

RESERVED
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 235 of 2016

Thursday, this the 12th day of July, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Dheerendra Pal Singh (Army No. 14671505 N)
Son of Shri Devendra Pal Singh
Resident of Village – Abupur
Post – Ase
District – Aligarh

.....Applicant

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

Versus

1. Union of India, through Secretary, Ministry of Defense, South Block, New Delhi.
2. Chief of the Army Staff, Army Headquarter, South Block, DHQ, P.O. New Delhi – 110011
3. Commanding officer, 512 Army Base Workshop, Khadki, Pune Maharashtra.
4. Battalion Commander Military Wing, 512 Army Base Workshop, Khadki, Pune, Maharashtra.
5. Zila Sainik Board, District – Aligarh, U.P.

.....Respondents

Ld. Counsel for the : **Shri Namit Sharma**
Respondents **Ld. Counsel for Central Govt.**

ORDER

“Per Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs :-

- “i. to quash the impugned order dated 07/07/2016 passed by the opposite party no. 2 (Annexure No.-1).*
- ii. to summon and quash the order of dismissal from service dated 20/10/2014 as the same has not been served to the applicant/petitioner till date.*
- iii. to issue an appropriate, order or direction to the opposite parties to set aside the order of deserter, if any, passed by the opposite parties.*
- iv. to issue any other appropriate, order or direction to the opposite parties to allow the applicant/petitioner to rejoin his services.*
- v. to issue any other appropriate order or direction, which this Hon’ble Court may deem fit and proper in the nature and circumstances of the case.*
- vi. to award the cost of original application.”*

2. The facts giving rise to the instant O.A. may be summarised as under :

The applicant was initially enrolled as Sepoy (Driver Trade) in the Indian Army on 24/04/2004 under Army Act, 1950 and after joining services he worked and discharged his duties with utmost sincerity and satisfaction to the higher authorities. After joining the applicant was given first posting at 601 EME Battalion, Patiala and thereafter he discharged his duties from the year 2009 to 2011 at 608 EME Battalion, HQ, Thank, Kargil. From 30/03/2011 the petitioner has been transferred from Kargil to 512 Army Base Workshop, Khadki, Pune as Sepoy Driver (M.T.).

During the service at Kherki, Pune, the applicant prayed for and was granted casual leave for a period of 13 days w.e.f. 07.08.2011 to 21.08.2011. During the leave period, due to compelling circumstances, he was not able to travel, so the applicant on 19.08.2011 (this date

mentioned by the applicant does not appear to be correct because it is stated that in reply to the telegram letter dated 09.08.2011 was sent by the respondents) informed the respondents and requested for extension of leave for one month through telegram. In reply to the said telegram/letter dated 09.08.2011 was sent by the respondent no.3 addressed to the wife of the applicant with the advise to join as her husband was over staying the leave w.e.f. 22.07.2011. The applicant approached 512 Army Base Workshop in the last week of September 2011 and requested Battalion Havildar Major and Subedar Major for his joining, but the same was rejected and thereafter neither any information has been given nor the applicant was allowed to join. After running from pillar to post at last, it was informed that unless the direction came from opposite party no.3 i.e. the Commanding Officer, he will not be allowed to join the service. After waiting for about three months, when the applicant was not informed. The applicant again approached 512 Army Base Workshop, Khadki, Pune in the month of February, 2012 then he was orally directed to approach before the Depot Battalion, Secunderabad as the decision with regard to over stay of leave will be taken by the depot Battalion only. As per the information given by 512 Army Base Workshop, Khadki, Pune, the applicant approached the Depot Battalion, Secunderabad, thrice between the year 2012 to 2013, but he was not been given any attention by any authority over there. On 20.09.2013 when the petitioner reached at Secunderabad, he stayed at retiring room of railway and thereafter on 21.09.2013 he again appeared before the Depot Battalion, Secunderabad. On 21.09.2013 when he appeared before the Depot Battalion, Secunderabad, it was noted on his leave certificate that the individual (present applicant) cannot be tried at EMI Depot Battalion because 512 Army Base Workshop, Khadki, Pune is peace station and it can be tried only at 512 Army Base Workshop. It was further mentioned therein that EME Depot Battalion only deal with cases of counter insurgency operations, High Altitude Area, Mission abroad and Andaman & Nicobar etc. A

copy of the leave certificate alongwith comments dated 21.09.2013 by EMI Depot Battalion is annexed as Annexure 5 to this O.A.

