

AFR
Court No.3

**ARMED FORCES TRIBUNAL (CIRCUIT BENCH,
JABALPUR)
REGIONAL BENCH, LUCKNOW**

Transferred Application No. 129 of 2011

Wednesday, this the 13th day of January 2016

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

Sujit Roy (Ex No. 15671671X Signalman Safaiwala), S/o Shri Sourendra Nath Roy, R/o Village Rajapur, Post Joka, Tahsil, Ulubsiria, Distt Howrah (W.B.).

...Petitioner

Ld. Counsel for the : **Shri K.C. Ghildiyal, Advocate**
Petitioner

Versus

1. Union of India, Through Secretary, Ministry of Defence, Govt. of India, New Delhi.
2. Chief of Army Staff, Army Headquarters, DHQ P.O., New Delhi.
3. The General Commanding In Chief, Centre Command, Lucknow (U.P.).
4. The Officer-in-charge, Records, Corps of Signals, Jabalpur (M.P.).
5. The Commanding Officer, Depot Regiment, Corps Signals, Jabalpur (M.P.).
6. The Commanding Officer, 36 Rashtriya Rifles Battalion (Assam), C/o 56 APO.

...Respondents

Ld. Counsel for the : **Mrs Kanak Gaharwar, Central**
Respondents. **Govt Counsel assisted by**
Capt Manisha Yadav, OIC,
Legal Cell.

ORDER (Oral)

1. Being aggrieved with the order of dismissal from the army, the petitioner preferred writ petition No 10306 of 2009 (s) in the High Court of Madhya Pradesh at Jabalpur. On constitution of Armed Forces Tribunal, the same has been transferred to this Tribunal under Section 34 of the Armed Forces Tribunal Act 2007 and re-numbered as T.A. No. 129 of 2011.
2. Heard Ld. Counsel for the parties and perused the record.
3. The brief fact gives rise to the controversy is summarized herein after.
4. The petitioner was enrolled in the army in the Corps of Signals on 22.01.2002 as a Signalmán (Safaiwala). He was posted with 36 Rashtriya Rifles (36 RR) in January 2007. While serving with 36 RR, he was granted absence of leave for 30 days as advance of Annual Leave w.e.f. 21.12.2007 to 19.01.2008 but he overstayed leave and not joined duty on expiry of leave but joined on 04.11.2008 at Depot Regimental Centre, Jabalpur. When the petitioner not joined duty after expiry of leave, the respondents issued Apprehension Roll.
5. During primary investigation and Summary of Evidence a trial under Summary Court Martial Proceedings, it is stated that the petitioner had pleaded guilty with regard to absenting for

290 days. In Summary Court Martial Proceedings, it has been observed that the petitioner has not given any valid reason for over staying leave for 290 days. In his statement at the time of surrender, Summary of Evidence and other material, the petitioner took defence that he lost his memory and undergone for treatment under Dr. S.K. Sengupte. However on calling defence witness during the Summary of Evidence, the petitioner decided to plead guilty. He pleaded guilty for two charges framed against him. For convenience sake charges framed against the petitioner are reproduced as under:-

“CHARGE SHEET

The accused No 15671671X Signalmán (S/Wala) Sujit Roy of 36 Rashtriya Rifles Battalion attached to Depot Regiment (Corps of Signals) is charged with :-

*First Charge Army DESERTING THE SERVICE,
Act Section 38 (i)*

In that he,

at field, while on active service, on 20 January 2008, having been granted leave of absence from 21 December 2007 to 19 January 2008 to proceed to his home, failed without sufficient cause, to rejoin his unit i.e. 36 Rashtriya Rifles Battalion on 20 January 2008 at 0001 hours, on the expiry of the said leave until surrendered voluntarily to Depot Regiment (Corps of Signals) on 04 November 2008 at 1100 hours.

Second Charge LOSING BY NEGLECT
Army Act CLOTHING AND EQUIPMENT
Section 54 (b) THE PROPERTY OF THE
GOVERNMENT ISSUED TO
HIM FOR HIS USE,

In that he,

at field on 28 February 2008 when his kit was finally checked by a Court of Inquiry held at 36 Rashtriya Rifles Battalion was found deficient of the items as mentioned in the list annexed as Annexure-1 to this charge sheet, the property of the government issued to him for his use valued Rupees 1701.00 (Rupees one thousand seven hundred one only)

Station : Jabalpur (MP) sd/- x x x x x x x
(S.K. Lohani)
Dated : 27 February 2009 Colonel
Commanding Officer
Depot Regt (Corps of Signals)”

6. Since the petitioner pleaded guilty and he has not produced any defence witness to substantiate the defence set up by him with regard to treatment provided by private doctor, the outcome was to convict the petitioner as deserter sentencing him to imprisonment for six months.

