

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

AFR
RESERVED.
(Court No. 3)

Transferred Application No. 115 of 2009Tuesday, the 24th day of November, 2015

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Devi Shankar, son of Sri Devi Gulam, resident of Village and Post
Amarpur, Tehsil Purva, District Unnao.

..... Petitioner

By Shri J.N. Mishra, learned counsel for the applicant.

Versus

1. Union of India through the Ministry of Defence, through its
Secretary, New Delhi.
2. The Officer In-charge, Army Medical Corps (Records),
Headquarters Army Medical Corps, Lucknow.

.....Respondents

**By Shri Rajesh Kumar, learned counsel for the respondents,
along with Capt. Soma John, Departmental Representative.**

ORDER**(Per Justice Devi Prasad Singh)**

1. Heard learned counsel for the applicant/petitioner and Shri Rajesh Kumar, learned counsel for the respondents assisted by OIC, Legal Cell.
2. The applicant/petitioner (called the 'applicant' for short) is a Soldier of Indian Army. Being aggrieved with the order of dismissal he preferred Writ Petition No. 699 (S/S) of 1996 in the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, which has been transferred to this Tribunal in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and now registered as Transferred Application No. 115 of 2009.

FACTS:

3. The relevant facts giving rise to the controversy in question and related issue are discussed hereinafter.
4. The applicant was enrolled in the Indian Army on 29.12.1987. He was found absent from the Unit with effect from 14.8.1991, hence declared 'deserter' after the Court of Inquiry, since he failed to join his duties within a period of three years from the date of desertion, he was dismissed from Army services by an order dated 29.10.1994 in pursuance to the provisions contained in Section 20 (3) of the Army Act.
5. The applicant stated that he fell ill on 26.3.1991 and admitted to Command Hospital, Pune, from where he was discharged on 12.8.1991. According to the applicant, he was again

subjected to private medical treatment in Kanpur (U.P.) till 20.12.1991. In October, 1992 the applicant alleged to suffer from another attack of Hepatitis and remained under medical treatment upto June, 1993. According to the applicant, he was confined to bed till June, 1994 and thereafter gone to resume duty but the Unit did not permit him to do so, hence he wrote a letter dated 12.8.1994 to respondent no. 2 for redressal of his grievance. However, on 5.5.1995 he received an order dated 19.4.1995 with regard to payment of Army Group Insurance to the tune of Rs. 4,100/-. According to the applicant's counsel, a statutory complaint dated 2.11.1995 was submitted against the order, but failed to get any response. It is also submitted that the mandatory provision, as contained in Section 106 of the Army Act, has not been complied with nor any show-cause notice was issued in pursuance to the provisions contained in Section 20(3) of the Army Act and hence the order of discharge suffers from arbitrariness and hit by Article 14 of the Constitution of India.

6. While bringing the applicant's conduct on record, the respondents stated that the applicant absented himself without leave from 11.2.1991 to 8.3.1991, hence punished 14 days pay fine. Thereafter he absented himself without sanctioned leave from 14.8.1991, hence declared 'deserter' after 30 days with due Court of Inquiry, and since he did not resume duty and remained absent for three years continuously, he was dismissed from service on 28.10.1994 with effect from 14.8.1991.

7. It is stated by the respondents that the applicant belongs to Unnao (U.P.) and alleged to take private treatment in adjoining district Kanpur in 1991. He never reported to the respondent-Army with regard to his illness and private treatment. In consequence thereof apprehension order was issued to the Superintendent of Police, Unnao (U.P.) as well as the District Collector, Unnao (U.P.) vide letter dated 3.9.1991.

8. It is submitted by the respondents' counsel that the applicant has cooked up false case since the alleged letter dated 12.8.1994, allegedly sent to respondent no. 2, who has got no concern with the matter being placed on the strength of Corps of Signals, Jabalpur. It is stated in the counter affidavit that after receipt of information the Signal Records, Jabalpur, sent reply to letter dated 12.8.1994, vide letter dated 2.11.1995, copy of which has been filed as Annexure 'C-2' to the counter affidavit. It is stated that even after receipt of letter dated 19.4.1995 the applicant did not bother to submit requisite documents, as demanded.

