

Reserved**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 240 of 2017**Tuesday, this the 11th day of July, 2023**“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”****“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”**

No. 14684158 Y Ex Sep (Cook / Special) Sinhasan Singh, S/O
Late Bashishth Narayan Singh, Resident of Village: Hardaspur
Kashi, Post: Bujurga, District: Ghazipur (UP).

..... Applicant

Ld. Counsel for the Applicant : **Shri Manoj Kumar Awasthi,
Advocate**

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. Officer in Charge Records, EME Records, PIN - 900453, C/o 56 APO.
4. Commanding Officer, Depot Battalion EME Centre, Secunderabad.
5. Commanding Officer, 7015 EME Battalion, C/o 56 APO.

.....Respondents

Ld. Counsel for the Respondents. : **Shri Asheesh Agnihotri,
Central Govt. Counsel.**

ORDER

“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

1. The instant Original Application has been filed under Section 15 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

*“(i) Issue orders/ direction in an appropriate manner to quash / set aside the attachment order issued by Commandant 1 EME Centre Secunderabad dated 23 Jun 2010 being without jurisdiction and attached with the original Application as **Annexure A-1**.*

“(ii) Issue orders / direction in an appropriate manner to quash / set aside the Summary Court Martial held by Commanding Officer, Depot Battalion, EME Centre Secunderabad dated 03 Aug 2010 being without jurisdiction and attached with the Original Application as Annexure A-2.

*“(iii) Issue orders / direction in an appropriate manner to quash / set aside the orders of the Chief of the Army Staff dated 30 Sep 2016, on the petition dated 09 May 2015 by the applicant being without application of mind on the mitigating factors in favour of the applicant and attached with the Original Application as **Annexure A-3**.*

“(iv) Issue orders / direction in an appropriate manner to the respondents to reinstate the applicant / appellant in service with all service and monetary benefits.

“(v) Pass any other such orders/direction which this Honourable Tribunal may deem fit in the facts and circumstances of this case.

“(vi) Allow the present Original Application with the cost.”

2. Tersely put the case of the applicant is that the applicant was enrolled in the Indian Army on 03.08.2006. He was granted 15 days CL wef 06.11.2009 to 20.11.2009. On expiry of said leave the

applicant failed to join his duty. The applicant neither reported back himself nor was he apprehended by civil police. He was declared deserter after 30 days. Court of enquiry was ordered. He voluntarily rejoined duty on 21.05.2010 after 182 days of desertion. He was dismissed from service by SCM on 03.08.2010. Against the decision of the SCM, applicant filed an O.A bearing number 244 of 2010 before this Court which was dismissed on the ground that applicant had not exhausted alternate remedy. Again an O.A No. 08/2016 was filed against the punishment awarded by SCM which was also dismissed on 26.10.2016 having been withdrawn with liberty to file fresh O.A. Applicant filed Statutory Petition which was rejected by Chief of Army Staff vide order dated 30.09.2016. Being aggrieved, applicant has filed instant O.A for quashing the punishment of dismissal awarded by SCM and to reinstate him in service.

3. Learned counsel for the applicant submitted that applicant was granted 15 days CL from 06.11.2009 to 20.11.2009 to attend his ailing father. His father was admitted in a Hospital due to Tuberculosis. Before expiry of the leave, applicant requested his Commanding Officer on mobile phone to grant annual leave so that he could look after his father. He was assured for the same but no further communication followed as to whether the applicant has been granted annual leave or otherwise. Thus, he could not join the duty in time and overstayed the leave granted to him. Ultimately his father

died on 22.12.2009. Due to death of his father, he was upset and mentally disturbed. After the death of his father applicant was involved in post cremation rituals as well as with other social obligation and disputes in the family. He himself got sick and suffered with Hepatitis C for which he was admitted to District Hospital Ghazipur wef 25.12.2010 to 16.05.2010. After recovery he approached his unit and was advised telephonically by 7015 EME Battalion to report EME Centre Secunderabad. Accordingly, he voluntarily reported there on 21.05.2010 and a surrender certificate was issued.

4. Ld. Counsel for the applicant further submitted that the applicant was attached arbitrarily to Depot Battalion EME Centre by Commandant 1 EME Centre Secunderabad under the provision of Para 381 of Regulations for the Army 1987 which stipulates that only cases of deserters whose units are located in Operational Area/ Foreign Country or engaged in active hostility shall be attached to Centre. Attachment order is illegal as the applicant has been tried under Sec 39(b) of the Army Act for overstaying leave granted to him. This is not the case of desertion or absence without leave so the Commandant had no power to attach the applicant and try him by SCM. Ld. Counsel for the applicant further stated that at the time of recording the Summary of Evidence (SoE), applicant apprised the respondents that due to death of his father, family problems and

his own sickness, applicant could not join his duties. He was pressurised to accept the mistake and was also assured that taking into consideration his trade of Cook, a lenient view shall be taken. Applicant was tried by SCM on 03.08.2010 by CO, CME Depot Battalion Secunderabad on a charge u/s 39(b) who had no jurisdiction because he was not a Commanding Officer under Army Order 7/2000 as amended by Army Order 7 of 2003. During SCM neither his oral evidence nor documents were taken on record and applicant was forced to plead guilty. Statement of the applicant negating the plea of guilty was not taken into consideration by SCM and applicant was awarded punishment of 'To be dismissed from the Service' which is very harsh punishment.

