

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI**

**T.A.No.203 of 2010**

THURSDAY, THE 13TH DAY OF DECEMBER, 2012/22ND AGRAHAYANA, 1934.

HON'BLE MR. JUSTICE SHRI KANT TRIPATHI, MEMBER (J)

HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

**APPLICANT:**

EX-SEPOY MANJUNATHA V.S. AGED ABOUT 28 YEARS,  
S/O SRI. SHIVANNAA, EX-MEG AND CENTRE,  
NOW RESIDING AT VILLAGE VEERAPURA , PO- THEETHA,  
TALUK-KORATAAGEERE, DIST.TUMKUR – PIN 572 129  
KARNATAKA STATE.

BY ADV. SRI. BHUPINDER SINGH

***versus***

**RESPONDENTS:**

1. UNION OF INDIA, REPRESENTED BY THE  
SECRETARY, MINISTRY OF DEFENCE,  
SOUTH BLOCK, DHQ PO, NEW DELHI-11.
2. THE CHIEF OF THE ARMY STAFF,  
COAS'S SECRETARIAT, ARMY HEAD QUARTERS  
SOUTH BLOCK, DHQ PO, NEW DELHI-11.
3. THE COMMANDANT AND OFFICER-IN-CHARGE,  
ABHILEKH KARYALAYA, MADRAS ENGINEERING GROUP,  
PIN 900 493, C/O 56, A.P.O.
4. THE EX- COMMANDING OFFICER,  
DEPOT BATTALION, MADRAS ENGINEERING GROUP,  
PIN 900 493, C/O 56, A.P.O.
5. THE COMMANDING OFFICER, 6 ENGINEERING REGIMENT,  
C/O 56, A.P.O.

6. EX ADJUTANT, DEPOT BATTALION,  
MADRAS ENGINEERING GROUP,  
PIN 900 493, C/O 56, A.P.O.

(The names appearing against respondents 4 and 6 are deleted from cause title as per order 4.2.2010 of the Hon'ble High Court of Kerala)

RESPONDENTS 1 TO 3 AND 5 BY CENTRAL GOVERNMENT COUNSEL  
SRI.K.M.JAMALUDHEEN.

### **ORDER**

LT. GEN. THOMAS MATHEW, MEMBER (A)

1. The petitioner had served in the Army for four years and was thereafter, dismissed by a summary Court Martial conducted by the respondent. Aggrieved by his dismissal, the applicant filed Writ Petition (W.P.No.2813 of 2010 (S)) before the Hon'ble High Court of Karnataka which has now been transferred to this Tribunal.

2. The petitioner, who enrolled in Madras Engineering Group (MEG), was serving with his unit 6 Engineer Regiment at Rajasthan when he was granted 15 days casual leave on 24.6.2002 to attend to his ailing mother. Due to the serious condition of his

mother he did not rejoin his unit in time and overstayed his leave. He had sent a telegram to his unit to that effect and later he tried to rejoin but was not permitted. On 27.10.2003, he surrendered to Korategera Police Station who handed him over to the MEG and Centre. On 28.1.2004, he was tried under Army Act, section 39 (b) and was found guilty of the charge, by the Summary Court Martial (SCM) and was sentenced to be dismissed from service.

3. It is submitted by the petitioner that since his mother was in critical condition and there was no one else to look after her, he overstayed the leave granted to him. Relevant Medical documents concerning his mother are attached as Annexure D. He had sent a telegram to his unit to extend his leave. Since there was no response from the unit, he stayed on at home till 19.10.2003. He rejoined his unit on 23.10.2003 but the Subedar Major sent him back since the unit was in a field area. His tickets for the journey to the unit and back have been produced as Annexure F1 and F2. On 27.10.2003, he voluntarily surrendered to the nearest Police Station who handed him over to the MEG and Centre at Bangalore. The petitioner has contended that the SCM was conducted without

following the relevant provisions of the Army Act and the Army Rules. Provision of Army Rule 22 was not complied with and no supporting document was produced by the respondent. He was also not provided adequate opportunity to defend himself. It is submitted by the petitioner that a serious error was committed by respondent since during the period of absence he had joined his unit on 23.10.2003 but the same period was not deducted from the total absence. His subsequent appeals were also dealt with by authority who was not competent to do so, hence those orders need to be set aside. Therefore, it was prayed that directions of dismissal contained in Annexures A and A1 be quashed and the petitioner be reinstated.

