ARMED FORCES TRIBUNAL, REGIONAL BENCH,

LUCKNOW,

AFR
RESERVED
COURT NO 1

Transferred Application No. 133 of 2010

Wednesday, the 20th day of September, 2017

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

Yogendra Singh Tomar son of Jaswant Singh Resident of Bharey Ka Purva, P.O. Harchandpura, District-Auraiyya.

…….…….. Petitioner

Shri D.K.S. Rathore, Ld. Counsel for the petitioner.

Versus

1. Government of India through Secretary Defence Sena Bhawan, New Delhi.

2. Central Commandant under Rajputana Rifles Regimental Centre, Delhi Cantt-10.

…… Respondents

Shri Namit Sharma, Ld. Counsel for the respondents, assisted by **Maj Salen Xaxa**, OIC Legal Cell.

ORDER

"Per Hon'ble Mr. Justice Devi Prasad Singh, Member (J)"

1. Being aggrieved with denial of salary and pension, the petitioner had preferred Civil Misc Writ Petition bearing No 14368 of 2001 on 27.02.2001 in the High Court of Judicature at Allahabad. The petition has been transferred to this Tribunal in pursuance of power conferred under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 133 of 2010.

2. We have heard Shri D.K.S. Rathore, Ld. Counsel for the petitioner and Shri Namit Sharma, Ld. Counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell and perused the records.

3. Is it fate or destiny we do not know but facts on record shake our conscious where a soldier (driver) seems to have been deprived from service benefits without any lawful order passed in pursuance of Army Act and Rules framed thereunder.

4. The petitioner was enrolled as soldier in Rajputana Rifles on 19.01.1984. In June 1999 his unit was sent to J&K where he was promoted to the rank of Naik. On 18.10.1999 he was directed to proceed on temporary duty to 7 Div Ord Unit Deck (Kargil) situated at a distance of 250 kms along with Vehicle TATA 2.5 Tons and remained there till 18.11.1999. On 18.11.1999 he was called back and sent to 192 Mountain Brigade Headquarters (Battalik) situated at a distance of 150 kms where he arrived on

22.11.1999 and remained on duty up to 08.02.2000. It is alleged by the petitioner that he was called back to his unit on 08.02.2000 but he was not paid salary for the period he worked at Kargil and Battalik i.e. from October 1999 to February 2000 (supra). It is further alleged by the petitioner that on 09.02.2000 he arrived in his unit where annual leave was sanctioned for two months with effect from 10.02.2000. He approached MTO, Captain Bhanwar Singh Rathore for payment of salary of the aforesaid period but he was told that he has already been given more salary than what he requires. Being agitated by petitioner's request, he was abused and directed to go for fitness test on the hill. The petitioner went up and down the hill the whole day under the command of Capt Bhanwar Singh Rathore for fitness test. Thereafter he had gone to his home alongwith papers relating to leave. He arrived his home on 14.02.2000 without a penny. The petitioner was in continuous correspondence with the respondents from as early as 01.08.2000 i.e. from within less than four months of being declared deserter (12.04.2000). The fact of being deserter was not communicated to him and no attempt was made by the respondents to apprehend him and take appropriate disciplinary action. Such an approach to a soldier who has had an unblemished record of 16 years (pensionable) service is not understood and pricks our conscience.

5. The Writ Petition had been filed in the Hon'ble High Court as early as 27.02.2001 i.e. within less than a year of reportedly being deserter. Respondents still did not initiate any action to apprehend him and continued to wait for the mandatory period of ten years to finish and was then dismissed vide order dated 18.05.2010. This dispassionate approach to a soldier with 16 years of service is also not understandable. He submitted representation on 01.08.2000 to Centre Commandant, Delhi Cantt, a copy of which has been filed as ***Annexure-1*** to the T.A. In response to petitioner's representation, the petitioner's complaint was forwarded by Regimental Centre, Delhi Cantt to 2 Rajputana Rifles for necessary action vide letter dated 07.08.2000. Photocopy of letter has been filed as ***Annexure-2*** to the T.A. which in totality is reproduced as under:-

"Tele: 5666575 The Rajputana Rifles Regimental Centre
Delhi Cantt-10

A 12/5 07 Aug 2000

2 RAJ RIF
c/o 56 APO

FORWARDING OF COMPLAINT IN RESPECT OF NO 2881940W NK YOGENDRA SINGH OF 2 RAJ RIF

Original copy of complaint, along with its encls recd from No 2881940W Nk Yogendra Singh Tomar of your unit is fwd herewith for your necessary action please.

Sd/- x x x x x
(RS Tokas)

Lt Col
Offg Adjt
For Comdt

Encls: As above.

Copy to

No 2881940W Ex Nk -for information please.
Yogendra Singh Tomar
Vill: Bhare Ka Purwa
PO: Harchand Pur
Distt-Etawa (UP)"

6. It appears that on account of commission and omission on the part of respondents, the petitioner sent representation on 02.09.2000 with objection that no letter of discharge has been received by him but even then in the letter dated 07.08.2000 he has been shown as ex Naik. Therefore, he prayed that in case he has been superannuated then he should be paid pension and other benefits. The letter dated 02.09.2000 has been filed as ***Annexure-3*** to the T.A. which is reproduced as under:-

´ãÀã ¶ãâ. 2881940¡ºÊãî ãäª¶ããâ‡ãŠ
2.9.2000
¶ãã¾ã‡ãŠ-¾ããñØãñ¶³ ãäÔãâÖ ¦ããñ½ãÀ
ØãÆã½ã-¼ããÀñ ‡ãŠã ¹ãìÌããÃ
¡ã‡ãŠÜãÀ-ÖÀÞã¶ª¹ãìÀ
•ã¶ã¹ãª-,ããõÀõ¾ãã (ƒ›ãÌãã) ¾ãî.¹ããè.

