

**ARMED FORCES TRIBUNAL,
REGIONAL BENCH,
JABALPUR**

TA/457/2010 in OA/848/2009

Date of Order : 09.01.2018

Hon'ble Mr. Justice Amar Saran, Judicial Member

Hon'ble Lt Gen N.B. Singh, Administrative Member

**Amit Kumar Khatkar, S/o Shri CR. Khatkar, R/o Village Pamgarh,
Tehsil Pamgarh, District Janjgir Champa, (Chattisgarh).**

..... Applicant

Versus

- 1. Union of India**, through the Secretary, Ministry of Defence, Govt of India, New Delhi.
- 2. Chief of Army Staff**, Army Headquarters, DHQ P.O. New Delhi.
- 3. The Chief Officer** Commanding-In-Chief, Centre Command, Lucknow (U.P).
- 4. The Office-in-Charge**, Records, Corps of Signals, Jabalpur (M.P).
- 5. The Commanding Officer**, Depot Regiment, Corps of Signals, Jabalpur (M.P).
- 6. The Commanding Officer**, 35 Rashtriya Rifles Battalion (Assam), C/o 56 APO.

..... Respondents

Ld. Counsel appeared for the Applicant - **Shri KC Ghildiyal**
and **Shri HC Singh**,
Advocates.

Ld. Counsel appeared for the Respondents - **Shri HS Ruprah**,
Central Govt. Counsel.
Along with
Maj Gourav Verma,
OIC Legal Cell.

ORDER

Delivered by Hon'ble Justice Amar Saran, Member (J)

1. The applicant who was enrolled in the Army (Corps of Signals) on 28.04.2003 was posted in 35 Rashtriya Rifles Batallion (Assam) which was committed to counter insurgency operations. He was granted 30 days advance of annual leave from 03.07.2007 to 02.08.2007 by Rashtriya Rifles Batallion (Assam). The applicant was to report to his unit on 03.08.2007 at 0001 hrs. After expiry of the leave instead of joining back the Batallion, he surrendered on 01.05.2008 after overstaying leave for 273 days. The applicant was issued a charge sheet by respondent No. 5 Commanding Officer, Depot Regiment, Corp of Signals, Jabalpur for holding a Summary Court Martial (SCM) under Army Act (AA) section 27 specifying two charges under section 39(b) for over staying leave granted to him without sufficient cause, as he was granted leave between 03.07.2007 to 02.08.2007 but he failed without sufficient cause to rejoin his unit i.e. 35 Rashtriya Rifles Batallion (Assam) on 03.08.2007 until he voluntarily surrendered at Depot Regiment, Corp of Signals on 01.05.2008 at 1300 hrs. The second charge was under AA Section 54(b) for losing by neglect clothing and equipment which are the property of Government issued to him for his use. When his kit was finally checked by a Court of Inquiry held at 35 Rashtriya Rifles Batallion, (Assam) it was found deficient in the items as mentioned in a list annexed to the charge sheet which was valued at Rs 5256/-. The applicant pleaded not guilty to the first charge and pleaded guilty to the second charge at the time of the arraignment, in the Summary Court Martial. But as during the course of the SCM the applicant cross-examined the NCO-In-Charge of Deserter Section of Depot Regiment, Hav Girani Lal, suggesting that he had simply reported that the applicant surrendered on 1.05.2008 after overstaying leave for 273 days when he was not found in possession of clothing and web-equipment, he had not checked his belongings at

the unit, the Court changed the guilty plea for the second charge to not-guilty, purportedly under Army Rule (AR) 116(4). Hav Girani Lal was directed to re-check his belongings in the unit. The list showed that the applicant possessed items such as blanket, mosquito net, haversack, combat coat, boot DMS etc. to the tune of Rs. 2906.42. A deduction from the original amount of Rs. 5256, was made and the applicant was finally adjudged to be guilty of losing by neglect, clothing, and equipment which was the property of the government to the tune of Rs. 2350 (and not Rs.5256) for the second charge. After the Summary Court Martial a sentence of dismissal from service was awarded to the on 21.11.2008.

