

Court No.1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 195 of 2015

Wednesday this the 5th day of September, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

Hon'ble Air Marshal BBP Sinha, Member (A)

No. 9421583 Ex Lance/Naik
Narendra Kumar Rai Ex 1/11 GR
Son of Agam Dhus Rai
Resident of Village : Lumkuma Ward No. 4
PO : Humtang
District : Bhojpur
East Nepal

..... Applicant

Versus

1. Union of India through Secretary,
Ministry of Defence,
New Delhi-110011.
2. Chief of Army Staff, DHQ PO,
New Delhi - 110011.
3. Commandant-cum-Chief Records Officer,
11 Gorkha Rifles Regimental Centre, Lucknow.
4. General Officer Commanding-in-Chief,
Centre Command, Lucknow
5. Commanding Officer, 1/11 Gorkha Rifles, C/o 56 APO

..... Respondents

Ld. Counsel appeared for the Applicant	-	Shri Rohit Kumar Advocate
Ld. Counsel appeared for the Respondents	-	Dr. Shailendra Sharma Atal Central Government Counsel

ORDER**“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”**

1. By means of this Original Application filed under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has prayed for the following reliefs :-

“(b) Quash the 1/11 GR (Batalik) letter No. 1125/A3 dated 06 May 2015.

(c) Quash the dismissal order of the applicant passed in absentia dated 20 Apr 2012.

(d) To issue any other order or direction considered expedient and in the interest of justice and Equity.

(e) Award the cost of the petition.”

2. In brief, the facts necessary for the purpose of adjudication in instant Original Application may be summarised as under.

The applicant was enrolled in the Army on 18.01.1995. During the service period, he served in the Army at different places and in different capacities. The applicant was granted 8 days leave-cum-posing w.e.f. 04.03.2009 from Lucknow to Jammu, where the unit had moved. Because of ill luck of the applicant, while he was returning from his home town for joining duty at Jammu location enroute, he fell sick and later on lost his senses. The applicant was later on found by some Nepali persons of his village area of Nepal and was brought to his home town. The applicant was treated at different hospitals in Nepal for his illness. After recovery of the applicant, he had been escorted to report for duty at 11 Gorkha Riles Regimental Centre, Lucknow on

28.10.2014 where he was told to report to the unit. When the applicant had tried to report to the unit at its location, he was refused the entry. Thereafter, the applicant had submitted an application under the Right to Information Act 2005 on 14.11.2014 addressed to Officer in Charge, Records, 11 Gorkha Rifles Regimental Centre at Lucknow, wherein he also made the prayer to join the duty. In reply dated 14.11.2014 given by the respondents, the applicant was informed as under :-

“2. It is intimated that you were declared deserter wef 11 Mar 2009 vide Court of Inquiry held at peace station on 22 Oct 2009 by 1/11 GR. Subsequently, you were dismissed from service under Army Act 20(3) wef 20 Apr 2012 after three years from the date of desertion. As per policy in vogue indl once dismissed from service cannot be reinstated.”

3. Thus, the applicant was declared deserter w.e.f. 11.03.2009. The declaration of desertion was based on Court of Inquiry dated 22.10.2009 held by Commanding Officer.

4. It is pleaded by the learned counsel for the applicant that it is not clear that at the time of desertion, the applicant was posted on the strength of the unit which was in peace location or in active service area because the dismissal order can be passed only after 10 years of desertion from active service area. It is also pleaded that dismissal has been ordered under Section 20 (3) of the Army Act 1950, the same warranted invoking of Rule 17 of the Army Rules 1954 and its strict compliance was necessary which has not

been done. It is also pleaded that the applicant had applied for certain documents but the same were not provided to him.

