

RESERVED
COURT NO. 2

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 143 of 2014
24th , this the Wednesday day of August, 2016

“Hon’ble Mr. Justice D.P.Singh, Judicial Member
Hon’ble Air Marshal Anil Chopra, Administrative Member”

No. 14296520 Ex. Hav. Hakim Singh son of Jeeva Lal, resident of village Gopalpur, Post office Kudar Kot District Auraia, U.P.

.... Applicant

Versus

1. Union of India, through its Secretary, Ministry of Defence, New Delhi.
2. The Chief of Army Staff Army HQ, New Delhi.
3. Officer In-Charge, Signal Records, Post Bag-5 Jabalpur M.P.
4. Commanding Officer, 12 Corps Signal Regt. C/o 56 APO

.... Respondents

Ld. Counsel appeared for the: Shri K.K. Mishra, Advocate
Applicant

Ld. Counsel appeared for the: Shri R.K.S.Chauhan, Central
Respondents Govt Standing Counsel assisted
By Maj Soma John, OIC Legal
Cell.

Order

“(Per Hon’ble Air Marshal Anil Chopra, Member A)”

1. The present application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved with the dismissal from service with effect from 20.10.2010 vide Part II Order dated 23.10.2010.
2. Heard Ld. Counsel for the parties and perused the records.
3. The substantial relief claimed by the applicant in the present O.A. is to the affect to quash impugned order of dismissal promulgated in Part II Order dated 23.10.2010 and re-instate the applicant in service.
4. Brief facts giving rise to the present O.A. are that the applicant Ex Hav Hakim Singh was enrolled in the Indian Army on 24.04.1977. The applicant underwent training at 2 Signal Regiment Centre Panaji Goa from April 1977 to July 1978 and was attested in the Army on the rank of Sepoy. The applicant was posted to various units and was granted various ranks on his own turn. In the month of June 1996 the applicant was holding the rank of Havildar and was posted in 12 Corps Signal Regiment. On 18.07.1999 the applicant was handed over movement order to proceed on posting to 19 Division Signal Regiment. While moving on posting the applicant was granted 15 days annual leave along with six days joining time excluding Sundays and Holidays and on expiry of said period the applicant was to report to 19 Division Signal Regiment on 11.08.1999. Submission of Ld. Counsel for the applicant is that while moving to join to the new unit, during the train journey, some miscreants took the applicant in

confidence and gave him some biscuits to eat. Submission is that the biscuits were poisonous and upon consumption, the applicant became unconscious; the entire belongings of the applicant were taken away by the miscreants; the applicant remained unconscious for a long time. It is further stated that on gathering information from the documents being carried by the applicant, some persons brought the applicant to his home on 15.10.1999 where he remained under treatment of doctors. In November 1999 the applicant went to No. 1 STC, Jabalpur to report for duty but was not allowed to join the Centre. Repeated efforts made by the applicant to join his duty at No. 1 STC went in vain. Consequently wife of the applicant wrote a letter to the Directorate General of Signals, Army Headquarters on 21.05.2004 with the request that the applicant be permitted to join duties. In response, vide letter dated 29.06.2004 received from Signals Records, Jabalpur it was informed that the applicant has been declared deserter with effect from 12.08.1999.

5. Repelling contention of Ld. Counsel for the applicant, Ld. Counsel for the respondents vehemently argued that the applicant was granted 15 days part of the annual leave-cum-posting with effect from 20.07.1999 and on expiry of said leave he was to join 19 Infantry Division Signal Regiment on 11.08.1999 which he failed to do. Vide letter dated 11.11.1999 apprehension roll was issued to the Superintendent of Police District Etawah. It is submitted that the applicant failed to join at his new duty station, accordingly as per the policy, after 30 days of continuous absence he was declared deserter by a Court of Inquiry convened on 13.11.1999 in pursuance to

Section 106 of Army Act, 1950 from 12.08.1999. A petition dated 31.05.2004 was received from Smt Vimla Devi, wife of the applicant after three years and nine months from the date of desertion which was suitably replied intimating her to instruct her husband to report to 1 STC, Jabalpur for trial of his desertion at any time forthwith. It has been submitted by Ld. Counsel for the respondents that the applicant failed to report to 1 STC, Jabalpur/Depot Regimental Corps of Signals for ten years from the initial date of desertion, thus he was dismissed from service under Section 20 (3) of the Army Act, 1950 with effect from 20.10.2010. Ld. Counsel for the respondents further submitted that in pursuance to para 113 of the Pension Regulations for the Army, 1961 (Part I), the applicant was not eligible for service pension and this fact was communicated to the next of kin of the applicant vide letter dated 18.05.2012.

6. From the facts mentioned hereinabove, it is evident that the Court of Inquiry was held before declaring the applicant as 'deserter' in pursuance to Army Regulations. The material on record shows that the applicant absented himself without leave from 11.08.1999 and he was declared deserter from 12.08.1999 in pursuance to Court of Inquiry.

