

RESERVED**Court No. 2****ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****O.A. No. 411 of 2017****Friday, this the 16th day of February 2018****Hon'ble Mr. Justice S.V.S. Rathore, Judicial Member**
Hon'ble Air Marshal BBP Sinha, Administrative Member

Nk Tribhuvan Shanker Singh (Army No. 13880436A), son of Late Laxmi Kant Singh, Last Unit 504 ASC Battalion, C/O 56 APO, resident of village Dharsona (Pawarepur) Post Cholapur, district Varanasi, Pin-221101

.....Applicant

Counsel for the Applicant Shri P.N. Chaturvedi, Advocate

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi-110011
2. Chief of the Army Staff, Integrated Headquarters of the Ministry of Defence (Army), South Block, New Delhi-110011
3. General Officer, Commanding-in-Chief, Central Command, Lucknow.
4. Officer-in-Charge, Records, ASC Records (South), Bangalore.
5. Controller of Defence Accounts (Pension) Draupadighat, Allahabad.
6. Commandant 39 Gorkha Training Centre, Varanasi Cantt.
7. Commanding Officer 504 ASC Battalion, C/O 56 APO.

....Respondents

Counsel for the Respondent Shri Yogesh Kesarwani,
Central Government
Standing Counsel

ORDER**“Per Hon’ble Mr. Justice SVS Rathore, Member (J)”**

1. By means of this Original Application, the applicant has made the following prayers:
- (a) *Issue/pass an order or direction to the respondents to grant pay and allowances till completion of the terms and condition of service in the rank of Naik and any other promoted ranks, in terms of Paras 163 and 164 of the Regulations for the Army, 1987.*
 - (b) *Issue/pass an order or direction to the respondent to quash/set aside the illegal dismissal from service w.e.f 29.7.2002 and improper discharge certificate dated 28.08.2016 (Annexure No.1) being violative of Army Rule 17 and also Army Rule 18 (3) which provides that the discharge order could not be retrospective and it was to be communicated to the applicant in the form of mandatory furnishing discharge certificate in terms of Army Act Sec 23 and Army Rule 12.*
 - (c) *Issue/pass an order or direction to give heavy compensation for the harassment caused to him and his family.*
 - (d) *Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.*
 - (e) *Allow this application with costs.*
2. This Original Application was filed after expiry of period of limitation and application for condonation of delay was moved. In support thereto, certain medical certificates were filed. On perusal of the same, the Tribunal vide order dated 26.07.2017 directed the respondents to verify the genuineness of the medical certificates and the period of medical treatment provided to the applicant by Rajendra Institute of Medical Sciences, Ranchi. Again, vide order dated 19.09.2017 it was directed that the respondents shall file counter affidavit and shall ascertain the genuineness of the medical certificates. By order dated 19.09.2017 the Original Application was admitted. The Original Application was admitted only on the ground that the respondents had not received instructions in spite of order dated 26.07.2017. Since the Original Application has been admitted, we proceed to dispose it of on merits.

3. The brief facts necessary for the purpose of the instant Original Application are that the applicant was enrolled in the Army Service Corps (ASC) in the Trade of MT Driver on 27.07.1979. In the year 1992, the applicant was attached to 39 GTC to enable him to pursue his pending criminal case in Criminal Court, Varanasi. In the year 1993, he was promoted to the rank of Naik. Married Family Accommodation was allotted to the applicant. It is pleaded on behalf of the applicant that there was a stay order dated 06.05.1995 with regard to said accommodation. In the year 1989-90, there was some problem and the applicant was harassed by the authorities in 39 GTC, Varanasi so he went back to his parent Unit wherefrom he was sent back to 39 GTC, Varanasi and after remaining there for some time he left Varanasi.

4. Applicant's wife wrote a letter to ASC Records on 12.04.2000 informing the authorities that the applicant has been traced out in Bihar at Ramrekha Ghat, Buxar. From 13.04.2000 to 09.08.2016 the applicant remained under treatment in Mental Health Centre, Ranchi. The applicant wrote letters on 12.07.2016 and 29.08.2016 to ASC Records requesting them to inform as to where he has to report for duty. On 29.07.2002 the applicant was informed by ASC Record letter dated 28.07.2016, and discharge certificate of the same date, that he was a deserter since 27.07.1999 and has been dismissed from service with effect from 29.07.2002.

