

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****COURT NO. 1 (List A)****O.A. No. 33 of 2011****Wednesday, this the 1st day of February, 2017****"Hon'ble Mr. Justice D.P.Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"**

Gunner (Opr) Santosh Kumar Singh Yadav (Army No. 15771627H) of 105 AD Regiment, C/o 56 APO, son of Late. Ramjapat Singh Yadav, resident of Village and Post – Darauli, Tehsil-Jamania, District - Ghazipur (U.P.) - 232329
 **Applicant**

Versus

1. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi – 110001.
2. Officer-In-Charge Records, Air Defence Artillery, Nasik Road Camp.
3. Commanding Officer, 105 AD Regiment, C/o 56 APO.

.....**Respondents****Ld. Counsel appeared
for the Applicant****- Shri R. Chandra,
Advocate****Ld. Counsel appeared
for the Respondents****- Shri D.K. Pandey, Advocate
Addl. Central Govt. Counsel.**

Order

(Per Hon'ble Air Marshal Anil Chopra, Member (A))

1. Challenge in the instant case is to the dismissal dated 04.06.2008 passed under section 20 (3) of the Army Act 1950 read with Para 22 of the Army order 43 of 2001.

2. The facts of the case in nut-shell are that the Applicant was enrolled in the Indian Army on 20.01.2000 and after undergoing training, he was posted to 105 Air Defence Regiment. It is alleged that on 04.06.2005, the applicant fled from his Unit and therefore Apprehension roll was issued vide letter dated 05.06.2005. Thereafter court of inquiry was held and consequently, he was declared deserter w.e.f 04.06.2005. The Applicant was dismissed from service declaring him deserter after 03 years of waiting with effect from 04.06.2008. The Applicant instituted the present Application on 31.01.2011. Subsequently, a communication was addressed to Zila Sainik Board Ghazipur on 30.04.2011 whereby intimation was sent to advise the Applicant to apply for outstanding dues after dismissal. It is in this backdrop that the Applicant claimed to be aware of his dismissal and applied for

amendment in the O.A. seeking setting aside of the dismissal order.

3. The case of the Applicant is that he had left the Unit on 04.06.2005 and arrived at his village on 06.06.2005. Finding the Applicant in unstable equilibrium, the wife of the Applicant immediately wrote a letter to the Commanding Officer, 105 AD Regiment and also informed him telephonically about the mental instability of the Applicant and thereafter he was taken to Government Mental Asylum Ranchi where it is alleged, the Applicant was continuously under treatment from 09.06.2005 to 25.12.2010. It is further alleged that during the course of treatment, the Applicant was taken to Air Defence Artillery Centre, Nasik Road Camp to report for duty where he claimed, he was interviewed by then Adjutant on 26.08.2006. On 28.08.2006, it is alleged, the Applicant was asked to report for duty at his Unit where it is further alleged he reported on 30.08.2006. At his Unit, it is alleged, the Applicant was interviewed by the Commanding officer, Colonel Sachit Sardana. Thereafter, he was told that a party would be sent to his village to ascertain the facts. It is further alleged that the party visited the village Darauli District Ghazipur sometime in the month of Sept 2006 and after necessary investigation, the

said party went back to the Unit. It is further alleged that ever-since then, he has not received any intimation and consequently, he invoked the jurisdiction of this Tribunal initially for the relief of direction to allow the Applicant to join his unit. Subsequently, by way of amendment, he introduced the relief of setting aside the order of dismissal with effect from 04.06.2008 which it is further alleged, was communicated to him by means of communication dated 30.04.2011. It may be noted here that the O.A was filed which was registered on 28.01.2011.

