A F R

(SEE RULE 102(1))
ARMED FORCES TRIBUNAL ,KOLKATA BENCH

T. A. NO.15/2013

THIS 3rd DAY OF JUNE, 2015

CORUM
HON'BLE JUSTICE DEVI PRASAD SINGH,MEMBER(JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S) Ranjeet Kumar {Army No.15679413M Sigmn (Lmn fd-III)} son of Sri Ram Breksh Prasad, resident of Village –Mushari, P. O. Basai, P. S.-Ishlampur, District- Nalanda

-versus-

RESPONDENT(S)

1. The Union of India through the Commanding Officer,
2. The Commanding Officer, 24 Infantry Division Signal Regiment (Aren) Jabalpur.
3. The Lieutenant, Officer-in-charge, Documentation 24 Infantry Division, Signal Regiment (Aren) Jabalpur
4. The Union of India through the Defence Secretary, Army HQ, Defence HQ, New Delhi -110 011.
5. The Chief of Army Staff, Army HQ, Defence HQ, New Delhi -110 011
6. The Chief Record Officer, Signal Records Abhilekh karyalaya, Jabalpur (M.P.) C/o 56 APO
7. The Officer-in-charge, P.C.D.A. (P), Allahabad (U.P.)

For the petitioner(s) : Mr. Fulman Singh, Advocate

For the respondent(s) : Mr. Anup Kumar Biswas, Advocate

O R D E R

PER HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)

1. This is an application under Section 14 of the Armed Forces Tribunal Act, 2007 preferred against the impugned order by which the appellant has been dismissed from Army service on account of habitual absence from duty through summary court martial (in short SCM). We have heard ld. counsel for the parties and perused the records.

2. The applicant is a signal man. He proceeded on leave from 05.05.2005 to 07.07.2005. He joined prematurely from leave on 20.05.2005 and was interviewed by the Adjutant and the Commanding Officer. Thereafter he resumed his duty in his own unit. All of a sudden, the applicant left his unit on 20.06.2005 without prior sanction of leave. In consequence thereof, he was declared absent without leave (AWL) from 18.00 hrs on 20.06.2005. Apprehension order was issued by unit letter No.1622/Sings/4/17 dated 02.07.2005. From the factual matrix of records it appears that the applicant was involved in a criminal case (named in criminal case) under Sections 147, 148, 149, 307 and 302 of the IPC read with Section 27 of the Arms Act. Being named in the criminal case he surrendered in the Court of Additional Chief Judicial Magistrate, Hilsa, Dist. Nalanda on 10.01.2006. He remained in jail from 10.01.2006 to 03.04.2007 and released in pursuance of bail order granted by Hon'ble High Court, Patna. After being released from jail he remained absent from 03.04.2007 (date of release) to 30.04.2007. It was on 30.04.2007 the applicant reported to Depot Regiment (Signal Corps). On 01.05.2007 the applicant was dispatched to the unit on movement order passed by Depot Regiment and in consequence thereof he reported to the unit on 03.05.2007. Disciplinary proceeding initiated against the applicant was based on two charges namely, viz 1) On 20.06.2005 absented himself without sanction of leave and later on surrendered before the Additional CJM, Hilsa, Nalanda on 10.01.2006 for violation of Sec.39(a) of the Army Act and 2) Even after release on bail on 03.04.2007 the applicant absented himself without sanction of leave till he joined the Depot Regiment on 30.04.2007.

The applicant was tried by SCM on 05.10.2007 and sentenced to be dismissed from service. Trial of SCM took place in pursuance of power conferred by Sec. 13 of the Army Act.

