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RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO 1

O.A. No. 231 of 2011

Tuesday, this the 3rd day of Nov. 2015

"Hon'ble Mr. Justice Virendra Kumar DIXIT, Judicial Member
Hon'ble Lt Gen Gyan Bhushan, Administrative Member"

Ex –Recruit Roshan Lal (Army No. 14449564W) of Artillery Centre, Nasik Road Camp, aged about 28 years, son of Shri Mohan Singh, resident of House No.31/MN/22 Nai Abadi, Mahadev Nagar, Rajpur, Post Office- Partappura, District Agra (U.P.)-282001..... **Applicant**

Versus

1. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delh-110001.
2. Officer-In-Charge Records, Artillery Records, Nasik Road Camp, PINCODE-900452.
3. Commanding Officer, 1412 Training Regiment, Nasik Road Camp, PINCODE-900452.....**Respondents**

Ld. Counsel appeared for the Applicant – Shri P.N.Chaturvedi, Advocate

Ld. Counsel appeared for the Respondents -Shri D.K.Pandey, Central Government Counsel

ORDER

“Per Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member”

1. Present Original Application has been filed on behalf of the Applicant under Section 14 of the Armed Forces Tribunal Act, 2007.

2. The applicant has sought following reliefs in the Original Application:-

“(a) Issue/pass an order or direction of the appropriate nature to the respondents to quash/set aside the letter No CF/14449564W/14 Bty/ 6 dated 26th July, 2005 (Annexure No A-5) issued by 14/2 Training Regiment Artillery Centre and another Letter No CF/14449566W/ 10/14 Bty dated 12 Aug 2005 (Annexed with Annexure no A-6 at page No.31 of the Original Application) and also the letter issued by Artillery Records, Nasik Road Camp vide their letter No 14449564W/ Dism-April 6/33/NE-1 (8) dated 20 October 2009 (Annexure No A-5), being per se illegal, arbitrary, capricious and against the provisions of law.

(b) Issue/pass an order or direction of appropriate nature to the respondents to allow the applicant to rejoin the Army Service and complete the residue of 14 days training and then become the trained soldier of the Army, with all consequential benefits from the day of dismissal from service on 20.04.2006.

(c) Issue/pass an order or direction of appropriate nature to the respondents to hold the inquiry as to how, despite the fact that the applicant was suffering form mental sickness, as diagnosed and treated subsequently and under such exceptional circumstances beyond human control nothing could be done by the applicant and on being fit he had tried to join the above centre which he was illegally denied.

(d) Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.

(e) Allow this application with costs.”

3. The facts of the case as are necessary for adjudication of the controversy involved in this case, are that the Petitioner was enrolled in the Indian Army on 24.09.2002 and during the course of training, he

escaped and absented himself from training w.e.f 04.03.2003. It is averred that an Apprehension Roll was issued dated 5.3.2003 addressed to Supdt of Police Agra and copy thereof was endorsed to the father of the Applicant, District Magistrate, concerned Police Station at various other addresses in Departmental (Army) Channel. After elapse of 30 days, a Court of Inquiry was constituted which in ultimate analysis, pronounced him deserter w.e.f 04.03.2003 under Section 106 of the Army Act. The Applicant was then dismissed from service w.e.f 20.04.2006 after elapse of 3 years in terms of Army Act Section 20 (3) read in conjunction with Army Rule 17 and Army Order 43/2001/DV after obtaining sanction of the Competent Authority.

4. The Learned Counsel for the Applicant submitted that since the Applicant was reeling under severe depression and was not within his senses, he had wandered off in the midst of training. He was found loitering at Agra Cantt Station and was brought to his home by some unknown persons. He further submitted that on account of severity of depression, Applicant was admitted in the Mental Asylum at Agra where he remained under treatment of Dr P.K.Sharma, Senior Physician of the said mental hospital and after sustained treatment, he was discharged from hospital w.e.f 21.05.2005. He further submitted that when the Applicant approached the Unit alongwith his father for resuming his duties, he was informed of dismissal order. In the light of the above circumstances, the precise submission is that Applicant's absence was not deliberate attended with submission that he was illegally dismissed without following the procedure prescribed for dismissal. He further submitted that the statutory Court of Inquiry as prescribed under section 106 read with Army Rule 183 was not

conducted and that no show cause notice was issued before dismissal as prescribed under section 20 of the Army Act read with Army Rule 17 of the Army Rule.

