

RESERVED
Court No.1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No. 01 of 2014

Wednesday, this the 04th day of January 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

No 14853258M/SHT Chandra Prakash Tiwari, S/O Hav/SKT Chandra Bhushan Tiwari House No-582/303, BADALI KHERA (MAKDUM NAGAR), PO-SAROJANI NAGAR, DISTRICT-LUCKNOW (UP), PIN-226023.

.....Applicant

Ld. Counsel for the : **Col (Retd) Y.R. Sharma, Advocate**
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-110011
3. General Officer Commanding in Chief, HQ Southern Command, PIN-908541, C/O 56 APO.
4. Commandant, ASC Centre and College (South) PIN-908493, C/O 56 APO.
5. Commanding Officer, Adm Bn ASC Centre and College (South) Pin-908493, C/O 56 APO

...Respondents

Ld. Counsel for the : **Shri G.S. Sikarwar, Central**
Respondents. **Govt Counsel assisted by**
Maj Soma John, OIC, Legal Cell.

ORDER

“Per Air Marshal Anil Chopra, Member (A)”

1. Being aggrieved with the impugned order dismissal dated 21.02.2013 and order rejecting statutory complaint dated 11.05.2013, the applicant has filed this original application under Section 15 of the Armed Forces Tribunal Act, 2007 with the following prayers:-

- (a) *Issue/pass an order or direction to set aside the attachment order issued by Commandant Army Service Corps Centre and College (South) Bangalore. (Annexure A-1)*
- (b) *Issue/pass an order or direction of appropriate nature to quash/set aside the proceedings of Summary Court Martial. (Annexure A-2)*
- (c) *Issue/pass an order or direction of appropriate nature to quash/set aside the orders of General Officer Commanding in Chief Southern Command rejecting the post confirmation/review petition. (Annexure A-3)*
- (d) *Issue/pass an order or direction of appropriate nature to the respondents to re-instate the applicant with all consequential benefits including pay and allowances, promotion and allied benefits.*

2. The brief facts of the case are that the applicant was enrolled in Army Service Corps as Store Hand Technical (SHT) on 14.11.2009. After due training he was posted to 235 Coy ASC (Sup) in counter insurgency area from there the applicant was granted 30 days casual leave for the period 04.10.2011 to 02.11.2011 on the ground of his marriage. After marriage it was

revealed to the applicant that his wife was suffering from mental illness since he found her behavior to be erratic. She was admitted in Medical Health and Family Welfare, Kanpur on 10.10.2011 where she remained up to 12.12.2012 (14 months and 02 days). The applicant voluntarily surrendered to ASC Centre & College (South), Bangalore on 23.01.2012 (**Annexure A-5**) having overstayed leave for 82 days. A court of inquiry was constituted by the appropriate authority. While the court of inquiry was proceeding, the applicant applicant again absconded on 28.01.2012 from ASC Centre and College (South), Bangalore and after lapse of 326 days, he surrendered on 18.12.2012 (**Annexure A-7**).

3. The court of inquiry after recording evidence of three witnesses declared the applicant deserter. Charge sheet dated 18.01.2013 under Section 39 (b) of the Army Act, 1950 for overstaying leave for 82 days i.e. from 04.10.2012 to 02.11.2011 and charge sheet under Section 39 (a) for absenting without leave for 326 days from 28.01.2012 to 18.12.2012 was drawn. Recording of Summary of Evidence was ordered by the Commanding Officer on 23.01.2013 and copy of the summary of evidence and charge sheet was supplied to the applicant on 06.02.2013 at 1200 hrs. The Commanding Officer being satisfied that charges ought to have been proceeded with, ordered for Summary Court Martial vide order dated 08.02.2013. Subsequently, on the strength of convening order of the Commanding Officer (supra), Summary Court Martial was

convened on 21.02.2013. The applicant pleaded guilty to both the charges. The Summary Court Martial proceeded after complying the provisions of Rule 115 (2) and Rule 115 (2A) of the Army Rules. During Summary Court Martial the applicant made a statement that he had committed the mistake because he was not interested to serve in the Army. He further went on to state that he rejoined on the asking of his father. He refused to produce any witness or document in defence. The Summary Court Martial passed verdict of dismissal from service on 21.02.2013.

4. The applicant preferred statutory petition under Section 164 (2) of Army Act, 1950 and Para 365 of the Regulation for the Army against sentence of dismissal from service awarded by the Summary Court Martial which was dismissed by the General Officer Commanding-in-Chief being bereft of merits on 16.09.2013. The order rejecting the statutory complaint preferred by the applicant was duly communicated to him on 30.09.2013.