5. On the contrary, it is pleaded by the learned counsel for the respondents in their counter affidavit that the applicant was enrolled in the Army on 18.01.1995. He served at different locations and in different capacities. On 04.03.2009, the applicant was granted 07 days leave cum posing to HQ CI Force Delta to which he failed to join the duty and overstayed leave granted to him. Because of the OSL, an apprehension roll was issued on 25.05.2009 by the unit of the applicant for his apprehension. After expiry of clear 30 days of OSL, he was declared deserter w.e.f. 11.03.2009 by the Court of Inquiry held at his parent unit. Neither the applicant nor his wife or any of the family members informed the parent unit/Regimental Centre or Records 11 Gorkha Rifles of the applicant, regarding the so-called illness of the applicant. The applicant continued to desert the service and he could not be apprehended. The applicant did not join his duty voluntarily and consequently, the applicant was dismissed from the service under Section 20 (3) of the Army Act 1950 w.e.f. 20.04.2012 after expiry of three years from the date of desertion . At that time, unit was located in Lucknow in peace station. After dismissal, payment of all the dues of the applicant were made to Mrs Mitra Kala Rai, wife of the applicant. It has also been pleaded that this desertion of the applicant is not the first incident of desertion on the part of the

applicant. He had also been declared deserter earlier in the year 2005 till he voluntarily rejoined the duty on 31.03.2005. At that time, he over stayed leave from 01.01.2005 to 30.03.2005 i.e. for 87 days and for that OSL, he was awarded punishment of 14 days pay fine and 14 days extra guard and duties.

6. The submission of the learned counsel for the applicant is that the absence was not voluntary but he was mentally ill and he was not in senses, therefore he could not join the duty in time. In support of this submission some medical documents have been filed by the applicant regarding his treatment. Apart from it, it has also been argued that there is no compliance of Rule 17 of the Army Rules, 1954.

7. On behalf of the respondents it is submitted that due procedure was followed. The applicant was declared deserter, apprehension roll was issued and after expiry of statutory period of three years, he was dismissed from service. His wife was informed about dismissal of the applicant from service and she has received the amount to which the applicant was entitled under rules after his dismissal from service.

8. Before proceeding further, we would like to reproduce the Para 22 of Army Order 'AO/43/2001/DV- DESERTION' which reads as under :-

"22. A person subject to the Army Act or a reservist subject to Indian Reserve Forces Act, who does not surrender or is not apprehended, will be dismissed from the service under Army Act Section 19 read with Army Rule 14 or Army Act Section 20 read

with Army Rule 17, as the case may be, in accordance with instructions given below :-

(a) *After 10 years of absence/desertion in the following cases :-*

(i) *Those who desert while on active service, in the forward areas specified in Extra Ordinary Gazette SRO 172 dated 05 Sep 77 (reproduced on page 751 of MML Part III) or while serving with a force engaged in operations, or in order to avoid such service.*

(ii) *Those who desert with arms or lethal weapons.*

(iii) *Those who desert due to subversive/espionage activities.*

(iv) *Those who commit any other serious offence in addition to desertion.*

(v) *Officers and JCOs/WOs (including Reservist officers and JCOs, who fail to report when required).*

(vi) *Those who have proceeded abroad after desertion.*

(b) *After 3 years of absence/desertion in other cases.*

(c) *The period of 10 years mentioned at sub-para (a) above may be reduced with specific approval of the COAS in special cases."*

9. Thus aforementioned Army Order provides for three years period for dismissal from service in case of a deserter from peace area. There is no doubt to the fact that the applicant was declared deserter and after expiry of three years, he was dismissed from service.

10. Learned counsel for the applicant, in support of the illness of the applicant, has filed several documents in the form of medical prescriptions only. Some of such documents relates to the year 2008 but these documents has no relevance in this case because at that time the applicant was in service. Admittedly during service applicant made no effort for his treatment of such disease. There

