

**AFR**  
**RESERVED**

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

**ORIGINAL APPLICATION No. 31 of 2017**

Friday, this the 29<sup>th</sup> day of October, 2021

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

Ex Sep Mange Ram No 3190393X S/o Shri Bhader Ram, JAT Regt Centre, Bareilly (U.P.) R/o Village & PO-Ding Mandi, Distt-Sirsa (Haryana).

..... Applicant

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

Versus

1. Union of India, its through Secretary, Govt. of India Ministry of Defence, New Delhi -110011.
2. Chief of the Army Staff, IHQ of MoD (Army), DHQ, PO-New Delhi-110011.
3. Officer in Charge, Records, The JAT Regt, Pin 900496, C/o 56 APO.
4. Commander Administrative Battalion, The JAT Regimental Centre, Pin 900496, C/o 56 APO.
5. Commanding Officer, 20JAT Battalion, Pin 911220 C/o 56 APO.
6. Commanding Officer, 5 RR Battalion (JAT), Pin 934505 C/o 56 APO.

.....Respondents

Ld. Counsel for the  
Respondents.

**Shri DK Pandey**, Advocate  
Central Govt. Counsel

## **ORDER**

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

*(i) To quash/set aside the order impugned dated 17 Aug 2015 passed by the Administrative Battalion Commander, the JAT Regimental Centre as well as order dated 28 Nov 2016 affirmed by Chief of the Army Staff in a illegal and arbitrary manner and direct the Respondent authorities to provide the all consequential service benefits to the applicant.*

*(ii) Issue an order or direction the Respondent authorities to regularize the absence period of the services of the applicant and also the pensionary benefits as well as arrears of salary to the applicant.*

*(iii) Issue an order / direction in favour of the applicant as this Hon'ble Tribunal may deem fit in the circumstances of the case.*

*(iv) Allow the application with cost along with other expenses.*

2. Brief facts of the case are that applicant was enrolled in the Indian Army (JAT Regiment) on 26.02.1997. While serving with 5 Rashtriya Rifles (RR) he was granted 30 days part of annual leave for the period 12.08.2002 to 15.09.2002. After expiry of leave applicant was required to report on 16.09.2002 which he did not do. An apprehension roll dated 02.10.2002 was issued to all concerned including wife of the applicant. Since he neither rejoined duties voluntarily nor was he apprehended by civil police, a Court of Inquiry was held under Section 106 of the Army Act, 1950 and he was declared a deserter from field area w.e.f. 16.09.2002. Since he was a deserter from field area, Army authorities had to wait for his

dismissal from service upto 15.09.2012 and after completion of ten years he was dismissed from service under para 376 of Regulations for the Army, 1987 (Revised Edition) and occurrence to this effect was notified vide Part II Order No. NE/0104/006/2012 dated 02.11.2012.

3. After a lapse of more than eight years of desertion, wife of applicant submitted a petition dated 28.08.2011 to Chief of the Army Staff requesting to allow her husband to rejoin duty. She had also mentioned in her application that her husband was mentally ill. She was advised to ask her husband to rejoin duty to 20 JAT vide letter dated 14.09.2011. The applicant did not rejoin duty but filed O.A. No. 13/2011 before this Tribunal for rejoining duty from overstaying leave. The O.A. was partly allowed vide order dated 05.02.2014 with directions to applicant to report to the JAT Regimental Centre within 60 days of the order whereupon he was to be taken on strength by the JAT Regimental Centre. The applicant reported to the JAT Regimental Centre on 01.03.2014 i.e. after completion of his terms of engagement as he was a Sepoy who could serve for 17 years or till attaining the age of 42 years whichever was earlier. The competent authority accorded sanction vide order dated 28.08.2014 to take applicant on strength of JAT Regimental Centre after positive identification and verification that the applicant was not involved in any illegal activity besides other aspects related to his medical condition.

