

AFR
RESERVED
Court No.1
(List 'A')

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION NO 65 of 2010

Thursday, this the 04th day of May 2017

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

Ex Subedar Ganesh Babu KV (Army No. JC 306009K) son of Late Venkatraman, permanent resident of 24 MIG Duplex Scheme, Sector G, Kanpur Road, District-Lucknow (U.P.).

....Applicant

Ld. Counsel for the: **Shri P.N. Chaturvedi**, Advocate
Applicant

Verses

1. Union of India, through the Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Integrated Headquarters of the Ministry of Defence, South Block, New Delhi-110011.
3. General Officer Commanding-in-Chief, Central Command, Lucknow.
4. Commandant 11 Gorkha Rifles Regimental Centre, Lucknow.
5. Headquarters Chief Engineer, Lucknow Zone, Lucknow.
6. General Court martial, presided by MR 005968P Col CM Trivedi of AMC Centre and School, Lucknow.
7. Colonel C.M. Trivedi, AMC Centre and School, Lucknow.

...Respondents

Ld. Counsel for the : **Dr. Shailendra Sharma Atal**, Central
Respondents. Govt Counsel assisted by
Capt Piyush Thakran, OIC, Legal Cell.

ORDER**“Per Hon’ble Mr. Justice Devi Prasad Singh, Member ‘J’”**

1. The present application under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred being aggrieved with the impugned order of punishment in pursuance to finding recorded under General Court Martial (GCM) proceedings to suffer Rigorous Imprisonment (RI) for seven years and to be dismissed from service.
2. We have heard Shri P.N. Chaturvedi, Ld. Counsel for the applicant and Dr. Shailendra Sharma Atal, Ld. Counsel for the respondents assisted by Capt Piyush Thakran, OIC Legal Cell and perused the records.
3. The applicant a member of Indian Army in the year 2005, was working as in-charge of Canteen Stores Department (CSD) of Chief Engineer Lucknow Zone. He was to be replaced by Sub P. Raju. During handing and taking over of the charge, the deficiency in stock was detected for about 3 lacs and odds and mater was reported to the Management Committee on 23.12.2005. After transfer from Lucknow the applicant was to report duty at Bangalore.
4. It appears that when the facts came to light with regard to deficiency in stock, the applicant fled away on 24.12.2005 without

any sanctioned leave. Total loss to the CSD was made to Rs 3,10,356.03.

5. Applicant absented himself without sanctioned leave and later on voluntarily reported to MEG Group and Centre, Bangalore on 27.04.2006. After reporting at Bangalore on 27.04.2006, the applicant came back to Lucknow on personal visit and gave a cheque dated 20 May 2006 for Rs 3,10,262.00 in the name of Capt J.K. Verma, meaning thereby applicant paid the entire amount with regard to deficiency in stock and thus virtually owned the responsibility with regard to misappropriation of funds.

6. From the material on record it appears that the applicant had not handed over the charge to Sub P. Raju on 24.10.2005 rather asked him to contact him on 29.10.2005 but he fled and not handed over the charge till 31.10.2005. His wife Smt Lalita Ganesh communicated to the office of Capt J.K. Verma on 24.10.2005 that the applicant is missing since 24.10.2005. In such condition Sub P. Raju had refused to take over the charge and matter was reported to Canteen Officer who instructed the applicant to sort out deficiency and surpluses. It was some time in December 2005 the applicant presented a handing/taking over note for signature which was not signed by Sub P. Raju.

7. Subject to above a court of inquiry and GCM was held and charges were framed on 15.02.2009. For convenience sake the charges are reproduced as under:-

“First Charge
Army Act Section 38(1)

DESERTING THE SERVICE

In that he,

at Lucknow, on 23 December 2005, absented himself from Headquarters Chief Engineer Lucknow Zone, Lucknow, until reported at Madras Engineer Group and Centre, Bangalore on 27 April 2006.

Second Charge
Army Act Section 52(b)

**DISHONESTLY MISAPPROPRIATING
PROPERTY BELONGING TO
MILITARY INSTITUTION**

In that he,

At Lucknow, between January 2005 and 23 December 2005, while performing the duties of junior Commissioned Officer-in-Charge of Canteen Stores Department of Headquarters Chief Engineer Lucknow Zone, Lucknow dishonestly misappropriated the sale proceeds of Canteen items, amounting to Rs. 3,10,362/- (Rupees three lakhs ten thousand three hundred sixty two only), the

property belonging to the said Canteen.

