

ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A.(A) No.36 of 2015

Tuesday, the 14<sup>th</sup> day of June 2016

THE HON'BLE JUSTICE S.S. SATHEESACHANDRAN  
MEMBER (JUDICIAL)

AND

THE HON'BLE LTGEN K. SURENDRA NATH  
(MEMBER – ADMINISTRATIVE)

Ex.Sep (DMT) B.Gurumurthy Achari  
No.14407343, aged 35 years  
S/o Shri Venkata Subbiah  
Village & PO: Allinagaram  
Tehsil: Komarok-523 373  
Prakasam District, Andhra Pradesh.

... Applicant

By Legal Practitioner: Mrs. Tonifia Miranda

vs.

1. Union of India  
Rep. by its Secretary  
Ministry of Defence  
New Delhi-110 011.

2. Chief of the Army Staff  
Army Head Quarters  
Integrated Head Quarters  
DHQ Post, South Block  
New Delhi-110 011.

3. Additional Directorate General  
Discipline & Vigilance (DU-3)  
Adjutant General's Branch  
Integrated Headquarters of MOD  
DHQ Post, New Delhi-110 011.

4. Commandant Cum Chief Records Officer  
Art Center and Records, Nasik Road Camp  
Maharashtra.

5. Commanding Officer  
Head Quarter Battery  
174 Regiment, C/o 99 APO.

6. Principal Controller of Defence Accounts  
Office of PCDA Pensions, Draupathighat  
Allahabad, Uttar Pradesh-211 014.

... Respondents

By Mr. K.Ramanamurthy, CGSC

### **ORDER**

[(Order of the Tribunal made by  
Hon'ble Justice Lt Gen K. Surendra Nath, Member (Administrative)]

1. The applicant Ex Sep (DMT) B.Gurumurthy Achari in this O.A. requests for call for records of Summary Court Martial dated 07.09.2005 and to quash order imposing sentence of dismissal to him.
2. Briefly, the applicant states that he was enrolled in the Army in 27.04.1992 and put in service of 13 years 4 months and 11 days and that he had served in field areas such as Nagaland, Assam, Jammu and Kashmir, Punjab, Goa, Coimbatore, Amritsar as well as other peace areas with an unblemished record. While he served with the 4<sup>th</sup> respondent, he was granted part of annual leave of 36 days with effect from 27<sup>th</sup> December 2004 to 31<sup>st</sup> January 2005. The applicant would claim that due to ill-effects of tantric trick attacks, he was compelled to overstay leave by 177 days and during this period, his wife had delivered a baby which also forced him to overstay beyond the leave of absence granted to him. The applicant would state that on reporting to the Unit, he was tried by a Summary Court Martial on 7<sup>th</sup> September 2005 and that he was awarded punishment of dismissal from service.

He would further submit that he was not given adequate opportunity to prepare the defence. He would further state that he pleaded guilty hoping that he would be given lesser punishment, but he was given harsher punishment of dismissal from service and he would state, but for the punishment, he would have completed his term of engagement by serving 1 year and 5 months and earned pension. He has lost his pension and he is now doing the job of daily wage worker. He has to look after his wife and three children. Though he applied to the Chief of Army Staff under Army Act Section 164, the said application was denied and the punishment was confirmed. In view of the foregoing, he would plead that the Court Martial be set aside and he may be re-instated/granted service pension with consequential benefits.

3. The respondents in the reply statement have not disputed the fact of enrolment of the applicant in 1992 and the fact that the applicant was tried by the Summary Court Martial under Army Act Section 39 (b) and that he was awarded sentence of dismissal from service with effect from 07<sup>th</sup> September 2005. The respondents would further state that the applicant had 5 red ink entries under Army Act 39(b) and in the present instance, he was granted 36 days Part of Annual Leave from 27<sup>th</sup> December 2004 to 31<sup>st</sup> January 2005 while he was posted in counter-insurgency operational Area. Thereafter, on expiry of the said leave, he did not report to duty, but voluntarily rejoined for duty on 27 July 2005 after an absence of 177 days. The respondents further refute the claim of the applicant that all his service had entirely been in field

areas and would aver that he had served a major portion of his service in peace and modified field areas which include Amritsar, Coimbatore and Ferozepur stations apart from Sevok Road which is a modified field area. Due process of law was adopted in declaring the applicant as a deserter under Army Act Section 106 after 30 days of absence and on his reporting back to the Unit after 177 days of overstayal of leave, he was taken back on strength. The applicant was provided adequate opportunity to cross-examine the witnesses as well as to make statements in the Summary of Evidence. All the laid down procedures were followed in the conduct of Summary Court Martial. A proper medical test was conducted prior to proceeding with SCM, in which he was declared fit for trial. The applicant was given 96 hours time before the commencement of the Summary Court Martial to prepare his defence. Hence, the statement that he was not given adequate opportunity to prepare the defence is nothing but false. The Summary Court Martial commenced on 07<sup>th</sup> September 2005. The applicant pleaded guilty during arraignment and refused to make any statement or call for any witnesses during the proceedings on the plea of guilty. The applicant was explained about the proceedings and the sentence thereupon and also he was informed in writing about his right of petition against the sentence by the Commanding Officer. The applicant was a habitual offender to the utter disregard of the discipline expected from a trained soldier. His claim of mental illness and