After getting information from EME Depot Battalion, the petitioner rushed to 512 Army Base Workshop, Khadki, Pune on 22.09.2013 where the opposite parties have not allowed him to join rather the petitioner has been directed to wait for further orders. The petitioner stayed over there for about a week and ultimately when he was assured by the opposite parties that as soon as any order regarding joining is passed, the same shall be communicated to him. Thereafter the petitioner returned back from Khadki. The claim of the applicant is that he was neither declared a deserter nor he was permitted to join and no disciplinary proceedings were initiated against him. The petitioner made all efforts for his joining after over staying leave. When the applicant received no communication from the authorities, the applicant went to Khadki on 06.01.2014 alongwith his father, but after reaching there, nothing happened and no order for his joining was passed. On the request of the petitioner, the Battalion Havildar Major directed the applicant to appear before Subedar Major, who was informed about the cause of over stay. The applicant was told that his wife was seriously ill, so he could not come and requested for extension of leave. The applicant was directed to produce his wife in support of his cause for over stay. In compliance of the said direction, the younger brother of the applicant travelled to Pune and reached there on 10.01.2014. The statement of the wife of the applicant was recorded by Subedar Major and thereafter the petitioner was assured that within 15 days, his joining order will be sent at his residential address. After getting assurance of joining, the applicant alongwith his family members came back to his home. Even after expiry of the period of assurance, when no communication was received, then the petitioner sent a representation on 30.01.2014 through registered post to the opposite party nos. 3 and 4 through proper channel. On 20.10.2014 the Record Officer through opposite party no.5 informed the wife of the applicant regarding final settlement of account of the applicant and in that letter he has been

shown as deserter and further it has been stated that it is a reminder dated 20.10.2014. By the said reminder letter, it was informed to the wife of the applicant that the applicant was declared a deserter w.e.f. 22.08.2011 and he was dismissed from service w.e.f. 20.10.2014. On behalf of the applicant, tickets of his travel have been filed in support of his assertion that he and his family members had travelled at different occasions and made all out efforts to join the Army, but the same was not permitted.

3. It has been submitted by the learned counsel for the applicant that admittedly the applicant remained present before the Unit at Secunderabad, where he was directed to go back to Khadki for further action. Thus, on 21.09.2013 his desertion automatically came to an end and the applicant could not have been treated as deserter. Since the statutory period of three years had not elapsed on that date, therefore, he could not have been dismissed from service in view of the settled policy of the respondents.

4. It is argued on behalf of the applicant that even if the applicant is assumed to be a deserter w.e.f. 21.09.2013, even then the order of dismissal has been passed within a period of less than three years and he has been dismissed from service w.e.f. 20.10.2014.

5. In the counter affidavit filed on behalf of the respondents, it is submitted that the applicant was declared as deserter w.e.f. 22.08.2011. Feeling aggrieved with the said order, the applicant preferred an appeal before the Hon'ble Tribunal, which was disposed of with the direction to the applicant to file statutory appeal before the appropriate authority within one month. The statutory complaint thereafter has been filed which has been examined and was found without any merit. Accordingly, it was rejected on 17.06.2016. Thereafter, the applicant being aggrieved by the dismissal from Army service w.e.f. 20.10.2014, has filed the instant O.A.