2. The applicant preferred a petition to respondent No.3, GOC-in-C, Central Command, Lucknow which was rejected on 15.07.2009. Hence, the applicant preferred a Writ Petition No. 8481 of 2009 (s) wherein he prayed for quashing the finding and sentence dated 21.11.2008 recorded by the respondent No. 5 after the SCM, and also the order dated 15.07.2009 (Annexure P/7) passed by respondent No. 3. He also prayed for a writ of mandamus directing the respondents to reinstate the applicant in service w.e.f. 21.11.2008 with all consequential benefits, including arrears of pay and allowances and continuity of service or to issue any other appropriate writ order or direction which the Court deemed fit and proper in the circumstances of the case. As in the meantime, the Armed Forces Tribunal Act 2007 came into force on 10.08.2009, vesting the jurisdiction in the Armed Forces Tribunal, the case was transmitted to the Armed Forces Tribunal, Regional Bench, Lucknow by an order dated 09.10.2009. The TA thereafter remained pending before the Armed Forces Tribunal, Regional Bench, Lucknow, for a long time where it was admitted on 12.05.2015 and thereafter directed to be listed before the Circuit Bench of Jabalpur Regional Bench.

3. After the constitution of the present Regional Bench, Jabalpur the matter was heard by this Bench on 16.02.2016 and on subsequent dates. On 13.12.2017, the case was finally heard and Shri HC Singh holding brief of Shri K.C. Ghildiyal appeared for the

applicant and Shri HS Ruprah along with Maj Gourav Verma, OIC Legal Cell appeared for the respondents and the judgment was reserved which we now pronounce.

4. The contentions of the Ld counsel for the applicant were that the applicant has remained absent from duty on expiry of leave from 03.08.2007 as he had met with an accident and was not in a position to rejoin his duty and hence he had overstayed his leave for sufficient cause, as such the provisions of Section 39(b) were not applicable to his case. The charge against the applicant under Section 54(b) was baseless as the applicant has not been given any opportunity to deposit his clothing and equipment. Before issuing the charge sheet to the applicant the provisions of Army Rule 22 and 23 have not been complied with by the respondent No.5. No witness was examined for substantiating that the applicant had overstayed leave. The respondent No. 5 was not the Commanding Officer of the applicant and therefore he had no authority or jurisdiction to try the petitioner by SCM. The petitioner was not awarded proper opportunity for defence during the SCM and was not given any opportunity to cross examine the witnesses or produce his defence. The punishment order passed by the respondent No. 5 was harsh and disproportionate. He relied on the decision in *Jawaharlal Dutt (Deceased) through LRs Vs Union of India and Others*, TA 457 of 2010 (arising out of CWP No. 6686 of 1995) decided on 07.02.2014, by the AFT, Chandigarh, Regional Bench at Chandimandir, wherein the punishment of dismissal was converted to one of 'Severe Reprimand' and the applicant was deemed to be in service till completion of the qualifying service for pension and discharged thereafter. The order passed by respondent No. 3 on 15.07.2009 rejecting the petition of the applicant was arbitrary and illegal.

5. Ld counsel for the respondents and OIC Legal Cell on the other hand submitted that there was sufficient evidence for holding that the applicant had overstayed leave without sufficient cause and that the applicant had reported to the Military Hospital, Jabalpur on 01.08.2007 with a left ankle sprain. He was given medicine and

advised to report to the MI Room on rejoining his unit at Assam as his leave was up to 02.08.2007. But instead of reporting to the Transit Camp on 03.08.2007 at 0001 hrs, he appeared to have gone to the District Hospital Raipur on 03.08.2007 where he was given treatment as an outdoor patient and without sufficient cause he overstayed leave for 273 days till he surrendered before the Depot Regiment (Corps of Signals) Jabalpur on 01.05.2008 at 1300 hrs. He has even appeared in UPSC examination for the post of *Van Sanrakshak* between 06.09.2008 to 09.09.2008 without permission from the Army, which indicates that his basic intention was to desert the service, hence he had overstayed leave. The condition of the applicant was not at all serious as he was not even confined to a civil hospital but was only receiving treatment as an outdoor patient. The second charge under Section 54(b) of the Army Act 1950 also stood proved against the applicant, as the value of the Govt. property issued to the applicant, which he had lost neglectfully was reduced as per the examination of the items by the witness. The summary of evidence proceedings were in order and accordingly he was issued a charge sheet on 03.07.2008 as was apparent from a perusal of the record produced before us. He declined to cross-examine the witnesses who were examined for proving the loss of items and for proving his absence from leave in the Summary of Evidence proceedings and evidence recorded on 10.08.2008 and pleaded guilty to the charges in the Summary of Evidence proceedings. There was thus no breach of Army Rules 22 and 23.

