

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
MUMBAI (CIRCUIT BENCH GOA)**

**ORIGINAL APPLICATION No. 151 of 2020**

Thursday, this the 21<sup>st</sup> day of December, 2022

**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**  
**Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)**

Ex Cfn/Avn Elect Army No 14659686X Vivek Vinayak Salunkhe, M Bana House, B-202, Malvalpada Road Vihar (East), Mumbai-401304.

.....Applicant

Learned counsel for the : **Shri AP Singh**, Advocate  
Applicant

Versus

1. The Union of India (Rep by Defence Secretary) Department of Ministry of Defence, South Block, DHQ, Post-New Delhi-110011.
2. The Chief of the Army Staff (COAS) (for Adjutant Gen Branch), IHQ of MoD (Army), D-II, Sena Bhawan, DHQ, Post, New Delhi-110105.
3. The General Officer Commanding-in-Chief, HQs Southern Command, Pune-411001.
4. The Officer-in-Charge Records, EME Records, Secunderabad-500021.

.....Respondents

Learned counsel for: **Shri AJ Mishra**, Advocate  
the Respondents. Central Govt. Counsel

### **ORDER (Oral)**

1. This O.A. has been filed under Section 14 of the Armed Forces Tribunal Act, 2007. The applicant has made following prayers:-

- (i) To set aside and quash the sentence of dismissal from service passed in SCM dated 23 Mar 2013 u/s 39 (b) i.e. OSL by CO of other unit (EME Depot Bn), moreover the sentence being illegal and without jurisdiction, besides harsh and disproportionate at this stage service and that to, when the applicant had not crossed the mandatory threshold of 04 Red Entries in the service records.*
- (ii) To direct the respondents to re-instate the applicant into service from the date of dismissal with back wages and service seniority, alternatively re-instate him notionally w.e.f. 23 Mar 2013 and discharge him notionally on completion of pensionable service with service pension of the rank last held.*
- (iii) Hon'ble Tribunal may order any other direction/relief as deemed fit in the facts and circumstances of the instant case.*
- (iv) Cost of this petition may be allowed to the applicant.*

2. The facts necessary for the purpose of adjudication in the instant Original Application may be summarised as under:-

3. The applicant, No. 14659686X Ex Cfn/Avn Elect Salunkhe Vivek Vinayak was enrolled in the Indian Army (Corps of EME) on 21.03.2003. During the service span of 10 years he was awarded three punishments i.e. two red ink and one black ink entries. While serving with 21 R & O Flt, he was granted 25 days Advance of Annual Leave (AAL) for the period 13.10.2011 to 11.11.2011. After expiry of leave he failed to report for duty on 12.11.2011 and overstayed leave granted to him. Accordingly, Court of Inquiry (C of I) under Section 106 of the Army Act, 1950 was conducted which declared him as a deserter w.e.f. 12.11.2011. After 380 days he voluntarily surrendered to EME Depot Battalion on 26.11.2012. As per Para 381 of Regulations for the Army,

1987, it was mandatory for EME Depot Battalion for issue of attachment order in respect of the applicant to initiate disciplinary proceedings against him whose unit was deployed in High Altitude Area/Counter Insurgency Operations Area. Summary Court Martial (SCM) proceedings were held on 23.03.2013 and he was awarded punishment 'dismissal from service' for the offence committed by him under Section 39 (b) of the Army Act, 1950. Accordingly, he was dismissed from service w.e.f. 23.03.2013 and his dues were remitted. By means of this O.A. applicant is claiming that he should be re-instated in service notionally by quashing SCM proceedings and granted service pension on the basis of notional re-instatement and discharge from service on completion of service.

4. Submission of learned counsel for the applicant is that the applicant was trained at EME Centre Secunderabad before posting to 21 R & O Flt. He further submitted that he was granted AAL w.e.f. 13.10.2011 but during the leave period since the applicant indulged in heavy drinking, he was hospitalised for alcoholic de-addiction treatment and that was the sole reason he could not report for duty in time. It was further submitted that on advice of his Commanding Officer, the applicant reported to EME Centre.

5. Learned counsel for the applicant further submitted that on reporting to the Centre he was attached to EME Depot Battalion for disciplinary action by the order of Commandant EME Centre and Records vide attachment order dated 16.12.2012. He further

submitted that tentative charge sheet dated 12.02.2013 was handed over to him under Section 39 (b) of the Army Act, 1950 and after recording of summary of evidence he was tried summarily and dismissed from service without providing adequate opportunity for his defence. His further submission is that in view of ***Mahipal Singh vs UOI & Ors***, writ petition No 3286 of 1991 decided by the Hon'ble Delhi High Court, trial conducted by Commanding Officer of other unit is vitiated and needs to be set aside.