5. Submission of learned counsel for the applicant is that the applicant was dismissed from service under Section 20 of the Army Act, 1950 without complying with the procedure and safeguards and no opportunity to show cause was afforded to him. The applicant's wife was informed vide ASC Records letter dated 28.07.2016. However, at the time of discharge, no discharge certificate was given to the applicant. It is submitted by learned counsel for the applicant that there is violation of Section 23 of Army Act, 1950 and Rules 17 and 18 (3) of the Army Rules, 1954.

6. On behalf of the respondents, it has been pleaded that the applicant while serving with the 511 ASC Battalion was granted 44 days of balance annual leave w.e.f. 10.08.1992 to 20.09.1992. After expiry of aforesaid period of annual leave, the applicant was further granted extension of 20 days advance annual leave for the year 1993 w.e.f. 21.09.1992 to 10.10.1992. While the applicant was on leave, he was beaten by the civil police of Cholapur police station and locked up in a semi conscious state. On the same day he was transferred to District Jail, Varanasi. Bail was granted to the applicant on the intervention of local military authorities on 29.09.1992. An inquiry was conducted by the Station Headquarter, Varanasi against alleged harassment of military personnel by the civil police. In said inquiry it was revealed that the applicant was involved by the civil police in a fabricated case. Accordingly, the case was referred to higher police authorities and investigation was conducted by the Central Bureau of Investigation. Since the applicant was involved in the case and he was required to appear before various inquires being conducted by the civil authorities and Central Bureau of Investigation, on the request of the applicant he was attached with 39 GTC, Varanasi for pursuing the court cases. During his attachment at Varanasi, the applicant was allotted Married Accommodation. On 06.05.1995, the applicant fabricated a document dated 06.05.1995 purported to be issued by the V Additional Chief Judicial Magistrate, Varanasi for retention of the Married Accommodation allotted to him by making false statement. Subsequently, a Court of Inquiry was initiated to investigate the circumstances under which the applicant had produced fake copy of letter dated 06.05.1995 purported to be written by the V Additional Chief Judicial Magistrate, Varanasi. As per findings of the Court of Inquiry, it revealed that the applicant wilfully and deliberately produced the fake copy of the letter with mala fide intention for personal gain and undue advantage. Thereafter, the applicant was asked to vacate said Married

Accommodation and disciplinary action for producing fake document was also recommended. The applicant was declared unauthorised occupant of said Married Accommodation and disciplinary proceedings were initiated against him. Tentative charge sheet dated 15.06.1999 was served upon the applicant. The Married Accommodation was got vacated on 14.08.1999 by civil police in the presence of a Magistrate and Board of Officers. The applicant absented himself without leave w.e.f. 16.06.1999 from 39 GTC and voluntarily reported to 504 ASC Battalion on 19.06.1999. Thereafter, 504 ASC Battalion despatched the applicant under escort to 39 GTC on 28.07.1999. The applicant absconded from 39 GTC, Varanasi on 28.07.1999 and did not rejoin duty. Apprehension roll to all concerned was sent by 504 ASC Battalion on 10.08.1999. Thereafter Court of Inquiry was conducted under orders of the Commanding Officer dated 07.02.2000 and based on the findings of the Court of Inquiry, the applicant was declared deserter w.e.f. 29.07.1999. It is submitted by learned counsel for the respondents that as per Paras 20 and 21 of the Special Army Order 9/S/89, an individual declared as a deserter is kept on supernumerary strength of the Corps for a period of three years in case of desertion from peace area and ten years in case of desertion from field area. Thereafter the deserters are administratively dismissed from service if not apprehended by civil authorities or rejoined voluntarily. Learned counsel for the respondents submitted that the applicant was neither apprehended by the civil police nor he resumed his duties voluntarily, therefore, he being a deserter from peace area was dismissed from service under Section 20 (3) of the Army Act, 1950 with effect from 29.07.2002 vide ASC Records Part-II order. Thereafter the wife of the applicant was informed to submit claim for amount of credit balance. However, she did not prefer any such claim.