Ôãñ Ìãã ½ãò,

Ôãñ¶›À ‡ãŠ½ãã¶¡ñ¶› ½ãÖãñª³¼ã
Àã•ã¹ãî¦ãã¶ãã Àñ•ããè½ãñ¶› Ôãñ¶›À ãäªÊÊããè

ãäÌãÓã¾ã :- àããä¦ã ¹ãîÀ‡ãŠ ,ãã£ããÀ ¹ãÀ Ôãñ Ìãã ãä‡ãŠÌãð¦ã ãä‡ãŠ¾ãñ •ãã¶ãñ †Ìãâ ¹ãòÔã¶ã ¶ã ¹ãã¶ãñ Öñ¦ãì ¹Çãã©ãÃ¶ãã ¹ã¨ã

½ãÖãñª³¼ã,

¹Çãã©ãâê ãäÌãØã¦ã ÊãØã¼ãØã 16 ºãÓããñÄ Ôãñ ãä´¦ããè¾ã Àã•ã¹ãî¦ãã¶ãã Àãƒ¹ãŠÊÔã ‡ãñŠ ,ã£ããè¶ã

ÔãñÌããÀ¦ã ÀÖã Öõ | ãä¶ã½¶ããäÊããäŒã¦ã ¹ãâãä§ãŠ¾ããâ ,ãã¹ã‡ãñŠ ãäÌãÞããÀã©ãÃ †Ìãâ ÔãÖã¶ãì¼ãîãä¦ã‡ãŠ ‡ãŠã¾ãÃÌããÖãè Öñ¦ãì ¼ãñ•ã ÀÖã Öõ |

½ãã¶¾ãÌãÀ-¹Çãã©ãâê ´ãÀã ãäª¶ããâ 1 ,ãØãÔ¦ã 2000 ‡ãŠãñ ãäÊãŒãñ Ø㾾ãñ ,ã¶ãìÀãñ£ã ¼ãÀñ ,ããÌãñª¶ã ¹ã¨ã ‡ãñŠ ¹Çããä¦ã ,ãã¹ã‡ãñŠ ´ãÀã ‡ãŠãè ØãƒÃ ÔãÖã¶ãì¼ãîãä¦ã‡ãŠ ‡ãŠã¾ãÃÌããÖãè ‡ãŠãè ãäÞã›áŸãè ¹Çãã©ãâê ‡ãŠãñ ãäª¶ããâ‡ãŠ 14 ,ãØãÔ¦ã 2000 ‡ãŠãñ ¹Çãã¹¦ã Öìƒà |

½ãÖãñª¾ã, •ãõÔãã ãä‡ãŠ ,ãã¹ã‡ãñŠ ´ãÀã ¼ãñ•ããè ØãƒÃ ãäÞã›áŸãè ½ãò ,ãã¹ã¶ãñ ´ãÀã ¹Çãã©ãâê ‡ãŠãñ ƒÃ †‡ã‹Ôã ¾ããñØãñ¶³ ãäÔãâÖ ¦ããñ½ãÀ ãäÊãŒã‡ãŠÀ Ôã½ºããñãä£ã¦ã ãä‡ãŠ¾ãã Ø㾾ãã Öõ | Ñããè½ãã¶ã •ããè-ãä•ãÔã‡ãŠã ,ã©ãÃ Öõ ãä‡ãŠ ¹Çãã©ãâê ÔãñÌãã ãä¶ãÌãð¦ã ãä‡ãŠ¾ãã •ãã Þãì‡ãŠã Öõ |

½ãã¶¾ãÌãÀ-,ãØãÀ ¹Çãã©ãâê ÔãñÌãã ãä¶ãÌãð¦ã ãä‡ãŠ¾ãã •ãã Þãì‡ãŠã Öõ ¦ããñ ¹Çãã©ãâê Ñããè½ãã¶ã •ããè Ôãñ ãäÌã¶ã½ãÆ ,ã¶ãìÀãñ£ã ‡ãŠÀ¦ãã Öõ ãä‡ãŠ ¹Çãã©ãâê ‡ãŠãñ ¹ãñ¶Ôã¶ã †Ìãâ ,ã¶¾ã ÔãìãäÌã£ãã¾ãò ¦ã©ãã ¹ãŠ¶¡ ,ããäãª ãäªÊãÌãã¶ãñ ‡ãŠãè ,ããä¦ã ÍããèÜÇã ‡ãðŠ¹ãã ‡ãŠÀò | ¹Çãã©ãâê Ñããè½ãã¶ã •ããè ‡ãŠãè ƒÔã ÔãÖã¶ãì¼ãîãä¦ã ‡ãŠã¾ãÃÌããÖãè ‡ãñŠ ãäÊã¾ãñ ,ãã¼ããÀãè ÀÖñØãã |