are three such prescriptions filed by the applicant dated 22.12.2008, 08.03.2008 and 25.03.2008 (Paper No. 38, 39 & 40 of the O.A.). It is pertinent to mention that disease of the applicant in these prescriptions is also mentioned as Headache, LOC and Insomania. The other documents, which pertain to the year 2009, have been filed wherein the applicant has gone to 'Moderen Diagnostic Centre', in Jhumka, Sunsari, Nepal as Outdoor Patient and regarding illness of the applicant, the Doctor has written as (i) Headache, (ii) LOC & (iii) Insomnia. Learned counsel for the applicant has stated that LOC means 'Loss of Consciousness'. There is no certainty of the details of the full form of the LOC as explained by the learned counsel for the applicant. Even if it is assumed to be true even then it shows that the Blood Pressure of the applicant was normal and the main illness of the applicant was headache and Insomnia. We fail to understand as to how the applicant could continue in service in the year 2008 with the same ailment and after his leave the same ailment made him a mentally disturbed person who last his consciousness, that too for years. While in service in the year 2008 the same illness could not even be noticed by anyone, nor the applicant reported the same in any military hospital. There might be a temporary loss of consciousness but there is absolutely no documents or medical certificate issued by the competent medical authority describing the applicant that indicates any mental disease or states that

because of his mental disease he was unable to perform his duties. He was never admitted in hospital and went to hospital as outdoor patient. From perusal of the prescriptions filed on behalf of the applicant it is clear that he always went to doctor alone and none has accompanied him. He was suffering from headache and he was capable to go to the doctor of his own so by no stretching imagination, it can be presumed that he was suffering from any mental illness of such gravity due to which he could not go to join his duty and continued to remain absent from service for a long period of several years while his own prescriptions shows that he was suffering with the same illness in the year 2008 while in service. Learned counsel for the applicant has also claimed that the Rule 17 of the Army Rules, 1954 was also violated and due procedure was not followed. At this stage, we would like to reproduce Army Rule 17, 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 subsection (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.”

11. What is, therefore, required by Rule 17 of the Rules is firstly to inform the person proposed to be dismissed or removed from service with the particulars of the cause of action/allegations levelled against him and secondly to provide him reasonable time to state in writing any reasons/grounds against the proposed dismissal or removal. But the aforesaid requirements of Rule 17 need not be observed in a case where dismissal or removal is made on the ground of conduct which has led to conviction of the person concerned by a Criminal Court or Court Martial. There is one more exception to the aforesaid principles as contained in the proviso to Army Rule 17, which empowers the competent officer to dispense with the requirement of the provisions of Rule 17, if he forms the opinion that it is not expedient or reasonably practicable to comply with provisions of Rule 17.

12. It would thus crystallize that compliance of Rule 17 is necessary before passing an order for dismissal or removal from service, of course, but for the exceptions indicated in the preceding paragraphs. One of such exceptions is that the competent officer may dispense with the requirements of provisions of Rule 17, if he is of the opinion that it is not expedient or reasonably practicable to comply with the provisions of Rule 17. If the notice is dispensed with in such manner, the dismissal order cannot be quashed on the ground that no show cause notice was served to a deserter who could not be even tracked by police despite a look out notice.

13. Keeping in view the policy dealing with desertion, as quoted above, the applicant was dismissed from service after three years from the date of his desertion. It transpires from perusal of the record that order of dismissal was passed under Rule 20 (3) of Army Act, 1950. Section 20 (3) reads as under :-

(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 an officer or a junior commissioned officer.

14. It is no where the case of the applicant that the officer who passed the order of his dismissal was not competent to pass such order. Applicant has voluntarily remained absent for several years and made no effort at any point of time to inform his unit about his alleged illness and his willingness to join. Hence his absence, in absence of any fact to the contrary, has to be presumed to be intentional and voluntary.

15. At this juncture, we would like to reproduce the pronouncement of Hon'ble Apex Court in the case of **Capt. Virender Singh vs. Chief of the Army Staff (1986) 2 SCC 217**, wherein in para 13 & 14, The Apex Court has held as under :-

“Section 38 and 39, and Section 104 and 105 make a clear distinction between ‘desertion’ and ‘absence without leave’, and Section 106 prescribes the procedure to be followed when a person absent without leave is to be deemed to be deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion if the procedure prescribed by Section 106 is followed. Since every desertion necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the *animus*. If there is *animus deserendi* the absence is straightway desertion.

