

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

O.A NO. 36 of 2011

IN THE MATTER OF:

SEP BHARAT KUMARAPPLICANT

Through: Mr. K. Ramesh, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERSRESPONDENTS

Through: Mr. Mohan Kumar, counsel for the respondents

CORAM:

HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER

HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT

Date: 20.04.2012

1. This OA under Section 15 of the Armed Forces Tribunal Act has been moved on 21.01.2011 against the order of dismissal of the applicant made by the Summary Court Martial on 08.12.2003. Against that order he made a representation in the month of January 2004 which was rejected by the General Officer Commanding (GOC) on 16.02.2004 (**Annexure P-3**). Aggrieved by the said order, the applicant preferred a writ petition No.8255 of 2004 in the Hon'ble High Court of Delhi. It is alleged that the Hon'ble Court observed that the applicant should first make a mercy petition/statutory representation before the appropriate authority and the said writ petition was disposed of on 13.08.2007. He made a representation on 01.10.2007 which

was also rejected by the respondents Government of India on 25.02.2010.

2. The applicant thereafter filed O.A. No.588/2010 before this Tribunal against the order dated 25.02.2010, but the same was withdrawn with liberty to file fresh application, the said O.A. was disposed of with aforesaid liberty on 30.09.2010 (page 51 of O.A.).

3. Vide this O.A., the applicant has sought quashing and setting aside of the Government of India order dated 25.02.2010 by which his representation dated 01.10.2007 was rejected, and also against the findings and sentence of Summary Court Martial (SCM) dated 08.12.2003 (Annexure A-1) by which he had been awarded three months R.I. and dismissal from services.

4. Brief facts of the case are that the applicant was enrolled in the Regiment of Artillery on 31.07.1998. During his service, the applicant once remained absent without leave for about 10 days and thereafter, his father took him back to the unit to join duty. But the applicant was awarded 28 days RI on the count which has not been assailed herein.

5. Subsequently on 29.11.2003 at about 8'o clock, the applicant absented himself from the drill parade, it is alleged that since he was not feeling well. In the absence of Sick Report Book, he was unable to report sick. He was thus charged under Section 42(e) of Army Act in SCM proceedings for "neglecting to obey regimental orders" and vide

order dated 08.12.2003 he was sentenced to RI for three months in civil prison and to be dismissed from service.

6. Thereafter, the applicant sent a petition to the GOC, 36 Inf. Division against the findings and sentence of SCM held on 08.12.2003 (Annexure A-2) which was rejected by the GOC on 16.02.2004 (Annexure A-3).

7. Further, the applicant filed a writ petition before the Hon'ble High Court of Delhi as explained above. Consequent to the orders of Hon'ble High Court, the applicant filed a mercy petition on 01.10.2007 which was rejected by the Government of India vide orders dated 25.02.2010 (impugned order). Aggrieved with the said orders, the applicant filed OA No.588/2010 on 28.09.2010 before the AFT (PB). Based on the liberty of Court No.2 (PB) dated 30.09.2010, the applicant filed the present O.A. on 21.01.2011.

8. Learned counsel for the applicant argued that his absence from the drill parade was a very minor offence and due to the fact that the applicant was unwell. The punishment given to the applicant was rather harsh and is not commensurate with the offence charged. Learned counsel argued that the applicant was unwell and in the absence of Sick Book Report, the applicant was unable to report sick. He further argued that the CO has taken a view that the applicant was not interested in the Army way of life and wanted to go on discharge

and proceeded accordingly, but it was alleged that this fact was not correct.

9. Learned counsel for the applicant further argued that the summary of evidence indicates that witnesses were tutored and the evidence that was adduced was incredible. As such, though the applicant has pleaded guilty but having gone through the summary of evidence, the CO should have himself made it a plea of 'not guilty' and then proceeded accordingly. Learned counsel for the applicant also stated that are a number of judgment which can be clearly applied *mutatis mutandis* to the case of the applicant.

