

RESERVED
Court No.1

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

Original Application No. 108 of 2011

Friday, this the 27th day of January 2017

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

Parvesh Kumar son of Sri Chob Singh, resident of Kathingra,
P.O. Rupdhani, Tehsil Aliganj, District Etah U.P.

.....Applicant

Ld. Counsel for the : **Shri K.K. Mishra, Advocate**
Applicant

Versus

1. Union of India, through its Secretary, Ministry of Defence,
New Delhi.
2. The Chief of Army Staff, South Block, New Delhi.
3. Officer Incharge, Artillery Records, Nasik Road Camp.
4. Commanding Officer, 218 Medium Regiment C/O 56 APO.

...Respondents

Ld. Counsel for the : **Shri Amit Jaiswal, Central**
Respondents. **Govt Counsel assisted by**
Col Kamal Singh, OIC, Legal Cell.

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

1. Being aggrieved with the order of dismissal from service dated 26.05.2010 (**Annexure-11**) and order dated 23.11.2010 (**Annexure-13**) rejecting the statutory complaint preferred by the applicant, the applicant has approached this Tribunal by means of the present Original Application under Section 14 of the Armed Forces Tribunal Act, 2007.
2. We have heard Shri K.K. Mishra, Ld. Counsel for the applicant and Shri Amit Jaiswal, Ld. Counsel for the respondents assisted by OIC Legal Cell.
3. The applicant was recruited in the Army as Gunner (Dresser-man) on 26.03.2001. After completion of nine months of training at Artillery Centre, Hyderabad he was posted to different units. On account of some pressing domestic problems at home while posted at 218 Medium Regiment, the applicant was granted 15 days leave with effect from 28.10.2005 to 11.11.2005. Since the problem could not be resolved, the applicant requested for 15 days extension of leave with effect from 12.11.2005 to 26.11.2005 which was granted and communicated to the applicant through telegram. It is further pleaded that on expiry of extended period of leave, the applicant reported to the unit on 26.11.2005 but was not permitted to do so on the ground that he had overstayed 15 days leave and was

declared absent from duty from 12.11.2005 to 26.11.2005. The applicant again voluntarily reported to 218 Medium Regiment on 10.02.2006 accompanied with his wife. He was provided accommodation to stay in the unit lines but despite efforts made he was not allowed to join duty. Again on 16.02.2006 he reported for joining duty but to no avail. On 01.03.2006 the applicant was made payment of Rs 14,000/-. The wife of the applicant sent several letters to the authorities concerned which were forwarded but yet the applicant was not permitted to join duty and ultimately he was dismissed from service vide order dated 26.05.2010 with effect from 13.12.2009. In sum and substance the grievance of the applicant is that he had committed no wrong but the respondents have illegally dismissed him from service as deserter without issuing apprehension roll and without convening Court of Inquiry in utter violation of procedure of law. The statutory complaint submitted by the applicant against his order of dismissal was illegally rejected vide order dated 23.11.2010.

4. Submission of Ld. Counsel for the applicant is that the applicant had proceeded on 15 days sanctioned leave on account of domestic problems and had requested for 15 days extension of leave with effect from 12.11.2005 to 26.11.2005 which was sanctioned as is borne out from the telegram received at his home address but in spite of efforts made by the applicant time and again he was not permitted to join duty. He further submitted that the action of the respondents dismissing

services of the applicant by order dated 26.05.2010 as deserter is in utter violation of the Rules and Regulations inasmuch as neither apprehension roll was issued nor Court of Inquiry was held. It is submitted that no disciplinary action was taken against the applicant and the unit authorities did not make any attempt to apprehend the applicant. Further submission is that process of law has been given a go by. He vehemently argued that the whereabouts of the applicant were well known to the unit authorities, as such the applicant could not have been declared deserter and dismissed from service.