5. **Per contra**, Learned Counsel repudiated the above contentions submitting that the Authority followed entire prescribed Procedure by issuing Apprehension Roll copy of which was also addressed to the relatives of the Applicant and thereafter, statutory Court of Inquiry was constituted after elapse of statutory 30 days and the applicant was pronounced deserter. It was after three years that the Applicant was discharged from Army Service as per policy. It was also contended that even-if it be assumed that the Applicant was severely depressed, none of the relatives of the Applicant responded to the Apprehension Roll issued by Army Authority and none of them came forward to explain the absence of the Applicant. The Learned Counsel also submitted that the medical certificate submitted by the Applicant was not genuine. To sum up, Learned Counsel submitted that proper procedure was observed in compliance and that in terms of the proviso to Army Rule 17, which empowers the competent officer to dispense with the requirement of the provisions of Army Rule 17, if he forms the opinion that it is not expedient or reasonably practicable to comply with provisions of Army Rule 17, the show cause notice was not issued.

6. In the rejoinder affidavit filed by the Applicant, it is averred in Para 4 that dismissal under Section 20 (3) of the Army Act read with Army Rule 17 demands a proper and specific procedure to be followed and in the absence of compliance of these mandatory provisions, the dismissal from service of the Applicant w.e.f 20.04.2006 after three years was totally illegal. It is further submitted that there is requirement of law to issue show cause notice to be served at the

permanent address of the Applicant and in case the show cause did not elicit any response, it would then be open to proceed under section 20 (3) of the Army Act read with Army Rule 17 of the Army Rule. It is further submitted that the Applicant is only answerable to justify his so called unauthorized absence and for this purpose the provisions of section 143 of the Army Act would be attracted. In reply to the rejoinder affidavit, a supplementary counter affidavit was filed in which it is averred in Para 5 that since the Applicant was a deserter, it was not practicable to comply with the provisions of Army Rule 17.

7. Army Rule 17 has been framed to provide for the procedure how the power of dismissal or removal under Section 20 of the Army Act has to be exercised. Army Rule 17 being relevant is quoted below:

"17. Dismissal or removal by Chief of Army staff and by other officers-Save in the case where a person is dismissed or removed from service on the ground of conduct which had led to his conviction by a criminal court or a court martial, no person shall be dismissed or removed under sub section (1) or sub section (3) of section 20, unless he has been informed of the particulars or the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from service.

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without comply within with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government."

8. It would thus transpire from a punctilious reading that Army Rule 17, as ruled in various decisions of Hon'ble The Apex Court as also of the High Court is firstly, to inform the person proposed to be dismissed or removed from service with the particulars of the cause of action leveled against him and secondly, to provide him reasonable time to state in writing any reasons against the proposed dismissal or removal. But the aforesaid requirements of Army Rule 17, need not be observed

in a case where dismissal or removal is made on the ground of conduct which has led to conviction of the person concerned by a criminal court or court martial. There is one more exception to the aforesaid principles as contained in the proviso to Army Rule 17, which empowers the competent officer to dispense with the requirement of the provisions of Army Rule 17, if he forms the opinion that it is not expedient or reasonably practicable to comply with provisions of Army Rule 17.

9. Now, we proceed to examine the case in the light of the above. As per records produced on behalf of the respondents, it is clear that the appropriate authority of the respondents was of the view that it was not reasonably practicable to comply with the provisions of Army Rule 17. It is averred in the counter affidavit that since Applicant had absconded in the midst of training and his whereabouts were not known for more than three years, the Authority rightly converged to the view that it was not practicable to comply with the provisions of Army Rule 17. On the other hand, Learned Counsel for the Applicant submitted that since the Applicant being in a state of severe depression, was not within his senses as to think as to what was right and what was wrong and that he was brought home from Agra Cantt Station where he was found loitering by some unknown persons and that he remained confined to mental asylum upto 20.05.2005. He further submitted that he was relieved from mental Hospital Agra and was certified to be fit to resume his duties from 21.5.2005 but when he approached the Unit he came to know that he had been declared deserter and after elapse of three years, he was dismissed from service with effect from 3.3.2005. Learned Counsel Respondents vehemently urged that as the Applicant had absconded in the midst of training and

did not report back, and that his whereabouts were not known for about three years and so in such circumstances, the decision of the competent authority to dispense with the issuance of show cause notice was perfectly legal and valid which was the only possible conclusion in the case. It may be noticed that the Applicant underwent training from Sep. 2002 to Mar. 2003. It is submitted that only 14 days of training remained to be undergone when the Applicant escaped in a state of depression.

