

**A F R**

**(SEE RULE 102 (1))**  
**ARMED FORCES TRIBUNAL, KOLKATA BENCH**  
**O.A NO. 46/2013**

**THIS 9<sup>TH</sup> DAY OF OCT, 2015**

**CORAM**

**HON'BLE JUSTICE SUNIL HALI, MEMBER (JUDICIAL)**

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

**APPLICANT(S)**

No. 15393361N Ex- Sigmnd Mandip Basu  
S/o Sri Murari Mohan Basu  
Village – Ramnarayanpur  
P.O. – Raghunathpur  
Dist. – 24 Parganas (N)  
West Bengal, Pin - 743428

-versus-

**RESPONDENT(S)**

1. The Union of India through the Secretary  
Min of Defence, Government of India,  
Ministry of Defence, South Block,  
D.H.Q. P.O. New Delhi – 110 011
2. The Chief of the Army Staff  
Through Adjutant General  
Integrated HQ of MoD (Army)  
South Block, DHQ P.O.  
New Delhi - 110011.
3. GOC  
HQ Madhya Bharat Area  
Jabalpur  
PIN Code – 482001
4. Commanding Officer  
Depot Regiment (Corps of Signal)  
Jabalpur  
Pin - 482001
5. The Commanding Officer  
48 Rashtriya Rifles (Garh Rif)  
C/o 56 APO.

**For the petitioner (s)**

**Mr. Subhash Chandra Basu, Advocate**

**Miss Manika Roy**

**For the respondents**

**Mr. S.K. Bhattacharyya**

**Assisted by OIC, Legal Cell.**

**PER LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE )**

1. This is an application made to set aside the Summary Court Martial (SCM) Proceedings held on 21.07.2004 and also to set aside or quash the order of rejection of an appeal against the said SCM passed by Govt. of India, MoD, New Delhi on 12.08.2014 and to direct the respondents to re-instate the applicant in service with arrears and admissible benefits he had in service as well as to allow to continue his duty in service till retirement after being reinstated.

2. The applicant, No 15393361N Ex-Sigmn Mandip Basu was recruited in the Indian Army on 27.12.1995. He absented himself without leave while proceeding on permanent posting from 12 Inf Div Sig Regt (AREN) to 48 RR Bn (48 RR) on 05.10.2001. The Unit was deployed in intense Counter Insurgency Operations in the State of J & K. The individual never reported to the Unit and he surrendered voluntarily to the Depot Regt, Signals, Jabalpur on 11.07.2003 after absenting himself without leave for 1 year 282 days. On his reporting, the Depot Regiment took up a case with his parent unit i.e. 48 RR for attaching him for disciplinary purpose under the provisions of Para 381 of Regulations for the Army (Revised Edition 1987) read in conjunction with Para 5 of Army HQ letter No. 50541/AG/DV 1 dated 28.06.1992 and AO 7/2000. This culminated in Draft Station Order signed by the CO 48 RR on 09.09.2003 and countersigned by the Commander 13 Sector RR on 14.09.2003 and published by Station HQ, Jabalpur on 28.09.2003. Subsequently he was brought before the CO on 03.07.2004 at 1340 hrs and proceedings under Army Rule (AR) 22 were taken down wherein he was presented with tentative charge sheet for trial under Section 39 (a) of Army Act (AA) for absenting himself without leave. Tentative charge sheet is reproduced as under :-

Annexure 1 to Appx 'A' to AO 24/94

TENTATIVE CHARGE SHEET

The accused No. 15393361N Sigmn (TER-III) Mandip Basu of 48 RR (GARH RIF), C/O 56 APO att to Depot Regt (Cor-ps of Signals) is charged with :-

**ARMY ACT SEC 39 (a)**  
**ABSENTING HIMSELF WITHOUT LEAVE**

In that he,

At field, on 05 Oct 2001 at 0001 hrs absented himself without leave while proceeding on permt posting from 12 Inf Div Sig Regt (AREN) to 48 RR (GARH RIF), till surrendered voluntarily to Depot Regt (Corps of Signals) on 11 Jul 2003 at 1330h.