6. Under Army Order 5/2003 existing paras 8,9 and 10 of the Army Order 7/2000 have been substituted and now persons who commit offences while away from their parent unit are not required, except in the cases of deserters, to be tried by the CO of the parent unit, but they may be tried by the concerned Regimental Centres where they may be attached with repatriation to the parent unit. The controversy on which authority was competent for trying an accused in a SCM, has been settled on the law laid down in *Union of India Vs Vishva Priya Singh, 2016 (8) SCC 641* and the Commanding Officer

of the unit where the applicant has surrendered is permitted to try an offender/individual .

7. The applicant having overstayed leave for as long as 273 days and having refused to join the parent unit despite a direction to do so for no justifiable cause, the punishment of dismissal could not be said to be disproportionate or excessive and that the case of *Jawaharlal Dutt (Deceased) through LRs (supra)* cited by the applicant was clearly distinguishable. There is also no illegality in the order of the respondent No. 3, GOC-in-C, Central Command dismissing the appeal of the applicant. Good reasons have been given by the GOC-in-C, Central Command in the order dated 15.07.2009 for dismissing the statutory petition filed by the applicant while appraising the order of the Summary Court Martial.

8. On a careful examination of the documents and the pleadings as well as the contentions advanced by the Ld counsel for the parties, we find that the applicant has been sanctioned advance annual leave while posted with 35 Rashtriya Rifles Battalion (Assam) w.e.f. 03.07.2007 to 02.08.2007. It may be noted that in the Summary Court Martial proceedings the applicant pleaded not guilty to the first charge. Hav Girani Lal, NCO-In-charge of Deserter Section of Depot Regiment, who apart from confirming the loss by neglect of govt. property by the applicant (i.e. regarding the second charge u/s 54(b) of the Army Act), he also deposed that the applicant reported back on 01.05.2008 after overstaying leave for 273 days. Hav Girani Lal was not cross-examined by the applicant on the latter aspect. Specifically Hav Balwant Singh, Legal Clerk, Depot Regiment, Corps of Signals submitted that the applicant who belonged to the 35 RR Bn voluntarily surrendered on 01.05.2008 after being OSL for 273 days from 03.08.2007 to 01.05.2008. Being the deserter section Dealing clerk, he produced the following documents before the recording officer of Summary of Evidence, viz., (a) IAFD 918 dated NIL prepared by 35 RR Bn (Assam), and (b) IAFD 910 dated 01.05.2008 (Surrender Certificate produced by the Depot Regiment). The

applicant declined to cross-examine this witness. Thus his over staying leave stands proved.

9. The other question regarding the existence of sufficient grounds for over staying leave may now be examined. Although, the applicant claims to have received serious injuries in an accident on 22.07.2007, for which he reported to the Military Hospital at Jabalpur on 01.08.2007, but at the Military Hospital at Jabalpur the applicant was found to be only suffering from a sprain on the left ankle and was not hospitalized, instead he was directed on 01.08.2007 by the prescribing doctor to report to the MI room of his parent unit 35 RR Bn in Assam, which he failed to do. The prescription slip given to the applicant who was diagnosed as suffering from sprain of the Lt Ankle when he appeared before Dr. Kalyani Vishwanathan in MH Jabalpur on 01.08.2007, directed the applicant to join the MI room of his Battalion. Dr. Kalyani Vishwanathan also gave her opinion by her letter dated 01.09.2008 relying on her prescription slip that the applicant had suffered from a sprain of the Lt Ankle and as after being given adequate treatment he was advised to attend his unit's MI room, and was not advised hospitalization she had opined that it was apparent that his condition was not very serious. The applicant thereafter appears to have gone to the District Hospital Raipur for further treatment where he was again not admitted as an indoor patient. He has not been given extension of leave as he was already on advance annual leave, when he spoke to the Adjutant of his parent unit, and his condition was also not very serious to justify further annual leave. He has pleaded guilty in his summary of evidence. The applicant after due warning in accordance with Army Rule 23 has been given an opportunity to voluntarily make a statement on 10.08.2008 wherein he pleaded guilty and requested that his case be considered sympathetically. The said confessional statement which has been proved by the witnesses could be relied upon in view of law laid down in the decision of the Apex Court in *Om Prakash v. Union of India and others*, (2015)8 SCC 705.

