

OA 150 OF 2016
Aghav Prabhakar vs. Union of India

ARMED FORCES TRIBUNAL, REGIONAL BENCH, MUMBAI

ORIGINAL APPLICATION No.150 of 2016

No..2798696H Ex-Sepoy]	
Aghav Rajabhau Prabhakar]	Applicant
Age: 36 years, s/o Prabhakar Aghav]	
16 Maratha LI, Parali Vaijnath, Madhav Bag]	
Jabalpur Road, Dist. Beed (M.S. 431 515)]	

-versus-

1] Union of India,]	
Through Ministry of Defence]	
New Delhi]	
]	
2] Chief of the Army Staff]	
Army Head Quarters]	Respondents.
New Delhi -11.]	
]	
3] Chief Record Officer]	
The Maratha LI]	
Pin 900 499]	
c/o 56 APO]	

Mr. Wilson Gaikwad, learned counsel for applicant.

Mr. B.K. Ashok, learned counsel for respondents.

**CORAM: SHAILENDRA SHUKLA, MEMBER (J) &
VICE ADMIRAL ABHAY RAGHUNATH
KARVE, MEMBER (A).**

DATE: 06.01.2023.

JUDGMENT [PER: SHAILENDRA SHUKLA, J.]

1] The instant Original Application has been filed under Section 15 of the Armed Forces Tribunal Act, 1951 against the impugned order dated 12th November 2013 passed by Summary Court martial wherein following reliefs have been sought :-

(a) *That the findings and sentence of Summary Court Martial be set aside as being illegal, unjust and against provisions of natural justice.*

(b) *That applicant be reinstated in service from the date of the dismissal.*

(c) *That the applicant be paid service pension taking into consideration his 13 years of service by giving him two years notional service to complete 15 years service.*

2] Briefly stated, facts of the case are that applicant was enrolled in Army on 10th July 2000 in MLI and was posted to 16 Maratha Regiment on completion of training. He was granted leave of absence from 22nd January 2011 to 16th

February 2011. Applicant, overstayed leave so granted from 17th February 2011 to 14th August 2014. On surrender, he was tried by Summary Court Martial on 12.11.2013 under Section 39(B) of Army Act and was dismissed from the service on the same day. An appeal was filed to the Chief of Army Staff who rejected the same on 29.8.2014. As per applicant, overstay of leave was due to circumstances beyond his control. The wife of applicant, who was 7 months pregnant had to undergo abortion due to severe health problem. Applicant was under tremendous mental trauma which disturbed his mental condition and therefore, he had to remain with his wife as there was nobody to look after her. It has been submitted that factum of overstay of leave is not a criminal offence, but is peculiar to Army Act aimed at maintenance of discipline. If sufficient cause is shown, the same has to be considered favourably, which was not done in this case. The sentence is severe and out of proportion as per Army Regulations. The applicant would have completed 15 years of service in two years time had he not been dismissed and he would have become entitled for pension. Provision for

accused to engage legal practitioner is not there. This was contrary to principles of natural justice and is breach of fundamental right. The Provisions of Section 106 of Army Act were not followed which provides for declaring the person deserter after holding commission for enquiry when he overstays for period of 30 days after the sanctioned leave and apprehension role is required to be issued to the police to apprehend him which has to be communicated to him also. In view of the above grounds the reliefs mentioned earlier have been sought.

3] In reply, respondent, has submitted that act of overstayal of leave was not on a singular instance. He was earlier punished for 7 days R.I. and fine amounting to 14 day's pay on 30.06.2006. It was the second occasion when he again overstayed leave after 16th February 2011. On this occasion, being absent for more than 30 days, he was declared as deserter and struck off active strength of Army w.e.f. 17.2.2011 pursuant to enquiry held on 24.04.2011, but applicant remained absent illegally for 2 years and 180 days and, thereafter, he

surrendered at his unit 16 Maratha on 14.08.2013. Thus, applicant was a habitual offender. He in fact had remained absent while his unit was in field area thereby setting a bad example amongst fellow soldiers in the Battalion. As per provisions of Pension Regulations in the Army Act 2008, a candidate who is dismissed under the provisions of Army Act, 1950 or removed under the Rules made thereunder, as a measure of penalty will be ineligible for pension or gratuity in respect of all previous service. The minimum qualifying service for getting service pension is 15 years. The total qualifying service of applicant after deducting absence period of 2 years and 225 days, works out to 10 years and 262 days and therefore he is not eligible for grant of service gratuity. However, he has been paid his personal provident fund balance, balance gratuity and Army Group Insurance benefits. Appeal filed by applicant was later on dismissed as the same was bereft of merits. Applicant was thus an undisciplined soldier in the battalion. Hence there was no impropriety in his dismissal which was in accordance with the prescribed procedure. He had remained

absent for total of 910 days illegally. If his wife really had any medical problem, he could have taken her to a Military Hospital in District Beed of which he was permanent resident, but no document has been filed by him regarding his wife's treatment. For above reasons, O.A. filed by applicant has been sought to be dismissed.

