SEE RULE 102(1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

O. A. No. 58 of 2011.

THIS 12th DAY OF APRIL, 2016

CORAM

HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S) Md. Mirajul Haque Molla
S/o Sk. Khoda Box
Village & PO, Deshpur, Purba Paharpur
P.S. Beldanga, Dist.- Murshidabad (West Bengal).

-versus-

RESPONDENT(S)

1. The Union of India,
   represented through Secretary,
   Ministry of Defence, South Block
   New Delhi, Pin -110 011.
2. Major General
   Madhya Bharat Area,
   Jabbalpur, Bihar.
3. Major AAG (Legal)
   GOC Head Quarter, Madhya Bharat Area
   Jabbalpur, Bihar
4. General Officer Commanding,
   Bihar Area, Patna, Bihar
5. Colonel Commanding Officer – I,
   3rd Battalion, (AT) Arm Services Corps, Centre
   (North), P.O. Berhampore, Dist. Gaya, Bihar.

For the petitioner(s) : Mr. Samim Ahammed, Advocate

For the respondent(s) : Mr. Anand Bhandari, Advocate

O R D E R

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

Feeling aggrieved and dissatisfied with the award of the Summary Court Martial (in short SCM) held at ASC Center (North) Paharpur, Gaya on 14.09.2005, whereby and whereunder the appellant has been dismissed from service (Annexure A-3), and the appellate order dated 10.06.2010 (annexure A-5) rejecting appellant's appeal, this appeal

being O.A. No. 58 of 2011 has been filed by the appellant U/s 15 of the Armed Forces Tribunal Act, 2007 (in short AFT Act).

2. Facts in brief necessary for disposal of this appeal are that the appellant was enrolled in the Army, BRO, Kanchrapara, West Bengal on 30.09.2004. While making entry before the enrolling officer in the Verification Roll at column No. 15(i) of IAFK-1152 (Revised), the appellant answered in negative to the question "if any case pending against you in any Court of Law at the time of filling up this Verification Roll", whereas he was found involved in a Civil Police Case at Beldanga Police Station being No. 141/2002 dated 05.08.2002 U/s 326/34 of the Indian Penal Code (in short IPC) as per charge-sheet No. 143/02 dated 25.08.2002 U/s 326/34 of IPC vide Ld. SDJM (Sadar) Berhampore. Considering the same as willful false answer, the appellant was tried by SCM U/s 44 of the Army Act, 1950 (in short the Act of 1950). The appellant pleaded not guilty to the charges and refused to cross-examine the prosecution witnesses and produce witnesses in defence. The SCM having found him guilty of the charges sentenced him to be dismissed from service. Being aggrieved, the appellant preferred appeal before the appellate authority vide order dated 08.06.2010 and the same was rejected.

3. In order to assail the legality and validity of the orders impugned following issues have been raised by the appellant :

(i) Trial by SCM for an offence punishable with more than one year is not permissible u/s 120 of the Act of 1950 and, therefore, the

appellant's trial u/s 44 of the Act of 1950 which is punishable with five years' imprisonment is without jurisdiction;

(ii) Order has been passed by SCM in complete non-compliance of Section 23 of the Act of 1950;

(iii) The appellant was not aware of the pendency of the criminal case against him when he filled the verification roll; He is not guilty of willful false answer to column No. 15(i) of IAFK-1152 (Revised); he was minor when the criminal trial was held against him and same is non-est and on this ground also the order impugned deserves to be quashed. For this, reliance has been placed by the counsel for the appellant in the case of Manjunatha Vs. State of Karnataka & Ors. reported in 2015(1)SCT 507 (SC) ;

(iv) The appellant had been acquitted from the charges by the criminal court vide judgement dated 02.03.2006 by Judicial Magistrate, 3rd Court, Berhampore and he certainly entitled for reinstatement.

3.1 According to the appellant's counsel the order impugned deserves to be quashed and the appellant be reinstated in service.

4. Per contra the ld. counsel for the respondents supported the order impugned and contended that knowing fully well regarding pendency of criminal case against him, in order to obtain employment he willfully gave false answer to the question column No. 15(i) of IAFK-1152 (Revised). Giving false answer is a serious offence u/s 44 of the Act of 1950. The appellant was tried by SCM and after giving him full opportunity of hearing. Looking to his age he was not punished with jail

sentence but was only dismissed from service. The question of his minority was never raised by the appellant. There is no illegality in the SCM proceedings and the appeal is devoid of substance and is liable to be dismissed.