4. In their reply, the respondents have submitted that the petitioner was granted 15 days casual leave from 10.6.2002 to 24.6.2002 by his unit. He overstayed his leave and remained absent from 25.6.2002, therefore an Apprehension Roll was issued but the police authorities could not locate him. A court of inquiry was conducted and the petitioner was declared a deserter with effect from 25.6.2002. After 493 days he surrendered to the police

who handed him over to the MEG and Centre, Bangalore. He was tried by a SCM for an offence under the Army Act section 39(b) and sentenced to be dismissed from service. His statutory complaint filed on 2.1.2010 under the provisions of the Army Act, section 26 and Para 365 of Regulation for the Indian Army 1987, for illegal SCM proceedings, is under consideration of the competent authority. No cause of action has been accrued to the petitioner to file this Writ Petition before the Hon'ble High Court of Karnataka just 26 days after filing the complaint. Since he filed this petition immediately after submission of his statutory complaint, the same is unsustainable in law and liable to be dismissed.

5. The respondents have averred that 6 Engineer Regiment, the unit of the petitioner had conducted a court of inquiry under provisions of Army Act, Section 106 when he failed to rejoin the unit after leave. Subsequently he was declared a deserter with effect from 25.6.2002. Thereafter he was taken on the supernumerary strength of Depot Battalion of MEG and Centre. From the date of his desertion, the Adjutant of Depot Battalion, MEG and Centre becomes his Commanding Officer. When the petitioner surrendered after an absence of 493 days on 29.10.2003,

he was taken on strength by MEG and Centre and tried by SCM in terms of provisions under Note 1(c) to Army Act Section 38. The SCM was conducted as per existing rules and there was no illegality in the conduct of the SCM. It has been contended by respondents that the charge was heard in the presence of the accused and he was provided full liberty to cross-examine any witness against him and also to call witnesses to make statement in his defence. The petitioner had not raised any objection against the convening order, or composition of the Summary Court Martial. The respondents have therefore submitted that the allegations made by the petitioner are totally false and without substance.

6. The learned counsel for the petitioner drew the attention of the bench to an order issued in favour of an applicant by the Armed Forces Tribunal, Chennai Bench in a similar case in O.A.No.56 of 2011. It was submitted that the applicant in that case had overstayed leave and when he rejoined the unit, he was tried by a SCM and dismissed from service. The Hon'ble Bench had quashed the order of dismissal from service and notionally reinstated him till he completed 15 years of service. The learned counsel has prayed that since the case of the petitioner in this case is identical,

he too be reinstated after quashing the dismissal.

7. The learned counsel for the respondents have pointed out that in the instant case, the petitioner was deployed with his unit for 'Operation Parakram' in the year 2002. It was a national emergency and war like situation and the entire Indian Army was deployed in border areas consequent to the attack on the Parliament in December, 2001. From the operational area the unit of the petitioner had granted him 15 days leave in June, 2002. He failed to rejoin the unit and surrendered to the Police 493 days later in October, 2003. By this time 'Operation Parakram' was over and all units had returned to their peace station. The counsel for the respondent have submitted that the railway ticket produced by the applicant as Annexure F.1 and F.2 cannot be relied upon since they do not correspond to the submissions regarding travel made in the petition, further the ticket from New Delhi to Jammu is seen as cancelled. The petitioner had stated that he had reported to the unit on 23.10.2003, whereas the ticket at Annexure F2 shows that he left Delhi for Bangalore on 21.10.2003. His averment that he had reported to his unit and that the Subedar Major had sent him back, therefore cannot be believed. Further, it was submitted that the

application before the Chennai Bench which was decided in favour of the applicant has no similarity with this case. In O.A.56 of 2011, before the Chennai Bench, the period of absence at the first instance was only 18 days, further there was evidence that the applicant had tried number of times to rejoin his unit but was prevented from doing so. The incident happened in the year 2009 from a peace station whereas the instant case occurred during national emergency in 2002-2003.