,ã¦ã: Ñããè½ãã¶ã •ããè Ôãñ ãäÌã¶ã½ãÆ ,ã¶ãìÀãñ£ã Öõ ãä‡ãŠ ¹Çãã©ãâê ‡ãŠãè „¹ã¾ãì§ãŠ ¹ãâãä§ãŠ¾ããò ‡ãŠãñ •ãÊªãè Öãè ¹Çãã©ããä½ã‡ãŠ¦ãã ªãè •ãã¾ãñ | ¹Çãã©ãâê ,ãã¹ã‡ãŠãè ÔãîÞã¶ãã †Ìãâ ãä¶ãªã¶ã ‡ãŠã¾ãÃÌããÖãè ‡ãŠãè ¹Çã¦ããèàãã ½ãò Öõ | ,ãã¹ã‡ãŠãè ,ããä¦ã ‡ãðŠ¹ãã ÖãñØããè |

ÔãâÊãØã-½ãÖãñª¾ã ´ãÀã ¼ãñ•ããè ØãƒÃ ãäÞã›áŸãè ‡ãŠãè †‡ãŠ ¹Çããä¦ãäãÊã¹ã |

ãäª¶ããâ‡ãŠ-02.09.2000 ,ãã¹ã‡ãŠã
,ãã—ãã‡ãŠãÀãè Ôãõãä¶ã‡ãŠ
¶ãâ. 2881940¡ºÊãî
¶ãã¾ã‡ãŠ ¾ããñØãñ¶³ ãäÔãâÖ ¦ããñ½ãÀ
ØãÆã½ã-¼ããÀñ ‡ãŠã ¹ãìÌããÃ
¡ã‡ãŠÜãÀ-ÖÀÞã¶³¹ãìÀ
•ã¶ã¹ãª-,ããõÀõ¾ãã (ƒ›ãÌãã) ¾ãî.¹ããè."

7. In continuation of aforesaid letter the petitioner represented his cause by subsequent representation and reminders dated

22.09.2000 (***Annexure-4***), 30.09.2000 (***Annexure-5***) and 10.10.2000. In response to petitioner's representation, the petitioner received a letter dated 20.10.2000 (***Annexure-6***) from the Record Office informing that the Record Office has not issued any information with regard to petitioner's retirement hence they are not in a position to take appropriate action. The letter sent by Record Office in its totality is reproduced as under:-

> "ªîÀ¼ãäÓã-5666584 ,ãäã¼ãÊãñŒã
> ‡ãŠã¾ãäÃÊã¾ã ÀãƒÃ¹ãŠÊÔã
> ãäªÊÊãäè œãÌã¶ãäè-10
>
> ƒÃ. ,ãäÀ. •ãäè. -Ôãñ‡ãñŠ¶¡/2 ,ãäÀ ,ãäÀ/14/2/95 20 ,ã‡ã‹›îÌãÀ 2000
>
> ¶ãâ. - 2881940 ¡ºÊãî ¶ãã¾ã‡ãŠ ¾ãäñØãò³ ãäÔãâÖ ¦ãäñ½ãÀ
> ØãÆã½ã-¼ãäÀñ ‡ãŠã ¹ãìÌãäÃ
> ¹ãäñÔ›-ÖÀÞã¶ª¹ãìÀ
> •ã¶ã¹ãª-,ãäõÀõ¾ãä (ƒ›ãÌãä) ¾ãî.¹ãäè.
>
> Ôãñ¶ãä Ôãñ Ôãñìãä ãä¶ãÌãð¦ã Öãñ¶ãñ ‡ãñŠ Ôã¶ª¼ãÃ ½ãò :-
>
> 1. ,ãä¹ã‡ãŠã ¹ã¨ã ãäª¶ãäâ‡ãŠ 22 ãäÔã¦ã½ºãÀ 2000 ‡ãñŠ Ôã¶ª¼ãÃ ½ãò :-
>
> 2. ,ãä¹ã‡ãŠãñ Ôãîãäÿã¦ã ãä‡ãŠ¾ãä •ãã¦ãä Öõ ãä‡ãŠ ƒÔã ‡ãŠã¾ãäÃÊã¾ã ‡ãŠãñ ,ãä¹ã‡ãŠãè ¾ãîãä¶ã› Ôãñ ,ãä¹ã‡ãñŠ ¹ãòÍã¶ã •ãã¶ãñ ‡ãñŠ Ôã½ºã¶£ã ½ãò ãä‡ãŠÔãäè ¼ãäè ¹Çã‡ãŠãÀ ‡ãŠãè Ôãîÿã¶ãä ¹Çãã¹¦ã ¶ãÖãé Öì¾ãäè Öõ | ƒÔãäãÊã¾ãñ Ö½ã ,ãä¹ã‡ãñŠ „¹ãÀãñ§ãŠ ‡ãñŠ ,ã¶ãìÔãäÀ ‡ãŠãñƒÃ ¼ãäè ‡ãŠã¾ãÃÌãäÖãè ‡ãŠÀ¶ãñ ½ãò ,ãÔã½ã©ãÃ Öö | ƒÔã Ôã½ºã¶£ã ½ãò ,ãä¹ã ,ã¹ã¶ãäè ¾ãîãä¶ã› Ôãñ Ôã½¹ã‡ãÃŠ ‡ãŠÀò | ƒÔã ‡ãŠã¾ãäÃÊã¾ã ‡ãñŠ ´ãÀã ,ãä¹ã‡ãŠãñ ‡ãŠãñƒÃ ¼ãäè ¹ã¨ã •ãäÀãè ¶ãÖãé ãä‡ãŠ¾ãä Øã¾ãä Öõ |"

8. From the material on record it is established that from 22.09.2000 to 20.10.2000 the Record Office was not aware with regard to petitioner's retirement or discharge. Under such facts

and circumstances petitioner approached the High Court by preferring the petition under Article 26 of the Constitution of India. In response to petitioner's aforesaid pleading on record, it has been stated in counter affidavit that the petitioner was granted 60 days annual leave for the year 2000. Since after expiry of leave he alleged to not join on 04.06.2000, desertion/apprehension roll was issued by letter of said date. District Magistrate informed the unit vide letter dated 05.09.2000 that petitioner does not desire to continue in Army service and could not be apprehended (***Annexure CA-1***). Court of inquiry was alleged to be ordered and petitioner was declared deserter with effect from 12.04.2000 and his absence was published vide Part II Order (***Annexure CA-2***).