9. It has been categorically pleaded that the applicant's wife, Smt. Shanti Devi, was informed, vide letter dated 6.2.1995, that her husband, Devi Shankar, has been dismissed from service by the order dated 29.10.1994 and she was eligible to claim the balance of AFPP Fund and AGI Fund. A copy of the letter dated 6.2.1995 has been filed as Annexure 'C-3' to the counter affidavit.

10. It is also submitted that the applicant's representation was disposed of by order dated 2.11.1995, a copy of which has been filed as Annexure 'C-2' to the counter affidavit.

11. The factual matrix on record, as stated in the counter affidavit, seems to have not been denied by specific pleading and trustworthy evidence while filing rejoinder affidavit, except that the provisions contained in Section 20(3) read with Section 106 of the Army Act have not been complied with. It is also stated that the representation was decided in pursuance to order passed by the High Court dated 17.5.1995 in Writ Petition No. 1451 of 1995, but the facts remain that the applicant approached the High Court after the lapse of three years' period that too after the order of dismissal passed by the respondents and due declaration with regard to desertion from the Army.

12. The supplementary affidavit filed by the respondents further reveals that the Court of Inquiry was held before declaring the applicant as 'deserter' in pursuance to Army Regulations. The material on record shows that the applicant absented himself without leave from 14.8.1991 and he was declared deserter by order dated 28.10.1991 in pursuance to report of the Court of Inquiry. However, the affidavit filed on 2.12.2014 by the respondents reveals that certain records are missing but from the rest of the documents available it reveals that the order of desertion was passed after issuing Apprehension Roll.

STATUTORY PROVISIONS

13. It shall be appropriate to deal with certain statutory provisions of the Army Act, Army Order and Regulations framed thereunder. Section 20 of the Army Act provides that a Army person may be dismissed from service by the Chief of the Army Staff and other officers subject to the provisions contained in the Act. For convenience, Section 20 of the Army Act is reproduced as under :-

“20. Dismissal, removal or reduction by the Chief of the Army Staff and by other officers. – (1) *The Chief of the Army Staff may dismiss or remove from the service any person subject to this Act, other than an officer.*

(2) The Chief of the Army Staff may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.

(3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than officer or a junior commissioned officer.

(4) Any such officer as is mentioned in sub-section (3) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer under his command.

(5) A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy.

(6) The commanding officer of an acting non-commissioned officer may order him to revert to his

permanent grade as a non-commissioned officer, or if he has no permanent grade above the ranks, to the ranks.

(7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder.”

14. Section 39 of the Army Act deals with the question relating to absence without leave which is reproduced below for convenience :-

“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.

15. It (supra) also includes the conditions for trial of Army personnel on over-stayal of the leave. Material fact on record (supra) established that the applicant was liable to be tried. Prima facie the applicant could have been tried and punished with imprisonment. Section 106 of the Army Act further provides certain circumstances/conditions where Army personnel is absent without leave and the situation where he may be held to be a deserter. For convenience, Section 106 of the Army Act is reproduced as under :-

“106. Inquiry into absence without leave. – (1)

When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a Court of inquiry shall, as soon as practicable, be assembled, and such Court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the Court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the Court-Martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

A conjoint reading of Section 39 and Section 106 of the Army Act shows that legislature to their wisdom has provided severe punishment for absence without sanction of leave or over-staying the leave.

16. Section 106 of the Army Act does not provide any waiting period except 30 days, after which a Army person may be declared deserter. However, Army Order 43 of 2001 contains a provision whereby three years' waiting period has been provided. The Army Orders 22, 23 as well as Army Regulation 376 deals with the present controversy, which are reproduced as under :

“22. A person subject to the Army Act or a reservist subject to Indian Reserve Forces Act who does not surrender or is not apprehended will be dismissed from the service under Army Act Section 19 read with Army Rule 14 or Army Act Section 20 read with Army Rule 17 as the case may be in accordance with instructions given below :-

(a) After 10 years of absence/desertion in the following cases :

(i) Those who desert while on active service in the forward areas specified in Extra Ordinary Gazette SRO 17E dated 05 Sec 77 (reproduced on page 751 of MME Part iii) or while serving with a force engaged in operations or in order to avoid such service.

