

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****T.A. No. 1234 of 2010**Wednesday, this the 19<sup>th</sup> day of July, 2017**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal Anil Chopra, Member (A)**

No. 6379128 Sep/SHT Raj Kumar  
R/o Village and Post Teni (Mazare Teni)  
Tehsil Khaga, District Fatehpur - Petitioner

Ld. Counsel for the Applicant : Shri V.P. Pandey, Advocate

Vs

1. Union of India, through the Secretary  
Defence, Sena Bhawan,  
New Delhi-110011.
2. Chief of Army Staff,  
Sena Bhawan,,  
New Delhi - 11
3. Officer Incharge Record Office,  
A.S.C. Records (Supply),  
Bangalore - 560007
4. Commanding Officer, 318, A.S.C. Regiment,  
C/o 56 A.P.O.
5. C.C.D.A. (Pensions),  
Draupady Ghat,  
Allahabad.

- Respondents

Ld. Counsel for the Respondents : Dr. Chet Narain Singh, Advocate,  
Assisted by Maj Salen Xaxa,  
OIC Legal Cell.

**ORDER (Oral)**

1. Feeling aggrieved with the order of dismissal from service, being deserter, petitioner preferred a writ petition, bearing Writ Petition No. 29206 of 1998 in the High Court of Judicature at Allahabad, which has been transferred to the present Tribunal in pursuance of provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and registered as T.A. No. 1234 of 2010.

2. We have heard learned counsel for the petitioner Shri V.P. Pandey and learned counsel for the respondents Dr. Chet Narain Singh, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

3. Admittedly, brief facts of the case are that the petitioner was enrolled in the Indian Army on 30.06.1983. However, while serving the Army he went on casual leave w.e.f. 12.08.1990 to 31.08.1990, for 20 days but he did not turn up on 31.08.1990. After waiting for a period of 30 days, under the provisions of Section 106 of the Army Act, 1950 petitioner was declared deserter. Thereafter also, after waiting for a period of 3 years in accordance with the provisions of Army Act petitioner was dismissed from service on 30.10.1993. Even after 30.10.1993 he did not turn up.

4. Learned counsel for the petitioner submitted that on account of mental disease, petitioner was not in a position to rejoin duty and kept absented himself. Petitioner filed a writ petition in Allahabad High Court on 09.09.1998 with the prayer that the respondents be directed to reinstate him and the order of dismissal dated 30.09. 1993 may not be given effect. During pendency of the petition in the High Court, petitioner amended the writ petition, with the prayer that the punishment of dismissal be converted into normal discharge on medical ground, on account of mental sickness and he may be sanctioned disability pension to the extent of 50% with due medical examination.

5. Learned counsel for the respondents in response to argument advanced by the learned counsel for the petitioner vehemently argued that the defence set up by the petitioner, justifying overstaying leave is not sustainable for the reason that he was not suffering from mental ailment and a case of mental ailment was cooked up by the petitioner for restoration in service. It has been submitted by him that in case the petitioner would have been suffering from mental illness, he would have taken mental sickness ground in the original prayer itself. The original prayer made by the petitioner, while preferring the writ petition in the High Court is reproduced as under :-

"a) issue a writ order or direction in the nature of mandamus commanding the respondents to reinstate the petitioner in service.

b) issue a writ order or direction in the nature of mandamus directing the respondents not to effect the dismissal order dated 30.9.1993.

c) issue any other writ order or direction in the nature of mandamus which this Hon'ble court deem fit and proper.

d) award costs in favour of the petitioner."

6. There appears no room of doubt that the petitioner preferred a writ petition for setting aside the order of dismissal dated 30.09.1993 alongwith a direction to restore him in service. In original pleadings, there is no pleading with regard to mental illness. It was only in January, 2003 the petition was amended with the prayer to convert the punishment of dismissal into normal discharge on medical ground. After a period of 5 years of filing of the petition the ground of mental sickness was added in the prayer clause of petition by way of amendment in the petition. The argument advanced by the learned counsel for the respondents seems to carry weight.

7. A plain reading of the original prayer of the petition shows that petitioner himself had preferred the petition but without any pleading of mental illness. The affidavit filed in support of the writ petition was also sworn in by the petitioner himself. In case the petitioner was

suffering from mental illness, he could not have filed affidavit in support of the petition filed in the High Court. Attention has been invited by the petitioner's counsel to Paras 4 and 5 of the writ petition, wherein he has taken a plea that he is suffering from mental illness. Paras 4 and 5 have been sworn in by the petitioner on the basis of personal knowledge. However, there is no material on record, including treatment provided by any hospital with regard to mental ailment of the petitioner. In the absence of any medical certificate from any Government hospital or from the Army hospital, the averments made in Paras 4 and 5 of the petition seem to be an afterthought. There is one other aspect of the matter that during the period of 3 years, option was open to the petitioner to have resumed duty or reported in the Unit and in that case the Unit would have taken care of his medical treatment and would have proceeded in accordance with law. On one hand petitioner was pursuing the writ petition before the High Court and later on before this Tribunal and on the other hand he did not care to report for duty. The period of 3 years to declare the services of a person as deserter, as appeared from Army Order 43 of 2001, gives an opportunity to a person who wants to resume duty or report in the Unit. For convenience relevant portion of Army Order 43 of 2001 is reproduced as under:-

### **"Dismissal Procedure**

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 17 E 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 Reserved 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. The period of 10 years mentioned at sub para (a) above may be reduced with specific approval of the COAS in special cases.

