

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****MISC APPLICATION No. 2001 of 2017****(Application for Condonation of Delay)****Inre: O.A. No NIL 2017**Monday, this the 3rd day of December 2018**“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal BBP Sinha, Member (A)”**

No. 15196659Y) Rect Nihal Singh son of Shri Jagat Singh, resident of village Gunha, Post Mawai, Tehsil Tiwa, district Kannauj - 209 738

..... Applicant

Ld. Counsel for the : Shri S.K. Singh , Advocate.
Applicant

Versus

1. Union of India, through Ministry of Defence, South Block, New Delhi – 1100011.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi 110001.
3. Command, Artillery Centre, Hyderabad.
4. Commanding Officer, Centre Hyderabad.

.....Respondents

Ld. Counsel for the : Shri Ashish Agnihotri,
Respondents. Addl Central Govt. Standing Counsel**ORDER(ORAL)**

1. At the very outset it may be mentioned that as per report of the office, there is delay of three years, six months and nine days in approaching this Tribunal.

2. By means of the O.A., the applicant has made the following prayers:-

- i. *To issue an order/direction to quash/set aside the effect and implementation of order dated 17.08.2017 passed by authority concerned against the applicant for dismissal from service on the basis of desertion since 28 October 2013 under Army Act 20*

(3). *Copy of the dismissal order dated 17.08.2017 is being annexed as Annexure No. 1 with O.A.*

- ii. *To issue order or direction to opposite party to allow applicant to resume his duty for the army service on the basis of Hon'ble Court observation which has not been complied due to pendency of criminal case against the applicant and dismissal order has been passed without legal procedure provided by the Act and Army Rule.*
- iii. *To pass any other such order which this Hon'ble Tribunal may deem fit in the fact of the present case.*
- iv. *Allow the present original application with cost.*

3. Learned counsels for the parties were heard and record of this case as well as earlier O.A. and Misc Applications filed by the applicant were perused because the applicant has filed copies of orders passed in earlier cases and has relied on the same as a ground to condone delay in preferring the present M.A.

4. Before proceeding further, we feel it necessary to narrate certain facts of the case. The applicant was enrolled in the Army as a recruit on 23.06.2013 and his training started on 13.07.2013. The applicant absented himself from the training and, therefore, he was declared a deserter with effect from 28.10.2013. The applicant preferred O.A. No. 25 of 2015 with the prayer for a direction to take the applicant on the strength and to permit him to complete his training. Said O.A. No. 25 of 2015 was disposed of by this Tribunal vide order dated 07.09.2015 on the ground of availability of alternative remedy. Order dated 07.09.2015 reads thus:

“Misc Application No.1224 of 2015.

By this application the applicant has submitted that since the present Original Application was preferred by the applicant without availing the alternative remedy and the applicant has now preferred a petition before the COAS against dismissal of the applicant on 16.5.2015, therefore, the present O.A. be dismissed on the ground of alternative remedy.

Accordingly, the application is allowed and, as prayed, the present O.A. No. 25 of 2015 is dismissed on the ground of alternative remedy.”

5. Thereafter, the applicant preferred M.A. No. 114 of 2016 (Application for condonation of delay) along with O.A. The O.A. was admitted and with the consent of the parties, the following order dated 27.07.2016 was passed:

“M.A. No. 114 of 2016

We have heard learned counsel for the parties on Application for condonation of Delay.

Being satisfied with the explanation offered by learned counsel for the Applicant the delay in filing the O.A. is accordingly condoned.

The Application for condonation of delay is allowed.

We have heard learned counsel for the parties on the point of admission. We are convinced that it is a fit case for adjudication.

The O.A. is admitted.

With the consent of the parties, we proceed to decide the O.A. at the very threshold.

In observance of the order of the Tribunal dated 05.07.2016, both Shri Yogesh Kesarwani and Lt Col Subodh Verma, have filed their respective affidavits explaining that only part-II order has been issued which revolves round desertion and no order for discharge of the Applicant has yet been passed. The statements made by the deponents aforesaid are inadvertent and incorrect statements made with regard to controversy in question.’

It is stated across the bar that since the Applicant has not yet been discharged, it is open to him to resume his duties.