Third Charge
Army Act Section 42(e)

**NEGLECTING TO OBEY
REGIMENTAL ORDERS,**

In that he,

At Lucknow, between January 2005 and 23 December 2005, neglected to obey Para 10(c) (vii) of the Standard Operating Procedures (SOP) of the CSD Canteen of Headquarters Chief Engineer Lucknow Zone, Lucknow of June 1998, which inter alia directed that, "all cash collected at the end of the day will be deposited in the Bank on the same day except when the amount does not exceeds Rs. 200/-, which is allowed to be retained with RTC".

8. The GCM recorded finding on 07.07.2009 holding the applicant guilty of first charge on 18.02.2009. Thus the applicant has been punished for first charge for desertion from service. Though it appears that the applicant seems to be also responsible for temporary causing loss of Rs 3,10,362.00 (because of deficiency in stock) but it appears that there has been exonerating finding of not guilty.

9. During course of GCM proceeding Sub P. Raju has been examined as PW-1, the Canteen Officer Capt JK Verma as PW-2. It appears that from the statement given by PW-1 and PW-2 which seems to be admitted in para 9 that the applicant was taken to the office of Chairman who had directed the applicant to resolve the anomaly in stock and report completion by 23.12.2005 but applicant failed to avail the benefit of the leniency shown by Canteen Officer. Since the applicant did not turn up in canteen, the Canteen Officer (PW-2) reported the matter to Col Som Prakash (PW-7) and also to Brig Arvind Agarwal who was Patron of the Management Committee of CSD canteen of Chief Engineer Lucknow Zone. The applicant was declared absent without leave (supra) and MEG Group and Centre, Bangalore was also informed accordingly. The Patron (supra) was examined as PW-9 and the Chairman of CSD was examined as PW-7.

10. From the record it transpires that the applicant did not deposit Rs 1,15,798.58 which was cash in hand on 30.11.2005, Rs 47,106.75 as sale proceeds during the month of December 2005, therefore there was anomaly of Rs 1,47,450.70 in liquor stock as amount of such sale was not accounted. It has been stated in Para 10 of the counter affidavit that at a later stage i.e. much before GCM, four officers of CSD Management Committee, Lucknow Zone had

decided to make up the said amount and in that Patron had paid Rs 90,000.00; Chairman paid Rs 80,000.00 and Vice Chairman and Canteen Officer both paid Rs 70,000.00 each. It is further stated that an amount of Rs 3 lacs was deposited in canteen account held in Vijaya Bank. During course of GCM, PW-6 Shri Naresh Singh Gautam, bank employee was examined whose house has been purchased by the applicant. In counter affidavit it has been admitted by the respondents that the applicant was absent without leave since 23.12.2005 (fore noon) but he met Shri Gautam (supra) on two occasions i.e. on 26.12.2005 and on 15/16.01.2006. It was after lapse of 30 days he was declared deserter and surrendered voluntarily to MEG Centre at Bangalore on 27.04.2006. It has been placed on record that the confirming authority in all fairness has found the applicant guilty on the first charge pertaining to desertion and not guilty on the second and third charges pertaining to misappropriation of property belonging to Military Institution and for neglecting to obey Regimental Orders. Copy of the minute sheet of the confirming authority dated 13.02.2010 has been filed as R-4 of the counter affidavit, which for convenience sake is reproduced as under :-

**“CONFIRMATION MINUTE OF THE GENERAL
OFFICER COMMANDING-IN-CHIEF CENTRAL
COMMAND ON THE FINDINGS AND SENTENCE OF
THE GENERAL COURT MARTIAL IN RESPECT OF**

**JC-306009K SUBEDAR GANESH BABU KV OF
HEADQUARTERS CHIEF ENGINEER LUCKNOW
ZONE, ATTACHED WITH 11 GORKHA RIFLES
REGIMENTAL CENTRE, LUCKNOW**

1. *I confirm the findings of the Court on the First and Third Charges, but do not confirm the finding of the Court on the Second Charge.*
2. *Further, I confirm the sentence awarded by the Court.*

Signed at Lucknow this Thirteenth day of February 2010.