Station : Jabalpur (MP)  
Dated : 03 Jul 2004

Sd/-  
(P.K. MEHTA)  
Lt Col  
Commanding Officer  
Depot Regt (Corps of Signals)

3. When the applicant did not report to his new Unit 48 RR (Garh Rif) on 15.10.2001, the unit issued a letter to Dy. Commissioner/Collector of 24 Parganas (N), the Superintendent of Police (SP) and the Station House Officer (SHO) of the Police Station where he was residing informing them that the applicant had deserted the Regt, from 05.10.2001 and gave out of his present particulars. The Unit has asked the Police to take necessary steps to apprehend him immediately and to inform the nearest Army/Regimental Centre /Unit telegraphically and arrange for his despatch under police escort. A letter was also sent to his father.
4. Statements of two prosecution witnesses (PW) were recorded. The applicant declined to cross examine the PWs and also declined to make any statement. He was also informed by the CO that he had liberty to make any statement or call any witness in his defence. The applicant declined to make any statement and produced no witness in his defence. On conclusion of the hearing of the charge, the CO ordered the evidence to be reduced to writing.
5. The Summary of Evidence consequent to the order of the CO was recorded on 11.07.2003. The officer recorded the Summary of Evidence and certified that AR 23 (i), 23 (2). 23(3) and 23 (4) have been complied with. Two Prosecution Witnesses were examined, both of whom the applicant again declined to cross examine. When asked to make a statement, he stated that he had 42 days part of annual leave and 30 days Casual Leave balance. The leave he requested for was not given to him. His father had brain tumor who was admitted in hospital as there was nobody to look after his aged parents. So instead of going to 48 RR he went to his home to see his ailing father. Besides his mother's health also deteriorated and he had spent about Rs. 90000/- for the treatment of his father. He also added that his wife was staying

separately as theirs was love marriage and was not accepted by his parents. The applicant declined to produce any defence witness. After this, the applicant was tried by a SCM on 21.07.2004. The trial was conducted by Lt Col P.K. Mehta, CO of the Depot Regt (Corps of Signals). It was attended by 2 independent witnesses, Sub Maj Dharam Pal and Sub Maj P.K. Sukumaran Nair. Sub Maj & Hony Lt. P. Radhakrishnan was appointed friend of the accused at the SCM. After his arraignment and after the charge sheet was read out to the individual, he was arraigned for trial. He was specifically asked by the Court whether he was guilty or not of the charge to which he replied that he was guilty. The CO then read out to the applicant the exact wordings as given in AR 115 (2) reproduced as under :-

*“Before recording the plea of guilty offered by the accused, The Court explained to the accused the meaning of the charge (s) to which he had pleaded guilty and ascertained that the accused has understood the nature of the charge (s) to which he had pleaded guilty . The Court also informed the accused the general effect of the plea and the difference of procedure, which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty accepts and records the same. The provisions of Army Rule 115 (2) is thus complied with”.*

	Sd/-
	21/07/04
	The Court
	(P.K. Mehta)
	Lt Col
	Commanding Officer
Sd/-	
15393361N	
(Sigmn Mandip Basu)	

He then signed that he had complied with AR 115 (2). Thereafter Charge Sheet was translated, read and explained to the applicant and attached to the Court Proceedings. The applicant was asked if he wish to make any statement with reference to the charge or in mitigation of the punishment. In reply the applicant stated :-

“Ans. 2. The accused says :-

“This is my first and last mistake. I will never do such a mistake again. I have a five month old child”.

Sd/-  
15393361N  
(Sigmn Mandip Basu)

6. He was then asked if he wish to call any witness to his character to which he stated “No”. Finally before the sentencing, the proceedings were recorded. His character was

recorded to have been exemplary. It was also certified that his age on the date of trial was 25 years and 50 days and that his service was 8 years and 207 days. The Court then sentenced him to be 'Dismissed from Service' and the trial closed at 1205 hrs on 21.07.2004. This was countersigned by the Commandant of 1 Signal Training Centre (STC), Brigadier on 2<sup>nd</sup> day of September 2004.

7. The applicant appealed against the order of SCM by filing a petition on 31.10.2013. The said petition was rejected by the Govt. of India, Min of Def vide their order/letter No. C/08989/DV/3(b)/1995/D/AG of 12.08.2014.