5. We have heard ld. counsel for both the parties and perused records.

6. The purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/ antecedents at the time of recruitment and suppression of such material information will have a clear bearing on the character and antecedents of the candidate in relation to his continuity in service. The person who suppressed the material information and gives false information cannot claim any right for appointment or continuity in service. The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

6.1 An employee can be dismissed/discharged from service on the ground of making false statement relating to his involvement in the criminal case, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

6.2 An employee in the uniformed service presupposes a higher level of integrity as such a person is expected to uphold the law and on the

contrary such a service born in deceit and subterfuge cannot be tolerated.

[please see Jainendra Singh Vs. State of UP reported in (2012) 8 SCC 748]

7. Looking to the above aspect of the matter the Legislature (the Act of 1950) in its wisdom has made "giving false answers on enrolment" a serious offence punishable for a term which may extend for a period of five years.

8. Now we shall deal with the issues raised by the appellant. U/s 120 of the Act of 1950, SCM may try any offence punishable under the Act of 1950. As per sub-Sec. (4) of Sec. 120, SCM may pass any sentence which may be passed under the Act of 1950 except a sentence of death or imprisonment or of imprisonment for a term exceeding the limit specified in sub-sec. (5) of Sec. 120. The limit prescribed under sub-sec. (5) is one year if the officer holding the SCM is of the rank of Lt Colonel and upwards, and three months, if such officer is below that rank.

8.1 A conjoint reading of the above provisions of the Act would reveal that SCM is empowered to try any offence punishable under the Act of 1950, but the award of punishment is restricted, as prescribed under sub-Sec. (4) and (5) of Sec.120 the Act of 1950. It no where states that if any offence is made punishable with imprisonment of more than one year it will be outside of purview of SCM and therefore, the above ground raised by the appellant on the face is devoid of merit.

8.2 U/s 44 of the Act of 1950, a Court Martial is empowered to award imprisonment for a term which may extend to five years or such less punishment as mentioned in Sec. 71 of the Act of 1050. U/s 71(e) a person can be dismissed from service and Sec. 72 empowers court-martial to award alternative punishments as set out in Section 71 of the Act of 1950.

8.3 The appellant has been tried under SCM in which Section 23 of the Act of 1950 has no application and therefore, the arguments advanced by the ld. counsel for the appellant on above grounds are sans merit.

9. Now we shall examine whether or not the appellant is guilty of giving willful false answer to column No. 15(i) of IAFK-1152 (Revised). Indisputedly, the appellant along with his other family members was charge-sheeted u/s 326/34 of the IPC pursuant to the complaint lodged by one Abdul Gafur before Beldanga P.S. on 05.08.2002. The appellant did not disclose the facts of minority before the criminal court and faced trial. Ultimately, vide judgement dated 02.03.2006 he has been acquitted along with his family members. He also applied for his reinstatement before the respondents authority after his acquittal. Para 4(i) and 4(m) to the O.A. which are relevant for the purpose are reproduced for convenience :

> *"(i) Your applicant states that on 29.08.2005 charge-sheet was issued by the Colonel Commanding No.1 Training Battalion (AT) ASC Centre (North) alleging that willful violation of the set out questions in the prescribed format of enrolment has been made by the applicant at the time of enrollment."*
>
> *(m) Your applicant on 1.11.08 sent an application and received by the respondents, disclosing the order of acquittal and asking the respondents to reinstate him in the service. Since the same was not done by the respondents, your applicant was compelled to file*

a writ petition in the Calcutta High Court in WP No. 12134(W) of 2006 which is disposed of on 21.07.2006 and liberty was given to the petitioner to file before the appropriate Bench."

A bare reading of the above would reveal that the appellant was very much aware regarding pendency of the criminal case against him and his family members in the year 2002, whereas he has filled the Verification Roll on 30.09.2004, i.e. much after registration of criminal case against him. In view of the above, appellant's plea regarding his unawareness of pendency of Criminal case at the time of filling of verification roll is devoid of merit and is also not believable.

10. The fact of giving false answer to the question asked at the time of filling of verification roll has been considered by the Hon'ble Supreme Court in several cases.

10.1 In Kendriya Vidyalaya Sangathan Vs. Ram Ratan Yadav reported in (2003) 3 SCC 437 Hon'ble Apex Court laid down the law in no uncertain term in Para 12 as under :

"12. The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya. The character, conduct and antecedent of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a

finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and belief; if he could not understand the contents of column nos. 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete, his version cannot be accepted.

10.2 In Secy. Deptt. of Home Secy. A.P. & Ors. Vs. B.Chinnam Naidu reported in (2005)2 SCC 746 Hon'ble Supremes Court has held in Para 7 as under:

"7. As is noted in Kendriya Vidyalaya Sangathan Case the object of requiring information in various columns like column 12 of the attestation form and declaration thereafter by the candidate is to ascertain and verify the character and antecedents to judge his suitability to enter into or continue in service. When a candidate suppresses material information and/or gives false information, he cannot claim any right for appointment or continuance in service. There can be no dispute to this position in law. But on the facts of the case it cannot be said that the respondent had made false declaration or had suppressed material information."