9. It has been alleged in para 6 of the counter affidavit that declaration of deserter by court of inquiry together with individual's service documents were forwarded to Record Office and he was struck of strength and later on dismissed from service in pursuance to power conferred by Section 20 (3) of the Army Act, 1950 with effect from 24.10.2000. So far as payment of salary is concerned, it has been stated that petitioner was paid salary from September 1999 to November 1999, December 1999 to February 2000 to a total amount of Rs 35,000/- for the period from September 1999 to February 2000. Details of payment were alleged to have been given in para 7 of the counter affidavit, which is reproduced as under:-

"Date of Payment Pay Book Ser No Amount

18 Sep 99	134	Rs 2,000/-
03 Nov 99	136	Rs 18,000/-
12 Dec 99	137	Rs 9,000/-
03 Feb 2000	138	Rs 6,000/-”

10. From the material brought on record, the respondents set up a defence to the fact that the petitioner was not paid salary regularly in each and every month but lump sum amount of Rs 35,000/- was paid four times during the period of six months. It is not understandable why each and every month he was not paid salary in case the reply is correct. Petitioner was alleged to have been declared deserter on 12.04.2000 but later on Record Office replied that he was struck of strength from the strength of the unit and information was communicated to Record Office but it is strange enough that the Record Office vide its letter dated 20.10.2000 (supra) informed the petitioner that the Record Office has not received any information with regard to petitioner’s discharge from service. In para 22 and 23 of the supplementary counter affidavit dated 18.10.2011 it has been stated that the petitioner was dismissed from service by order dated 23.04.2010 with effect from 24.04.2010. For convenience sake paras 22 and 23 of the supplementary counter affidavit are reproduced below:-

> *“22. That as existing policy all deserters either from ‘peace station’ or ‘field area’ those deserters who do not surrender or are not apprehended by the police within three years and ten years respectively from the date of their absence are to be dismissed from service under Army Rules 20 (3). Petitioner’s name found place at Sl. No. 1 in the Nominal Roll dated 23.04.2010 of deserters who have completed 10*

(TEN) year desertion from field Area. A true copy of the Nominal Roll dated 23.04.2010 is filed as ***Annexure No. SCA-4*** *to the Short Counter Affidavit.*

23. That in accordance with the above mentioned policy and appearance of name of the petitioner in the Nominal Roll dated 23.04.2010 of deserters, the petitioner was dismissed w.e.f. 24.04.2010 vide Part-II Order JCO/OR. A true copy of the Part-II Order JCO/OR is filed as ***Annexure No. SCA-5*** *to the Short Counter Affidavit."*

11. The document filed as Annexure SCA-4 is the nominal roll of deserters and absentees of Rajputana Rifles contains 74 names in all. The covering letter indicates that order of dismissal has been signed on 24.04.2010 under the Army Act Section 20 (3). The covering letter of the nominal roll in its totality is reproduced as under:-

"Appendix 'A' to Integrated HQ of MOD (Army)
Letter No 17774/AG/DV-1 dated 11 Mar 1980

The total number of sheets comprising this nominal roll of deserters/absentees of THE RAJPUTANA RIFLES are THREE containing 74 (SEVENTY FOUR) names in all.

Station : C/O 56 APO *sd/-x x x*
(Yashwant Singh)
Dated : 23 Apr 2010 *Lt Col*
Chief Record Officer

The dismissal of the persons whose names appear in the nominal roll containing 74 (SEVENTY FOUR) in all has been sanctioned on 24 Apr 2010 under Army Act Sec 20 (3). It has not been practicable to comply with the provisions of Army Rule 17 in their cases.

Station : C/O 56 APO *sd/- x x x x*
(AK Shukla)
Dated : 24 Apr 2010 *Brig*
OIC Records"

12. The nominal roll indicates that services of 74 persons were terminated by exercising power under Section 20 (3) of the Army Act, 1950. Petitioner's name finds place at Ser No. 1 pointing out date of desertion as 12.04.2000. From the perusal of the supplementary counter affidavit, it appears that Integrated Headquarters of MoD (Army) has exercised power under Section 20 (3) of the Army Act, 1950 and passed a combined order but it appears that the case set up in supplementary counter affidavit is contrary to averments made in original counter affidavit dated 24.11.2005. The respondents have stated that the petitioner is still a deserter. He may receive pensionary awards after disciplinary action. For convenience sake para 17 of the counter affidavit is reproduced as under:-

> *"17. That the contents of paragraph No. 10 of the writ petition are incorrect on the following grounds that the petitioner is neither a serving personal nor ex serviceman but is a deserter. The petitioner is still a deserter. He has not rejoined either at Rajputana Rifles Regimental Centre or second Battalion The Rajputana Rifles on expiry of his Annual leave. The petitioner is not entitled for pay and allces w.e.f. 12.4.2000 as he is a deserter. The petitioner can only be paid his due benefits after his rejoining and necessary disciplinary action against him."*

