

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

O.A. No. 120 of 2013

DATED THE **13th** DAY OF NOVEMBER, 2018.

CORAM :

Hon'ble Dr. (Mrs.) Justice Indira Shah, Member (J)

Hon'ble Lt Gen Gautam Moorthy, Member (A)

782600- A EX-CPL SAMARENDRA BEURA
S/O Laxmidhar Beura,
R/O Vill/P.O. Kusa Panji,
Dist - Cuttack,
State-Odisha (PIN-754007)

.... APPLICANT

BY MR. BISIKESAN PRODHAN, LD. COUNSEL
BY MRS. SONALI DAS, LD. COUNSEL

- VERSUS -

1. Union of India, service through the Secretary,
Ministry of Defence, New Delhi - 110011.
2. Chief of AIR Staff,
Air HQ Vayu Bhawan, New Delhi-110011.
3. Air Officer Commanding-in-Chief,
Eastern Air Command, IAF
C/O 99 APO.
4. Air officer Commanding
Air Force Record Office
Air Force Station Subroto Park,
New Delhi-110010.
5. Commanding Officer,
51 ASP, Air Force
C/O 99 APO.

.... RESPONDENTS

BY MR. S. AGRAWAL, CENTRAL GOVT
COUNSEL

ORDER

(Dr. (Mrs.) Justice Indira Shah, Member (J))

1. The findings of the District Court Martial dated 18.03.2013 and confirmation of the order dated 20th April, 2013 of the AOC-in-C, HQ EAC, IAF and rejection order dated 20th May 2013 of the Chief of Air Staff for pardon and remission Under section 177 of the Air Force Act, 1950 have been challenged in this Original Application.
2. The appellant/applicant was convicted Under section 39() of the Air Force Act, 1950 in the DCM proceeding and sentenced to undergo Rigorous Imprisonment of 3 years, to be dismissed from service and to be reduced to the Rank. The said order of sentence was confirmed by AOC-in-C, EAC, IAF and his application for pardon was rejected on 20th May 2013 by the Chief of the Air Staff.
3. The appellant/applicant's case is that due to deteriorating health conditions of his father and violent activity of his brother because of mental illness and also of encroachment by the miscreants of his landed/agricultural property, he submitted an application for discharge from service on 12.06.2012. His application for discharge from service, was duly recommended and forwarded by the Section Commander CTO and UWO vide official letter dated 22.06.2012, remained without consideration. In the meantime, the appellant accrued 4 red ink entries in the service documents for the offence absent without leave (AWL)/Overstay of leave (OSL). On 03.10.2012, the applicant submitted a general application along with leave application to expedite his application

for discharge from service on compassionate ground and to allow him to proceed on leave only with effect from 03.10.2012. However, the Station Commander endorsed his remark on his application "Case has been taken up with HQ EAC to declare him habitual offender. He was advised not to go on leave. Wait for HQ EAC decision. Constant watch was kept on him."

4. On 09.10.2012 his father informed that his brother acted violently and also that his father had persistent breathing problem. Since the Station Commander did not approve the leave application of the appellant and his application for discharge from service were not acted upon till then, the appellant/applicant out of anxiety left for his home on 09.10.2012 in the evening to take his father to Delhi for treatment. The applicant reported back to his Unit 51 ASP, Air Force on 01.02.2013 after remaining 115 days absent without leave and also overstayed. A charge-sheet was framed against the applicant Under section 39(a) of the Air Force Act, 1950 for being absent without leave from 09.10.2012 until he surrendered on 01.02.2013. The Commanding Officer, 51 ASP, Air Force directed evidence to be reduced in writing. Accordingly, summary of evidence was recorded. Only 9 witnesses were examined and statement of appellant was also recorded.