7. Learned counsel for the respondents further submitted that as per Regulation 113 of Pension Regulations for the Army, 1961 Part-I, an individual who is dismissed from service under the provisions of the Army Act is not eligible for pension or gratuity in respect of all previous service.

8. The applicant preferred a petition dated 15.02.2016 for settlement of pension which was suitably replied by ASC Records (South) vide letter dated 29.02.2016 stating therein that the applicant has been dismissed with effect from 29.07.2002 under Section 23 of the Army Act, 1950 being a deserter, as such, he is not entitled to any pension. Apart from it, the applicant also preferred statutory petition on 13.05.2016 to set aside order of dismissal and to grant him all service monetary benefits. Said statutory petition was also rejected by the competent authority on valid grounds.

9. Submission of learned counsel for the respondents is that when the applicant remained absent for a very long period of several years, he was declared deserter and in accordance with the Rules he was dismissed from service after lapse of three years. All procedural safeguards in this connection were complied with and the present Original Application lacks merits.

10. Admitted fact position is that the applicant has nowhere in the Original Application or in the synopsis admitted that he was a deserter and subsequently was dismissed from service. Certain Sections of the Army Act and Rules framed thereunder have been brought to our notice by learned counsel for the applicant and it has been argued that before passing order of dismissal, the prescribed procedure has not been followed, as such, the order of dismissal cannot be sustained.

11. It has been argued by learned counsel for the applicant that the applicant was mentally ill and was under treatment for about fourteen years. However, the medical certificates submitted by the applicant show that the applicant was treated at Ranchi while the applicant has

given his address of Varanasi. The applicant had taken treatment in a private hospital and at no point of time he went to any Military Hospital for his treatment.

12. Submission of learned counsel for the applicant that the applicant was not provided discharge certificate which was communicated to him in the 2016 is absolutely without any substance. According to the applicant himself he was mentally ill. At no point of time the applicant made any effort to contact the competent authority and his whereabouts were not known to the military authorities, therefore, the respondents were not in a position to serve the discharge certificate upon him personally. It was only when the applicant moved representation, then in reply to said representation, he was informed that he has been dismissed from service with effect from 29.07.2002 and a copy of the same was sent to the applicant.

13. Learned counsel for the applicant submitted that the date mentioned in the discharge certificate is 28.07.2016 which shows that there was no discharge certificate issued prior thereto. We do not find any substance in this submission because the applicant was not available at any point of time even in accordance with his own admission. Additionally, despite a lookout with police, the applicant could not be traced during his desertion period and till his dismissal. His wife was duly informed and asked to raise claim for payment of outstanding amount. Therefore, the applicant cannot get any benefit of his own wrongs after such a long lapse of time.

14. The next submission of learned counsel for the applicant is that there is no compliance of procedure for dismissing a soldier under Section 20 of the Army Act, 1950. Section 20 reads as under:

“20. Dismissal, removal or reduction by (Chief of the Army Staff)1 and by other officers.—(1) The (Chief of the Army Staff)1 may dismiss or remove from the service any person subject to this Act other than an officer.

(2) *The (Chief of the Army Staff)1, may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.*

(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.*

(4) *Any such officer as is mentioned in sub-section (3) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer under his command.*

(5) *A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy.*

(6) *The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a non-commissioned officer, or if he has no permanent grade above the ranks, to the ranks.*

(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.”*

15. The authority of the officer passing the order of dismissal has not been challenged by the applicant. The procedure for passing order of dismissal/removal is provided under Rule 17 of the Army Rules, 1954. Rule 17 provides as under:

“17. 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 subsection (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.”