13. Though in para 6 of the counter affidavit it has been stated that a court of inquiry was held but nothing has been brought on record to establish that when the convening order for court of inquiry was passed, when it was held and when concluded. For convenience sake para 6 of the counter affidavit is reproduced as under :-

> *"6. That a court of inquiry was ordered and petitioner was declared as a deserter w.e.f. 12.4.2000. The occurrence regarding his leave, over staying leave, declaration of deserter and reversion of paid acting Naik have been published vide our Part II orders 240/01 to 4/2000 dated 24.10.2000, copy of which is being filed here with and marked as Annexure CA-2 to this affidavit."*

14. In response to different reminders and letters the petitioner was informed by letter dated 13.02.2003 by Record Office that petitioner has deserted and his account has been closed subject to payment of certain amounts. Strange fact of the case on record further reveals that Captain of 2 Rajputana Rifles has informed the petitioner and passed order that the petitioner has been declared deserter due to absent without leave and entire records have been sent to Delhi for necessary action. A copy of the letter dated 13.02.2003 has been filed at page 36 of the supplementary rejoinder affidavit. It has been pleaded in para 11 of the supplementary rejoinder affidavit that letter dated 05.09.2000 was handed over to the petitioner by Captain/Quarter Master. While giving reply to para 9 of the supplementary counter affidavit, the petitioner has stated that he has been paid only Rs 2,000/- in September 1999 and the amounts shown have not been received by him. It has also been submitted that acquaintance roll contains his forged signature. It is also stated that there is no provision or procedure for obtaining signatures on the acquaintance roll before making any payment. Moreover he was on duty to 8 Mountain Div Ord Unit (Kargil) and later on to

192 Battalik Mountain Brigade and there was no occasion to sign the acquaintance roll. No person has approached him for payment of salary and received signature in lieu of acknowledgement of the acquaintance roll. With regard to acquaintance roll petitioner has made the following pleading in his supplementary rejoinder affidavit in para 10. The relevant portion is reproduced as under:-

> *"According to enclosure enclosed by respondent itself shows that date is 3.11.1999 and 29.12.1999 and 3.2.2000. Photocopy of acquaintance roll of 3.11.1999, 29.12.1999 and 3.2.2000 which shows signature of petitioner is fabricated as the petitioner has not signed on the acquaintance roll. It is further submitted that there is no provision of obtaining signature on the acquaintance roll before making any payment. It is amply clear from Marching order dated 17.10.1999 that petitioner was sent to 8 Mountain DOU Kargil i.e. 260 kilometer from main unit and petitioner remained there till 18.11.1999 and thereafter petitioner was again sent to 192 Mountain Brigade Battalik from 20.10.2000 to 8.2.2000 and in this connection petitioner is enclosing herewith photocopy of duty slip of 3.11.1999 at 8 Mountain DOU on the same day he was attached to vehicle for driving is mentioned above and on 29.12.1999 and 3.2.2000, he was on duty in 192 Battalik Mountain Brigade. Photocopies of duty slip are being filed herewith and marked as* ***Annexure No. SRA-5, 6 and 7*** *to this affidavit.*

15. It is averred by Ld. Counsel for the petitioner 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. 18.05.2010 is totally illegal. It is further submitted that show cause notice was required

to be forwarded to the petitioner at his permanent address and in case the show cause notice 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 Rules, 1954. 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 the 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 has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under sub-section (1) or subsection (3), of section 20, unless he has been informed of the particulars of 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 the 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 complying 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."*

16. It would thus appear that the dismissal order passed against the petitioner is not a reasoned and speaking order inasmuch as in terms of Army Rule 17, the petitioner has not been informed of the particulars of 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.

17. One more important feature on record is that the petitioner has rendered 16 years of dignified service, hence we do feel that no person would overstay the leave or in ordinary circumstances do anything to forgo pension. Signature on the acquaintance roll while working in Jammu and Kashmir (Kargil) or Battalik seems to make out a case to frustrate the petitioner's claim for pension. While filing affidavit dated 11.12.2015 under title supplementary rejoinder affidavit the petitioner has filed the attendance roll while working at 192 Mountain Brigade at Battalik. The petitioner has signed the attendance roll, a copy of which containing the presence at 192 Mountain Brigade has been filed with supplementary rejoinder affidavit. Although by one another supplementary affidavit dated 23.02.2017 the petitioner has filed Photostat copy of movement order dated 08 October 1999. A copy of sheet roll has also been filed with such affidavit.

18. With regard to payment of salary, the petitioner has categorically pleaded in his affidavit dated 11.12.2015 that the payment of salary as alleged by the respondents in their affidavit is apparently false and incorrect for the reason that the dates mentioned by the respondents for payment of salary on 18.09.1999, 03.11.1999, 12.12.1999 and 03.02.2000 are not correct because on the said dates the petitioner was away in Kargil and Battalik. The relevant portion of supplementary rejoinder affidavit-2, for convenience sake is reproduced as under:-

> *"The document showing payment of salary on 3 Nov 1999, 29 December 1999 and 03 February 2000 have not been paid to petitioner as on the said date petitioner was sent away in 8 Mountain DOU Kargil and thereafter on 18 Nov 1999 he was sent to 192 Mountain Brigade Battalik, all the documents have already annexed in the supplementary counter affidavit filed by the department and the same has been replied in rejoinder affidavit, marching order 18 Oct 1999 annexed as SRA-1 to this affidavit."*

19. We have no hesitation to hold that the respondents have tried to conceal material facts to defend their action while depriving the petitioner of his constitutional right to avail due process of law, payment of pension, salary and other benefits. We feel it is a major contradiction on record which shows that the respondents did not apply their mind to the material placed by the petitioner. The respondents tried to conceal the facts with high handedness in depriving the petitioner's lawful rights.