3. Being aggrieved the applicant preferred a writ petition bearing No.4999/2008 in the High Court of Judicature at Patna which has been transferred to this Tribunal by an order dated 10.07.2013 of High Court, Patna. Grounds raised by the applicant as contained in Para.2 of the Writ Petition is reproduced below :-

"2. That main point involved in this writ application are as follows :-

1) Whether petitioner has vitiated in a criminal case while he was on leave in the village resultly he was surrender in the court of Additional Chief Judicial Magistrate Hilsa on 10.09.06 after which he was put in Jail and was released on bail on 0.04.07 thereafter he reported to depot Regt., Crops of Signals on 30.4.07 or not ?
2) Whether the Rule 19(ii) and 129 of Army Rule violated by respondents or not ?
3) Whether petitioner was proceeded on 64 days on leave from 5 March 05 to 7.7.05 while he was on leave, on 16.5.05 there was fighting amongst some persons in the village of petitioner in which one Biveka Kumar died, when petitioner was in the laws house for attending a Tilak ceremony at the time of fight even then he has been falsely implicated or not ?
4) Whether when petitioner learned that he has falsely charged against section 147, 148, 149, 307 and 302 I.P.C. and 27 Arms Act, then petitioner choose to report in the Unit line to senior J. C. O., one COY on 20.5.05 and he was interviewed by Lt P. P. Kour Adjit and Col Rajindra Kumar on 21.5.05 and resume the duty of the petitioner in the Unit or not?
5) Whether during course of court martial respondent authority denial of the fundamental right of the citizen during the proceeding before the court martial or not ?

6) Whether respondent authorities issued a letter dt. 6.10.07 by which service of the petitioner has been dismissed without any cogent reason is fit to be dismissed or not ?"

4. The applicant was tried by SCM in pursuance of power conferred by Sec. 116 of the Army Act, 1950 (in short 'the Act'). Sec. 120 of the Act further extends power to SCM. Since the petitioner was absent without sanction of leave and also overstayed the leave, respondents seems to be justified in convening SCM. Record shows that allegation against he applicant was proved during the course of SCM by two independent witnesses namely, Sub Nepal Singh and Hav U. K. Singh. The applicant was also asked to examine the witnesses but he declined to do so. He himself did not cross-examined the witnesses but unequivocal corroborated factual matrix of record it shows that the applicant had absented himself by overstaying the leave as well as went to his native place without obtaining prior permission. Furthermore, during course of absence from duty he was involved in a criminal case (supra) and later on appeared before the Additional Chief Judicial Magistrate for bail on 03.04.2007. He had not informed his Unit with regard to imprisonment as under trial. Record reveals that Col Rajindra Kumar vide letter dated 29.09.2007 informed the applicant that he will be tried by SCM and accordingly requested to assemble at 11.00 A.M. on 05.10.2007. A copy of summary of evidence, charge-sheet and convening order of September, 2007 was also provided to the applicant. The applicant was also informed vide letter dated 09.09.2007 to choose a friend who may defend his case during SCM. The applicant vide letter dated 01.10.2007 requested that one Maj Rohit Saini be made available to represent him during SCM trial on 05.10.2007. He was given full liberty in accordance with AR 19(2) and 129 to choose a friend of the accused.

Argument made by ld. counsel for the applicant that in spite of request the applicant was not permitted to seek help of an advocate seems to be misconceived for the reason that the applicant himself vide letter dated 01.10.2007 made a request to take assistance from Maj Rohit Saini. The impugned order of dismissal dated 06.10.2007 seems to be passed with compliance of procedure prescribed by law.

5. A person who is a member of the Armed Forces should be disciplined one and in case he/she overstayed or absented himself without sanction of leave, broadly no lenient view should be taken.

6. Section 39 of the Army Act deals with the question relating to absence without leave which is reproduced below for convenience :-

> "**39. Absence without leave**.- Any person subject to this Act who commits any of the following offences, that is to say, --
>
> (a) absents himself without leave; or
> (b) without sufficient cause overstays leave granted to him; or
> (c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or
> (d) without sufficient cause fails to appear at the time fixed t the parade or place appointed for exercise or duty; or
> (e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or
> (f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or
> (g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there,
>
> shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned."

7. It (supra) also includes the conditions for trial of Armed Forces personnel on over-stayal of the leave. Material fact on record (supra) established that the applicant was liable to be tried. Prima facie the applicant could have been tried and punished with imprisonment. Section 106 of the Army Act further deals with certain circumstances where Armed Forces personnel is absent without leave. In certain situation he may be held to be a deserter. For convenience, Sec.106 is reproduced as under :-

> "**106. Inquiry into absence without leave**.—(1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter."