Thereafter, applicant was taken on strength of JAT Regimental Centre for his trial. Section 123 of Army Act, 1950 was invoked and he was tried by Summary Court Martial for committing offence under Section 38 (1) of Army Act, 1950 and was awarded punishment as 'Dismissed from Service' on 17.08.2015. A petition dated 05.10.2015 was preferred by applicant to Chief of the Army Staff against order dated 17.08.2015. Before decision of aforesaid petition could arrive, applicant filed O.A. No. 315/2015 to this Tribunal which was disposed off vide order dated 19.11.2015 directing the respondents to dispose of his petition dated 05.10.2015 within six months. Consequent to delay in disposal of petition dated 05.10.2015, applicant filed Execution Application No. 232 of 2016. Later, petition dated 05.10.2015 was rejected by Chief of the Army Staff vide order dated 28.11.2016 and Execution Application was dismissed vide order dated 13.12.2016 being infructuous. This O.A. has been filed to challenge Summary Court Martial proceedings dated 17.08.2015 and order dated 28.11.2016 rejecting his petition dated 05.10.2015 by Chief of the Army Staff.

4. Submission of learned counsel for the applicant is that apprehension roll dated 02.10.2002 was issued at wrong address in contravention to Army Act Section 106, SAO 9/S/89 and para 377 of the Regulations for the Army, 1987. Therefore, complete proceedings are vitiated on account of the above fact.

His further submission is that during the course of Summary Court Martial, applicant was not provided friend of accused as per Rule 33 of Army Rules, 1954. Further submission of learned counsel for the applicant is that there should be a gap of 96 hours between Charge Sheet and Summary of Evidence as envisaged in sub rule 7 of Rule 33 and 34 of Army Rules, 1954 but the aforesaid Regulations have not been complied with as held in Hon'ble Apex Court judgment in the case of **Ram Pravesh Rai vs Union of India & Ors**, Writ Petition No. 4450 of 1982 decided on 02.09.1988 and AIR 1987 SC 2386, **Ranjit Thakur vs Union of India & Ors**. His other submission is that applicant was not provided salary for the period 01.03.2014 to 16.08.2015 (approx 17 months) despite submitting an application to the respondents in this regard. Learned counsel for the applicant further submitted that charge sheet and summary of evidence was not provided to applicant prior to commencement of Summary Court Martial Proceedings. His further submission is that applicant had not signed any paper during Summary Court Martial Proceedings, as such the whole proceedings are null and void and shall be deemed to be ex-parte proceedings. His other submission is that the Summary Court Martial took place on 17.08.2015 at 1245 hrs and sentence was passed on same day at 1315 hrs, as such there is a clear violation of Rules 33 and 34 of Army Rules, 1954. His further submission is that during the course of trial,

Rules 119, 120, 125, 129, 137, 138 and 149 were not complied with therefore, Summary Court Martial Proceedings is void ab-initio and impugned order dated 17.08.2015 as well as affirming order dated 28.11.2016 are clear violation of Army Rules aforesaid. He pleaded that impugned order dated 17.08.2015 and 28.11.2016 be set aside and applicant be granted service pension by regularising the absence period.

4. On the other hand, learned counsel for the respondents submitted that on account of overstaying leave, applicant was declared deserter from field area w.e.f. 16.09.2002 by a Court of Inquiry dated 18.10.2002 and after completion of ten years from the date of desertion, he was dismissed from service in terms of para 22 of Army Order 43/2001/DV. His further submission is that consequent to AFT, Lucknow order dated 05.02.2014, he rejoined at JAT Regimental Centre on 01.03.2014 and was taken on their strength notionally w.e.f. the said date. He was tried by Summary Court Martial and dismissed from service w.e.f. 17.08.2015 in accordance with the procedure laid down in Section 123, 106 and 38 (1) of Army Act, 1950. He pleaded for dismissal of O.A. on the ground that applicant was a deserter for more than ten years and he rejoined service on the orders of this Tribunal after completion of his terms of engagement.