6. It is pleaded by the respondents that the applicant was declared deserter under Section 106 of the Army Act. Finally after three years for his not reporting to the duty, he was administratively dismissed

from service on 22.10.2014 after prescribed period of three years of continuous absence. However, it has been admitted by the respondents in Para 21 of the counter affidavit that the applicant reported only once to EME Depot Bn on 21.09.2013. It is submitted in Para 23 of the counter affidavit that the applicant was directed by EME Depot Bn to report to 512 Army Base Wksp on 21.09.2013, but the applicant failed to report on time and came to this unit with the remarks of EME Depot Bn on 11.01.2014 after a delayed period of three months and twenty days and further after coming on 11.01.2014 with family, the applicant left again without any intimation to the unit authorities. Alongwith counter affidavit, Annexure CA-8 has been filed and this document has also been filed by the applicant as Annexure A-5 to the O.A. This leave certificate, where on the bottom of which, following endorsements have been made on 21.09.2013 by the O.C. EME Depot Bn. The said endorsement reads as under :

1. Reported to EME Depot Bn on 21.09.2013.
2. Individual cannot be tried at EME Depot Bn as LOC of 512 ABW is Pune (Peace Stn). Provision of DSR Para 381 only for CI Ops, HAA, Msn abroad, A & N IS & Active positively.
3. To be tried only at 512 ABW.

7. Thus, it is admitted fact that after declaration of the applicant as deserter w.e.f. 22.08.2011, he appeared before the Depot Bn on 21.09.2013 i.e. within less than period of 3 years. He again appeared at EME Depot on 11.01.2014 with his family but, as mentioned in the rejection order dated 23.06.2016, he left without informing any authority and without payment of guest room charges, where he was staying. At this juncture, we would also like to mention the grounds which have been mentioned by the competent authority in the rejection order dated 07.07.2016, whereby the statutory complaint of the applicant was rejected. Paras 2(c) and (d) and 3(a) of this speaking order, which reads as under :

“2(c) He adds that he repeatedly visited the EME Depot Battalion but to no avail. On 21 Sep 2013, it was intimated to him that he cannot be tried at EME Depot Bn because 512 Army Base Wksp is in peace station and the Depot Bn can only deal with cases of Counter Insurgency Operations, High Altitude Area, Mission

abroad and Andaman & Nicobar etc. He avers that thereafter he rushed back to the unit, where again he was not allowed to join and was asked to wait until further order.

(d) He states that he was present at 512 Army Base workshop till 30 Sep 2013, but he neither received any order of joining nor was any disciplinary proceedings initiated/instituted against him. He avers that he regularly approached the authorities but was not allowed to join.

3(a) The individual was enrolled in the Army in the Corps of EME on 24 Apr 2004. He was granted 13 days Casual leave wef 08 Aug 2011 to 20 Aug 2011 with permission to prefix and suffix 07 Aug 2011 and 21 Aug 2011 respectively. He illegally absented himself without leave from 22 Aug 2011 without any reason and despite intimations sent to him on 31 Aug 2011 and 09 Sep 2011 and an Apprehension Roll issued vide letter dated 21 Sep 2011, he failed to join his duty. After waiting for a period of 30 days, the process of declaring him a deserter was initiated as per Section 106 of the Army Act. The Complainant reported to 512 Army Base Wksp on 11 Jan 2014 with remarks endorsed by EME Depot Bn dated 21 Sep 2013 on copy of leave certificate dated 06 Aug 2011. However, the complainant left the Wksp and failed to report back. Pertinently, had the complainant remained at the Wksp the Competent Authority would have initiated suitable action. It is noteworthy that the complainant has also been punished thrice in the past on charges of absence/overstay of leave.”

8. Before proceeding further, we would like to reproduce Para 22 of Army Order ‘AO/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.”*

9. We would like to refer the case of **Capt. Virender Singh vs. Chief of the Army Staff (1986) 2 SCC 217**, wherein in para 13 & 14, The 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."*

10. In another case of **Shish Ram vs. Union of India & Ors (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.

11. We also consider it appropriate to quote Sections 105 and 106 of the Army Act, which reads as under :

“105. Capture of deserters.-*(1)Whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs, shall give written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a magistrate, and shall deliver the deserter, when apprehended, into military custody.*

(2) Any police officer may arrest without warrant any person reasonably believed to be subject to this Act, and to be a deserter or to be travelling without authority, and shall bring him without delay before the nearest magistrate, to be dealt with according to law.

