

ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A. (Appeal) No.42 of 2014

Thursday, the 26<sup>th</sup> day of February 2015

THE HONOURABLE JUSTICE V. PERIYA KARUPPIAH  
(MEMBER - JUDICIAL)

AND

THE HONOURABLE LT GEN K. SURENDRA NATH  
(MEMBER – ADMINISTRATIVE)

David Suresh Babu  
S/o Late D.D. Das  
No.2594450-H, Ex-NK (MUSN)  
No.1, Bharathi Nagar Main Road  
Kulathu Ma Nagar, Pallavaram  
Chennai-600 043.

... Applicant

By Legal Practitioners:  
M/s. M.Selvaraj & T.Sundaranathan

vs.

1. Chief of Army Staff  
Additional Director General  
Personnel Services  
Adjutant Generals Branch  
Integrated Head Quarters  
Ministry of Defence (Army)  
New Delhi-110 011.

2. The Officer in Charge Records  
The Madras Regiment  
Wellington  
Nilgiris-643 231.

3. The Principal Controller of Defence  
Accounts (Pension)  
Droupathi Ghat, Allahabad, UP.

4. The Admin Battalion Commander  
The Madras Regimental Centre  
Wellington, Nilgiris-643 231.

5. Union of India  
rep.by the Secretary  
Government of India  
Ministry of Defence  
New Delhi-110 011.

... Respondents

By M. Dhamodharan, SCGPC

### **ORDER**

(Order of the Tribunal made by  
Hon'ble Justice V. Periya Karupiah, Member (Judicial))

1. The applicant is seeking for the relief of calling for records pertaining to the order of Summary Court Martial, dated 10.05.2007 on the file of Respondent No.4 and to set aside the same and consequently direct the respondents to re-instate the applicant or to grant pensionary benefits with all attendant benefits.

2. The factual matrix of the applicant's case would be as follows:

The applicant was enrolled in the Army as Sepoy in the month of July 1989 and was working in various places of this country as Musician. He was promoted to the rank of Lance Naik and thereafter to Naik. He performed as the Musician on the Independence Days and Republic Days and thus he served for 17 years 10 months and 10 days in the Army. The applicant was granted leave from 11.06.2004 to 20.07.2004 and he proceeded on leave, stayed at home. Due to unavoidable family circumstances and due to sickness of himself and other family members, he could not join back in time, but on his own

volition, he joined duty on 07.04.2007. The 4<sup>th</sup> respondent having not satisfied with the explanation of the applicant, conducted a Summary Court Martial and awarded punishment of reduction in rank under Section 38(1) of Army Act and also dismissal of the applicant from service on 10.05.2007, by invoking Section 71 of the Army Act. The SCM proceedings were not conducted in accordance with the procedures contained in Army Act and Rules and Regulations made therein. On 07.05.2007 at 1230 Hours, he was issued with a Charge Sheet wherein it was stated that the applicant did not rejoin duty on the expiry of the leave granted for forty (40) days from 11<sup>th</sup> June 2004 to 20<sup>th</sup> July 2004 and absented himself with an intention to avoid active service till he voluntarily surrendered himself at the Madras Regimental Centre, Wellington on 07 April 2007 at 0900 hours. The applicant's submission that due to unavoidable circumstances and mental disability, he could not report before the Unit and he never intended to desert the service and rejoined voluntarily on 07<sup>th</sup> April 2007 were not considered. The charges framed are not relevant to his overstayal of leave. No Summary of Evidence was recorded and therefore his overstayal of leave cannot be treated as desertion. The impugned order imposing punishments is contrary to the provisions of Army Act since both the punishments cannot be imposed and therefore, he is left with no other alternative except to challenge the said order of SCM

dated 10.05.2007 before this Tribunal. The applicant therefore requests that this application may be allowed.