A conjoint reading of Sec.39 and Sec.106 shows that legislature to their wisdom has provided severe punishment for absence without sanction of leave or over-staying the leave.

8. The applicant proceeded to his native place and left the Unit on 20.06.2005 without sanctioning leave. In consequence he was declared absent without leave from 18.00 hours on 20.06.2005 followed by apprehension order dated 02.07.2005. Factual matrix of record with regard to absent from leave without any sanction and even over-staying of leave have not been denied except with an averment that under certain compelling circumstances the applicant went to his native place without sanction of leave. Since factual matrix of record has not been denied and also the applicant himself did not cross-examine the witnesses, there appears to no reason to take different view than what has been taken during SCM by the competent authority.

9. Much emphasis have been given by the ld. counsel that punishment awarded to the applicant is not in proportionate to the misconduct. Supreme Court in a case reported in 2010 Vol.II SCC 497 G. Vallikumari Vs. Andhra Education Society and Others held that disciplinary authority should apply mind while awarding punishment in accordance with statutory mandate with due compliance of principle of natural justice. The statutory rule should be strictly followed.

In SCC 2010 Vol.V Page 775 Administrator, Union Territory of Dadra and Nagar Haveli Vs. Gulabhia M. Lad Supreme Court held that while exercising power of judiciary the High Court should not interfere with the discretion exercised by the disciplinary authority except in case if a punishment imposed, shocks the conscience of the Court or Tribunal. Ordinarily a Court or Tribunal would not substitute its opinion on reappraisal of facts. The relevant portion is reproduced as under :-

"14. The legal position is fairly well settled that while exercising the power of judicial review, the High Court or a Tribunal cannot interfere with the discretion exercised by the disciplinary authority, and/or on appeal the appellate authority with regard to imposition of punishment unless such discretion suffers from illegality or material procedural irregularity or that would shock the conscience of the court/tribunal. The exercise of discretion in imposition of punishment by the disciplinary authority or appellate authority is dependent on host of facts such as gravity of misconduct, past

conduct, the nature of duties assigned to the delinquent, responsibility of the position that the delinquent hold, previous penalty, if any, and the discipline required to be maintained in the department or establishment he works. Ordinarily the court or a tribunal would not substitute its opinion on reappraisal of facts."

The aforesaid proposition have been reiterated by the Supreme Court in the cases reported in 2010 Vol. II SCC 497, 2009 Vol. IX SCC 621, 2010 Vol. VI SCC 718, 2014 Vol. IV SCC 108 and 2014 Vol. II SCC 748.

10. In 2004 Vol. IV SCC 108 Chennai Metropolitan Water Supply and Sewerage Board Vs. T. T. Muralibabu Supreme Court had deprecated the case of persons who are habitual absentee and held that in case such person is suffered from habitual absenteeism no lenient view may be taken as it shall be gross violation of discipline. After re-appreciating the earlier decision their Lordships held as under :

"23. We have quoted in extensor as we are disposed to think that the Court in *Krushnakant B. Parmar Case* has, while dealing with the charge of failure of devotion to duty or behaviour unbecoming of a government servant, expressed the aforestated view and further the learned Judges have also opined that there may be compelling circumstances which are beyond the control of an employee. That apart, the facts in the said case were different as the appellant on certain occasions was prevented to sign the attendance register and the absence was intermittent. Quite apart from that, it has been stated therein that it is obligatory on the part of the disciplinary authority to come to a conclusion that the absence is willful. On an apposite understanding of the judgment *Krushnakant B. Parmar case* we are of the opinion that the view expressed in the said case has to be restricted to the facts of the said case regard being had to the rule position, the nature of the charge leveled against the employee and the material that had come on record during the enquiry. It cannot be stated as an absolute proposition in law that whenever there is a long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a find that the said absence is willful even if the employee fails to show the compelling circumstances to remain absent.

24. In this context, it is seemly to refer to certain other authorities relating to unauthorised absence and the view expressed by this Court. In *State of Punjab v. P.L.Sigla* the Court, dealing with unauthorise absence, has stated thus : (SCC p.473, para 11)

> "11. Unauthorised absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorized absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct."

25. Again, while dealing with the concept of punishment the Court ruled as follows: (*P.L. Singla case*, SCC pp.473-74, para 14)

> "14. Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence."