memory loss is false as it is not substantiated by any medical documents. In view of the foregoing, the punishment and dismissal from service is just. The applicant had filed the application in terms of Army Act 164 against the findings and sentence of the Court Martial. The Chief of Army Staff after having examined the application dismissed the said application in a speaking order and confirmed the said punishment and therefore, the respondents would state that the O.A. is liable to be dismissed being devoid of any merit.

4. We heard the arguments of both sides. We have also thoroughly perused the documents placed before us.

5. The applicant earlier filed an application in O.A.No.50 of 2013 before this Tribunal which was disposed of by order dated 10.06.2013 directing the applicant to exhaust the remedy under Section 164 of the Army Act before the competent authority against the order of the SCM. The applicant filed an appeal and the 3<sup>rd</sup> respondent rejected the claim of the applicant vide their reply dated 06.08.2013 which is the order impeached by the applicant.

6. From the above pleadings, the following issues emerge for consideration:

- a. *Whether proper procedures were followed in the conduct of the Summary Court Martial and the applicant was given adequate opportunities to defend his case?*
- b. *Whether the punishment awarded to the applicant justified?*
- c. *What remedy, if any, is the applicant entitled to ?*

7. Point Nos. 1 and 2: From a perusal of the original records, it is seen that the applicant was enrolled in the Army on 27.04.1992 and he had served in peace, field and modified field areas. The fact that he was serving with the 4<sup>th</sup> respondent, that he was granted part of annual of 36 days with effect from 27<sup>th</sup> December 2004 to 31<sup>st</sup> January 2005, that he overstayed the said leave by 177 days and on reporting to the Unit, he was tried by a Summary Court Martial on 7<sup>th</sup> September 2005 and was found guilty and was awarded the punishment of dismissal from service, are not disputed by either side. From the records, it is seen that the applicant was posted in counter-insurgency area at the time of his absence. When the applicant did not report for duty after completion of leave, a Court of Inquiry was held under Army Act Section 106 to inquire into his absence beyond 30 days and the said Court of Inquiry declared the applicant as a deserter. We do not find any irregularity in declaring the applicant as a deserter. Thereafter, the applicant voluntarily reported to the Unit on 27<sup>th</sup> July 2005, after an absence of 177 days and was taken on strength. On 9<sup>th</sup> August 2005, he was arraigned before the Commanding Officer on the charge of over-staying leave under Army Act Section 39 (b), in accordance with Army Rule 22 (1). The Commanding Officer ordered evidence to be reduced to writing. Summary of Evidence was recorded from 13<sup>th</sup> August 2005 and three prosecution witnesses were examined. The witnesses deposed that the applicant was granted leave from 27<sup>th</sup> December 2004 to 31<sup>st</sup> January 2005, and that on completion of the leave, he failed to report to duty, till he voluntarily

rejoined on 27 July 2005. The applicant was given opportunity to cross-examine the witnesses, however, he declined to cross-examine the witnesses. At the end of recording of Evidence, he volunteered to make a statement in terms of Army Rule 23(3), in which he stated that he suffered from memory loss and left his house for a neighbouring village and that after a few days, he was tracked down by one of his cousins and submitted the above reasons for his long absence. Based on the Summary of Evidence, the applicant was issued charge-sheet. On 31 August 2005 for an offence under Armed Act Section 39(b), i.e., without sufficient cause, overstaying leave granted to him. He was also provided a copy of the Summary of Evidence. The SCM commenced on 07 September 2005. He was provided with a "Friend of the Accused" to assist him during the trial. During Court Martial proceedings, the applicant pleaded guilty to the charge and we note that the applicant was explained the meaning and import of "pleading guilty" and he maintained it even after he was explained the procedure in accordance with the Army Rule 115(2) and 2(A). The Summary of Evidence was read and explained to him. Thereafter, the applicant was given an opportunity to make a statement in reference to the Charge Sheet in mitigation of the punishment. His statement was, "I do not have anything to say". From the Field Conduct Sheet, we note that the applicant had been punished on five separate occasions and was awarded five (5) red ink entry punishments, on similar charges of overstaying leave without sufficient

