

ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A. (A) No. 77 of 2014

Monday, the 21st day of September, 2015

The Honourable Justice V.Periya Karupiah
(Member-Judicial)
and
The Honourable Lt Gen K Surendra Nath
(Member-Administrative)

Ex Spr Neelam Moyyi No.15328913H
Aged 29 years, S/o Shri Ramalu
Village & PO: Thotavada, Mandal : Burja
District Srikakulam, Andhra Pradesh-532 445

...Applicant

By Legal Practitioner:
Mrs.Tonifia Miranda

vs

1. Union of India
Rep. by its Secretary
Ministry of Defence, New Delhi – 110 011
2. The Chief of Army Staff
DHQ PO, New Delhi – 110 011
3. Record Office
Madras Engineer Group
PIN : 900 493, C/o 56 APO
4. Commanding Officer
1 Armoured Engineer Regiment
Pin 914 001, C/o 56 APO
5. Principal Controller of Defence Accounts (Pensions)
PCDA (P), Draupattighat, Allahabad – 211 014

...Respondents

N.Ramesh, CGSC

ORDER

[Order of the Tribunal made by
Hon'ble Lt Gen K Surendra Nath, Member (Administrative)]

The applicant, Ex Spr Neelam Moyyi has filed this O.A. to quash the order of Summary Court Martial dismissing him from service on 22.05.2011, the punishment being disproportionate as well as illegal and to grant him reinstatement with all consequential benefits of pay and allowances and other monetary benefits from the date of his dismissal including other benefits such as AGIF and PLI.

2. Briefly, the applicant states that he was enrolled in the Army and had put in 8 years and 8 months of service and was posted in J & K and that he was married on 14.08.2009 and his wife was staying with him in Kupwara, J & K. Due to the climatic conditions, his wife was severely affected. On completion of his tenure, he was issued with a permanent posting to the 4th respondent, i.e., 1 Armoured Engineer Regiment. The applicant, during the break journey of 7 days *en route* to his permanent posting, went home to leave his wife at Srikakulam, A.P. State. He would state that he had asked for advance of Annual Leave from his previous unit. However, it was not granted. Since his wife was a case of high-risk pregnancy, the applicant sent a telegram dated 13.04.2010 asking for ten days leave. The applicant states that he received no reply to his telegram and since there was nobody to look after his wife, he was forced to stay with his wife. Ultimately, he reported to the 3rd respondent on 12.04.2011 who further directed him to report to the 4th respondent which

had been dutifully done. While serving with the 4th respondent, he would state that he suddenly received orders of his dismissal from service. The dismissal order was read out to him. When he pleaded with the Commanding Officer, he did not listen to his plea. He claims that the Summary Court Martial conducted on 22.08.2012 was not conducted properly and he was made to sign on blank sheets. The applicant submits that even though he had filed a mercy petition dated 22.08.2012, it is yet to be disposed off on merits. In view of the foregoing, the applicant requests that the Summary Court Martial (SCM) proceedings be quashed on the ground that the said SCM was not conducted in accordance with the law and punishment given was disproportionate to the offence committed by him.

3. The respondents, in their reply statement would submit that the applicant was enrolled in the Army on 19.09.2002 and had served in 1 Armoured Engineer Regiment and, thereafter was posted to Garrison Engineer 874 Engineer Works Section with effect from 13.11.2007. On completion of tenure at that unit, the applicant was posted back to 1 Armoured Engineer Regiment *vide* posting order dated 08.09.2009. The applicant was issued with movement orders to join the new unit on 04.04.2010, with 7 days of preparatory leave and to report to the unit on 18.04.2010. However, he failed to do so. The applicant absented himself without leave from 1800 hrs on 05.04.2010 till he surrendered himself at 1800 hrs on 12.04.2011 at Depot Battalion, Madras Engineer Group and Centre, Bangalore. He was tried by Summary Court Martial on the charge under Army Act Section 39 (a) and was dismissed from