5. It is alleged by the appellant that he was not allowed to cross-examine any of the witnesses. The proceeding of the District Court Martial (DCM) was initiated on 15.03.2013. The appellant was all along in close arrest from 01.02.2013 to 17.03.2013 and was not allowed to communicate with anyone except his Defending Officer Flt LT Swamy. During DCM proceeding, 8 witnesses were examined on behalf of the prosecution and only one witness, i.e. appellant was examined as defence witness.

6. It is further alleged by the appellant that he was never asked to produce any witness in defence of his case. On completion of DCM proceeding, it was held that the applicant is guilty of charge and, therefore, he was convicted and sentenced to suffer rigorous imprisonment for 3 months, to be dismissed from service and to be reduced to the rank.

7. The applicant submitted his mercy petition/pre-confirmation Petition on the same day Under Section 161(1) of the Air Force Act, 1950 before the AOC-in-C, HQ EAC, IAF. However, his Mercy Petition was rejected and the sentence awarded by DCM was affirmed.

8. Since the appellant/applicant was in close arrest from 01.02.2013, on expiry of 45 days in the Military Custody, he submitted 2 representations on 30.04.2013 before the Chief of the Air Staff Under Section 180(1) and another Under section 177 of the Air Force Act, 1950 for setting off under trial detention period from 3 months Rigorous Imprisonment and for pardon and remission of sentence awarded by the District Court Martial. His representations remained undisposed. The appellant approached the Hon'ble Supreme Court Under Article 32 of the Constitution of India by filing a Writ Petition (Criminal) No. 78 of 2013. The Hon'ble Supreme Court disposed of the writ petition directing the competent authority to decide the representations of the appellant within 7 days.

9. In view of the direction of the Hon'ble Supreme Court, the Chief of Air Staff vide order dated 28.05.2013 was pleased to remit the sentence of Rigorous Imprisonment and the appellant was released from custody on 28.05.2013. Thereafter, the appellant was issued with Dismissal Certificate by the Station Commander, 51 ASP, Air Force on the same day.

10. The respondents in their counter affidavit have averred that the appellant arrived at 51 ASP on being posted from PMG on 25.06.2012. On joining 51 SP he proceeded on 33 days annual leave from 02.07.2012 to 03.08.2012 and suffix on 4/5th August, 2012. Till then, the appellant's application for discharge from service to the previous Unit had not been received by his present Unit. The applicant during his total 5 days in the said park before proceeding on leave neither did exhibit any symptoms of disturbed behavior from domestic front nor he informed regarding his discharge application during counseling by MTO.

11. On completion of his leave, the appellant did not report to the Unit and overstayed leave till he reported to the Unit on 31.08.2012. He had already availed 58 days annual leave and without intimating any authority, he again remained absent from the next day, i.e. 01.09.2012. He reported at his own accord on 30.09.2012. During his absence on 05.07.2012 an unactioned application for discharge from service in respect of the appellant was received from his previous Unit. Since the appellant was on leave and remained absent, no course of action was initiated during his absence.

12. It is contended that the appellant's interview with the CO was mandatory with regard to his discharge application.

13. On 03.10.2012, the appellant/applicant was tried summarily and awarded minor punishment of "Severe Reprimand" for being AWL. On 03.10.2012, the appellant applied for interview in connection with his discharge from service with a request for leave on the ground of his father's ailment and brother's adamant behaviour. It was learnt that he had already applied for discharge from service on two occasions and the

same were turned down by the previous Unit. On fulfilling the criteria of habitual offender, a case was taken with HQ EAC and a show-cause notice was issued as to why he should not be discharged from service Under Rule 15(2)(g)(ii) of the Air Force Rules and the applicant was advised not to go on leave and wait for HQ EAC decision. He was advised to bring his father to look after him. It is alleged that the appellant remained absent without leave and proceeded to his home without intimating any authority. During the period of his absence, several communication were made to his parents which were never responded. It is also alleged that the appellant was in habit of absenting himself from duty and overstaying leave without any cause on eight occasions for which he was awarded five red ink entries.