7. Feeling aggrieved the petitioner preferred statutory complaint which has been dismissed by an order dated 13.07.2009 by General Officer Commanding-In-Chief. In consequence thereto the present controversy is before the Tribunal.

8. While assailing the order, Ld. Counsel for the petitioner has raised the following three grounds :-

(i) The petitioner could not be held to be deserter as it was because of overstaying leave.

(ii) Since the petitioner was serving in the forward area of Rashtriya Rifles hence he was liable to be tried by the Commanding Officer of the Rashtriya Rifles. The trial by the Depot Regiment is bad in law and is not sustainable.

(iii) The plea of guilt could not have been accepted since it is not supported by Summary of Evidence and is negated by it.

9. A question cropped up whether overstaying leave may be treated as a case of desertion. Section 39 (b) of the Army Act provides for Court Martial in case army personal overstayed leave without sanction. It provides that such person may also be tried by Court Martial. However the trial of Court Martial in view of the provision of section 116 is to be done by the Commanding Officer. For convenience sake section 116 of the Army Act is reproduced as under :-

116. Summary Court martial. (1) *A summary court martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.*

(2) *The proceedings shall be attended throughout by two other persons who shall be officers or junior*

commissioned officers or one of either, and who shall not as such, be sworn or affirmed.

10. Perusal of section 116 (supra) shows that Summary Court Martial may be held by the Commanding Officer of any Corps or Department or Detachment of the regular army and he shall alone constitute the court. The legislature in its wisdom has used the words in sub section (1) of section 116, Commanding Officer of 'any' Corps. In Chamber's Dictionary the word 'any' is defined as under :-

“any. 1. one, no matter which. 2. some, no matter which. 3. with negatives and in questions even a very small amount of something 4. Indefinitely large 5. every, no matter which, any one or any amount.”

11. Keeping the dictionary meaning of word “ANY”, Summary Court Martial may be conducted by any Commanding Officer and not only by Commanding Officer of the unit where the person is working. Of course trial by any Commanding Officer may subject matter of judicial review in case such power has been exercised arbitrarily. In substance literal meaning which is born out from the record the statutory provision does not differentiate between Summary Court Martial conducted by Commanding Officer of the same unit or any other Commanding Officer.

12. According to the 'Maxwell on The Interpretation of Statutes (12th Edition Page 36), to quote:-

“A construction which would leave without effect any part of the language of a statute will normally be rejected.”

13. Thus while interpreting statutory provision every word as well as punctuation should be read and no line should be made redundant. Hon'ble Supreme Court from time to time repeatedly reiterated interpretative jurisdiction and observed that while considering statutory provision, the provision should be considered section by section, word by word, line by line along with punctuation in reference to context for which it has been used.

14. In a recent judgment reported in ***Vipulbhai M. Chaudhary vs. Gujarat Coop. Milk Mktg. Federation Ltd.*** (2015) 8 SCC 1, the Hon'ble Supreme Court has held:-

“In the background of the constitutional mandate, the question is not what the statute does say but what the statute must say. If the Act or the Rules or the bye-laws do not say what they should say in terms of the Constitution, it is the duty of the court to read the constitutional spirit and concept into the Acts.”

15. In the same judgment Hon'ble Supreme Court, while applying interpretative jurisprudence, further emphasized to implement constitutional mandate in the following words:-

‘When the Constitution is eloquent, the laws made thereunder cannot be silent. If the statute is silent or imprecise on the requirements of the Constitution, it is for the court to read the constitutional mandate into the provisions concerned and declare it accordingly.’

Again the Hon’ble Supreme Court has said as under:

“Where the Constitution has conceived a particular structure of certain institutions, the legislative bodies are bound to mould the status accordingly. Despite the constitutional mandate, if the legislative body concerned does not carry out the required structural changes in the statutes, then, it is the duty of the court to provide the statute with the meaning as per the Constitution. As a general rule of interpretation, no doubt, nothing is to be added to or taken from a statute. However, when there are adequate grounds to justify an interference, it is the bounden duty of the court to do so.”

(iii) In ***Deevan Singh vs. Rajendra Prasad Ardevi***

2007 (10) SCC 28, Hon’ble Supreme Court held that while interpreting Statute the entire statute must be read as a whole, then section by section, clause by clause, phrase by phrase and word by word.

Further it is the settled law that *causus omissus* (Principle of reading down) may be applied in case there is any ambiguity or absurdity in the statutory provisions, vide ***Gujrat Urja Vikash Nigam Ltd vs. Essar Power Ltd***, 2008 (4) SCC 755.

