

RESERVED
Court No. 1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

O.A. No. 318 of 2017

Tuesday, this the 14th day of May, 2019

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

Jag Mohan Sharma Nayak 1487839, S/o Late Kundan Lal Sharma, R/o Ram Lila Bhawan, Hathikhana, Chilkhana Road, District- Saharanpur.

.... Applicant

Ld. Counsel for the: **Shri Dharmesh Sinha, Advocate.**
Applicant

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Defence Head Quarter, South Block, New Delhi.
3. Commanding Officer, 69 Engineering Regiment, Bengal Engineering Group and Center, C/O A.P.O.
4. OIC Records, Bengal Engineering Group, Roorki.

...Respondents

Ld. Counsel for the: **Dr. Shailendra Sharma Atal, Advocate.**
Respondents.

ORDER

“(Per Hon'ble Mr. Justice SVS Rathore, Member (J))”

1. By means of this O.A. under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has made the following prayers :-

“(i) The Hon’ble Tribunal may kindly be pleased to issue an order or direction quashing/setting aside order dated 06.06.2017 contained in Annexure No.A-1 to the OA.

(ii) The Hon’ble Tribunal may kindly be pleased to issue an order or direction quashing/setting aside impugned order dated 21.04.2009 and the subsequent Part II order dated 22.04.2009 contained in Annexure No. A-2 to the OA to the extent the same dismisses the applicant from service for absence without leave.

(iii) The Hon’ble Tribunal may kindly be pleased to issue an order or direction quashing/setting the Court of Inquiry held on 20.12.2005 contained in Annexure No.A-2 to the OA whereby the applicant has been declared deserter.

(iv) The Hon’ble Tribunal may kindly be pleased to issue an order or direction commanding upon the respondents to reinstate the applicant back in service with all consequential benefits.

(v) The Hon’ble Tribunal may kindly be pleased to issue any other order or direction deemed to be just and proper under the circumstances of the case.

(vi) The Hon’ble Tribunal may kindly be pleased to direct the respondents to pay cost of the OA.”

2. In brief the facts of the case for the purpose of instant O.A. may be summarised as under.

3. The applicant was enrolled in Army on 29.12.1992. During service period the applicant made a prayer for leave for his private treatment, which was allowed and he was granted leave for one month w.e.f. 19.10.2005 to 17.11.2005. Before the grant of such leave the applicant had preferred a representation on 14.09.2005 through proper channel requesting his premature retirement from Army service, a copy of which has been annexed as Annexure A-5 to the O.A. After completing the leave period the applicant moved an application on 18.11.2005 for extension of his leave on the ground of his own illness and illness of his wife. However, on

the said application the applicant was directed to join duty. The applicant was referred to G.D. Pant Hospital, New Delhi for further treatment, without passing any order on the application of the applicant moved for premature retirement, the respondent no.3 issued an apprehension roll on 20.12.2005. The said apprehension roll was challenged by applicant's wife by filing Writ Petition No. 7525 of 2006 Smt. Seema Sharma vs. Chief of Army Staff and others before the Hon'ble High Court of Allahabad and the same was subsequently transferred to this Tribunal and was registered as T.A. No. 330 of 2010. Since the said petition was filed by applicant's wife, the petition was considered as misconceived and the same was disposed of vide order dated 07.04.2011 with a direction to the applicant that he may file a fresh petition, if so advised. Thereafter the applicant filed a fresh O.A. No. 280 of 2012 challenging the said apprehension roll issued on 20.12.2005. The said O.A. was dismissed by this Tribunal vide order dated 10.01.2013 as there was no application for condonation of delay, copy of which has been annexed as Annexure No.A-10 to the O.A. Thereafter the applicant preferred an application for recall of the order dated 10.01.2013 alongwith an application for condonation of delay and vide order dated 12.09.2013 the said O.A. was restored, delay was condoned and it was admitted.

4. A counter affidavit was filed in the said O.A. with the plea that the applicant after the statutory period of 03 years, while he

was posted in a peace area, was dismissed being a deserter w.e.f. 20.04.2009 under Section 20(3) of the Army Act. It is pleaded by the applicant that neither order of dismissal was filed nor copy of the Court of Inquiry was annexed with the counter affidavit hence he prayed for the same. After said application the applicant was provided Part-II order dismissing him from service vide order dated 20.04.2009 for the reasons of his absence without leave after three years of his being declared as deserter w.e.f. 18.11.2005.

5. Since the fact of dismissal was pleaded in the counter affidavit, therefore, the applicant moved a miscellaneous application in the aforesaid O.A. and said application was allowed and the O.A. No. 280 of 2012 was dismissed as infructuous vide order dated 23.04.2014, which reads as under:-

“Heard Shri Dharmesh Sinha, learned counsel for the applicant, on Misc. Application No. 78 of 2014.

This application has been filed by the applicant with the prayer that since Original Application No. 280 of 2012 has rendered infructuous for the reason that the apprehension/surrender order is no more in existence and the applicant has been discharged, the original application be dismissed.

Accordingly, Misc. Application No. 78 of 2014 is allowed.

Since the Misc. Application No. 78 of 2014 has been allowed, the Original Application No. 280 of 2012 is dismissed as infructuous.”