8. The applicant in the Original Application has stated that before his posting to 48 RR, he came to know that his father was seriously suffering from heart and brain problems. He applied for 5 days leave to meet his ailing father and this leave was declined but it was not given to him in writing. He has stated that he has an elder brother who resides in a distant place. As there was nobody to look after his ailing father, it was a social obligation for him and under such compelling circumstances it was beyond his control and he proceeded to meet his ailing father. As he was sure that no leave would be granted to him, he reiterated that the situation was beyond his control and he stated that when he reached his village, his father was on his death bed and required immediate treatment. He then stated that when his father was somewhat well and recovered to his normalcy he went to the Depot Regt, Jabalpur after 1 year 9 months and 6 days. He further stated in the O.A. that he voluntarily rejoined on 11.07.2003. He came to know that a COI was conducted behind his back earlier to record his desertion and he was not given any chance to plead his case. He further stated that false and fabricated charges were framed against him under AA Section 39. He stated that the Summary of Evidence was ordered but neither the Court of Inquiry nor Summary of Evidence was given to him before initiation of the SCM.

9. He further stated that he was not given full opportunity under AR 22 (1) and the CO mechanically adjourned the case for the purpose of having evidence to be reduced to writing. He further stated that no independent officer was present at the time of recording of the

Summary of Evidence. In addition he said that the CO had remanded him for trial by Court Martial under AR 24(1)(a) but should have applied AR 24(2) by referring it to the proper military authority to convene the court martial as this case required. He stated that without any intimation from the proper military authority, the CO himself decided to try him and assembled the SCM. This he stated vitiated the complete trial. He further stated that due to circumstances beyond his control he could have been dealt with under AR 22(3)(a) but CO chose to try him under AR 22(3)(c) and resorted to this measure and ultimately he was tried by the SCM which was illegal and arbitrary. He went on to state that charge under Section 39(a) of AA for absence without leave is not maintainable under the eye of law as the inquiry was held for his alleged desertion. Other procedural issues assailed by him was as under :-

- (a) It was mandatory to give him 96 hrs notice under AR 34 but this was not done.
- (b) He was given friend of the accused Sub Maj and Hony Lt P. Radhakrishnan under AR 129 only on 21.07.2004.
- (c) 'Friend of the Accused' could neither plead nor contest the case like a civil lawyer or defending officer and thus there is a gross violation of the Article 22 of the Constitution of India.
- (d) The friend of the accused remained silent at the time of giving legal assistance and misguided him to plead guilty. He stated that he made the plea of guilty without realizing consequences of the case. Neither the Court nor the friend of accused explained the consequence of plea of guilty during the trial. He has assailed that AA Sec 130 and AR 49 are not applicable to the SCM and this is violative of Article 14 of the Constitution of India.
- (e) The applicant has basically questioned his trial by SCM and asked as to why DCM or GCM was not convened in this case. Punishment of dismissal was completely disproportionate to the offence committed.

(f) The charge with which he was arraigned was not read out to him as per AR 111(2). The authority had taken two views on framing of charges, the first view being that he was deserter under AA Sec 38 and the second view that he was absent without leave under AA Sec 39(a).

(g) He stated that he could not take plea in bar under AR 114 and also stated that no paper related to the case was given to him under the provisions of AR 131 and 133.

(h) Also that no opportunity was given to him under AA Sec 106 during the enquiry read with AR 183..

10. After his dismissal he stated that the authorities had not issued him discharge certificate under AA Sec 23 read with AR 12. Further in the OA the applicant has said that there was no reason for the authorities for withholding or refusing his leave for 5 days specially at the time when his father was seriously ill. Hence he left unit without leave. He stated that he was not only deprived of his rights during the trial but was not intimated about his statutory right for remedy under Military Law. He further assailed that since the findings of sentence of the SCM are not required to be confirmed under AA Sec 161, no remedy is available under AA Sec 164(2) at the post confirmation stage. Besides there is remedy at the pre-confirmation stage under Section 164(1) and he was dismissed from service within one day i.e. 21.07.2004 and everything was done with undue haste.

11. Assailing the rejection of his petition by the Govt. of India, under AA Sec 164 (2), he stated that the authority had dealt with some portion of the representation and not with the entire representation. The Ld counsel for the applicant while admitting to the fact that his client was indeed absent from duty for one year and 282 days, has argued the above issues most vehemently and stated that because of these issues, the trial was vitiated and hence punishment of dismissal should be set aside and the applicant be reinstated in service. On the other hand the Ld counsel for respondent had put across the fact that there was no doubt that the applicant never reported to his Unit 48 RR which was deployed in an intense Counter

Insurgency Operational (CI Ops) areas in J & K and deliberately stayed away for a prolonged period of 1 year 292 days despite the Unit sending telegrams and letters to all concerned including the father of the applicant.