4. **Per contra**, the case of the respondents is that the Applicant voluntarily left the Unit without any leave on 04.06.2005 and immediately thereafter apprehension roll was issued on 05.06.2005. Thereafter court of inquiry was convened and the Applicant was declared deserter. After expiry of three years, the Applicant was dismissed from service with effect from 04.06.2008. The further case of the respondents is that there was no intimation of the whereabouts of the Applicant between August 2006 till Jan 2011. The averment that the wife of the Applicant had immediately contacted the Commanding officer of 105 AD Regiment has been vehemently denied submitting that there was no such record with them to

vouchsafe the averments made by the Applicant. It is further contended that while undergoing alleged treatment at Mental Hospital at Ranchi, the Applicant never visited the nearest Military Hospital, which he was under a duty to do. It is further contended that had the Applicant reported at the nearest Military Hospital, he would have certainly been referred back to Government Hospital at Ranchi for specialised treatment. It is denied that any party from Unit was ever sent to the village of the Applicant for investigation. It is also denied that the Applicant was ever noticed as mentally unstable in the Unit and there is nothing on record to indicate that the Applicant was ever seen behaving abnormally during the period from 2000 to 2005.

5. We have heard learned counsel for the parties and have also perused the materials on record.

6. From a close scrutiny of the record, it would transpire that the only ground urged in challenge is that the order of dismissal with effect from 04.06.2008 as contained in the Communication dated 30.04.2011 is not sustainable in law the same having been passed with retrospective effect having been made effect from 04.06.2005 more-so without complying with Army Rule 17 and in this connection, he referred to Section 18(3)

of the Army Act attended with submission that there was legal requirement to comply with section 20(3) of the Army Act read with Army Rule 17. It is further submitted that the Applicant being under treatment in Government Mental Hospital at Ranchi which the Army Authorities were fully cognizant of, ought not to have been declared deserter as they were aware of where the Applicant was getting treatment followed by the submission that they were also made available the requisite documents of the Govt Mental Hospital at Ranchi.

7. In view of the aforesaid submissions, we have to examine the ambit and scope of Section 20(3) of the Act read with Rule 17 of the Rules. Sub sections (3) and (7) of Section 20 of the Act being relevant, are reproduced as follows:

"20. Dismissal, removal or reduction by the Chief of the Army Staff and by other officers. (1) Xxx xxx xxx (2) xxx xxx xxx (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. (3) xxx xxx xxx (4) xxx xxx xxx (5) xxx xxx xxx (6) xxx xxx xxx (7) The exercise of any power under this

section shall be subject to the said provisions contained in this Act and the rules and regulations made there-under."

8. Section 20(3) of the Act has, therefore, conferred power on an officer having power not less than a Brigade or equivalent Commander and also any prescribed officer to dismiss or remove from service any person serving under his Command other than an officer or a Junior Commissioned Officer. Sub section (7) of Section 20 provides as to how the power of dismissal and removal is to be exercised, according to which, the exercise of any power under Section 20 shall be subject to Rules and Regulations and provisions of the Act. Rule 17 of the Rules seems to have been framed to provide for the procedure as to how the power of dismissal or removal under Section 20 of the Act has to be exercised. The provisions of Rule 17, being relevant, are reproduced as follows:

"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 sub-section (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"

9. 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.

10. 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.

11. The present case needs to be examined accordingly. If materials on record are any indication, it is crystal clear that the appropriate authority of the respondents was of the view that it was not reasonably practicable to comply with the provisions of Rule 17. As the Applicant had been absconding and did not report back and his whereabouts were not known for about three years, in such circumstances, the decision of the competent authority to dispense with the Show Cause notice, it would appear, was perfectly legal and valid, which would seem to be only possible conclusion in the case. In such circumstances, the dismissal order cannot be said to be unwarranted in law only on the

ground that the show cause notice as per Rule 17 was not served on the applicant.

12. According to Para 22(b) of the aforesaid Army Order, three years of absence/desertion in other cases was required for dismissal. If such is the case, the respondents cannot be said to have acted illegally in dismissing the applicant from service on expiry of three years' period of his desertion. The applicant did not report back to rejoin duties after fleeing from his Unit without any prior permission or leave and remained absent thereafter without any justification for several years. More so, he was declared as a deserter after convening of proper Court of Inquiry. After the declaration as a deserter, he never reported back except by way of filing the Original Application in the year January 2011. His claim that he had gone on different dates to the Unit but authorities did not pay any heed, is not borne out from the record. In such circumstances, the stand of the applicant cannot be said to be justified. In our view, the Armed Forces are managed by disciplined persons, who are supposed to be fully dedicated to the Nation and its security. If everybody moves from the Army, as the applicant did in this case, it would be very difficult to enforce not only discipline in the Armed Forces but also to ensure

security of the Nation. So in such matters, dismissal cannot be said to be illegal only on the ground that no show cause notice was given and it was dispensed with as per the requirements of the Rule 17. More so, Section 18 of the Act clearly provides that every person subject to the Act shall hold office during the pleasure of the President. In fact, section 18 of the Act is nothing except reproduction of Article 310 of the Constitution of India.

