

Reserved
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transfer Application No. 28 of 2013

Thursday, this 12th day of January, 2017

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

Jagdish Singh Yadav, son of Sri Ghure Singh, resident of
village Chaumunha, District Mathura. U.P.

..... Petitioner

By Legal Practitioner Shri R.Chandra, Advocate

Versus

1. Union of India, through Defence Secretary, New Delhi.

2. Officer Incharge, E.M.E. Records, Secunderabad.

..... Respondents

By Legal Practitioner Shri Amit Sharma, Learned Counsel
for the Respondents, assisted by Col Kamal Singh, OIC
Legal Cell

ORDER

Per Justice D.P.Singh

1. Being aggrieved with discharge as Reservist Army
Personnel, the petitioner had preferred a writ petition
bearing No. 33059 of 1995 in the Hon'ble High Court of
Judicature at Allahabad, which has been transferred to this
Tribunal in pursuance to provisions contained in Section 34

of the Armed Forces Tribunal Act, 2007 (in short, the Act) and registered as Transfer Application No. 28 of 2013.

2. This application under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred against the impugned order of discharge dated 30.11.2011.

3. We have heard Shri R. Chandra, learned counsel for the applicant and Shri Amit Sharma, learned counsel appearing for the respondents, assisted by Col Kamal Singh, OIC Legal Cell and perused the record.

4. The petitioner was enrolled in the Indian Army (Corps of EME) as Draftsman on 19.07.1955. After completion of 11 years of service, he was transferred to reserve services on 09.08.1966 and struck off colour service with effect from 10.08.1966. An army personnel sent to Reserve Establishment is required to report for duty in the event of national emergency or in the event of war. A reservist is called for two months' training in every calendar year to keep him acquainted with the professionalism of Army. According to the petitioner's counsel, no letter was received by him to undergo training of two months. It is further submitted by learned counsel for the petitioner that a Reservist undergoing training is given salary as a regular soldier. Being not called for

training, the petitioner sent different letters, copies of which have been filed as Annexures 1A, 1B, 1C and 1D to the petition. The letters are alleged to have been sent by registered post. The pleading as aforesaid contained in para 5 of the petition has been replied by the respondents vide para 13 of the counter affidavit, stating that since the petitioner was dismissed from service, question of issuing a call letter does not arise.

5. It has been submitted by the respondents that when the petitioner was released as Reservist, a return journey warrant was given to him instructing to report for training when due or immediately in case of emergency declared by the Government, but he did not turn up in spite of warning letter sent to him for periodical reservist training, which was firstly due in the year 1968. The warning letter was received back unserved by the postal authorities. The Superintendent of Police, Mathura was also requested vide letter dated 02.07.1968 to inquire and investigate the whereabouts of the petitioner, but to no avail. The petitioner did not turn up for training at 505 Army Base Workshop, Delhi Cantt. According to learned counsel for the respondents, an apprehension roll was issued to the Superintendent of Police, Mathura to apprehend the

petitioner and when nothing came forward, he was declared deserter with effect from 01.09.1968 and dismissed from service with effect from 16.10.1971 in pursuance to the provisions of Section 20(3) of the Army Act. A sum of Rs.466/- on account of service gratuity was admitted for the period from 08.07.1958 to 10.08.1966 and the same was remitted to the petitioner accordingly. Since the petitioner was dismissed from service as deserter, he was not entitled for pensionary benefits.

6. On the other hand, submission of learned counsel for the petitioner that he sent several representations to Army authorities but no reply was given to him. He further submitted that a letter dated 03.09.1980 (Annexure-2 to the petition) sent by 505 Army Base Workshop, Delhi Cantt was communicated to the petitioner. In response to a letter sent by the Secretary, Mathura, the EME Records sent a letter dated 11.07.1980 (Annexure-3 to the petition), informing that since call up letter was issued to the petitioner by 505 Army Base Workshop, Delhi Cantt, the petitioner may be advised to approach Army Base Workshop to obtain the copy of call up letter.