26. In *Tushar D. Bhatt v. State of Gujarat,* the appellant therein had remained unauthorisedly absent for a period of six months and further had also written threatening letters and conducted some other acts of misconduct. Eventually, the employee was visited with order of dismissal and the High Court had given the stamp of approval to the same. Commenting on the conduct of the appellant the Court stated that he was not justified in remaining unauthorisedly absent from official duty for more than six months because in the interest of discipline of any institution or organization such an approach and attitude of the employee cannot be countenanced."

Keeping the aforesaid broader principle of law it appears that absence from duty by the applicant was deliberate. He had concealed from the authorities the factual matrix of his surrender and detention before the Addl. C.J.M. and detention in civil prison and remained at his native place without due communication. Authorities to their wisdom sent letter to the applicant's mother. Even then the applicant could not awake towards his duty.

11. Punishment awarded to the applicant is squarely in conformity with Section 39 read with Section 106 of the Army Act and within jurisdiction. Where the disciplinary authority applied mind and discharged his statutory duty punishing the offender i.e. petitioner, treating him as habitual offender then it is not ordinarily open to this Tribunal to re-appreciate the evidence that too with regard to misconduct of an Army personnel who is supposed to set up higher standard while serving the Nation as the member of Armed Forces.

12. Supreme Court in a case reported in *Coal India Ltd. v. Mukul Kumar Choudhuri* reported in 2009 Vol. XV SCC 620 while considering the principle of proportionality held that what is otherwise within the discretionary domain and sole power of the decision maker to quantify the punishment ordinarily it should not be a subject-matter of judicial review. Their Lordships further held the principle applied for judicial review would be whether any reasonable employer would have imposed such punishment in the like circumstances ?. The answer in the present case seems to be "yes". There appears no doubt that in the event of misconduct relating to Armed Forces personnel that too with regard to a habitual offender such person may be punished with dismissal or removal from service on account of unauthorized absence.

13. Supreme Court while considering the habitual offender policy with regard to Air Force in a case reported in 1996 Vol. III SCC Page 65 *Union of India and Others Vs. Corporal A. K. Bakshi and Another* had considered the relevant provisions with the following observation which is reproduced as under :-

> "5. Having regard to the existence of habitual offenders among the airmen and the adverse effects of their repetitive indiscipline of habitual offenders among the airmen on the general discipline and administration of the Indian Air Force, the Air Headquarters decided to Say down the Policy for Discharge prescribing the guidelines to deal firmly with such habitual offenders. In paragraph 4 of the said policy it was prescribed :
> "Airmen who meet any one of the following individual criteria are to be treated as habitual offenders and considered for discharge under Rule 15 (2)(g)(ii) of Air Force
> Rules, 1969 :-
> (a) Total number of punishment entries six and above (including Red and Black ink entries);
> (b) Four Red ink punishment entries;
> (c) Four punishment entries (Red and Black ink entries included) for repeated commission of any one specific type of offence such as disobedience, insubordination,
> AWL, breaking out of camp, offences involving alcohol, mess indiscipline, use of abusive/threatening language, etc."
>
> 6. The detailed actions and procedures which are required to be followed to implement the Policy for Discharge are given in the Appendix to the policy (hereinafter referred to as `the Procedure for Discharge'). By paragraph 3 of the Procedure for Discharge habitual offenders who may not be found suitable for retention in service are initially placed in two categories, viz., (a) habitual offenders who have already crossed the criteria as laid down vide paragraph 4(a), (b) and (c) of the policy guidelines, and (b) offenders who are on the threshold. Under paragraph 7 Units/Stations are required to order Boards of Officers to scrutinize the service documents (conduct sheets) of all airmen with a view to identity and list out the habitual offenders and potential habitual offenders as per the criteria laid down in paragraph 4 (a), (b) and (c) of the policy guidelines. Copies of the proceedings of the Board of Officers are required to be forwarded to the Command Headquarters and Air Force Records. Under paragraph 9 airmen of both categories are to be warned in writing by the Commanding Officer personally about the implication of their persisting in acts of indiscipline and they are to be informed that firstly, they are getting another opportunity to mend themselves and an addition of another punishment entry (either Red or Black) in their record will result in their discharge. Under paragraph 11 conduct sheet of the airman is required to be reviewed by the Adjutant of the unit concerned every time an airman put on charge is found guilty and punished to ascertain whether the offender falls in any of the categories and, if so, initiate appropriate action where necessary. Under paragraph 13 it is required that whenever an airman of the above two categories is awarded another punishment, his case is to be immediately reported by the Unit to the Command concerned. In paragraph 14 it is provided that all cases of the two categories, i.e, those who have already crossed the criteria laid down for qualifying as habitual offenders and those on the threshold of doing the same, reported to Command Headquarters either by the initial Board of Officers or individually, are to be monitored by the Command Headquarters and on receipt of intimation regarding award of another punishment in such cases the Command Headquarters are to issue show cause notice to the individual, By paragraph 15 it is required that all case of airmen who have been