20. It appears that no action has been taken under Section 106 of the Army Act with regard to absence without leave (AWL). No notice has been sent under Army Rule 17 for dismissal from service. No court of inquiry has been held in accordance to process contained in Army Rules and Regulations. The procedure has been given a go bye and actual procedure has not been adopted and complied with rather, unfounded grounds have been made while filing counter affidavit and supplementary counter affidavit.

21. Section 20 (3) of the Army Act, 1950 provides that wherever a member of the Army is dismissed or discharged, he/she shall be communicated in prescribed format material information as given

therein. For convenience sake, Section 20 (3) of the Army Act, 1950 is reproduced as under:-

> *"20.* ***Dismissal, removal or reduction by (Chief of the Army Staff) and by other officers***
>
> *(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 an officer or a junior commissioned officer."*

22. In the present case respondents have not brought on record any material or order issued in compliance with Section 20 (3) of the Act. The provisions contained in Section 20 (3) of the Act is mandatory and it shall be obligatory on the part of the competent authorities of the Indian Army to serve an order of termination or discharge, dismissal or removal indicating cause of termination in English language with information as contained in clause (a) and clause (b) of Section 20 (3). In the present case there appears that no order has been passed by the respondents indicating the decision against the petitioner in the form of Section 20 (3). Mere communication by Record Office at belated stage i.e. on 24.10.2000 does not seem to be sufficient rather seems to an attempt to conceal the material fact and defend the action taken against the petitioner.

23. In ***Dalip Singh vs. State of U.P.,***(2010) 2 SCC 114, the Hon'ble Supreme Court considered the question whether relief should be denied to the appellant who did not state correct facts in the application filed before the prescribed authority and who did

not approach the High Court with clean hands. After making reference to some of the precedents, it was observed:

> *"9….. while exercising discretionary and equitable jurisdiction under Article136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. If the appellant has not come forward with clean hand, has not candidly disclosed all the facts that he is aware of and he intends to delay the proceedings, then the Court will not non-suit him on the ground of contumacious conduct."*
>
> *(Emphasis supplied)*

24. In ***Oswal Fats and Oils Ltd vs. Commr (Admn),*** (20010) 4 SCCF 728 relief was denied to the appellant by making the following observations (SCC pp.738-39 paras 10-20):

> *"19. It is quite intriguing and surprising that the lease agreement was not brought to the notice of the Additional Commissioner and the learned Single Judge of the High Court and neither of them was apprised of the fact that the appellant had taken 27.95 acres land on ease from the Government by unequivocally conceding that it had purchased excess land in violation of Section 154(1) of the Act and the same vested in the State Government. In the list of dates and the memo of special leave petition filed in this Court also there is no mention of lease agreement dated 15.10.1994. This shows that the appellant has not approached the Court with clean hands. The withholding of the lease agreement from the Additional Commissioner, the High Court and this Court appears to be a part of the strategy adopted by the appellant to keep the quasi-judicial and judicial forums including this Court in dark about the nature of its possession over the excess land and make them believe that it has been subjected to unfair treatment. If the factum of execution of lease agreements and its contents were disclosed to the Additional Commissioner, he would have definitely incorporated the same in the order dated 30.5.2001. In that event, the High Court or for that reason this Court would have none suited the appellant at the threshold. However, by concealing a material face, the appellant succeeded in persuading the High Court and this Court top entertain adventurous*

litigation instituted by it and pass interim orders. If either of the courts had been apprised of the fact that by virtue of lease deed dated 15.10.1994, the appellant has succeeded in securing temporary legitimacy for its possession over excess land, then there would have been no occasion for the High Court to entertain the writ petition or the special leave petition.

20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, it is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected for a person of ordinary produce. If he is found guilty of concealment of material facts or making an attempt to pollute the purse stream of justice, the court not only has the right but a duty to deny relief to such person."

25. Even a solemn proceeding stands vitiated if it is activated by fraud. In the case of ***S.P. Chengalavaraya Naidu vs. Jagannath*** (1994) 1 SCC 1 Supreme Court had held that a fraud is an act of deliberate deception with the design of securing something by taking undue advantage of another. In ***Baburao Dagdu Paralkar vs. State of Maharashtra*** (2005) 7 SCC 605 Hon'ble Supreme Court has held that by fraud meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other, is immaterial.

26. In ***V. Papayya Shastry vs. Govt of AP***, (2007) 4 SCC 211 Hon'ble Supreme Court has held that the judgment, decree or order obtained by plain fraud on the court, tribunal or authority is a nullity and non est in the eyes of law. Such a judgment decree or

order passed by the first court or by the final court is to be treated as nullity by every court, superior or inferior. It can be challenged in any court at any time, in appeal, revision, and writ or even in collateral proceedings.

27. In view of ***A. V. Papayya Shastry's*** case (supra) while adjudicating the controversy involved in the review the Tribunal has got right to record a finding with regard to commission of fraud and nullify the impugned order dated 30.10.2012 and direct to maintain status quo ante. No person how so high may be, should be permitted to enjoy office acquired by commission of fraud even for a day.