10. On being called upon to enter his defence, the applicant claimed that he had got annual leave because his mother had earlier been operated upon, but she is said to have returned back home within two days of his home leave. While on leave he met with an accident on 22.07.2007 while driving his motor cycle. He was advised by his Adjutant to whom he spoke telephonically for extending his leave to report to MH Jabalpur which he visited on 01.08.07. But the doctor on duty Lt. Col Kalyani Vishwanathan prescribed him some medicines and asked him to report to the MI room of his unit for further treatment. He spoke to the Adjutant of his unit who refused his prayer for further leave. He then received treatment as an outdoor patient in District Hospital Raipur. He was unable to substantiate his claim that he had overstayed leave because of his accident. On his request for production of Dr. K.K. Gajbhiye, Senior Medical Officer, District Hospital, Raipur, the latter was examined and his statement recorded. The doctor admitted that the applicant had only come as an OPD patient on 03.08.2007 and he was diagnosed with 'enteric fever' and lumber spondylitis. This seems to be a different ailment from the applicant's case that he met with an accident where he received injuries, and because of the Respondents doctor's refusal to admit him at MH, Jabalpur as they found his sprain on the Lt Ankle to be not serious, he had gone to the District Hospital at Raipur where he was differently diagnosed. However it was admitted by Dr Gajbhijye, the applicant's DW, that the applicant's condition was not so serious and he could move around and, therefore, he was not admitted and was advised to take rest at home. The treatment for enteric fever, even if we accept for a moment that he was suffering from the same, the treatment for the same was admitted to have been discontinued after 02.11.2007. Yet the applicant reported to his unit only as late as 05.08.2008. Also so far as the finding of enteric fever is concerned, it is notable that when the applicant was examined at Military Hospital, Jabalpur, he had not complained of fever. The District Hospital doctor even stated that he had advised the patient Physiotherapy which he could have got done anywhere, including in the Army in his unit. The

applicant himself also admitted when he was called upon to enter his defence that during the period of his casual leave when he was hospitalized in the MH Jabalpur from 06.09.2008 to 09.09.2008 he had appeared in the U.P.S.C. Examination for the post of *Van Sanrakshak* (Forest Guard) at Bilaspur. He had appeared in the said examination without permission of the Army Authorities, which was illegal and unwarranted, and preparation for which appears to be the principal reason for the applicant overstaying leave without permission. Therefore in our view there was no sufficient cause for the applicant overstaying leave and as such an offence under Section 39(b) of the Army Act is was clearly made out against him.

11. So far as the contention of the applicant regarding non compliance of Army Rules 22 and 23 in the Summary of Evidence proceedings is concerned, we find from a perusal of the record that there has been sufficient compliance of the said provisions. The applicant was issued a tentative charge sheet on 03.08.2008 in the form of Annexure 1 to Appendix A to the Army Order 24/1994 for two offences under Section 39(b) and under Section 54(b) of the Army Act, 1950. Two witnesses Havildar Girani Lal of Depot Regiment, Corps of Signals and Havildar Balwant Singh of Depot Regiment, Corps of Signals were examined on 03.07.2008 but the applicant declined to cross-examine them. On 03.07.2008, an order was passed for recording their evidence in writing. On 10.07.2008 their evidence was recorded in writing. Hav Girani Lal submitted a report regarding the applicant's not being in possession of a few items, which had been issued to him. The applicant declined to cross-examine the other witness Havildar Balwant Singh of Depot Regiment, Corps of Signals who was the legal clerk in the Section and who mentioned that the applicant voluntarily surrendered on 01.05.2008 at about 1300 hrs after overstaying leave for 273 days from 03.08.2007 to 01.05.2008 and produced the relevant form prepared by 35 RR Battalion (Assam) at Depot Regiment, Corps of Signals. He had pleaded guilty to the charges and prayed for sympathetic treatment. He duly appended his signatures. We

therefore see no violation of Army Rules 22 and 23 in the conduct of the Summary of Evidence Proceedings.

