Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 379 of 2020

Monday, this the 28th day of March, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Ex-Signalman (Lineman) Rohitash Gurjar (Army No. 15713411-W) of 16 Corps Engineering Signal Regiment, C/o 56 APO
S/o Late Sep Kaushal
R/o Village – Kakara ki Dhani, Post Office – Sarund, Tehsil – Kotputli, District – Jaipur (Rajasthan)-303105
Presently residing at C/o Shri Yogendra Kumar Sharma
Mohalla Sheetalganj (Near Gaji Dharmkanta), Town Area Purwa, District – Unnao (UP) – 209825

…….. Applicant

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

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi – 110011.
3. Directorate General of Signals/Signals 4 General Staff Branch, IHQ of MoD (Army), DHQ PO, New Delhi – 110011.
4. Commandant, Headquarter 1 Signal Training Centre, PIN – 901124, C/o 56 APO.
5. Officer-in-Charge Records, Signal Records, Regiment of Records, Jabalpur.
6. Commanding Officer, Depot Regiment (Corps of Signals), PIN – 901124, C/o 56 APO.
7. Officer-in-Charge Records, The Rajput Regiment, Fatehgarh, PIN – 900427, C/o 56 APO.

..... Respondents

Ld. Counsel for the Respondents : **Shri Yogesh Kesarwani,**
Central Govt Counsel

ORDER

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

"(a) Issue/pass an order or direction to the respondents to quash/set-aside the impugned termination of service with effect from 12 July 2014 vide HQ 1 STC letter No. HQ-1318/ SD-Discp/Deserter dated 09.07.2014 (Annexure No. A-1(i).

(b) Issue/pass an order or direction to the respondents to reinstate the applicant in service with effect from 12 July 2014 with all service and monetary consequences.

(c) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.

(d) Allow this appeal with costs."

2. The applicant was enrolled in the Indian Army (Corps of Signals) under Unit Headquarters Quota (UHQ) on 05.03.2009 at HQ 2 STC and was dismissed from service w.e.f. 12.07.2014 under Army Act Section 20 (3) read in conjunction with Army Rule 17 being fraudulent enrolment after having served for 5 years and 129 days. At the time of enrolment, the applicant had produced relationship certificate dated 06.01.2009 issued by Records, which later on was verified and was found to be a fake certificate. In the mean time applicant absented himself from unit lines of 16 Corps Engineering Signal Regiment w.e.f. 01.10.2012 and surrendered to Depot Regiment on 05.03.2013. The applicant was declared deserter w.e.f. 01.10.2012. During his attachment at Depot Regiment, the applicant again proceeded on 30 days Part of Annual Leave from 12.04.2013 to 11.05.2013 and brought another relationship certificate dated 23.04.2013 from Records which turned out to be genuine, as verified by Records. On the basis of Charge Sheet prepared on 13.03.2014 under Army Act, Section 38(1), a Summary Court Martial was held on 25.03.2014 and applicant was sentenced 90 days RI and was

released from military custody on 22.06.2014. Subsequently, by the order of Commandant 1 STC, applicant was dismissed from service w.e.f. 12.07.2014 under the provisions of Army Act, Section 20 read in conjunction with Army Rule 17 vide dismissal certificate dated 11.07.2014. Being aggrieved, the applicant has filed the present Original Application to convert order of dismissal into discharge.

3. The submission of the learned counsel for the applicant is that applicant was enrolled in the Army (Corps of Signals) under Unit Headquarters Quota (UHQ) on 05.03.2009 as Signalman (Sepoy). When the applicant was posted at 16 Corps Engineering Signal Regiment, he was intimated by the unit that Relationship Certificate submitted by him at the time of enrolment in the Army was fake. He submitted that applicant had personally obtained the Relationship Certificate from the Records. Thereafter, the applicant immediately approached Records, The Rajput Regiment to meet OIC NER Group. The applicant apprised him that he had obtained a Relationship Certificate from Records at the time of his enrolment but it had been declared fake during verification. He asked the applicant to forward an application for obtaining a fresh relationship certificate.

