

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, MUMBAI****ORIGINAL APPLICATION No. 84 of 2017**

On this the 16th day of January, 2023

**“Hon’ble Mr. Justice Shailendra Shukla, Member (J)**

**Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

Pateliya Dilip Kumar Bhimji Bhai	]	
(No.14439315K – Ex Gunner)	]	
Age : 32 years,	]	
s/o (Late Shri. Bhimji Bhai)	]	
r/o 26-A Pragati Nagar Society	]	Applicant.
Vis Nagar Link Road	]	
Mehsana – 384001 (Gujarat State)	]	
Mob: 09998280141	]	

**Shri. Ajit P. Singh,** Advocate for applicant.

Versus

1.	Union of India,	]	
	Through Chief of Army Staff IHQ	]	
	MoD (Army)	]	
	New Delhi -11	]	
		]	
2.	Commanding Officer,	]	
	222, Medium Regiment	]	
	c/o 56 A.P.O.	]	
		]	
3.	GOC –IN –C	]	
	Northern Command	]	Respondents.
	Pin 908 545 c/o 56 A.P.O.	]	
		]	
4.	Officer in –Charge	]	
	Air Artillery Records	]	
	Nasik Pin 422 102.	]	
	c/o 56 A.P.O.	]	

**Mr. Rishi Ashok**, Advocate for respondents.

**ORDER**

**[Per Hon'ble Mr. Justice, Shailendra Shukla, Member (J).]**

1]           The instant Original Application has been preferred as an appeal under Section 15 of the Armed Forces Tribunal Act, 2007, against the impugned order of dismissal from service awarded by Summary Court Martial and the following reliefs have been sought by the applicant:-

- “(a)       Issuance of appropriate order or direction of suitable nature, quashing the impugned order of dismissal from service awarded by SCM, held on a charge under the Army Act, section 39(b) “overstaying leave granted to him” by commanding Officer 222 Medium Regiment dated 05.08.2014.
- (b)       Issuance of an appropriate order or direction of a suitable nature, commanding the Respondent to reinstate the Applicant into service with retrospective seniority and all consequential benefits, within a period to be specified by this Hon'ble Tribunal.

2]           Briefly stated, facts of the case are that applicant was enrolled in Army on 7<sup>th</sup> May 2001 as a Gunner in Artillery Regiment and after obtaining training, served in 222 Medium Regiment throughout. The applicant was the only surviving male member after

his father's death and had to shoulder the responsibility of marriages of his three sisters. The applicant arranged the marriage of his first sister which however, ended in divorce and remarriage had to be arranged by the applicant. The second sister met with an accident and remained hospitalized for long time and thereafter on recovery, her marriage was arranged by applicant. This was followed by the marriage of third sister which was also arranged by the applicant. The applicant suffered tremendous financial hardship and mental strain resulting from shouldering these responsibilities and therefore, he inadvertently overstayed for 7 to 8 months beyond sanctioned leave. The applicant, thereafter voluntarily reported to Hyderabad Artillery Centre to which his unit was affiliated and submitted his explanation for overstaying. Such an explanation was forwarded by Artillery Centre to his unit. However, this letter was not considered by Summary Court Martial and applicant was dismissed from service vide order dated 25<sup>th</sup> April 2007.

3] Aggrieved by dismissal order, applicant filed an appeal and the Tribunal in O.A.No.52 of 2012 was pleased to set aside order of dismissal from service passed on 25.4.2007. The Tribunal was of opinion that the punishment of dismissal from service is more severe than the sentence of imprisonment and the Tribunal directed respondents to consider the circumstances shown by the applicant and pass fresh order regarding sentence under Section 39(b) of the Army Act.

4] The Tribunal in its judgment dated 13<sup>th</sup> January 2014 had directed the applicant to report to his unit within one month. Accordingly, applicant returned to the said unit, but the Unit Authorities refused to take back applicant inside the unit. Hence, the applicant came back and filed Misc. Application No.22/Misc./2014 praying for allowing applicant to join the unit. Applicant thereafter reported to his unit and then he was given an opportunity to explain overstay of 7 months. Applicant submitted an application explaining the circumstances for overstay alongwith i] willingness certificate to join the duty dated 27.06.2014, ii] non criminal certificate dated 27.06.2014, iii] employment certificate after dismissal and iv] certificate from village Sarpanch, showing performance of marriage of three sisters.

5] As per the applicant despite submission of aforesaid documents, fresh SCM did not consider them and totally ignored them and applicant was again dismissed from service for the reason that the applicant is a habitual offender and showed no respect for discipline and his retention in service would be detrimental to the maintenance of discipline in a disciplined force like Army.

6] Against this order, applicant filed his post confirmation petition under Section 164 (1) of the Army Act, 1950 to the CoAS IHQ, MoD (Army) New Delhi and GOC-in-C, Northern Command, which was rejected on 31.05.2016. The applicant submits that C.O. in second Court Martial had acted only as a prosecutor and not as a

Judge by overlooking suggestions of this Tribunal order dated 13.01.2014 to consider the mitigating circumstances as brought out in his O.A.No.52 of 2007 while considering the nature of punishment to be imposed by the Second SCM. Hence present application has been filed seeking reliefs mentioned hereinabove.