13. Further when the applicant surrendered on 11.07.2003 after this long absence, the army set into motion to procedure for dealing with such cases. Accordingly, his attachment orders to the Depot Regiment were issued and he was arraigned under AR 22 on a tentative charge sheet. This was followed by the Summary of Evidence and finally he was tried by SCM on 21.07.2004. As a result of which he was sentenced to be dismissed from service. The Ld counsel for the Respondent reiterated that the applicant not only admitted to his absence during the Summary of Evidence but also during the SCM and he had authenticated all the proceedings. He further stated that it was apparent that the individual deliberately tried to avoid the posting to 48 RR deployed in intense CI Ops area and hence absented himself without leave despite forthwith move due to contingency of service. He also stated that the applicant who having pleaded guilty, and adduced no additional evidence to the contrary to the defence of himself at a judicial proceedings cannot now be allowed to resile from such conduct within the scope of an application of the AFT Act.

14. We have heard both sides and studied the written submissions of both the parties. At the out set it may be seen that the applicant's petition under Section 164(2) of AA to the Govt of India has been rejected by very detailed reasoned and speaking order which is reproduced as under :-

*C/08989/DV-3(B)/1995/D/AG*

*Page 1*

*Ex SIGNALMAN (TECHNICAL ELECTRICIAN RADIO-III) MANDIP BASU*

*Government of India  
Ministry of Defence  
New Delhi, the*

*12 Aug 2014*

**ORDERS**

**PETITION AGAINST SUMMARY COURT MARTIAL SUBMITTED BY  
NUMBER 15393361N EX SIGNALMAN (TECHNICAL ELECTRICIAN RADIO-III)**



**MANDIP BASU OF 48 RASHTRIYA RIFLES BATTALION (GARHWAL RIFLES)**  
**ATTACHED TO DEPOT REGIMENT (CORPS OF SIGNALS)**

1. WHEREAS, in exercise of the powers conferred under Army Act Section 164(2), the Central Government has examined the petition dated 29 December 2012, submitted by Number 15393361N Ex Signalmán (Technical Electrician Radio-III) Mandip Basu of 48 Rashtriya Rifles Battalion (GARHWAL RIFLES) attached to Depot Regiment (Corps of Signals) and other relevant documents pertaining to the case. The Petition is against the award of punishment by Summary Court Martial (SCM) held on 21 July 2004 by Commanding Officer (CO) Depot Regiment (Corps of Signals).
2. **AND WHEREAS**, the petitioner was tried by SCM on 21 July 2004 under Army Act Section 39 (a) for 'ABSENTING HIMSELF WITHOUT LEAVE', the particulars of the Charge averring that 'he, at field, on 05 Oct 2001 at 0001 hrs absented himself without leave while proceeding on permt posting from 12 Inf Div Sig Regt (AREN) to 48 RR (GARH RIF), TILL SURRENDERED VOLUNTARILY TO Depot Regt (Corps of Signals) on 11 Jul 2003 at 1330h'.
3. **AND WHEREAS**, THE Petitioner pleaded 'Guilty' to the Charge. The Court, after trial found him 'Guilty' of the Charge and sentenced him 'to be dismissed from the service'.
4. **AND WHEREAS**, the Petitioner in his Petition has mainly contended that :-
  - (a) He had absented himself without leave to meet his ailing father as he was sure that he would not get leave.
  - (b) During the recording of Inquiry (C of I), he was not given opportunity to defend the case.
  - (c) A false and fabricated charge was framed against him.
  - (d) He was not provided with a copy of Summary of Evidence (S of E) and the C of I.
  - (e) That Hearing of Charge and S of E were not conducted as per Army Act and Army Rules. The S of E was recorded behind his back without affording him an opportunity to defence his case.
  - (f) His trial by SCM was held without referring the matter to the officer empowered to convene a District Court Martial (DCM).
  - (g) The charge framed against him is not maintainable in the eyes of law as inquiry was conducted for desertion, whereas, he had been tried under Army Act Section 39(a), i.e. Absent without leave (AWL).
  - (h) The 'Friend of the Accused' was provided by the authorities to the Petitioner, however, he did not guide or advise him.
  - (j) The entire proceedings of SCM were arbitrary, discriminatory, unjust, unreasonable and in violation of Article 14 of the Constitution.
  - (k) Why was he not tried by District Court Martial/General Court Martial, wherein, he could have got an opportunity to challenge the Court under Army Act Section 130?
  - (l) The punishment awarded to him was disproportionate.
  - (m) After arraignment on the charge, the Court did not record finding of Guilty/Not Guilty.
  - (n) The charge against him was not read out in the language as per Army Rule 111(2).