5. Ld. Counsel for the applicant submitted that applicant filed O.A No. 244 of 2010 which was dismissed vide order dated 20.04.2015 on the ground that alternate remedy has not been exhausted by him u/s 21 of AFT Act, 2007. Thereafter, applicant preferred a Statutory Petition to Chief of Army Staff and Officer-in-Charge Records EME on 09.05.2015 u/s 164(2) of the Army Act 1950. Ld. Counsel for the applicant pleaded that petition was rejected by COAS vide order dated 30.09.2016 in a mechanical manner and not by a speaking order. Learned counsel for the applicant pleaded that order passed by the respondents be quashed and applicant be reinstated in service with all consequential benefits.

6. On the other hand, Id. Counsel for the respondents submitted that the applicant was enrolled in Indian Army (Corps of EME) on 19.08.2006. While working with 150 Field Workshop (7015 EME Bn.) applicant was granted 15 days CL w.e.f 06.11.2009 to 20.11.2009. On expiry of leave, he failed to report to 213 Transit Camp for further dispatch to unit despite of telegram and repeated correspondence sent to him. Thereafter, 150 Field Workshop Coy issued apprehension roll dated 08.12.2009. However, neither the applicant reported back himself nor was he apprehended by the civil police. Since the applicant was continuously overstaying leave for more than 30 days, he was declared deserter by a duly constituted Court of Inquiry. Applicant joined voluntarily from desertion at EME Depot B. Secunderabad after 182 days of desertion period. Since the applicant was declared a deserter at field, the onus of finalizing the disciplinary action for his overstay leave rests with applicant's Regimental Centre in terms of para 381 of Regulations for the Army, 1987. Hence, the applicant was attached with EME Depot Bn. for finalization of disciplinary action.

7. Ld. Counsel for the respondents further submitted that hearing of charge was held on 19.07.2010 under Army Rule 22. On conclusion of hearing of charge, C.O, EME Depot Bn. ordered 'Evidence to be reduced to writing'. Accordingly, the SoE was recorded on 23.07.2010 and the applicant was tried by SCM on

03.08.2010 and sentenced "To be dismissed from Service". SCM proceedings were supplied to the applicant. Applicant submitted a statutory petition dated 09.05.2015 u/s 164(2) of Army Act to the COAS which was rejected vide order dated 30.09.2016. Meanwhile, an O.A No. 244/2010 was also filed before this Tribunal for setting aside the sentence of SCM which was also dismissed on the ground of 'Alternate remedy not exhausted'. Applicant filed another O.A No. 08/2016 before this Tribunal which was also dismissed having been withdrawn with liberty to file fresh O.A.

8. Ld. Counsel for the respondents further informed that applicant was earlier convicted u/s 39(g) for absenting himself for 37 days from ASC Centre and College and was awarded 15 days confinement to lines and 14 days pay fine. Applicant is habitual offender and his retention will send wrong message among the disciplined soldiers. At the time of his trial, he had three years, eleven months and fourteen days of service. During short service of three years he was punished twice. Learned counsel for the respondents pleaded that instant O.A has no merit and is liable to be dismissed.

9. Heard learned counsel for the parties and perused the documents available on record.

10. The moot question before us to decide is 'whether the applicant is entitled for reinstatement in service till completion of pensionable service?.

11. There is no dispute that the applicant was enrolled in the Army on 19.08.2006. He applicant was awarded earlier punishment of 15 days confinement to lines and 14 days pay fine for 37 days unauthorised absent without sufficient cause. While on 15 days casual leave w.e.f. 06.11.2009 to 20.11.2009 the applicant failed to report back to his unit after expiry of leave. As per procedure, Apprehension roll No. 21201/Est-1 dated 08.12.2009 was issued to all concerned agencies and after clear 30 days a Court of Inquiry was conducted as per Section 106 of the Army Act, 1950 which declared him deserter. Applicant has contended that he could not rejoin duty after expiry of leave due to the death of his father, post cremation rituals, disputes in the family and he himself got sick and suffered with Hepatitis B/C for which he was admitted to District Hospital Ghazipur wef 25.12.2010 to 16.05.2010.

12. The main contention of the applicant is that he was attached arbitrarily to Depot Battalion EME Centre by Commandant 1 EME Centre Secunderabad on 23.06.2010 under the provision of Para 381 of Regulations for the Army 1987 which stipulates that only cases of deserters whose units are located in Operational Area/ Foreign Country or engaged in active hostility shall be attached to

Centre, rest of the cases shall be attached to Centre if required by the Formation Commander of the parent units, hence attachment order is illegal as the applicant was tried under Sec 39(b) of the Army Act for overstaying leave granted to him. This is not the case of desertion or absence without leave so the Commandant had no power to attach the applicant and try him by SCM. His next contention is that he was suffering from Hepatitis-B and was under treatment at Government Hospital Ghazipur. The only defence of the applicant is that during the period of his absence, he was taking treatment at Government Hospital Ghazipur.