7. It appears that on account of commission and omission on the part of the respondents in informing

petitioner to approach for training and other follow up actions, the petitioner filed a Regular Suit for redressal of his grievance, where the respondents replied that the petitioner has been dismissed from service on 26.10.1971, but according to the petitioner, the order of dismissal was never served (Para 9 of the petition).

8. The contents of para 9 of the petition have not been admitted by the respondents. It is stated in para 15 of the counter affidavit that vide letter dated 11.07.1980, the Secretary, Zila Sainik Board, Mathura was in fact intimated with regard to dismissal of the petitioner from service. However, the respondents while giving reply to the contents of para 9 of the petition in para 15 of their counter affidavit did not come forward with specific reply with regard to petitioner's contention that the dismissal order was not served on him and service record of the petitioner was tampered with. Learned counsel for the petitioner has invited attention to the fact that in case the petitioner's services had been dispensed with, there was no occasion to send call up letter for reservist training by 505 Army Base Workshop, Delhi Cantt. In such a scenario, after sending a notice under Section 80 CPC as per legal advice, the petitioner filed a civil suit bearing No. 287 of 1981

challenging his dismissal and for grant of pension. The said suit was ultimately dismissed as not maintainable on 27.03.1985 being barred by the Pension Act. Appeal filed by the petitioner was also dismissed upholding the non-maintainability of suit vide order dated 27.04.1989 being barred by Clause 4 of Chapter II of the Pension Act. After running from pillar to post for a few years, the petitioner filed the writ petition in the Hon'ble High Court, which has been transferred to this Tribunal and registered as Transfer Application, numbered above.

9. It has been vehemently argued and pleaded on behalf of the petitioner that under Para 209 of the Regulations for the Army (for short, the Regulations), he was not required to undergo training at EME Centre, Secunderabad in the year 1968 in pursuance to the notice sent by the appropriate authority of the respondents. The petitioner is not at all at fault; he has suffered on account of lapses on the part of the respondents. The submission is that dismissal of the petitioner without Court Martial or notice under Army Rule 13 read with Para 215 of the Regulations is substantially bad in law and that too, without serving a copy of dismissal or discharge order on him.

10. In response, it is submitted by the respondents that the Additional District Judge, Mathura, vide judgment and order dated 27.04.1989 had dismissed the petitioner's appeal and the matter attained finality. It is further submitted by learned counsel for the respondents that the men transferred to the reserve from the colours are required to serve until the completion of the period of combined colour and reserve service for which they were originally engaged and since the petitioner failed to complete the period of combined and reserve service, he was not entitled to any relief as prayed for. In support of his aforesaid submission, learned counsel for the respondents has relied upon a decision dated 22.11.2004 rendered by the Hon'ble Delhi High Court in *Writ Petition (Civil) No. 5580/2000* in re: **Shish Ram versus Union of India and others.**

11. It is also submitted by the respondents that under Army Headquarters letter No.17774/PS1 dated 07.03.1968, a reservist subject to Indian Reserve Forces Act, who does not surrender or is not apprehended within three years of the date of his absence/desertion, such absentee/deserter may be dismissed from service under Section 20(3) of the Army Act.

12. A perusal of the record shows that on account of the prolonged pendency of the petition in the Hon'ble High Court, the petitioner had filed applications from time to time for early hearing of the matter but it could not be decided. Learned counsel for the petitioner has invited our attention to para 6 of the Rejoinder Affidavit, pointing out that the petitioner's home address given in the service-book is different. He submits that the letter dated 07.03.1968 (supra) was not received by the petitioner, hence no credence can be given to it and he was entitled to be call for reservist training at 505 Army Base Workshop.