- (o) *The promulgation Minute was not handed over to him.*
- (p) *The Discharge Certificate was not issued to him under Army Act Section 23 read with Army Rule 12.*
- (q) *He was misguided by 'Friend of the Accused' who made him understand that no punishment will be given, if he pleads "Guilty".*

5. *AND WHEREAS, a close scrutiny of the SCM proceedings and other relevant documents on record reveal that :-*

- (a) *The contention of the Petitioner that he would not be granted leave and hence he absented himself without leave does not in any manner protect him legally. He was answerable for the continuous long absence without making any communication to the concerned authorities. The said contention is far from reality and seems to be an afterthought and is devoid of merit.*
- (b) *In the instant case, the C of I was held under Army Act Section 106 read with Army Rule 183 to enquire into his absence without leave. The said inquiry is always held in the absence of the accused. The contention of the Petitioner is therefore baseless.*
- (c) *The Petitioner absented himself from the Unit Lines and admittedly remained absent upto 11 July 2003. After he surrendered voluntarily, Hearing of Charge was duly conducted by the CO, followed by recording of S of E and then the proceedings culminated into a trial by SCM. As is evident, the charge was framed on the basis of evidence on record. Moreover, in the instant Petition, the Petitioner himself has admitted his absence and hence, the contention of the Petitioner is factually and legally incorrect.*
- (d) *As per the comments of Colonel RS Samar, the CO. the copy of Charge Sheet and the S of E were handed over to the Petitioner on 14 July 2004 at 1000 hours i.e. seven days prior to the commencement of the trial and therefore, the legal requirement of Army Rules 33 and 34 stand complied with. There is an endorsement on Charge Sheet that the same was provided to him. There is nothing on record to show that the Petitioner had asked for a copy of the C of I. The contention of the Petitioner is found to be devoid of merit and substance.*
- (e) *The documents placed on file reveal that the Hearing of Charge under Army Rule 22 was conducted on 03 July 2004 on a Tentative Charge Sheet of the same date, wherein, two Prosecution Witnesses (PWs) were heard by the CO. The Petitioner was given opportunity to cross examine the PWs, but he declined. Similarly, when he Petitioner was asked to make a statement or to call any witness in his defence, he declined to do so. Thereupon, the officer conducting the proceedings under Army Rule 22, ordered evidence to be reduced to writing. Similarly, during the S of E, the evidence of the witnesses was recorded in the presence of the accused and he was afforded due opportunity to cross examine the witnesses. However, the Petitioner declined to cross-examine the witnesses. Thereafter, in compliance of Army Rule 23(3), the Petitioner was cautioned and he made a statement admitting his absence with effect from 05 October 2001 and joining duty voluntarily on 11 July 2003. He had no explanation for his long absence. Hence, it is evident from the records that provisions of Army Rule 22 and 23 have been duly complied in the instant case. Thus the contention of the Petitioner is baseless and devoid of merit.*
- (f) *The contention of the Petitioner is legally untenable as he has been tried for Absence Without Leave (AWL), an offence which does not fall under the purview of Army Act Section 120(2). The CO was empowered to try him for his offence without referring the matter to an officer empowered to convene a DCM.*

(g) *The contention of the Petitioner is not sustainable as the C of I was held under Army Act Section 106 read with Army Rule 183 to enquire into the absence of the Petitioner without leave and on conclusion of the said inquiry, he was declared as deserter. As per the statutory provisions under Army Act Section 106 (2), if the person declared illegally absent does not afterwards surrender or is not apprehended, he shall for the purpose of the Act, is deemed to be a deserter which in any case does not debar the CO to frame a charge of AWL is less grave than Desertion. Hence, the framing of a less grave charge has not jeopardized his interest.*

(h) *As required under Army Rule 129, the 'Friend of the Accused' was provided by the Commanding Officer and he was acceptable to the Petitioner. At the trial, the Petitioner pleaded 'Guilty' to the charge, leaving hardly any scope for the 'Friend of the Accused' to advise him. Therefore, the contention of the Petitioner is an after thought and not tenable.*