5. We have heard learned counsel for both the sides and perused the material placed on record. We have also

scrutinised the original records related to the matter including Summary Court Martial Proceedings by which applicant was dismissed from service.

6. No. 3190393X Sep Mange Ram while serving with 5 Rashtriya Rifles (JAT) was granted leave for the period 12.08.2002 to 15.09.2002 and he was to report back for duty which he failed to report on 16.09.2002. In consequence thereof apprehension roll dated 02.10.2002 was issued to Superintendent of Police, District Ding Mandi (Haryana) and other agencies including his wife Smt Manju Devi on the address which was given by the applicant at the time of enrolment. The applicant neither rejoined the duties voluntarily nor was he apprehended by civil police. As such, in accordance with Section 106 of Army Act, 1950 a Court of Inquiry was held on 18.10.2002 and he was declared a deserter.

7. After more than 08 years, Smt Manju Devi, wife of applicant submitted a petition dated 28.08.2011 addressed to Chief of the Army Staff with a request to allow her husband to rejoin duty as her husband was mentally ill. In response to her petition she was advised to ask her husband to report 20 JAT within two weeks vide letter dated 14.09.2011. 20 JAT requested Records JAT Regiment with copy to Smt Manju Devi to forward medical documents in support of her claim that her husband was a victim of poisoning by some miscreants.

Thereafter, neither medical documents were submitted by Smt Manju Devi nor applicant reported to 20 JAT.

8. Smt Manju Devi, wife of applicant had lodged a complaint dated 06.11.2002 (Annexure No A-3) with regard to his missing husband whereas the records shows that he was under treatment of Dr. SS Tantia at Sri Ganga Nagar (Rajasthan). In this regard, it may be submitted that after lodging of police complaint related to her missing husband, applicant was traced and therefore, his treatment started at Sri Ganga Nagar (Rajasthan).

9. As per para 22 (a) (i) of Army Order 43/2001/DV when an individual becomes deserter while on active service (field area) and who does not surrender or is not apprehended, he is dismissed from service after 10 years of desertion. For convenience sake para 22 (a) (i) of Army Order 43/2001/DV is reproduced 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."*

10. Thus, the aforesaid para stipulates that when an individual deserts the service for a duration of 10 years while posted in field area, his services may be dispensed with in terms of para 376 of Regulations for the Army 1987 (Revised Edition). For convenience sake the aforesaid para is reproduced as under:-

*"376. Deserters From The Regular Army. - A person subject to AA who is declared absent under AA, Section 106 does not thereby cease to belong to the corps in which he is enrolled though no longer shown on its returns, and can, if subsequently arrested, be tried by court-martial for desertion. When arrested he will be shown on returns as rejoined from desertion."*

11. In the instant case applicant was declared illegally absent/deserter w.e.f. 16.09.2002. Due to non apprehension/non rejoining the duty by 15.09.2012, he was dismissed from service and occurrence to this effect was notified vide Part II Order No. NE/0104/006/2012 dated 02.11.2012.

12. The applicant took legal recourse for rejoining the duty by way of filing O.A. No. 13 of 2012 to this Tribunal prior to dismissal from service. The aforesaid O.A. was decided by this Tribunal vide order dated 05.02.2014 with the following directions:-

*"10. Admittedly, the applicant is still on 'supern' strength of his parent unit (20 JAT). The unit is now probably located in field area since they had stated in September 2011 that they were moving to field area on 01 October 2011. Therefore, there is merit in contention of 20 JAT that the applicant be asked to report to JAT Regimental Centre."*

*Considering all facts of the case we are of the view that the applicant deserves to be taken on strength by JAT Regimental Centre after proper positive identification and verification that he is not involved in any illegal activity. His medical condition needs to be ascertained since we find that all the correspondence has been made by his wife and not the applicant. The respondents then may proceed as provided by law to regularize the period of absence.*

