

**Court No. 1**  
**Reserved Judgment**

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

**Original Application No. 266 of 2012**

**Tuesday this the 28<sup>th</sup> day of August, 2018**

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

No. 13624763M, Ptr Subhash Chand  
S/o Sh. Karkalli, R/o Village & P.O. – Beenjhela  
Post – Mathuraheda, Tehsil – Kathumar  
Distt – Alwar (Rajasthan)

.....Applicant

Ld. Counsel for : **Shri Shailendra Kumar Singh, Advocate**  
the Applicant

Versus

1. Union of India, through its Secretary,  
Govt. of India, Ministry of Defence, South Block,  
New Delhi-110011.
2. Chief of Army Staff,  
Army Headquarters, New Delhi – 110011.
3. Commanding Officer  
7 PARA Regiment, C/o 56 APO
4. Officer Incharge Records  
The Parachute Regiment  
C/o 56 APO
5. Commanding Officer  
17 Para Field Regiment  
(SCM Convening Authority)  
C/o 56 APO
6. Brigade Commander  
50 (I) Para Brigade, C/o 56 APO

7. Col. Sameer Karol  
C/o Commanding Officer  
7 Para Regiment, C/o 56 APO

.....Respondents

Ld. Counsel for the : **Shri G.S. Sikarwar,**  
Respondents **Ld. Counsel for Central Govt.**

### ORDER

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

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, and he has claimed the reliefs as under:-

*“(a) Quash/set aside the impugned order/remarks dt. 08.11.2008 (Annexure A-1 Page 83, 84), order dt. 17/26.12.2008 (Annexure A-2 Page 85, 86), subsequent impugned order dt. 15.01.2009 (Annexure A-3 Page 87, 88) entre court of inquiry proceedings dt. 05.02.2009, also Impugned order dt. 12.07.2009 (Annexure A-5 Page-96), impugned convening order dt. 12.04.2010 (Annexure A-6 Page – 98) also the impugned summary of evidence proceedings dt. 15.04.2010 (Annexure A-7 Page 99-118), also impugned charge sheet dt. 26.04.2010 and convening order dt. 03.05.2010 and Impugned sentence and conviction order dt. 13.05.2010 passed by the respondents being wholly illegal, unsustainable being bad in law;*

*(b) By quashing/setting aside all the aforesaid impugned orders direct the respondents to reinstate back the appellant in service by deeming continuing in service with retrospective effects and with all consequential benefits including pay and allowances, arrears, promotion etc. Etc. And all other monetary benefits admissible under the Rules and flowing from the order of the reinstatement by treating the appellant as relief of all the adverse consequences of the illegal court martial trial;*

*(c) Pass such other and further orders, as this Hon’ble Court may deem fit and proper in the facts and circumstances of the present case.”*

2. In brief the facts of the case are that the applicant was enrolled in the Indian Army on 22.12.2001 as a Paratrooper in 7<sup>th</sup> Para Regiment. While posted in Para Regiment in Field Area on 13.10.2008, he sustained fracture injury in his 12<sup>th</sup> Rib. He was hospitalised from 13.10.2008 to 14.10.2008. Thereafter he was

discharged with four weeks' sick leave. However, after joining the unit, instead of permitting the applicant to proceed on sick leave as per medical recommendations, the applicant was forced to proceed on advance annual leave and also forced to put up papers for voluntary discharge. Under pressure, he moved an application for his voluntary discharge and his discharge was recommended by the Company Commander, which was thereafter sanctioned by the Commanding Officer and a direction to prepare the documents at the earliest was also issued and in order to prepare the said documents, which also required his wife's signature, the applicant was granted leave from 28.10.2008 to 26.11.2008 as advance annual leave. The applicant came back after availing the aforesaid leave, but he did not file his documents for voluntary discharge and he again prayed that further leave be granted as a last opportunity to get papers signed from his wife and, therefore, he was again granted casual leave w.e.f. 21.12.2008 to 04.01.2009. Prior to this, the applicant claims that at several times, he was threatened by his Commanding Officer with dire consequences to the extent that he shall be killed in some ambush if he did not apply for voluntary discharge and he was being constantly forced to seek voluntary discharge.