8. The learned counsel for the respondents drew the attention of the Bench to the statement made by the petitioner during the Summary of Evidence, which reads as follows:-

*"I was granted C/L 15 days with effect from 10 JUN 02 to 24 JUN 02 from my Fd Coy, 6 Engr Regt. I had received intimation of my mother being seriously ill. She was to be operated upon, hence on my request leave was sanctioned. However on reaching home, the operation was delayed and I was told that two operations will have to be performed at an interval of one month. Since there was nobody else to look after my mother I stayed on. After approximately 3 to 4 months of absence I decided to join the Regt, however since the loc of the unit was not known being in OP. PARAKRAM. I did not know where to*



*report. because of being late for reporting in time, I was scared and stayed on at home. In the meantime on advise of my brother L/NK T.C.Visheswaraya of 17 Eng Regt, I surrendered to police authorities and was escorted by them to Depot Bn,MEG & Centre.*

*I regret having made the mistake of overstayal of leave and I promise I will not make such mistake again. "*

9. It has been argued by respondent, that the Medical documents produced as Annexure D in the petition shows that his mother had Appendicitis with Fibrosis during the period from 15.10.2003 to 27.10.2003, where as the petitioner went on leave almost 16 months earlier in June 2002. Further it was pointed out that in his voluntary statement he had referred to a brother L/NK.T.C.Visheswaraya serving with 17 Engineer Regiment. The petitioner has made contradictory statements regarding his mother's ailment and also about no one else being available to look after her. The petitioner went on leave in June 2002 and remained absent for 493 days and then surrendered to the police in October 2003 once the war like situation was over. The petitioner's claim of illness of his mother and his attempt to rejoin the unit in October 2003 has also

been questioned by the respondent. In his statement during summary of evidence the petitioner has made no mention of his having reported back to the unit in October 2003 and the Subedar Major sending him back. Hence it is submitted by the respondents that all the contentions of the petitioner in this petition lacks credibility and the same is liable to be dismissed.

10. We have heard both sides and perused the documents that have been produced. The petitioner had submitted a statutory complaint under Army Act Section 26 and para 265 of Regulations for the Indian Army 1987. This has been confirmed by the respondents and who have further admitted that the same is under consideration by the authorities. It appears that the petition should have been filed under Army Act section 164 read with para 365 of Regulation for the Indian Army 1987. Notwithstanding this aspect, more than six months have elapsed after submission of the complaint. Section 15 of the Armed Forces Tribunal Act 2007 states "the Tribunal shall exercise from the appointed day, all jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or incidental

thereto". The instant petition can therefore be considered and decided upon by this Tribunal.

11. It is an admitted fact that the petitioner overstayed his leave and he surrendered to the police 493 days later; he was tried by a Summary Court Martial and dismissed from service by the respondents. Therefore, the issues that needs to be resolved in this case are:-

(a) Whether the SCM was conducted in the prescribed manner or not.

(b) Whether the sentence of dismissal is commensurate with the gravity of the offence.

(c) Whether O.A.56 of 2011 decided upon by Armed Forces Tribunal Bench, Chennai would have a bearing on this case.

12. First of all we shall consider the events leading to the SCM and its conduct. It is seen from the documents that when the petitioner did not rejoin the unit from leave, an apprehension roll was issued and later a Court of Inquiry was ordered by the

Commanding Officer of the unit. The petitioner was declared a deserter and on his surrender to the police, he was handed over to the MEG and Centre at Bangalore on 29.10.2003, his unit being in a field area.

13. The Commandant MEG and Centre of the rank of a 'Brigadier' gave the order for attachment of the petitioner with Depot Battalion for initiating disciplinary action on 25.11.2003. The petitioner had been placed in the supernumerary strength of the Depot Battalion once he was declared a deserter as per existing orders. The hearing of the charge against the petitioner in terms of Army Rule 22 was carried out on 8.12.2003 by the Commanding Officer of the Depot Battalion in the presence of two independent witnesses. The accused (petitioner) declined to cross examine the prosecution witnesses and also did not call any defence witnesses. On the conclusion of the hearing, the Commanding Officer ordered the 'evidence to be reduced to writing by recording Summary of Evidence'.

14. Accordingly, the Summary of Evidence was recorded on 22.12.2003 wherein provisions of Army Rule 23 (1), 23(2), 23 (3)

and 23 (4) were complied with. Statement of two witnesses were taken in the presence of the petitioner and he was given an opportunity to cross examine them which he declined. The petitioner gave a voluntary statement to the officer recording the evidence which has been reproduced earlier in paragraph 8 of this order. On 21.1.2004, the Commanding Officer informed the petitioner that he would be tried by a Summary Court Martial (SCM) at 11.30 hours on 28.1.2004. Copies of the charges were handed over to him and he was asked regarding the facilities he needed for preparation of his defence as well as names of witnesses he desire to call. He was also offered the assistance of an officer to represent him during the trial.