*Sd/- x x
(JK Mohanty)
Lieutenant General
General Officer Commanding-in-Chief
Central Command"*

11. While preferring the present O.A. the applicant seems to not come up with clean hands and tried to conceal the decision of confirming authority. Keeping in view the order passed by confirming authority (supra), it may be inferred that the applicant is guilty of first and second charges. We hold that the confirming authority has not confirmed the finding of 'Not Guilty' on the second charge. The said authority has only confirmed the finding of guilty on the first charge and finding of 'Not Guilty' on the third charge and finding recorded should be considered in the light of order passed by the confirming authority.

12. Solitary arguments advanced by Ld. Counsel for the applicant is that charge No. 1 has not been proved for the reason that the applicant has not been in intention to desert the Army. Question cropped up whether the applicant may be held guilty for desertion under Section 38 (1) of the Army Act, 1950? For convenience sake Section 38 of the Army Act (supra) 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 other 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, 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.”*

13. Ld. Counsel for the applicant seems to be correct when he submits that there was no intention on the part of the applicant to

desert the Army, rather from the material on record, there appears to be no room of doubt that the offence under Section 39 (a) of the Army Act, 1950 is made out against the applicant.

14. While deciding identical case in T.A. No. 31 of 2012, **2Lt Shatrughan Singh Chauhan vs Union of India & Ors** decided on 19.01.2017 we have held that intention to desert the Army with *mens rea* not to return back is condition precedent to hold a person guilty of desertion. In the present case the applicant absented himself but he was continuously in touch with the officers of the Canteen which seems to be admitted by the respondents in their reply as contained in para 10 of the counter affidavit. The applicant met to superiors and kept on negotiating the matter and later on deposited an amount of Rs 3 lacs and odd.

15. In the case of **2Lt Shatrughan Singh Chauhan** (supra) interpreting the word desertion is reproduced as under :-

“76. A plain reading of Note-2 of Section 38 of the Army Act, 1950 shows that desertion is distinguished from absence without leave as defined in Section 39 of the Army Act, 1950. Desertion or attempt to desert the service implies intention on the part of the accused either (a) never to return back; or (b) to avoid some important military duty. Intention to desert may be inferred from long absence, wearing of disguise, distance from the duty station and manner of termination of absence.

Under Note-11, while framing charges of desertion or absence without leave, the Court must

take care to establish by oral evidence of a witness who apprehended the accused or to whom the accused surrendered.

In the present case the petitioner neither surrendered nor was apprehended rather he approached his family and with his father, Honorary Capt Jagpal Singh, contacted Lt Gen Y.S. Tomar, Adjutant General, Army Headquarters, who recommended for his admission in Army Hospital (R.R. Hospital) New Delhi and instituted an inquiry to be conducted by Capt Gen R.S. Taragi. Keeping in view this vital fact, the controversy in question does not seem to be case of desertion.

Punishment for desertion is not only to be cashiered but may be sentenced to death or life imprisonment or imprisonment not less than seven years.

134. The step to declare the petitioner deserter, prima facie, seems to be hasty since it was done in violation of Section 106 of Army Act, 1950. A person should have been declared deserter only after expiry of thirty days followed by Court of Inquiry as soon as practicable. For convenience sake Section 106 of the Army Act, 1950 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.”

135. A plain reading of Section 106 of the Army Act, 1950 (supra) shows that if a person is declared absent from duty and does not surrender or is apprehended within thirty days, for the purpose of Army Act, he or she shall be deemed to be deserter keeping in view the mandate of sub-section (2) of Section 106 (supra)”.

16. In view of the above we are of the opinion that ingredients of Section 38 (1) under which the applicant has been punished seems to be not made out from the pleadings and material on record. The GCM has been failed to exercise jurisdiction vested in it while recording finding with regard to charge No. 1.

