mother also expired.

5. He subsequently reported to the Signal Regimental Centre on 12.09.1997. On 13.09.1997, the Commandant ordered to proceed departmental action for the misconduct of overstayal of leave (OSL).

6. As per the directions of Commanding Officer Depot Regt., the summary of evidence was recorded by Capt. Ayub Ahmed of the Depot Regt. The Officer Commanding framed a tentative charge sheet

against the applicant vide order dated 12.1.1998 (Annexure-P-5). Overall there were two charges levelled against him.

7. The Summary Court Martial (SCM) was held by the Officer Commanding Depot Regt. which convicted him. He was sentenced to 'dismissal' from service on 31.1.1998 alongwith 'reduced to ranks', and was also awarded 'stoppages of pay and allowances' until he has made good the sum of Rs.90.03 being the amount in respect of government clothing and equipment lost by him in relation to second charge.

8. The punishment was reviewed by the Area Commander who vide order dated 04.04.1998 changed the finding and reduced the period of absence from 26.10.96 to 12.9.97 (320 days) to that of 26.10.96 to 02.1.1997 (67 days) in relation to the first charge. But the Reviewing Authority maintained the sentence awarded by the Officer Commanding Depot Regt. Order of Reviewing Authority is reproduced as under:-

> *"2. Your Summary Court Martial proceedings which was forwarded to Dy JAG HQ Central Command for review has been received duly reviewed.*
>
> *3. In exercise of the powers vested vide Army Act Section 163, Officiating General Officer Commanding, HQ MP, B&O Area has substituted the letters and figures 12 Sep 97 at 2130 h, appearing in the statement of particulars of first charge, to read*

02 Jan 97. The punishment awarded to you has been confirmed as just and legal."

9. Ld. Counsel for the applicant also argued that the statement recorded by Capt. Ayub Ahmed in the summary of evidence was not as per the applicant's statement. He further argued that in the SCM proceedings, it has been shown that the applicant pleaded "guilty". On the other hand, the applicant had not pleaded guilty and the plea entered by the Officer Commanding the SCM was not as per the Army Rule 115(2). No signature was obtained as token of acceptance in the front of plea at the time of recording plea. The very fact that the applicant had stated that he had reported to the Transit Camp on 03.01.97 was conflicting with the substance of the chargesheet handed over to him. Therefore, the Officer Commanding should have conducted the SCM as if the applicant had pleaded not guilty because of the differing dates and proceeded accordingly. He also drew our attention to the Note 7 and 8 to Army Rule 116 in which the Court was required to endorse the plea of not guilty. Not having done so vitiates the trial and its verdict needs to be set aside.

10. Ld. Counsel for the applicant further argued that the individual had exemplary service of 14 years and 22 days. Therefore, the punishment was rather harsh because this was the first and the only offence in his total 14 years long service. Thus, it requires consideration.

11. Ld. Counsel for the applicant also argued that the Competent Authority i.e., the Sub Area Commander while considering his reply and after perusal of record has reduced the period of absence while reviewing the SCM proceedings. The period of absence was reduced to just 67 days as against the 320 days in the original charge. He was equally competent to set aside or reduce the extent of punishment which was as per 163 AA, obligatory on his part in case of any change in findings. Looking to punishment in changed situation, the punishment which was also being harsh and disproportionate, he should set aside or reduce the same. However, he did not do so. Therefore, the order of Reviewing Authority is bad in law and is liable to be set aside.

12. Ld. Counsel for the applicant has invoked the provisions of Section 15(6) of the Armed Forces Tribunal Act which empowers the Armed Forces Tribunal to review the SCM proceedings in terms of evidence, findings and sentences. Ld. Counsel for the applicant also cited HQ Letter dated 17.7.1999 which empowers conversion of dismissal into discharge in appropriate cases and contended that the circumstances existed in this case to use this discretion in favour of the applicant. The relevant portion is reproduced as under:-

"3. In view of the foregoing, the following decisions have been arrived at:-

(a) A punishment of dismissal awarded to a JCO/OR can be converted to discharge in deserving cases from the date his dismissal came into effect, by the authority competent to pass order under Army Act Section 164(2).

(b) The punishment of dismissal awarded to an officer can be converted to release by the Central Government from the date his dismissal came into effect.