7] In reply, it has been submitted by the respondents that the applicant had been granted leave from 10.08.2006 to 16.08.2006. However, he failed to re-join after expiry of the aforesaid period and was declared as deserter w.e.f. 17.08.2006. The applicant, however, voluntarily reported after lapse of 231 days on 05.04.2007. Prior to this absence, on four earlier occasions also applicant had remained absent for longer periods and was awarded punishment of varying days on each of these occasions and which included punishment of varying days. Petitioner was thus a habitual offender of overstaying of leave without sufficient cause and such an attitude shows utter disregard to military discipline and this set an extremely bad example to other disciplined soldiers. High standard of discipline is expected from military persons. But applicant never cared for his future prospects and demonstrated no improvement in his conduct. It has been further stated that the service document of petitioner shows he is having only one sister and not three as made out in the petition. Thus, the relief sought by applicant lacks merit and substance. Despite giving opportunity to prove his contention no evidence has been brought forth by applicant assigning cause of his

absence and after specifically asking to lead evidence, applicant had voluntarily submitted that he did not want to lead any other evidence. Applicant has admitted that he did not contact anyone for a period of 7½ months. Thus, despite giving ample opportunity, petitioner failed to appear and lead evidence. Hence he was dismissed from service for the reasons shown in reply-affidavit. The punishment awarded was just and fair and as per existing rules and regulations. In fact during 7 ½ months of his absence, applicant never contacted unit. He was an habitual offender whose retention in service would be detrimental to the cause of discipline in a disciplined force like Army. On these grounds the reliefs mentioned by the applicant have been sought to be rejected.

8]           The question before us is whether in view of grounds mentioned above, this application is liable to be allowed and reliefs as sought be granted to the applicant or not?

9]           There is no dispute regarding the fact that in first SCM, applicant was granted an opportunity to lead evidence regarding his overstayal of leave. It would be appropriate to reproduce the relevant paragraphs of judgment dated 13.01.2014 of AFT Bench at Mumbai.

*“15. For the aforesaid reasons, the appeal is partly allowed. While we confirm and maintain the order of conviction under Section 39(b) of the Army Act, we hereby set aside the order of sentence of dismissal from service and remand the matter back to the concerned Authority to consider the*

*circumstances given by the applicant as mitigating circumstances and, if need be, to give opportunity to prove those circumstances and then to pass fresh order about the sentence under Section 39(b).*

16. *The applicant to report his duty unit, within one month from this date and, within two months after his appearance in the unit, the concerned Summary Court-Martial shall hear the applicant and pass the appropriate order of sentence for the offence under Section 39(b) of the Army Act. Appeal or statutory petition, if any, filed by him shall also be disposed of by the Competent Authority within three months thereafter.*

10] Thus, applicant was required to report to his unit within one month from 13<sup>th</sup> January 2014. However, it appears that instead the applicant reported to his unit in the month of June 2014. Although Learned counsel for applicant submits that applicant had in fact gone to his unit one month after passing of order dated 13.01.2014, but was not allowed to enter the premises, however, there is nothing on record to suggest or prove that applicant had in fact reported to his unit. Accordingly, the respondents have denied the same and have categorically stated that applicant did not turn up in his unit in stipulated period of one month.

11] Learned counsel for applicant has submitted that the documents furnished by him in form of letter of the village Sarpanch was overlooked by respondent. However respondents have stated that no such letter of Sarpanch was produced by applicant. Learned

counsel for applicant has drawn Tribunal's attention to the aforesaid letter which is placed on record. However, we find that there is no seal of the respondent to indicate receipt of the document and thus prove its submission. Attention to documents purported to be the proceedings of second SCM was drawn by learned counsel for respondent. This document is placed on record. Some questions and answers have been noted in this document. It would be appropriate to reproduce clause (a) to (h) in question – answer form, as under:-

*(a) Q. No.1 : Do you wish to make any statement verbally or submit any written statement?*

*(b) Answer No.1 : The accused says," I hereby produce my written statement. The statement of the accused is received. Perused and attached as Annexure.*

*(c) Q.2 Do you wish to call any witness?*

*(d) Answer No.2: The accused declined to call any witness.*

*(e) Q.3 : Do you wish to produce any evidence, documentary or in support of your statement?*

*(f) Answer No.3. The accused declined to produce any evidence.*

*(g) Q.4 : During about seven and half months of your absence did you contact anybody in the unit?*

*(h) Answer No.4: The accused says, "No, I did not contact anyone in the unit."*



12]            Thus, pointing to the above document, it has been stated that despite giving opportunity to adduce evidence, neither any witness was produced nor any documentary evidence was submitted by applicant. Moreover, applicant admitted that he did not contact anyone from his unit during the period of absence of 7 ½ months. This document bears the signature of the applicant.

13]            There appears to be substance in the submission of respondent that applicant did not avail of the opportunity to submit evidence either documentary or in terms of witness to substantiate his case in the second Summary Court Martial. He did not even contact any person from his unit which also shows his basic callous attitude and indifference to his duties. Even prior to the long period of absence of 231 days, applicant had already been punished with rigorous imprisonment for committing similar type of misconduct of overstaying of leave without sufficient cause. Thus, the applicant showed scant respect of observing discipline in the institution where observance of appropriate discipline and conduct is *sine-quo-non*. Apprehension of respondents is not without basis and stands on firm ground that if reinstated, it would be bad example for the colleagues which would be detrimental to cause of maintenance of discipline in disciplined force like Army.

14]            Further we are of the opinion that applicant had already been given a long rope by the Tribunal by way of an opportunity to lead evidence in Second Summary Court Martial but instead he

exhibited disdain in availing the opportunity. This, coupled with his earlier similar instance of OSL leaves no ground to allow his application. Application, therefore, stands dismissed.

**(Vice Admiral Abhay Raghunath Karve)**  
**Member (A)**

**(Justice Shailendra Shukla)**  
**Member (J)**

Dated : 16th January, 2023

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