16. In view of settled proposition of law in case argument of Ld. Counsel for the petitioner is accepted it shall make

redundant the word 'any' as used in section 116 of the Army Act which is not permissible in view of settled provision of law (supra).

17. Ld. Counsel for the petitioner has further invited our attention to sub section (v) of section 3 of Army Act 1950 which provides that the word 'Commanding Officer' means the officer under whom a person is discharging his duties. Sub Section (v) of section 3 is reproduced as under :-

(v). "commanding officer", when used in any provision of this Act, with reference to any separate portion of the regular army or to any department thereof, means the officer whose duty it is under the regulations of the regular Army, or in the absence of any such regulations, by the custom of the service, to discharge with respect to that portion of the regular Army or that department, as the case may be, the functions of the commanding officer in regard to matters of the description referred to in that provision:

18. No doubt Commanding Officer means an officer who is immediate Commanding Officer of the person serving in the army. Definition clause relates to administrative and other related matters of the army personnel but provision contained in sub section (v) of section 3 (supra) cannot be looked into in isolation. It must be read conjointly along with section 116 of the Army Act. Section 166 of the Army Act relates to disciplinary proceedings of army personnel. Accordingly, for the purpose of disciplinary action, the legislature has used the

word 'any Commanding Officer' should be read along with Section 116 of the Army Act and we may not exclude the word 'any' while interpreting Section 116 of the Army Act.

19. It may be noted that the Constitution in Article 33 has given special status to the armed forces personnel and even to some extent, principles of natural justice may be diluted to meet out special requirements which the armed forces face. In every case, it may not be possible to assign trial to the Commanding Officer where the person is working. That is why, the legislature has used the word 'any Commanding Officer' while legislating Section 116 of the Army Act. For any hardship, it is not for the Courts to look into it, but it is for the legislature to make necessary amendment to do so. We are concerned with the legislative jurisdiction. Sub section (v) of Section of the Army Act must be considered along with Section 116 of the Army Act. In para-22 of the counter affidavit, it is categorically stated that in the Army discipline, in case of operationally committed units deployed in field/High Altitude/Counter Insurgency operation are finalized in the Regimental Centres. Headquarters 1 Signal Training Centre Centre has given the responsibility to Depot Regiment (Corps of Signals) for handling of field unit deserters cases. Depot Regiment (Corps of Signals) finalizes all deserter cases of operationally committed units deployed in field/High Altitude/Counter Insurgency operation. Once the petitioner was attached with the filed unit of the Depot

Regiment, then the petitioner shall be deemed to be working under the Commanding Officer of the Depot Regiment. Merely because the offence or misconduct related to the period when the petitioner was a member of the Rastriya Rifles would not mean that the power of the Commanding Officer was stand negated in pursuance to provisions of Section 116 read with sub-section (v) of Section 3 of the Army Act. Even if liberal meaning is given, the Commanding Officer of the Depot Regiment will have power to convene court martial and try the petitioner. After considering both the grounds raised by Ld. Counsel for the petitioner, we are of the view that the trial of the petitioner does not suffer from any illegality.

20. Coming to the second limb of the arguments raised by the Ld. Counsel for the petitioner that the petitioner cannot be treated to be a deserter, at this score, we are of the view that the petitioner may be deserter for the reasons discussed hereinafter.

21. Section 38 of the Army Act provides that any person subject to the Act who deserts or attempts to desert the service shall, on conviction by court-martial may be imprisoned to the extent of seven years. For convenience, Section 38 of the Army Act is reproduced as under:

38. *Desertion and aiding desertion.*-(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial,

if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned, and

if he commits the offence under any circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned

(2) Any person subject to this Act who, who knowingly harbours any such deserter shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(3) Any person subject to this Act, who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended shall, on conviction by court-martial be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.”

22. At the face of the record, the statutory provision contained in Section 38 of the Act does not define deserter. However, the Chambers 21st Century Dictionary at pg. 362 defines word ‘desert’ as under”

*“**desert**¹. 1 to leave or abandon (a place or person), intending nor to return. 2 to leave (especially a branch of the armed forces) without permission. 3 to take away support from ‘a person, cause, etc) **deserted** said of a building, etc; empty or abandoned. **deserter** someone who deserts from military service.”*

23. Thus, the deserter means to leave or abandon intending not to return back or to take away support from a person, cause etc.

