

UNION OF INDIA & ORS.

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v.

EX. NO.6492086A SEP/ASH KULBEER SINGH

(Civil Appeal No.3095 of 2017)

MARCH 11, 2019

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**[DR DHANANJAYA Y CHANDRACHUD AND  
HEMANT GUPTA, JJ.]**

*Army Act, 1950 – s.106 – Inquiry into absence without leave – Respondent-sepoy in the Indian Army failed to report to his new unit – He was declared to be a deserter – However, respondent reported after a lapse of 302 days – He was tried by a Summary Court Martial – Respondent pleaded guilty and he was dismissed from service – However, Armed Forces Tribunal came to conclusion that the finding arrived at by the Summary Court Martial was correct, but the sentence of dismissal was disproportionate – On appeal, held: On perusal of record it is evident that the respondent did not make any effort to apply for extension of his leave – Absence of 302 days from his duty by a member of the Armed Force was not condonable – Tribunal was in error in coming to the conclusion that the punishment which was imposed was harsh – The only basis for finding was that the respondent had put in twelve years of service – However, this was all more a reason why any responsible member of the Armed Forces should not have absented himself from service without permission – Judgment and order of the Armed Forces Tribunal set aside.*

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**The respondent was enrolled in the Indian Army as a Sepoy in the Army Service Corps. Having failed to report to his new Unit, he was declared as absent without leave. However, after a lapse of 302 days, the respondent reported to the ASC Centre (North) at Gaya. Thereafter, he was tried by a Summary Court Martial, wherein respondent pleaded guilty. The Summary Court Martial found the respondent guilty and sentenced him to dismissal from service. The respondent challenged his conviction and dismissal from service before the Armed Forces Tribunal. The Tribunal came to the conclusion that the finding arrived at by the Summary Court Martial was correct, but that the sentence**

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A of dismissal was disproportionate. Hence, present Special Leave Petition.

Allowing the appeal, the Court

B HELD: It is evident from the statement of the respondent, that he had admitted his absence for 302 days without leave. The statement contains a justification for the absence. From the record, it is evident that the respondent did not make any effort to apply for extension of his leave. Absence of 302 days from his duty by a member of the Armed Force could not be condoned. This Court is clearly of the view that the Armed Forces Tribunal was in error in coming to the conclusion that the punishment which was imposed was harsh. The only basis for the finding was that the respondent had put in twelve years of service. This was all the more a reason why any responsible member of the Armed Force should not have absented from service without permission. The Tribunal clearly misdirected itself in law in coming to the conclusion that the punishment of dismissal from service was harsh and disproportionate. [Paras 10 and 11] [1103-E-H]

C CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3095 of 2017

E From the Judgment and Order dated 21.08.2015 of the Armed Forces Tribunal, Regional Bench, Lucknow in O.A. No. 483 of 2012 / Order dated 06.01.2016 in M.A. No. 2351 of 2015 in O.A. No. 483 of 2012

F Ms. Madhavi Divan, ASG, Ms. Rukhmini Bobde, Shailender Saini, A.K. Sharma, Mukesh Kumar Maroria, Advs. for the Appellants.

Ms. Anindita Pujari, Ms. Aarti Krupa Kumar, Advs. for the Respondent.

The Judgment of the Court was delivered by

G **DR DHANANJAYA Y CHANDRACHUD, J.**

1. Admitted.

2. The respondent was enrolled in the Indian Army as a Sepoy in the Army Service Corps on 25 April 1996. On 11 November 2007, he

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was dispatched on a permanent posting to 874 ASC Batallion, which was deployed in Jammu and Kashmir. Having failed to report to his new Unit on 21 November 2007, he was declared as absent without leave on 22 November 2007. In terms of Section 106 of the Army Act 1950, a Court of Inquiry was held and the respondent was declared to be a deserter with effect from 22 November 2007. On 18 September 2008, after a lapse of 302 days, the respondent reported to the ASC Centre (North) at Gaya.

3. On 12 November 2008, he was tried by a Summary Court Martial on two counts: the first count was his unauthorized absence over a period of 302 days without leave; while the second count related to the loss of certain equipment and clothing. The respondent pleaded guilty to the two charges. In his statement before the Summary Court Martial, the respondent stated thus:

“14. I No 6492086-A Sep/ASH Kulbeer Singh of 874 AT Bn ASC att with HQ Wing, ASC Centre (North) was enrolled in the Army on 25 Apr 1996. I belong to Vill – Sampla Begampur, PO – Sarsawa, PS – Nakur, Teh – Nakur, Distt – Saharanpur, State – UP. My family consists of my father aged 55 yrs, mother aged 52 yrs, wife aged 29 yrs and son aged 3 yrs.