After completing all the formalities the applicant again went to join the 16 Corps Engineering Signal Regiment in J&K in December 2012 where he was asked to report to HQ 1 STC, Jabalpur. He then reported to HQ 1 STC, Jabalpur on 08/09 Feb. 2013 where he was not allowed to join. Thereafter, applicant was allowed to join at Depot Regiment of Corps of Signals on 05.03.2013. He went on leave from Depot Company in April 2013 and obtained a fresh Relationship

Certificate dated 23.04.2013 and submitted the same to Depot Regiment.

4. Learned counsel for the applicant further submitted that on the basis of Charge Sheet prepared on 13.03.2014 under Army Act, Section 38(1), a Summary Court Martial was held on 25.03.2014 and applicant was sentenced 90 days RI and was released from military custody on 22.06.2014. Copy of SCM proceedings was not provided to the applicant. The authorities have been very harsh in terminating the services of the applicant w.e.f. 12.07.2014 alleging that the relationship certificate was fake, without considering the fact that if the certificate was indeed fake, then the applicant would not have been able to obtain fresh Relationship Certificate dated 23.04.2013. A Show Cause Notice for termination of service by HQ 1 STC was issued vide letter dated 17.06.2014 under the provision to Army Act, Section 20 read with Army Rule 17 for submitting a fake certificate for enrolment. The applicant while undergoing RI for 90 days, received the Show Cause Notice on 24.06.2014 and replied to notice on 03.07.2014 and requested for re-inquiry into the matter as he had obtained the relationship certificate from Records. The authorities were in tearing hurry so they overlooked the aspect that the applicant is a son of veteran soldier and the authorities have illegally dismissed the applicant w.e.f. 12.07.2014 ignoring the provisions of Section 122 (4) of Army Act, 1950.

5. Learned counsel for the applicant further submitted that after dismissal, the applicant represented his case to the Chief of the Army Staff vide letter dated 31.08.2014 and sent a reminder dated

30.03.2015 but no response was received from the respondents. Later on applicant was informed that since he has been dismissed from service for fraudulent enrolment, hence, he does not come under the status of ex-serviceman and he is not authorized/eligible for Discharge Book. Learned counsel for the applicant placed reliance on the judgment of AFT (RB), Lucknow in O.A. No. 888 of 2010, ***Ex Sep Ranbir Singh vs. Union of India & Others***, decided on 04.07.2017 and pleaded that since the relationship certificate was issued by Records and applicant suffered illegal RI for 90 days awarded by SCM and there being violation of Section 122(4) of Army Act, 1950, applicant deserves to be reinstated in service from the date of termination, i.e. w.e.f. 12.07.2014 with all consequential benefits.

6. Learned counsel for the respondents submitted that applicant was enrolled in the Army on 05.03.2009 through UHQ at HQ 2 STC and was dismissed from service w.e.f. 12.07.2014 under Army Act Section 20 (3) read in conjunction with Army Rule 17 being fraudulent enrolment after serving for 5 years and 129 days. At the time of enrolment, the applicant had produced relationship certificate dated 06.01.2009 issued by Records, which later on was verified and was found to be fake certificate. In the mean time applicant absented himself from unit lines of 16 Corps Engineering Signal Regiment w.e.f. 01.10.2012 and surrendered to Depot Regiment on 05.03.2013. The applicant was declared deserter w.e.f. 01.10.2012. During the stay at Depot Regiment, the applicant again proceeded on 30 days Part of Annual Leave from 12.04.2013 to 11.05.2013 and brought

another relationship certificate dated 23.04.2013 from Records which was genuine, as verified by Records.

7. Learned counsel for the respondents further submitted that case of desertion was heard under Army Rule 22 on 06.02.2014. The applicant was provided a copy of charge sheet alongwith proceedings of Summary of Evidence before trial by Summary Court Martial and he had signed the same. The SCM was conducted on 25.03.2014 and applicant was awarded sentence of Rigorous Imprisonment for three months. A Show Cause Notice dated 17.06.2014 was issued to the applicant for termination of his services. The applicant replied to the Show Cause Notice on 09.07.2014. Subsequently, by the order of Commandant 1 STC, applicant was dismissed from service w.e.f. 12.07.2014 under the provisions of Army Act, Section 20 read in conjunction with Army Rule 17 vide dismissal certificate dated 11.07.2014.