106. Inquiry into absence without leave.— *(1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.*

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.”

12. Keeping in view the aforementioned legal position, it is clear that the applicant was declared a deserter w.e.f. 22.10.2014, it is absolutely clear from perusal of the fact that it was a case of over staying the leave and at no point of time, it can be presumed that the intention of the applicant was to desert the service. It is also clear from the fact that on 21.09.2013, the applicant appeared before the EME, Secunderabad and thereafter on 11.01.2014 at EME Depot Khadki, though the claim of the applicant is that he had made all

efforts to join the duty, but the same were not entertained. Even if for the sake of argument, we keep away this submission, even than it is an admitted fact that on 21.09.2013, he appeared before the Depot Battalion, Secunderabad, wherefrom he was directed to appear before 512 Army Base Workshop, Khadki, Pune where he was to be dealt with under rule. He again appeared at Khadki, Pune on 11.01.2014 with his family, stayed in the guest house. So the desertion of the applicant stood automatically revoked by his reporting at Secunderabad, from where he was directed to appear at Khadki. The case of the respondents is that even after that he appeared at Khadki on 11.01.2014. But once a person who has been declared a deserter reports at unit, then it was the duty of the respondents to take him on strength and also in custody, in view of provision of Section 105 of the Army Act and to hand over such person to the unit, where he is to deal with administratively. In this case apprehension roll of the applicant was issued vide order dated 21.09.2011. But it was not done by the respondents and the applicant was directed to report at Khadki Pune. This is an admitted fact that the applicant on 21.09.2013 reported at Secunderabad. Thus, the submission of the applicant assumes importance that he was dismissed from service within a period less than three years from 21.09.2013.

13. It appears from the counter affidavit that the court of enquiry was ordered to declare the applicant deserter vide Part I order dated 27.09.2011.

14. Since the applicant had reported on duty on 21.09.2013, therefore, in our considered view that overstay of leave/desertion comes to an end on that day and fresh desertion order claiming the applicant, if any, ought to have been passed in accordance with the provisions of Section 106 of the Army Act and thereafter the respondents were entitled to dismiss him after a period three years from that day of his reporting, but the same has not been done and the applicant was dismissed from service w.e.f. 22.10.2014.

15. Thus, in this case the respondents have not given due consideration of the fact that the applicant has reported to EME, Secunderabad on 21.09.2013 and again on 11.01.2014 and with this reporting to a military unit, his desertion comes to an end. Thus, without considering the said fact, the order of dismissal was passed on 22.10.2014. This technical ground has rendered the dismissal order unsustainable in law.

16. Keeping in view that the applicant is not in service for the last about seven years, we do not consider it proper to reinstate him in service, keeping in view of strict discipline of the Army and such a long break, but ends of justice would meet if the applicant is notionally treated to be in service till he attains pensionable service and thereafter he may be granted retiral benefits, in accordance with law.

17. Accordingly, this O.A. deserves to be partly allowed and is hereby **partly allowed**. The impugned orders dated 07.07.2016 and 20.10.2014 passed by the respondents are set aside. The applicant shall be notionally treated to be in service till he attains pensionable service, thereafter, he shall be entitled to post retiral benefits in accordance with law. However, he shall not be entitled to the back wages for the said period on the principle of 'no work no pay', but shall be entitled for service pension of the rank last held by him. The respondents shall calculate the pension of the applicant from the date of his notional discharge after acquiring pensionable service.

The respondents are directed to complete this exercise within a period of six months from today, failing which the applicant shall be entitled to interest @ 9% per annum on the total amount accrued from due date till the date of actual payment.

Learned counsel for the respondents as well as the Registrar of this Tribunal are directed to communicate this order to the authorities concerned to ensure compliance of the order.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: July , 2018.
PKG