In view of the above, it is directed that the Applicant may report for duty in the concerned Unit, i.e. Hyderabad Artillery Centre. However, it shall be open to the respondents to proceed in accordance with law in the matter if so advised to do so.

The Application shall stand disposed of in terms of the above directions.

It may be clarified that the aforesaid order has been passed keeping in view the statements made by the OIC Legal Cell that the Applicant is entitled to resume duty at the Artillery Centre, Hyderabad.

Let a certified copy of this order be supplied by tomorrow to enable the learned counsel for the parties to do the needful in the matter of compliance of the order of the Tribunal.”

6. It transpires that even after the aforesaid order, the applicant failed to report to his Unit and thereafter he again moved Execution Application No. 211

of 2016 Inre: MA. No.114 of 2016 claiming execution of order dated 27.07.2016.

The Execution Application was rejected vide order dated 13.01.2017, which reads thus:

“Dr Satendra Kumar Singh, Ld. Counsel for the applicant submits that he has received instructions from the applicant that on account of involvement of the applicant in a case under Section 498 (A) IPC initiated by his Sister-in-Law with regard to whole family of the applicant, the applicant could not appear before the Army authorities to resume duties.

We feel that so far as the respondents are concerned they have complied the order of the Tribunal. It is for the applicant to adopt appropriate recourse in case he could not resume duties.

So far as the present application is concerned it is rightly argued by Ld. Counsel for the respondents that the respondents are not at fault.

Application is rejected.”

7. From the record it transpires that in compliance of order dated 18.10.2016 passed by the Tribunal, a Court of Inquiry was held to investigate into the allegations made by the applicant in Execution Application No. 21 of 2016 Inre: M.A. No.114 of 2016. The concluding portion of the opinion of the Court of Inquiry is reproduced as under:

“OPINION OF THE COURT.

1. *Ex Recruit Nihal Singh reported to Artillery Centre, Hyderabad on 05 Sep 16.*
2. *His reporting was informed in the chain of reporting and he was directed to report to 2 Training Regiment.*
3. *Ex Recruit Nihal Singh, however, did not report to 2 Training Regiment and went back without informing anyone.*
4. *The following instances indicate unwillingness of Ex Recruit Nihal Singh in Rejoining.*
 - (a) *Not rejoining despite the orders of the Honourable Court on 27 Jul 16.*
 - (b) *Making a token appearance for a day, forty days after the Court Order and still absconding.*
 - (c) *Not rejoining even when escorts went to his residence to facilitate his rejoin.”*

8. Learned counsel for the applicant argued that since the applicant was falsely implicated in a Criminal Case under Sections 498A, 323, 504, 506 & 328 IPC, he could not go to join his Unit and thereafter he was dismissed from service.

9. On the other hand, learned counsel for the respondents argued that the applicant has moved the present Application for Condonation of Delay along with O.A. with concealment of facts. It is argued that the applicant was only a recruit and was not attested. Applicant's basic military training for 19 weeks commenced on 15.7.2013 at 4/2 Training Regiment Artillery, Hyderabad. However, on the very next day of commencement of training, the applicant absented himself without leave from the Unit from 16.07.2013 to 27.07.2013 and voluntarily surrendered on 28.07.2013. The applicant was tried under Section 39 (a) of the Army Act, 1950 and was awarded punishment of seven days' pay fine. Applicant's training resumed on 04.08.2013 but on 26.08.2013, after completion of 22 days from resumption of training, the applicant again absented himself without leave from 26.08.2013. On resumption of training, the applicant was tried and was saddled with punishment of seven days' pay fine. The applicant was permitted to resume his basic military training on 08.09.2013 but on 28.10.2013 after completion of 44 days' of training, he again absented himself without leave for the third time. On 16.11.2013, the applicant accompanied by his guardian came to the Training Regiment, Artillery Centre Hyderabad, and in spite of lenient approach accorded to him, stated that he is unwilling to continue in service and returned back along with the guardian. It is argued by learned counsel for the respondents that in these circumstances, the applicant was declared a deserter in accordance with the procedure prescribed and after completion of three years, he was dismissed.