16. A bare perusal of Army Rule 17 (supra) makes it abundantly clear that this Rule itself gives discretion to the competent authority to order dismissal/removal even if it is not expedient or reasonably

practicable to comply with the provisions of this Rule. Therefore, in this case, when the applicant himself claims that he was mentally ill and was under treatment for long fourteen years, violation of this Rule cannot be presumed in absence of any evidence to the contrary. It is pertinent to mention here that only those provisions of procedure would vitiate the proceedings which are mandatory in nature. It is clear from a bare perusal of the aforesaid Rule 17 of the Army Rules, 1954 of the Army Act, 1950 that the same has not been worded in mandatory language and discretion has been given to the concerned authority to dispense with the requirement in given circumstances. Therefore, we do not find any substance in the argument of learned counsel for the applicant on this point.

17. It has also been argued that the procedure provided in Section 23 of the Army Act, 1950 have not been complied with. Section 23 reads as under:

“23. Certificate on termination of service.— *Every junior commissioned officer, warrant officer, or enrolled person who is dismissed, removed, discharged, retired or released from the service shall be furnished by his commanding officer with a certificate, in the language which is the mother tongue of such person and also in the English language setting forth—*

(a) the authority terminating his service;
(b) the cause for such termination; and
(c) the full period of his service in the regular Army.”

18. A bare perusal of Section 23 (supra) shows that persons who are covered under this Section have to be provided discharge certificate containing aforementioned information at the time of discharge/dismissal/removal or release, but in the facts of the present case whereabouts of the applicant were not informed. This fact stands established from the fact that on 12.04.2000, the applicant’s wife had sent a letter to the Senior Record Officer, ASC Records (South) informing that with the help of her relatives she could trace out her husband but his mental condition is bad and he is not recognizing any

person. Thus, to expect the respondents to provide copy of the discharge certificate to a person whose whereabouts were not known would not be justified and, therefore, the applicant who admittedly never went after his desertion to the unit requesting them to permit him to join duties, would amount to taking advantage of one's own wrong, which is not permissible under law.

19. Learned counsel for the applicant also argued that there is non-compliance of Rule 18 (3) of the Army Rules, 1954. Rule 18 (3) reads as under:

“18. Date from which retirement, resignation, removal, release, discharge or dismissal otherwise than by sentence of court-martial takes effect.—(1) The dismissal of an officer under Section 19 or the retirement, resignation, release or removal of such officer shall take effect from the date specified in that behalf in the notification of such dismissal, retirement or removal in the the official Gazette.

(2)

(3) The retirement, removal, resignation, release, discharge or dismissal of a person subject to the Act shall not be retrospective”.

20. Applicant as per pleadings on record was dismissed from service on 29.07.2002. As stated earlier, whereabouts of the applicant were not known and he was not traceable. Subsequently, when the applicant in the year 2016 sent representations, then in reply thereto discharge certificate was sent to him. Submission of learned counsel for the applicant is that as per sub-Rule (3) of Rule 18 (supra), discharge certificate cannot have retrospective effect. We have given our anxious consideration to this aspect of the matter and are of the view that this submission of learned counsel for the applicant has no substance for the reason that after his desertion from services, i.e. in the year 1999, the applicant was not getting any salary from the Army. A person who is not getting salary for the last seventeen years has to be presumed that he knows that he is no more in service. If the applicant had any impression that he is still in service, then he should have made request for payment of his salary, which is nowhere the case of the applicant. On the

contrary, learned counsel for the respondents has argued that the ground of mental sickness is devoid of merit and it has been taken only as a ground to explain the delay of seventeen years. As per the averments of the applicant, he was under treatment for about fourteen years at Ranchi which is far away from Varanasi, the place of residence of the applicant as mentioned in the Original Application. How such a mentally disturbed person can take treatment for such a long period of fourteen years by travelling from Varanasi to Ranchi, does not inspire confidence. Admittedly, the applicant remained absent without leave and was duly declared a deserter by a Court of Inquiry. After three years of desertion he was dismissed from service in accordance with Rules. We do not find any illegality or irregularity in the impugned order.

20. The Original Application is devoid of merits and is **dismissed** accordingly.

21. No order as to costs.

(Air Marshall BBP Sinha)
Member (A)

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

Date: 16th February, 2018
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