

(1997) 12 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 5407 of 1991

Thomas L.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 19-12-1997

Acts Referred:

Army Act, 1950 — Section 106, 164, 179, 38, 38(1)

Citation : (1998) 1 KLJ 138

Hon'ble Judges : AR. Lakshmanan, J

Bench : Single Bench

Advocate : A.K. Avirah, for the Appellant; K.L. Joseph (A.C.G.S.C.), for the Respondent

Final Decision : Dismissed

Judgement

AR. Lakshmanan, J.—Heard both sides. The above petition has been filed to quash Exts. P1, P3 and P4 and for a mandamus commanding the respondents to reinstate the petitioner in the Indian Army as a Signal man with the benefits of continuity in service, fixation of pay and disbursement of arrears of salary and for other reliefs. The petitioner was enrolled in the Indian Army on 9.11.1982 as a Signal Man, Signal Corps, Jabalpur. In the month of June 1983 his mother fell ill and on getting information of the same he has applied for leave in order to visit his mother in Kerala, Accordingly leave for a period of 30 days from 3.6.1983 to 2.7.1983 was granted and he left for Kerala. The petitioner's mother who underwent an operation for her brain, however died in the hospital following the operation and as a result of the immediate and unexpected death of the mother the petitioner became upset and in the said situation he had an attack of malarial fever. After getting cured of the illness the petitioner has reported for duty before the Signal Corps on 9.12.1983 and had explained the reasons for his delay to report for rejoining duty. He has also produced medical certificate to show that he was under treatment and that it was impossible for him to join duty on the expiry of the leave granted. However, the second respondent refused to

consider the explanation offered and instead of allowing him to rejoin duty the petitioner was court martialled on the charge he had deserted the army u/s 38 sub clause (1) of the Army Act 1950. According to the petitioner the charge of desertion levelled against him itself was factually unfounded in as much as he has never deserted the army but only overstayed the leave granted to him which is an offence punishable u/s 39 of the Army Act. However he was sentenced to imprisonment for one month and subsequently he was dismissed from the army with effect from 20.1.1984. He underwent the punishment of rigorous imprisonment for one month in civil prison. The copy of the order of the Summary Court Martial received by the father of the petitioner from the second respondent has been filed and marked as Ext.P1. It is the case of the petitioner that none of the formalities as contemplated in the relevant provisions in the Army Act and the Rules were followed or complied with by the authorities in the case of the petitioner before issuing Ext.P1 order. It is also his case that the charge of desertion against the petitioner was not heard in his presence as contemplated in Rule 22 of the Army Rules, and even at the stage of hearing of charge the petitioner has the full liberty to cross-examine any witness against him and in his defence and the mandatory provisions were not complied with and therefore the petitioner contended that non-compliance with the said mandatory provision vitiates the whole procedure against the petitioner culminated in the imposition of the penalty of rigorous imprisonment for one month and dismissal from service. Even during the summary court martial no witness was examined before the Commanding Officer in the presence of the petitioner and no statement of any witness or any other evidence on record was read over to the petitioner and obtained the signature thereof. The petitioner has not been given any opportunity to prepare his defence as contemplated in Rule 33 of the Army Rules.

2. Aggrieved by the order dated 2nd January, 1984 the petitioner submitted an appeal to the Central Government under Rule 164 of the Army Rules which is marked as Ext.P2. The Government of India, Ministry of Defence considered Ext.P2 and passed the orders only altering the sentence of dismissal from service into one of discharge from service with effect from the date of dismissal viz., 20.1.1989. The said order is marked as Ext.P3. Subsequently the Assistant Record Officer under the 2nd respondent served the petitioner with his letter No. P/14246913/T-3A dated 2.12.1989 intimating him that cause of his discharge has been remitted by the Government of India, Ministry of Defence. That letter is marked as Ext.P4. The petitioner's original discharge certificate was forwarded to him only as per letter No. P1 14246913/T-3A/WE/NER dated 6.4.1990 from the Senior Records Officer of Signal Records, Jabalpur. The true copy of the said letter has been filed as Ext.P5. Thus the petitioner contended that the orders passed by the respondents in Ext.P1, P3 and P4 are illegal and unsustainable and therefore this court should issued a writ of mandamus directing the respondents to reinstate the petitioner in the Indian army as a Signal Man with the benefits of continuity of service, fixation of pay and disbursement of the arrears of salary etc.