10.3 In R. Radhakrishnan Vs. Director General of Police and Ors. reported in (2008) 1 SCC 660 the Hon'ble Supreme Court has held in Para 10 as under:

"10. Indisputably, the appellant intended to obtain appointment in a uniformed service. The standard expected of a person intended to serve in such a service is different from the one of a person who intended to serve in other services. Application for appointment and the verification roll were both in Hindi as also in English. He, therefore, knew and understood the implication of his statement or omission to disclose a vital information. The fact that in the event such a disclosure had been made, the authority could have verified his character as also suitability of the appointment is not in dispute. It is also not in dispute that the persons who had not made such disclosures and were, thus, similarly situated had not been appointed. In the instant case, indisputably, the appellant had suppressed a material fact. In a case of this nature, we are of the opinion that question of exercising an equitable jurisdiction in his favour would not arise."

10.4 In Union of India and Ors. Vs. Bipad Bhanjan Gayen- reported in (2008)11 SCC 314 Hon'ble Apex Court has held in Para 10 as under:

> ***"10. It bears repetition that what has led to the termination of service of the respondent is not his involvement in the two cases which were then pending, and in which he had been discharged subsequently, but the fact that he had withheld relevant information while filling in the attestation form. We are further of the opinion that an employment as a police officer pre-supposes a high level of integrity as such a person is expected to uphold the law, and on the contrary, such a service born in deceit and subterfuge cannot be tolerated."***

10.5. The consequence of making false statement or suppression of material information in verification roll has also been considered by Hon'ble Supreme Court in the case of Navin Kumar Vs. State of Bihar & Ors. reported in (2015) 2 PLJR 739, wherein it has been observed in Para 42 as under :

> "42. Thus, the Supreme Court, in Daya Shankar Yadav Vs. Union of India & Ors. [(2010) 14 SCC 103] has observed *that where the declarant has answered the questions in the negative and, on verification, it is found that the answers were false, the employer may refuse to employ the declarant (or discharge Patna High Court LPA No.818 of 2014 dt.21-01-2015 him, if already employed) even if the declarant had been cleared of the charges or is acquitted. This is because, when there is suppression or non-disclosure of material information bearing on his character, that itself becomes a reason for not employing the declarant. The Supreme Court, therefore, further pointed out, that an employee on probation can be discharged from service or a prospective employee may refuse employment on the ground of suppression of material information or making false statement, in reply to queries relating to prosecution or conviction for a criminal offence even if he was ultimately acquitted in the criminal case. This ground, according to the Supreme Court is distinct from the ground of previous antecedents and character inasmuch as making a false declaration or false statement shows a current dubious conduct and absence of character at the time of making the declaration thereby making the candidate unsuitable for the post."*

10.6. After considering several pronouncements of the Hon'ble Apex Court the cardinal principles on this issue has been summarized by the Hon'ble Apex Court in Jainnendra Singh's case (supra) as under :

> *(i) Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or*

could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

(ii) Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

(iii) When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.

(iv) A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

(v) Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

(vi) The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

(vii) The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

(viii) An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

(ix) An employee in the uniformed service pre-supposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

(x) The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable.

10.7. In the light of the above pronouncements of Hon'ble Apex Court in our opinion, the appellant who gave willful false answer to the question at Column No. 15(i) of IAFK-1152 (Revised) even after subsequent acquittal, is not entitled for his continuation in the Army and the question of exercising any equitable jurisdiction in his favour do not arise at all.

11. Considering the specific Rules 5(7), 10 and 20 of Karnataka Civil Services (General Recruitment) Rules, 1977 and having found the petitioner under the Rules not disqualified for appointment for withholding information required to be furnished, in Manjunatha's case (supra) the petitioner was reinstated in service by the Hon'ble Apex Court, which is not the case here. In the instant case the appellant's recruitment was in the Indian Army; giving false answer regarding pendency of criminal case on filling of verification roll is certainly fatal to such an employment and, therefore, the case cited by the appellant is of no help to him. Moreover, the appellant has been tried by the SCM where he was having full opportunity of hearing, but he neither cross-examined witnesses nor produced defence witnesses nor denied his involvement in criminal case at the time of filling the verification roll. The plea of his minority during criminal trial was not taken and the SCM held him guilty after following due procedure and so also it cannot be said that the appellant is not guilty of giving false answer to the question no. 15(i) of IAFK-1152 (Revised).