*11. Thus, in result the Original Application is partly allowed. The applicant is directed to report to JAT Regimental Centre within 60 days of this order whereupon he will be taken on strength by JAT Regimental Centre who will then proceed in the case as prescribed by law after positive identification of the applicant, verification of his antecedents and medical examination."*

13. After the aforesaid order of this Tribunal, the JAT Regimental Centre took applicant on their strength ignoring the fact that he had already been dismissed from service in terms of para 376 of Regulations for the Army, 1987 (Revised Edition) on completion of desertion period of over 10 years.

14. Applicant reported to JAT Regimental Centre on 01.03.2014. His verification was done as per direction of this Tribunal's order dated 05.02.2014 and he was not found to be involved in any illegal activity. He was also medically examined and he was declared in SHAPE-I. It is noticeable that by the time applicant reported JAT Regimental Centre, he had already completed his terms of engagement on 28.02.2014 as per para 134 of Regulations for the Army, 1987.

15. On 10.11.2014, applicant was remanded by Lt Col Sameer Katiyar, Administrative Battalion Commander in terms of Rule

22 of Army Rules, 1954. He was charged under Section 38 (1) of Army Act, 1950, while on active service, at field on 16.09.2002, being on leave of absence from 12.08.2002 to 15.09.2002, did not rejoin his unit on 16.09.2002 on expiry of the said leave, with intent to avoid such active service, until voluntarily surrendered at Administrative Battalion, the JAT Regimental Centre, on 01.03.2014. After hearing of charge, the Administrative Battalion Commander gave order to reduce evidence to writing. Convening order for recording of Summary of Evidence in respect of applicant, who deserted since 16.09.2002, was ordered on 10.11.2014 and Summary of Evidence recorded by Lt Col AK Gupta on 11.05.2015 and he was tried by Summary Court Martial on 17.08.2015 and awarded punishment 'dismissal from service'.

16. Now we would like to ascertain the fact whether Summary Court Martial proceedings were held as per rules on the subject. Tentative Charge Sheet as illustrated on page 363 of Manual of Military Law was prepared on 05.11.2014 under Section 38 (1) of Army Act, 1950 which for convenience sake is reproduced as under:-

"AA Sec 38 (1)  
Deserting the Service

*In that he,*

*While on active service, at field on 16 Sep 2002, being on leave of absence from 12 Aug 2002 to 15 Sep 2002, did not rejoin his unit at 0001 hrs on 16 Sep 2002 on the expiry of the said leave, with intent to avoid such active service, until voluntarily surrendered at Adm Bn, The JAT Regimental Centre, on 01 Mar 2014."*

17. The above charge sheet and summary of evidence were provided to applicant in Hindi and English on 01.08.2015 with an intimation that his Summary Court Martial will be held on 07.08.2015. He was also informed to exercise his option for representation by a friend of accused (an officer) or a counsel to which he replied on 11.08.2015 that a counsel was in his contact and he would arrive at trial location within time. Later, when there was no counsel from the side of applicant, Major Bharat Singh Jhala was detailed as his friend of accused. Prior to trial, he was medically examined by Maj Praveen Kumar Singh, Medical Officer, JAT Regimental Centre and found him fit to undergo the Summary Court Martial trial on 17.08.2015. The Court commenced at 1245 hrs on 17.08.2015 and he was arraigned. Applicant pleaded not guilty and refused to sign connected papers in front of two witnesses. During Summary Court Martial Proceedings two witnesses were produced and applicant declined to cross examine the prosecution witnesses. The court closed at 1315 hrs on 17.08.2015 and punishment 'dismissal from service' was awarded. Thereafter, Summary Court Martial Proceedings and connected documents were countersigned by Brig AN Jha, Commandant, JAT Regimental Centre, on 06.10.2015 after taking legal advice from JAG Branch, HQ Central Command.