14. Heard Mr. Bisikesan Pradhan, learned counsel for the appellant and Mr. Satyendra Agrawal appearing on behalf of the respondents.

15. Mr. Pradhan, learned counsel for the appellant has submitted that the DCM proceeding is vitiated since the statutory provisions laid down in Rule 39 and Rule 43 of the Air Force Rules, 1969 have not been complied with. The applicant was in close arrest was neither afforded proper opportunity for preparing his defence nor was allowed to have free communication with his witnesses, friends or legal advisor. The appellant was not provided copies of Court Enquiry Proceeding despite his request.

16. It is further submitted that AOC-in-C HQ EAC, IAF is the convening officer for District Court Martial who never said that he ever recorded his satisfaction to the effect that the charges to be tried by the District Court Martial nor has ever authorized the Commanding Officer to convene the

DCM on his behalf in keeping with Rule 43 of the Air Force Rules, 1969 and therefore, the entire DCM is vitiated.

17. Learned counsel for the appellant has cited the case of Union of India and Others. vs. Harish Chandra Goswami reported in IR 1999 S.C. 1940 in support of his contention. In the cited case, it was observed that there was no record whatever in the file to show that personnel of Court Martial was appointed by or nominated by the Lt. General. The order of the Assembly of the General Court Martial did not contain either the signature or initial of Lt. General. It was signed only by Colonel and none else. In the said circumstances, the said order cannot be considered to be an order evidencing the appointment of the personnel of the Court Martial by Lt. General.

18. Here in this case AOC-in-C, EAC, IAF on perusal of all the relevant documents including the record of the accused approved that the appellant to be tried by DCM. Therefore, the facts and circumstances of the cited case is not applicable to this case.

19. It is further argued by the counsel for the applicant that sentence passed by DCM suffers from illegality in view of the provisions of Section 39. Section 39(a) contemplates punishment, i.e. imprisonment for a term which may extend upto 3 years or less punishment.

20. According to the learned counsel, the appellant was awarded three punishments, i.e. (a) To suffer Rigorous Imprisonment (b) To be dismissed from service and (c) To be reduced to the Rank for the single offence Under Section 39(a) of the Air Force Act, 1950, which is contrary to Section 39(a) and Section 73 of Air Force Act, 1950. The case of Sheel Kr. Roy vs.

Secretary M/o Defence and Ors, reported in (1997) 12 SCC 462 has been cited in support of his contention which is quoted below :

"19. We although agree with the learned Additional Solicitor General that it is legally permissible to award more than one punishment in terms of Section 71 of the Act but we may notice that Section 39(a) specifically deals with the misconduct in respect of absence without leave. It is one thing to say that legally it is permissible to impose more than one punishment but then also it is another thing that in exercising the said power all attending situations which fell for consideration by the punishing authority in regard to the quantum thereof would not be taken into consideration. It is clear that the Commanding Officer in the Summary Court Martial proceedings failed to take into consideration the relevant fact and, thus, committed an error apparent on the face of the record. We are also of the opinion that in a case of this nature, imposition of both punishment of rigorous imprisonment for six years as also dismissal from service was wholly arbitrary in nature. It is also vitiated I law as all relevant facts were not taken into consideration."

21. Section 73 provides for combination of punishment including dismissal along with imprisonment which a Court Martial may award as punishment in addition.

22. In the cited case, no ratio is laid down that the Court Martial could not award punishment of dismissal or reduction of rank in addition to the punishment of imprisonment awardable Under Section 39 of the Act. It is clear from the ratio laid down in the case of Soubhagya Chandra Patnaik Vs. Union of India (UOI) Represented by Chief of Army Staff reported in 1969 0 AIR (Ori) 169 as well as 1976 AIR (All) 405 wherein Section 73, i.e. combination of punishment, had been discussed and held that a sentence of the Court Martial may award in addition to the punishment which specified in Clause (B) or Clause (e) of Section 71, any one or more of the punishment, if specified in Clause (a) (f) to (i) of that Section.