6. Learned counsel for the applicant further submitted that the applicant was not served with convening order, charge sheet and summary of evidence including connected documents for his trial held on 23.03.2013 and he was forced to sign under coercion which is per se illegal. It was further submitted that after his SCM was over he was despatched to his home town without paying a single penny. His other submission is that the applicant was having only two red ink entries but his dismissal from service is in contravention to policy letter dated 28.12.1988 as per which an individual can only be discharged from service having four or more red ink entries. It was pleaded that punishment of dismissal being harsh and disproportionate needs to be looked into and applicant be re-instated into service notionally and granted service pension.

7. On the other hand, learned counsel for the respondents submitted that the applicant was enrolled in the Corps of EME on

21.03.2003 and during the course of his service he earned two red and one black ink entries in a short span of ten years service. He further submitted that he was granted 25 days AAL which was due to expire on 11.11.2011 but after expiry of leave he failed to report for duty. Accordingly, C of I was conducted and he was declared a deserter w.e.f. 12.11.2011.

8. Learned counsel for the respondents further submitted that the applicant voluntarily surrendered at Depot Battalion of the Training Centre after a lapse of 380 days on 26.11.2013 where by the order of Commandant he was attached with EME Depot Battalion of EME Centre in terms of Para 381 of Regulations for the Army, 1987 (Revised Edition). It was further submitted that the SCM was held by following due process and he was dismissed from service w.e.f. 23.03.2013. It was further submitted that all dues i.e. AFPP fund and AGIF maturity benefits pertaining to the applicant were paid.

9. Learned counsel for the respondents concluded his submission stating that in terms of Para 113 of Pension Regulations for the Army, 1961 (Part-I), applicant is not entitled to service pension. In support of his contention, learned counsel for the respondents has relied upon order dated 08.03.2017 passed by AFT, RB, Lucknow in M.A. No. 1665 of 2016, **Sepoy Driver (MT) Goverdhan Vishwakarma vs Union of India & Ors** and pleaded for dismissal of O.A.

10. Heard Shri AP Singh, learned counsel for the applicant and Shri AJ Mishra, learned counsel for the respondents and perused the record.

11. It is undisputed fact of the parties that the applicant was enrolled in the Army on 21.03.2003. During the course of his service he was awarded two red ink and one black ink entry punishments for the misconduct on his part which are as under:-

Nature of offence	Army Action Section	Period of Offence	Punishment Awarded
AWL (Absent without leave)	39 (a)	<u>21.09.2008</u> <u>23.09.2008</u>	21 days RI
An act of prejudicial to good order and military discipline	63	18.12.2008	14 days RI
Intoxication	48	31.09.2011	14 days pay fine

12. While posted with 21 R & O Flt he was granted 25 days AAL for the period 13.10.2011 to 11.11.2011 and after expiry of leave he failed to report for duty. Accordingly, an apprehension roll was issued and after 30 days C of I was conducted under Section 106 of the Army Act, 1950 which declared him as a deserter. After a lapse of 380 days the applicant voluntarily surrendered at EME Depot Battalion on 26.11.2012 at 1700 hrs. Since his unit was located in field area, he was attached to EME Depot Battalion by HQ 1 EME Centre in terms of Para 381 of Regulations for the Army, 1987 (Revised Edition) where he was tried by SCM and awarded punishment 'dismissal from service' w.e.f. 23.03.2013.

13. Applicant's contention, that the he could not have been attached to other unit for SCM trial, is not sustainable as he was

rightly attached to EME Depot Battalion as per Para 381 of Regulations for the Army, 1987 (Revised Edition) as his unit was deployed in HAA/CI Ops Area. Applicant's other contention is that Rule 22 of the Army Rules, 1954 has not been complied with, which is discussed in succeeding paras. Before proceeding further in this matter, we would like to quote Rule 22 of the Army Rules, 1954 which deals with the hearing of a charge by the Commanding Officer:-

*"22. Hearing of Charge.*

*(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence: Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).*

*(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with: Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.*

*(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-*

*(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or*

*(b) refer the case to the proper superior military authority; or*

*(c) adjourn the case for the purpose of having the evidence reduced to writing; or*

*(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial: Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless-*

*(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or*

*(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.*

*(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge."*

14. It is, therefore, incumbent on all Commanding Officers proceeding to deal with a disciplinary case to ensure that "Hearing of Charge" enjoined by Army Rule 22 is scrupulously held in each and every case where the accused is a person other than an officer and also in case of an officer, if he so requires it. In case an accused officer does not require "Hearing of the Charge" to be held, the Commanding Officer may, at his discretion, proceed as described in Army Rule 22(2) or Army Rule 22(3). We find that the applicant was marched before the Commanding Officer and charges were read over to him in the language he understood.