(ii) Those who desert with arms or lethal weapons.

(iii) Those who desert due to subversive/espionage activities.

(iv) Those who commit any other serious offence in addition to desertion.

(v) Officers and JCOs/WOs (including Reservist officers and JCOs. Who fail to report when required).

(vi) Those who have proceeded abroad after desertion.

(b) After 3 years of absence/desertion in other cases.

(c) The period of 10 years mentioned at sub para (a) above may be reduced with specific approval of the COAS in special cases.”

“23. The following procedure will be adopted for dismissal of OR:

(a) A nominal roll in respect of such absentees/deserters will be prepared by Record Officer concerned in triplicate in the form set out in Annexure-1 to Appendix ‘F’. The nominal roll (in duplicate) will then be forwarded to the Commandant Centre/Depot concerned having Brigade Commander’s power under Army Act Section 8 or if he has no such powers to the Sub Area Commander in whose jurisdiction the record officer is located for sanctioning dismissal under orders given in para 24 below. If the nominal roll consists of more than one sheet each sheet will be serially numbered. The nominal roll will be accompanied by a statement as per Appendix ‘E’ which will be pinned to the top sheet of the nominal roll. Such nominal rolls will be submitted to the

authority concerned i.e. Centre Commandant/Sub Area commander by 20 Apr and 20 Oct each year.

(b) *On the discharge certificate required under Army Act Section 23 read with Army rule 12 reasons for dismissal may be shown as “absence without leave”.*

The discharge certificate need not be issued on IAFY-1964. A simplified form that can be used is at Appendix ‘G’. This will be both in English and in the regional language of the person dismissed. An officer not being an enrolled person is not furnished with a discharge certificate.

(c) *Such discharge certificate may be retained by record offices and dispatched under registered cover only when demanded specifically by the person to whom the discharge certificate pertains. This will avoid financial loss to the State resulting from the discharge certificate being sent to the last known address of the deserter by registered post and returned undelivered.*

(d) *After obtaining orders for the dismissal of the persons mentioned in the nominal roll one copy of the nominal roll will be returned to the Record Office concerned.*

(e) *As soon as a person is dismissed from service the civil police authorities will be informed simultaneously. In cases mentioned at Para 22 (a) (ii), (iii) and (iv) above the civil police will be informed to effect arrest of these persons and proceed against them in civil courts for offences (other than desertion) committed by them. In other cases it may be stated that it will no longer be necessary for the civil police to secure the arrest of the person concerned.”*

“376. Deserters From The Regular Army. – A person subject to AA who is declared absent under

AA, Section 106 does not thereby cease to belong to the corps in which he is enrolled though no longer shown on its returns, and can, if subsequently arrested, be tried by court-martial for deserting. When arrested he will be shown on returns as rejoined from desertion.”

17. Army Order 22 (supra) provides waiting period of 3 years which may be reduced by the Chief of the Army on reasonable ground. A combined reading of Army Orders 22 and 23 shows that procedure provided therein deals with a situation when a person absented himself for more than 3 years and did not turn up. It empowers the Army to dismiss the deserter by “in-absentia proceedings”. It is part and parcel of service conditions specified by the Chief of Army in pursuance of power conferred by Rule 13(2A) of the Army Rules, 1954, as well as sub section (7) of section 20 of Army Act hence has got statutory force. Obviously, in absentia proceedings, principle of natural justice does not come in the way and the Chief of the Army has got statutory power to issue such order in view of constitutional mandate as contained in Article 33 of the Constitution of India to maintain discipline in the army. Hence submission of learned counsel for the applicant with regard to violation of principles of natural justice is not sustainable.

18. Sub-section (2) of Section 106 provides that in case a person is declared absent and does not afterwards surrender or apprehended, then for the purposed of Army Act, he or she shall be

deemed to be deserter and once a person is declared deserter and does not surrender or apprehended, he shall be deemed to be deserter by fiction of law.

Section 39 (g) of the Army Act with regard to Court Martial proceedings shall be attracted only when incumbent is arrested or apprehended.