service with effect from 22.05.2011. The respondents would state that the applicant had been indulging in unwanted activities and had been a habitual offender and has faced various disciplinary actions for absenting without leave and overstayal of leave. The respondents would further state that all procedures in respect of the conduct of the trial were followed in accordance with established rules and regulations on the subject and the applicant had pleaded guilty to the charge of absence without leave and provisions of Army Rule 115 (2) were complied with. They would also state that the applicant's plea that he had no knowledge of the unit where he has been moved is incorrect as he was issued with movement order and railway warrant. The applicant did not make any telephone call nor any telegram was received by the unit regarding his wife's sickness. He was absent without leave for more than one year and he made no effort to communicate with the unit or any person in the unit during this long period of absence. The applicant's mercy petition was answered by the Government of India, Ministry of Defence *vide* order dated 13.05.2014 in which the Central Government had rejected his request and, therefore, his plea that his mercy petition was not attended to, is incorrect. The respondents contend that, in view of the foregoing, the punishment awarded to the applicant is just and the application lacks merit and substance, it should be dismissed.

4. We have heard the arguments of Mrs. Tonifia Miranda, learned counsel for the applicant and Mr.N.Ramesh, learned CGSC assisted by Maj Suchithra Chellappan, learned JAG Officer (Army) appearing for the respondents and perused all the documents placed before us.

5. On the above pleadings, the following questions beg our consideration:

- (a) Were proper procedures followed by the respondents in the conduct of the Summary Court Martial?
- (b) Are the proceedings of the Summary Court Martial liable to be set aside?
- (c) What relief, if any, the applicant is entitled to?

6. The fact that the applicant was enrolled in the Army on 19.09.2001 and was posted to 1 Armoured Engineer Regiment and, thereafter, posted to Garrison Engineer 874 Engineer Works Section and completion of his tenure there, was posted back to his Unit, i.e., 1 Armoured Engineer Regiment and he did not report to the said unit on the due date and was absent without leave for 373 days till he voluntarily surrendered to Madras Engineer Group Centre, Bangalore on 12.04.2009, are not disputed by either side. The applicant was subsequently sent to his unit, 1 Armoured Engineer Regiment wherein he was tried by Summary Court Martial on 22.05.2011 and was sentenced to 'dismissal from service' are also not disputed.

7. We have perused the proceedings of the Charge Sheet, Summary of Evidence and the Summary Court Martial proceedings. The applicant was charged under Section 39(a) of Army Act for absenting without leave from 1800 hrs on 05.04.2010 till 1800 hrs on 12.04.2011, an absence of 1 year and 7 days. In the Summary of Evidence, three witnesses were examined who, *inter alia*, stated that the applicant had left his previous

unit, i.e., Garrison Engineer 874 EWS on 05.04.2010 and did not report to his new unit on the due date. Instead, he voluntarily surrendered himself at MEG Centre, Bangalore only on 12.04.2011. The applicant was given an opportunity to cross-examine the witnesses; however, he did not do so. He was also given an opportunity under Army Rule 23 (2) and again, he declined to make any statement before the Summary of Evidence. He was subsequently tried by Summary Court Martial on 22.05.2011 by Col Amod Chadha, his Commanding Officer for the charges under Section 39 (a) of Army Act. The applicant pleaded guilty to the charge. Before recording the applicant's plea of guilty, he was explained the meaning of the charge to which had pleaded guilty in terms of Army Rule 52 (2) and 115 (2) and Army Headquarters letter dated 15.02.1988. The Summary of Evidence was explained to him in the language he understands and attached to the Court proceedings. The accused was given an opportunity to make a statement with regard to mitigation and with regard to his general character, to which the applicant declined to do. The Commanding Officer, thereafter, pronounced the sentence of dismissal from service. At the time of his dismissal, the applicant had 8 years, 8 months and 2 days of service in the rank of Sapper (Sepoy).