28. A fraud has been committed and petitioner has been dealt with high handedness manner except that the salary and material facts have been concealed from the Tribunal and this is borne out from the following facts and circumstances on record:-

(a) Letter dated 07.08.2000 sent to the petitioner by Rajputana Rifles, Delhi Cantt in response to his representation dated 01.08.2000 addressed to him as ex Nk, though by that time neither petitioner was dismissed nor anything was brought on record that he was dismissed from service. The complaint of the petitioner was for payment of salary and other benefits but no reply was given to him as to why salary was not paid to him. In case something was in the record of Rajputana Rifles Centre, Delhi Cantt that

petitioner was dismissed by that time then it should have been brought on record.

(b) After receipt of letter of Rajputana Rifles Regimental Centre (supra) petitioner was shocked on account of using word ex Nk, he sent a letter dated 02.09.2000 for payment of pensionary benefits if he has been discharged. In response to which the Record Office vide letter dated 20.10.2000 informed that no communication has been received from petitioner's unit with regard to petitioner's payment of pension on discharge from service. This is indicative of the fact that prior to 20.10.2000 no proceeding was held against the petitioner indicating discharge from service.

(c) In case Court of Inquiry was ordered and petitioner was declared deserter on 12.04.2000 and Part II Order was published in his absence then why no information was communicated to the petitioner in pursuance to his first representation dated 01.08.2000 where he raised his grievance to the competent authority.

(d) Instead of sending appropriate information in response to his representation dated 07.08.2000 and 02.09.2000 the respondents have gone ahead without communicating the petitioner that he has been declared deserter on 12.04.2000. Why no information was communicated to the petitioner is not understandable.

(e) No order has been passed and served in pursuance to statutory provision contained in Section 20 (3) of the Army Act, 1950, he was struck of strength from service on 24.10.2000 that too without communication in pursuance to mandatory provision contained in Section 20 (3) of the Army Act. He suffered because of ill treatment by the respondents with regard to pendency of information proceeded against him. At no stretch of imagination the petitioner can be held to be a deserter when he has completed more than 16 years of service and entitled for pension. Petitioner was on duty in Kargil and Battalik.

29. The payment of salary to him was not possible at all at Srinagar unless some person is sent to respective places or by other lawful methods. Attendance sheet filed by the petitioner amply proves that he was serving in Kargil and Battalik between September 1999 to February 2000. At the face of record the false case has been set up by the respondents while commission of fraud at the threshold of the petitioner's career who worked at lower rung of Indian Army. The respondents have tried to conceal material fact on record and deprived the petitioner from his source of livelihood.

30. Petitioner seems to have suffered because of malice in law. However, the material on record and the manner in which the petitioner has been harassed is blatant abuse of power by

incompetent authority which seems to make out a case of malice in law.

31. In ***Ravi Yashwant Bhoir vs. District Collector, Raigad***, AIR 2012 SC 1339; 2012 AIR SCW 1877: (2012) 4 SCC 407, the Supreme Court held that the State is under an obligation to act fairly without ill will or malice in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. “legal malice” or “malice in law” means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for “purposes foreign to those for which it is in law intended”. It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (see: ***A.D.M., Jabalpur v. Shivakant Shukla***, AIR 1976 SC 1207: (1976) 2 SCC 521: 1976 Cr LJ 945; ***Union of India thr. Govt of Pondicherry vs. V. Ramakrishnan***, (2005) 8 SCC 394: AIR 2005 SC 4295: 2005 AIR SCW 5147; and ***Kalabharati Advertising vs. Hemant Vimalnath Narichania***, AIR 2010 SC 3745: (2010) 9 SCC 437: (2010) 9 SCALE 60).

32. It is trite law that right to livelihood is a fundamental right to deal with matters relating to source of livelihood. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood.

33. In ***Union of India and ors vs. Rajpal Singh***, (2009) 1 SCC 216, their Lordships of the Hon'ble Supreme Court held that the an executive authority must be rigorously held to the standards by which it processes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.

34. In ***Air India etc etc. vs. Nergesh Meerza and ors***, 1981 AIR 1829, Hon'ble Supreme Court held that decisions relating to employment cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. There cannot be gender discrimination while dealing with subject matter in the matter of employment. While considering earlier judgments, it was observed:

> *"In view of our recent decisions explaining the scope of Art. 14, it has been held that any arbitrary or unreasonable action or provision made by the State cannot be upheld. In M/s Dwearka Prasad Laxmi Narain v. The State of Uttar Pradesh, this Court made the following observations:*
> *"Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under article 19 (1) (g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in reasonableness.*

35. In ***Maneka Gandhi vs. Union of India, Beg, C.J***. observed as follows*:*

> *"The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognized by and embodies in our Constitution. If either the reason sanctioned by the law absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed."*
> *And Bhagwati, J observed thus:*
> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied".*

36. In an earlier case in ***E.P. Royappa v. State of Tamil Nadu and Anr.*** Similar observations were made by this Court thus:

> *"In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 4."*

37. In ***State of Andhra Pradesh and Anr. vs. Nalla Raja Reddy and Ors***, this Court made the following observations:

> *"Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows*

where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately."

38. With the aforesaid observations with regard to applicability of Article 14 of the Constitution, their Lordships further held that the provision which leads to unbridled power cannot in any sense characterized as reasonable.

