

(2019) 12 AFT CK 0037

In the Armed Forces Tribunal

Case No : Original Application No. 1287 Of 2019, Miscellaneous Application No. 2019 Of 2019

Vinod Kumar Singh

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 04-12-2019

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14
Army Act, 1950 — Section 164(2)
Army Rules, 1954 — Rule 107

Citation : (2019) 12 AFT CK 0037

Hon'ble Judges : Rajendra Menon, J;B.B.P. Sinha, Member (A)

Bench : Division Bench

Advocate : Rayasha Kumar, Neeraj

Final Decision : Dismissed

Judgement

M.A No. 2019 of 2019:

1. This miscellaneous application has been filed seeking condonation of 3,042 days' delay in invoking the jurisdiction of this Tribunal under Section 14

of the Armed Forces Tribunal Act, 2007. Even though the learned counsel for the respondents vehemently opposed the prayer made in the application

for condonation of delay, keeping in view the fact that the applicant is now claiming certain pensionary benefits after his dismissal has been converted

into discharge, we allow this application, condone the delay and proceed to decide the issue involved with regard to maintainability of the application at

the stage of admission.

M.A stands allowed, as above.

O.A No. 1287 of 2019:

As already indicated herein above, the applicant has invoked the jurisdiction of this Tribunal and the relief sought in Para 8 of the O.A reads as under:

(i) Direct the respondents to reinstate the applicant on the date of his dismissal i.e. 04.05.1991 to grant pension; and

(ii) Direct the respondents to grant consequential relief to the applicant.

2. The facts, in a nutshell, indicate that the applicant joined the Indian Army as a Signalmán on 27.03.1986 and was posted at various places as are

detailed in Paragraph 4.1 of the O.A. It is stated that sometime in December 1990, due to ailment of a family member at his native place, the applicant

applied for casual leave, which was initially refused, but after certain persuasion, he was granted casual leave from 17.12.2019 to 16.12.2019.

However, while on leave, due to certain circumstances beyond his control, the applicant sought extension of leave by five days. The leave was

extended and allowed as 20 days of advance annual leave for 1991. It is stated that the applicant did not avail of the extended leave, but returned back

to join duty. However, due to the condition of his ailing family member, the applicant had to take leave. The applicant submits that during the leave

period, the family member had expired and he could not join duty at the end of the leave period. He reported for duty on 06.03.1991 and informed

about the unfortunate demise in his family and explained why he was unable to rejoin duty on 29.01 .1991. Be that as it may, it is the case of the

applicant that due to compelling circumstances, he could not join duty in time and as a consequence thereof, Summary Court Martial (SCM)

proceedings were initiated against him and finally he was sentenced to suffer rigorous imprisonment for six months and dismissed from service, vide

Annexure A4 dated 04.05.1991. A petition was filed by the applicant before the Chief of Army Staff (COAS) on 09.01.1995 and when nothing was

heard, he filed W.P No. 23312 of 1995 before the Allahabad High Court and the prayer in the writ petition was to quash the dismissal order. It is

stated that the writ petition was admitted on 28.08.1995 and in the meanwhile, when the writ petition was pending, the petition filed before the COAS

was rejected on 26.02.1997 vide Annexure A7 and A8. The matter was kept pending before the Allahabad High Court for about ten years and finally

on 17.11.2006, vide Annexure A9, the writ petition filed before the Allahabad High Court was dismissed on account of want of territorial jurisdiction.

Review petition and special appeal filed before the High Court were also dismissed. Thereafter, a Special Leave Petition (SLP) was filed before the

Hon'ble Supreme Court challenging the orders of the Allahabad High Court on 15.02.2010, when the matter came up for consideration before the

Honble Supreme Court, it was informed on behalf of the Union of India that an order dated 05.02.2010 had been passed by the Lieutenant General,

General officer Commanding-in-Chief, Eastern Command, by which, in exercise of the powers conferred under Section 164(2) of the Army Act, the

dismissal of the applicant was converted into discharge with effect from the date his dismissal took effect. Accordingly, the SLP was disposed of vide

Annexure A1. The order passed by the Hon'ble Supreme Court reads as under:

Learned counsel appearing on behalf of the Union of India has brought to our notice an order dated .5Th February, 2010, passed by the

Lieutenant General, General Officer Commanding-in-Chief, Eastern Command, by which in exercise of the powers conferred under Section

164(2) of the Army Act, the 'dismissal' of the petitioner has been converted into 'discharge' with effect from the date his dismissal took effect.