7. Section 20 of the Army Act provides that an Army person be dismissed from service by the Chief of the Army Staff and other officers subject to the provisions contained in the Act. For convenience, Section 20 of the Army Act is reproduced as under:-

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

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

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

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

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

(6) The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a non-commissioned officer, or if he has no permanent grade above the ranks, to the ranks.

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

8. It is well settled proposition of law that overstaying of leave for reasonable period may be justified with sufficient cause and may make out a case for minor punishment. But absence without leave is a serious misconduct and in the event of absence without sanctioned leave, as would be borne out from Section 39 of the Army Act, 1950,

immediately after 30 days followed by Court of Inquiry, Army person may be declared deserter by following due procedure. For convenience sake Section 39 of the Army Act, 1950 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; or*
- (b) *without sufficient cause overstays leave granted to him; or*
- (c) *being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or*
- (d) *without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or*
- (e) *when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or*
- (f) *when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or*
- (g) *without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there, shall, on conviction by court martial, be liable to suffer imprisonment for a term which*

may extend to three years or such less punishment as in this Act mentioned.”

9. The facts borne out from the record (supra) establish to the hilt that the applicant was liable to be tried for desertion. Prima facie, he could have been tried and punished with imprisonment. Section 106 of the Army Act further deals with circumstances where Armed Forces personnel is absent without leave. For convenience, Section 106 of the Army Act is reproduced as under :-

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

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

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

10. A conjoint reading of Section 39 and Section 106 of the Army Act shows that legislature to their wisdom has provided severe

punishment for absence without sanction of leave or over-staying the leave.

11. Section 106 of the Army Act does not provide any waiting period except 30 days, after which Army person may be declared deserter. However, Army Order 43 of 2001 contains a provision whereby three years' waiting period has been provided. In the case on hand, the applicant had overstayed leave from 11.08.1999 and was declared deserter by Court of Inquiry held on 13.11.1999. Thus, after expiry of three years' period it was not necessary for the Army to wait further, more so, when in spite of communication to the applicant's wife that he has been declared deserter, the applicant has not contacted the Unit.

12. At the face of record the defence set up by the applicant explaining the absence of duty without sanctioned leave for more than three years seems to be cooked up case and does not inspire confidence, more so, when he has not communicated his whereabouts to the Army under the teeth of letter sent by the Army to his wife (supra). It may be noted that under sub-section (2) of Section 106 of the Army Act in case a person declared absent and does not surrender or is not apprehended, he shall for the purpose of the Act deemed to be deserter.

13. In Transferred Application 115 of 2009: ***Devi Shankar vs. Union of India and*** others, decided on 24.11,2015 while dealing with similar controversy as involved in the present case, after

extensively quoting the relevant provisions of the Army Act, 1950, we had come to the conclusion that a deserter from Army is not entitled to any indulgence. Such Army personnel should be dealt with sternly so as to maintain discipline in the Army. It was observed, to quote:

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

31. Desertion and absence without leave for long period without reasonable cause and even in appropriate case for shorter period without reasonable cause is a serious misconduct on the part of the Armed Forces personnel. It is not known when the Armed Forces or the Army may require their services to meet out exigencies of service or the sudden cause. Virtually, a desertion from Army is deserting the Nation from the trust and confidence deposited by the country to the Armed Forces personnel. Neither any lenient view may be taken during the course of judicial review nor such persons may be given minor punishment.

32. While parting with the case it shall be appropriate to draw attention of the Union of India as well as Chief of the Army Staff that the waiting period of three years (supra) is too much and not proportionate to the gravity of misconduct where a person of Armed Forces absented without sanctioned leave. Once a person declared deserter after the lapse of 30 days during peace time or when an Armed Forces personnel absented himself without sanctioned leave or overstayed leave, the waiting period of three years is too much and should be reduced to one year or like period. The waiting period of three years after declaring a person deserter that too in 21st Century

having advanced Information and Technology seems to encourage the abuse of the process. Ordinarily Apprehension Roll issued to apprehend Armed Forces personnel are kept unattended by the police stations for extraneous reasons as appears from catena of cases.

“To sum up;

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

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

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

14. The dictum laid down in the case of **Devi Shanker** (supra) was challenged by the petitioner before the Apex Court in Civil Appeal (D) No. 18327 of 2016. The Full Bench of the Apex Court vide order dated 08.07.2016 have dismissed the leave to appeal.

15. While parting with the case, it may be noticed that in a plethora of cases involving controversy of over staying leave and

consequently being declared deserter, we have directed the Principal Secretary (Home), State of Uttar Pradesh as well as the Director General of Police, U.P. to issue guidelines to all concerned police authorities to pay utmost attention to apprehension rolls issued by Army authorities. We propose to pass similar directions in the present case also with the sanguine hope that said authorities shall take up this matter earnestly and do the needful.

16. For the reasons discussed herein above, the Original Application lacks merit; hence is **dismissed** accordingly.

Registrar of the Tribunal shall send a copy of the order to the Principal Secretary (Home) state of U.P. as well as the Director General of Police, U.P. who shall look into the matter and issue appropriate directions.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)
24.08.2016

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

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