(j) *The contention of the Petitioner is vague. The proceedings of SCM were conducted in accordance with the provisions laid down under Army Act and Army Rules, The SCM proceedings were duly countersigned by the Reviewing Officer after scrutiny. Hence, this contention of the Petitioner is also devoid of merit.*

(k) *In a SCM, the CO is the sole judge and it is his prerogative to decide the forum of trial on the basis of gravity of the offence, the evidence on record and circumstances of the case. The action of the CO was legally in order. Herefore, the contention of the Petitioner is unfounded.*

(l) *Keeping in view the long absence of the Petitioner from the Unit (48 RR), deployed in Counter Insurgency environment, the punishment awarded to the Petitioner is justified and commensurate with gravity of his offence. The punishment is legally sustainable.*

(m) *The contention of the Petitioner is contrary to the record. Page 'B' of the SCM proceedings clearly indicates that after the Petitioner pleaded 'Guilty' to the Charge, the officer holding the trial recorded his plea as 'Guilty'. The Petitioner has signed underneath the plea of 'Guilty' as well as compliance of Army Rule 115 (2). Hence, the contention of the Petitioner lacks merit.*

(n) *The contention of the Petitioner stands negated in view of the certificate rendered by the officer holding the trial. On Page 'B' compliance of Army Rule 115 (2) is recorded and underneath the Petitioner has signed corroborating that the Court had explained to the Petitioner the meaning of the Charge to which he had pleaded 'Guilty' and ascertained that the Petitioner had understood the nature of the Charge to which he had pleaded 'Guilty'. Hence this contention is also devoid of merit.*

(o) *The contention of the Petitioner is again contrary to the record. On conclusion of the trial, the sentence awarded by the SCM was promulgated to the Petitioner on the same day by Lieutenant Colonel Gulzar Rai, Officer-in-Charge Documents, Depot Regiment (Signals). This compliance is recorded on Page 'J' of the proceedings. Moreover, the certificate duly signed by the Petitioner dated 21 July 2004 that he has received the copy of the SCM proceedings and its connected documents, placed on file, negate the contention of the Petitioner. This contention is an afterthought and misleading.*

(p) *As per Army Act Section 23, Army Rule 12 and Para 168 of Regulations for the Army 1987 (Revised Edition), the Petitioner is entitled to a certificate setting forth the authority terminating his service, cause of termination and full period of his service in the regular Army. The comments provided by the CO at Para 24 are contrary to the statutory provisions on the subject as the Petitioner was entitled to a Discharge Certificate. However, even if he had not been provided with such a certificate, it did not cause any prejudice to him. Notwithstanding he above, the Petitioner should be issued*

*with the discharge certificate. However, non-issuance of Discharge Certificate does not affect legality of the SCM proceedings which are independent of the said issue. There is sufficient evidence available on record to establish his guilt, besides, his unequivocal plea of 'Guilty'.*

*(q) The Petitioner had pleaded 'Guilty' to the charge unconditionally and unequivocally during the SCM. The contention of the Petitioner that he was misguided by 'Friend of Accused' is an afterthought.*

6. *NOW, THEREFORE, considering the case in its entirety, the Central Government rejects the Petition dated 29 December 2012 submitted by Number 15393362N ex Signalmán (Technical Electrician Radio-III) Mandip Basu of 48 Rashtriya Rifles Battalion (GARHWAL RIFLES) attached to Depot Regiment (Corps of Signals), as it lacks substance and is devoid of merit.*

*Sd/-*

*(V.N. Raveendran)*

*Under Secretary to the Government of India*

*Copy to :-*

*The Chief of the Army Staff - : With the request to communicate the Order to the  
(Four copies) Petitioner through the Staff Channel and take necessary  
action as per laid down rules on the subject.*