15. We find that the SCM of the petitioner commenced at 11.30 hours on 28.1.2004. The accused (petitioner) pleaded 'guilty' before the court. Before recording the plea offered by the accused(petitioner), the court explained the meaning of the charges and the general effect of his plea. Provisions of Army Rule 52 (2) and 115(2) (a) was complied with. Proceeding ahead, the Summary of Evidence was read over to the accused (petitioner) who once again declined to call any witness or cross examine anyone.

Thereafter, the court sentenced the petitioner to be dismissed from service. The same day, the petitioner was explained his right to petition or appeal against his conviction by his Commanding Officer. His mother was also informed regarding the SCM of her son. The proceedings of the SCM was counter signed by the next Superior Officer, the Commandant (Brigadier) of the MEG and Centre on 20.3.2004. Copies of the SCM proceedings were handed over to the petitioner the same day which has been acknowledged by him. The petitioner's signatures are seen appended at all the relevant pages of the Summary of Evidence proceedings as well as the Summary Court Martial proceedings (IAFD-907). The summary of evidence was also read over and explained to the applicant after he pleaded guilty of the charge, which was marked as Ext. 'K'. We find that the disciplinary proceedings against the petitioner from the time of his overstaying of leave till his dismissal has been carried out by the Respondents as per the Army Act and Rules and no illegality has been committed by the authorities.

16. We shall now examine the offence committed by the petitioner as well as the sentence awarded by the SCM. On this issue the petitioner's first contention is the sickness of his mother

and also the fact that there was no one else to look after her. In support of his contention he has produced Annexure D which shows his mother's diagnosis and admission in hospital. The petitioner had gone on leave in June 2002, whereas the diagnosis of 'Appendicitis' and 'Fibrosis' is on 25 October 2003 and admission in hospital from 15<sup>th</sup> October 2003 to 27<sup>th</sup> October 2003. There is no logical explanation as to why he had to go on leave in June 2002 when his mother was diagnosed and admitted in hospital one year and four months later. In his petition, it has been submitted that he reported to his unit on 23.10.2003 when his mother was in hospital. There is no explanation as to why he overstayed his leave for more than a year and on the day of his mother's admission in hospital he travelled to Delhi. Further, he had stated in the Summary of Evidence that it was his brother, L/NK.T.C.Visheshwaraya of 17 Engineer Regiment who advised him to surrender to the police. Hence we find that he had a brother in the Army, who could also look after his mother. The petitioner's contentions regarding his mother's illness and there being no one else to look after her for which reason he remained absent for 493 days is thereby not convincing.

17. The petitioner has also contended that he had reported back to his unit, 6 Engineer Regiment on 23.10.2003 but the Subedar Major refused permission for him to remain there, gave him some money and sent him back. He has produced copies of six railway tickets as Annexures F1 and F2 to prove his submission. In Annexure F1, copies of four tickets have been produced. The lower two tickets are for journey from Bangalore to Delhi/Jammu Tawi on 14.10.2003/15.10.2003. In both, the status of reservation is shown as Wait List 424 and then at another place Wait List 124. The third ticket is a Reservation slip from Delhi to Jammu Tawi on 17.10.2003 by Train No.4645 where he is wait listed 85. The fourth ticket is a cancellation ticket for a journey by Train No.4645 from Delhi to Jammu Tawi on 16.10.2003. The Fifth ticket is from New Delhi to Bangalore for travel by Karnataka Express on 21.10.2003. The sixth ticket produced is again for a travel by Karnataka Express undertaken on 09.06.2002 to Bangalore when he had initially proceeded on 15 days leave from his unit to home station. Age of the petitioner in these tickets vary from 21 years to 23 to 24. These tickets only prove that the petitioner could have travelled from Bangalore to Delhi on 14/15.10.2003 and then returned from Delhi on 21.10.2003. Therefore he should have been at Bangalore or his



home town on 23.10.2003 and not his unit. It is pertinent to note that in his statement during the summary of evidence, the petitioner has not mentioned his rejoining the unit on 23.10.2003. Once again we find it difficult to believe petitioner's contention that he had reported to his unit on 23.10.2003 and that he was not permitted to rejoin the unit.

