

S. Ramachander Vs. the Union of India, Represented by Chief of Army and Others

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Court : Armed forces Tribunal AFT Regional Bench Chennai

Decided On : Aug-10-2011

Judge : A.C. Arumugaperumal Adityan (Member-Judicial) & the Honourable Lt Gen (Retd) S. Pattabhiraman (Member " Administrative)

Appeal No. : T.A.No.1 of 2011, (W.P.No.13621 of 2010 " High Court of Andhra Pradesh)

Appellant : S. Ramachander

Respondent : The Union of India, Represented by Chief of Army and Others

Judgement :

(ACA Adityan)

1. Challenging the order of the 3rd respondent in Summary Court Martial dated 08.03.2008, an order of dismissal from service, confirmed by the appellate authority/2nd Respondent on 08.11.2008, the applicant/appellant had approached the Honourable High Court of Andhra Pradesh by way of filing W.P.No.13621 of 2010, which has subsequently been transferred to this Tribunal under Section 34 of the Armed Forces Tribunal Act 2007, and re-numbered as T.A.No.1 of 2011.

2. Before the Summary Court Martial the applicant/appellant was charged under Section 39(b) of the Army Act for having absented himself after availing leave of

64 days in 2005 ie, from 31.01.2005 to 04.04.2005 and also 15 days Advance Annual Leave in the year 2006 ie., from 05.04.2005 to 19.04.2005, but he failed to rejoin duty on 20.04.2005, but had voluntarily surrendered before the competent authority only on 11.11.2005 at 5.30 hours. The total days of absence come to 205 days under the first charge.

2(a) The second charge against the applicant/appellant was under Section 39(a) of the Army Act ie., without sufficient cause he absented himself without leave from 01.03.2006 to 12.02.2008, but rejoined duty voluntarily on 12.02.2008 at 17.00 hours. The days of absence come to 714 days under the second charge.

2(b) Before the Summary Court Martial three witnesses were examined on the side of the prosecution.

2(c) P.W.1 - BHM SHT Devinder Kumar had identified the accused. According to P.W.1, the accused had surrendered voluntarily on 12.02.2008 at 17.00 hours with his Identification Card and that after his surrender, P.W.1 reported the matter to JA . P.W.1 was not cross-examined by the accused.

2(d) P.W.2 is JC-726633X Sub AS Falid. According to P.W.2, he was performing the duties of JA since February 2007 and that after overstaying the leave of 64 days of Annual Leave of 2005 from 31.01.2005 to 04.04.2005 and 15 days of Advance Annual Leave of 2006 from 05.04.2005 to 19.04.2005, the accused had surrendered voluntarily on 11.11.2005 and that the accused without any reasonable cause had absented himself since 01.03.2006 till he surrendered voluntarily on 12.02.2008. P.W.2 was also not cross-examined by the accused.

2(e) P.W.3 is Havildar Devendra Singh. According to P.W.3, the accused was declared as a deserter by 21 FAO in Court of Inquiry conducted on 16.07.2005. In other respects, P.W.3 corroborated the evidence of P.W.1 and P.W.2. According to P.W.3, an apprehension roll was initiated against the accused vide 461/F10/Depot dated 19th March 2006 (Exhibit-VII) and that the accused had voluntarily rejoined from AWL on 12.02.2008. The accused declined to cross-examine P.W.3 also. 3.Exhibits I to VII were marked before the Summary Court Martial.

4. Before the Summary Court Marital the accused/Applicant/ Appellant herein has also given his statement. In his statement the accused would practically admit the charges 1 and 2 and at the end, he would plead mercy in the following lines:-

I am the only bread winner in my family and I have to support my ailing wife and two kids. I dont have a support of my in-laws family as well as my own family. Keeping in view of the situation in which I have absented myself and over stayed, I humbly beg your Honour to pardon me and give me an opportunity to serve and support my family

He has also produced medical documents to show that his mother and his wife were suffering from illness at the relevant point of time. A certificate has also been produced to the effect that the Officer, who had recorded the Summary of Evidence, has complied with the Army Rules 23(1) to 23(4).

5. On the basis of the above said available documentary and oral evidences and also taking into consideration the previous punishments of 28 days of Rigorous Imprisonment for an offence under Section 39(b) of the Army Act on 31.05.1993, 28 days of RI for an offence under Section 39(b) of Army Act on 25.09.1998, 89 days of RI for an offence under Section 39(b) of Army Act on 18.03.1999 and 7 days pay fine for an offence under Section 63 r/w 48 of Army Act on 13.07.2004, the impugned order of dismissal from service was passed by the 3rd respondent, which was confirmed by the 2nd respondent/appellate authority on 08.11.2008, which are under challenge before this Tribunal.