15. I was posted to 874 AT Bn ASC from 514 ASC Bn during Nov 2007. During my preparatory leave I went to my house. On reaching home, I cam to know that my uncle had taken possession of my old house. The matter was reported to Village Sarpanch & Tehsildar. Tehsildar investigated the matter & the house was recovered from my uncle and handed over to my father. Thereafter I reported at HQ Wing on 18 Sep 2008 afternoon after being absent for 302 days.

16. I was found to be deficient of clothing and equipment items for Rs.2265/- (Rupees two thousand two hundred sixty five only) as mentioned in the kit deficiency list att as Appx to IAFD-918 (Annexure – II produced by Prosecution Witness No.2).

17. The above statement has been read over to me in the language (Hindi). I understand better and sign it as correct in the presence of independent witness.”

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A           4. The Summary Court Martial found the respondent guilty and sentenced him to dismissal from service.

          5. The respondent submitted a petition under Section 164 of the Army Act on 17 May 2010, which was rejected by the GOC, Madhya Pradesh Area on 13 April 2011. The respondent challenged his conviction and dismissal from service before the Armed Forces Tribunal at its Regional Bench in Lucknow. By an order dated 21 August 2015, the Tribunal came to the conclusion that the finding arrived at by the Summary Court Martial was correct, but that the sentence of dismissal was disproportionate. The Tribunal noted that in his twelve years of service, the respondent had been punished in 2007 for having overstayed his leave by 140 days and this was his second infraction. In the view of the Tribunal, the punishment could have been modulated so as to allow the respondent to continue to serve the Army until he qualified for pension. The Tribunal found that the punishment which was awarded to the respondent was disproportionate having regard to his service of twelve years and, accordingly, issued the following directions:

          “20. Accordingly, the O.A. is only partly allowed. While affirming the Summary Court Martial proceedings and the Attachment Order to be a valid, we direct that the punishment of dismissal be hereby quashed. The petitioner will be deemed to be notionally in service w.e.f. 12.11.2008 till he attains the service which entitles him to receive pension and thereafter he shall be granted pension with all consequential benefits. We clarify that the petitioner shall not be paid salary during the period of notional service. No order as to costs.”

F           6. Assailing the aforesaid directions, the Union of India is in appeal.

          7. Ms. Madhavi Divan, learned Additional Solicitor General along with Ms. Rukhmini Bobde, learned counsel appearing for the appellants, submitted that the respondent had duly admitted the charge of misconduct. The Tribunal specifically found no reason to interfere with the finding of the Summary Court Martial. Once this was duly established, there was no justification for the Tribunal to hold that the punishment was disproportionate, considering the fact that there was an unauthorized absence of 302 days by a member of the Armed Force.

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8. Two submissions were urged on behalf of the respondent. Firstly, it was submitted that Section 39 of the Army Act, 1950 provides that on conviction by a Court Martial, a person who has committed an offence *inter alia* of overstaying the leave granted shall be liable to suffer imprisonment for a term which may extend to three years or such lesser punishment as may be mentioned in the Act. In the present case, it was, hence, urged that instead of subjecting the respondent to a term of imprisonment under Section 39, he was dismissed from service. Secondly, it was submitted that if the statement of the respondent is duly construed, it would be incorrect to hold that he had admitted the charge of misconduct.

9. 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 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. Insofar as the second submission is concerned, it is evident from the statement, which was extracted earlier, that the respondent had admitted his absence for 302 days without leave. The statement contains a justification for the absence. From the record, it is evident that the respondent did not make any effort to apply for extension of his leave. Absence of 302 days from his duty by a member of the Armed Force could not be condoned. We are clearly of the view that the Armed Forces Tribunal was in error in coming to the conclusion that the punishment which was imposed was harsh. The only basis for the finding was that the respondent had put in twelve years of service. This was all the more a reason why any responsible member of the Armed Force should not have absented from service without permission.

11. The Tribunal clearly misdirected itself in law in coming to the conclusion that the punishment of dismissal from service was harsh and disproportionate.

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A            12. We accordingly allow the appeal and set aside the impugned judgment and order of the Armed Forces Tribunal dated 21 August 2015. In consequence, OA 483 of 2012 filed by the respondent shall stand dismissed. However, there shall be no order as to costs.

B            Ankit Gyan

Appeal allowed.