10. Army Rule 17 clearly postulates as to the applicability of the said provision in respect of the Army personnel under Defence Department. Proviso to Army Rule 17 provides that if in the opinion of the officer competent to order dismissal or removal, it is not expedient or reasonably practicable to comply with the provision of Army Rule 17, he may after certifying to that effect, order dismissal or removal without complying with the procedure cited in Army Rule 17. It is further provided in the said Rule that all cases of dismissal or removal under the Rule where prescribed procedure has not been complied with should be reported to the Central Govt.

11. Coming to the facts of the instant case, it would appear that except saying that it was not practicable to comply with the Army Rule 17 in the dismissal order, no reasons for arriving at such conclusion have been enumerated, nor any materials justifying the said conclusion of it being impracticable to comply with Army Rule 17 has been produced before us. It is also not disputed by the Learned Counsel for the Respondents that there was no involvement of the security of the state in the instant case.

12. Coming to the dismissal order, it would appear that it was passed without issuing show cause notice to the Petitioner as required by Army Rule 17 as stated supra. The learned Counsel for the Respondents merely stated that dismissal was made under section 20 (3) of the Army Act and it was not practicable to comply with the provisions of Army Rule 17.

13. It brooks no dispute that the compliance of the Army Rule 17 is mandatory in nature. It is also not disputed that it has two purpose firstly to provide an opportunity to the person concerned to explain the particulars of the cause of action made against him and to put forth his explanation alongwith materials if any for controverting the particulars of the cause of action and also for showing that the intended dismissal or removal from service is uncalled for. From a close scrutiny of the Army Rule 17, it would appear that the other object is to give due consideration to the reply/explanation so furnished by the person concerned by a speaking order which implies that Authority concerned is duty bound to apply his mind to the facts of the case, give due consideration to the explanation and pass a reasoned order. The distillate of the above is that the principles of audi alteram partem are required to be observed in compliance.

14. In the instant case, it has been stated that it was not practicable to comply with the provisions of Army Rule 17 as the Applicant had absconded and his whereabouts were not traceable. It was also claimed that Apprehension Roll was issued. In this view of the matter, submission of the Learned Counsel for the Petitioner appears to be loaded with substance that mandatory requirement of issuing show cause notice was not complied with.

15. In the case of **S.N.Mukherjee vs Union of India (1990) 4 SCC 549**, A constitution Bench of the Supreme Court inter alia examined the question of necessity of observing the principles of natural justice and recording of reasons by the authority exercising the quasi judicial functions and held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action.

16. It would thus appear that the dismissal order passed against the Applicant is not a reasoned and speaking order in as much as in terms of Army Rule 17, the Applicant has not been informed of the particulars or the cause of action against him nor he was allowed reasonable time to state in writing any reasons he could have to urge against his dismissal or removal from service. To rephrase it, no show cause notice was issued or served on the Applicant before passing the impugned dismissal order. No documentary evidence has been brought on record to prop up the stand that despite strenuous efforts, the Applicant or any of his relatives could not be served. In fact, admission is writ large that no show cause notice was issued before passing the impugned dismissal order. In this view of the matter, the dismissal order is liable to be set aside. However, considering that there is large gap between the date of dismissal and this order, it would be just and expedient to reinstate the applicant in service without any benefit of back pay and allowances for the period dismissal remained in operation. It will however be open to the respondents to proceed afresh against the applicant in accordance with law.

Order

17. In the conspectus of the above discussion, the Original Application is allowed in terms of the above directions. The impugned

dismissal order dated 20.04.2006 is set aside. The petitioner shall be reinstated in the service without any benefit of back wages and allowances for the period the dismissal order remained in operation. The Respondents shall be at liberty to proceed afresh against the Applicant in accordance with law.

18. There will be no order as to costs.

(Lt Gen Gyan Bhushan)
Administrative Member
Dated : Nov ,2015

(Justice Virendra Kumar DIXIT)
Judicial Member

MH/-