

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW  
COURT NO. 2**

**O.A. No. 245 of 2015**

**Friday, this the 25<sup>th</sup> day of November, 2016**

**"Hon'ble Mr. Justice D.P.Singh, Judicial Member  
Hon'ble Air Marshal Anil Chopra, Administrative Member"**

No. 15224615A Ajay Kumar Tiwari, son of Shiv Shanaker Tiwari,  
resident of village Majhanpurva Post Nawabganj, Tehsil  
Tarabganj, District Gonda, U.P. ..... **Applicant**

Versus

1. Chief of Army Staff Integrated Head Quarter Ministry of  
Defence (Army) New Delhi.
2. Director General Artillery, Integrated head Quarter Ministry  
of Defence (Army) New Delhi.
3. Officer Incharge Records, Artillery, Nasik Road Camp,  
Nasik.
4. 2- Training Regiment, AC NRC, Nasik Road Camp, Nasik.

.....**Respondents**

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|---|---|
| <b>Ld. Counsel appeared<br/>for the Applicant</b>   | <b>- Wg Cdr (Retd) A.K. Singh,<br/>Advocate</b> |
| <b>Ld. Counsel appeared<br/>for the Respondents</b> | <b>- Shri G.S. Sikarwar,<br/>Sr. C.G.S.C</b>    |
| <b>OIC, Legal Cell</b>                              | <b>- Maj Soma John</b>                          |

### **Order (Oral)**

1. Present Original Application has been preferred under section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved by the impugned order dated 20.04.2014 the services of the Applicant were dismissed with effect from 20.04.2014 on the ground of being deserter.

2. The factual matrix of the case is that the applicant was enrolled in the Indian Army in the Corps of Artillery on 21.12.2009. He completed his elementary training in Nov 2010. It is alleged that one Havildar Sunil P. ordered the applicant to bring his dinner from the Mess. While bringing dinner "Dal" spilled into the plate, making chapattis wet. Havildar Sunil P. lost temper and started caning him. Next day applicant reported to M.I. Room and was referred to MH for x ray. Later-on, applicant was detailed for "Langar Duty" for Barakhana on 31.12.2010. From the Badakhana the Applicant was thrown out by the Havildar for fear that he may not spill the beans before the Commanding Officer. In consequence thereof, the Applicant made strenuous endeavour but he was not permitted to enter the Unit or join duty and was shooed away at the instance of aforesaid Havildar. The next limb of submission is that

the Applicant reported for duty on 15.02.2011 which fact would be borne out from the Gate Entry Register in which the signatures of the Applicant find mention. As a matter of fact, this Court sent for the Gate Entry Register which was produced before the Tribunal on 30.03.2016 and from a perusal of which it transpires that the Applicant had reported for duty on 15.02.2011 at 1000h. He was not allowed to join duties. The order of the Court dated 30.03.2016 is reproduced below for ready reference.

*"Heard learned counsel for the applicant on admission of this O.A. The point raised by learned counsel for the applicant is that after being declared deserter on 1.1.2011 the applicant went to join his duties on 15.2.2011 and put his signature in the in/out 2<sup>nd</sup> Gate Register of Artillery Centre, Nasik, on 15.2.2011 at 1000 hours. He was thereafter not allowed to join his duties. This fact is evident from the in/out 2<sup>nd</sup> Gate Register produced before this Court by Major Rohit Mishra and name of the applicant, Ajay Kumar Tiwari, find placed at Sl. No. 1 of that date and in the column of date and time 15.2.2011 at 1000 hours is mentioned. Thus there seems to be some substance in the argument of learned counsel for the applicant.*

*Accordingly, we admit this O.A.*

*In our order dated 23.2.2016 cost of Rs. 25,000/- was imposed on the respondents to be realised by the Commanding Officer, 2 Training Regiment, nasik, from the pay and allowances of the officer/official, who flouted our orders repeatedly, to be paid to the applicant. Major Rohit Mishra, who appeared in Court,*

*states that he has already deposited the amount in the A.F.T. Bar Association. The Secretary, A.F.T. Bar association is directed to return the amount and deposit it with the Registrar of this Tribunal by means of a cheque within two weeks.*

*Since counter affidavit is already on record, learned counsel for the applicant prays for and is granted four weeks' time to file rejoinder affidavit.*

*List this case for orders on 18.7.2016 before the appropriate Court having jurisdiction as per roster of that date.*

*The 2<sup>nd</sup> Gate Register, brought by Major Rohit Mishra, is being returned to him with the caution that henceforth as and when the Court wishes to see the Register again it be produced on that date as to be ordered without fail."*

*Sd/- xx xx*

*sd/- xx xx*

*(Lt Gen A.M. verma) (Justice Abdul Mateen)*

*Member (A)*

*Member (J)*

*PG/*

Later-on, it appears, the Applicant was declared deserter with effect from 01.01.2011 vide order dated 23.02.2011 and subsequently, his services were dismissed vide impugned order dated 20.04.2014. On being called upon, OIC Legal Cell produced the order dated 23.02.2011 and it being relevant is reproduced below for ready reference.