18. The entire Indian Army was deployed in a near war like situation from January 2002 to March 2003 in their operational locations along the borders. This was consequent to the attack on the Parliament in December 2001 by terrorists. Petitioner himself has admitted in his petition that he was 'posted to Rajasthan to take active part in Operation Parakram'. He was sent on 15 days leave from the operational area. The petitioner did not rejoin on completion of leave and remained absent for 493 days during this national emergency. It has been claimed that he had sent a telegram to his unit and has produced a receipt for an inland telegram at Annexure E. This receipt without any date or proper address cannot be relied upon to support the petitioner's contention. A fact which cannot be over looked is that, the MEG and Centre where he ultimately reported is not too far from his home station.

He could have gone and reported there, or any other military station during this period. Ultimately, the petitioner surrendered well after the war like situation had improved and when the Army had returned to its peace locations. Petitioner's conduct gives the impression that he was trying to avoid military duty when the entire Indian Army was deployed for a possible war. Despite all these, the respondents awarded only a 'dismissal' to a soldier who remained absent for 493 days during a very critical period for the security of the nation, as such the sentence cannot be said to be unreasonable and excessive.

19. We shall now consider the issue regarding similarity of this case with O.A.No.56 of 2011 decided in favour of the applicant by the Armed Forces Tribunal Bench, Chennai. In O.A.No.56 of 2011, the applicant's unit was at Delhi and he was granted 28 days leave in December, 2008. During the leave, a child was born to his wife and due to the child's ill health, he requested for extension of leave. This telegram was received by his unit and was replied to but after a lapse of time. The applicant did not receive any intimation and he overstayed his leave and then reported back to the unit. The applicant's identity card was confiscated during his interview by

Subedar Major and he was asked to report the 2<sup>nd</sup> respondent, the MEG and Centre, Bangalore. Accordingly the applicant reported to the MEG and Centre, where he was not allowed to join duty since he did not have his identity card. The applicant went back to his unit at Delhi where he stayed for 7 days and he was again sent away from there. He went back to his home station and he was arrested by the police and taken to MEG and Centre, Bangalore, where he was again not taken on strength. He was sent away, but he came back again after a month and finally was taken on strength and thereafter tried by a SCM and dismissed from service. The Hon'ble Tribunal Bench at Chennai felt that eventhough the act of indiscipline warrant severe punishment, the mitigating circumstances as found in the application deserved consideration by the Court and a lesser punishment. The application was therefore allowed in part.

20. In the instant case, we find that the petitioner overstayed leave when he was deployed with his unit for Operation Parakram in the year 2002/2003. The war like situation necessitated the deployment of the entire Army. The petitioner's claim that his mother was sick is not at all convincing. He had a

brother, who could also have helped if the need arose. His statement that he reported to his unit 6 days before he finally surrendered to the police has been proved false. In our view, the petitioner deliberately overstayed his leave to avoid service in an operational area during Operation Parakram when the nation was facing a war like situation. The Armed Forces are trained and prepared to encounter such a situation which rarely happens. Here we find the petitioner shirking his duty and staying at home while his colleagues toiled in the borders preparing for war. We have no hesitation to say that there is no similarity, None at all, between this case and O.A.No.56 of 2011 of Armed Forces Tribunal Bench, Chennai.

21. Considering our discussions in the earlier paragraphs, we are of the view that the SCM was conducted as per laid down rules and regulations and there is no infirmity in the SCM proceedings. We do not find the sentence of 'dismissal' disproportionate to the offence committed. On the contrary, the respondents have been lenient considering the overall security environment when the petitioner overstayed leave. We do not find anything to support the various allegation made by the petitioner regarding the Court of

Inquiry, Summary of Evidence or the Summary Court Martial proceedings. Competent authorities have exercised their powers as per existing orders. We are also clear that the instant case cannot be compared with the application which the Chennai Bench of Armed Forces Tribunal had allowed in part. Therefore, we are of the considered opinion that the respondents have acted as per the law and there is no requirement for us to interfere in this case.

22. In the result, the Transfer Application is dismissed.

23. No cost, issue free copies.

Sd/-

LT. GEN. THOMAS MATHEW,  
MEMBER (A)

Sd/-

JUSTICE SHRI KANT TRIPATHI,  
MEMBER (J)

**(True copy)**

SV.