ARMED FORCES TRIBUNAL, CHANDIGARH
REGIONAL BENCH AT CHANDIMANDIR

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TA 250 of 2011 (arising out of CWP 13380 of 1995)

Rajendra Chandra Bhan …… Petitioner(s)
Vs
Union of India and others …… Respondent(s)

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For the Petitioner (s) : Mr. Manohar Lall, Advocate
For the Respondent(s) : Mr RN Sharma, CGC

Coram: Justice Prakash Krishna, Judicial Member.
Air Marshal (Retd) SC Mukul, Administrative Member.

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ORDER
27.01.2014

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The file of the above case has been received on transfer on the commencement of the Armed Forces Tribunal Act, 2007, from Punjab and Haryana High Court at Chandigarh, in view of Section 34 of the Act.

The petitioner joined the Army in the year 1969 in the Regiment of the Commanding Officer, 17, Engineer Regiment and remained there till he was dismissed from service on 21.5.1993. By means of present petition, the petitioner has challenged the said dismissal order a copy whereof has been filed as Annexure P-4.

The background facts may be noticed in brief. The petitioner has been admittedly punished repeatedly by the military authorities. He was tried by a Summary Court Martial on 27.7.1987 on his absence without leave and was sentenced to three months rigorous imprisonment in military custody by the Summary Court Martial. Again the petitioner had absented himself without leave on 14.5.1988 till 12.4.1989 and on 28.4.1989 till 13.6.1989. A Summary Court Martial was ordered against him for the second time. A show cause

notice dated 15.12.1989 was issued to him. In reply to the show cause notice, the petitioner came out with the case that instead of dismissal from service, he should be discharged. The petitioner further states that he is not aware about the said Summary Court Martial proceedings. He thereafter filed a writ petition No. 3597 of 1993 before the Punjab and Haryana High Court claiming a writ of mandamus in connection with releasing his pensionary benefits such as Gratuity etc. In reply thereof, in the written statement the respondents came out with the case that the petitioner was not discharged but was dismissed from service. The order of dismissal was annexed along with the reply. Consequently, the said writ petition was not pursued any further and it was got dismissed with leave to file a fresh petition challenging the dismissal order. Thereafter the present writ petition challenging the dismissal order has been filed on various grounds such as the prescribed procedure before passing of the dismissal order has not been followed, no notice was given to the petitioner before conduct of Court of Inquiry and that the dismissal order, at any rate, could not be operative with effect from retrospective date.

On notice, the respondents filed a detailed written statement by denying the essential averments as contained in the writ petition. They have come out with the case that the petitioner was habitual offender under the Army Act and was in habit of over-stepping the leave and/or not reporting on duty. Earlier, a lenient view was taken to enable the petitioner to improve his work and conduct but there was no improvement. He was sent to Military Reformatory Trimulgherry Secunderabad to undergo 06 months rigorous imprisonment as a

punishment awarded by Summary Court Martial and was granted remission of 14 days of rigorous imprisonment with effect from 14.01.1990 to 27.01.1990. He was released from Military Reformatory Trimulgherry on 13.01.1990 and was sent to Depot Battalion, Madras Engineer, Group & Centre, Bangalore. He was then despatched to 17 Engineer Regiment (his parent unit) on 16.1.1990 but he did not report to his parent unit and again absented. He was declared illegally absent with effect from 17.1.1990 by Court of Inquiry held at his Regiment. The petitioner failed to surrender himself nor could be apprehended by the civil police. The petitioner was declared deserter from peace area and as per rules, he stands dismissed from service after a period of three years according to the policy of the Army Headquarters vide letter No. 17774/AG/DV-1, dated 11.3.1980.

The written statement was filed long ago on 2.1.1997 but no rejoinder has been filed. In the meantime, petition has been transferred to this Tribunal and remained pending for the last two years and the Tribunal has granted many adjournments to the petitioner on various dates.

When the matter was taken up for hearing on 09.01.2014, it was pointed out to the learned counsel for the petitioner that there is no rejoinder-affidavit on the record, who submitted that the matter may be heard and decided as he does not propose to file any reply to the written statement.

Heard the learned counsel for the parties and perused the record. The learned counsel for the petitioner argued that

dismissal order has been passed in breach of rule 17 of the rules framed under the Army Act. It was also urged that no notice was given or served on the petitioner with respect to the proceedings of Court of Inquiry declaring the petitioner as deserter. The order declaring the petitioner as deserter is thus has been passed in violation of principle of natural justice. Lastly, in any view of the matter, the dismissal order is liable to be set aside on the short ground that the discharge certificate is dated 21.5.1993 while the dismissal takes effect from 17.1.1990. Elaborating the arguments, it was submitted that the discharge order could not be made effective from back date i.e. 17.1.1990. Reliance was placed on relevant provisions of the Army Act.