13. As we mentioned earlier neither the expression ‘deserter’ nor the expression ‘desertion’ is defined in the Army Act. However we find paragraph 418 of the Artillery Records Instructions, 1981 refers to the distinction between desertion and absence without leave. It says :

418. A person is guilty of the offence of absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If, when he so absented himself, he intended either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. Therefore, the distinction between desertion and absence without leave consists in the intention. (AO 159/72). When a soldier absents himself without due authority or deserts the service, it is imperative that prompt and correct action is taken to avoid complications at a later stage.

We also find the following notes appended to the Section 38 of the Army Act in the Manual of the Armed Forces :

2. Sub-section (1) – Desertion is distinguished from absence without leave under AA Section 39, in that desertion or attempt to desert the service implies an intention on the part of the accused wither (a) never to return to the service or (b) to avoid some important military duty (commonly know 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 picquet 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 formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.

3. A person may be a deserter although he re-enrols himself, or although in the first instance his absence was legal (e.g. authorised by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).

4. Intention to desert may be inferred from a long absence; wearing of disguise, distance from the duty station and the manner of termination of absence e.g. apprehension but such facts though relevant are only prima facie, and not conclusive, evidence of such intention. Similarly the fact that an accused has been declared an absentee under AA Section 106 is not by itself a deciding factor if other evidence suggests the contrary.

In Black’s Law Dictionary the meaning of the expression ‘desertion’ in Military law is states as follows :

Any member of the armed forces who – (1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion. Code of military Justice, 10 U.S.C.A. 885.

14. As we mentioned earlier, the Army Act makes a pointed distinction between ‘desertion’ and ‘absence without leave’ simpliciter. ‘Absence without leave’ may be desertion if accompanied by the necessary ‘animus deserendi’ or deemed to be desertion if the Court of Inquiry makes the declaration of absence prescribed by Section 106 after following the procedure laid down and the person declared absent had neither surrendered nor been arrested.”

16. In another case of **Shish Ram vs. Union of India & Ors (2012) 1 SCC, page 290**, the appellant in that case was declared deserter with effect from 19.06.1978 and was dismissed from service with effect from 20.10.1981 that is after expiry of three years. The appellant challenged his dismissal order, however, no infirmity in the said order was found by the Hon’ble Apex Court and dismissal order was confirmed.

17. Keeping in view the facts of this case, we are of the considered view that the applicant deliberately and intentionally deserted from the service. Even on earlier occasions, he was OSL for a period of more than 80 days and thereafter in this incident, he remained absent for several years. He was dismissed from service after his continued wilful absence for a period of three years from the date of desertion. The applicant could not furnish any satisfactory prima facie evidence to justify his absence from his

parent unit stating cause of his absence. It is also an admitted fact that the applicant's wife was informed about the dismissal of her husband and his wife has received the post dismissal dues of the applicant, in accordance with the rules. Thereafter, even the wife of the applicant or family members of the applicant made no efforts to inform the authority concerned that the applicant is not in sound, physical and mental condition to report to duty. Thus, it is clear that the applicant's absence was wilful desertion from service and therefore after due procedure, he was dismissed from service. Desertion in the Army is a very serious offence. Claim of the applicant that he went to report when he recovered from his illness in the year 2014 has absolutely no bearing on the facts of this case as by that time the applicant stood dismissed from service so there was no reason to permit him to join the duty which was rightly refused.

18. Learned counsel for the applicant in the alternative has argued that his dismissal may be converted into discharge. He has placed reliance on the pronouncement of Hon'ble Apex Court in the case of *S Muthu Kumaran vs. Union of India & Ors*, Civil Appeal No. 352/2017, decided on 17.01.2017 but we do not find that this submission of the learned counsel for the applicant has any substance because the case of *S Muthu Kumaran (supra)* was of dismissal on the ground of involvement of the Army personnel in a recruitment racket. While in the instant case, the applicant

was a deserter and after the desertion period of three years, he was dismissed from service. The desertion in the Army has very serious consequences and no leniency can be shown in the matters of desertion from the service as it would adversely affect the strict discipline and administration of the Army. Therefore, we are not inclined to convert the dismissal into discharge.

19. This O.A. is devoid of merits and is liable to be dismissed. Accordingly, it is **dismissed**.

(Air Marshal BBP Sinha)
Member (A)

Dated : September, 2018
SB

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