

**ARMED FORCES TRIBUNAL REGIONAL BENCH,**

**LUCKNOW**

**Original Application No. 518 of 2012**

Wednesday, the 2<sup>nd</sup> day of December, 2015

**Reserved**  
(Court No. 2)

**“Hon’ble Mr. Justice Abdul Mateen, Member (J)  
Hon’ble Lt. Gen. A.M. Verma, Member (A)”**

No. 6484309X Sep/ASH Gajendra Singh, son of Shri Vijay Singh,  
resident of Village Roshanpur, Salemabad, Post Office, Muradnagar,  
District Ghaziabad (UP)

..... Applicant/petitioner

By Col (Retd.) Y.R.Sharma, Counsel for the Applicant.

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, New Delhi-110011
2. Chief of the Army Staff, Army Headquarters, South Block, New Delhi-11001
3. General Officer Commanding in Chief, Headquarters Central Command, PIN-900450 C/o 56 APO
4. General Officer Commanding, Madhya Bharat Area, PIN-901124 C/o 56 APO
5. Commandant ASC Centre (North) PIN-900493 C/o 56 APO

6. Commanding Officer, Headquarters Wing ASC Centre (North)  
PIN-900493 C/o 56 APO

.....Respondents.

By Shri D.K.Pandey, Counsel for the respondents alongwith Col  
J.G.Manhas and Capt. Soma John, Departmental Representatives.

### **ORDER**

1. This O.A has been filed seeking the reliefs of setting aside the invocation of Army Act Section 123; setting aside the attachment order, if any; setting aside the finding and sentence passed by Summary Court Martial; setting aside the order of the General Officer Commanding, Madhya Bharat Area, attached Annexure A-1 and to reinstate the petitioner.

2. Facts of the case are that the petitioner, who was enrolled in the Army on 21.3.1991, was posted at 898 AT Bn ASC in October 2000. He was granted 34 days' leave from 17.4.2001 to 20.5.2001. He did not rejoin his Unit on termination of the leave until he surrendered voluntarily at HQ Wing ASC (North) on 10.12.2008 after being absent for seven years six months and twenty one days. Army Act Section 123 was invoked on 11.12.2008 to finalize the disciplinary case of the petitioner. The petitioner was tried by a Summary Court Martial on 18.12.2008 on the charge as follows:

|  |   |
|--|---|
| <p><b><u>FIRST CHARGE</u></b><br/> <b><u>Army Act</u></b><br/> <b><u>Section 38 (1)</u></b></p>  | <p><b><u>DESERTING THE SERVICE</u></b></p> <p><i>in that he,</i></p> <p><i>at field on 17 April 2001, having been granted leave of absence from 17 April 2001 to 20 May 2001 to proceed to 34 days Balance of Annual Leave for the year 2001, failed without sufficient cause to rejoin at 898 Animal Transport Battalion Army Service Corps on 21 May 2001 on expiry of said leave, till he surrendered voluntarily to Headquarters Wing, Army Service Corps Centre (North) on 10 December 2008 afternoon.</i></p> |
| <p><b><u>SECOND CHARGE</u></b><br/> <b><u>Army Act</u></b><br/> <b><u>Section 54 (b)</u></b></p> | <p><b><u>LOSING BY NEGLIGENCE IDENTITY CARD THE PROPERTY OF THE GOVERNMENT ISSUED TO HIM FOR HIS USE</u></b></p> <p><i>in that he,</i></p> <p><i>at Paharpur, Gaya on 10 Dec 2008 afternoon when surrendered voluntarily from desertion was found deficient of Identity Card bearing machine No C-423738 dated 26 Aug 1994, the property of the government issued to him for his use.</i></p>   |

The petitioner was found guilty and was dismissed from service. His appeal challenging the Summary Court Martial was rejected by the GOC MB Area vide order dated 11.4.2011.

3. The petitioner was represented by Col (Retd.) Y.R.Sharma, his learned counsel. The petitioner challenges the Summary Court Martial on several grounds. He begins with saying that that the charge of desertion itself is wrong since the petitioner had rejoined voluntarily and, therefore, he should have been, if at all, charged under Army Act Section 39 for overstaying of leave. He pleads that in the case of desertion, the intention of the individual is to be seen which, in the

instant case, was not to leave the service altogether, as is proved by the fact that he rejoined the Unit. The petitioner further states that he was not even absent without leave. There was a very good reason for absence which he has stated in his statement during the Summary of Evidence. He says that he had gone on leave on learning that his daughter was unwell. He got his daughter treated in the Army hospitals and later on in civil hospitals and he was so engrossed in this that he was unable to rejoin the duty. The petitioner has attached several medical documents to substantiate the fact that his daughter was unwell. He also claims that he tried to rejoin his Unit on expiry of his leave but was not allowed to rejoin. He mentions that in 2005, his wife wrote to the authorities. However, the petitioner has not produced any evidence to establish that he did try to contact his Unit during the period of absence. The petitioner claims that he did not know the location of his Unit; therefore, was unable to rejoin. He tried to join ASC Centre in April 2008 and after a prolonged correspondence was allowed to rejoin. His trial by SCM was conducted by CO of Adm Bn of ASC Centre, which is wholly illegal since the petitioner's attachment with Adm Bn ASC Centre under Para 381 Regulations for the Army had not been ordered. The petitioner's counsel states that the trial by the CO of Adm Bn of ASC Centre is, therefore, illegal and the SCM proceedings are liable to be quashed. The petitioner also states that he had written letters to the Senior Superintendent of Police and

the District Collector. Under the provisions of Army Act Section 143, response from them should have been obtained, which was not done, and on this ground also the SCM proceedings are legally not sustainable.