18. Medical certificate issued by Dr. SS Tantia of Tantia General Hospital, Sukhada Marg, Sri Ganga Nagar (Rajasthan)

indicates that he was under treatment for 'Bipolar Mood Disorder' w.e.f. 21.11.2002 to 31.07.2011 as outpatient. This was never informed by applicant and his wife/family members to unit or any military authority till his wife wrote letter dated 28.08.2011. In this regard, it will be prudent to mention that Ganga Nagar (Rajasthan) is a military station with a military hospital where he would have been given the required medical care. It can thus, be concluded that applicant had deserted the unit i.e. 5 Rashtriya Rifles located in a field area w.e.f. 16.09.2002 and had reported at the JAT Regimental Centre on 01.03.2014 after expiry of his minimum period of colour service.

19. Applicant had submitted a statutory petition dated 05.10.2015 to Chief of the Army Staff regarding his illegal dismissal of service from Army who, on perusal of whole proceedings had rejected the appeal on 28.11.2016 with the following remarks:-

*"5 (a) The petitioner did not approach CO, 20 JAT Battalion on 25 September 2011 as now being claimed by him and therefore, his contention/assertion is incorrect.*

*(b) The documents reveal that the petitioner had completed his terms of engagement of service as applicable to the rank of Sepoy on 28 February 2014. Therefore, when the petitioner reported to Administrative Battalion, The JAT Regimental Centre on 01 Mar 2014, in compliance with Hon'ble AFT (RB) Lucknow order dated 05 February 2014, Army Act Section 123 was invoked in his respect and he was attached with Administrative Battalion, The JAT Regimental Centre, Bareilly so as to bring him under the subjection of Army Act for the purpose of finalization of disciplinary case against him. In terms of Integrated Headquarters of Ministry of Defence (Army) letter no 01086/123/AG/DV-1(P) dated 23 March 2007, no pay and allowances are permissible after the due date of retirement.*

(c) 5 Rashtriya Rifles Battalion while issuing the 'Apprehension Roll' had sent it at the address which the petitioner had given in his enrolment form. In any case, the wrong address of the petitioner mentioned in the 'Apprehension Roll' does not negate the factum of absence of the petitioner, which the petitioner himself accepted.

(d) In terms of Army Rule 125, the Court is required to sign at the sentence and such signature authenticates the whole of the proceedings. In the instant case however, the Court authenticated each page of the SCM proceedings by appending its signature. The contention of the petitioner, therefore, is misconceived. Further, the SCM proceedings reveal that there is sufficient evidence to show that the petitioner had deserted the service by not rejoining the unit on 16 September 2002, on expiry of his leave and remained absent for prolonged period. Further, the petitioner has not produced any evidence to establish that he was incapable of reporting to his unit/any military unit/nearest military hospital. It will be relevant to mention that even Hon'ble AFT (RB), Lucknow in its order dated 05 February 2014 has observed, "No reasons or explanation have been advanced by the applicant for not reporting to a military hospital, that too when the applicant was under OPD treatment. The absence of approximately nine years remains unexplained which needs to be regularised as provided by law." Considering the facts of the case in its entirety, the findings of 'Guilty' arrived at by the Court is legal.

6. And Whereas, the proceedings of SCM have been conducted in accordance with the provisions of Army Act, 1950 and the Rules made thereunder and do not suffer from any legal infirmity. Considering the gravity of the offence of which the petitioner has been found 'Guilty', the sentence 'to be dismissed from the service' awarded by the Court is rather lenient for desertion for a period of over 11 years."