15. It may be clarified that the charge at this stage is a 'Tentative' charge which may be modified after the hearing or during the procedure as described in Army Rule 22 (3) (c) or during examination after completion of the procedure under Army Rule 22(3) (c), depending upon the evidence adduced. Further, as long as the Commanding Officer hears sufficient evidence in support of the charge (s) to enable him to take action under sub-rules (2) and (3) of Army Rule 22, it is not necessary at this stage to hear all possible prosecution witnesses. As a matter of abundant caution it would be desirable to have one or two independent witnesses during the hearing of the charge(s).



16. After the procedure laid down in Army Rule 22 has been duly followed, other steps as provided in Army Rules 23 to 25, shall be followed both in letter and spirit. It may be clarified that the statutory requirements of Army Rules 22 to 25 cannot be dispensed with simply because the case had earlier been investigated by a C of I where the accused person might have been afforded full opportunity under Army Rule.

17. Learned counsel for the applicant in support of his argument has placed reliance on a judgment of ***Mahipal Singh vs UOI & Ors***, writ petition No 3286 of 1991 decided by the Hon'ble Delhi High Court dated 03.04.2012. We have carefully examined the aforesaid judgment. In the facts of that case we find that the applicant was granted partial relief as he was tried by the other Commanding Officer and not by his own Commanding Officer being posted in peace area contrarily to Para 381 of Regulations for the Army, 1987. Therefore, the facts of this case are different with the case in hand. In the instant case the applicant while on AAL overstayed leave for 380 days and was declared a deserter by a duly constituted C of I. He surrendered at Depot Battalion voluntarily on 26.11.2012 where he was tried by SCM and dismissed from service w.e.f. 23.03.2013. The Commanding Officer had carried out hearing of charge of the applicant in accordance with Army Rule 22, provided opportunity to the applicant for his defence against the offence for which he was tried. The charge against the applicant was read over and

explained to him by the Commanding Officer and provided opportunity to cross examine the prosecution witness, make any statement in his defence and call any witness in his defence, which he declined. The hearing of charge was conducted in the presence of two independent witnesses. Therefore, there seems to be no procedural lapse in conduct of hearing of charge. On conclusion, the Commanding Officer ordered to record Summary of Evidence (S of E) with an aim to afford maximum opportunity to produce his defence in order to provide natural justice to the applicant. Thus, Army Rule 22 has been complied with.

18. We also find that while recording summary of evidence, the applicant gave his statement which clearly shows that he was provided adequate opportunity to defend himself which he declined. The following statement was given by the applicant:-

*"17. I proceeded to my home on 05 days BAL-11 and 25 days AAL-12 to participate in the 'Navrathri' celebrations. During my leave I started drinking alcohol quite heavily and was coming home very late. My parents got afraid of my behaviour and got me admitted in a rehabilitation home. I was admitted there for nearly 03 months. After I was discharged, my mind got upset due to non availability of alcohol for nearly three months. I was behaving abnormally. My parents confined me to our home and gave me treatment. When I became normal I realized my mistake and surrendered voluntarily to EME Depot Bn on 26 Nov 12 at 1700 h being OSL for nearly 380 days. I request you to pardon me for my mistake and provide me with a chance to serve. I assure you that I will not commit such mistake in future.*

*18. After having recorded the statement of the accused, the accused was given an opportunity by the officer recording the summary of evidence if he wanted to produce any witness or document in his defence for which he had declined."*

19. Before proceeding further, we would like to quote the pronouncement of Hon'ble Delhi High Court in the case of **Lance**

**Dafedar Laxman Singh vs. Union of India & Ors.** (1992) SCC

OnLine Del 371) in paras 9 and 10 as under :

"(9). ..... The scope of investigation which is preliminary in nature to be conducted under the Army Rule 22 has strictly to be adhered to. The word 'Charge' came up for interpretation before the Division Bench of this Court in the case of *Ex Sappy Rajbir Singh Vs. Union of India & Ors.* in Crl.W. No.43/1985 decided on 27th May, 1988. It was pointed out that the word 'charge' referred to means a simple complaint or allegation against the soldier concerned. The rules lay down a clear distinction between the 'charge sheet' and the 'charge'. Charge has been defined in subrule (2) of Rule 28 under this very chapter. It reads as under:

(10) The "charge-sheet" has to be framed after the preliminary investigation during which the statements of the witnesses and the plea of the accused are not to be recorded in writing. However, the nature of the offence has to be made known to the accused and the witnesses are to be examined in support of those allegations in his presence. The accused has also to be given full liberty to cross examine those witnesses deposing against him. The Commanding officer after holding the preliminary investigation has been given three options in sub-rule (3) of Rule 22. If the Commanding officer is satisfied then the case should proceeded. He will adjourn it for purposes of having the evidence reduced into writing. The procedure for recording evidence is laid down in Army Rule 23.