10. It has further been contended by the learned counsel for the applicant that it has been made out by the respondents that the applicant was a habitual and perpetual offender whereas the record shows only one red ink entry which was consequent to ragging by his seniors especially Havildar Surender Vir who had slapped him and therefore, forced him to be away from the unit lines for about 10 days. Even the statement of the applicant in the summary of evidence seems to be planned *suo moto* by the CO. That, at that point of time as the applicant had just been released out of the Quarter Guard after having 28 days of RI and was not feeling well and he also wanted to report sick but in the absence of Sick Report Register, he was unable to do so and thus he did not turn up for the drill parade. At this juncture, since the applicant did not get any time to recoup,

immediately new charge was framed which resulted in disproportionate punishment and dismissal with 3 months of RI.

11. Learned counsel for the applicant further contended that prima facie it is a case well covered by 'Doctrine of Proportionality' which is an established principle of natural justice as held in the cases of (i) **Bhagat Ram Vs UOI (1983) 2 SCC 442** and (ii) **Ex Naik Sardar Singh Vs UOI AIR 1992 SC 417**.

12. Learned counsel for the applicant further submitted that PW-I has stated in his statement that "*After about 10-15 minutes or so, Hav (TA) Surenderveer Singh escorted Gnr(TA) Bharat Kumar from the living barracks to the drill ground. I inquired from Gnr (TA) Bharat Kumar reasons for his absence. He said that he has no physical problems but he did not like the work culture and ethos of Army, hence he wanted to quit the Army, that is why he on his own decided to absent himself from the parade.*" Similarly, witness No.4 has stated in his statement that "*After this, Pyar Chand inquired from Gnr (TA) Bharat Kumar regarding the nature of his problem. Bharat Kumar told him he had no problem with the Regiment or any particular individual in the Regiment, only that he did not like the work culture and ethos of the Army and that he wanted to quit the Army.*" Witness No.5 has also deposed to state that "*In inquired from Gnr (TA) Bharat Kumar about the reasons for his absence from the parade. Bharat Kumar told me that "he did not like the work culture and ethos of the Army and that he*

wanted to quit the Army." It has been stated by the learned counsel for the applicant that a plain reading of the above three statement of the witnesses shows that the entire summary of evidence was contrived and the same reason was ascribed by the applicant. It is contended by the learned counter for the applicant that this all appears to be a concocted story by the respondents.

13. In support of his contentions, learned counsel for the applicant relied upon the judgments passed in the cases of **Mansa Ram Vs UOI AIR 1980 SC 147, Karan Singh Vs UOI 1989 SC 653 & Satpal Singh Vs UOI 2000 5 SCC 570.**

14. Learned counsel for the respondents argued that the applicant was enrolled in the Army on 31.07.1998 and was posted to 77 Med Regt after completing his training. After reporting to the Unit, the applicant had consistently been manifesting a belligerent and defiant nature towards the authorities and many a times had expressed his desire to quit the organisation. This was obvious from the averment made in his statement before the summary of evidence and also in front of the SCM. The applicant always stated that the unit is good and that he had no problems with anyone. He felt that the service conditions and remunerations do not measure upto his expectations and that he was being harassed in the unit is baseless and incorrect. Learned counsel for the respondents also argued that the applicant absented himself without leave from 12.10.2003 to 20.10.2003. This

being his first offence, he was dealt in accordance with law and given 28 days RI in military custody. After serving the sentence of 28 days RI, there was no change in attitude of the accused and he continued to show indifference to service norms. Even after the first offence, the applicant committed the second offence within a month by absenting himself from the mandatory drill parade on 29.11.2003 which clearly indicates the indifferent attitude of the accused. He preferred not to report sick or got to the unit MI room for his so called illness. It is pertinent to mention that he has been wilfully, on number of occasions absented himself from many parades and was suitably counselled and cautioned by his peers and superiors but he was not ready to mend his ways.

15. His father Shri Gajraj Singh, who was a retired JCO, during his period of unauthorised absence from 12.10.2003 to 20.10.2003 gave a telephone call to the unit stating that the applicant had reached home and he brought him back to the unit thereafter. Shri Gajraj Singh and the applicant had a lengthy audience with the CO on 21.10.2003 in the presence of Subedar Major, Sub Unit Commander and Second-in-Command. The applicant himself proclaimed in the presence of all present that he absented himself illegally since he had no intentions of serving in the organisation.

16. Learned counsel for the respondents further submitted that all five witnesses were examined during the summary of evidence and all

five witnesses have clearly stated that the applicant was not willing to continue in Army and despite counselling he was not ready to mend his ways.