(c) HQs Command may make recommendations to the above effect in deserving cases while forwarding post confirmation petitions to this HQ.

4. In view of the legality and uniformity of expression, the directions in all such cases be worded as under:-

"I remit the sentence of dismissal awarded by the Court and direct that the petitioner shall be deemed to have been discharged with effect from the date his dismissal took effect."

13. Ld. Counsel for the applicant also argued that since he was posted at the 8, Mountain Div. Signals Regiment, the SCM held by the Officer Commanding, Depot Regiment was therefore, invalid as he was only technically attached to the Regimental Centre. The Officer Commanding, Depot Regiment was not his Officer Commanding since he was not posted on their strength. Thus the whole proceeding of SCM was without jurisdiction and that was non-est in eye of law.

14. Ld. Counsel for the applicant also submitted that as the punishment awarded is excessive, a lenient view may be considered. He cited a judgment given in the case of **Ex Maj Narender Pal Vs UOI & Ors., in TA No.535 of 2009 decided on 11.5.2001** by this Tribunal

wherein the award of dismissal was converted into removal with all pensionary benefits.

15. Ld. Counsel for the applicant also invoked the authority of Regulation 381 of the Regulations for the Army, 1962. Ld. Counsel for the applicant further cited the judgment given in the case of **Vishav Priya Singh (Ex. LN) Vs Union of India and Ors., (2008 VI AD (Delhi) 231)** in which it was observed as under:-

> *"23. As per our analysis above, the exception to this Rule is restricted to the case of Deserters and that too where the CO of the Unit to which they belong is not readily and easily available. Secondly, the SCM must be the exception and not the Rule. It can only be convened where the exigencies demand an immediate and swift decision without which the situation will indubitably be exacerbated with widespread ramifications. Obviously, where the delinquent or the indisciplined action partakes of an individual character or has civil law dimensions, an SCM should not be resorted to. Delay would thus become fatal to an SCM. Thirdly, the decision to convene an SCM must be preceded by a reasoned order which itself will be amenable to Judicial Review. We are certain that once this formality is complied with, the inevitable disregard of the accused rights for a fair trial shall automatically be restricted to those rare cases where the interests of maintaining a disciplined military force for outweigh the protection of the minor civil rights of a citizen of India."* *(Emphasis given by us)*

16. Ld. Counsel for the applicant also cited the Hon'ble Delhi High Court order given in the case of **L/NK Gurdev Singh Vs Union of**

India & Ors., in WP (C) No.776 of 1995 decided on 01.2.2008 in which the Hon'ble Court observed that though the petitioner has purported to have consented to a plea of guilt, his signatures do not appear anywhere and in the absence whereof lends credence to the allegation of the petitioner that he was not even present at the time of recording of the summary court martial proceedings and thus his averment that he never pleaded guilty could be probable. The relevant paras 12 and 13 of the judgment are reproduced as under:-

> *"12. Though the petitioner has allegedly admitted the charge by pleading guilty, his signatures nowhere appear on the purported plea of guilt. When an accused person pleads guilty, it would be necessary to obtain his signatures to lend authenticity to such proceedings. This basic requirement was not even adhered to, the absence whereof lends credence to the allegation of the petitioner that he was not even present at the time of recording of the summary court martial proceedings and he never pleaded guilty.*
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> *13. In our recent judgment pronounced on 17.1.2008 in LPA No.254/2001 entitled The Chief of Army Staff & Ors. Vs Ex.14257873 K. Sigmm Trilochan Behera, we have concluded that such martial proceedings would be of no consequence and would not stand the judicial scrutiny. In forming his opinion, we had referred to the judgment of the Jammu & Kashmir High Court in the case of Prithpal Singh Vs Union of India & Ors., 1984 (3) SLR 675 (J&K). We had also take note of the instructions issued by the respondents themselves in the year 1984, based on the aforesaid judgment of the Jammu & Kashmir*

High Court, mandating that signatures of the accused pleading guilty of charge be obtained and if there is an infraction of this procedural requirement, it would violate the mandatory procedural safeguard provided in Rule 115(2) of the Army Rules and would also be violative of Article 14 of the Constitution of India."