13. Perusal of the record reveals that before proceeding on leave applicant was working with 150 Field Workshop (7015 EME Bn.) and was granted 15 days CL. Apprehension roll dated 08.12.2009 was issued. Since the applicant was declared a deserter at field, the onus of finalizing the disciplinary action for his overstay rests with applicant's Regimental Centre in terms of para 381 of Regulations for the Army, 1987. Hence, the applicant was rightly attached with EME Depot Bn for finalization of disciplinary action. So far as applicant's illness is concerned, applicant should have reported for treatment from Military Hospital.

14. From the aforesaid an inference may be drawn that applicant intended not to join duty. Therefore, in absence of any reliable explanation for absence, the only conclusion is that applicant

deserted the service intentionally. In the case reported in (1986) 2 SCC 217, Capt Virender Singh vs. Chief of the Army Staff, the Hon'ble Apex Court has held as under:-

“Sections 38 and 39, and Sections 104 and 105 make a clear distinction between 'desertion' and 'absence without leave', and Section 106 prescribes the procedure to be followed when a person absent without leave is to be deemed to be deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion if the procedure prescribed by Section 106 is followed. Since every desertion necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the animus. If there is animus deserendi the absence is straightaway desertion.

13. As we mentioned earlier neither the expression 'deserter' nor the expression 'desertion' is defined in the Army Act. However we find paragraph 418 of the Artillery Records Instructions, 1981 refers to the distinction between desertion and absence without leave. It says:

418. A person is guilty of the offence of absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If, when he so absented himself, he intended either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. Therefore, the distinction between desertion and absence without leave consists in the intention. (AO 159/72). When a soldier absents himself without due authority or deserts the service, it is imperative that prompt and correct action is taken to avoid complications at a later stage.

We also find the following notes appended to the Section 38 of the Army Act in the Manual of the Armed Forces:

2. Sub Section (1)-Desertion is distinguished from absence without leave under AA. Section 39, in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known

as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire piquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.

3. A person may be a deserter although here-enrolls himself, or although in the first instance his absence was legal (e.g. authorised by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).

4. Intention to desert may be inferred from a long absence, wearing of disguise, distance from the duty station and the manner of termination of absence e.g., apprehension but such facts though relevant are only prima facie, and not conclusive, evidence of such intention. Similarly the fact that an accused has been declared an absentee under AA. Section 106 is not by itself a deciding factor if other evidence suggests the contrary.

In Black's Law Dictionary the meaning of the expression 'desertion' in Military Law is stated as follows:

Any member of the armed forces who-(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion. Code of Military Justice, 10 U.S.C.A. 885".

15. Keeping in view the aforesaid legal position when we examine the facts and circumstances of the instant case, it is clear that the defence of the applicant, that he was undergoing treatment in civil hospital for illness, is absolutely without substance. If applicant was a case of illness, his relatives could have brought him to a nearby military hospital for treatment rather than going to civil hospital. Medical fitness certificate issued by civil hospital is not acceptable in these circumstances. The applicant was a deserter and did not report to any authority after 20.11.2009. This itself shows that the applicant had no intention to return to his unit. Admittedly, after unauthorised absence of the applicant, a Court of Inquiry was held and he was declared a deserter.

16. Thus, keeping in view of the afore mentioned situation when we examine the facts and circumstances of the instant case, it is clear that applicant was intimated to rejoin duty. Within three years of service he was punished twice for offences. The applicant was declared a deserter by the duly constituted Court of Inquiry and he did not report to any authority after expiry of leave granted to him. No lenient view may be taken where misconduct relates to Armed Forces personnel. Any leniency shown to such a recalcitrant soldier would lead to indiscipline and demoralizing the Force in which discipline and adherence to duty is inviolable. Soldiers are expected to be disciplined not only in their official life but also in personal life.

Country reposes faith in the members of the Armed Forces to be honest and fair in their lives while serving the Nation. Absence without sanction of leave is a serious misconduct and in some cases it may result with ill consequences. No one knows when a flux of bullet will come from enemy side. In the Armed forces discipline cannot be overlooked in military matters especially overstaying leave and desertion.

17. Hence, we do not find any illegality or irregularity in declaring applicant a deserter and issuing dismissal order. The dismissal order does not suffer from any illegality. He was dismissed from service by following due process. Hence, we do not find any illegality or irregularity in the impugned order. We do not find any substance in the present O.A. which deserves to be dismissed. It is, accordingly **dismissed**.

18. No order as to costs.

(Vice Admiral Atul Kumar Jain)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated : 11 July, 2023

Rkm/-