12. So far as the charge under Section 54(b) of the Army Act 1950 against the applicant for losing by neglect army property valued at Rs.5256/- was concerned, the applicant had pleaded guilty to the said charge. However as noted above that in the Summary Court Martial proceedings as the applicant stated that some of his items were lying in the unit, the plea of guilt was changed to one of not guilty. The clothes and other items were directed to be re-checked, whereupon as pointed out above, the loss of Government property issued to the applicant was found to be Rs. 2350 in place of Rs. 5256. But in any case this appears to be the minor offence for which the applicant had been held guilty.

13. So far as the submissions of the respondent no.5 not being the Commanding Officer of the applicant's unit was concerned, it may be mentioned that in the Army Order 5/2003 it is no more necessary that a person who commits an offence be charged by the Commanding Officer of the parent unit. This position has been clarified in *Union of India v. Vishva Priya Singh (supra)* wherein it has been observed by the Apex Court that three situations can be visualized:-

(i) In the first situation an accused commits an offence or an act constituting an offence being in a regular unit or part of his regular unit and he is tried by SCM by his own CO i.e. the CO of the unit itself.

(ii) The second situation is for attachment to a different unit where an individual commits an act constituting an offence and is therefore tried by SCM by the CO of the unit to which he was sent on attachment.

(iii) The third situation with which we are concerned here is where an accused committing an act constituting an offence while he is part of his regular unit is later sent on attachment to a different unit and is then tried by that unit.

It was for this third category of cases that it was observed in *Vishav Priya Singh (supra)* that in view of Section 116 there was no requirement that the Commanding Officer should be the Commanding Officer of the applicant's parent unit and he could be tried by any Commanding Officer, including the Commanding Officer of the unit to which the applicant was attached for the purpose of SCM. Therefore, there is no substance in the contention of the learned counsel for the applicant that the applicant has wrongly been tried by respondent No. 5 and he ought to have been only tried by the Commanding Officer of his parent unit i.e, 35 Rashtriya Rifles Battalion (Assam).

14. Even otherwise, we find no patent illegality, arbitrariness and perversity in the finding and sentence passed by the Summary Court Martial and the Ld counsel for the applicant also could not indicate as to what provisions have been specifically breached and the nature of the breach. In this context it would be useful here to refer to the decision in *Union of India and Others Vs Maj A Hussain (1998) 1 SCC 537*, wherein it has been held that when there is sufficient evidence to sustain the conviction it is unnecessary to examine the question as to whether the pre-trial investigation was adequate or not and any violation of the pre-trial investigation does not invalidate the Court Martial unless it is shown that the accused has been prejudiced or that a mandatory provision has been violated. In this context reference was made to Army Rule 149 which provides that whenever it appears that the Court Martial has jurisdiction to try any person and there is legal evidence or a plea of guilt to justify the finding, the said finding shall be deemed to be valid even if there are some minor deviations from the Rules or that the Charge Sheet has not been signed by the Commanding Officer or by the Convening Officer etc. and notwithstanding any defect or objection technical or otherwise, unless it appears that any injustice had been done to the offender where any finding or sentence is otherwise valid it shall not be