12. Nevertheless, admittedly the appellant was minor at the time of commission of offence. Therefore, he should have been tried under Juvenile Justice (Care and Protection of Children) Act, 2000 (in short JJ

Act). The JJ Act that came into force on 1.4.2001 repealing the JJ Act 1986 and provides that a juvenile will be a person who is below 18 years of age. Section 6 of the JJ Act contains a non-obstante clause, giving overriding effect to any other law for the time being in force. It also provides that the Juvenile Justice Board, where it has been constituted, shall "have the power to deal exclusively" with all the proceedings, relating to juveniles under the Act, that are in conflict with other laws. Moreover, non-obstante clauses contained in various provisions thereof, particularly Sections 15, 16, 18, 19 and 20, render unambiguously, the legislative intent behind the JJ Act, i.e. of the same being a special law that would have an overriding effect on any other statute, for the time being in force. Such a view stands further fortified, in view of the provisions of Sections 29 and 37, that provide for the constitution of Child Welfare Committee, which provides for welfare of children in all respects, including their rehabilitation. Clause (p) of Section 2 of the JJ Act defines 'offence', as an offence punishable under any law for the time being in force. Thus, the said provision does not make any distinction between an offence punishable under the IPC or one that is punishable under any local or special law. The provisions of the JJ Act have been interpreted by this Court time and again, and it has been clearly explained that raising the age of "juvenile" to 18 years from 16 years would apply retrospectively. It is also clear that the plea of juvenility can be raised at any time, even after the relevant judgment/order has attained finality and even if no such plea had been raised earlier. Furthermore, it is the date of the commission of the offence, and not the date of taking cognizance or of framing of charges or of the conviction, that is to be taken into consideration. [please see Union of India & Ors. Vs. Ex-Gnr Ajeet Singh reported in (2013)4 SCC 186]

12.1 In the light of the above, the appellant indeed could not be tried by the SCM for those charges that had been committed when he was juvenile.

13. However, the factum of minority was not brought to the notice of the Criminal Court as well as of the SCM, where the appellant was entitled to take special plea of jurisdiction under Rule 51 of the Army Rule, 1954, which is reproduced for convenience :

> *"51. Special plea to the jurisdiction. — (1) The accused, before pleading to a charge, may offer a special plea to the general jurisdiction of the court, and if he does so, and the court considers that anything stated in such plea shows that the court has no jurisdiction it shall receive any evidence offered in support, together with any evidence offered by the prosecutor in disproof or qualification thereof, and, any address by or on behalf of the accused and reply by the prosecutor in reference thereto."*

14. Further the age of enrollment in the Army is 17 and half years, meaning thereby the Army recruits persons when they are minor; they are required to fill the verification roll on that age; it is not the intention of the JJ Act that minor cannot commit offence and the purpose of calling information regarding involvement in any criminal case is for the purpose of verification of character and antecedents at the time of recruitment and suppression of such material information, therefore, will have a clear bearing on the character and antecedents of the candidate, especially a person who has been recruited in the Armed Forces.

15. The appellant has also not been convicted awarding jail sentence, but dismissed from service. The award of dismissal is also permissible on administrative reasons. The court-martials under the Act are not courts in the strict sense of the term as understood in relation to implementation of the civil laws. The proceedings before court-martial are more administrative in nature and of the executive type. Such courts under the Act, deal with two types of offences, namely, (1) such acts and omissions which are peculiar to the Armed Forces regarding which no punishment is provided under the ordinary law of the land and (2) a class of offenses punishable under the IPC or any other legislation passed by the Parliament. Chapter VI of the Act deals with the offences.

Sections 34 to 68 relate to the offences of the first description noted hereinabove and Section 69 with civil offences which means the offence triable by an ordinary criminal court. *[please see* Union of India & Ors. Vs. Charanjit S. Gill & Ors. -SLP (Civil) No. 7347 of 1999]:

16. The Hon'ble Apex Court in such cases where plea of juvenility has not been raised at the initial stage of trial and has been taken only on the appellate stage, has consistently maintained the conviction, but has set aside the sentence. [please see para 19 in Ajeet Singh's case (Supra)]

17. In the instant case the appellant has been dismissed from service and has not been convicted awarding jail sentence u/s 44 of the Act of 1950. Considering every aspect of the matter, in our considered opinion the appellant is not entitled for his reinstatement in service, but looking to overall circumstances of the case and the fact that appellant was minor at the time of commission of offence we deem it fit convert dismissal into discharge simpliciter.

18. For the reasons mentioned above, the application is allowed in part. The appellant's dismissal from service is converted into discharge simpliciter.

19. Before parting, we would like to observe that after coming into force of the JJ Act the respondents authority should think over a change of recruitment age.

20. The application is thus disposed of. No order as to costs.

(Lt Gen Gautam Moorthy)
Member (Administrative)

(Justice N. K. Agarwal)
Member (Judicial)