

**ARMED FORCES TRIBUNAL REGIONAL BENCH, LUCKNOW**

**Original Application No. 02 of 2014**

Friday, the 5<sup>th</sup> of February, 2016

**(Reserved)  
Court No. 2**

**“Hon’ble Mr. Justice Abdul Mateen, Member (J)  
Hon’ble Lt. Gen. A.M. Verma, Member (A)”**

No. 15164823H Ex Gunner Rajneesh Kumar Patel, son of Budhsen Patel,  
Village Karaundi, Post Kaoundi, Tehsil Gurh, District Rewa.

..... Petitioner/Applicant

By Shri Rohit Kumar, Counsel for the Applicant.

Versus

1. Chief of the Army Staff, DHQPO, New Delhi-110 011
2. Commandant-cum-Chief Records Officer, Arty Centre and Records, Nasik Road Camp.
3. Union of India through Secretary, Ministry of Defence, DHQPO, New Delhi.

.....Respondents.

By Shri Anurag Mishra, Counsel for the Respondents alongwith Capt  
Ridhishri Sharma, Departmental Representative.

**ORDER**

1. This O.A seeks the reliefs of quashing the rejection order by Chief of the Army Staff dated 8.11.2013; quashing the proceedings of Summary Court Martial held on 14.10.2009 and to issue any other order.

2. Facts of the case are that the petitioner was enrolled in the Army on 7.4.2003 and was posted to 118 Medium Regiment. He was sent on attachment to Artillery Records on 13.11.2005, from where he was returned to the Unit vide Movement Order dated 1.5.2007. The petitioner did not report to the Unit on due date until he voluntarily reported to the Unit at Jullundur on 7.2.2009 being absent for 648 days. He was tried by a Summary Court Martial (SCM) on the following charge:

*Army Act            DESERTING THE SERVICE*  
*Section 38(1)*

*in that he,*

*at Nasik Road on 01 May 2007 (afternoon) having been dispatched to 118 Medium Regiment on completion of attachment, did not rejoin duty and remained absent until he rejoined the unit voluntarily at Jalandhar on 07 Feb 2009 at 1400h.*

*(Total period of absence 648 days)*

3. The punishment awarded was to be dismissed from service. The petitioner filed a non-statutory complaint, which was rejected. Thereafter he filed a statutory complaint dated 30.9.2010, which when not

responded to, he filed O.A.No. 244 of 2012 in this Tribunal, in which the Tribunal, vide its order dated 5.7.2012, asked the Chief of the Army Staff to dispose of the statutory complaint. The Chief of the Army Staff rejected the statutory complaint vide his order dated 8.11.2013.

4. The petitioner was represented by Shri Rohit Kumar, his learned counsel. The petitioner states that he was tried for a charge of desertion, whereas he had reported to the Unit voluntarily, and in such a case he should have been tried under Army Act Section 39(b) and not under Army Act Section 38(1). Further, he states that the two witnesses, who were examined during hearing of the charge on 12.8.1999, should not have been included as witnesses. The petitioner also brings out some infirmities in recording of Summary of Evidence. On the issue of charge under Section 38(1), the petitioner quotes the judgment passed in T.A.No. 545 of 2009, decided by the Principal Bench of the Armed Forces Tribunal. The SCM, according to the petitioner, ended in a matter of just 20 minutes. The petitioner says that he was denied the protection available under Army Rule 115(2) during the trial. The petitioner also claims that the charge-sheet that was handed over to him was dated 14.10.2009 whereas the trial also took place on 14.10.2009 and thus the provisions of Army Rule 34 have not been complied with.

5. The respondents were represented by Shri Anurag Mishra, learned Standing Counsel, duly assisted by Capt Ridhishri Sharma, Departmental

Representative. The respondents state that due process of law was followed in the investigation and the trial of the petitioner. When the petitioner did not report back to the Unit, a Court of Inquiry was held on 21.8.2007 in the Unit and thereafter he was declared a deserter with effect from 2.5.2007. An Apprehension Roll dated 16.6.2007 was sent to all concerned, but no trace of the petitioner could be found. During the period of absence for 648 days, the respondents say, the petitioner did not make any contact with the Unit. The Unit was in field area in May 2007 and thus by not joining the Unit, the petitioner avoided field area and, therefore, the charge under Army Act Section 38(1) is fully justified.

6. Heard both sides and examined the documents.
7. The petitioner has raised the issue of non-sustainability of the charge under Army Act Section 38 since he had reported back to the Unit voluntarily. In this regard, it is relevant to quote Note 2 to Army Act Section 38, which reads as under:

*“2. Sub sec. (1).- Desertion is distinguished from absence without leave under AA s. 39; in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire piquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was found at the time during the period of absence and not necessarily at the time when*

*the accused first absented himself from unit/duty station.”*

8. From the above, it is clear that if a person avoids service in a forward area, then his absence is to be construed as desertion. In the instant case, the Unit i.e. 118 Medium Regiment in May 2007 was in field area and the petitioner avoided joining in field area. He rejoined the Unit only when the Unit moved to Jullundur. Thus, we find no infirmity in the charge levelled against the petitioner under Army Act Section 38(1).

9. We find that in the Summary of Evidence or during the trial or in his petition, the petitioner has not indicated the reason of his absence for 648 days. It is evident from the original record brought before us by the respondents that the copies of charge-sheet and Summary of Evidence were handed over to the petitioner on 01 Oct 2009. Since the trial took place on 14 Oct 2009, there is no violation of Army Act Section 34. Also we find that the hearing of charge under Army Rule 22 on 12.8.2009 was as prescribed by law. We find no infirmity in the process of investigation, the charge and the Summary Court Martial proceedings.

10. Accordingly, the O.A is dismissed lacking in merit. No order as to costs.

**(Lt. Gen A.M. Verma)**  
**Member (A)**

**(Justice Abdul Mateen)**  
**Member (J)**

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