17. However, our attention has been invited to Section 15 of the Armed Forces Tribunal Act, 2007 which deals with the power of the Tribunal. Sub section 6 and 7 of the Section 15 of the Act (supra) deals with certain powers of the Tribunal whereby the Tribunal may substitute for the findings of the Court Martial, finding of guilty for any other offence for which the offender could have been lawfully found guilty by the Court Martial and pass a sentence afresh for the

offence specified or involved in such findings under the provisions of the Army Act, 1950 as the case may be. The Tribunal may also enhance the sentence awarded by the Court Martial or reduce the same. For convenience sake Section 15 (5) and 15 (6) of Armed Forces Tribunal Act, 2007 are reproduced as under:-

“15. Jurisdiction, powers and authority in matters of appeal against court-martial.-

(5) The Tribunal may allow an appeal against conviction, and pass appropriate order thereon.

(6) Notwithstanding anything contained in the foregoing provisions of this section, the Tribunal shall have the power to :-

(a) substitute for the findings of the court-martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court-martial and pass a sentence afresh for the offence specified or involved in such findings under the provisions of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), as the case may be; or

(b) if sentence is found to be excessive, illegal or unjust, the Tribunal lay-

(i) remit the whole or any part of the sentence, with or without conditions;

(ii) mitigate the punishment awarded.

(iii) commute such punishment to any lesser

punishment or punishments mentioned in the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), as the case may be;

(c) enhance the sentence awarded by a court-martial;

Provided that no such sentence shall be enhanced unless the appellant has been given an opportunity of being heard.

(d) release the appellant, if sentenced to imprisonment, on parole with or without conditions;

(e) suspend a sentence of imprisonment.

(f) pass any other order as it may think appropriate.”

18. From the material on record and evidence laid there appears to be no dispute with regard to applicant's absence from duty during the period commencing from 23.12.2005 to 27.04.2006 that too without sanctioned leave.. The only ground advanced by Ld. Counsel for the applicant Shri P.N. Chaturvedi is that the applicant could not have been tried for desertion and charges have been incorrectly framed. We lay our hands to the provision containing under Section 39 (a) and (b) of the Army Act (Supra) which is reproduced as under :-

“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;*
- (b) *without sufficient cause overstays leave granted to him”.*

19. A plain reading of Section 39 (a) shows that if a person is absent without sanctioned leave, he shall commit an offence under Section 39 (a) of the Act (supra) and on finding by Court Martial, shall liable to suffer imprisonment for a term which may extend to 3 years or such punishment, as in the act mentioned.

20. In *Black’s Dictionary* the desertion has been defined as under:-

“The willful and unjustified abandonment of a person’s duties or obligations, esp. to military service or to a spouse or family. In family law, the five elements of spousal desertion are (1) a cessation of cohabitation, (2) the lapse of a statutory period, (3) an intention to abandon, (4) a lack of consent from the abandoned spouse, and (5) a lack of spousal misconduct that might justify the abandonment.”

21. In view of the above and in our considered opinion the applicant has committed offence under Section 39 (a) of the Act (supra) whereby he absented for about four months without sanctioned leave which is very serious offence in a disciplined force like Army.

22. Coming to second limb of dispute with regard to confirming order passed by competent authority, relevant portion of the confirming authority, for convenience sake, is reproduced as under:-

“7. It has come in the evidence of Shri Naresh Singh Gautam (PW-6) that the accused along with his wife had met him at his residence on 26 Dec 2005 for purchase of his house in Lucknow. The contention of the defence that the accused, due to his domestic problem, had left Lucknow and reached the Ashram of Sai Baba run counter to his admitted position of case, as th accused had met PW-6, after three days of his desertion, to negotiate the deal of the purchasing of a house in Lucknow.

8. The Court, in his discretion should re-appreciate the entire evidence on record and come to on their conclusion to see whether or not the conduct of the accused, under the facts and circumstances as mentioned above, was blameworthy on the second charge.

9. After the Revision Order is read in the open Court, the prosecution and the accused be given further opportunity to address the Court. Thereafter, if it becomes necessary to clear any point raised by the accused, the Judge Advocate may give further summing-up. The Court should then reconsider its finding on the second charge in the light of what has been brought out above and evidence on record in the proceedings as a whole.

10. After re-consideration of its finding on the second charge as indicated above, if the Court does not adhere to its earlier finding, it shall revoke the finding and award fresh sentence, commensurate with the gravity of the offence committed by the accused. While determining the sentence, the Court, undoubtedly, would take into consideration the facts that the accused has already been found ‘Not Guilty’ of third charge and ‘Guilty’ of first charge, which are serious offences.