15. It is, therefore, seen that every point assailed on the legal process of the applicant being declared a deserter and the procedure involved in hearing all the parties under AR 22(i) i.e. Hearing of Charge and under AR 23(1), (2), (3) and (4) regarding Summary of Evidence as well as the SCM under AA 116, 120 and AR 106 – 133 have been followed correctly. The detailed reasoned and speaking order of the Govt. of India is a testimony to this fact that has also been affirmed by us. It may be seen that the petitioner pleaded guilty at the SCM. The question raised by the Ld counsel for the applicant was that the plea of guilty could have been induced and not done voluntarily by the applicant. There is nothing on record to show that the plea of guilty was induced. Besides it is seen that AR 115 (2) was complied with and a certificate to the effect was signed by the Court which informed the applicant about the consequences of such plea (Para 5 Supra). The Ld counsel for the applicant made much of the fact that the certificate was in a printed form and not written by the CO in his own hand. Be that as it may, when the applicant himself has pleaded guilty to the charge and sufficient documentary evidence exists to prove that he was absent for 1 year 282 days, all other objections raised by the Ld counsel for the applicant pale into insignificance. Therefore, it may be seen that the trial as well as

punishment awarded to the applicant is legal and in accordance with AA 1950 read in conjunction with AR 1954. In any case, even if there is irregularity in procedure when no injustice is done, AR 149 would apply. The relevant AR is reproduced as under :-

***Irregular procedure when no injustice is done***

*149. Validity of irregular procedure in certain cases.- Whenever, it appears that a court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilty to justify such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary of court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid, they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer, but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules.*

16. Now we came to the aspect of proportionality of the punishment. Relevant portion of Section 39 of the Army Act is reproduced as under :-

*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) xxxxxx*
- © xxxxxx*
- (d) xxxxxx*
- (e) xxxxxx*
- (f) xxxxxx*
- (g) xxxxxx*

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.

17. It is, therefore, seen from the Section that not only could the applicant have been dismissed but he could have also been liable to suffer a term which may extend to 3 years or less if he was tried by a Court Martial. Under the provisions of AA Sec 120 (5), the CO in the SCM could have awarded maximum punishment of dismissal of service coupled with 1 year rigorous imprisonment (RI). The relevant portion of AA 120 is reproduced as under :-

**120. Powers of Summary Courts-Martial. –**

(1) *Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.*

(2) *When there is no grave reason for immediate action and reference can without detriment to discipline be made 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, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.*

3. *A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer.*

4. *A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section (5).*

5. *The limit referred to in sub-section (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant colonel and upwards, and three months, if such officer is below that rank.*

Therefore, in this case it is seen that punishment was well within the limits laid down i.e dismissal with no imprisonment being awarded to the applicant.

18. A conjoint reading of Section 39 and 106 of the AA shows that legislature in their wisdom has provided for severe punishments for absence without sanctioned leave for 1 year 282 days. It is also evident that the applicant stayed away from duty to avoid a posting to a very hard and intense CI Ops area where he would have been engaged in counter militancy tasks. The safety of the Nation depends upon army personnel fighting the enemies of the country in a befitting manner as per their training. Avoiding such a duty cannot in any way be condoned or accepted by a disciplined organization such as the Indian Army. The applicant could have brought his ailing father to the nearest Military Hospital where he is entitled free top class medical treatment and ensure that while his father was being taken care of in such a Military Hospital, he could have been performing his duties in the Counter Insurgency operational area. However, he chose not to do so and proved himself unfit and unworthy to belong to a disciplined organization like Indian Army.

19. Much emphasis have been laid by the Id. counsel that punishment awarded to the applicant is not in proportionate to the misconduct. The Hon'ble 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.

20. In SCC 2010 Vol. V Page 775 Administrator, Union Territory of Dadra and Nagar Haveli Vs. Gulabhia M. Lad, the Hon'ble 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."*

21. The aforesaid proposition have been reiterated by the Supreme Court in other 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.

22. The applicant has rightly been dismissed from service in accordance with law under AA Sec 39 and could have also been punished with imprisonment. The SCM seems to have taken a lenient view and has given lesser punishment and this has been observed by JAG in his review of the proceedings and has been adversely commented upon.

23. No lenient view may be taken where misconduct relates to a person belonging to the Armed Forces. They are expected to be disciplined not only in their official life but also in their personal life. Glaring examples of misconduct should neither be condoned nor treated with lesser punishment as it sets a bad example to the body of troops and would encourage similar behavior which is detrimental to discipline and regimentation that the Armed Forces are respected for. Besides the nation 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 that too in an operational area and may result in ill consequences which cannot be fathomed.

24. 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.

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

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

(LT GEN GAUTAM MOORTHY)  
Member (Administrative)

(JUSTICE SUNIL HALI)  
Member (Judicial)

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