8. Learned counsel for the respondents further submitted that as far as application of Army Act, Section 122(4) is concerned, the subject Army Act pertains to limitation for disciplinary action by Court Martial. In the instant case, the applicant was dismissed under the provisions of Army Act 20 read with Army Rule 17 and Additional Directorate General of Recruiting letter dated 05.03.2004. He pleaded for dismissal of O.A.

9. We have heard learned counsel for the parties and perused the material on record including relationship certificate.

10. While assailing the impugned order of dismissal, learned counsel for the applicant invited attention to Section 122(4) of the

Army Act, 1950 which provides that a person, in the present case a soldier having exemplary record, could not have been dismissed on account of alleged fake relationship certificate in case satisfactory period of service rendered by him is more than three years. Admittedly, the applicant has served for more than five years at the time when he was discharged from service with effect from 12.07.2014.

11. Learned counsel for the applicant invited attention of this Tribunal judgment dated 03.02.2016 passed in Original Application No. 139 of 2015 ***Sep/MT Sunil Kumar Singh vs. Union of India and others***. The provisions of Section 122 of the Army Act, 1950 has been considered in the case of Sunil Kumar Singh (supra) and findings recorded thereof are reproduced as under:- —

> "19. Attention has been invited by Ld. Counsel for the applicant to Section 122 of the Army Act which deals with the period of limitation of trial which commence from the date of offence. Sub Section 4 of Section 122 of the Army Act provides no trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army. For convenience sake Section 122 of the Act is reproduced as under :- —
>
> 122. Period of Limitation for Trial.—(1) Except as provided by sub section (2), no trial by court – martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence,-
>
> (a) on the date of offence; or
>
> (b) where the commission of the offence was known to the period aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or
>
> (c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.
>
> (2) The provision of sub section (1) shall not apply to a trial for an offence of desertion of fraudulent enrolment or for any of the offences mentioned in section 37.
>
> (3) In the computation of the period of time mentioned in sub –section (1), any time spent by such person as a prisoner of war, or in enemy territory or in evading arrest after the commission of the offence, shall be excluded.

(4) no trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army".

(Emphasis supplied)

20. It is vehemently argued by Ld. Counsel for the respondents that provisions contained in Section 122 of the Army Act relates to counting the period of limitation for trial. No doubt had note of section 122 of the Army Act speaks of period of limitation for trial, but sub-section (4) of Section 122 (supra) provides that after three years of service a non commissioned officer like soldier in the present case shall not be tried for any fraudulent act in case he or she has served the Army with unblemished record in exemplary manner for not less than three years. It is further argued by Ld. Counsel for the respondents that sub-section relates to trial and not discharge from Army and no show cause notice is required. The arguments advanced by Ld. Counsel for the respondents seem to be misconceived. We have to see the intent of the legislature. The intent of legislature should be inferred from the language and the entire statute must be read as a whole then section by section, phrase by phrase and word by word.

21. According to Maxwell, any construction which may leave without affecting any part of the language of a statute should ordinarily be rejected. Relevant portion from Maxwell on the Interpretation of Statutes (12th edition page 36) is reproduced as under:- —

> "A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, through extraordinary and perhaps an oversight, could not be eliminated."

22. In AIR 2005 SC 1090, Manik Lal Majumdar and others Vs. Gouranga Chandra Dey and others, Hon'ble Supreme Court reiterated that legislative intent must be found by reading the statute as a whole.

23. In 2006 (2) SCC 670, Vemareddy Kumaraswami and another Vs. State of Andhra Pradesh,their Lordship of Hon'ble Supreme Court affirmed the principle of construction and when the language of the statute is clear and unambiguous court can not make any addition or subtraction of words.

24. In AIR 2007 SC 2742, M.C.D. Vs. Keemat Rai Gupta and AIR 2007 SC 2625, Mohan Vs. State of Maharashtra, their Lordship of Hon'ble Supreme Court ruled that court should not add or delete the words in statute. Casus Omisus should not be supplied when the language of the statute is clear and unambiguous.