5. Heard Col (Retd) Y.R. Sharma, Ld. Counsel for the applicant and Shri G.S. Sikarwar, Ld. Counsel for the respondents assisted by Maj Soma John, OIC Legal Cell and perused the records.

6. Ld. Counsel for the applicant submitted that the order of punishment vitiates since Army Rule 34 was not complied with. For convenience sake Army Rule 34 is reproduced as under:-

“34. Warning of accused for trial.—(1) *The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.*

The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused is on active service less than twenty-four hours.

(2) *The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.*

(3) *The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in court-martial other than summary courts-martial.*

(4) *If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with his rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced.”*

7. In view of Rule 34 (1) of the Army Rules, 1954 the interval between the period the accused is charge sheeted and arraigned shall not be less than ninety six hours or where the accused is on active service less than twenty four hours.

8. Admittedly the applicant was in active service. On 08.02.2012 the Commanding Officer passed convening order for Summary Court Martial and the applicant was duly informed that he shall be tried by the Summary Court Martial on 21.02.2013. The Summary Court Martial proceeding commenced on 21.02.2013. As mentioned above, he was served with the charge sheet and summary of evidence on 06.02.2013. In token of receipt of the charge sheet and summary of evidence the applicant had put his signature. Thus the interval between his being so informed and his arraignment was not less than 96 hours and in any case not less than 24 hours (for active service). The argument of Ld. Counsel for the applicant is unsustainable and deserves rejection.

9. With regard to submission of Ld. Counsel for the applicant that the applicant was not supplied with copy of the charge sheet and summary of evidence, suffice to mention that applicant was supplied copy of the charge sheet and copy of summary of evidence on 06.02.2013 and in token of receipt thereof the applicant had appended his signatures as is evident from **Annexure CA-4** to the counter affidavit. Thus, this argument of Ld. Counsel for the applicant that the applicant was not given copy of charge sheet and summary of evidence is also misconceived.

10. It is next argued by Ld. Counsel for the applicant that the respondents have committed legal infirmity in trial of the applicant by the Commanding Officer of Administrative Battalion, ASC

Centre & College (South) Bangalore. Ld. Counsel for the applicant invited attention of the Tribunal to para 381 of the Regulations for the Army and Section 116 and Section 120 of the Army Act. Regulation 381 of the Regulations for the Army is reproduced as under:

“381. Trial of Deserters.- *Under 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 one of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and 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 to the offence by him will also be a unit to which the man properly belongs.

TABLE

<i>Column one</i>	<i>Column two</i>
<i>Armoured Corps Regiment</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 battalion</i>	<i>Regimental Centre concerned.</i>
<i>Gorkha Rifle Battalion</i>	<i>Gorkha 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 by General, Summary General or District Court Martial at any place, if such a course appears desirable in the interest of discipline.”

11. From the facts mentioned hereinabove, it is evident that the Court of Inquiry was held before declaring the applicant as ‘deserter’ in pursuance to Army Regulations. The applicant while serving in 325 Coy ASC (Sup) located in field area overstayed leave for 82 days. He surrendered to ASC Centre & College (South), Bangalore from where he again deserted and voluntarily surrendered after 326 days. Since the applicant deserted from ASC Centre & College (South), Bangalore as such in view of table appended to Regulation 381 reproduced hereinabove, he was rightly attached with ASC Centre & College (South), Bangalore and the Commanding Officer of Administrative Battalion of Depot Coy of ASC Centre & College (South), Bangalore was well within his right to convene Summary Court Martial of the applicant who as mentioned above was declared a deserter in court of inquiry proceedings.

12. Further arguments advanced by Ld. Counsel for the applicant is that keeping in view of Doctrine of proportionality of punishment, the punishment awarded to the applicant for dismissal from service is disproportionate to the gravity of the charges. He submitted that para 448 of the Regulations for the Army, 1987 Part I prescribes the scale of punishment. He submitted that in view of various pronouncements of Hon'ble the Supreme Court the sentence of dismissal from service is disproportionate to the offence complained of. Ld. Counsel for the applicant placed reliance on the Hon'ble Apex Court decision in the case of **Ranjit Thakur vs Union of India & Ors** reported in (1987) 4 SCC 611 to augment his submission that the punishment awarded to the applicant is disproportionate. In the case of Ranjit Thakur (supra) the charge leveled against the petitioner in said case was that 'when ordered by JC-106251-P Sub Ram Singh, the orderly officer of the same regiment to eat his food, did not do so'. It was in this context that their Lordships of the Apex Court observed:-

“25. Judicial review generally speaking, is not directed against a decision but is directed against the “decision-making process”. The question of choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suite the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscious and amount in itself to conclusive evidence of bias.....”