5. In rebuttal, Ld. Counsel for the respondents submitted that it is evident from para-1 of the impugned order dated 26.05.2010 that the applicant was dismissed from service being deserter but in the prayer clause of the Original Application, vide prayer (ii), the applicant has made a prayer for a direction to the respondents to permit the applicant to join duties with consequential benefits but has not challenged the impugned order of dismissal from service dated 26.05.2010. Ld. Counsel for the respondents further argued that the non-reckonable-service of the applicant is mentioned in the Artillery Records letter dated 23.011.2010. The same is excerpted as under:

Sl No.	Period		Cause	No of days
	From	To		
(i)	18 July 03	23 Jul 03	AWL	06 days
(ii)	18 May 05	19 May 05	AWL	02 days
(iii)	21 May 05	29 May 05	AWL	09 days
(iv)	18 Jun 05	03 Jul 05	AWL	16 days
(v)	19 Jul 05	28 Jul 05	AWL	10 days
(vi)	12 Nov 05	16 Feb 06	OSL	97 days
(vii)	05 Mar 06	30 May 06	AWL	87 days
(viii)	06 Jun 06	30 Nov 06	AWL	178 days

6. Ld. Counsel for the respondents further submitted that the applicant has come up with a false and cooked up case to the effect that he was not permitted to join duties after availing leave but the true fact is that after rejoining duty with effect from 16.02.2006, the petitioner was taken on the strength of the unit and as a welfare measure he was paid an amount of Rs. 14,000/- on 01.03.2006. Immediately on receiving the payment he again absconded from the unit on 05.03.2006. He remained absent without leave and joined on 30.05.2006. The applicant again deserted without sanctioned leave on 06.06.2006 till 30.11.2006 i.e. for 178 days. Submission of Ld. Counsel for respondents is that during the period 18.07.2003 till 30.11.2006 the applicant remained absent without leave/overstayed leave on many occasions totaling 405 days. Further submission of Ld. Counsel for the respondents is that Court of Inquiry was convened on 15.02.2007 and the applicant was declared deserter with effect from 04.12.2006 (**Annexure A-13**) and ultimately dismissed from service vide order dated 26.05.2010.

7. So far as the ground taken by the applicant that no disciplinary action was taken against the applicant, Ld. Counsel for the respondents submitted that apprehension roll was issued to the Superintendent of Police, District Etawah on 12.01.2007. Since the applicant had not reported to the unit, as such, the unit had no means to ascertain the whereabouts of the applicant and

disciplinary action could not be initiated against the applicant for the reason that he had physically not reported to the unit.

8. We have examined the rival submissions made by Ld. Counsel for the parties and have carefully gone through the record.

9. From a careful appraisal of the arguments advanced by Ld. Counsel for the parties and pleadings on record, we are of the considered opinion that the applicant has not approached this Tribunal with clean hands. It appears that a case has been fabricated as defence for filing the Original Applicant before the Tribunal that the applicant tried to resume duties but was not permitted to do so. A bare perusal of Artillery Records letter dated 23.11.2010 makes it evident that after 16.02.2005, when even as per applicant's own case he was not permitted to join duty, the applicant remained absent without leave on two occasions for 87 and 178 days. This goes to show that the applicant has come before the Tribunal with a false case. The fact as is borne out from the pleadings on record is that the applicant was permitted to join duty after overstaying leave for 97 days but he again absented without leave on two occasions, i.e. from 05.03.2006 up to 30.05.2006 and from 06.06.2006 up to 30.11.2006. After convening Court of Inquiry, the applicant was ultimately dismissed from service as deserter by order dated 26.05.2010. The applicant has not challenged the order of dismissal (supra). Submission made by Ld. Counsel for the applicant that the applicant had tried to resume

the duties but the authorities did not permit him to do so, does not inspire confidence. Rather from the facts brought on record, an adverse inference may be safely drawn from the applicant's own conduct that the applicant was a habitual offender and an unwilling soldier.

10. Dismissal from Army service on account of overstaying leave/absence without leave as deserter, that too after long period of three years or more seems to be inevitable on account of commission and omission of the Army personnel. Once a person is not present and overstayed leave/remained absent without sanctioned leave for more than three years and Army Order provides to dismiss such an employee, in such event we feel that formal procedure will not come in the way.