declared invalid by reason only of failure to administer oath or affirmation to the interpreter or shorthand writer. Reliance was placed in *Maj A Hussain's case (supra)* also to the judgment in *Maj GS Sodhi Vs Union of India (1991) 2 SCC 382*, wherein with reference to Rules 22 to 25 it was observed that procedural defects unless they were vital and substantial would not affect the trial. As the Court had held in that case that the accused had duly participated in the proceedings regarding recording of summary of evidence and there was no flagrant violation of any procedure or provision causing prejudice to the accused, there was no illegality or irregularity in the order. No doubt Ld counsel for the applicant referred to *Union of India and Others Vs Devi Singh (2007) 15 SCC 709*, which has sought to limit the amplitude of *Maj A Hussain's case (supra)* by holding that in *Maj A Hussain's case* no objection was raised regarding violation of mandatory Rule 22 at the time when Court Martial Proceedings were initiated but it was raised after the culmination of the proceedings whereas in *Devi Singh's case (supra)* it was raised at the initial stage. However, in the present case we also find that no objection was raised regarding the validity of the proceedings under Army Rule 22. at the initial stage. Also, as pointed out above we find that there has in fact been complete compliance of Army Rules 22 & 23 in the present case in as much as the tentative charge sheet was framed and thereafter witnesses were examined and the applicant refused to cross examine them inspite of opportunity being afforded to him.

15. Even so far as the punishment being disproportionate or excessive, regarding which Ld counsel for the applicant had cited a decision in *Jawahar Lal Dutt (deceased) through LRs vs. Union of India and others, TA 57 of 2010* decided by the Chandigarh Regional Bench on 07.02.2014. It may be noted that in the said case the charge against the soldier was for overstaying sanctioned leave for only 3 days for which he was dismissed from service. The punishment was held to be disproportionate and the sentence of dismissal was converted to one of severe reprimand, and the individual was deemed to have remained in service till completion of

qualifying service for pension and discharged thereafter, and was held entitled for only service pension and his widow was eligible for family pension thereafter. The consideration of the four red-ink entries for awarding the penalty of dismissal which was extraneous to the SCM proceedings was held unwarranted in the said case. In the present case, however, we find that the applicant who had been in service for only 4 years and 207 days has remained absent for a period as long as 273 days and has not come up with any reasonable explanation for his absence without leave from service for such a long period. Therefore the present case is clearly distinguishable from the case of *Jawahar Lal Dutt (deceased) (supra)* relied on by the learned counsel for the applicant.

16. We also see no illegality in the order of the respondent No. 3 GOC-in-C, Central Command, dismissing the statutory petition dated 22.02.2009 on 15.07.2009 on the grounds that the petitioner has not denied overstaying leave for a period of 273 days, that the petitioner claims to have met with an accident on 22.07.2007. The petitioner had reported to Military Hospital Jabalpur, on 01.08.2007 a day prior to the expiry of his leave, but he was found fit by the Military Hospital Jabalpur, and was advised to report to his Unit. However, instead of reporting to his unit the petitioner took treatment in District Hospital, Raipur, for enteric fever as an outdoor patient Dr. KK Gajbhiye, Medical Officer who treated the petitioner was summoned by the Court as a defence witness. Dr KK Gajbhiye, stated that the petitioner did not disclose to him that he was a person subject to the Army Act who was over staying leave granted to him. Furthermore, Dr KK Gajbhiye categorically stated that the petitioner's condition was not so serious that he could not have rejoined his unit. Therefore, a finding was recorded by the GOC-in-C that there was no merit in the contentions of the applicant nor were there sufficient grounds for overstaying leave. It was also pointed out that the petitioner had appeared in the UPSC examination for the post of *Van Sanrakshak* between 06 Sep 2008 to 09 Sep 2008 which also revealed his intention of not returning to the service.

17. So far as the other charge Under Section 54(b) for losing by neglect clothing and equipment which was a property of the Government issued to him concerned, it was observed in the order that it was the responsibility of the petitioner to safeguard the property of the Government issued to him. Also, as we have noted from the perusal of the trial documents that the items which were eventually recovered from the kit of the petitioner and subtracted from the total items issued to the petitioner initially were found deficient. Hence, the applicant has been found guilty after due deliberation based on the evidence on record. Hence, the statutory appeal was dismissed on merit.

18. We see no illegality in the said order also. In view of the aforesaid, we see no good ground to grant any relief to the applicant. The findings of the Summary Court Martial dated 21.11.2008 passed by respondent No. 5 and the order dated 15.07.2009 (Annexure P7) dismissing the applicant's statutory petition passed by respondent No. 3 call for no interference. The application has no merit and it is **dismissed**. No order as to costs.

(Lt Gen NB Singh)
Member (A)

(Justice Amar Saran)
Member (J)

Sc / 09.01.2018