3. The respondents filed reply statement which would be as follows:

The respondents submit that the applicant was enrolled in the Madras Regiment on 31<sup>st</sup> July 1989 and posted at Madras Regimental Centre after completion of his military training, that he was granted forty (40) days Part of Annual Leave with effect from 11<sup>th</sup> June 2004 to 20<sup>th</sup> July 2004, but he failed to report duty in time and that therefore, his absence was treated as Overstayal Leave from 21<sup>st</sup> July 2004. Since the applicant did not report to Unit, the Commandant, MRC ordered Court of Inquiry, in accordance with Army Act Section 106, to investigate the circumstances and that the Court of Inquiry found the applicant as deserter with effect from 21<sup>st</sup> July 2004. The applicant voluntarily surrendered at the MRC on 07<sup>th</sup> April 2007 at 0900 Hrs after a long absence of 991 days. The applicant was a habitual offender of absenting himself from duty for which he had been tried summarily twice earlier. The respondents further submit that after his surrender, the Administrative Battalion Commander, MRC heard the charge in accordance with Army Rule 22(1) on 27 April 2007 and thereafter, Summary of Evidence was recorded and he was subsequently tried by Summary Court Martial for the offence charged under Army Act Section 38(1) "Deserting the Service". The Charge Sheet was handed over to

the applicant on 07<sup>th</sup> May 2007 and the SCM was held on 10<sup>th</sup> May 2007, wherein the applicant pleaded "guilty" to the charge. The officer who conducted the trial, after due compliance of Army Rule 115(2) found him guilty accordingly and awarded the sentence that the applicant be reduced to the rank and to be dismissed from service and the verdict was promulgated immediately. The respondents submit that all legal procedures were followed before, during and after the trial. The applicant never contacted the Madras Regimental Centre or any Military Authorities to convey the reason for not reporting due to unavoidable circumstances. The allegation that he remained absent due to unavoidable domestic problems is false, since neither he examined any witness nor produced any medical documents to prove the same. The respondents further submit that the punishment awarded to the applicant was commensurate with the offence committed by him. Therefore, the respondents submit that the application may be dismissed.

4. The applicant filed a rejoinder which would be as follows:

The applicant submits that the procedure of admitting the guilty was not followed in the SCM proceedings, that Rule 115(2) contemplates that the accused has to be warned about the consequences if he is accepting the guilty. The applicant did not desert the service, but only overstayed the leave granted and the

respondents, while imposing the punishment, should consider the nature of the case of the applicant and the alleged misconduct and that the respondents ought to have considered that the applicant had completed 15 years of service and thereby he had completed his terms of engagement and entitled for pensionary benefits and the imposing of punishment of dismissal is too severe and therefore the punishment has to be set aside.

5. On the above pleadings, the following points were found emerged for consideration in this appeal:

*(1) Whether the SCM proceedings and the sentence passed against the applicant dated 10.05.2007 are liable to be quashed?*

*(2) If so, whether the applicant be re-instated in service as asked for by him?*

*(3) Whether the applicant is entitled for pension or pensionary benefits with all attendant benefits, as alternatively prayed for by him?*

*(4) To what reliefs the applicant is entitled for?*

6. We heard the arguments of Mr. M.Selvaraj, learned counsel for the applicant and Mr. M. Dhamodharan, learned SCGPC assisted by Major Suchithra Chellappan, learned JAG Officer appearing for the respondents. We have also perused the documents and records

produced on either side. We have anxiously considered the oral and written arguments submitted on either side.

7. **Point Nos.1 to 3:** The facts that the applicant was enrolled in the Madras Regiment on 31.07.1989 and posted with Madras Regimental Centre after completion of his military training, that he was performing service in musical band and that he was promoted to the rank of Naik have not been disputed. It is also an admitted fact that the applicant was granted 40 days Part of Annual Leave with effect from 11.06.2004 to 20.07.2004 and that he did not report to duty on the expiry of the leave. The applicant did not dispute the instance of being declared as a deserter for the overstayal of the leave with effect from 21.07.2004 but raised an objection that it was not amounting to desertion. He voluntarily surrendered at Madras Regimental Centre on 07.04.2007 at 0900 Hours after a lapse of 991 days is also not disputed.

8. The respondents have initiated Court Martial proceedings on the basis of the report of Court of Inquiry that the applicant was a deserter. Charges were framed under Army Rule 22(1) on 27.04.2007 and thereafter, Summary of Evidence was recorded and was tried by Summary Court Martial for the offence under Army Act Section 38(1) "deserting the service". The proceedings of the Summary Court Martial were produced by the applicant as well as the respondents for the perusal of the Court. In the said proceedings, Charge Sheet dated

07.05.2007 was found handed over to the applicant on the day itself and SCM commenced on 10.05.2007. We could also find that the applicant had pleaded guilty of the charge and the Presiding Officer of the Summary Court Martial had found him guilty on the basis of the evidence available and punished him (a) to be reduced to the rank and (b) to be dismissed from service on 10.05.2007.

