A UNION OF INDIA AND ORS.

v.

EX LAC NALLAM SHIVA

B (Criminal Appeal No. 967 of 2017)

AUGUST 10, 2017

[DIPAK MISRA, AMITAVA ROY, A. M. KHANWILKAR, JJ.]

C *Service Law – Dismissal from service – On ground of overstaying leave period – Respondent while serving in Air force, overstayed the casual leave granted to him without informing his superiors – District Court Martial sentenced him to undergo rigorous imprisonment, dismissal from service and reduction in rank – Respondent served the sentence of imprisonment – Tribunal took* D *note of regn. 754(C) and held that punishment awarded to the respondent was excessive and disproportionate and directed reinstatement with period between the date of dismissal to date of rejoining to be treated as non-qualifying service – Held: Respondent overstayed for period of around 1.5 years beyond the casual leave* E *period without informing his seniors or the nearest military station which is indubitably against the requirement of discipline – Punishment of dismissal was not vindictive, unduly harsh or disproportionate to offence committed by the respondent – Tribunal misdirected itself in invoking regn. 754(C) and exceeded its jurisdiction in overturning the order of punishment – Air Force Act,* F *1950 – Defence Service Regulations for Armed Forces – regn. 754(C).*

Partly allowing the appeal, the Court

HELD: 1. A priori, reliance placed by the Tribunal on G **Regulation 754(C) is misplaced in the fact situation of the present case. For, it was not a case of overstaying for couple of days or a technical and trivial offence committed by the respondent. He overstayed beyond the casual leave period for around 1½ years without informing either his superiors or the nearest military station as to his whereabouts. [Para 8] [536-H; 537-A]**

H

2. In the fact situation of the present case, it is not possible to hold that the punishment of dismissal was vindictive, unduly harsh or disproportionate to the offence committed by the respondent and especially after the Tribunal has positively concluded that failure of the respondent to communicate either to his unit or to the nearest military station for around 1 ½ years was uncondondable. Ordinarily, the Tribunal ought not to interfere with the order of punishment except in appropriate cases only after recording a finding that the punishment imposed is grossly or shockingly disproportionate after examining all the relevant factors including the nature of charges proved against the delinquent officer. [Para 9] [537-B-C]

3. The Tribunal misdirected itself in invoking Regulation 754(C) and to reckon the mitigating circumstance of respondent having already undergone punishment of sentence for the stated offence. Thus, the Tribunal exceeded its jurisdiction in overturning the order of punishment imposed by the disciplinary authority and instead directing reinstatement of the respondent in service and treating the period between the date of dismissal of the respondent and the date of his rejoining service as non-qualifying service, so as to give him a chance of rehabilitation in service. [Para 10] [537-D-E]

4. However, the prayer of the respondent is accepted to modify the order of dismissal from service to one discharge from service simplicitor. [Para 12] [538-B]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 967 of 2017.

From the Judgment and Order dated 09.12.2016 in O. A. No.77 of 2015 and Order dated 17.03.2017 in M. A. No.43 of 2017 in O. A. No.77 of 2015 of the Armed Forces Tribunal, Regional Bench, Chennai.

R. Balasubramanian, Ms.Aarti Sharma, Mukul Singh, Prakash Gautam, Hemant Arya, Mukesh Kumar Maroria, Advs. for the Appellants.

Rabin Majumder, Adv. for the Respondent.

A The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. The respondent was enrolled in the Indian Air Force on 28th March, 2006 and in due course of time was promoted to the rank of Corporal. While serving in that capacity, he overstayed the casual leave granted to him from 20th October, 2012 till
B 4th November, 2012, until 11th April, 2014, allegedly due to his ill-health and family problems. Resultantly, he was tried before the District Court Martial (DCM) on 11th November, 2014. He was served with the charge-sheet which reads thus:-

C *"CHARGE SHEET*

The accused 916856-L Corporal Nallam Shiva Comn. Tech of Master Control Centre, Air Force Station Basantnagar, an airman of the regular Air Force, is charged with :-

D *First Charge: Section 38 (1) AF Act, 1950*

DESERTING THE SERVICE
In that he,

At Master Control Centre, Air Force Station Basantnagar, New Delhi, having been granted leave of absence from 20 Oct 12
E *to 04 Nov 12, did not rejoin his unit on expiry of the said leave, with the intention at the time of leaving or formed thereafter, of remaining permanently absent and remained absent until he surrendered himself to 901799-B Cpl Deepak Tiwari IAF/P of said Air Force Station on 11 Apr 2014.*

F *Second charge: Section 39(b)AF Act, 1950 (Alternative to the first charge)*

WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM
In that he,

G *At Master Control Centre, Air Force Station Basantnagar, New Delhi, having been granted leave of absence from 20 Oct 12 to 04 Nov 12, overstayed the said leave without sufficient cause, until he surrendered himself to 901799-B Cpl Deepak Tiwari IAF/P of the said Air Force Station on 11 Apr 14.*