10. Submission of learned counsel for the respondents is that the applicant has utterly failed to explain the delay in filing this O.A. inasmuch as, vide order dated 27.07.2016 passed in M.A. No. 114 of 2016 (Application for condonation of delay) he was directed to resume duties but even specific order passed by the Tribunal permitting the applicant to join duty, he did not join his duty and therefore, the applicant is not entitled to any further indulgence by this Tribunal.

11. It is further submitted by learned counsel for the respondents that the case of the applicant is covered under Policy dated 28.02.1986 which deals with 'Relegation of Recruits' (Para-4) which provides in indisputable terms that a recruit who has been absent without leave for a period of 30 consecutive days during basic military training period will not be allowed to rejoin his training again. Such recruits will be discharged after necessary disciplinary action. The absentees for less than 30 consecutive days may be considered for relegation, if otherwise found suitable for retention. However, once the technical training of a recruit has commenced, the discretion to discharge the recruit for such absence will be left to the Commander of the Centre, who may retain or discharge him considering the case on its merit. Learned counsel submitted that since the applicant absented for more than thirty days during basic military training, he could not be permitted to resume his training and with due compliance of the procedure, he was declared a deserter and consequently dismissed from service. It is further argued by learned counsel for the respondents in this perspective, no useful purpose will be served by condoning the delay.

12. The solitary argument advanced by learned counsel for the applicant is that the applicant could not report for joining after passing of order dated 27.07.2016 for the reason that he and his family members were falsely implicated in a case being Case Crime No. 0451 under Sections 498A, 323, 504, 506 & 328 IPC. Copy of the FIR in which the applicant claims to have been involved has been annexed by the applicant as Annexure A-12. A perusal of said FIR indicates that Case Crime

No. 0451 was registered on 01.11.2016, i.e. after about three months when order was passed by this Tribunal dated 27.07.2016 permitting the applicant to join duty. This shows that the applicant was not the least interested to join duty and the occurrence of lodging of the FIR is a lame excuse set up by the applicant not to join duty in compliance of orders of this Tribunal.

13. Besides this, in the affidavit sworn and filed by the applicant in support of application for condonation of delay, in para 16, it is averred that on 02.11.2016 FIR was lodged by the deponent's (applicant) sister-in-law against the deponent and all family members as case crime No. 0541 under Sections 498A, 323, 504, 506, 328IPC at Police Station Sivli, district Rambai Nagar. This is virtually the only ground taken by the applicant for condonation of delay in approaching this Tribunal. As started earlier, this FIR was lodged on 01.11.2016 and it is really strange to note that no person having the name and address as that of the applicant has been arrayed as an accused in said FIR. It reflects that the applicant has not approached the Tribunal with clean hands.

14. In the case of *Mahanagar Telephone Nigam Limited vs. State of Maharashtra & ors*, (2013) 9 SCC 92, the controversy before the Hon'ble Supreme Court was that in case a person does not approach the Court clean hand, then whether some relief may be granted to him? Their Lordships of Hon'ble Supreme Court held that a person who has not approached the Court with clean hands concealing material shall not be entitled to any relief from the Court.

15. In *Oswal Fats and Oils Ltd vs. Commr (Admn)*, (2010) 4 SCC 728 relief was denied to the appellant by making the following observations (SCC pp.738-39 para 20)

“20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, it is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/ suppressing any material fact within his knowledge or which he could have known by exercising diligence expected for a person of ordinary produce. If he is found guilty of concealment of material facts or making an attempt to pollute the

pure stream of justice, the court not only has the right but a duty to deny relief to such person”

16. From the facts narrated above, it is abundantly clear that the applicant has not approached this Tribunal with clean hands; the ground for condonation of delay taken by the applicant is absolutely false and baseless; and virtually the applicant has tried to mislead the Tribunal, thus, he is not entitled to any indulgence by this Tribunal.

17. In view of observations made hereinabove, we are of the opinion that the delay in filing the O.A. cannot be condoned.

18. The application for condonation of delay is accordingly **rejected**.

19. As a consequence, the O.A. is also **dismissed**.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

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

Dated: 3rd December, 2018
Anb