23. The following procedure will be adopted for dismissal of OR :

(a) A nominal roll in respect of such absence/deserters will be prepared by Record Officer concerned in triplicate in the form set out in Annexure-1 to Appendix 'F'. The nominal roll (in duplicate) will then be forwarded to the Commandant Centre/Depot concerned having Brigade Commander's power under Army Act Section 8 or, if he has no such powers, to the Sub Area Commander in whose jurisdiction the record office is located, for sanctioning dismissal under orders given in Para 24 below. If the nominal roll consists of more than one sheet,

each sheet will be serially numbered. The nominal roll will be accompanied by a statement as per Appendix 'E' which will be pinned to the top sheet of the nominal roll. Such nominal rolls will be submitted to the authority concerned, i.e. Centre Commandant/Sub Area Commander by 20 Apr and 20 Oct each year.

(b) On the discharge certificate required under Army Act Section 23 read with Army Rule 12, reasons for dismissal may be shown as "absence without leave". The discharge certificate need not be issued on IAFY-1964. A simplified form that can be used is at Appendix 'G'. This will be both in English and in the regional language of the person dismissed. An officer, not being an enrolled person, is not furnished with a discharge certificate.

(c) Such discharge certificate may be retained by record offices and dispatched under registered cover only when demanded specifically by the person to whom the discharge certificate pertains. This will avoid financial loss to the State resulting from the discharge certificate being sent to the last known address of the deserter by registered post and returned undelivered.

(d) After obtaining orders for the dismissal of the persons mentioned in the normal roll, one copy of the nominal roll will be returned to the Record office concerned.

(e) As soon as a person is dismissed from service, the civil police authorities will be informed simultaneously. In cases mentioned at Para 22 (a) (ii), (iii) and (iv) above, the civil police will be informed to effect arrest of these persons and proceed against them in civil courts for offences (other than desertion) committed by them. In other cases, it may be stated that it will no longer be necessary for the civil police to secure the arrest of the person concerned.

**(f) No disciplinary action will be taken against a deserter/absentee, who is proposed to be dismissed in accordance with sub para (a) above, even though he is**

***apprehended or voluntarily surrenders before he is dismissed.”***

8. Since the petitioner has not reported for duty, neither within 3 years nor thereafter and he was pursuing the matter in the High Court and thereafter in this Tribunal, the argument advanced by the learned counsel for the petitioner does not inspire any confidence and seems to be a case set up only to approach judicial forum to ventilate his grievance. A letter of the Army contained in Annexure-CA-1 shows that the petitioner's wife Smt. Usha Devi was informed that the petitioner has exceeded leave period and on expiry of leave period he was required to resume the Unit but he has not reported back. Accordingly, a request was made to her to send him to the Unit. Later on petitioner seems to have sent a handwritten letter through 'Village Pradhan' of the village informing that he is suffering from some mental problem and now he is O.K. and he may be permitted to resume duty. The letter dated 01.08.1991 has been filed as Annexure-C.A.-2 by the respondents. In response to petitioner's letter the respondents had sent a letter dated 19.09.1991, a copy of which has been filed as Annexure-C.A.-3, advising him to report in the nearest Unit or Military Head Quarters Bangalore. But it appears that in spite of letter of the respondents petitioner did not turn up. By another letter dated 28.03.1998 petitioner was



informed that he has been dismissed from service being a deserter and a request was made to return the contingency bill for Rs.11,480/- and for sending duly completed documents for further action. It appears that in spite of communication made by the respondents, petitioner has been failed to respond and instead preferred to pursue the matter in the High Court. One of the features, which may be noted that on one hand petitioner preferred a petition on 08.09.1998 in the High Court of Judicature at Allahabad and on the other hand he kept on flouting the request made by the respondents to report in the Unit.

9. In view of above, the order of dismissal have been passed by the respondents in pursuance to power conferred by Army Act, 1950 under Section 20(3), which does not seem to suffer from any impropriety or illegality. A person who suffers injury on account of his own conduct may not be granted relief. We do not find any reason that the action taken against the petitioner in pursuance to statutory power conferred by Army Act, 1950, that too under the teeth of material on record to the effect that the petitioner had neither responded nor reported in the Unit right from 1990 till date suffers from any illegality. In case the petitioner would have been fair in his action then even during pendency of the petition in the High Court or Tribunal he could have moved an application for

resumption of duty and follow up action but it has not been done.

10. In view of above, T.A. lacks merit and is rejected. However, we direct the respondents to pay whatever fund is due to the petitioner in accordance with the rules expeditiously.

**(Air Marshal Anil Chopra)**  
**Member (A)**

**(Justice D.P. Singh)**  
**Member (J)**

**Dated: July 19,2017**

JPT