20. The Hon'ble Apex Court in the case of **Prithi Pal Singh Bedi Lt. Col. Vs. Union of India**, AIR 1982 SC 1413 in para 37 has discussed the procedure laid down for conducting the Summary Court Martial, which is reproduced as under :-

"37. The submission is that before a general court martial is convened as provided in rule 37 it is obligatory for the commanding officer to hear the charge made against the accused in his presence giving an opportunity to the accused to cross examine any witness against him and to call any witness and make any statement in his defence and that if the commanding officer is so satisfied he can dismiss the charge as provided in sub-rule (2) of rule 22. If at the conclusion of the hearing under rule 22 the commanding officer is of the opinion that the charge ought to be proceeded with, he has four options open to him, one such being to adjourn the case for the purpose of having the evidence reduced to writing, called summary of evidence. Rule 23 prescribes the procedure for taking down the summary of evidence which, inter alia, provides recording of

*the evidence of each witness, opportunity to the accused to cross-examine each such witness, etc. Rule 24 provides that the summary of evidence so recorded shall be considered by the commanding officer who at that stage has again three courses open to him, to wit, (a) remand the accused for trial by a court-martial, (b) refer the - case to the proper superior military authority; and (c) if he thinks it desirable, re-hear the case and either dismiss the charge or dispose - it of summarily.*

21. Apart from it, in the case of **Major G.S. Sodhi vs. Union of India & Ors**, (1991) 2 SCC 382, the Hon'ble Supreme Court has considered Army Rule 22 and the other Rules. The relevant part of the said judgment reads as under:-

*"6..... Rule 22 provides for the hearing of charges. Rule 23 lays down the procedure for taking down the summary of evidence. Rule 24 deals with remand of accused and lays down that the summary of evidence recorded under Rule 23 shall be considered by the Commanding Officer who thereupon-shall either remand the accused for trial by a court-martial or refer the case to the proper superior military authority and if the accused is remanded for trial by a court-martial the commanding officer shall without unnecessary delay either assemble a summary court- martial or apply to the proper military authority to convene a court-martial. Rule 25 provides for the procedure to be followed on a charge against an officer. Rule 28 deals with framing of charges and lays down that the charge-sheet shall contain the whole issue or issues to be tried by a court-martial. Rule 33 deals with the defence by the accused personxxxxxx.*

*11. xxxxx Rule 22 contemplates that every charge against a person other than an officer, shall be heard in the presence of the accused, and the accused shall have full liberty to cross- examine any witness against him, and to call any witnesses and make any statement in his defence. Rule 25 lays down the procedure on a charge against officer and is to the effect that where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held, and the evidence be taken in his presence in writing, in the same manner as required by Rules 22 and 23xxxx."*

22. We also find that the applicant has fully participated in the SCM proceedings, therefore, keeping in view that there was sufficient evidence with regard to his overstaying of leave, there was no need to reduce the evidence in writing. The evidence led

by the prosecution, was fully proved and there was sufficient evidence in support of the charge with regard to desertion for approx 380 days in addition to two red ink and one black ink entries prior to his desertion of 380 days.

23. In view of the above discussions, we do not find any procedural illegality or irregularity in conducting the SCM and findings recorded on the basis of the evidence are also in accordance with the rules. In our considered opinion the applicant is a habitual offender and needs no sympathy.

24. With regard to grant of service pension, we find that in view of Para 113 (a) of Pension Regulations for the Army, 1961 (Part-I) a dismissed Army person is not entitled to pension or gratuity. For convenience sake the aforesaid Para is reproduced as under:-

*"113 (a). An individual who is dismissed under the provisions of the Army Act is ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date."*

25. In view of the discussions made above, the O.A. is liable to be dismissed. It is accordingly, dismissed.

26. No order as to costs.

27. Miscellaneous application(s), pending if any, stand disposed of.

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

Dated: 21.12.2022  
rathore

**(Justice Umesh Chandra Srivastava)**  
**Member (J)**