> served with show cause notices are to be individually forwarded with all the relevant replies/details/documents/recommendations to Directorates of PS and PA at AIR Headquarter at the earliest. Paragraph 16 makes provision for scrutinizing of the cases by the Directorate of PS and for forwarding the same to the Directorate of PA with their recommendations. Under paragraph 17, the Directorate of PA has to submit the cases to Air Officer In charge Personnel for his approval and then to intimate follow up action with Air Force Records Officer."

Their Lordships subject to scrutiny of rules as above further observed which is as under :-

> "The basic idea underlying the Policy for Discharge is that recurring nature of punishments for misconduct imposed on an airman renders him unsuitable for further retention in the Air Force. Suitability for retention in the Air Force has to be determined on the basis of record of service. The punishments that have been imposed earlier being part of the record of service have to be taken into consideration for the purpose of deciding whether such person is suitable for retention in the Air Force. The discharge in such circumstances is, therefore, discharge falling under Rule 15(2)(g)(ii) and it cannot be held to be termination of service by way of punishment for misconduct falling under Rule 18 of the Rules. We are, therefore, unable to agree with the High Court that termination of services on the basis of the Policy for Discharge does not constitute discharge under Rule 15(2)(g)(ii) but amounts to removal for misconduct under Rule 18 of the Rules."

14. The observation made by the Hon'ble Supreme Court with regard to Air Force personnel may be applied to the present case since provisions dealing with the subject-matter are most identical. In the present case, the applicant has been declared as habitual offender which under the factual matrix of record seems to be correct for being absent for a fairly long period without sanctioning of leave and also overstaying the leave, which has been done in conformity with the confidential circular dated 28.12.1988, relevant portion of which is reproduced as under :-

"<u>JCOS, WOS and OR who have proved undesirable</u>

2. (a) an individual who has proved himself undesirable and whose retention in the service is considered inadvisable will be recommended for discharge/dismissal. Dismissal should only be recommended where a court martial, if held, would have awarded a sentence not less than dismissal, but trial by court martial is considered impracticable or inexpedient, In other cases, recommendations will be for discharge."

No doubt under the circular mere grant of four red ink entries is not sufficient for discharge from service and punishment should be awarded keeping in view the nature of offence but fact remains that the applicant was absent from leave for a pretty long period (supra) without apprising the authorities and also over-stayed the leave.

15. The appellant has been dismissed from service though as per provisions contained in Section 39 of the Act he could have been also punished with imprisonment for a term which may extend to three years. Authorities seems to have taken lenient view and granted lesser punishment.

16. No lenient view may be taken where misconduct relates to Armed Forces personnel. They are expected to be disciplined not only in their official life but also in personal life. Country reposes faith in the members of the Armed Forces to be honest and fair in their lives while serving the Nation. Absence without sanction of leave is a serious misconduct and in some cases it may result with ill consequences. No one knows when a flux of bullet will come from enemy side.

17. In view of the above, the impugned order does not seem to suffer from any impropriety or illegality. Hence the application is rejected being devoid of merit. No cost.

18. Original documents submitted by the respondents be returned to them under proper receipt.

A plain copy of the order, duly countersigned by the Tribunal Officer be furnished to both sides after observance of usual formalities.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE DEVI PRASAD SINGH)
Member (Judicial)