9. According to the submission of the learned counsel for the applicant, the SCM has not followed the procedures properly and the sentence passed were not in accordance with the evidence on record. It was further argued by the learned counsel for the applicant that the applicant's overstay of leave was caused only due to the applicant's mental disorder and subsequent treatment he had. He would also submit that the punishment of dismissal of the applicant from service is disproportionate to the charge framed against him, since he had an unblemished record of service throughout his career. However, the said argument of the learned counsel for the applicant was refuted by the learned counsel for the respondents that the applicant is a habitual offender and that he was punished twice for similar offences by Summary Court proceedings. He would also submit that the intention of desertion on the part of applicant could be inferred from the long absence to the tune of 991 days. He would further submit that the Summary Court Martial proceedings were meticulously followed and the



applicant is now estopped from challenging the same since he had pleaded guilty to the charge. The reasons stated by the applicant for overstaying of leave as to his mental disorder was not pleaded anywhere before the Summary Court Martial but he stated domestic problems for the cause of his long absence. Therefore, he would request us to dismiss the claim of the applicant in all respects.

10. Considering the submissions on either side and on a careful perusal of the Summary Court Martial proceedings, we could see that the Summary Court Martial was convened on 10<sup>th</sup> May 2007 on the charge of deserting service against the applicant under Section 38(1) of the Army Act on 07.05.2007. When the charge was read out to the applicant/accused on 10.05.2007, he has pleaded guilty and therefore, the proceedings of Court Martial were conducted on the plea of guilty. The verdict of the Court was based upon the plea of guilty by the accused and on the Summary of Evidence recorded and it was pronounced on that day itself directing the applicant be reduced to the ranks and be dismissed from service. The applicant was present throughout the proceedings and he put his signatures wherever it was required. Therefore, the arguments advanced by the learned counsel for the applicant that the procedures for the conduct of Summary Court Martial proceedings have not been followed by the said Court cannot be sustained.

11. As regards the sentence passed by the Summary Court Martial, we could see that it was imposed on the basis of the previous punishments awarded by the summary proceedings, imposing punishments of 10 days pay fine on 20.09.1997, under Section 39 (a) of Army Act and 01 month R.I. in military custody on 17.10.2000, under Section 39(a) of the Army Act for the absence without leave. The said earlier punishments were considered by the Summary Court Martial along with long absence of 991 days of overstayal of leave in the present instant. He was given the punishment of reduction in rank and also dismissal from service. Considering the above factors, the punishment of dismissal from service appears to be justifiable. However, there are some mitigating factors that would go in favour of the applicant for remission of sentence as pleaded by the applicant's counsel. The applicant had put in 17 years and 280 days of service of which 14 years and 311 days is qualifying service for promotion. Though he had two earlier punishments for "Absence Without Leave", these punishments were at much earlier stage of his service, i.e., in years 1997 and 2000. In the extant case, the applicant in his defence stated that he could not join duty due to domestic problems. Though this does not completely explain his long absence of nearly 3 years, without communicating his problems to his superiors, some sympathy may be shown towards him, he being a tradesman.

12. The applicant, at the time of his dismissal was about 42 years old and as already stated had 14 years and 311 days (10 months and 11 days) of qualifying service and, but for the punishment, he would have earned pensionable service after serving for another 54 days. There is no doubt that dismissal from service not only affects his present employment, if any, his pensionary and other benefits, but also has an adverse effect on his future employment and rehabilitation in civil society. Discharge from service is a lesser punishment than the dismissal from service, since it will not adversely affect his rehabilitation and employment in civil society. But the net result of discharge as well as dismissal from service is one and the same for an applicant as in either case, he cannot continue in service. We have already seen that there are some mitigating circumstances to review and remit the punishment given to the applicant. In accordance with the provisions of Section 15(6) (b) and (e) of Armed Forces Tribunal Act, this Tribunal has the powers to remit the whole or any part of the sentence with or without conditions, if the sentence imposed is excessive, and to pass any other order as it may think appropriate. It is our considered decision to remit the punishment of "Dismissal from Service" to "Discharge from Service", for the reasons discussed above.