13. It would be relevant to look into the procedural aspect followed by the respondents with respect to dismissal of the petitioner. The letter dated 07.03.1968, relied upon by the respondents, deals with the conditions/events in which an army personnel may be dismissed from service. For convenience, paras 1 to 6 of Army Headquarters letter dated 07.03.1968 are reproduced as under:

"1. In supersession of this headquarters letter No. 17774/AG/PS1 dated 14 Jul 58 as amended or modified by letters of even number dated 17 Sep 59, 16 Nov 60, 12 Jan 63 and 6 Jul 64, the following revised instructions are issued.

APPLICATION

2. *These instructions will apply to all deserters and absentees from the regular Army and to reservists who fail to report when required to do so, with the exception of the following :-*

(a) *Those who desert while on active service in the forward areas specified in Annexure A to this HQ letter No 54551/PS1 dated 01 Jan 64 or while serving with a force engaged in operations or in order to avoid such service.*

(b) *Those who desert with arms or lethal weapons.*

(c) *Those who desert due to subversive activities.*

(d) *Those who commit any other serious offence in addition to desertion.*

(e) *Officers and JCOs (including Reservists Officers and JCOs who fail to report when required).*

The personnel of the categories mentioned at (a) to (e) above will be dealt with in the normal manner, i.e steps will be taken to effect their arrest so as to take suitable disciplinary action irrespective of the time that may have elapsed. Army Act Section 122 (2) refers.

COURT OF INQUIRY

3- *A Court of inquiry will be held in the case of all absentees after 30 days of their absence under Army Section 106, In Calculating the period of 30 days, the date on which the person concerned to absented and the date on which the court of inquiry is assembled to inquire in to his absence must be excluded.*

4- *In the case of reservist who fails to report, when called up for training or for Army service, it is not obligatory to assemble a court of inquiry under Army Act Section 106. A Court of inquiry may, however, be held at the discretion of the OC Reservist. Rule 9 of the Indian Reserve Force Rules, 1925 refers.*

5- *The deserters on being struck off strength of their units will be taken on the supernumerary strength of the Regimental / Training Centers or Depots concerned.*

PROCEDURE TO BE FOLLOWED

6- *The following procedure will be followed in respect of a person subject to the Army Act, or a reservist subject to Indian Reserve Forces Act, who does not surrender or is not apprehended with three years of the date of his absence/ desertion:-*

(a) *Such absentees/deserters will be dismissed from service under Army Act Section 20(3).*

(b) *A nominal roll in respect of such absentees/deserters will be prepared by Record Officers concerned in triplicate in the form set out in annexures 1 to Appendix 'A' to this letter. The nominal roll (in duplicate) will then be forwarded to the commandant Centre /Depot concerned having Brigade commander's powers under the Army Act section 8 or, if has no such powers, then to the sub Area commander in whose jurisdiction the record office is located , for sanctioning under Army Act Section 20(3)*

If the nominal roll consists of more than one sheet, each sheet will be serially numbered. The nominal roll will be accompanied by a statement as per Appendix 'A' which will be pinned to the top sheet of the nominal roll. Such nominal rolls will be submitted to the authority concerned by 20 Apr and 20 Oct each year.

(c) *After obtaining orders for the dismissal of the persons mentioned in the nominal roll, one copy of the nominal roll will be returned to the Record Office concerned.*

(d) *On the discharge certificate required under Army Act Section 23 read with Army Rule 12, reason for dismissal may be shown as "absence without leave". The discharge certificate need not be issued on IAFY-1964. A simplified form that can be used is at appendix '8' to this letter. This will be both in English and in the regional language of the person dismissed.*

(e) Such discharge certificates may be retained by Record Offices and dispatched under registered cover only when demanded specifically by the person to whom the discharge certificate pertains. This will avoid financial loss to the state resulting from discharge certificate being sent to the last known address of the deserters by registered post and returned undelivered.

(f) As soon as a person is dismissed from service, the civil police authorities will be informed simultaneously that it will no longer be necessary to secure arrest of the person.

(g) No disciplinary action will be taken against a deserter /absence who is proposed to be dismissed in accordance with this letter, even though he is apprehended or voluntarily surrenders before he is dismissed.”