H

Place: New Delhi A
Date: 21st October, 2014

Sd/-
(MS Shekhawat)
Air Commodore
Air Officer Commanding
AF Stn Basant Nagar" B

2. The said authority, after giving opportunity to the respondent, on 11th November 2014 found him guilty of the second charge only and sentenced him to undergo punishment of four months' rigorous C imprisonment, dismissal from service and reduction in rank. However, the Air Officer Commanding-in-Chief, WAC, IAF reduced the period of rigorous imprisonment from four months to three months. The respondent was kept in Air Force custody from 11th November, 2014 to 10th February, 2015 and was dismissed from service on 10th February, 2015. The respondent submitted a petition under Section 161(2) of the Air Force D Act, 1950 before the Chief of the Air Staff seeking for his reinstatement which, however, was rejected vide order dated 12th February, 2015. The respondent then filed an original application before the Armed Forces Tribunal, Regional Bench at Chennai, Circuit Bench at Hyderabad, being O.A. No.77 of 2015. The same was partly allowed vide the impugned E judgment. In that, the Tribunal rejected the plea of the respondent that the disciplinary action suffered from legal infirmity and want of fairness of opportunity. After rejecting that contention, however, the Tribunal proceeded to hold that the second charge was duly proved against the respondent. But the Tribunal was impressed by the plea taken by the respondent that he overstayed because of compelling circumstances due F to matrimonial dispute and illness of his father resulting in mental disturbances and more particularly, because it was the first offence of the respondent. The Tribunal took note of Regulation 754(C) of the Defence Service Regulations for Air Force and came to hold that the punishment awarded to the respondent was excessive and G disproportionate. For, it was his first offence and that the respondent deserved a chance of being rehabilitated in service. The Tribunal was, therefore, pleased to set aside the order of punishment of dismissal from service and, instead, directed the appellants to reinstate the respondent in service. The Tribunal observed thus:-

H

A *"17. In the instant case, admittedly, this is the first offence by the applicant and otherwise the applicant's conduct has been exemplary. Further, there are some mitigating circumstances, especially with regard to his family problems, including the ill health of his father. In view of the foregoing, we find there is merit in remitting part of the sentence awarded to the applicant.*
B *The fact is that the applicant had already undergone punishment of three months Rigorous Imprisonment in Air Force custody and reduction in the rank of LAC is a pre-requisite for undergoing such punishment. We are of the view that the applicant deserves a chance to be rehabilitated in*
C *service and, therefore, we set aside the punishment of "To be dismissed from the service" alone, and other punishments shall stand. The Respondents are directed to reinstate the applicant in service within two months from the date of receipt of a copy of this order. The period between the date of dismissal*
D *of the applicant i.e. 10.2.2015 to the date of his rejoining service will be treated as non-qualifying service.*

18. The appeal is ordered accordingly. No order as to costs."

3. Shri R. Balasubramanian, learned counsel appearing for the
E appellants, would contend that the Tribunal has exceeded its jurisdiction in interfering with the order of punishment, which is the prerogative of the disciplinary authority. He submits that the fact that the respondent committed his first offence per se cannot be the basis to conclude that the punishment of dismissal awarded by the disciplinary authority in the fact situation of the present case was disproportionate or excessive.
F The justification given by the respondent for committing the offence of overstaying the casual leave period for almost around 1 ½ years, without informing any competent authority about the cause of such overstay, cannot be viewed lightly considering the requirements of the disciplined Force. Further, Regulation 754(C) of the Defence Service Regulations
G for Armed Forces adverted to by the Tribunal cannot be pressed into service in the fact situation of the present case. He submits that the Tribunal has misguided itself in interfering with the order of punishment and, more so, directing reinstatement of the respondent in service.

4. Learned counsel, Mr. Rabin Majumder, appearing for the
H respondent, on the other hand, submits that the Tribunal justly invoked

Regulation 754(C) as it was a case of first offence committed by the respondent, for which reason the order of punishment of dismissal was unduly harsh and disproportionate as to shock the conscience of any prudent person. He submits that the compelling circumstances in which the respondent overstayed the casual leave period has been rightly taken into account by the Tribunal as mitigating circumstances, besides the fact that it was a case of first offence committed by the respondent. He submits that even though the disciplinary authority has the prerogative to choose the quantum of punishment, but while doing so it has to take into account the totality of the circumstances including the circumstances which drove the respondent to overstay the casual leave period. It was an unintentional act of the respondent and, more so, he had already suffered the sentence period for the stated offence. Therefore, he submits that the appeal be dismissed.