The learned counsel for the respondents on the other hand submits that the petitioner has been dismissed after following the prescribed procedure. Elaborating the arguments, he submits that in view of uncontroverted averments as contained in Paras 1-4, 7 and 12 of the counter-affidavit/written statement, it is clear that the petitioner has been rightly dismissed from the service. In any view of the matter, submission is that such a person who is habitual offender should not be retained in the Army any longer.

Considered the respective submissions of the learned counsel for the parties and perused the record. We were taken through the show cause notice dated 15.12.1989 (Annexure P-3) which was admittedly served to the petitioner. The above show cause notice is reproduced below :-

> "1. It is revealed from your Fd Conduct Sheet that you have been awarded four red ink entries for the following offences which show that you are a habitual offender :-
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> a) Forfeiture of pay & allow for three days & three extra duties awarded on 24 May 79 vide 61B (DO) Pt II No. 0/0074/001/79 under AA Sec 39(b) (OSL)
> b) Awarded 7 days RI in Nil custody on 07 Dec 84 vide 3 ER 02E Pt II No. 2/0020/002/85, under AA Sec 39(a) (AWL)
> c) Tried by SCM and awarded three months RI in Nil custody on 27 Jul 87 vide Depot En Pt II No. 3/0125/019/87.
> d) Tried by SCM on 22 Jul 89 and awarded 6 months RI in Nil custody vide Depot En (AP) Pt II No. 3/0105/014/89, under AA Sec 38(i) and AA 39(a) (AML)
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> 2. In view of the above, you are requested to explain the reasons as to why action in terms of Army Rule 13 item 3 (v) read in conjunction with Army Rule 17 should not be taken for your discharge from service being unfit for further retention. Your reply should reach this office within 7 days from the date of receipt of this notice failing which, it will be assumed that you have nothing to state in your defence."

A bare perusal of the show cause notice would demonstrate that the petitioner had earned 4-red-ink entries for the various offences detailed therein which show that he is an habitual offender. Though it was maintained by the petitioner's counsel that the show cause notice was replied but copy of the reply has not been annexed and/or could not be placed before us. The pleading that the show cause notice was given on non-existent ground is lacking. The writ petition averments are bereft of any such pleas or material.

The submission is that the petitioner had pleaded that he should be discharged instead of dismissal from the service. In the absence of

copy of reply to the show cause notice, it is difficult to find any merit in the said submission. Even otherwise also, it is clear from Paras 4 to 7 of the counter-affidavit which remained uncontroverted that the petitioner was punished on number of occasions and was tried by Summary Court Martial many times. The details mentioned therein may be summarised which is as follows :-

(i) For absence without leave, petitioner was declared deserter by Court of Inquiry with effect from 30.11.1986. However, he rejoined from desertion on 3.3.1987 after having remained absent for 94 days.

(ii) He was tried again by Summary Court Martial for absence without leave on 21.7.1987 and was awarded three months RI in military custody.

(iii) Petitioner availed the annual leave from 15.3.88 to 13.5.88 but failed to report on duty on the expiry of the leave period. The Court of Inquiry was held on 14.6.88. The petitioner thereafter surrendered before the Regiment on 12.4.89 after an unauthorised absence of 334 days.

(iv) The petitioner after rejoining from desertion, when he was under trial, absented himself without leave from 28.4.89 and remained absent for a period of 47 days till he again surrendered again at Depot Battalion, Madras Engineer Group & Centre, Bangalore on 13.6.89. He was tried by Summary Court Martial and was sentenced to 06 months RI. A remission of 14 days rigorous imprisonment with effect from 14.1.90 to 27.1.90 was granted and was asked to report to his unit on 17.1.90. Instead of reporting to the unit, the petitioner again deserted the Army and went to his home.

(v) Thereafter again the Court of Inquiry was held on 17.2.90 and the petitioner was declared deserter. He neither surrendered himself nor was apprehended by Civil Police.

The above mentioned facts are not disputed by the petitioner, rather they are substantially admitted in the writ petition. The petitioner could not dare to file a reply to the written statement to controvert the allegations of habitual absentee from duty detailed above.

The only submission of the learned counsel for the petitioner is that as the petitioner in reply to the show cause notice submitted that he should be given discharge, it should be presumed that petitioner was given discharge and with that impression, the petitioner had earlier filed a writ petition claiming pension and other retiral benefits. There is no material before us to show that the petitioner was ever given discharge by the Army authorities. In the absence of any material or discharge order, the plea of discharge put by the petitioner is his own creation, imaginary and is liable to be rejected.

Coming to the plea that Rule 17 was not followed, we find that the petitioner has not been able to demonstrate in what manner, rule 17 has not been followed. The record shows that the petitioner has tried to confuse the issue by raising a plea of discharge. It is not a case of discharge of the petitioner. Court of Inquiry was held when the petitioner failed to report to his unit after completing his sentence and he was declared deserter. In the entire writ petition, there is no challenge to the order or proceedings declaring the petitioner as deserter. The learned counsel for the petitioner could not dispute during arguments that after completing the sentence, the petitioner was required to report to his parent unit but failed, why? On the own showing of the petitioner, it is but apparent that he was supposed to report to 17 Engineer Regiment (parent unit) on 17.1.90 instead he went to his home and started filing writ petitions one after the other.

