Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

M.A. No. 05 of 2018
(Application for condonation of delay)
Inre:
OA No. NIL of 2018

Tuesday, this the 05 day of February 2019

"Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)"

Gnr Rajesh Kumar, son of Sri Shankar Lal, resident of Village and Post Kashipur, Tehsil Ginnor, District Badaun.

….. Applicant

Counsel for the Applicant : **Shri Paras Nath Singh**, Advocate.

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi.
2. Director General (Lieutenant General), Artillery Record, Defence Department, New Delhi.
3. Major/Captain SRO/RO, Artillery Record, PIN 908802, C/o 56 APO.
4. The Commandant Artillery Centre, Nasik Camp Deolali (M.R.)

.....Respondents

Counsel for the Respondents. : **Shri Virendra Singh,**
Addl Central Govt. Standing Counsel

ORDER (ORAL)

1. Being aggrieved by order of dismissal dated 25.04.2011, the applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 with the following prayers:-

(A) *That this Hon'ble Tribunal may graciously be pleased to quash the impugned order of desertion and dismissal dated 25.04.2011 Annexure No. 1 with all consequential service benefits including continuity of service and arrears of salary.*

(B) *That this Hon'ble Tribunal may graciously be pleased to issue any other and further order which may deem fit and proper in the circumstances of the case in favour of the applicant.*

(C) *Costs of the original application may also be allowed in favour of the applicant.*

2. As per report of the Registry, there is delay of 06 years, 02 months and 05 days.

3. Brief facts of the case are that the applicant was enrolled in the Indian Army on 17.06.1996. It is pleaded by the applicant that while working in 34 RR Bn. he was sanctioned annual leave with effect from 25.08.2000 to 25.10.2000. The applicant fell ill and was under treatment of Dr. Om Prakash, Medical Officer, P.H.C., Rajpura, Badaun from 25.10.2000 to 08.06.2001. Since the applicant did not report back after availing annual leave, apprehension roll was issued to the Superintendent of Police, Badaun (UP) vide 34 Rashtriya Rifles (JAT) letter No. 7031/HQ/46/A dated 13.11.2000. The applicant could neither be apprehended by the Civil Police nor he surrendered voluntarily within the stipulated period, as such, he was declared a deserter with effect from 26.10.2000 and subsequently, as per the policy on the subject, was dismissed from service with effect from 25.04.2011 after 10 years, the applicant being a field deserter. The applicant preferred a departmental appeal against his dismissal from service on 10.02.2017 which was disposed of vide order dated 02.03.2017. Being aggrieved with order declaring the applicant a deserter with effect from 26.10.2000 and order of dismissal from service dated 25.04.2001, the applicant has preferred the instant O.A.

4. Learned counsel for the applicant has argued that the applicant was diagnosed suffering from Intestinal Tuberculosis and was under treatment of Dr. Om Prakash, Medical Officer, I/C. PHC Rajpura, Budaun from 25.10.2000 to 08.06.2001. The applicant was declared fit to rejoin duty on 09.06.2001 and thereafter he went to 34 RR Bn to join duty along with fitness certificate, but was told that his record has been closed and sent to Nasik Records and was advised to report at Nasik Record where he was not allowed to join duty. Since then the applicant has been approaching the authorities but to no avail. It is further argued that only on 13.10.2012 a discharge certificate was issued indicating that the applicant has been declared a deserter with effect from 26.10.2000 and thereafter he was dismissed from service with effect from 25.04.2011. It is submitted that the applicant has been pursuing his cause diligently and the words ‘sufficient cause’ for not making the application within the period of limitation should be applied in a reasonable and liberal manner so as to advance substantial justice.