17. Ld. Counsel for the applicant also quoted the Armed Forces Tribunal, Court No.2 order in **TA No.723/09 in WP(C) No.5116/2001 Nk. Subhash Chand Vs UOI & Others** decided on 27.4.2010 wherein the Hon'ble Tribunal observed that the SCM in which the plea of guilt was arbitrarily endorsed and it does not bear the signatures of the accused as per Army Rule 115(2), the 'plea of guilt' therefore, had to be disregarded. In all cases, Army Rule 115(2) has to be adhered to and the accused has to sign, name and place so matching.

18. The learned counsel for the applicant cited **114(2004) DLT 667 (DB) Veer Bhan (Sepoy) Vs Chief Of the Army Staff & Others** dated 01.10.2004, in which Hon'ble Court held:-

"20. In these circumstances, we are unable to agree with the submission made on behalf of the respondents that the Summary Court Martial was conducted on the plea of 'guilt' in compliance with Army Rule 115. Valuable safeguards provided in the Section, keeping in view the responsible role to be discharged by the Summary Court Martial, have been completely given a go by. For this reason as well, the proceedings, findings and sentence of the Summary Court Martial are liable to be set aside and quashed."

19. Ld. Counsel for the applicant also argued that the moment a doubt is created in the plea of guilt, action should be taken by the Officer Commanding conducting the SCM to try as if the plea was not guilty and proceed with the matter according to the Army Rule 116(4).

20. Ld. Counsel for the respondents refuted the contentions placed by Ld. Counsel for the applicant and submitted that there has been no proof whatsoever by the applicant to show that he had actually reported to the Transit Camp on 03.1.1997 and thereafter he proceeded to the unit. No documentary proof was produced by the applicant and therefore, his period of absence was from 26.10.96 to 12.9.1997.

21. Going by the averments made by the Ld. Counsel for applicant, it is clear that the father of the applicant actually expired on 09.10.96 while he has incorrectly stated in his OA that his father expired during his leave after he proceeded to his home on 22.10.96. Be that as it may, the individual reported back to the Regimental Centre on 12.9.97. Had he been genuine in his intentions to report back to the unit, he could have done the same much earlier rather than wait for September 1997. If he had also reported to the Transit Camp on 3.1.1997 and was not accepted by the authorities, he could have immediately come to the Regimental Centre rather than to go home and wait till 12.9.1997.

22. Ld. Counsel for the respondents further argued that the plea of guilty has been signed by the individual and it can be verified from the original records.

23. Ld. Counsel for the respondents also quoted the Armed Forces Tribunal, Court No.2 order in respect of WP(C) No.5116/2001 in TA No.723/09 to say that if the signatures of the accused are obtained below the certificate so given under Army Rule 115(2), the plea of guilt shall be up-held. He further argued that all the procedural rules were followed by the SCM in recording of 'plea of guilt' so as to ensure voluntariness of the 'plea of guilt'. His signatures are existing on plea of guilty.

24. Ld. Counsel for the respondents further argued that the applicant has in his own statement made in the summary of evidence stated facts which appeared to be an improvement on his stance from the earlier facts of the case. "*During my absence my father has been expired but there was some improvement in the health of my mother"*. Actually, his father expired on 9.10.96 even before he has reached home. Earlier he has stated that *"during my leave my father and mother were seriously ill. I approached to my Coy. Cdr., through telephonically for extension of one month advance of annual leave for the year 1997 but he denied me for the same."*

25. These statements appeared to be an after thought in order to avoid the consequences. The certificate from the Gram Panchayat Sarpanch which was enclosed by him in evidence has given out the dates of demise of his father and mother respectively. In his statement, he has further accepted the absent period and has sought lenient view in consideration of the fact that he belongs to poor family and was the only earning member. This clearly shows that he was in a frame of mind to accept the plea of guilt. Therefore, his signatures have been obtained in a proper manner and there is no malafide intentions of the officer conducting the SCM.

26. Ld. Counsel for the respondents further argued that since the applicant was absent without leave due to overstayal of leave from 27.10.96, he was declared a “deserter” after 30 days by the unit. Therefore, he was accepted by the Regimental Centre, Depot company who is authorised to take action against the deserter when the operational unit is in field. His operational unit i.e., 8, Mountain Div. Signals Regiment was in the valley and conducting active CI operations. Thus, the applicant was posted to the Regimental Centre in the Depot Regiment and was accordingly rightly tried by the Commanding Officer of the Depot Regiment, to which action there is no bar.