13. In the case in hand it is undisputed that the applicant absented for 82 days and while court of inquiry was in the offing he again absented without leave for a period of 326 days. The applicant was enrolled in the Army as Store Hand Technical and at the time of over staying leave for 82 days he was on active service in counter insurgency area. Thus the punishment of dismissal from service awarded to him by the Summary Court Martial by no stretch of imagination can be termed to be disproportionate. We are of the considered opinion that the punishment awarded to the applicant is in consonance with the delinquency and the applicant is not entitled to any indulgence.

14. It is well settled proposition of law that overstaying of leave for reasonable period may be justified with sufficient cause and may make out a case for minor punishment. But absence without leave is a serious misconduct and in the event of absence without sanctioned leave, as would be borne out from Section 39 of the Army Act, 1950, immediately after 30 days followed by Court of Inquiry, Army person may be declared deserter by following due procedure. For convenience sake Section 39 of the Army Act, 1950 is reproduced as under:-

*“39. **Absence without leave:-** Any person subject to this Act who commits any of the following offences, that is to say, -*

- (a) absents himself without leave; or*
- (b) without sufficient cause overstays leave granted to him; or*

- (c) *being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or*
- (d) *without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or*
- (e) *when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or*
- (f) *when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or*
- (g) *without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there, shall, on conviction by court martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as in this Act mentioned.”*

15. The facts borne out from the record (supra) establish to the hilt that the applicant was liable to be tried for desertion. Prima facie, he could have been tried and punished with imprisonment. Section 106 of the Army Act further deals with circumstances where Armed Forces personnel is absent without leave. For

convenience sake, Section 106 of the Army Act is reproduced as under :-

“106. Inquiry into absence without leave. – (1) *When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a Court of inquiry shall, as soon as practicable, be assembled, and such Court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the Court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the Court-Martial book of the corps or department a record of the declaration.*

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

16. A conjoint reading of Section 39 and Section 106 of the Army Act shows that legislature to their wisdom has provided severe punishment for absence without sanction of leave or over-staying the leave.

17. Section 106 of the Army Act provide waiting period of 30 days only after which Army person may be declared deserter. It

is admitted case that the applicant overstayed leave for 82 days at the first instance and while court of inquiry was proceeding, he again deserted the army and surrendered after expiry of 326 days. The applicant has accepted his guilt during the Summary Court Martial and had in unequivocal terms stated that he was not interested in serving the Army. It is trite law that absence without leave and desertion is a serious misconduct and no leniency is required while awarding punishment in cases of misconduct (desertion) relating to armed forces personnel who are expected to be disciplined in official and personal life.

18. In Transferred Application No. 115 of 2009: ***Devi Shankar vs. Union of India and*** others, decided on 24.11.2015 while dealing with similar controversy as involved in the present case, after extensively quoting the relevant provisions of the Army Act, 1950, we had come to the conclusion that a deserter from Army is not entitled to any indulgence. Such Army personnel should be dealt with sternly so as to maintain discipline in the Army. It was observed, to quote:

“30. The persons who join the Army should be disciplined one and in case they overstayed the leave or absented themselves without sanction of leave ordinarily no lenient view may be taken as it shall adversely affect the discipline of Armed Forces. The respect which the Armed Forces command from the people of the country requires them to be disciplined person while serving the nation.

31. Desertion and absence without leave for long period without reasonable cause and even

in appropriate case for shorter period without reasonable cause is a serious misconduct on the part of the Armed Forces personnel. It is not known when the Armed Forces or the Army may require their services to meet out exigencies of service or the sudden cause. Virtually, a desertion from Army is deserting the Nation from the trust and confidence deposed by the country to the Armed Forces personnel. Neither any lenient view may be taken during the course of judicial review nor such persons may be given minor punishment.

19. The dictum laid down in the case of **Devi Shanker** (supra) was challenged by the petitioner before the Apex Court in Civil Appeal (D) No. 18327 of 2016. The Full Bench of the Apex Court vide order dated 08.07.2016 has dismissed the leave to appeal.

20. For the reasons discussed hereinabove, the Original Application lacks merit; hence is **dismissed** accordingly.

No orders to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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