6. In compliance of the aforesaid order, the applicant was supplied with the order of dismissal dated 21.04.2009 alongwith order dated 05.01.2017 and statutory complaint filed by the

applicant was dismissed vide order dated 06.06.2017. The claim of the applicant is that order passed on the statutory complaint is non-speaking, it has not been signed by the competent authority i.e. Chief of the Army Staff and the dismissal order has been passed in violation of Rule 17 of the Army Rules, 1954.

7. So far as the fact situation above is concerned, the applicant has admitted the aforesaid fact situation and has also admitted that the applicant was dismissed being a deserter. Applicant has nowhere claimed that he had never overstayed the leave, he was dismissed from service before completion of statutory period of 03 years from the date of his desertion or that the order passed under Army Rule 17 was not passed by the competent authority. Copy of Court of Inquiry, on the basis of which the applicant was declared deserter and dismissed from service has also been filed, which reads as under:-

“ Findings of the Court

1. No 1487839 H NK/Ftr Jag Mohan Sharma of 690 Fd Coy was granted 30 days of AAL w.e.f. 19 Oct 05 to 17 Nov 05. The leave certificate of the indl is att as exhibit I.
2. The indl proceeded on AAL on request due to his mother's illness.
3. The indl failed to report on duty after expiry of AAL and is absent till date.
4. The locks of the indl's box and room locker were broken in presence of the undersigned and the two members of the C of I viz 328644 Sub A Singh and JC 328809 Sub Rajender Singh.
5. The list of items recovered are att as per Appces A (Govt property) and B (indl pvt property).
6. Identity card of the indl bearing machine No C-385425 was not found in the indl's box and locker. It is likely to be in the possession of the indl.
7. The pay book and duplicate clothing cards are in the safe custody of 690 Fd Coy office.

8. *The indl is not in the possession of any arms, amn or control store.*
9. *The Apprehension Roll fwd to Superintendent of Police vide letter No 9005/09/690 dt 20 Dec 05 is att as Exhibit II.*

Opinion of the Court

1. *No 1487839H Nk/Ftr Jagmohan Sharma of 690 Fd Coy failed to report on duty after expiry of AAL wef 19 Oct to 18 Nov 05 granted to him and is still absent till date.*
2. *No 1487839H Nk/Ftr Jagmohan Sharma be declared as deserter.”*

Copy of order of dismissal has also been filed, which reads as under:-

“

CONFIDENTIAL

Regn No.AA/5021M

Appx 'A'

Refer to Army Hqs letter No.
17774/AG/DV-1 dt 11 Mar 80
even 17774/AG/DV-1(p)
Dt 30 Aug 2001

DESERTERS

The total numbers of sheets comprising this nominal roll of deserters/absentees of the Bengal Engineer Group and Centre are two containing twenty one names in all.

Sd/- SS Pathania

Lt Col

Chief Record Officer

For OIC Records

Dated: 18 Apr 2009

The dismissal of the persons, whose names appear in the nominal roll containing twenty one names in all, has been sanctioned on 21 April 2009 under Army Act Sec 20(3). It has not been practicable to comply with the provisions of Army Rule 17 in their cases.

Sd/- Manoj Kumar

Brig

Commndant

Station: Roorkee

Dated: 18 Apr 2009

Bengal Engr Group & Centre”

8. Alongwith the said order, list of persons who were dismissed has also been annexed. In the annexed list, name of the applicant appears at serial no.05, which shows that the absence of the

applicant commenced w.e.f. 18.11.2005 and the Court of Inquiry was held on 20.11.2005. There is also an Annexure to the dismissal order wherein a list of 05 persons and name of the applicant appears at serial no.05 and it has been mentioned in it that he has been dismissed from service. It is no where the claim of the applicant that the applicant never absented without prior sanction of leave. Sole ground of challenge is that Army Rule 17 has not been complied with, which reads as under:-

“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 sub-section (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.”

9. A perusal of the aforesaid Rule shows that the competent authority has been given the power to dispense with the procedure provided under this rule, if it is not expedient or reasonably practicable to comply with the provisions of Rule 17 to order dismissal or removal under this rule.

10. Learned counsel for the applicant has drawn our attention towards order dated 30.08.2001 (dismissal order), with which a list

of dismissed soldiers has been annexed and wherein the name of the applicant appears at serial no.05. It is also mentioned in the order that ***“It has not been practicable to comply with the provisions of Army Rule 17 in their cases.”***

11. Thus, in our considered view when the fact of dismissal is admitted by the applicant then he cannot claim the benefit of such a plea of non-compliance of provisions of Rule-17 of the Army Rules, 1954 at this belated stage. Admittedly, the applicant overstayed leave in 2005 and for the first time he filed O.A. in the year 2012. He remained absent for a long period of 03 years and after completion of the statutory period of 03 years he was dismissed from service.

12. In view of the aforesaid fact situation, we are of the considered view that in the peculiar circumstances of this case Army Rule 17 stood complied with. We do not find any irregularity or illegality in the order of dismissal. Accordingly, the O.A. is devoid of merits, same deserves to be dismissed and is hereby **dismissed.**

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

Dated: May 14, 2019
JPT

(Justice SVS Rathore)
Member (J)