A F R

(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
O.A NO. 43/2011

THIS 21ST DAY OF AUG, 2015

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

APPLICANT(S)

No. 15148053X Ex Gnr (GD) Shyamal Debnath
Village – Balagarh
P.O. – Srupur Bazar
PS - Balagarh
Dist. – Hooghly (W.B.)

Presently residing at :-
Village : Sabaldaha
P.O. – Kurutia
P.S. – Burdwan
Distt. - Murshidabad

-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-in-C, Western Command
HQ Western Command
Chandimandir
Haryana

4. Commanding Officer
221 Medium Regiment
Pin – 926221
C/o 56 APO.

5. JC-256558 I, Sub Bhim Singh
221 Medium Regiment
Pin – 926221
C/o 56 APO.

For the petitioner (s) **Mr. S.K. Choudhury, Advocate**

For the respondents **Mr. Sudipto Panda, Advocate**

Assisted by OIC, Legal Cell.

ORDER

PER LT GEN GAUTAM MOORTHY, MEMBER(ADMINISTRATION)

1. This is an application against the order of the COAS dated 28.08.2007 being Appellate Authority dismissing the appeal against the order of dismissal passed by the Commanding Officer 221 Medium Regiment vide order No C-08252/DV/3(B)

2. The applicant, No 15148053X Gnr (GD) Shyamal Devnath of 2212 Medium Battery, 221 Medium Regiment was appointed as gunner in the Indian Army on 19.03.2001 after completion of basic training. He was posted to 221 Medium Regiment on 18.01.2002. The applicant was granted leave from 02.07.2006 to 16.07.2006 to proceed to his home station. However, on expiry of the said leave he did not rejoin and remained absent till 2000 hrs on 19.09.2006 thereby being absent without leave for 65 days. A Court of Inquiry was earlier held on 30.08.2006 to investigate into the circumstances of his absence. The court opined that since he did not rejoin after expiry of leave granted to him, he was declared deserter w.e.f. 15.08.2006. Earlier too the Unit issued an apprehension roll on 25.07.06 to the Superintendent of Police, Hooghly asking for apprehending the individual and for him to inform the nearest Regimental Centre/Unit as well as arrange for his despatch.

3. Subsequently, on his voluntarily rejoining on 19.09.2006, Col Sumesh Seth, CO 221 Medium Regiment brought the individual on 20.09.2006 on a tentative charge sheet under Army Rule 22 (1) in presence of three independent witnesses and ordered the evidence to be reduced to writing. The applicant was informed by the CO that he was at liberty to make any statement and call any witness in his defence. However, the individual declined to make any statement. Based on this, a Summary of Evidence was recorded from 20.09.2006 to 22.09.2006 in which the applicant was explained the nature of the charge sheet against him under Army Act Section 39 (b) and his right to cross examine the witnesses and produce any defence witness in his favour under the provisions of Army Rule 23 (1), (2), (3) and (4). During the recording of the Summary of Evidence, statements of three prosecution witnesses were recorded and at the end of each recording, the applicant was asked if he wished to cross examine the particular witness

based on the statement made by the witness which had been read out to him in the presence of an independent witness. In all three cases, the applicant declined to cross examine the witnesses. At the end of the Summary of Evidence, formal caution to the applicant under Army Rule 23 (3) was given in presence of the independent witness which is reproduced as under :-

> "Do your wish to make any statement ? You are not obliged to say anyting unless you wish to say anything but whatever you say will be taken down in writing and may be given in evidence."

4. The applicant declined to make any statement. He was also asked to produce any witness in his defence if he so desired. The applicant declined to produce any witness in his defence. The Summary of Evidence, 9 pages in all, was then put up before the CO, Col Sumesh Seth who on 25.09.2006 remarked :-

> "1. I have perused the contents of the Summary of Evidence recorded from 20.09.2006 to 22.09.2006. In my opinion there is sufficient evidence that No. 15148053X Gnr (GD) Shyamal Debnath of 2212/221 Medium Regiment has committed the following offence :-
>
> '**Over staying of leave under Section 39 (A) of Army Act.'**
>
> 2. I direct that he be tried by Summary Court Martial (SCM)"

5. Based on the above he was informed 25.09.2006 that he would be tried by SCM on 29.09.2006 and was asked to nominate a friend of the accused and was given a copy of charge sheet as well as the Summary of Evidence. He was also asked to call any body as his defence witness. In response, the applicant proposed Sub/PA Ramesh Chander as his friend in the trial.