3. The original petition was resisted by the respondents 1 and 2. A detailed counter affidavit has been filed by the respondents narrating the entire background of the case. According to the respondents the petitioner who was supposed to come back to the duty on 2.7.1983 afternoon and failed to do so and thus overstayed with effect from 3.7.1983. On 7.7.1983 one Mr. Lawrence, father of Recruit Thomas L was informed about over staying leave of his son with effect from 3.7.1983 and simultaneously apprehension order was issued to civil police authorities. When the petitioner did not come back even after lapse of 30 days a court of enquiry was ordered on 3.8.1983 u/s 106 of the Army Act, 1950 which declared him as deserter with effect from 3.7.1983. No communication regarding the reason for absence from duty was made neither by the petitioner nor by his father. After absents from duty for 160 days the petitioner suddenly rejoined the unit on 9.12.1983 at 11.00 hours and he did not produce any medical certificate/documents suggesting reasons for his over stay from leave. As he has committed an offence under the Army Act, the petitioner was put on offence report where in charge was heard and consequently a summary of the evidence was ordered and he having found medically fit and having observed all rules he was court martialled on 20.1.1984 and rigorous imprisonment in civil prison and dismissed from service u/s 38 sub clause (1) of Army Act. It is specifically contended by the respondents that no intimation was received from the petitioner or from his father about the happenings at home namely serious illness, the death of the petitioner's mother and his falling sick/admission to the hospital in Kerala while he was on leave and thereafter and no documents to support his case were produced by the petitioner as has been stated by him in the original petition. The petitioner at no stage revealed that he had an attack of Malaria fever in the statement given in the summary of evidence. No documentary evidence to the effect that he was admitted in the Primary Health Centre, Kundara was produced during recording of summary evidence. However the petitioner has stated that he was taken to Military Hospital, Trivandrum and the doctor at the military hospital advised him to go back to his unit as his leave had expired. However the petitioner did not produce any documents to support his statement. His non-admission in the military hospital as per the statement reveals that his physical condition was alright and therefore the doctor at the said hospital advised him to undertake journey and rejoin the unit. The allegation of the petitioner that he was not duly heard by his Commanding Officer under Rule 22 was also denied. It is stated that summary of evidence was recorded as per Rule 23 and that the petitioner was offered all opportunities on perusal of summary evidence and the Commanding Officer decided to try the petitioner to Summary Court Martial and accordingly issued the charge sheet. The petitioner was also given liberty to cross-examine any witness against him and call any witness and make any statement in his defence. However the petitioner refused to do so. The petitioner was also given an opportunity to call any witness in his defence. But he did not make use of the opportunities given to him and has declined to cross-examine or to call any witness. Accordingly the summary of evidence was concluded. In fact the petitioner had expressed his intention of

leaving the service and rendered his willingness in writing that he would not submit the petition against the conviction by the summary court martial on 20.1.1984 when asked for to make any statement or any reference to the charge or any mitigation of punishment. Therefore it is contended by the respondents that the contention is not relevant and tenable.

4. I have carefully gone through the entire materials placed before me by way of affidavit and counter and also the other documents relied on by both parties. It is the case of the petitioner that no opportunity was given to him to examine his witness and cross-examine other witnesses. This has been specifically denied by the respondents in their counter affidavit. It is stated in para 15 of the counter affidavit. It is stated in para 15 of the counter affidavit that meticulously as contemplated in the Army Rules full opportunity was given to the petitioner but he has not availed of any of the opportunities given to him. The intention of the petitioner to leave the service can also be very well inferred from his behaviour in not informing the authorities about the reasons for his absence or the happenings in his home during the period he was absent from service. Hence it is alleged in the counter affidavit that sentence awarded to him was just and proper. The statement made in the counter affidavit that the petitioner was heard as contemplated in Rule 22 of the Army Rules and the summary of evidence as recorded as per Rule 23 and many other statements made in the counter affidavit by the respondents have not been denied at all by the petitioner by filing a reply affidavit. In fact the counter affidavit was served on the counsel for the petitioner as early as on 14.1.1992. In the absence of any statement, I am of the view that it has to be taken that the petitioner was given full and sufficient opportunity to call any witness in defence but he did not make use of the opportunities given to him and has been declined to cross-examine the witness and therefore the summary of evidence was concluded.

5. Learned counsel for the petitioner next contended that his dismissal u/s 38 sub clause (1) of the Army Act is illegal. According to him he was court martialled on the charge that he had deserted the army u/s 38 sub clause (1) of the Army Act 1950 and that the charge of desertion levelled against him itself was factually unfounded in as much as he has never deserted the army but only overstayed the leave granted to him which is an offence punishable u/s 39 of the Army Act. However he was sentenced to imprisonment for one month and subsequently he was dismissed from the army with effect from 20.1.1984 and also underwent the punishment of rigorous imprisonment for one month in civil prison.