The petitioner has been dismissed from service as a result of declaring him deserter in peace which has not been challenged in the present writ petition, the present writ petition is misconceived one. As

a matter of fact, the petitioner has not come to the court with clean hands and has concealed the fact that he voluntary deserted the Army by not reporting to the unit on 17.1.90, or on any day thereafter, is it self sufficient to deny him any relief. We do not find any merit on the first point of the petitioner.

Strong reliance was placed on few judgments. (i) Ex. Hav. Satbir Singh Vs The Chief of the Army Staff and others, (2009) 4 SLR 164 and (ii) Dalbir Singh Vs State Bank of Patiala and another, (2009) 4 SLR 168. These cases are besides the point in issue and are not applicable to the facts of the present case. Moreover they cannot be treated as good precedents in view of the judgment of the Apex Court in the case of Union of India Vs Rajesh Vyas, (2008) 3 SCC 386. It is not necessary to delve upon this point any further as the issue of four red ink entries and dismissal is not directly involved in the present case. Here the petitioner, as found is deserter of Army, in peace.

Then it was urged that no notice or opportunity was given by the Court of Inquiry before declaring the petitioner as deserter. The said argument has no substance as it lacks necessary pleadings in the writ petition. In the absence of any averment to the effect in the writ petition, the argument is not available to the petitioner. The learned counsel for the petitioner could not refer any paragraph to show that any such point has been set out in the petition. The said point therefore, is rejected. He could refer Para (iii) of Para 12 of the writ petition. The said paragraph is reproduced below:-

> "(iii) That the action of the respondent is bad in law for not following the provision of Defence Services Regulations 1962 pertaining to deserters from regular

> Army. According to the provisions of the defence services Regulations, a copy of movement order giving the probable date of arrival of the soldier at his new unit is to be forwarded by the Dispatching unit and if the soldier fails to join his new unit as ordered and is after 10 days from the date shown from the movement order he is still absent, a casualty to that effect will be published in part II orders of the soldier's new unit. But this procedure has not been followed by respondent No. 3. And subsequent dismissal during the pendency of the earlier writ petition, thus can not be sustained in the eye of law and deserves to be set aside."

We fail to find any such plea therein.

Lastly, emphasis was laid on the point that dismissal order cannot be given effect from a retrospective date. We were taken through the dismissal order filed as Annexure P-4 to the writ petition. At a flash, the argument appears to be attracting but on deeper scrutiny, it has no legs to stand. The learned counsel for the respondents pointed out the procedure for declaring a Army personnel as deserter. A reference was made to Para 12(i) of the counter-affidavit, wherein it has been stated that Army personnel deserted from peace area are to be dismissed from the service after a period of 3 years according to the policy of Army Headquarters vide letter No. 17774/AG/DV-1 dated 11.3.1980. Admittedly, the petitioner was supposed to report to his parent unit on 17.1.90 but he failed. After waiting for one month, the period prescribed under the rule, on 17.2.90, a Court of Inquiry was held and the petitioner was declared as deserter. After expiry of three years, the necessary information

regarding his dismissal with effect from the date of desertion is required to be communicated to the various administrative wings of the Army which has also been done in the present case. That is the reason that although the discharge certificate is dated 21.5.93 but dismissal takes place with effect from 17.1.90 the day when the petitioner was supposed to report his unit. The said document recites the cause of dismissal as – Absence without Leave. The petitioner has not come out disputing the said averment that he failed to report the unit on or after 17.1.90.

The learned counsel for the petitioner has placed reliance on Daya Shankar Tiwari Vs Chief of the Army Staff and others, (2002) 6 SLR 787 where it has been held that if a notice is not given, order of dismissal is bad. At the cost of repetition, we find, whether a notice was given or not, is factual aspect of the case which should have been pleaded in the writ petition, but has not been pleaded. In the absence of any such pleading in the writ petition, it is too much to say that no notice was given to the petitioner. Therefore, no assistance from the relied upon decision in the case of Daya Shankar Tiwari (Supra) can be derived at, in the facts of the present case. We, therefore, do not find any merit in the last submission of the learned counsel for the petitioner.

Viewed as above, we do not find any merit in the writ petition. Neither law nor equity is in favour of such person like the petitioner

who is habitual absentee and there is no improvement in the working in spite of punishments given to him. We do not find any merit in the case. The petition is dismissed but no order as to costs.

(Justice Prakash Krishna)

(Air Marshal (Retd) SC Mukul)

27.01.2014
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Whether the judgment for reference to be put up on website – Yes/No