5. After cogitating over the submissions made by both the sides and perusing the record, it is noticed that the charge against the respondent of overstaying the casual leave period without communicating either to his superiors or to the nearest military station, has been duly proved against the respondent. Although the respondent asserted that he had suffered health problem, including mental stress due to matrimonial dispute, he did not choose to go to a Military Hospital. Being a member of the Armed Forces such indiscipline cannot be countenanced. Even the Tribunal has rejected the defence of the respondent in this behalf, by observing thus:-

> *"15. From the above pleadings, it appears that there are some mitigating circumstances for the long absence of the applicant though his absence and his failure to communicate either to his unit or to the nearest Military Station are not condonable....."*
>
> (emphasis supplied)

6. The Tribunal, nevertheless, was swayed by the justification given by the respondent (which, according to the respondent, prevented him from reporting to duty or for that matter, intimating either to his superiors or to the nearest military station), singularly because it was his first offence. The Tribunal relied on Regulation 754(C) and concluded that since the respondent's conduct was otherwise exemplary and as it

was his first offence and that he had already undergone three months rigorous imprisonment for the stated offence, the order of punishment of dismissal from service was disproportionate and unduly harsh.

7. Regulation 754(C) of the Defence Service Regulations for Armed Forces reads thus:-

> *"Sentences must necessarily vary according to the requirements of discipline but in ordinary circumstances, and for a first offence, a sentence should be light."*

Indeed, the respondent may have been charged for the first time for having committed offence of overstaying the casual leave period. The respondent may also have offered explanation about the matrimonial dispute, other family issues and his ill-health, as the cause for not reporting to duty. From the proved facts, however, it is evident that the respondent overstayed for a period of around 1½ years beyond the casual leave period which is indubitably against the requirements of discipline. In that, he was granted casual leave from 20th October, 2012 to 4th November, 2012, but he surrendered only on 11th April, 2014. He did not bother to intimate his whereabouts either to his superiors or to the nearest military station during the intervening period stretched upto around 1½ years. If he was suffering from any illness personally or for that matter if his father suffered a paralytic attack, he ought to have gone to the Military Hospital for treatment. However, he did not choose to go to the Military Hospital but to a quack. This is a serious misconduct and cannot be countenanced in the disciplined force where the respondent was serving. From the established facts it would not warrant a lighter view, much less to direct reinstatement of the respondent, as has been done by the Tribunal. That would send a wrong signal and impact the discipline of the Armed Forces. The respondent had just put in around six years of service when he ventured into committing the stated offence. The fact that he has already undergone punishment of sentence period for the offence of desertion also can be of no avail so as to interdict the decision of the disciplinary authority to dismiss the respondent from service.

8. A priori, reliance placed by the Tribunal on Regulation 754(C) is misplaced in the fact situation of the present case. For, it was not a case of overstaying for couple of days or a technical and trivial offence

committed by the respondent. He overstayed beyond the casual leave period for around 1½ years without informing either his superiors or the nearest military station as to his whereabouts. A

9. To put it differently, in the fact situation of the present case, it is not possible to hold that the punishment of dismissal was vindictive, unduly harsh or disproportionate to the offence committed by the respondent and especially after the Tribunal has positively concluded that failure of the respondent to communicate either to his unit or to the nearest military station for around 1½ years was uncondonable. Ordinarily, the Tribunal ought not to interfere with the order of punishment except in appropriate cases only after recording a finding that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of charges proved against the delinquent officer. B C

10. We have no hesitation in concluding that the Tribunal misdirected itself in invoking Regulation 754(C) and to reckon the mitigating circumstance such as respondent has already undergone punishment of sentence for the stated offence. Thus, the Tribunal exceeded its jurisdiction in overturning the order of punishment imposed by the disciplinary authority and instead directing reinstatement of the respondent in service and treating the period between the date of dismissal of the respondent and the date of his rejoining service as non-qualifying service, so as to give him a chance of rehabilitation in service. The judgment under appeal, therefore, deserves to be set aside. D E

11. Counsel for the respondent made a fervent alternative submission that even if the direction given by the Tribunal to reinstate the respondent in service was to be set aside, this Court may take a sympathetic view as the respondent has already suffered the sentence period for the stated offence. He submitted that this Court may modify the order of dismissal from service to one of discharge from service, so that the respondent may not be disqualified from applying for employment elsewhere, considering that he is young and has to support his family. The counsel for the appellants, in all fairness, submits that so long as the respondent is not ordered to be reinstated in the Indian Air Force Service and there is no financial implication for the department, he may leave it to the discretion of this Court to pass orders as may be deemed appropriate. F G

H

A 12. As a result, even though we are inclined to set aside the order of reinstatement of the respondent in service and to treat the period between the date of dismissal of the respondent and the date of his rejoining service as non-qualifying service, to do complete justice we accept the prayer of the respondent to modify the order of dismissal from service to one of discharge from service simplicitor.

B

13. The appeal partly succeeds in the above terms with no order as to costs.

Ankit Gyan Appeal partly allowed..