19. Fiction of laws means that a thing which might not have been written in the statute shall deem to exist and must be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

20. In the case of ***State of Bombay vs. Pandurang Vinayak, AIR 1953 SC 224***, Hon'ble Apex Court held that when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.
(Para 5)

21. In the case of ***Bengal Immunity Co. Ltd. Vs. State of Bihar, AIR 1955 SC 661***, Hon'ble the Apex Court has held that legal fictions are created only for some definite purpose and it is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field.

22. In the case of ***CIT vs. S. Teja Singh, AIR 1959 SC 352***, Hon'ble the Apex Court has held that it is a rule of interpretation well settled that in construing the scope of legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate (Para 6).

23. In the case of ***CIT Vs. Shakuntla, AIR 1966 SC 719*** it has been held by Hon'ble Supreme Court that the fiction created by the legislature must be restricted by the plain terms of the statute. The principle that a legal fiction must be carried to its logical conclusion does not require the court to travel beyond the terms of the section or give the expression a meaning which it does not obviously bear. (Para 6)

24. In yet another case of ***Boucher Pierre Andre Vs. Supdt. Central Jail, AIR 1975 SC 164*** Hon'ble apex court held that where a legal fiction is created, full affect must be given to it and it should be carried to its logical conclusion.

25. Thus once a person is declared deserter and not turned up the defence set up by the person to violation of principle of natural justice seems to be unavailable to him, in view of constitutional privilege granted to armed forces by Article 33 of the Constitution of India, vide ***AIR 1962 SC 1166 Kameshwar Prasad & Ors vs. State of Bihar, AIR 1965 SC 247 Ram Sarup vs. Union of India.***

26. Learned counsel for the applicant has relied upon the judgment of the Allahabad High Court in the case of **Daya Shankar Tiwari v. Chief of the Army Staff and others** reported in 2002 (6) SLR 787 with submission that Court of Inquiry could not have been held in absentia without associating the deserted person. The argument advanced by learned counsel for the applicant seems to be misconceived. In the case of Daya Shankar Tiwari (supra), relied upon by the applicant's counsel, the incumbent returned back/arrested, hence the High Court held that the trial should have been held with due participation of the incumbent. The provision contained in Army Order (supra) has not been considered by the High Court which seems to have been issued in pursuance to power conferred by Rule 13 (2A) of the Army Rules, 1954 and Section 20 (7) of the Army Act and has got statutory force in view of law settled by this Tribunal in O.A. No. 168 of 2013 (NK Abilash Singh Kushwaha v. Union of India & others) decided on 23.9.2015.

27. After expiry of three years' period it was not necessary for the Army to wait further, more so, when inspite of communication to the applicant's wife that he has been declared deserter, the applicant has not contacted the Unit.

FINDING

28. From the material on record there appears to no room of doubt that the applicant was declared deserter on account of

absence without leave. The defence set up by the applicant that he was undergoing medical treatment for more than three years in private hospital seems to be cooked up case for the reason that he has not communicated the respondents or appropriate authority during the course of alleged treatment by private medical aid. He could have approached the Unit or the adjoining district Lucknow to avail medical facility from the Command Hospital or may have approached Jabalpur, but he did not do so. The Command Hospital, Lucknow, is situated at a stone throw distance from district Unnao where he could have received better treatment than the private hospital or doctors and again not doing so the applicant preferred writ petition after receipt of letter from the respondents (supra), i.e. after more than a period of one year from the date when he was declared deserter and dismissed. At the face of record the defence set up by the applicant explaining the absence of duty without sanctioned leave for more than three years seems to be cooked up case and does not inspire confidence, more so, when he has not communicated his whereabouts to the Army under the teeth of letter sent by the Army to his wife (supra). It may be noted that under sub-section (2) of Section 106 of the Army Act in case a person declared absent and does not afterward surrender or apprehended he shall for the purpose of the Act deemed to be deserter.