In view of the aforesaid order passed by the Lieutenant General, no further directions are necessary in these petitions. The special leave

petitions are disposed of (emphasis supplied)

3. It is the grievance of the applicant that even though the order was passed converting the dismissal into discharge on 05.02.2010, the same was not

intimated to him. It was only after about five months that this order was communicated to the applicant vide Annexure A10 dated 06.07.2010.

Thereafter, the discharge book/certificate was also not provided to the applicant. Therefore, the applicant filed Civil Miscellaneous Writ Petition No.

56813 of 2010 before the Allahabad High Court praying for compensation for the illegal action taken against him and for issuance of the discharge

certificate. This petition was disposed of by the Allahabad High Court vide order dated 16.09.2010. Thereafter, according to the applicant, the

discharge book/certificate was provided to him after much delay. The applicant, in the meanwhile, filed Special Leave to Appeal (Civil) No. 8708 of

2012 before the Hon'ble Supreme Court, wherein he challenged the order passed by the Allahabad High Court on 08.11.2011 in C.M.W.P No. 63058

of 2011. The said petition was dismissed by the Hon'ble Supreme Court on

03.07.2012. The order passed in W.P No. 63058 of 2011 is also brought on record by way of an additional document.

4. Now, after initiating all these proceedings, the applicant has filed this O.A and learned counsel after taking us through all the facts that have come

on record, pointed out various illegalities in the action taken. It was submitted that the SCM was carried out in an unjust manner defying all principles

of natural justice. The record of certificate issued by the respondents with a copy of the SCM was not provided to the applicant and the respondents

on their own made a note that the applicant did not wish to submit any petition against his conviction. It was also argued that the statutory provisions

like Rule 107 of the Army Rules, 1954 were violated while holding the SCM. The punishment was harsh, the reason for absence and the bereavement

in the family were not taken note of by the competent authority and placing reliance on the judgments of the Hon'ble Supreme Court in (i) State of

Punjab v. Amar Singh Harika (Appeal (Civil) No. 938 of 1964 decided on 06.01.1966); (ii) Deokinandan Prasad v. State of Bihar and others (W.P

No.217 of 1968 decided on 04.05.1971); (iii) Ex Nk Sardar Singh v. Union of India and others (1991) 3 SCC 21;3 and Inder Pal Singh v. Union of

India and others (2003) 133 PLR 749) and this Tribunal in Nb Sub Amarjit Singh v. Union of India and others (O.A No. 336 of 2013 decided on

07.04.2014), it was vehemently argued by the learned counsel for the applicant that the order of discharge cannot be made effective from the original

date of dismissal from service i.e. 04.05.1991 but it has to be made effective from the date when it was converted into an order of discharge and

thereafter, the applicant should be granted pension treating him discharged from service from the date the punishment was modified by the competent

authority.

5. Learned counsel for the respondents vehemently opposed the aforesaid prayer and raised a preliminary objection with regard to the maintainability

of this O.A on the ground that once the applicant had filed a writ petition before the Allahabad High Court and the Supreme Court, based on which the

original order of dismissal was converted into discharge and when the second petition in the Allahabad High Court, particularly W.P No. 63058 of

2011 was dismissed, wherein the prayer made was for compensation to the applicant for the loss in terms of money, etc. this petition now is barred by

the principles of constructive res judicata and is not maintainable.

6. Having heard the learned counsel for the parties and bestowed our anxious consideration on the various submissions made, the question for

consideration at this stage before us is as to whether the O.A is maintainable. Admittedly, after the applicant was dismissed from service on

04.05.1991, the applicant invoked the jurisdiction of the Allahabad High Court by filing a writ petition challenging the order of dismissal. The writ

petition (C.M.W.P No. 23312 of 1995) came to be dismissed on 17.11.2006 vide Annexure A9. Even though the Allahabad High Court did not enter

into the merit of the impugned order of dismissal dated 04.05.1991 and the petition was dismissed on the ground of delay, thereafter the review

application and the special appeal were also dismissed. All these orders viz, the order passed in the writ petition on 17.11.2006 and the orders passed

in the review petition and the special appeal were challenged before the Hon'ble Supreme Court and, as already indicated herein above, the Hon'ble

Supreme Court disposed of the said SLP on 15.02.2010 taking note of the fact that the dismissal was converted into discharge by the General Officer

Commanding-in-Chief, Eastern Command on 05.02.2010.