3. The case of the applicant is that he did not want voluntary discharge from service, but due to direct pressure and threat from his superior in unit to complete voluntary discharge papers during leave and only thereafter report back for duty, he did not have the courage to go back to his unit and face the dire consequences. He therefore, before expiry of his leave reported to Para Regiment Centre, Bangalore on 03<sup>rd</sup> January 2009, so as to meet the Commandant and seek help from him to save him from this situation. However, he was not allowed to join at Para Regiment Centre or meet the Commandant. Thereafter in desperation, he has called up his C.O. on phone on 07.01.2009 and also sent a FAX requesting them to permit him to join duty without insisting on voluntary discharge from him. The C.O.,

however, did not answer the phone call and no response was received on his Fax message.

4. In desperation after few days, the applicant again tried to report and join at PRTC, Bangalore. This time he went alongwith his brother, but again a hearing by Commandant or permission to join duty was denied.

5. In the mean time, the wife of the applicant has written a series of letters starting from 09.01.2009 to Raksha Mantri, Co AS & his wife offering for help, however, in response to her letters, the respondents replied to her vide their letter dated 12<sup>th</sup> July 2009 stating that as per their policy, they do not take any action on letters written by third party/proxy and her husband should write such representations.

6. In the mean time, a Court of Inquiry was conducted by the respondents on absence of the applicant. The finding of the Court of Inquiry was that the applicant was absent and he was accordingly declared a deserter w.e.f. 05.01.2009. After trying everything possible to join duty, the applicant filed a statutory petition through his counsel on 31.08.2009 for permission to join and on this statutory petition, the counsel for the applicant was informed by the respondents to advise his client to go to the Unit and join. This order was passed on 09.12.2009 by the respondents and the applicant joined the Unit on 14.12.2009, where from he was sent from the Company vide movement order dated 18.09.2009 to 17 Para Regiment. Summary of evidence was recorded on 15.04.2010 after the applicant had joined the service. The Summary of Evidence was recorded by Major Harbir Singh. The applicant has refused to take part in the said summary of evidence, therefore, on his refusal, he was arrested under oral order of the C.O. and thereafter summary of evidence was recorded and the statements of PW 1 Jogindar Singh, PW 2 Capt Dipankar Barua, PW

3 Capt Shiv Shanker and PW 4 Sub Balraj were also recorded and thereafter the order to hold the Summary Court Martial (in short “SCM”) was passed by the C.O.

7. The applicant was charge sheeted as under :

**“CHARGE SHEET**

*The accused **No 13624763M Paratrooper Subhash Chand** of 7<sup>th</sup> Battalion The Parachute Regiment attached with 17 Parachute Field Regiment vide HQ 50 (I) Parachute Brigade letter No. 505005/S/A dated 14 Dec 2009 is charged with :-*

**ARMY ACT**  
**SECTION 38(I)**

**DESERTION**

*in that he,*

*at Field having been granted 15 days Advance of Annual Leave for the year 2009 from 21 Dec 2008 to 04 Jan 2009 to proceed to his home, did not rejoin at Field on expiry of his leave but remained absent until he surrendered himself to CO 7<sup>th</sup> Battalion The Parachute Regiment on 13 Dec 2009.*

*Total period of absence - 342 days  
Period under custody - Nil.”*

8. During SCM, applicant pleaded not guilty and statements of PW 1 Capt Dipankar Barua, PW 2 Sub Jogindra Singh and PW 3 Sub Balraj were recorded. All the witnesses were cross examined by the applicant. In defence, the applicant filed a detailed written submission which was also taken on record, wherein he has given specific statement that he was threatened with dire consequences by the C.O. to apply for his voluntary discharge. He was not granted sick leave and the C.O. had threatened him that he would not let him to complete his service of 15 years required for pension. The applicant claimed to have made all possible efforts to join his duty after expiry of the sanctioned leave period, but he was not permitted to join. The SCM sentenced the applicant to be dismissal from service.

9. The submission of the learned counsel for the applicant is that though there is no direct evidence against the Commanding Officer, but the circumstances present in this case clearly establishes his malafide intention. It is also argued that the Commanding Officer was

impleaded as respondent no.7, however, he has not put in his appearance in this case.

10. Learned counsel for the applicant has submitted that when a person is granted sick leave, then the sick leave must commence from the very next day of its sanction, this is a mandatory medical requirement. But in the instant case, sick leave was to start from 15.10.2008, but the applicant was granted advance annual leave w.e.f. 28.10.2008. Provisions of sick leave are well known to every unit of the Army, hence denial of sick leave and grant of advance annual leave, that too after a delay of 12 days after discharge, proves the malafide intent of the Commanding Officer.