27. Ld. Counsel for the respondents also stated that the case of the applicant was reviewed by the Sub Area Commander who was also

the Competent Authority in which his charge was reduced from a period of absence from 26.10.96 to 12.9.97 to that of 26.10.96 to 03.01.1997. However, sentence was found just and legal and no change in the sentence was sanctioned by the Competent Authority.

28. Having heard both the parties at length and examined the documents, we are of the opinion that the applicant had overstayed leave granted to him from 22.10.96 to 07.11.96 till he voluntarily rejoined on 03.01.1997 as accepted by the reviewing authority. Though, there is no documentary evidence on behalf of the applicant to show that he actually reported on 03.01.1997 at the Transit Camp, but taking into account the plea of the applicant and the circumstances, we accept the date which has also been accepted by the Sub Area Commander who reviewed the SCM proceedings.

29. As regards the plea of the applicant in the SCM, it is clear that the applicant did plead guilty and he signed in the relevant space provided for under the Certificate of Army Rule 115(2). This can further be gauged by the statement that has been made by the applicant in the summary of evidence which was recorded prior to the SCM proceedings. The judgments cited by applicant in this respect do not help his contentions.

30. Since the petitioner was a “deserter” and his unit was in field in active CI operations, it was legitimate that the Regimental Centre and

in this case the Depot Regiment rightly conducted the proceedings. Having been declared a "deserter" by the unit, he would have automatically been posted on the strength of the Regimental Centre since the unit was in active field. Therefore, the contention raised in this respect is not tenable and judgment cited in this respect given in case of Vishav Priya Singh (Supra) does not help him.

31. As regards the quantum of punishment which was delivered by the SCM and was reviewed by the Sub Area Commander, the period of absence was reduced from 320 days to 67 days. There was vital change in the absence period. We are of the opinion that having reduced the period of absence, the gravity of the offence is also reduced and therefore, punishment should also have been reviewed appropriately but reviewing authority has not considered this aspect. Section 163 of the Army Act 1950 reads as follows:-

> *"163.* ***Alteration of finding or sentence in certain cases:***
>
> *(1) Where a finding of guilty by a Court-martial, which has been confirmed, or which does not require confirmation, is found for any reason to be invalid or cannot be supported by the evidence, the authority which would have had power under Section 179 to commute the punishment awarded by the sentence, if the finding had been valid, may substitute a new finding AND pass a sentence for the offence specified or involved in such finding:*
>
> *Provided that no such substitution shall be made unless such finding could have been validly made by the court-*

martial on the charge and unless it appears that the court –martial must have been satisfied of the facts establishing the said offence.

(2) Where a sentence passed by a court-martial which has been confirmed, or which does not require confirmation, not being a sentence passed in pursuance of a new finding substituted under sub-section (1), is found for any reason to be invalid, the authority referred to in sub-section (1) may pass a valid sentence.

(3) The punishment awarded by a sentence passed under sub-section (1) or sub-section (2) shall not be higher in the scale of punishments than, or in excess of, the punishment awarded by, the sentence for which a new sentence is substituted under this section."

32. Considering the fact that the applicant has put in 14 years and 22 days of unblemished service and the fact that the period of absence was reduced from 320 days to 67 days, we opine that in view of the substitute findings by the Competent Authority, the sentence awarded by Officer Commanding, Depot Regt., and maintained by reviewing authority of *"To be dismissed from service"* and "reduction to rank" are changed only to the extent of the sentence of "Reduction to Ranks" and order of dismissal is set aside. The applicant will be notionally treated to be continuing in service with no back wages till he attains minimum required pensionable service in the reduced rank. The conclusion also finds support from the judgments given in cases of Ranjit Thakur Vs UOI & Ors. (1987) 4 SCC 611, Ex Nk Sardar Singh Vs UOI & Ors., (1991) 3 SCC 213 and Naik Nur Asstt. V.V. Khedkar

(Supra) 1997 IIIAD (DELHI) 916 and judgment passed by this Tribunal in case of Ex Maj Narender Pal (Supra). In all the above mentioned cases, it has been observed that punishment should not be disproportionate but be commensurate with the offence.

33. The exercise should be completed within 180 days from the date of issue of this order. Delay in payment of financial dues beyond 180 days of the order will attract 12 percent per annum penal interest till the date of payment.

34. The application is partially allowed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 8th day of September, 2011.