20. In a case reported in (1984) 4 SCC 116, **Sharad Birdhichand Sarda vs State of Maharashtra**, their Lordships of the Hon'ble Apex Court have held that there are five principles of standard of proofs in a case sought to be established on circumstantial evidence as under:-

"(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every possible hypothesis except the one to be proved, and

*(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

21. In the instant case, it is not disputed that applicant himself overstayed leave w.e.f. 16.09.2002 and was declared a deserter w.e.f. 16.09.2002 by a Court of Inquiry. He surrendered on 01.03.2014. Therefore, in these circumstances it is crystal clear that he absented himself for the period 16.09.2002 to 28.02.2014 (approx 12 years).

22. Applicant's contention that impugned order dated 17.08.2015 was passed within four hours whereas the Rule provides that the period should be 96 hours and he was not given sufficient opportunity in terms of Army Rule 34 (1), is not sustainable on the ground that applicant was posted in field area (active service) and requirement of 96 hours is applicable in case an individual is posted in peace area. The aforesaid Section (supra) reads as under:-

*"The interval between his being so informed and his arraignment shall not be less than ninety six hours or where the accused person is on active service less than twenty four hours."*

23. On perusal of Manual of Military Law and Defence Service Regulations for the Army, 1987 we find that duration of trial has not been specified. We are of the view that the trial may be so extended or kept concise till such time and to such decision and reasons and on rational appreciation and

application thereof in passing a reasoned speaking order as to be tenable in law as well as on facts.

24. The other ground taken by learned counsel for the applicant is that applicant should have been tried under Section 39 (b) and not under Section 38 (1). In this regard we observe that since applicant deserted while serving in field area, Section 38 (1) would apply in this case.

25. On the point of pay and allowances for the period of his attachment with the JAT Regimental Centre, we have noticed that policy letter dated 23.03.2007 clearly provides that no pay and allowances are applicable to an individual after the date of his retirement/superannuation. Since the applicant's service tenure had completed on 28.02.2014 prior to his reporting to the JAT Regimental Centre i.e. on 01.03.2014, he is not entitled to pay and perks for the period 01.03.2014 to 17.08.2015.

26. During the course of hearing, though pleaded in the O.A., it was vehemently argued by learned counsel for the applicant that applicant was suffering from mental illness and on account of that he was getting treatment in Tania General Hospital (mental hospital), Ganganagar (Raj). It was further argued that when doctors have found him fit (certificate dated 30.08.2011 refers) he reported to unit on 01.03.2014, by that time the Tribunal also passed an order for his rejoining vide order dated 05.02.2014. His other argument is that had he been mentally fit, he would have rejoined from leave within

time after expiry of leave. We have perused the medical documents including medical certificate placed on record and we find that applicant was under treatment at Tania Hospital, Sri Ganga Nagar (Rajasthan) for his mental illness but we observe that his relative would have tried to get him admitted in nearby military hospital for treatment rather than getting him admitted in civil hospital. The above submission does not inspire us confidence that he could not rejoin duty being under treatment in civil hospital on account of his mental illness.

27. In view of the above, we are of the view that applicant overstayed leave/deserted from Army for the period 16.09.2002 to 28.02.2014 (approx 12 yrs). The Summary Court Martial was held in accordance with rules on the subject and no prejudice seems to have been done to applicant while dismissing him from service.

28. While perusing Section 38 of the Army Act, 1950, we find that applicant was punished leniently and not severely as held in the Act, which for convenience sake is reproduced as under:-

**"Section 38 in The Army Act, 1950**

*Desertion and aiding desertion.*

*(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court- martial, if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and if he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.*

*(2) Any person subject to this Act who, knowingly harbours any such deserter shall, on conviction by court- martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.*

*(3) Any person subject to this Act who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court- martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned."*

29. We are also of the view that desertion of a soldier while posted at border area should be viewed seriously as it tantamounts to desertion from the nation, especially when an individual is posted at line of control.

30. In view of the above, the O.A. being devoid of merit is **dismissed.**

31. No order as to costs.

32. Pending miscellaneous applications, if any, shall stand disposed off.

**(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)**  
**Member (A) Member (J)**

Dated: 29.10.2021  
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