Condition No. 2(a) relates to desertion while on active service; 2(b) relates to those who desert with arms or lethal weapons; 2(c) deals with those who desert due to subversive activities and 2(d) relates to those who commit any other serious offence in addition to desertion, whereas Condition No. 2(e) relates to officers and JCOs (including Reservist Officers and JCOs who fail to report when required. Petitioner's case does not appear to cover the aforesaid HQ letter.

14. A question cropped up as to whether the condition mentioned in para 2(e) of the Army Headquarters letter dated 07.03.1968 covers the petitioner's case, in what

circumstances it may be applied to cases of dismissals without any disciplinary proceedings and shall be the position of regulations and rules covering the services of reservists. Chapter V of the Regulations for the Army deals with the case of reservist. Para 208 deals with the training and Para 209 deals with the event of failure to attend the training. For convenience, Paras 208 and 209 of the Regulations are reproduced as under:

“208. Training.- *On a reservist being recalled to active service, if the training centre commandant feels the necessity of a short duration refresher training and time is available for such training the same may be organized before these personnel are dispatched to the units or reinforcement camps.*

209. Failure to Attend When Called Up.- *When a reservist fails to attend when called up for service or muster the OC reservists will institute enquiries. Unless a satisfactory explanation is forthcoming the man will be struck off the effective strength of the reserve. He will not be discharged from the service and may, if subsequently apprehended, be tried by court-martial or by the civil authorities for an offence under the Indian Reserve Forces Act, 1888, Section 6. Should his absence be due to a cause which renders his retention in the reserve undesirable, the OC reservists will take steps for his immediate discharge under the appropriate item of the table annexed to Army Rule 13. Should his absence be due to sickness, the OC reservists will arrange for him to be medically examined at the military hospital or reserve centre whichever is nearest his home in accordance with the Indian Reserve Forces*

Rules, 1925, Rule 8. If the reservist is found to be unfit for field service he will be brought before a medical board for discharge under the appropriate item of the table annexed to Army Rule 13. A reservist who has been ordered to attend for medical examination and fails to do so, will be struck off the effective strength of the service. He will not be discharged from the service and may, if subsequently apprehended, be tried by court-martial or the civil authorities for an offence under the Indian Reserve Forces Act, 1888, Section 6.”

15. A plain reading of Para 209 of the Regulations shows that the name of incumbent will be struck off the effective strength of the reserve in case he fails to attend when called up for service. Even a reservist has a right to explain the failure to attend training by submitting a satisfactory explanation. In the present case, the defence set up by the respondents while filing the counter affidavit as also during the course of arguments is that it was the petitioner himself to attend the training. The defence set up by the respondents in their pleadings on record seems to be an afterthought and in contravention to their duties envisaged in Regulations 208 and 209 (supra). How a reservist shall attend the training unless some information is communicated to him as to when training shall commence and what shall be the period of training. In the absence of such communication and that too under the teeth of

Regulation 209 it is not expected that a person shall attend the reservist training. The Respondents seem to conceal material facts while filing counter affidavit and defending their own action.

16. The Army Headquarters letter (supra) relied upon by the Respondents keeping in view the Regulations (supra) does not seem to be applicable to dispense with the services of the petitioner. In the present case, the petitioner was holding the rank of Soldier, whose services are not covered by Army Headquarters letter aforesaid. Otherwise also, the provisions contained in Regulations for the Army have overriding and binding effect on such letters.

17. We are further of the considered opinion that the provisions contained in Regulations for the Army have not been complied with. No material has been brought on record to indicate that any notice was ever sent to the petitioner to attend the training meant for reservists. The contention of the Respondents that railway warrant was given to the petitioner to attend training does not make out a case to shirk from their responsibility of sending a notice to him for training. In the absence of a notice sent to the petitioner as per Regulations, the petitioner cannot be blamed for a sense of training, that too when training was

not scheduled. At least the Respondents have not brought on record by appropriate pleading or otherwise anything with regard to scheduling of training on a particular date or the period for which he was required to attend it. It appears that a false case has been cooked up by the respondents while filing the counter affidavit to defend their commission and omission in order to save their neck. In the absence of any notice sent to the petitioner, all subsequent actions of the Respondents including alleged dismissal from service suffer from the vice of arbitrariness.