11. It has also been argued by the learned counsel for the applicant that when the C.O. was clear in his intent to get him dismissed from service, therefore, no other officer subordinate to him, was in a position to give evidence against the wishes of C.O., but by the evidence available on record, it is clear that the C.O. was prejudiced with the applicant to a great extent. He has also drawn our attention towards Part-II Order which was issued on 01.03.2009, whereby the leave of the applicant w.e.f. 28.10.2008 to 26.11.2008 has been shown as sick leave. Learned counsel for the applicant has drawn our attention towards the movement order, wherein this leave has been mentioned as "advance annual leave". It is submitted that because of the malafide intentions of the C.O., the entire SCM proceedings have become null and void as the same was against the principle of natural justice and the defence of the applicant was not at all considered.

12. On behalf of the respondents, it is argued that though the sick leave was granted by the Medical Officer, but immediately thereafter the applicant moved an application for his voluntary discharge which was sanctioned and the applicant was directed to get his pension papers completed, so he was granted leave after some gap.

13. Learned counsel for the respondents has also placed reliance on the Part-II Order, wherein the said leave has been shown as sick leave. However, learned counsel for the respondents could not give any satisfactory reply to the movement order, wherein this leave has been shown as advance annual leave nor he could furnish any explanation as to why Part-II Order of the sick leave granted w.e.f. 28.10.2008 was published after about five months on 01.03.2009.

14. We find substance in the submission of the learned counsel for the applicant that some force was working against the applicant to ensure that he is out from service. Even after his fracture while he was granted sick leave by the Medical Officer, even then he was not permitted to proceed on sick leave forthwith as per rules, instead he was sent on advance annual leave that too after gap of several days. The respondents, after realising their own mistake that the applicant ought to have been granted sick leave, tried to rectify this blunder in a very shabby manner by publishing Part-II Order on 01.03.2009 showing that it was a sick leave. A perusal of the record shows that the applicant was fearful of going to unit and before expiry of the leave on 04.01.2009, had made all out efforts to join the duty at Para Regimental Centre, Bangalore on 03.01.2009. He travelled from New Delhi to Bangalore City to join PRTC on 03.01.2009 and again after few days, he visited PRTC with his brother, but he was neither permitted to join nor permitted to meet the Commandant. In support of his submission, he has filed railway journey tickets.

15. Learned counsel for the respondents has argued that simply because a person has filed some railway tickets, does not mean that he has made all efforts to join the service. We have given anxious thoughts on this issue. Admittedly the wife of the applicant had moved representations on 09.01.2009 mentioning all the facts including the threat to her husband and his not having allowed to join

duty at PRTC on 03.01.2009 despite his best efforts for the same. His request to meet the Commandant of PRTC was also turned down. The said representations were addressed to the Defence Minister, Chief of the Army Staff and also to the President, AWWA. It transpires from perusal of the record that this representation dated 09.01.2009 filed by the wife of the applicant Smt. Babita was forwarded by the President, AWWA to the concerned authority for consideration, but no action was taken on the said representation nor the applicant was permitted to join. Thereafter in reply to another representation of the wife dated 11.05.2009 stating similar facts and requesting the respondents to allow her husband to join duty, the respondents have replied that they will not take any action on 3<sup>rd</sup> party representation. It was only after the statutory petition was preferred by the applicant through his counsel, only then he was permitted to join on 14.12.2009. The said order in response to statutory appeal for joining was issued on 09<sup>th</sup> December 2009, which means that only five days thereafter i.e. on 14.12.2009, the applicant has reported for duty. So this chain of circumstances clearly indicates that the applicant was willing and ready to join the duty and in this perspective, his absence from service cannot be said to be voluntary. Circumstantial evidence clearly points that he was not permitted to join with some ulterior motive, inspite of his best efforts to join duty.

16. It is not a case where the applicant has made allegation against his superior after the SCM, but in the COI before SCM and the SCM itself, the applicant has filed his detailed written submission stating all the true facts making allegations against the Commanding Officer. We are of the considered view that the COI and the SCM which was held by an officer junior to the Commanding Officer, when they became aware of the allegations against the C.O., ought to have referred the matter in the interest of justice to the Commanding Officer of 17 Para Regiment for getting the COI and the SCM conducted through an officer, who was senior to the Commanding Officer of 7 Para



Regiment. The applicant filed his detailed written statements which runs in 16 handwritten pages, wherein he has mentioned all these facts which have been raised by the applicant in this O.A.