23. It is further urged by the learned counsel for the applicant that the DCM proceeding is vitiated since provisions of Regulation of 740 (c), (d) (f)

and Regulation of 754 (d) of the Air Force regulates 1964 have not been complied in letter and spirit before commencement of District Court Martial proceeding because no opportunity was given to the appellant to adduce his witness in his defence or to engage any law qualified Officer/Advocate as defending Officer

24. On perusal, of records of DCM proceeding, it appears that the accused was accorded with three choices to select law qualified officer to act as a Defending Officer of trial under Court Martial vide letter dated 19.02.2013. During the DCM proceeding a specific question was asked whether he intend to call any witness in his defence and the appellant/applicant declined to call any defence witness and submitted that he did not have any more defence witness to be examined.

25. It is the defence plea that the appellant/applicant although remained absent without leave and also overstayed the leave granted to him on various occasions and although there are 5 red ink entries for his absence without any cause on eight occasions, he was compelled to overstay or to remain absent without leave since his father needed his attendance and his brother was also mentally sick. His application for discharge on compassionate ground was not considered. Therefore, he was compelled to remain absent without any leave.

26. The accused in his statement before the DCM has deposed that he received a call from Birbhum about the seriousness of his father. Therefore he went home. He applied for an interview with Station Commander for discharge from the service along with a leave application for grant of casual leave. Station Commander advised him to bring his father to his Unit and keep his father with him. But his father was not

willing to come with him. He has categorically stated that on 09.10.2012 in the afternoon he received a call from his home that his father had been suffering from breathing problem and there was no one to assist him. Thereafter he booked-out at Main Guard Room on 09.10.2012 and headed for home without intimating the authority. He stayed in Delhi for 1 month with his father for his treatment. Thereafter, he left his father at his home and again headed for Delhi on 11.01.2013 for review of his medical report and only on 01.02.2013 he surrendered himself at the Main Guard Room, 51 ASP, AF.

27. It is evident from his statement that prior to 11.01.2013 he might had been with his father but he left his father at his home on 11.01.2013. From 11.01.2013 to 01.02.2013 there is no explanation whatsoever why he failed to report/surrender to his Unit. Admittedly, he went home without submitting any leave application or without intimating any authority. He also admitted that he did not contact anybody during his prolonged absence. He further admitted that he was in Delhi from 11.01.2013 till he reported back 51 ASP,AF on 01.02.2013 and during his stay in Delhi, his father was keeping well with medicine and was at his native home.

28. Although he has averred that his brother was suffering from mental disease, he stated before the DCM being examined by the Court that his brother is married having one kid and his brother sometimes behave adamantly because of his disorder. All his property had been given on lease and his brother manages the lease income of his property. He admitted that he went without leave on 01.09.2012 and on reaching home, he found that his father was not that serious and he was stable, yet he did not make any effort to call up Station Authority.

29. It is evident from the statement of the accused that when he went home to see his father, he found his father was stable. He was being looked after by his uncle. In spite of the fact that he did not have much requirement at that time at home, he continued to remain absent for a period 1 month and 5 days without informing his authority about any compelling situation. The DCM has discussed all the mitigating circumstances and considered the statement of the accused and also the medical documents produced by him in respect of his father and came to the finding that these circumstances cannot be considered as a ground for absence of the accused.

30. In view of the above discussion, we are of the considered view that this Original Application is devoid of any merit. The decision arrived at by the DCM needs no interference.

31. Therefore, the instant Original Application is dismissed.

32. There will, however, be no order as to costs.

33. Let the original records be returned on proper receipt.

34. Let a plain copy of this order be handed over to both the parties upon usual formalities.

(Lt Gen Gautam Moorthy)
Member(Administrative)

(Justice Indira Shah)
Member (Judicial)

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