39. In the case of ***D.K. Yadav vs. J.M.A. Industries Ltd***, (1993) 3 SCC 259, their Lordships reiterated the well settled law that procedure prescribed for depriving a person from livelihood would be liable to be tested on the anvil of Article 14 of the Constitution. The principle of natural justice is part of Article 14 of the Constitution and the procedure prescribed by law must be just and fair and not fanciful or oppressive. The colour and contents of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. The order of termination of the service of an employee/workman visits with civil consequences of jeopardizing not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his/her case is given and domestic inquiry conducted complying with the principles of natural justice. There is no distinction between the quasi judicial function and an administrative function.

40. In the case of ***Delhi Transport Corporation vs. D.T.C. Mazdoor Congress & Ors.,*** 1991 Supp (1) SCC 600 their Lordships have held as under :-

> "*There is need to minimize the scope of the arbitrary use of power in all walks of life. It is in advisable to depend on the good sense of the individuals, however high-placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whim and fancies. Individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however, high they may be. There is only a complacent presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law. Hence the absence of guidelines cannot be defended on the ground that the discretion is vested in high authorities".*

41. In the case of ***Lt Col SPS Rekhi and ors vs. Union of India and Ors***, (Mil LJ 2005 Del 5) a Division Bench of Delhi High Court held that in case a person is deprived from service and prevented from discharging duty on unfounded grounds then such person may be restored with full back wages.

42. In ***Roop Singh Negi vs. Punjab National Bank & Ors.*** (2009) 2 SCC 570 Hon'ble Supreme Court granted full back wages where the employee was dismissed from service without inquiry.

43. In the case of ***State of Mysore vs. P.R. Kulkarni & Ors Etc***, (1973) 3 SCC 597 their Lordships of Hon'ble Supreme Court held that exercise of every power, whatever its nature, lodged in Government authorities, is controlled by the need to confine it to the ambit within which it could justly and reasonably be expected to take place. A power used under the misapprehension that it was needed for effectuating a purpose, which was really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose.

44. The aforesaid proposition of law has been reiterated by Hon'ble Supreme Court in the case of ***Bachan Singh vs. State of Punjab,*** (1982) 3 SCC 24.

45. In view of the above, we are of the considered view that respondents had not filed counter affidavit and supplementary counter affidavit with clean hands. They have tried to conceal material fact and have not been fair while dealing with the case in the Tribunal.

46. It is a fit case where cost should be imposed apart from allowing the petition. It is the sheer negligence on the part of the respondents because of which the applicant has suffered not only financial loss but mental pain and agony for so many years. The Hon'ble Supreme Court, in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others,*** (2011) 8 SCC 249, has given emphasis to compensate the litigants, who have been forced to enter into unnecessary litigation. This view has been

fortified by Hon'ble Supreme Court in the case of ***A. Shanmugam V. Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others,*** (2012) 6 SCC 430. In the case of A***. Shanmugam*** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. ***Indian Council for Enviro-Legal Action V. Union of India,*** *(2011) 8 SCC 161;*
2. ***Ram Krishna Verma V. State of U.P***., (1992) 2 SCC 620;
3. ***Kavita Trehan V. Balsara Hygiene Products Ltd***. (1994) 5 SCC 380;
4. ***Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.,*** (1999) 2 SCC 325;
5. ***Padmawati V. Harijan Sewak Sangh,*** (2008) 154 DLT 411;
6. ***South Eastern Coalfields Ltd. V. State of M.P.,*** (2003) 8 SCC 648;
7. ***Safar Khan V. Board of Revenue***, 1984 (supp) SCC 505;
8. ***Ramrameshwari Devi and others*** (supra).

47. In the case of ***South Eastern Coalfields Ltd*** (supra), the apex Court while dealing with the question held as under:

> *"28. ...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for*

which the interim order of the court withholding the release of money had remained in operation".

48. In the case of ***Amarjeet Singh V. Devi Ratan***, (2010) 1 SCC 417 the Supreme Court held as under :-

"17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been field. The maxim actus curiae neminem gravabit, which means the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party involving the jurisdiction of the court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court".

49. As is evident from above, the question of award of cost is meant to compensate a party who has been compelled to enter litigation unnecessarily for no fault on its part. The purpose is not only to compensate a litigant but also to caution the authorities to work in a just and fair manner in accordance to law. The case of ***Ramrameshwari Devi and others*** (supra) rules that it the party who is litigating and is to be compensated.

50. In the case of ***Centre for Public Interest Litigation and others V. Union of India and others***, (2012) 3 SCC 1, the Hon'ble Supreme Court after considering the entire facts and circumstances and keeping in view the public interest, while

allowing the petition, directed the respondents No 2, 3 and 9 to pay a cost of Rs. 5 crores each and further directed respondents No 4, 6, 7 and 10 to pay a cost of Rs. 50 lakhs each, out of which 50% was payable to the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants and the remaining 50% was directed to be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

51. T.A. deserves to be allowed. Accordingly we **allow** the T.A. with following directions:-

(a) The petitioner shall be entitled to Rs 35,000/- towards salary for the period from Sep 1999 to Feb 2000 in lieu of service rendered in Kargil and Battalik along with interest @ 10%.

(b) The impugned order dismissing the petitioner with effect from 23.10.2000 is set aside with all consequential benefits, perks and salary.

(c) Petitioner shall be entitled for payment of full salary in accordance with rules for the full length of service of the rank which he was holding with pension and other benefits. The arrears of salary shall be paid with interest of 10% within four months from today.

(d) Cost is quantified to Rs 2 lacs which shall be deposited by the respondents in the Tribunal within four

weeks and shall be released in favour of the petitioner through cheque.

T.A. is **allowed** accordingly.

(Air Marshal Anil Chopra)
Member (A)

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

September, ,2017
Rathore