4. The respondents were represented by Shri D.K.Pandey, learned Standing Counsel duly assisted by Col J.G.Manhas and Capt Soma John, Departmental Representatives. The respondents state that the petitioner had been granted 34 days leave on his request but he did not make any effort to join the Unit on 21.5.2001 neither did he ask for extension of leave. Following the prescribed practice, the petitioner was declared a deserter with effect from 21.5.2001. Since the petitioner's Unit was in operational area i.e. Poonch in J & K, if the petitioner had not rejoined for ten years, he would have been dismissed from service as per Army Order 43 of 2001-DB. Since he rejoined on 10.12.2008 at ASC Centre (North), disciplinary proceedings were initiated against him. The respondents claim that there is no evidence to suggest that his wife wrote any letter to the authorities in 2005. The first correspondence that they received from his wife is dated 03 April 2008. As regards trial under Army Act Section 38, the respondents state that the intention of the petitioner was well proved since he had deserted his Unit, which was in operational area and therefore, his absence from the Unit is to be construed as constructive desertion since he was trying to avoid operational duty. The respondents state that

invocation of Army Act 123 was ordered by the Commandant ASC Centre (North) vide order dated 11.12.2008. The SCM was conducted as provided in law and all relevant documents were provided to the petitioner. Later on when the petitioner asked for copies of the documents, these too were provided vide the respondents' letter dated 8.6.2010. As regards the attachment of the petitioner to the ASC Centre (North), the respondents state that the attachment was with Adm Bn, and the Commanding Officer was CO of the petitioner and was legally empowered to try the petitioner by SCM. As regards Note 5 of the Army Act Section 120, the respondents state that this note was deleted as far back as in 1991.

5. Heard both sides and scrutinized the documents.

6. The narrative that emerges is that the petitioner who did have 17 years of service when he was tried by SCM had been away from his Unit which was in operational area, for a period of seven years six months and twenty one days. The law is well settled that in cases of desertion, intention of the individual has to be established which may be to avoid an operation or important task. In the instant case, the petitioner's Unit was in a high intensity operational area and therefore, his absence from this Unit will be construed as constructive desertion. Therefore, we hold that the trial of the petitioner under Army Act Section 38 on charge of desertion is legally valid.

7. The second major issue that the petitioner has raised is with regard to his attachment. Para 381 of the Regulations for Army reads as follows:

**“Para 381. Trial of Deserters:-**Under the normal circumstances trial by Summary Court Martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column 1 of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and is taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by Summary Court Martial by the OC of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counter insurgency operation or active hostilities or Andaman and Nicobar Islands.

*In no circumstances will a man be tried by Summary Court Martial held by a CO other than the CO of the unit to which the man properly belongs; a unit to which the man may be attached subsequent to commission of the offence by him will also be unit to which the man properly belongs.*

TABLE

| <i>Column One</i>               | <i>Colum Two</i>                              |
|---------------------------------|---|
| <i>Armoured Corps Regiments</i> | <i>Armoured Corps Centre and School</i>       |
| <i>A unit of Artillery</i>      | <i>Regimental Centre concerned</i>            |
| <i>A unit of Engineers</i>      | <i>Headquarters Engineers Group concerned</i> |
| <i>A unit of Signals</i>        | <i>Signal Training Centre Jabalpur</i>        |
| <i>Infantry Battalions</i>      | <i>Regimental Centre concerned</i>            |

|                 |                             |
|-----------------|-----------------------------|
| <i>ASC Unit</i> | <i>ASC Centre concerned</i> |
| <i>RV Corps</i> | <i>RVC Centre</i>           |

*This rule is not intended to limit the power of any convening officer, who at his discretion may order trial be General, Summary General, or District Court Martial at any place, if such a course appears desirable in the interest of discipline.”*

It provides that the person must be properly attached. In the instant case, the respondents have not produced the attachment order vide which the petitioner was attached to Adm Bn of ASC Centre (North). We are inclined to hold that in the absence of attachment order, trial by CO of Adm Bn of ASC Centre is legally not valid and is liable to be quashed. However, the factum of prolonged absence of seven years six months and twenty one days cannot be ignored. It is an act of indiscipline which is against the tenet of discipline of the Army on which the foundation of Armed Forces rests. Acts of such indiscipline need to be addressed appropriately and legally.

8. Accordingly, this O.A is partly allowed. In that, the trial by the SCM is quashed on the ground that the attachment order with Adm Bn of ASC Centre (North) has not been produced by the respondents. We remand the petitioner for retrial by appropriate authority following the provisions of law. We further direct the petitioner to report to ASC Centre Bangalore by 31 Dec 2015 and if he does so, the process of



retrial be completed within a period of six months from today. In the event the petitioner fails to report to the ASC Centre Bangalore by 31 Dec 2015, the respondents will be under no obligation to initiate any action for re-trial and the petitioner will forfeit his right to challenge his dismissal. No order as to costs.

**(Lt. Gen. A.M. Verma)**  
**Member (A)**

**(Justice Abdul Mateen)**  
**Member (J)**

LN/-