cause under Army Act Section 39(b). In awarding the punishment of dismissal from service, the Commanding Officer in the Memorandum has stated that the individual is a habitual offender since his recruitment and apart from his first over-stayal leave from the Regimental Centre, other absences have occurred when the applicant was serving in field area/counter-insurgency operation area. He noted that the individual shied away from fulfilling his duties in field area/counter-insurgency areas and his discipline had consistently deteriorated after every punishment thus implying that he cannot be reformed. We find no infirmity/irregularity in the recording of Summary of Evidence and the proceedings of the SCM. We also observe that the applicant was given the charge sheet six clear days prior to the conduct of the Court Martial which is in consonance with the provisions of Army Rule 34 and was provided with "Friend of the Accused" to assist him in accordance with law. Therefore, the plea of the applicant that he was not given adequate time and opportunity to defend his case is not proved by facts and more so, since he had pleaded guilty to the charge.

8. Point No.3: From the Records, we observe that the applicant had a total service of 13 years 4 months and 11 days of service, of which 400 days was non-qualifying service, due to his absence from duty. In effect, the applicant had a total of 12 years, 3 months and 4 days of qualifying service. We further observe that the applicant was a habitual offender, having incurred five red ink entries earlier. The plea of the applicant in his statement at the Summary of Evidence that he was under the



influence of jaadu (magic) and lost his memory does not seem to be true and appears to be an after-thought. The counsel for the applicant in her plea for mitigation, had stated that since the applicant was on the verge of completing pensionable service, the punishment of dismissal was unduly harsh and he ought to have been permitted to complete his minimum qualifying service for pension. As already noted, the applicant had less than 12½ years of qualifying service and in effect had service to more than 2 years and 8 months of qualifying service to earn minimum pension. Considering the fact that the applicant had been a habitual offender and the fact that he had been absenting himself from duty especially when posted to operational/field service, we do not find merit in the plea of the learned counsel for the applicant that the applicant be re-instated in service and be permitted to continue service in order to complete minimum pensionable service.

9. However, taking note of the fact that the applicant had put in more than 12 years of qualifying service and considering the nature of offence committed by the applicant, there is a case for giving some relief to the applicant by converting the punishment of "dismissal from service" to that of "discharge from service." "Discharge from service" is less severe than "dismissal from service" as it would provide better prospects to the applicant in getting a civilian employment. However, the effect of the "dismissal from service" and "discharge from service" is one and the same as, in either case, he cannot continue in service. In view of the above facts and circumstances of the case, it would be in the interest of justice,

if the applicant's punishment of dismissal from service is converted into "discharge from service" and it would provide an opportunity to the applicant to rehabilitate in the society and to seek civilian employment.

9. In fine, the punishment awarded to the applicant by the SCM on 7<sup>th</sup> September 2005 is substituted to "discharge from service." Accordingly, the applicant is entitled to the benefit of gratuity and any other entitlements for the service rendered, if he is otherwise eligible. This order shall be complied with within three (3) months from the date of receipt of this order. In default, the applicant will be entitled to interest at 9% p.a. The O.A. is accordingly disposed off. No order as to costs.

Sd/  
LT GEN K. SURENDRA NATH  
MEMBER (ADMINISTRATIVE)

Sd/  
JUSTICE S.S.SATHEESACHANDRAN  
MEMBER (JUDICIAL)

14.06.2016  
(True copy)

**Member (J)** – Index : Yes/No

**Member (A)** – Index : Yes/No

VS

Internet : Yes/No

Internet : Yes/No

To:

1. The Secretary  
Ministry of Defence  
New Delhi-110 011.
2. Chief of the Army Staff  
Army Head Quarters  
Integrated Head Quarters  
DHQ Post, South Block  
New Delhi-110 011.
3. Additional Directorate General  
Discipline & Vigilance (DU-3)  
Adjutant General's Branch  
Integrated Headquarters of MOD  
DHQ Post, New Delhi-110 011.
4. Commandant Cum Chief Records Officer  
Art Center and Records, Nasik Road Camp  
Maharashtra.
5. Commanding Officer  
Head Quarter Battery  
174 Regiment  
C/o 99 APO.
6. Principal Controller of Defence Accounts  
Office of PCDA Pensions Draupathighat  
Allahabad, Uttar Pradesh-211 014.
7. Mr. Tonifia Miranda  
Counsel for applicant.
8. Mr. K. Ramanamoorthy, CGSC  
For respondents.
9. OIC, Legal Cell,  
DAKSHIN BHARAT AREA, Chennai.
11. Library, AFT, Chennai.

HON'BLE MR.JUSTICE S.S.SATHEESACHANDRAN  
MEMBER (JUDICIAL)  
AND  
HON'BLE LT GEN K. SURENDRA NATH  
MEMBER (ADMINISTRATIVE)

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Dt: 14.06.2016