11. *Considering the gravity of the offence (s) committed by the accused, the determination of the right measure of punishment is often a point of great difficulty and, indeed, no hard and fast rule can be laid down, it being a matter of discretion of the Court, which has necessarily to be guided by a variety of factors and consideration. The Court, however, is expected to bear in mind the necessity of proportion between the offences committed and penalty proposed to be imposed. The pronounced sentencing policy stands incorporated in para 468 of the Regulations for the Army, 1987 (Revised Edition), which lays down clear guidelines for compliance, while determining the quantum of punishment. The Court must consider that it has found the accused 'Not Guilty' of third charge and 'Guilty' of first charge.*

12. *Attention of the Court is invited to Army Act Section 160 and Army Rule 68 and the form of proceedings on revision given on pages 421 and 422 of MML (Vol-II), 1983, which would be modified to conform to Army Rule 62 (1) and 68.*

13. *After the revision, the proceedings should be returned to this HQ through Dy Judge Advocate General, Headquarters Central Command, Lucknow.*

Hence we hold that the applicant is guilty of absence without leave and liable to be punished accordingly.

23. Now coming to other limb of argument of Ld. Counsel for the applicant and pleading contained in the counter affidavit, there appears to be no room of doubt that the applicant caused loss/deficiency to stock of the Canteen at Lucknow to the tune of Rs 3 lacs and odds. By depositing the amount he does not seem to be exonerated for the charges but lenient view may be taken since he

has repaid the amount with regard to deficiency to the officers concerned who had made good the deficiency of stock by contribution (supra) but in any case he seems to be guilty of second charge which seems to be admitted fact on record for the reason that the applicant himself paid back through cheque dated 20.05.2006 a sum of Rs 3,10,362.00 in the name of Capt JK Verma and the amount later seems to be given back to the officers who had made good the deficiency through contribution (supra).

24. Moreover the applicant has not paid back the amount to the Treasury of the Canteen, but paid back the amount to Capt JK Verma which shows his mind set to evade for charges. The amount was paid back to the officers who contributed earlier to make up the deficiency. In such situation the applicant seems to be guilty of charge No. 2 also, hence we revert the finding of the GCM with regard to charge No. 2 and hold the applicant guilty in pursuance to power conferred under Section 15 (6) of the Armed Forces Tribunal Act, 2007.

25. Keeping the aforesaid fact and material on record it appears that all efforts were made by officers of Canteen with reasonable opportunity to the applicant to make good to the deficiencies but the applicant failed to do so. The officers have shown their great hearts by making the deficiency good through contribution from their own

pockets which has been repaid by the applicant (supra). However such things should ordinarily be not done by the officers to subsidize the crime for the reason that the over leniency and soft attitude may encourage the commission and omission of such serious misconduct/crime which shall not be good for the Armed Forces. Let the culprit be dealt with firmly without any leniency. Once the applicant fled without sanctioned leave, FIR should have been lodged followed by court of inquiry before taking strong measures, otherwise it shall not be possible for the country to check the corruption which has crept into the blood of our system.

26. Subject to findings recorded hereinabove a question cropped up, what punishment should be awarded to the applicant? Of course since the applicant paid back the amount to the officers concerned, who had made good the deficiency, a lenient view may be taken while modifying and awarding punishment. Applicant has already served the sentence for two years. Accordingly we hold as under:-

- (a) The applicant is not guilty for charge No. 1 but he is guilty for an offence under Section 39 (a) of the Army Act, 1950 since his absence for four months for the period from 23.12.2005 to 27.04.2006 is not disputed and while holding guilty the applicant requires to be punished under the said Section.

- (b) The applicant is also guilty of charge No. 2. Accordingly findings recorded by GCM are reversed to the tune with the observations made by confirming authority.
- (c) For both the charges conviction of the applicant is upheld but the sentence awarded to him is reduced to the period already undergone.

27. Subject to aforesaid modification, the O.A. deserves to be dismissed and is accordingly **dismissed**.

Petitioner need not to surrender and the sentence is changed to period undergone.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

Dated: May, 2017
Rathore

(Justice Devi Prasad Singh)
Member (J)