8. The learned counsel for the applicant, in his pleadings before us, has claimed that the applicant's wife was sick due to the climatic conditions in J & K and he had taken her to home town to drop her at her place and since she continued to remain sick, he did not report back to duty. He claimed that he had sent a telegram stating that he wanted 10 days of leave. However, since he did not receive any reply he took no

more action. He would also claim that he did not know the location of his unit and that is why he did not report to the unit.

9. *Per contra*, the learned counsel for the respondents would state that no telegram purported to have been sent by the applicant was received by his unit nor did the applicant make any communication whatsoever in the form of letter or telephonic communication as has been clearly brought out in the Summary of Evidence in which the applicant was also present. As for the claim of the applicant that he did not know the location of the unit, the respondents would state that the applicant was issued movement order as well as a railway warrant which clearly states the nearest railway station of the unit, therefore, the claim of the applicant that he did not know the location of the unit is completely false and not tenable.

10. We are inclined to agree with the respondents that the applicant, during his one year of absence had made no effort to communicate with his unit other than the said telegram, either in the form of a letter or telephonic communication and the plea of the applicant that he did not know the location of his unit appears to be false and an after-thought since he had been issued with a railway warrant and movement order.

11. The respondents in their reply statement have claimed that on verification of service records, it was seen that the applicant was a habitual offender and a bad example to the organization and was in the habit of indulging in unwanted activities like absenting himself without leave and overstaying of leave. The respondents have also stated that

while serving with various units, the applicant was involved in various disciplinary cases and was given punishments under different sections of the Army Act. *Per contra*, the learned counsel for the applicant would state that the applicant had no previous punishments for any offences and that this was the first time that he committed this offence for which he was Court Martialled and punished with dismissal from service. He had otherwise, an exemplary service record, as shown at the time of trial proceedings, in which his character was assessed as Exemplary. We have perused the Summary Court Martial documents and we find that the Commanding Officer himself had stated in the said Court Martial proceedings that the applicant had no other punishments for any other offence either within the last 12 months or throughout his service. Therefore, we are baffled by the pleadings of the respondents that the applicant was a habitual offender and had various disciplinary cases against him. The respondents, i.e., the Union of India, and the Army being responsible organizations ought not to make such submissions on Affidavit without verifying the records. As mentioned earlier, the Court Martial proceedings do not show any previous offences committed by the applicant, as alleged by the respondents. The Commanding Officer had also certified the applicant's character, at the time of trial, as exemplary.

12. We have examined the proceedings of the Summary of Evidence as well as the Summary Court Martial. The applicant was present throughout, both in the Summary of Evidence and SCM and during the hearing of charges and recording of statement of witnesses. We do not find much credence to the plea of the applicant that these proceedings

were not conducted in the proper manner and that he was asked to sign on blank papers, especially when an independent witness was present throughout the recording of the Summary of Evidence as well as members in attendance present during the proceedings of the Summary Court Martial. During the Summary Court Martial, the Commanding Officer, in terms of the Army Order No.307/73 has given reasons for awarding the said punishment of "dismissal from service" stating that the applicant did not proffer any justifiable reason for his absence and his presence in the unit would be detrimental to the discipline in the Regiment and the said punishment will set an example to all other ranks. For a better understanding, the Commanding Officer's remarks are reproduced below:

CO MEMORANDUM IN TERMS OF AO 307/73

1. *No.15328913H Spr/PAD Neelam Moyyi of 1 Armoured Engineer Regiment was AWL wef 05 Apr 2010 to 12 Apr 2011 and was declared deserted on 05 Apr 10. He surrendered himself voluntarily at Depot Battalion, HQ MEG & Centre on 12 Apr 2011 (ANO at 1800 hrs under Army Act 39 (a).*
 2. *Accused has failed to give any justifiable reason for his absence.*
 3. *Individual's retention in service would be detrimental to general discipline in Regt. In order to set an example to all ranks and prevent re-occurrence of such cases of gross indiscipline the individual was tried in a SCM and has been awarded Dismissed from service.*
13. Further, we find that the petition filed by the applicant before the Government of India, Ministry of Defence, dated 22.08.2012 was dismissed by a Speaking Order dated 13.05.2014 stating the following:

