

E-court**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 83 of 2022**

Friday, this the 04th day of November, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)

Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

No. 21006231X Ex Recruit Vivek Kumar S/o Shri Rajesh Kumar,
R/o Vill-Salpur, PO-Salpur, Tehsil-Haidergarh, Distt-Barabanki,
UP-225001.

..... Applicant

Ld. Counsel for the : **Shri Virat Anand Singh**, Advocate
Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence (Army), South Block, New Delhi.
2. Chief of the Army Staff, Integrated HQ of MoD (Army), DHQ, PO-New Delhi-110011.
3. Commandant, Arty Centre, Nasik, C/o 56 APO.

.....Respondents

Ld. Counsel for the:
Respondents.

Shri Jai Narayan Mishra, Advocate
Central Govt Counsel

ORDER (Oral)

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act, 2007 for the relief of setting aside the impugned order of dismissal dated 30.07.2020 attended with the relief of reinstating him in service with all consequential benefits.

2. The thumbnail sketch of the facts is that the applicant was enrolled in the Indian Army on 04.04.2016. While undergoing advance military training at Artillery Centre, Hyderabad, he was admitted in Military Hospital, Golconda on 06.12.2016 and was discharged from the Hospital on 13.12.2016 for diagnosis 'Myalgia'. He was again admitted in Military Hospital, Golconda on 22.02.2017 and was discharged from the Hospital on 25.02.2017 for diagnosis 'Stress Reaction (Lt) Tibia' and granted 28 days sick leave from 26.02.2017 to 26.03.2017. After termination of sick leave he failed to rejoin duty and was declared as overstaying sick leave w.e.f. 26.03.2017. An apprehension roll dated 26.03.2017 was issued to Superintendent of Police,

Barabanki. Subsequent to that he voluntarily surrendered and rejoined from overstaying leave on 04.04.2017 (AN) and accordingly, the apprehension roll was cancelled and he was taken on strength w.e.f. 05.04.2017. He was awarded 03 days pay fine under Section 39 (b) of Army Act, 1950. On 30.07.2017 he absented without leave/authority from unit lines and apprehension roll dated 31.07.2017 was issued accordingly. After expiry of 30 days absence period, a Court of Inquiry (C of I) was conducted on 05.09.2017 and he was declared a deserter w.e.f. 30.07.2017 and Part-II Order to this effect was published. After three years from the date of desertion he was dismissed from service w.e.f. 30.07.2020. This O.A. has been filed to quash the dismissal order and re-instate him in service with all consequential benefits.

3. Learned counsel for the applicant submitted that being suffering from ENT problem, the applicant was admitted in Hospital wherefrom he was granted sick leave and after termination of sick leave he rejoined the unit slightly late for which he was punished. He further submitted that having felt

severe pain in his ear in the midnight he left the Centre after informing his senior and while at home he underwent treatment at Sardar Patel Dental College and Hospital, Lucknow (Annexure No-3 to O.A.). He further submitted that the treatment took too long to recover and meanwhile he was declared a deserter. It was further submitted that after receiving apprehension roll he became depressed and had to undergo a prolonged treatment at Barabanki which lasted till mid 2019.

4. Learned counsel for the applicant further submitted that applicant's father wrote several letters to the Commandant, Artillery Regimental Training Centre but none of the letters were replied. Thereafter, applicant went to surrender in the Centre but he was denied entry into the Regimental Training Centre. It was submitted that on 21.11.2020 the applicant received a letter informing about his dismissal from service but due to Covid pandemic he could not approach the Tribunal for redressal of his grievance. He pleaded for setting aside dismissal order dated 30.07.2020 and re-instate the applicant in service with all consequential benefits.

5. On the other hand, learned counsel for the respondents submitted that the applicant was enrolled in the Army on 04.04.2016. He further submitted that during the course of his military training he was admitted to Military Hospital, Golconda on 22.02.2017 for diagnosis 'Stress Reaction (Lt) Tibia' and was discharged on 25.02.2017 with 28 days sick leave which was to terminate on 26.03.2017. After termination of leave he overstayed sick leave and voluntarily rejoined on 05.04.2017, and accordingly, he was awarded 03 days pay fine under Section 39 (b) of the Army Act, 1950. It was further submitted that the applicant was awarded minimum punishment so that he could improve.

6. Learned counsel for the respondents further submitted that the applicant absented without leave on 30.07.2017 and never turned up even after issuing apprehension roll dated 31.07.2017. It was further submitted that a C of I was conducted under Section 106 of the Army Act, 1950 after 30 days of desertion which declared him as a deserter and after waiting 03 years he was dismissed from service w.e.f. 30.07.2020. He pleaded for

dismissal of O.A. on the ground that the applicant was rightly dismissed from service in accordance with Para 22 of Army Order '43/2001/DV- DESERTION'.

7. Heard Shri Virat Anand Singh, learned counsel for the applicant and Shri Jai Narayan Mishra, learned counsel for the respondents and perused the record.