6. We heard Ms.K.V.Vani, learned counsel appearing for the applicant and Mr.V.Balasubramanian, CGC, and the learned JAG Officer Captain Jitender Singh and considered their respective submissions, besides perusing the averments in the application/memorandum of appeal and the reply statement, under which the respondents would justify the impugned order.

7. Now the point for determination in this application is whether the impugned order dated 08.03.2008 of the 3rd respondent dated 08.03.2008 and the impugned order dated 08.11.2008 of the 2nd respondent, resulting the punishment of dismissal from service for an offence under Section 39(b) of the Army Act, are

liable to be set aside for the reasons stated in the memorandum of the application/appeal?

8. THE POINT:- Charges 1 and 2 levelled against the applicant under Section 39(b) and 39(a) are being proved by the evidence of P.W.1 to P.W.3 before the Summary Court Martial. The above said prosecution witnesses have not been cross-examined by the accused/applicant /appellant in spite of an opportunity being given to him. Per contra, the statement of the accused before the Summary Court Martial will go to show that he has practically admitted the charges 1 and 2 levelled against him and he has only pleaded mercy on the basis of the family circumstances viz., mothers illness and wifes illness. The learned counsel appearing for the applicant has produced a medical document which shows that the applicants wife got injury in her right heel on 16.03.2006 and was treated for the same in the Military Hospital. But, the second charge against the accused reads that the applicant had absented himself from duty as early as on 01.03.2006 itself. So, the reasoning alleged by the accused for his absence under the second charge is unbelievable. The only consideration to be in favour of the applicant is under Section 39 of the Army Act. The punishment given under Section 39 of the Army Act is 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. Admittedly the applicant/appellant was awarded the punishment of dismissal from service, which in our view is disproportionate to the offence committed by him under Army Act Section 39(a) and (b).

8(a) With regard to the quantum of punishment, We consider it relevant to refer to the dictum of the Honourable Apex Court in JT 2007(7) SC 485 (Sheel Kr. Roy Vs. Secretary M/O Defence and ors), wherein the appellant therein was tried under Section 39(a) and 71 of the Army Act for absenting himself from duty without leave. The short facts of the said case are that the appellant therein joined in the Army service on 18.08.1981 and after training in the Army as a Technician Electronic System, he passed the 54th Entrance Examination for Army Cadets College from Dehra Doon in the year 1986 and was to become a Commissioned Officer and before that could happen, he was posted to Ladakh. While posted at Leh, owing to high altitude of the place, he became psychiatric patient and

received his treatment in the Army Hospitals at Chandigarh, Allahabad, Jabalpur and Ambala. In the Medical Board proceedings held on 22.04.1987, he was put in medical category CEE. Thereafter, medical re-categorization was held on or about 21.10.1987 wherein his category was categorized as CEE. Thereafter, he went on leave as a part of annual leave, but he allegedly over stayed for about 96 days. He was summarily tried and awarded three days pay fine. He was again admitted to Medical Hospital, Ambala from 13.05.1990 to 7.6.1990 for medical recategorisation. Thereafter, he was granted casual leave for the period from 7.6.1990 to 18.06.1990 to visit his family, but he again overstayed his leave for 20 days. He was charged under Section 39(a) of the Army Act for absenting himself without leave. The Summary Court Martial tried and found him guilty and sentenced to undergo 6 months RI and also the punishment of dismissal from service. On appeal, the Chief of Army Staff, however, remitted three months RI maintaining the sentence of dismissal. After exhausting the remedies available to him under statute, he approached the High Court. Since the appellant could not get his relief before the High Court, the present appeal before the Honourable Apex Court was preferred by the accused/appellant therein. Relying on the judgment in *RanjitThakur Vs. Union of India and ors* reported in 1987(4) SCC 611, wherein the relevant observation quoted are as follows-

The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But, the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.

The Honourable Apex Court allowed the appeal with the following observation:-

The question, however, which arises for consideration is the relief which can be granted to the appellant. He has already undergone the sentence. He has not been working since 1991. He had also remained in Hospital for a long time. Although, thus, it is not possible for us to grant him all the prayers made in his writ petition before the High Court, we are of the opinion that keeping in view the peculiar facts and circumstances of this case, interest of justice would be met if it is directed that he should be deemed to have been discharged from 7.9.1991. He would, thus, be entitled to all benefits arising therefrom.

8(b) We are of the considered view that the above said dictum of the Honourable Apex Court will be applicable in all four corners to the present facts of the case. Even though, We are not in favour of passing an order of reinstatement, on the basis of the circumstances he has pleaded before the Summary Court Martial as a defence witness, We are of the view that the sentence alone is to be modified from dismissal to that of discharge. Point is answered accordingly.

9. In fine, the application/appeal is disposed of under the following terms_ While confirming the conviction part of the impugned orders, the sentence alone is ordered to be modified from dismissal to that of discharge. Consequently, the applicant/appellant will be entitled to all monetary benefits as per Rules. No costs. In other respects, the application/appeal is dismissed.

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