6. The SCM assembled on 29.09.2006 at Basoli Camp and trial commenced at 1100 hrs. All legal requirements and formalities were observed at the trial.

7. While being arraigned, the court specifically asked the applicant if he was Guilty or Not Guilty of the said charge against him under Army Act Sec 39 (b) which was ***"without sufficient cause over staying leave granted to him"*** in that he at Basoli Camp, on 17.07.2006, having

been granted leave of absence from 02.07.2006 to 16.07.2006 to proceed to his home, did not join on expiry of leave and rejoined voluntarily at 2000 hrs on 19.09.2006. The applicant pleaded **Guilty** to the charge.

8. Before recording pleadings of Guilty, the court explained to the applicant meaning of the charge to which he had pleaded guilty and ascertained from him that he understood the nature of the charge to which he had pleaded guilty. The court also informed him the general effect of the plea and the difference in procedure which will be followed consequent to the said plea. The court thus having satisfied itself that he understood the charge and the effect of his plea of guilty, accepted and recorded the same.

9. The Summary of Evidence was then read (translated) and explained to him and was attached to the proceedings. He was then asked if he wish to make any statement in respect to the charge or in mitigation of the punishment or if he wished to call any witness as to his character. The applicant replied in the negative. Subsequently, the court taking all these matters into consideration sentenced the applicant to be ***'Dismissed from Service'.*** The trial closed at 1300 hrs and the sentence was promulgated on that day itself i.e. 29.09.2006.

10. The proceedings were subsequently countersigned by Brig MS Sidhu, Commander, 401 (Independent) Artillery Brigade at 1200 hrs on 18.11.2006 after due vetting by DJAG HQ 9 Corps.

11. The applicant in the original application (O.A.) stated that he was sanctioned 15 days leave from 02.07.2006 to 16.07.2006. He over stayed about 2 months due to his serious illness as well as that of his wife. Although he has stated that he joined duty on 09.09.2006, from the factual matrices on record it is seen that he reported on duty on 19.09.2006 and not on 09.09.2006 as stated by him. He has stated that after the SCM he was released from Army custody but no paper was handed over to him regarding his dismissal. Again from the factual matrices on record, it is seen that he had indeed applied for and received the Court Martial Proceedings on 29.09.2006 wherein it was certified that ***No. 15148053X Gnr (GD) Shyamal Devnath of 221 Medium Regiment was supplied with the Summary Court Martial***

proceedings. This has been signed by the applicant and countersigned by the CO on 29.09.2006. He was also issued with a letter No. 15148053X/CF/04/A dated 29.09.2006 wherein he was advised regarding his right to petition. The applicant states on 30.09.2006, his mother received his order of dismissal.

12. Based on the above he has stated that he made an appeal to the COAS and GOC-in-C, Western Command on 16.11.2006. He has also made a prayer to the Hon'ble President of India and Hon'ble Minister of Defence on the same issue stating inter-alia the circumstances which compelled him to over stay leave after 16.07.2006. He has stated that the appeal has not been disposed of by the appellate authority. He has stated that the application before the Hon'ble President of India was forwarded to the MoD on 07.12.2006. He then filed a Writ Petition No. 2457 (W) of 2007 which was transferred to the AFT, Kolkata Bench and was renumbered as TA 87/2007.

13. However, from the documents on record it is seen that the COAS by means of a well reasoned and detailed order had rejected the petition dated 16.11.2006 submitted by the applicant against the findings and sentence of the SCM. Additionally it has been observed by COAS in this order that the petitioner had committed similar offences on two occasions earlier also, for which he was punished and given a chance to improve but he failed to show any improvement. The COAS also commented in detail on the trial procedure which was conducted

"Strictly in accordance with the provisions of Army Act and Army Rules."