29. Once the applicant declared deserter with the follow up action of dismissal from service by the impugned order dated 29.10.1994 all subsequent efforts made by the applicant for

restoration in service seems to be not sustainable till the order of dismissal or desertion stands. In the absence of the applicant for more than three years decision taken by the authorities concerned in pursuance to statutory provision by holding Court of Inquiry does not seem to hit by the principles of natural justice. Section 106 of the Army Act empowers the authority to hold the Court of Inquiry in the absence without sanctioned leave as per statutory provisions and is protected by Article 33 of the Constitution of India. The Army has a right to hold Court of Inquiry against a person in his or her absence in pursuance to power conferred by Section 39 read with Section 106 of the Army Act in case the incumbent does not report back to Army within stipulated statutory period (supra).

30. The persons who join the Army should be disciplined one and in case they overstayed the leave or absented themselves without sanction of leave ordinarily no lenient view may be taken as it shall adversely affect the discipline of Armed Forces. The respect which the Armed Forces command from the people of the country requires them to be disciplined person while serving the nation.

31. Desertion and absence without leave for long period without reasonable cause and even in appropriate case for shorter period without reasonable cause is a serious misconduct on the part of the Armed Forces personnel. It is not known when the Armed Forces or the Army may require their services to meet out exigencies of service or for the sudden cause. Virtually, a desertion from Army is deserting the Nation from the trust and confidence

deposed by the country to the Armed Forces personnel. Neither any lenient view may be taken during the course of judicial review nor such person may be given minor punishment.

32. While parting with the case it shall be appropriate to draw attention of the Union of India as well as Chief of the Army Staff that the waiting period of three years (supra) is too much and not proportionate to the gravity of misconduct where a person of Armed Forces absented without sanctioned leave. Once a person declared deserter after the lapse of 30 days during peace time or when an Armed Forces personnel absented himself without sanctioned leave or overstayed leave, the waiting period of three years is too much and should be reduced to one year or like period. The waiting period of three years after declaring a person deserter that too in 21st Century having advance Information and Technology seems to encourage the abuse of the process. Ordinarily Apprehension Roll issued to apprehend Armed Forces personnel are kept unattended by the police stations for extraneous reasons as appears from catena of cases.

33. To sum up;

- (a) A person is declared deserter and did not turn up or not apprehended within a period of three years, then he or she may be dismissed from army under the provisions contained in Army Orders 22 and 23 (supra). Only in case a person is apprehended or turned up, the

procedure of appropriate Court Martial may be applied in accordance to rules.

(b) Principles of natural justice shall not come in the way of authorities to hold ex parte proceedings of a deserter under the deeming provisions (supra) in case he or she does not turned up or is not apprehended within a period of three years.

(c) Under sub section (2) of section 106 of the Army Act, in case a person does not surrender or is apprehended, shall deemed to be deserter and competent authority shall have a right to take follow up action by ex parte proceedings. Applicant was dismissed after continuous absence of 3 years 73 days.

34. Importance of Armed Forces personnel as a disciplined force to serve the Nation to meet out eventualities or sudden requirements is the call of Nation applicable to all the citizens in principle and philosophy. A few couplets from the poem titled 'MY COUNTRYMEN' of Khalil Gibran touches the heart. The couplets may be reproduced :-

*"I have called you in the silence
Of the night to point out the
Glory of the moon and the dignity
Of the stars, but you startled
From your slumber and clutched
Your swords in fear, crying,
"Where is the enemy? We must kill*

*Him first!" At morningtide, when
The enemy came, I called to you
Again, but now you did not wake
From your Slumber, for you were
Locked in fear, wrestling with
The processions of spectres in
Your dreams".*

Those who are locked in fear should not join Armed Forces since, because of them country may suffer with irreparable loss and injury. There should be no sympathy with deserters established under law.

35. For the reasons discussed herein above, the T.A. seems to lack merit. The order does not suffer from any impropriety or illegality. The Transferred Application, therefore, lacks merit and stands dismissed. No order as to costs.

36. Let a copy of the order be sent by the Registrar of this Tribunal to the Chief of the Army Staff, Chief of the Navy and Chief of the Air Force as well as Defence Secretary, Union of India, to look into the matter for proper amendment, if found fit by experts committee with regard to reduction of the period of three years (supra) which ordinarily seems to have been abused.

**(Air Marshal Anil Chopra)
Member (A)**

**(Justice D.P. Singh)
Member (J)**

PG/anb