5. In rebuttal, learned counsel for the respondents argued that the applicant has deserted the Army on 26.10.2000 and after waiting for 10 years, he was dismissed from service with effect from 25.04.2011. It is submitted that previously also the applicant did not join duty from 16.09.1998 to 05.10.1998 and from 28.12.1999 to 04.03.2000. He proceeded on sanctioned annual leave from 25.08.2000 to 25.10.2000 and thereafter did not join his duties. Apprehension roll was issued to the concerned Superintendent of Police but neither the applicant could be apprehended nor he joined his Unit, as such; he was declared a deserter with effect from 26.10.2000. Learned counsel for the respondents further argued that certificate mentioning the date of desertion and dismissal was issued on 13.10.2012, but the applicant for the first time preferred departmental appeal only on 10.02.2017. It is also submitted that mere filing of representation does not make out a case for condonation of delay. Such representation must be within a reasonable period and adequate details/explanation must be brought on record to explain the period of delay, in the absence of which the petition deserves to be dismissed.

6. We have heard learned counsel for the parties and perused the record.

7. Learned counsel for the applicant could not dispute that the order of dismissal from service passed after following due procedure by the competent authority does not involve recurring cause of action. It is settled law that if there is inordinate delay and such delay is not satisfactorily explained the Courts/Tribunals are loath to intervene and grant relief in exercise of its jurisdiction. The High Court (Tribunal in this case) in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. (See ***M.P. vs. Nandlal Jaiswal & ors*** reported in AIR 1987 SC 251).

8. In the case in hand, admittedly the applicant was declared deserter with effect from 26.10.2000 and after expiry of the waiting period of ten years, he was dismissed from service on 25.04.2011. Certificate was issued indicating the date of desertion and dismissal on 13.10.2012. The applicant preferred a belated representation on 10.02.2017 which was rejected vide order dated 02.03.2017. It is trite law that if any order is passed by the Court or Tribunal to dispose of a representation, then the period of limitation would not

commence from the date of decision of such a representation. Hon'ble the Apex Court in the case of ***C. Jacob vs. Director of Geology & ors,*** reported in (2008)10 SCC 215 has held that simply because a direction to decide representation was given and the representation was decided, it would not furnish a fresh cause of action. In this regard, we may refer to paras 9, 10, 11 and 15 of the case of ***C. Jacob*** (supra), which read thus:-

> *"9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any `decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to `consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to `consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.*
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> *10. Every representation to the government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the department, the reply may be only to inform that the matter did not concern the department or to inform the appropriate department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations cannot furnish a fresh cause of action or revive a stale or dead claim.*
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> *11. When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of acknowledgment of a jural relationship' to give rise to a fresh cause of action.*
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> *15. The present case is a typical example of `representation and relief'. The petitioner keeps quiet for 18 years after the termination. A stage is reached when no record is available regarding his previous service. In the representations which he makes in 2000, he claims that he should be taken back to service. But on rejection of the said representation by order dated 9.4.2002, he filed a writ petition claiming service benefits, by referring the said order of rejection as the cause of action. As noticed above, the learned Single Judge examined the claim, as if it was a live claim made in time, finds fault with the respondents for not producing material to show that termination was preceded by due enquiry and declares the termination as illegal. But as the appellant has already reached the age of superannuation, the learned Single Judge grants the relief of pension with effect from 18.7.1982, by deeming that he was retired from service on that day. We fail to understand how the learned Single Judge could declare a termination in 1982 as illegal in a writ petition filed in 2005. We fail to understand how the learned Single Judge could find fault with the department of Mines and Geology, for failing to prove that a termination made in 1982, was preceded by an enquiry in a proceedings initiated after 22 years, when the department in which appellant had worked had been wound up as long back as 1983 itself and the new department had no records of his service. The appellant neither produced the order of termination, nor disclosed whether the termination was by way of dismissal, removal, compulsory retirement or whether it was a case of voluntary retirement or resignation or abandonment. He significantly and conveniently, produced only the first sheet of a show cause notice dated 8.7.1982 and failed to produce the second or subsequent sheets of the said show cause notice in spite being called upon to produce the same. There was absolutely no material to show that the*

> *termination was not preceded by an enquiry. When a person approaches a court after two decades after termination, the burden would be on him to prove what he alleges. The learned Single Judge dealt with the matter as if he the appellant had approached the court immediately after the termination. All this happened, because of grant of an innocuous prayer to `consider' a representation relating to a stale issue."*

9. Similar view was expressed by their Lordships of Hon'ble Apex Court in the case of and ***Union of India vs. M.K. Sarkar*** reported in (2010) 2 SCC 59 wherein in para 18, their Lordships have observed thus:-