14. The COAS order dated 28.08.2007 is reproduced below :-

C/08252/DV-3(B)

ORDERS OF THE CHIEF OF THE ARMY STAFF ON THE PETITION DATED16 NOVEMBER 2006 SUBMITTED BY NUMBER 15148063 X EX GUNNER (GENERAL DUTY) SHYAMAL DEVNATH OF 221 MEDIUM REGIMENT AGAINST THE FINDING AND SENTENCE OF SUMMARY COURT MARTIAL

1. In exercise of the powers conferred on me vide Army Act Section 164(2), I have examined the petition dated 16 November 2006 submitted by Number 15148053X Ex Gunner (General Duty) Shyamal Devnath of 221 Medium Regiment against the finding and sentence of Summary Court Martial (SCM) held on 29 September 2006 in the light of the proceedings of the said court and other relevant documents on record.

2. The petitioner was tried by SCM on a charge under Army Act Section 39 (b) for 'WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM'. The particulars of the charge averred that "he, at Basoli Camp, on 17 July 2006, having been granted leave of absence from 02 July 2006 to 16 July 2006 to proceed to his home, failed without sufficient cause, to rejoin on expiry of the said leave and rejoined voluntarily at 2000 hrs on 19 September 2006". The petitioner pleaded 'Guilty' to the charge. The court after complying the provisions of Army Rule 115 (2) and 2(A) found him accordingly and sentenced him 'to be dismissed from service'.

3. The petitioner in his petition has mainly contended that the petitioner was not given any opportunity to make a statement at any stage, that his signature on the documents were obtained without his knowledge of the contents thereof; that the unintentional overstay of leave was informed to the unit by the petitioner, that the charge sheet did not contain the whole issue; that the petitioner was not given any opportunity to plead 'Not Guilty' and the Provisions of Army Rule 115 (2) were not explained to him.

4. Documents on record reveal that the petitioner was given full opportunity to make a statement, defend his case and to cross-examine the witnesses at the time of hearing of charge as well as during recording of Summary of Evidence. There was no pressure on him for signing any documents as alleged by the petitioner. The petitioner voluntarily rejoined the unit in an absolutely fit condition. He did not give any reason for overstaying leave nor he produced any document about his illness. A preliminary hearing of charge as per Army Rule 22 compiled on Appx 'A' to AO 24/94 was held in presence of the petitioner on 20 Sep 2006. Subsequently Summary of Evidence was recorded when culminated into his trial by SCM. The charge was framed in accordance with the rules based on the evidence which emerged during the investigation. The petitioner committed similar offences on two occasions earlier also for which he was punished and given chance to improve but he failed to show any improvement. The sentence was awarded keeping in view the offence committed by him as well as his past soiled record of service. The trial was conducted strictly in accordance with the provisions of Army Act and Army Rules. The petitioner pleaded 'Guilty' to the charge voluntarily and signed a certificate in presence of two persons attending the trial namely Maj Manu Tewari and Capt Amit Bisht besides the 'Friend of the Accused', Sub Ramesh Chander. It is evident from written record on page 'B' of the proceedings that provisions of Army Rule 115 (2) were duly complied with.

5. The contentions of the petitioner as mentioned in his petition are misconceived and bereft of any merit. The finding of the court is supported by cogent and reliable evidence on record. Considering the attendant circumstances of the case and the past record of the petitioner, the sentence awarded is just and legal.

6. I, therefore, reject petition dated 16 November 2006 submitted by Number 15148053X Ex Gunner (General Duty) Shyamal Devnath of 221 Medium Regiment as the same lacks in merit and substance.

Signed at New Delhi on this twenty eighth day of August 2007.

Sd/-
(JJ Singh)
General
Chief of the Army Staff

15. The applicant further questioned "*person who is detailed as a judge and Presiding Officer of the court himself in the capacity of Administrative Officer issue the charge sheet of the petitioner as a result no fair trial can be expected in the proceedings and natural justice has been violated and order by the SCM is biased and without any basis and sense since designated officer, disciplinary authority and enquiry officer cannot be the same person as such above proceeding has been vitiated".*

16. The trial by SCM is authorized under Army Act Section 116 which is reproduced as under :-

> "116. **Summary Court Martial.** – (1) A Summary Court Martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.
>
> (2) The proceedings shall be attended through out by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed. "

17. It may be seen that the trial as well as punishment awarded to the applicant is legal and in consonance with the Army Act, 1950. The applicant has also stated that the proceedings of the SCM were done keeping the applicant in confinement i.e. double punishment and double jeopardy.

