2023 INSC 656

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 246 of 2017

EX SEPOY MADAN PRASAD .... APPELLANT

Versus

UNION OF INDIA AND OTHERS .... RESPONDENTS

J U D G E M E N T

HIMA KOHLI, J.

1. The present appeal is directed against the judgment and order dated 16th February, 2015, passed by the Armed Forces Tribunal[1], Regional Bench, Lucknow whereby the appeal[2] originally filed by the appellant as a Writ Petition before the High Court of Judicature at Allahabad[3] and subsequently transferred to the AFT, which was dismissed and the orders dated 24th August, 1999 and 4th October, 2001 passed by the respondents No. 5 and 2, respectively upholding the charge levelled against him under Section 39(b) of the Army Act, 1950[4] of overstaying the leave granted to him without sufficient cause, thereby dismissing him from service, were endorsed.

[1] For short "AFT"
[2] Transfer Application No. 1227 of 2010
[3] Writ Petition No. 3439 of 2003
[4] For short "The Act"

2. Briefly stated, the facts of the case are that the appellant was enrolled in the Army Service Corps[5] on 4th January, 1983 as a Mechanical Transport Driver. In the year 1998, he was initially granted leave for 39 days from 8th November, 1998 to 16th December, 1998. His request for extension of leave on compassionate grounds was allowed by the respondents and he was granted advance annual leave for 30 days in the year 1999, from 17th December, 1998 to 15th January, 1999. However, the appellant failed to rejoin duty. Claiming that his wife had fallen ill and he was arranging her medical treatment and looking after her, he overstayed the leave granted to him. The petitioner's telephonic request for extension of leave was rejected[6]. However, he did not report back immediately. On 15th February 1999, a Court of Inquiry was conducted under Section 106 of the Army Act to investigate the circumstances under which the appellant had overstayed leave. The Court opined that the appellant be declared a deserter with effect from 16th January, 1999.

3. The appellant finally surrendered after 108 days, on 3rd May, 1999 at HQ Wing, ASC Centre (South), Bangalore. The charge framed against him was heard by the Commanding Officer under Rule 22 of the Army Rules on 8th July, 1999. The appellant declined to cross examine any of the witnesses. After recording the Summary of Evidence, a Summary Court Martial[7] was conducted by the Commanding Officer, HQ Wing Depot Coy (MT), ASC Centre (South), Bangalore, where the appellant was attached. The respondent No. 5

[5] For short "ASC"
[6] Vide Telegram dt. 18.01.1999
[7] For short 'SCM'

constituted the Court to conduct SCM[8] which held the appellant guilty and awarded punishment of dismissal from service.

4. Aggrieved by the dismissal order, the appellant preferred an appeal under Section 164 of the Army Act before the respondent No. 2 that came to be dismissed *vide* order dated 4th October, 2001. The said orders were challenged by the appellant before the High Court of Judicature at Allahabad by filing a writ petition that was transferred to the AFT for decision and was finally dismissed by the impugned order.

5. Mr. Shiv Kant Pandey, learned counsel for the appellant seeks to assail the impugned order on the ground that the respondents have violated the provisions of Section 39(b) and Section 120 of the Act; that the SCM could not have awarded punishment of dismissal from service and the maximum punishment was of imprisonment for a period of one year which could have been awarded; that Section 72 which deals with alternative punishment awardable by the Court Martial and Section 73 that contemplates a combination of punishments as a sentence of a Court Martial, as set out in Section 71, is not applicable to a SCM but only to a General Court Martial or a District Court Martial and lastly, that Regulation 448 of the Defence Service Regulations, 1987[9] prescribes the scale of punishment awardable by SCM and in the table of punishments mentioned in the Schedule, absence without leave or overstaying leave features at serial No. 4 which entails a punishment of rigorous imprisonment for three months or less, whereas the appellant

[8] On 24th August, 1999
[9] For short "DSR"

has wrongly been imposed such a harsh punishment of dismissal from service. It was thus argued that the punishment of dismissal from service imposed on the appellant was disproportionate to the offence committed.