17. Learned counsel for the respondents submitted that in the summary of evidence the applicant was present and the statements were recorded in his presence. He had been advised in the beginning that he was at liberty to cross examine the witnesses as also to bring the evidence in defence in his favour. To ensure that he was given an opportunity to cross examine the witnesses, he has also signed on the summary of evidence and he has declined to cross examine the witnesses.

18. On the other hand, the applicant having been duly cautioned has himself given a statement that *"I was enrolled in the Army on 31 July 98 under great pressure from my parents, despite the fact that I did not want to join the Army. Although, the Unit is good and I do not have any problems with any particular individual, I do not wish to serve in the Army as it is a 24 hours job. I have been advised to put up formal application for release from service by my superior officers but I will not give any application for release from the Army nor do I intend to attend any parades or carry out any job assigned to me by my superiors."*

19. Learned counsel for the respondents further submitted that the applicant himself pleaded guilty in the SCM and he signed the same on 08.12.2003 while in the Court. At the end of the proceedings when

he was asked to give a statement, he stated "*I have no problems of any kind with any individual of the unit or with the unit. Since I do not want to serve in the Army, I will continue by defying the orders. I have been advised by my CO and other officers to mend my ways and approach but I do not want to serve any more.*"

20. It was further contended by the learned counter for the respondents that having made this kind of unequivocal statement, the applicant did not take any action till he sent a petition in January 2004. Once his petition was rejected by the GOC on 16.02.2004, he preferred a writ petition.

21. Having heard learned counsels for both the parties at length and having examined the summary of evidence and the SCM proceedings along with judgments referred by learned counter for the applicant, we are of the opinion that there was no infringement from legal point of view while conducting the SCM proceedings. In the summary of evidence, the applicant has throughout maintained in the recording of summary of evidence that he was not interested in serving in the Army any more, the contention that all witnesses were planned and evidence was fabricated and concocted are not sustainable.

22. Further, during the recording of summary of evidence, the applicant was given all opportunity to cross examine the witnesses and he was also allowed to produce any witness in his favour.

23. In the SCM proceedings, the accused has pleaded guilty to the charge under Section 42(e) of the Army Act i.e. "Neglecting to obey Regimental orders". Besides, in the statement to the CO before the sentence could be pronounced, the applicant has stated that "*I have no problems of any kind with any individual of the unit or with the unit. Since I do not want to serve in the Army, I will continue by defying the orders. I have been advised by my CO and other officers to mend my ways and approach but I do not want to serve any more.*" Therefore, the contentions that the applicant was made to give such statement is not maintainable, the judgments referred in this respect do not help his pleading.

24. We have also examined the impugned order whereby the mercy petition filed by the applicant was dismissed by the Government of India. The impugned order is a detailed speaking order which has taken all aspects of the case into account. It has also taken into account the allegations made by the applicant in the mercy petition that Army Rule 22 and 23 were not complied with. This issue has not been averred in the OA. All the same, having examined the documents, we are of the opinion that all procedures including the application of Army Rule 22 and 23 have been fully complied with. The applicant has also made an allegation in the mercy petition that he was not given an opportunity to engage a legal counsel. In the impugned order of the Government of India dated 25.02.2010, it has been stated that Lt Vikas Shukla was detailed as the friend of accused and was

present throughout the SCM and he has not made any objection to this effect. As such, no prejudice has been caused to the applicant on any count. All the contentions had been raised before the Hon'ble High Court in earlier writ petition even at that time his representation against SCM had been disposed of by GOC on 16.02.2004, but has not pressed in writ. Thereafter, the said representation has been filed and that has been disposed of by a speaking order and the said order is not suffering from any infirmity.

25. We also note that before pronouncing the sentence, the CO who presided over the SCM had taken his past record also into consideration. The punishment, therefore, cannot be said to be harsh. Again during consideration of the representation, the same was taken into account. Looking to the charge along with the past record of the applicant, the punishment awarded to him does not seem inappropriate, hence, need not require any interference and the judgments cited by him do not support his contentions.

26. In view of the foregoing, we are of the opinion that there are no reasons for this Court to interfere in the matter. The O.A. is hereby dismissed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

**Announced in the open Court
on this 20th day of April, 2012.**