4] In rejoinder to O.A., applicant has stated that previous absence on only one occasion, for a short period, does not make him habitual offender. Since nearest Military Hospital from Beed district was 250 Kms away, therefore, applicant had to admit his wife in Civil Hospital at Parali. Thus, there was only one red ink entry against him at the time of dismissal. The S.C.M. was required to follow proper procedure, such as compliance of A.R. 22 which was not done.

5] The question to be determined is whether in view of the grounds so mentioned, the O.A. deserves to be allowed and reliefs as prayed for be granted to the applicant or not?

6] The applicant has not denied the fact that he had been punished for overstayal of leave and was sentenced to 7

days R.I. and fine amounting to 14 days pay on 30.06.2006.

With such background, applicant ought to have been more careful in in future. However, on the second occasion, overstayal amounted to 910 days which is so substantial that the same had to be taken very seriously. No convincing reasons for such a long overstayal of leave have been given. In O.A. it has been stated that due to his wife having pregnancy issue, resulting in ultimate abortion and subsequent disturbed mental state of wife and the applicant, the applicant could not report on time. However, in the departmental appeal against punishment, which is annexed in file, he states that he continued to remain absent due to fear of a strict military discipline in the Army. Thus, divergent grounds have been taken for absence. Most importantly not a single document pertaining to wife's medical condition and abortion etc., has been placed for perusal. In fact applicant surrendered on 14.08.2013, after he was declared deserter and local police station was informed. Section 39(b) of the Army Act provides for punishment of imprisonment for a term which may extend to three years or such lesser punishment as

his punishment. In fact dismissal from service is considered to be lesser in severity than imprisonment as per section 71 of Army Act.

7] The applicant states that he was perfunctorily subjected to Summary Court Martial without giving any notice to him and that the procedure provided in Summary Court Martial breaches fundamental right to life and liberty.

8] Regarding aforesaid contention, Section 108 of Army Act provides for four types of Court Martial and Summary Court Martial is one of them. It is not correct that no notice was given to applicant on Court Martial. Notice of Court Martial is placed in the record which is dated 7th November 2013 in which the date of Summary Court Martial has been shown to be fixed on 12.11.2013. The Act does not provide for issuance of show cause to applicant as to why Summary Court Martial proceeding be not initiated against him. Proceeding adopted in Summary Court Martial in this case is in accordance with Rule 106 to 123 of Army Rules 1954. Applicant himself has not cross examined any of the witnesses who have deposed against him. He had an

opportunity to file documents in support of his defence, which he has refrained from filing. During the period of long absence from duty, applicant did not even telephonically inform his superiors regarding cause of his absence. He in fact surrendered when he realised that he would be arrested and will be brought before his superior authorities.

9] Absence for 910 days is a more serious lapse on the part of applicant as he had absented from his service when he was a part of platoon of Alfa Camp deployed in insurgent areas of Manipur. Thus, it can be assumed that applicant had in fact absented himself because of fear for his life when his unit was deployed for CI Ops. This was absolutely unbecoming of a combat soldier.

10] As far as the process of Summary Court Martial being unconstitutional as breaching fundamental rights is concerned, this Tribunal is not appropriate forum to determine the contention.

11] The contention that Commanding Officer of same Unit could not have conducted Summary Court Martial before

whom applicant surrendered is also rejected as under Section 116 of Army Act, it is the Commanding Officer only who can conduct Summary Court Martial. It is nowhere provided that he should be Commanding Officer of some other Corps, department or detachment.

12] In view of above discussion, punishment of dismissal from service cannot be considered to be disproportionate at all. Further as applicant had not completed 15 years of service in the Army at the time of his dismissal, he was not entitled to any pension or consequential benefits as well,. The residual benefits have already been given to him.

13] The appeal of the applicant consequently fails and is dismissed accordingly.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Shailendra Shukla)
Member (J)

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