11. Further submission of Ld. Counsel for the applicant is that the applicant has been dismissed without affording opportunity of hearing. On the other hand Ld. Counsel for the respondents submitted that since the applicant absented without sanctioned leave, a Court of Inquiry was convened and the order of dismissal as deserter was passed. 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.”*

12. 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, 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.

13. It may be noted that under sub-section (2) of Section 106 of the Army Act in case a person is declared absent and does not surrender or is not apprehended, he shall, for the purpose of the Act deemed to be deserter. A conjoint reading of Section 39 and Section 106 of the Army Act, 1950 shows that legislature to their wisdom has provided severe punishment for absence without sanctioned leave or over-staying the leave.

14. Section 106 of the Army Act does not provide any waiting period except 30 days, after which Army person may be declared

deserter. However, Army Order 43 of 2001 contains a provision whereby three years' waiting period has been provided. In the case on hand, the applicant had overstayed leave for 97 days on 12.11.2005, absented without leave for 87 days on 05.03.2006 and again absented without leave for 178 days on 06.06.2006 and after convening Court of Inquiry on 15.02.2007 was declared deserter and dismissed from service by order dated 26.05.2010. Thus, after expiry of three years' period it was not necessary for the Army to wait further.

15. From a careful appraisal of the arguments advanced by Ld. Counsel for the parties and pleadings on record, we are of the considered opinion that the applicant has not approached this Tribunal with clean hands. It appears that a case has been fabricated for filing the Original Application before the Tribunal that the applicant tried to resume duties but was not permitted to do so. A bare perusal of Artillery Records letter dated 23.11.2010 makes it evident that after 16.02.2005 when even as per applicant's own case that he was not permitted to join duty, the applicant remained absent without leave on two occasions for 87 and 178 days. This goes to show that the applicant has come before the Tribunal with a false case. The pleadings on record show that he was permitted to join duty after overstaying leave for 97 days. He again absented without leave on two occasions, i.e. from 05.03.2006 up to 30.05.2006 and from 06.06.2006 up to 30.11.2006. After convening Court of Inquiry,

the applicant was ultimately dismissed from service as a deserter by order dated 26.05.2010. The applicant has not challenged the order of dismissal having deserted the Army (supra). The letters purported to have been written by the applicant and his wife seem to be fabricated to cook up a false case.

16. In Transferred Application 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.

32. *While parting with the case it shall be appropriate to draw attention of the Union of India as well as Chief of the Army Staff that the waiting period of three years (supra) is too much and not proportionate to the gravity of misconduct where a person of Armed Forces absented without sanctioned leave. Once a person declared deserter after the lapse of 30 days during peace time or when an Armed Forces personnel absented himself without sanctioned leave or overstayed leave, the waiting period of three years is too much and should be reduced to one year or like period. The waiting period of three years after declaring a person deserter that too in 21st Century having advanced Information and Technology seems to encourage the abuse of the process. Ordinarily Apprehension Roll issued to apprehend Armed Forces personnel are kept unattended by the police stations for extraneous reasons as appears from catena of cases.*

“To sum up;

(a) A person is declared deserter and did not turn up or not apprehended within a period of three years, then he or she may be dismissed from Army under the provisions contained in Army Orders 22 and 23 (supra). Only a case is apprehended or turned up, the procedure of appropriate Court Martial may be applied in accordance to rules.

(b) Principles of natural justice shall not come in the way of authorities to hold ex parte proceedings of a deserter under the deeming provisions (supra) in case he or she does not turn up or is not apprehended within a period of three years.

(c) Under sub section (2) of Section 106 of the Army Act, in case a person does not surrender or is apprehended,. Shall deem to be deserter and competent authority shall have a right to take follow up action by ex parte proceedings. Applicant was dismissed after continuous absence of 3 years 73 days.”

17. The dictum laid down in the case of **Devi Shanker** 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 have dismissed the leave to appeal.

18. In view of the above, we are of the view that the O.A. deserves to be dismissed, hence **dismissed**.

No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

anb

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