13. In the case of **Union of India and others v Major S.P.Sharma and others (2014) 6SCC 351**, the Apex Court held that the order of termination passed under section 18 of the Act can be challenged on the ground of malafides. The Apex Court further held that indisputably defence personnel fall under the category where the President has absolute pleasure to discontinue the services. The safeguards available to civil servants under Article 311 is not available to defence personnel as in such matters, judicial review is very limited. The Apex Court further held that while exercising the judicial review against the 'pleasure doctrine', the Court cannot substitute its own conclusion on the basis of materials on record inasmuch as the safety and security of the Nation above all is everything. The Apex Court further observed that

the Court in exercise of powers of judicial review should be slow in interfering with such pleasure of the President exercising constitutional power.

14. In the present matter, there were adequate materials against the applicant. He left the Army without any justification and did not turn up even after issue of apprehension roll and was ultimately declared a deserter with effect from 04.06.2005. He did not turn up during the period of three years from the date of desertion and even thereafter.

15. In so far as submission that the wife of the Applicant immediately after arrival of the Applicant in the village on 06.06.2005 had informed the Commander of the Regiment telephonically and had also written a letter to that effect intimating the prevailing condition of the Applicant, is concerned, the same has been repudiated by the respondents in the counter affidavit. The Applicant produced certain documents but the same have been vehemently denied by the respondents. It has been averred that there is nothing on record to show that any telephonic call was received by the Commander of the Regiment or that any letter was written by the wife of the Applicant. In repudiation, it has been argued that the Applicant could not produce any letter from the Unit which could

vouchsafe the acknowledgment of the letter of the wife of the Applicant. In the circumstances, we have no alternative but to lend ears to the contentions that no such communication was exchanged between the family members of the Applicant and the Unit of the Applicant. It is suggested that the pleas taken by the Applicant are afterthought and they are designed to prop up his failing case. We have traversed upon the materials on record and we do not find anything which could bolster up the arguments of the learned counsel for the Applicant. In so far as medical documents vouching for the treatment which the Applicant had undergone in a Government Hospital cannot salvage the situation in favour of the Applicant. The same have been denied to have been received. The argument of the learned counsel for the respondents that even if it be assumed that the Applicant was not in fit mental condition and was undergoing treatment in Government Hospital at Ranchi, the Applicant or for matter of that, his family members very well knew that the Applicant ought to have been taken to the nearest Military Hospital from where he could have been referred back to the Government Mental Hospital for specialised treatment does commend to us for acceptance. On one hand, it is averred that the

Applicant was not in a fit mental condition and on the other hand, it is averred that the Applicant had gone to the Air Defence Artillery Centre Nasik Road camp, where he was interviewed on 26.08.2006. If he was not in a fit mental state, how could he go to the aforesaid Unit where he claimed he was interviewed by Lt B.S Colonel Bhati, the then Adjutant and then on 31.08.2006, he was interviewed by the Commanding officer Colonel Sachit Sardana of his Unit. The respondents have denied the aforesaid averments to the hilt. It is also vehemently denied that pursuant to the telephonic conversation, the Commander of Applicant's Unit had sent any party to the village of the Applicant for investigation.

16. In our considered view, the Armed Forces are managed by disciplined persons who are supposed to be fully dedicated to the nation and its security. If everybody flees from the Army without any prior permission or leave, it would be very difficult to enforce not only discipline in the Armed Forces but also to ensure security of the Nation. In such circumstances, dismissal cannot be said to be illegal on grounds urged in this case by the learned counsel for the Applicant.

17. As a result of foregoing discussions, the Application being devoid of merit is dismissed.

(Air Marshal Anil Chopra)
Member (A)

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

Date: February, ,2017

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