> *"Where a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."*

10. At the cost of repetition, it may be observed that the applicant was declared deserter with effect from 26.10.2000 and since the applicant did not report to the Unit, after expiry of the waiting period, he was dismissed from service with effect from 25.04.2011. Certificate to this effect was issued on 13.10.2012 and since then applicant did not pursue his cause and only on 10.02.2017, i.e. after about four and a half year, he preferred a representation, followed by a legal notice, which was rejected by the competent authority. Expression "sufficient cause" presupposes no negligence or inaction on the part of the applicant, to whom want of bonafide is imputable. The aggrieved should show that besides acting bonafidely, he had taken all possible steps within his power and control and had approached the court or Tribunal (as the case may be) without any unnecessary delay. A bald assertion that the applicant suffered from Intestinal Tuberculosis, that too from 25.10.2000 to 08.06.2001, would not lend justification for the absence of the applicant from duty from 25.10.2000 when the applicant was to join his duty after availing annual leave. The purported typed copy of the medical certificate issued by Dr. Om Prakash, Medical Officer, I/C PHC Rajpura, Budaun also does not inspire confidence for the reason, firstly; it is not a Photostat copy of the medical certificate and is a typed copy and, secondly; the period of advised rest is in months and days, i.e seven months and fifteen days. Besides this, if the applicant was actually suffering from such a dreaded disease, he or his family

members ought to have informed the concerned authorities of the Army and should have admitted the applicant in Military Hospital, Bareilly which is at a short distance, where more efficient medical aid would have been made available to him. It is also worth mentioning that the applicant himself has asserted in his representation dated 10.02.2017 that he had sent a letter dated 14.10.2003 through his Counsel annexing thereto the medical certificate. Thus, it can be safely presumed that the applicant was in the knowledge that he has been declared a deserter. The applicant has not only failed to explain the delay in approaching this Tribunal, but has also not explained his absence from duty at least from 25.10.2000 when he proceeded on annual leave.

11. The Hon'ble Apex Court in the case of ***Balwant Singh (dead) vs. Jagdish Singh & ors***, reported in (2010) 8 SCC 685 has laid down certain guidelines with regard to condonation of delay. Relevant portion of the judgment reads thus:

> *"32. It must be kept in mind that whenever, a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provision can be treated to have been enacted purposelessly.*
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> *33. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to the provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the Ld. Counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law.*
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> *34. Liberal construction of the expression "sufficient cause" is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bonafide is imputable. There can be instances where the court should condone the delay; equally there would be cases where the court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect "sufficient cause" as understood in law. (Advanced Law Lexicon, P. Ramanatha Aiyer, 2nd Edn., 1997).*
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> *35. The expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay as and excusable one. These provisions give the courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.*
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> *36. We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bonafide, it had*

taken all possible steps within its power and control and had approached the court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention. ***(Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005****).*

12. In the case of ***H. Dohil Constructions Company Private Limited vs. Nahar Exports Limited & anr***, (2015) 1 SCC 680. their Lordships of the Hon'ble Apex Court have observed as under:

> "*23. We may also usefully refer to the recent decision of this Court in Esha [(2013) 12 SCC 649)] where several principles were culled out to be kept in mind while dealing with such applications for condonation of delay. Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under: (SCC pp. 658 to 59."*
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> *(iv) No presumption can be attached to deliberate causation of delay but gross negligence on the part of the counsel for litigant is to be taken note of.*
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> *(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*
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> *(vii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter, it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*
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> *(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant facts to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.*
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> *(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation."*

13. In view of the settled legal proposition enunciated by Hon'ble Supreme Court in above referred pronouncements, there is an absolute lack of bona fide imputable to the applicant in approaching the Tribunal within a reasonable and explainable delay. The applicant has miserably failed to discharge his legal obligation to explain each day delay.

14. In view of the observations made herein above, the application for condonation of delay deserves to be rejected; hence **rejected**.

15. As a consequence to rejection of application for condonation of delay, the O.A. is also dismissed.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated: 05.02.2019
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