25. In AIR 2008 SC 1797, Karnataka State Financial Corporation vs. N. Narasimahaiah and others, Hon'ble Supreme Court held that while constructing a statute it can not be extended to a situation not contemplated thereby. Entire statute must be first read as a whole then section by section, phrase by phrase and word by word. While discharging statutory obligation with regard to take action against a person in a particular manner that should be done in the same manner. Interpretation of statute should not depend upon contingency but it should be interpreted from its own word and language used.

26. House of Lord in the case of Johnson Vs. Marshall, sons and Co. Ltd. reported in (1906) AC 409 (HL) where the issue was whether the workmen was guilty of serious and willful misconduct their Lordships held that burden of proving guilt was on employer. Misconduct is reduced to the breach of rule, from which breach injuries actionable or otherwise could reasonably be anticipated is depend upon each case.

27. In the case of Rasik Lal Vaghaji Bhai Patel Vs. Ahmedabad Municipal Corporation reported in (1985) 2 SCC 35, (Para 5) Hon'ble Supreme Court has held that unless either in the certified standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and would not be comprehended in any of the enumerated misconduct.

28. In the case of Union of India Versus J. Ahmed, (1979) 2 SCC 286, Hon'ble Supreme Court has held that, deficiency in personal character or personal ability do not constitute misconduct for taking disciplinary proceedings.

29. In the case of A.L. Kalara Vs. Project & Equipment Corporation (1984) 3 SCC 316;Hon'ble Supreme Court has held that acts of misconduct must be precisely and specifically stated in rules or standing orders and cannot be left to be interpreted ex-post facto by the management.

30. In the case of Rasik Lal Vaghaji Bhai Patel Vs. Ahmedabad Municipal Corporation,(1985) 2 SCC 35, the apex Court has held that it is well settled that unless either in the certified standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and would not be comprehended in any of the enumerated misconduct. (Para 5).

31. In case we see the intent of the legislature, the purpose of sub-section (4) of Section 122 of the Army Act is that Army personnel who are not officers should not be tried after three years in case they have served Army in an exemplary manner even if they have committed some fraud and the purpose of trial is to punish guilty persons.

32. Rule 17 of the Army Rules speaks for court martial which seems to not have been done in the present case. The proviso of Rule 17 mandates that all cases of dismissal or removal where the prescribed procedure has not been complied with shall be reported to the Central Government. Once a person cannot be convicted after due trial, then how he can be convicted by adopting administrative procedure has not been satisfactorily explained by the respondents. The statutory bar of trial under sub-section (4) of Section 122 of the Army Act means that a soldier may not be punished after three years of exemplary service in the Army for defect in recruitment. Latitude given by the Parliament seems to be for the soldiers keeping in view that they belong to the lower rung of the Army and in view of the latitude given by the Parliament, it is not open for the Tribunal to record a finding otherwise. It is for the respondents to approach the Legislature for amending the provision of sub-section (4) of Section 122 of the Army Act."

12. In the aforesaid case we have held that legislature to its wisdom has created legal fiction providing that no action shall be taken against a person with regard to any fault in the enrolment who has rendered more than three years' of satisfactory service and also is not

an officer of the Indian Army. The finding with regard to legal fiction has been recorded in para-33 of the aforesaid judgment. The same is reproduced as under:- —

> "33. It is well settled that the Legislature is quite competent to create a legal fiction, in order words, to enable a deeming provision for the purpose of assuming existence of a fact which does not really exist provided the declaration of non-existent facts as existing does not offend the Constitution. Although the word 'deemed' is usually used, a legal fiction may be enacted without using that word. (See CIT vs. Urmila Ramesh, AIR 1998 SC 2640). While interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so constructing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. The principles stated above are well settled. A legal fiction may also be interpreted narrowly to make the statute workable. A legal fiction in terms enacted for purposes of this Act will cover the entire Act. (See State of West Bengal vs. Sadam K. Bormal, AIR 2004 SC 3666)."