6. *Per contra*, Mr. R. Balasubramanian, learned Senior Advocate appearing for the respondents refuted the arguments advanced by the other side and submitted that the appellant remained a habitual defaulter which is apparent from the number of punishments imposed on him, as set out in para 4 of the impugned order. It was argued that contrary to the assertion of the appellant that he had reported to his Unit on 18th February, 1999 but was not allowed entry, as per the records, he did not report for duty on expiry of the extended leave; nor did he provide any documents to support his claim that his wife was so unwell and he was getting her treated. The allegation of the appellant that the procedure followed during the conduct of the Court of Enquiry or the SCM was contrary to the Rules, was strongly refuted by the learned senior counsel who stated that the Court of Enquiry was conducted under the orders of the respondent No. 4 and there was no procedure prescribed for the respondent No. 4 to have reported the matter directly to the respondent No. 3, as contended. Learned senior counsel concluded by submitting that the appellant having pleaded guilty of the charge during the course of the SCM, he cannot be permitted to renege subsequently and question the entire process.

7. We have heard the arguments advanced by learned counsel for the parties and perused the records. The contention of the appellant that he was granted leave for the period between 8th November, 1998 and 15th January, 1999 and his request for extension

of leave was unreasonably rejected by the respondents whereupon he had returned to the Unit on 8th February, 1999, thus, having overstayed leave only by 34 days, is not borne out from the records. The appellant was granted leave for 39 days from 8th November, 1998 to 16th December, 1998, and his request for extension was acceded to upto 15th January, 1999. When his request for further extension of leave was turned down by the respondents, the appellant ought to have reported for duty immediately on expiry of the extended leave but he failed to do so. No document was produced by the appellant to demonstrate that he had reported to the Unit on 18th February, 1999. In fact, even in his statement made during the Summary of Evidence, the appellant failed to mention that he had reported to the Unit on 18th February, 1999. Quite apparently, this was an after-thought. In fact, in his statement, the appellant had clearly admitted that he left his home and came to Bangalore where he surrendered on 3rd May, 1999, after remaining unauthorizedly absent for 108 days.

8. The appellant did not place any document on record by way of the treatment summary or medical certificate of his wife to demonstrate that she was seriously ill and required his presence for constant treatment. Instead, a bald statement was made by him during the Summary of Evidence to the effect that he had remained absent without leave on account of his wife's ill health. Moreover, the appellant failed to cross-examine any of the prosecution witnesses produced by the respondents during the Summary of Evidence conducted on 12th July, 1999. It is noteworthy that during the course of the SCM conducted on 24th August, 1999, after the charge sheet was read out and explained to the appellant

when he was asked whether he pleaded guilty or not to the charge preferred against him, he had categorically answered in the affirmative, by stating "*Guilty*". In other words, the appellant pleaded guilty to the charge levelled against him of having failed to rejoin duty on expiry of the leave granted to him from 8th November, 1998 to 15th January, 1999.

9. It is also relevant to note that this was not the first occasion when the appellant had remained absent without leave. He had made a habit of remaining absent without leave even on earlier occasions. A summary of the punishments for overstayal of leave imposed on the appellant under Sections 39 (b) and 63 of the Army Act, set out in the impugned judgment are extracted below :

Sl. No.	**Army Act/Section**	**Punishment Awarded**	**Date of Award**	**Period Absence**
a)	63	03 days pay fine	13.07.87	
b)	39 (a)	28 days RI in	12.5.90	20 days
c)	39(b)	28 days RI and 14 days detention In military custody	10.12.90	11 days
d)	39(b)	07 days RI in Military Custody	17.11.95	07 days
e)	39(b)	Severe Reprimand and 14 days pay fine	28.8.98	150 days
f)	39(b)	To be dismissed from the service.	24.8.99	108 days

10. It is apparent from the above table that the appellant was a habitual offender. There were four red ink entries and one black ink entry against him before the present incident

cited at serial number (f) above. Such gross indiscipline on the part of the appellant who was a member of the Armed Forces could not be countenanced. He remained out of line far too often for seeking condonation of his absence of leave, this time, for a prolonged period of 108 days which if accepted, would have sent a wrong signal to others in service. One must be mindful of the fact that discipline is the implicit hallmark of the Armed Forces and a non-negotiable condition of service.

11. As for the plea taken on behalf of the appellant that the charge under Section 39(b) is not maintainable or that the provisions of Section 120 provide for a maximum punishment of imprisonment for one year, the same is found to be misconceived. Section 39 falling under Chapter VI of the Act is extracted below for ready reference :

> "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 ordered 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, is 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 duly 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."

12. It is apparent from a bare reading of the aforesaid provision which deals with offences relating to absence without leave, that in case of an offence of overstaying leave without sufficient cause, on a conviction by a Court Martial, punishment by way of

imprisonment for a term that may extend to three years or such less punishment as contemplated in the Act can be imposed on the delinquent person. Section 71 that falls under Chapter VII of the Act deals with punishments that may be inflicted for offences on conviction by the Court Martial, listed in a sliding scale. The punishment of imprisonment finds mention at sub-clause (c) whereas that of dismissal from service is mentioned down below, in sub-clause (e). In other words, the punishment of dismissal from service on conviction by Court Martial has been treated as a lesser punishment *vis-à-vis* the punishment of imprisonment for any period below 14 years. That being the position, the appellant cannot be heard to state that the punishment inflicted on him is graver than the one contemplated under the Act.