8. Undisputedly the applicant was enrolled in the Army on 04.04.2016. While undergoing advanced military training he was admitted to Military Hospital, Golconda. After discharge from the Hospital, he was granted sick leave which he overstayed and for this act he was awarded 03 days pay fine. On 30.07.2017 he absented from unit lines without any leave and was declared a deserter by a duly constituted C of I. After 03 years of desertion he was dismissed from service under the authority of Army Order 43/2001.

9. Record reveals that two apprehension rolls were issued on two occasions and applicant's father was informed every time about his absence without leave from unit lines without any valid

permission/authority but there was no response either from the applicant or his father and applicant made no effort to join physically to the Regimental Training Centre.

10. Admittedly, the dismissal order was conveyed to the applicant vide letter dated 21.11.2020 and thereafter, he kept silent for a considerable period and filed this O.A. on 31.01.2022 for setting aside the dismissal order and re-instatement into service. In Para 4.3 of O.A. applicant has submitted that he was suffering from ENT problem and because of that he was admitted in Military Hospital, Golconda but on perusal of AFMSF-11 (page 19 of O.A.) we find that he was admitted in Hospital for the diagnosis 'Myalgia' which in medical terminology is 'Muscle Aches and Pain' and not related to ENT. Thus, submission of the applicant that he was suffering from ENT problems is not trustworthy. The only defence of the applicant is that he was undergoing prolonged treatment at Sardar Patel Dental College and Hospital, Lucknow which is unconvincing. Had he been suffering from ailment he could have been treated in Base/Command Hospital, Lucknow rather than in Civil Hospital.

11. In absence of any reliable explanation for absence, the only conclusion would be that the applicant deserted the service voluntarily and he intentionally deserted and remained absent without sanctioned leave and without permission for a long period. At this stage, we would like to quote Para 22 of Army Order '43/2001/DV- DESERTION' which reads as under :-

"22. A person subject to the Army Act or a reservist subject to Indian Reserve Forces Act, who does not surrender or is not apprehended, will be dismissed from the service under Army Act Section 19 read with Army Rule 14 or Army Act Section 20 read with Army Rule 17, as the case may be, in accordance with instructions given below :-

(a) After 10 years of absence/desertion in the following cases:-

(i) Those who desert while on active service, in the forward areas specified in Extra Ordinary Gazette SRO 172 dated 05 Sep 77 (reproduced on page 751 of MML Part III) or while serving with a force engaged in operations, or in order to avoid such service.

(ii) Those who desert with arms or lethal weapons.

(iii) Those who desert due to subversive/espionage activities.

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

(v) *Officers and JCOs/WOs (including Reservist officers and JCOs, who fail to report when required).*

(vi) *Those who have proceeded abroad after desertion.*

(b) After 3 years of absence/desertion in other cases.

(c) The period of 10 years mentioned at sub-para (a) above may be reduced with specific approval of the COAS in special cases."

Thus, aforementioned Army Order provides for three years period for dismissal from service in case of a deserter.

12. We would like to refer the case of ***Capt Virender Singh vs. Chief of the Army Staff***, reported in (1986) 2 SCC 217, wherein in Para 13 & 14, the Hon'ble Apex Court has held as under:-

"Section 38 and 39, and Section 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 straightway 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 wither (a) never to return to the service or (b) to avoid some important military duty (commonly know 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 he re-enrols 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 states 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.

14. As we mentioned earlier, the Army Act makes a pointed distinction between 'desertion' and 'absence without leave' simpliciter. 'Absence without leave' may be desertion if accompanied by the necessary 'animus deserendi' or deemed to be desertion if the Court of Inquiry makes the declaration of absence prescribed by Section 106 after following the procedure laid down and the person declared absent had neither surrendered nor been arrested."

13. In another case of ***Shish Ram vs. Union of India & Ors***, reported in (2012) 1 SCC, page 290, the appellant in that case was declared deserter with effect from 19.06.1978 and was dismissed from service with effect from 20.10.1981 that is after expiry of three years. The appellant challenged his dismissal order, however, no infirmity in the said order was found by the Hon'ble Apex Court and dismissal order was confirmed.

14. Keeping in view the aforesaid legal position when we examine the facts and circumstances of the instant case, then it is clear that the defence of the applicant, that he was under treatment in Civil Hospital for a prolonged period and therefore, he could not rejoin duty, is absolutely without substance. There is absolutely no documentary evidence of Military Hospital to support that he was suffering from ENT problem. Hence this defence is only an afterthought which does not inspire confidence. Admittedly, after unauthorised absence of the applicant, a C of I was held and he was declared a deserter from the date of his absence. Three years from the date of desertion, he was dismissed from service. It is nowhere the case of the applicant

that the authority passed the order was not competent to pass such order or the order of dismissal was passed before expiry of period of three years as provided in the Army Order quoted above. Hence, we do not find any illegality or irregularity in the impugned order. The discipline is the main pillar of Army and any compromise with respect to discipline will set a bad example to others and hence these cases have to be dealt with severity. Therefore, we do not find any substance in the present O.A. which deserves to be dismissed.

15. In our view, the Original Application has no merit, deserves to be dismissed and is accordingly, dismissed.

16. No order as to costs.

17. Miscellaneous application(s), pending if any, stand disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

Dated:04.11.2022

rathore

(Justice Umesh Chandra Srivastava)
Member (J)