13. Apart from above, our attention has been invited to Section 43 of the Army Act, 1950 which provides that a person against whom allegation of fraud is raised for the purpose of fraudulent enrolment shall be tried by Court Martial. He/she, as the case may be, cannot be discharged merely on service of notice. The discharge shall be only on the basis of Court Martial. Admittedly, in the present case, no Court Martial was held and merely on the basis of report of Court of Inquiry and follow up Show Cause Notice, the applicant has been discharged from service. For convenience sake, paras 34, 35, 36 and 37 of the judgment in Sunil Kumar Singh (supra) are reproduced as under:- —

> "34. Under Section 43 of the Army Act, a person committing fraud is required to be tried by court-martial. For convenience sake Section 43 of the Army Act is reproduced as under:
>
> "43. Fraudulent enrolment.—Any person subject to this Act who commits any of the following offences, that is to say,--
>
> (a) Without having obtained a regular discharge from the corps or department to which he belongs, or otherwise fulfilled the conditions enabling him to enroll or enter, enrolls himself in, or enters the same

> or any corps or department or any part of the naval or air forces of India, or the Territory Army; or
> (b) is concerned in the enrolment in any part of the Forces or any person when he knows or has reason to believe such person to be so circumstanced that by enrolling he commits an offence against this Act,
> shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned."
>
> (Emphasis supplied)

35. In the present case, the provisions contained sub-section (4) of Section 122 of the Army Act are contrary to the provisions of Section 43 of the Army Act which provides initiation of court-martial proceedings for the for the offences enumerated therein. It means that exception has been given by the Legislature itself with regard to fraudulent enrolment and consequently action taken thereon. We feel that the provisions of sub-section (4) of Section 122 of the Army Act is exception to Section43 of the Army Act which goes to the root of the matter in the event of commission of fraud and in case Army personnel has served for more than three years in an exemplary manner, he may not be punished with order of dismissal in the garb of statutory power. In this view of the matter, the Army authorities are not empowered to proceed with trial in view of Section 43 of the Army Act.

36. Needless to say that policy letters are subordinate legislation and policy letters being subordinate legislation, or executive instructions cannot go against the statutory mandate of the Army Act. The provisions contained in the statute, i.e. the Army Act in question, is binding on the respondents and no guideline or policy letter may be issued against statutory provision unless the Act itself permits to do so.

37. Attention of the Tribunal has not been invited to any statutory provision in the Army Act, 1950 or the Rules framed there under which may indicate that the respondents have right to issue letter in contravention of the statutory mandate contained in the Army Act. Otherwise also, as we have observed above, dismissal without holding a regular inquiry is permissible, but that should be done with due communication to the Central Government and the notice may contain brief material facts to apprise the incumbent of the charges arraigned so that he may give reply to the show cause notice which seems to not have been done.‖

14. It is clarified that in the present case, a Summary Court Martial was held in the matter which was in regard to desertion of the applicant (and not for the charge of fraudulent entry) for which applicant had been punished for 90 days RI.

15. In view of law settled by the Tribunal in the case of Sunil Kumar Singh (supra), dismissal of the applicant merely on the basis of Show Cause Notice, that too after lapse of three years' satisfactory service

seems to be not sustainable and suffers from vice of arbitrariness. Dismissal being in contravention of statutory mandate, vitiates. In any case since the charge of fraudulent entry on account of production of fake relationship certificate was no longer valid after the same Records provided a correct certificate, dismissal of the applicant solely on that charge becomes unsustainable in law.

16. A conceptus of our observations made above is that the O.A. deserves to be allowed.

17. It is accordingly allowed. Impugned order passed by the respondents is set aside. The applicant shall be notionally reinstated in service in the rank which he held at the time of dismissal. The applicant will thereafter be considered to be notionally in service till he completes his minimum (15 years) pensionable service. No back wages shall be admissible for that period. The applicant shall however be entitled to terminal benefits and service pension (in the same rank he was at the time of dismissal) as per Pension Regulations for the Army, 2008 (Part-1) on completion of 15 years pensionable service. The respondents are directed to comply with the order within four months from the date of production of a certified copy of this order. Delay shall invite interest @ 8% per annum till actual payment.

18. No order as to costs.

19. Pending Misc. Application(s), if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: March, 2022
SB