7. Once the Hon'ble Supreme Court disposed of the SLP and when the applicant at that point of time did not raise any objection with regard to giving

only prospective effect to the discharge order, in our considered view, the applicant cannot claim any benefit now in this O.A making a prayer that he

should be deemed to be in service till the discharge order was passed, because in the order passed on 05.02.2010 (Annexure A2), it has been

specifically mentioned that in exercise of the powers conferred under Section 164(2) of the Army Act, the sentence of dismissal awarded was

remitted and the applicant should be deemed to have been discharged with effect from the date on which he was dismissed. If the applicant had any

grievance with regard to the discharge taking effect from the date of dismissal, then this grievance should have been agitated before the Hon'ble

Supreme Court when the SLP was disposed of. Even if the contention of the applicant that this order was never served on the applicant on 05.02.2010

is considered, once the Hon'ble Supreme Court accepted this order and disposed of the SLP, it was for the applicant to ventilate his grievance before

the Hon'ble Supreme Court. Having accepted this order, the matter cannot be re-

opened now before us in these proceedings. That apart, we find that even after the SLP was disposed of on 15.02.2010, the applicant seems to have filed another writ petition before the Allahabad High Court (C.M.W.P No. 56813 of 2010) and the same was disposed of by a Division Bench of the Allahabad High Court on 16.09.2010. In this petition, multiple prayers were made by the applicant. Even though he made a complaint with regard to non-issuance of the discharge book/certificate, one of the prayers made in the writ petition was that the applicant was kept under wrong imprisonment under the order of GCM and prayed for a compensation of Rs.1 Crore and taking note of the order of dismissal being converted into discharge, no relief was granted by the Allahabad High Court.

8. Be that as it may, after the discharge certificate was issued, the applicant again filed C.M.W.R No. 63058 of 2011 and the copy of the order available on record indicates that the prayer made before the High Court was to issue a direction in the nature of mandamus commanding the respondents to compensate the applicant in terms of money for the irreparable loss caused to him. The Allahabad High Court took note of the order passed by the Hon'ble Supreme Court and came to the conclusion that after the order passed by the Hon'ble Supreme Court, the writ petition praying for mandamus cannot be entertained. It was held that the applicant was seeking the relief which was available in the SLP and having not claimed it earlier, the writ petition was dismissed. Interestingly, this order passed on 08.11.2011 by the Allahabad High Court dismissing the writ petition was again challenged by the applicant before the Hon'ble Supreme Court in S.L.P (C) No. 8708 of 2012 and Annexure A14 is the order passed by the Hon'ble Supreme Court, whereby the SLP was dismissed. Now after all these writ petitions and SLPs, the applicant wants this Tribunal to grant the relief as prayed for. In our considered view, the prayer made now in this O.A is hit by the principle of constructive res judicata. All issues pertaining to dismissal of the applicant from service on 04.05.1991 and its subsequent modification by the competent authority into discharge with effect from 04.05.1991 were subject matters of consideration both before the Allahabad High Court and the Hon'ble Supreme Court. After the writ petition filed by the applicant C.M.W.P No. 63058 of 2011 was dismissed by the High Court, which was upheld by the Hon'ble Supreme Court while disposing of

the S.L.P, as indicated herein above on 03.07.2012, this O.A is not maintainable. If the applicant felt that apart from the damages claimed before the Allahabad High Court, the applicant was entitled to get the discharge to be effective from the date of his dismissal i.e. from 04.05.1991. All these prayers should have been made in the earlier proceedings initiated either before the Allahabad High Court or before the Hon'ble Supreme Court, as these reliefs could have been very well claimed by the applicant in those proceedings. Having failed to do so, now in these proceedings, these reliefs cannot be claimed and in our considered view, the principles of constructive res judicata prevent the applicant from doing so. Accordingly, there is much force and substance in the preliminary objection raised by the respondents with regard to the maintainability of the instant O.A. Accordingly, we are of the considered view that the instant O.A is not maintainable.

9. Before parting, we may take note of the fact that the learned counsel appearing for the applicant has placed reliance on various decisions with regard to the relief of pension to be granted and liberal approach to be adopted in such case, once we have held that the prayer made in this petition cannot be considered by us in view of the principle of constructive res judicata being applicable, these decisions will not help the applicant as we are, under law, prohibited from going into the merits of the matter.

10. The instant O.A thus stands dismissed. No order as to costs.