18. Army Act Section 101 read in conjunction with Para 391 and 392 of the Regulaations for the Army provide for ordering into military custody a person subject to Army Act. Section 102 (1) of the Army Act states that "*it shall be the duty of every CO to take care that a person under his command when charged with an offence is not detained in custody for more than 48 hrs after committal of such a person into custody is reported to him without the charge being investigated unless investigation within that period seems to him to be impracticable having regard to be service."*

19. In this case it is seen that the individual reported on 2000h on 19.09.2006 and was brought before the CO under Army Rule 22 on a tentative charge sheet on 20.09.2006 which was well within the period of 48 hrs and hence the plea of double jeopardy is not sustainable as the arrest was merely that of custody of an undertrial and not as a consequence of punishment. The applicant also stated that the disciplinary authority as well as appellate authority had power to issue/impose lesser punishment to the applicant which is provided under section 71 and 72 of the Army Act without imposing punishment of dismissal and the order of dismissal is an excessive one for over staying leave for some days. He also stated that Section 39 of the

Army Act specifies that no punishment has been suggested for dismissal from service for absent without leave but for imprisonment for 3 years or such less punishment.

20. 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) 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 or5dered on active service, fails without sufficient cause, to rejoin without delay; or

(d) Without sufficient cause fails to appear at the time fixed at 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, if 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 duty 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.

21. Thus it may be seen that a person subject to the Army Act who is absent without leave shall on conviction by SCM be liable to suffer imprisonment which may extend to 3 years or less punishment under the act as mentioned. Hence it is seen that even on this ground the

punishment was well within the limits laid down i.e. dismissal with **no imprisonment** being awarded to the applicant.

22. The applicant sought the following reliefs :-

(a) Direction upon the respondents, their men and agents to cancel and/or withdraw the order of punishment imposed against your applicant by an order of dismissal of the applicant from the service by Summary Court Martial on 29th September, 2006 as well as the order of the appellate authority and allow the applicant to resume his duty forthwith.

(b) Direction upon the respondents, their men and agents to allow the applicant to resume the duty forthwith, treating the applicant in service all through and accordingly to pay the consequential benefit to the applicant including intrest on arrears.

(c) And/or to pass such other or further order or orders as this Hon'ble Tribunal may deem fit and proper.

(d) Pending final decision of this application, your applicant prayed that an order of injunction restraining the respondents, their men and/or agents not to give effect or further effect of the impugned order of punishment both by the disciplinary authority as well as the appellate authority and to allow your applicant to resume his duty till the disposal of the instant application.

(e) And/or to pass such other or further order or orders as ths Hon'ble Tribunal may deem fit and proper.

23. A conjoint reading of Section 39 and Section 106 shows that the Legislature in their wisdom has provided for severe punishment for absence without sanctioned leave or over staying the leave. In this case the applicant over stayed for 65 days . Also earlier too he overstayed leave for 38 days in June/July 2005 and 25 days in Feb/Mar 2006 for each of which he was awarded 21 days RI by the CO. It is evident that he has been dismissed service not only for this offence but

also keeping in mind this earlier offences too. It appears that he was a habitual and a perpetual offender and his over staying leave occurred not once but three times. He did not reform himself despite award of 21 days RI on earlier occasions and proved himself unfit and unworthy to belong to a disciplined organization like the Indian Army.

24. 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.

25. **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."

26. 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.

27. **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 suffering 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.

28. 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."

29. 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."

30. Keeping the aforesaid broader principle of law it appears that absence from duty by the applicant was deliberate. 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 his 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 Jawan who is supposed to set highest standard while serving the Nation as the member of the Armed Forces.

31. 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.

32. The appellant has been dismissed from service in accordance to law and U/S 39 of the Act he could also have been punished with imprisonment for a term which may extend to three years. The SCM seems to have taken lenient view and given lesser punishment.

33. 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. Repeated and 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 and in cases it may result in ill consequences which cannot be fathomed.

34. 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.

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

36. 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)

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