18. There is one other aspect of the matter. The order of dismissal seems to have never been communicated to the petitioner. It is a well settled law that dismissal or termination from service takes effect from the date of its communication. Sections 22 and 23 of the Army Act makes it mandatory to serve a certificate on the incumbent and pass orders of retirement, release or discharge in the manner as may be prescribed under the Act. The order of termination or dismissal should also be in the language which the incumbent understands and should also indicate the cause of such termination or dismissal. For convenience, Sections 22 and 23 of the Army Act are reproduced as under:

“22. Retirement, release or discharge.-

Any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed.

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 stating 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.”*

19. The provisions contained in Sections 22 and 23 of the Army Act seem to have not been complied with, which vitiates the alleged action of the respondents in dispensing with the services of the applicant and that too, without serving its notice.

20. It is well settled proposition of law that a thing should be done in the manner provided in the Act or statutory provisions and not otherwise, vide **Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253; Deep Chand Vs. State of Rajasthan, AIR 1961 SC 1527; Patna Improvement Trust Vs. Smt. Lakshmi Devi and others, AIR 1963 SC 1077; State of U.P. Vs. Singhara Singh and**

another, *AIR 1964 SC 358*; **Barium Chemicals Ltd Vs. Company Law Board**, *AIR 1967 SC 295 (Para 34)*; **Chandra Kishore Jha Vs. Mahavir Prasad and others**, *(1999) 8 SCC 266*; **Delhi Administration Vs. Gurdip Singh Uvan and others**, *(2000) 7 SCC 296*; **Dhananjay Reddy Vs. State of Karnataka**, *AIR 2001 SC 1512*; **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others**, *(2002) 1 SCC 633*; **Prabhashankar Dubey Vs. State of M.P.**, *AIR 2004 SC 486*; **Ramphal Kundu Vs. Kamal Sharma**, *AIR 2004 SC 1657*, **Tailor Vs. Tailor (1876) 1 Ch. D. 426**; **Nikka Ram Vs. State of Himachal Pradesh**, *AIR 1972 SC 2077*; **Ramchandra Keshav Adke Vs. Govind Joti Chavre and others**, *AIR 1975 SC 915*; **Chettiam Veettil Ammad and another Vs. Taluk Land Board and others**, *AIR 1979 SC 1573*; **State of Bihar and others Vs. J.A.C. Saldanna and others**, *AIR 1980 SC 326*; **A.K.Roy and another Vs. State of Punjab and others**, *AIR 1986 SC 2160* and **State of Mizoram Vs. Biakchhawna**, *(1995) 1 SCC 156*.

21. The Hon'ble Supreme Court in catena of decisions has held that the statutory provisions or procedure established by law must be adhered to while taking an action against a person depriving of his livelihood, which is an integral facet

of the right to life, vide **Narendra Kumar Vs. State of Haryana, JT (1994) 2 SC 94.**

22. In view of above and that too, in the absence of any order of dismissal with due communication to the petitioner in the manner prescribed, the impugned order dismissing the petitioner from service vitiates and T.A. deserves to be allowed.

23. Accordingly, T.A. is allowed. The impugned order dismissing the services of the petitioner w.e.f 26.10.1971 is hereby set aside with all consequential benefits. The applicant shall be entitled for pensionary benefits as well as arrears of salary of the rank which he was holding till the date of superannuation. Let the arrears of salary be paid with continuity of payment of regular pension in accordance with rules expeditiously, say within a period of four months from the date of this order.

24. No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Dated : 12 Jan 2017
LN/