6. My attention was drawn to sections 38 and 39 of the Army Act, which reads as follows:-

38. Desertion and aiding desertion

(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial,

if he commits the offence on active service or when under orders for active

service, he liable to suffer death or such less punishment as is in this Act mentioned; and

if he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(2) Any person subject to this Act who, knowingly harbours any such deserter shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(3) Any person subject to this Act who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

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.

7. Section 39 deals with absence without leave. A reading of Sections 38 and 39 reveal that desertion is a very serious offence of absence without leave or overstayal of leave. In this case it is alleged that the petitioner has committed an

offence u/s 38(1) of the Army Act that is to say "deserting from service" and therefore he had been awarded the punishment or rigorous imprisonment for one month in civil prison". According to the petitioner he applied leave for a period of 30 days from 3.6.1983 to 2.7.1983 which was granted and he left for Kerala. The petitioner's mother died after the operation and thereupon the petitioner had reported for duty only on 9.12.1983. Therefore he was court martialled on the charge that he had deserted the army u/s 38(1) of the Act. Learned counsel for the petitioner contended that the petitioner had not deserted from the army but only overstayed the leave granted to him which is an offence punishable u/s 39 of the Act. A reading of both the Sections reveal that desertion is a very serious offence of absence without leave or overstaying of leave. Though it is contended by the petitioner that what was done by him was only overstaying of leave granted to him which was due to the reasons beyond his control, the same cannot be accepted. Admittedly the petitioner was absent himself from duty for 160 days and did not produce any medical certificate or documents suggesting reasons for his overstaying from the service. It is further contended that desertion is entirely different from absence without leave or overstaying of leave. In case of absence without leave or overstaying of leave the offender intends to return but in the case of desertion the offender ordinarily intends never to return and that the intention must be inferred from the surrounding facts and circumstances of the case. Section 38, as already noticed deals with a very serious offence. The punishment contemplated for the said offence is death or such less imprisonment as in the Act mentioned and if any person commits the offence under any other circumstances is liable to suffer imprisonment for a term which may extend to seven years or such less punishment as in the Army Act mentioned. Section 39 of the Act deals with the punishment for overstaying of leave granted to any person. Any person on conviction by the court martial is liable to suffer imprisonment for a term which may extend to three years or such less punishment as in the Army Act mentioned. In this case though a punishment of death or imprisonment for a term which may extend to seven years is contemplated, the respondent has taken a lenient view and has awarded rigorous imprisonment for one month and also the dismissal from service. They have not imposed serious punishment or imposed punishment of seven years on the petitioner for the desertion committed by him u/s 38 sub-clause (1) of the Act. Under Ext.P3 order the Government of India in exercise of the powers conferred by Section 164 sub-clause (2) and 179 of the Army Act modified the sentence of dismissal from service and awarded the punishment of discharge from service with effect from the date of dismissal namely, 20.1.1984. The respondents have also forwarded the original discharge certificate to the petitioner by the letter dated 6.4.1990. As the petitioner belongs to a disciplined service, he is bound to follow strictly the provisions of the Army Act and the Rules made thereunder. He has not only deserted the army but has overstayed the leave granted to him which is an offence punishable under both the Sections 38 and 39 of the Act. Therefore no leniency could be shown to the persons like the petitioner who is expected to maintain strict discipline. In this case the overstaying for more than

160 days has not been denied by the petitioner. Considering the nature of the offence committed by the petitioner, the punishment imposed by the respondents have been modified by the Government of India by discharging him from service with effect from the date of dismissal. In my opinion both the respondents have shown sympathy for the petitioner and has awarded the punishment of one month imprisonment and dismissal from service which was later on modified by Central Government as that of discharge from service. At the time of hearing, learned counsel for the petitioner submitted that since the petitioner is very young some more leniency should be shown in regard to punishment with the alternative that he may be atleast be permitted to join in army service. Admittedly the petitioner has suffered imprisonment for one month and by the final order of the Government discharged from service. The petitioner is young and therefore as rightly pointed out by the counsel for respondents, since the order of punishment of dismissal is modified into that of discharge from service the petitioner may seek re-employment in any Government service and therefore it is open to him to apply for any post if he so desires. I am of the view that the request made by the petitioner can be sympathetically considered Now that the petitioner has been discharged from the service, it is open to the petitioner to apply for any post either in the Central Government or in any other department if he so desires and if any such application is made the same may be considered sympathetically and a chance may be given to the petitioner to reform himself and also to eke out his livelihood for the rest of his life. There are no merits in the Original Petition. Therefore the said Original Petition is dismissed subject to the above observation. No costs.