**"REMARKS OF THE COMMANDING OFFICER, 3  
ADM & TRG REGT ON THE COURT OF INQUIRY OF  
NO 15224615A RECT (DMT) AJAY KUMR TIWARI**

**OF 8/3 ADM & TRG REGT, ARTY CENTRE, NASIK**  
**ROAD CMAP**

1. *I agree with the findings of the court.*
2. *I direct that No 15224615A Rect (DMT) Ajay Kumar Tiwari of 8/3 Adm & Trg Regt, Arty Centre, Nasik Road Camp who is absent without leave with effect from 01 Jan 2011 till dat be declared as deserter wef 01 Jan 2011.*

Station : Nasik Road Camp

Dated : 23 Feb 2011

Sd/- xx xx

(Colonel)

Commanding Officer

3 Adm & Trg Regt

Arty Centre Nasik"

3. A very pertinent question that crops up for consideration is whether the Applicant could be declared deserter and his services could be dismissed once he put in appearance for resuming duty on 15.02.2011 as would be borne out from the Gate Entry Register produced before us.

4. For coming to grips with the aforesaid question, we feel called to refer to sections 104, 105 and 106 of the Army Act 1950 and the same being relevant, are reproduced below for ready reference.

*"104. **Arrest by civil authorities.**- Wherever any person subject to this Act, who is accused of any offence under this Act, is within the jurisdiction of any magistrate or police officer, such magistrate or police officer shall aid in the apprehension and delivery to military custody of such person upon receipt of a*

written application to that effect signed by his commanding officer.

**105. Capture of deserters.** – (1) Whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs, shall give written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a magistrate, and shall deliver the deserter, when apprehended, into military custody.

(2) Any police officer may arrest without warrant any person reasonably believed to be subject to this act, and to be a deserter or to be travelling without authority, and shall bring him without delay before the nearest magistrate, to be dealt with according to law.

**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."*

5. It would appear that section 104 of the Army Act empowers the Senior Authority to arrest the deserter whereas section 105 postulates that after receipt of apprehension roll, it empowers the police authority to arrest such person. It would appear that letter to the Civil Authority was sent on 01.01.2011, a copy of which has been filed as Annexure CA 1 to the counter affidavit.

6. The question that comes up for consideration is when the Applicant was present during BARAKHANA on 31<sup>st</sup> December 2010, which fact has not been denied, then how and under what circumstances, roll of apprehension was sent to the Police Authority on 01.01.2011. This fact finds support from the record. If it remains the truth, then we are constrained to observe that such action on the part of the authority concerned is one actuated by malice and deliberately taking hasty decision to send the apprehension roll that to without probing into the causes of absence on 01.01.2011 itself. In our opinion, it was incumbent upon the Commanding officer before initiating action under section 105 of the

Army Act, to have inquired as to how a person who was present on 31.12.2010, absented himself on 01.01.2011 and it was only after getting at the truth through reasonable sources and holding a fact finding inquiry, the roll of apprehension ought to have been sent to the police authority to arrest the Applicant.

7. Section 106 of the Army Act postulates that when a person is absent from duty without due authority for a period of 30 days, the court of inquiry shall as soon as be assembled. Sub section (2) of section 106 further postulates that when a person declared absent does not after-wards surrender or is not apprehended, he shall for the purposes of the Act be deemed to be deserter.

8. From the record, it crystallizes that the Applicant had put in appearance for resuming duty on 15.02.2011 as would be borne out from Gate Register Entry, in view of the statutory mandate as contained in sub section (2), he could not have been declared deserter on 23.02.2011. In the circumstances, we have no option except to deduce the inference that the entire case was cooked up and the officials that be, were adamant not to permit the Applicant to resume duty and somehow or the other, to oust him from Indian Army. To cap it all, once the Applicant had reported in the unit, in that event, it was incumbent upon the respondents to



capture or detain him and proceed further in accordance with law to punish him for his absence from duty. In our considered view, the omission and commission on the part of the Commanding officer at the relevant time, seem to be not justified. Prima facie, glitches have occurred on his part in effective supervision of his own subordinates either at the behest of Havildar or otherwise.

9. In the instant case, copious allegations have been made against the Havildar which are also borne out from the record. Since Havildar has not been impleaded in the present O.A by the Applicant as one of the respondents, we refrain from recording any adverse finding against him and leave it to the discretion of the authority concerned to ferret out the details of omission and commission on the part of Havildar and proceed against him accordingly.

10. Since the respondents have not proceeded in the instant case in accordance with the provisions contained in section 106 of the Army Act, in the manner provided therein, in the teeth of the fact that the Applicant had reported for duty on 15.02.2011, the entire subsequent action of the respondents against the Applicant in law are vitiated. We feel constrained to say that the Applicant has not been treated fairly by the authority at

the helm of affairs and dismissal order has been passed in contravention of the statutory mandate.

10. In the above conspectus, the order of dismissal is held to be vitiated for the reasons discussed above and the O.A deserves to be allowed with all consequential benefits.,

11. Accordingly O.A is allowed. The impugned order dated 20.04.2014 is set aside with all consequential benefits. The Applicant shall be permitted to resume duty within two months from today. The respondents shall communicate the order to the authority that be for compliance within the aforesaid period.

12. Before parting, needless to say, none of the observations made in the body of this judgment shall be construed to the detriment of service career of any of the authority involved in the instant case.

13. There shall be no order as to costs.

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

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

Date: November, 25 ,2016

MH/-