13. In a case of proportionality of the punishment imposed for unauthorised absence in ***Union of India and Others v. Ex. No. 6492086 Sep/Ash Kulbeer Singh***[10]**,** this Court had turned down the contention made on behalf of the respondent therein that instead of subjecting him to a term of imprisonment under Section 39, he had been dismissed from the service, which was disproportionate to the offence, it was held thus:

> "6. We do not find any merit in the first submission. Section 39 of the Army Act, 1950 is comprised in Chapter VI which deals with "offences". Section 39 provides that on a conviction by the Court Martial for an offence involving absence without leave, a sentence of imprisonment which may extend up to three years may be imposed. Chapter VII which deals with "punishments" contains Section 71. Clause (e) of Section 71 specifically contemplates the punishment of dismissal from service on conviction by Court Martials. Hence, we find no merit in the first submission."

[10] (2019) 13 SCC 20

14. The provision of Section 120 of the Act relied on by learned counsel for the appellant is also inapplicable to the facts of the instant case. Section 120 deals with the power of Summary Court Martial. Sub-sections (1), (2) and (4) of Section 120 reads as follows :

> "120. **Powers of summary courts- martial.**
>
> (1) Subject to the provisions of sub- section (2), a summary court- martial may try any offence punishable under this Act.
>
> (2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court- martial or on active service a summary general court- martial for the trial of the alleged offender, an officer holding a summary court- martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court ."
>
> xxxx xxxx xxxx
>
> (4) A summary court- martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub- section (5)."

15. It is explicit from the aforesaid provision that the said section deals with the offences punishable under Section 34 i.e., offences in relation to the enemy and punishable with death, Section 37, i.e., Army mutiny and Section 69 i.e., Civil Offences. Sub-section (2) of Section 120 places an embargo on an officer holding a SCM to try any of the offences mentioned in Sections 34, 37 and 69 without any reference to a District Court Martial or a Summary General Court Martial for trial of the alleged offender. Read in the aforesaid context, sub-section (4) of Section 120 clearly states that a SCM can pass any sentence as contemplated under the Act except for a sentence of death or transportation or of imprisonment for a term that may exceed a period of one year for an officer of the rank of Lieutenant Colonel and above and a period of three months for an officer below that rank, as specified in sub-section (5). Quite clearly, the aforesaid provision is not applicable here

and cannot come to the aid of the appellant for insisting that a District Court Martial or Summary General Court Martial ought to have been convened in his case, when SCM can try any offence punishable under the Act.

16. Regulation 448 of the DSR cited by learned counsel contemplated the scale of punishments awardable by the SCM. The said Regulation states in so many words that these are general instructions issued for the guidance of officers holding SCM for passing a sentence and that nothing contained in the said Regulation would be construed as limiting the discretion of the Court to pass any legal sentence, even if there is good reason for doing so. Therefore, citing the table of punishments listed under the Schedule appended to Regulation 448 to urge that for absence without leave or for overstaying leave, the normal punishment being rigorous imprisonment for three years or less to be undergone in military custody, punishment of dismissal from service could not have been inflicted on the appellant by the SCM, is unacceptable. Sufficient discretion vests in the SCM to inflict a higher punishment in the given facts and circumstances of a case. Same is the position under Sections 72 and 73 of the Act. Both the sections leave it to the discretion of the Court Martial to award a particular punishment, depending on the nature and degree of the offence. There is no merit in the submission made by learned counsel for the appellant that the said provisions are not applicable to a SCM.

17. For the aforesaid reasons, we do not find any infirmity in the impugned judgment passed by the AFT. The appellant had been taking too many liberties during his service

and despite several punishments awarded to him earlier, ranging from imposition of fine to rigorous imprisonment, he did not mend his ways. This was his sixth infraction for the very same offence. Therefore, he did not deserve any leniency by infliction of a punishment lesser than that which has been awarded to him.

18. Accordingly, the present appeal is dismissed as meritless, while upholding the impugned judgment. The parties are left to bear their own costs.

…….J.

[HIMA KOHLI]

…….J.

[RAJESH BINDAL]

New Delhi;
July 28, 2023