24. Though the petitioner has joined duties after 290 days, but a question cropped up whether he may be deemed to have abandoned the army or wanted to leave the army. Needless to say that in case the petitioner would have completed three years of service or more years, then he would have been dismissed in accordance with Army Orders. We have to interpret as up to what extent absence from army may make out a case of desertion. Ld. Counsel for the petitioner has invited attention to Army Order 43 of 2001. He relied upon para-4 of Army Order 43 of 2001, which is reproduced as under:

“Ingredients and Proof of Desertion

4. Distinction Between Desertion and Absence Without Leave (AWL)—The distinction between desertion and AWL consists in the intention. A person is guilty of the offence of AWL when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If when he so absent himself, he intends either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. In other words, desertion is absence without leave accompanied by either of the intentions mentioned above, and a court, before convicting a person for desertion must be satisfied that he had one or the other or these intentions. When a person is tried for absencing himself with intent to avoid

some duty, the intent must be averred in the particulars of the charge.”

A plain reading of Army Order 43 of 2001 shows that the person shall be guilty on desertion in case he is absent without leave accompanied by either of the intentions mentioned above. It further provides that the court must be satisfied that he had one or the other intention to desert the army when a person is tried for absencing himself with intent to avoid some duty.

25. In the present case, the petitioner was serving in the Rashtriya Rifles at the western disturbed area of J & K at the time when he absented himself for 290 days. Needless to say that the petitioner was posted in the hazardous area of the country. Even if the petitioner may be held to be guilty or not guilty, it was his onerous duty to produce the private doctor who had given medical certificate with regard to his mental illness. Further defence set up by the petitioner seems to be untrustworthy for the reason that in case he was suffering from mental disease, then obviously the parents who were duly informed by apprehension roll, should have sent him to some military hospital. Further at the time of joining after 290 nothing has been brought on record to indicate that the petitioner was suffering from mental or physical ailment. Since the petitioner was not suffering from mental ailment at the time of joining army, then why adverse inference may not be drawn and take it as a case on the part of the petitioner in not intending to serve

the army in the western border. Opinion of the medical boards convened show that the petitioner was mentally fit when he resumed duty after 290 days of absence.

26. Procedure for deserter is after 30 days, a person is declared deserter with follow up proceedings by court of inquiry, or summary court-martial. It is not disputed that the petitioner was granted leave for 30 days. After 30 days of absence without leave, court of inquiry was held and other formalities were completed in accordance with the rules. Of-course, if overstaying of leave was for few weeks or few months then inference may be drawn that it is a case of overstaying and not a case of desertion under Section 39 (b) of the Army Act providing certain safeguards to the person who overstayed leave. But this is in consequence to other provisions of the Act. Once a person who proceeded on 30 days leave does not return for ten months, then there appears no option but to proceed against him in accordance with law as a deserter. Proceedings initiated by the respondents do not suffer from any impropriety or illegality.

27. Adverting to the third limb of arguments advanced by Ld. Counsel for the petitioner that the petitioner has pleaded guilty, is concerned, there appears no room of doubt that in summery of evidence it has been recorded that the petitioner absented himself on account of mental ailment. Relying upon the summery of evidence and the statement recorded thereon, Ld. Counsel for the petitioner has set up a case that being case of

mental ailment, statement of guilt should have been taken as not guilty in view of the provisions contained in Regulation 381 of the Army Regulations read with Regulation 115 of the Army Regulation. Submission of Ld. Counsel for the petitioner may make out a case where opinion of the doctor could have been believed by the respondents. During process of judicial review, it is not open for the Tribunal to interfere with regard to observations made on certain document, that too when the same has not been proved by the petitioner. Once the petitioner was mentally fit, it was incumbent upon the petitioner to move appropriate application and make out a defence by producing the doctor under whom he was under medical treatment. In such a situation, arguments advanced by Ld. Counsel for the petitioner does not seem to make out a case for interference in the impugned order. Otherwise also, statement of guilt does not relate to guilt on some other count but it relates to absence from duty. Whatever reason may be behind it, but the fact remains that the absence for 290 days without sanctioned leave has not been disputed by petitioner.

28. We should not forget that persons serving the army are serving the country. Desertion by such persons or overstaying leave for unreasonable long period may be to desert and abandon the country. No much latitude can be given to members of armed forces since the country does not know when their services shall be required for the safety and security of the country. In case armed forces personnel over stay leave

for ten months or one year, then how our border would remain safe. Person overstaying leave for such long period without any reasonable cause may be treated as a person abandoning the army and may be punished in accordance with statutory provisions.

29. The other submission of Ld. Counsel for the petitioner that the petitioner was not properly attached, it appears that the petitioner returned for duty in the Depot Regiment where he was kept by the army.

30. The impugned order of punishment and finding recorded thereof does not seem to suffer from any illegality and impropriety.

31. According, the T.A. deserves to be dismissed; hence dismissed.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

ukt

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