13. **Point No.4:** In view of the discussions held above, we find that the Summary Court Martial proceedings were conducted in accordance

with the procedures laid down for that purpose. Considering the length of service of applicant and mitigating factors as discussed, the punishment of dismissal from service is liable to be modified as that of discharge from service instead of dismissal from service and the other punishment of reduction in rank is maintained. Therefore, the prayer for re-instatement cannot be ordered in favour of the applicant. Furthermore, we find that the applicant served in the Army for 14 years, 10 months and 7 days. The applicant has asked for the grant of service pension or pensionary benefits as an alternative prayer. However, for the grant of service pension for 15 years qualifying service is necessary. We have already found that the applicant had completed 17 years and 280 days and out of which a period of 2 years and 334 days was non-qualifying service. The learned counsel for the applicant would submit that the applicant having served for more than 14 years be given with service pension after condoning the deficiency of service as per Para-125 of Pension Regulations for the Army 1961, Part-I. He would further submit that the applicant would not come under any of the exceptions in Para-125 of Pension Regulations for the Army 1961, Part-I and therefore, the Tribunal may condone the deficiency in service towards eligibility of service pension of the applicant. In order to appreciate the submission of the learned counsel for the applicant, it has become necessary for us to extract

Para-125 of Pension Regulations for the Army 1961, Part-I which reads as under:

**"Condonation of deficiency in service for eligibility to service/reservist pension**

*125. Except in the case of:*

*(a) an individual who is discharged at his own request, or*

*(b) an individual who is eligible for special pension or gratuity under Regulation 164, or*

*(c) an individual who is invalided with less than 15 years service, deficiency in service for eligibility to service pension or reservist pension or gratuity in lieu may be condoned by a competent authority upto six months in each case. "*

As per the said provisions, a competent authority may condone the six (6) months deficiency in service in each case. It is also brought to the notice of this Tribunal that the said six months' period has been amended for a period of one year by a subsequent Government of India letter. As regards the present case, the deficiency of service is 54 days or one (1) month and 23 days. Since the dismissal of the applicant from service has been modified as discharge from service, the deficiency of service of the applicant deserves to be condoned. This will meet the ends of justice. Therefore, we are accordingly inclined to condone 1 month and 23 days, the deficiency of service towards the qualifying service of 15 years for the applicant and direct

the respondents to pay service pension and other attendant benefits in favour of the applicant.

14. For the foregoing reasons, the application is allowed in respect of the modification of sentence of dismissal from service as discharge from service and the consequent benefit of service pension be granted as the deficiency in qualifying service for pension is condoned. The respondents are therefore directed to pay the arrears of service pension and other attendant benefits to the applicant within a period of three months by issuing a PPO to that effect. In default, the arrears shall carry an interest of 9% per annum till the date of payment. In other respects, this application is dismissed. There will be no order as to costs.

Sd/  
LT GEN K. SURENDRA NATH  
MEMBER (ADMINISTRATIVE)

Sd/  
JUSTICE V.PERIYA KARUPPIAH  
MEMBER (JUDICIAL)

**26.02.2015**  
**(True copy)**

**Member (J)** – Index : Yes/No  
**Member (A)** – Index : Yes/No  
VS

Internet : Yes/No  
Internet : Yes/No

To:

1. Chief of Army Staff  
Additional Director General  
Personnel Services  
Adjutant Generals Branch  
Integrated Head Quarters  
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Government of India  
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New Delhi-110 011.
6. M/s. M.Selvaraj & T.Sundaranathan  
Counsel for applicant
7. Mr. M. Dhamodharan, SCGPC  
For Respondents
8. OIC, Legal Cell, ATNK & K Area, Chennai.
9. Library, AFT, Chennai.

HON'BLE MR.JUSTICE V. PERIYA KARUPPIAH  
MEMBER (JUDICIAL)  
AND  
HON'BLE LT GEN K. SURENDRA NATH  
MEMBER (ADMINISTRATIVE)

O.A. (A) 42 of 2014

Dt: 26.02.2015