17. Learned counsel for the respondents has vehemently argued that since the applicant had made a prayer for voluntary discharge, therefore, he was asked to get the papers completed and now the applicant cannot contend that he has not moved any application or he was forced to write the application for voluntary discharge. We do not find any substance in the submission of the learned counsel for the respondents. We fail to understand that why the Commanding Officer of a unit was giving so much importance to the voluntary retirement of a Jawan. This is his personal matter and personal decision. Where was the need for Commanding Officer to interfere in the treatment and recovery of the Jawan by delaying his sick leave by 12-13 days. If the unit was so helpful to Jawan, where was the need to deny him his entitled sick leave and send him on Advance annual leave from next year. Therefore, even if the application for discharge by the applicant is taken to be voluntary, for the argument sake only, even then on the basis of the said application, which was not yet complete and still at unit level, the applicant had every right under the law to withdraw it at any point of time. Therefore, the whole hype and hoopla by the respondents in justifying that he voluntarily wanted discharge and that he had signed on extra certificate with officer witnesses which indicates that he voluntarily wanted discharge is misplaced and creates serious doubts as to who wanted the applicant go to out of service, he himself or his Commanding Officer.

18. In the Court of Inquiry, the applicant was declared a deserter, but he was not dismissed from service. In desertion and absence without leave, absence is common. But it is the intention of the individual which converts absence into desertion. On this point, we may like to refer the pronouncement of the Hon'ble Apex Court in the

case of **Capt Virendra Kumar vs. Chief of the Army Staff** (1986) 2 SCC 217. The relevant Paras 12 to 14 are quoted as under:

*“12. ....Sections 38 and 39, and Sections 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 straightaway 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 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 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 here-enrolls 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 stated 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."*

19. Keeping in view the fact of this case, when the applicant was neither dismissed nor discharged, then there was absolutely no occasion for the respondents not to permit the applicant to join his duty and to take him on strength, but inspite of best efforts of the applicant, he was not taken on strength and only under the orders passed on the statutory petition of the applicant, he was taken on strength and thereafter the SCM was conducted and he was dismissed from service. We would like to make it clear that Rail tickets submitted by the applicant for his efforts to join at PRTC, Bangalore, the receipts of telephonic call by him to his C.O., the receipts of Fax

to his unit are prima facie credible. His stand has been corroborated by the letter sent by his wife on 09.01.2009 (which was merely within four days of his absence). Thus, the applicant being a Jawan with limited literacy and fear of reprisal by the C.O., has apparently tried his best to join, but has not been allowed, therefore, he could not be termed a deserter specially so because he has been asked to join after the pressure of statutory application filed by his counsel. Thus this entire chain of circumstances is sufficient to hold that the SCM has been conducted in a biased manner. The applicant never absented voluntary from duty, rather he was not taken on strength inspite of his efforts for the purpose.

20. In view of discussions, made herein above, we are of the view that in the interest of substantial justice, the orders of discharge of the applicant from Army and the conviction and sentence awarded by the SCM deserves to be set aside. The applicant may be treated to be in service notionally for the period till he attains the minimum pensionable service and thereafter he may be entitled to get the pension of the rank to which he held at the time of discharge.

21. Accordingly, this O.A. is **partly allowed** and the orders of dismissal and the conviction and sentence dated 13.05.2010 passed by the SCM are hereby set aside. The applicant shall be notionally treated to be in service till he attains pensionable service, thereafter, he shall be entitled to post retiral benefits in accordance with law. He shall be entitled for service pension of the rank which he held before his dismissal. The respondents shall calculate the pension of the applicant from the date of his acquiring pensionable service.

The respondents are directed to complete this exercise within a period of five months from today, failing which the applicant shall be entitled to interest @ 9% per annum on the total amount accrued from due date till the date of actual payment.

Learned counsel for the respondents as well as the Registrar of this Tribunal are directed to communicate this order to the authorities concerned to ensure compliance of the order.

No order as to costs.

**(Air Marshal B.B.P. Sinha)**  
**Member (A)**

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

Dated: August , 2018.  
PKG