5. (a) – (b) xx xx

(c) *The Petitioner was tried by a SCM in accordance with the procedures prescribed in the Army Act and Army Rules. The Finding of the Court is just, legal and appropriate and the sentence awarded is commensurate with the gravity of the offence.”*

No doubt, the applicant has committed an offence under Section 39 (a) Army Act by absenting himself without leave and to that extent the punishment awarded to the applicant appears to be justified. However, we find that mitigating circumstances proffered by the applicant have not been taken into account or recorded. Further, the respondents in their justification have stated that the applicant is a habitual offender with several offences and, therefore, the punishment given to the applicant is commensurate with the offence committed. As we have already seen, the plea of the respondents that the applicant was a habitual offender has been totally incorrect and false. In fact, this was the first offence of the applicant and the Commanding Officer ought to have considered the mitigating circumstances. The Commanding Officer, in his Speaking Order has further stated that the *“objective of this punishment is to set an example to all ranks and prevent recurrence of gross indiscipline”*. This is misconceived. The Hon'ble Apex Court, in several judgments has stated that when punishments, especially from Court Martials, are grossly disproportionate, then it is justifiable to interfere with such punishments. In its judgment in the case of Ranjit Thakur vs Union of India and Ors reported in 1987 (4) SCC 611, made the following observations:

“The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But, the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.”

14. Though we find the applicant guilty of the said offence, there are mitigating circumstances to alter the punishment awarded to the applicant. The applicant had already 8 years and 8 months of service at the time of his dismissal from service and he is now approximately 30 years of age. Therefore, he is fit for continued service if he is permitted to rejoin service. In the said circumstances, we are inclined to alter the punishment of ‘dismissal from service’ to a lesser punishment of “75 days of Rigorous Imprisonment in military custody”.

15. Further, we are constrained to caution the respondents that willful misrepresentation of facts, especially while filing Affidavits shall be liable for contempt under the AFT Act.

16. In fine, the punishment of ‘dismissal from service’ awarded to the applicant is mitigated to a lesser punishment of ‘75 days of Rigorous Imprisonment in military custody’. The applicant shall join service within two months from the signing of this order and he shall undergo the said punishment from the date of his reporting to the unit. The respondents are directed to permit the applicant to rejoin service on his reporting to the 3rd

respondent with a copy of this order. The period of absence from the date of dismissal to the date of rejoining will be counted as non-qualifying service.

17. The application is allowed to that extent. No costs.

Sd/-

Lt Gen K Surendra Nath
Member (Administrative)

Sd/-

Justice V.Periya Karuppiah
Member (Judicial)

21.09.2015
[True copy]

Member (J) – Index : Yes/No

Internet : Yes/No

Member (A) – Index : Yes/No
ap

Internet : Yes/No

To

1. The Secretary
Ministry of Defence, New Delhi – 110 011
2. The Chief of Army Staff
DHQ PO, New Delhi – 110 011
3. Record Office
Madras Engineer Group
PIN : 900 493, C/o 56 APO
4. Commanding Officer
1 Armoured Engineer Regiment
Pin 914 001, C/o 56 APO
5. Principal Controller of Defence Accounts (Pensions)
PCDA (P), Draupattighat, Allahabad – 211 014
6. Mrs.Tonifia Miranda
Counsel for the applicant
7. Mr.N.Ramesh, ACGSC
Counsel for respondents
8. Officer in-Charge
Legal Cell, ATNK & K Area,
Chennai-600009.
9. Library, AFT, RB, Chennai.

Hon'ble Justice V.Periya Karuppiah
(Member-Judicial)

and

Hon'ble Lt Gen K Surendra Nath
(Member-Administrative)

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