

(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
O.A NO. 100/2013

THIS 14TH DAY OF AUG, 2015

CORUM

HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S) No. 15218671H Ex Gnr (OPR) Rakesh Kumar Choudhary
S/o Sri Ram Chandra PD Choudhary
Village & P.O. - Chulhiya
Dist. - Deoghar
Jharkhand – 814157

-versus-

RESPONDENT(S)

1. The Union of India through the Secretary
Min of Defence, Government of India,
Ministry of Defence, South Block,
D.H.Q. P.O. New Delhi – 110 011
2. The Chief of the Army Staff
Through Adjutant General
Integrated HQ of MoD (Army)
South Block, DHQ P.O.
New Delhi - 110011.
3. Director General Regiment of Artillery
Integrated HQ of MoD (Army)
Sena Bhawan, D.H.Q. P.O.
New Delhi – 110 011.
4. The Officer-in-Charge,
Artillery Records
Nasik Road Camp
PIN - 908802
5. The Commanding Officer
Unit – 463
PIN – 935010
C/o 56 APO

For the petitioner (s) **Mr. S.K. Choudhury, Advocate**

For the respondents **Mr. Anup Kumar Biswas, Advocate**

Assisted by OIC, Legal Cell.

ORDER

Per Justice Devi Prasad Singh, Member (Judicial):

1. The instant application under Section 14 of Armed Forces Tribunal Act 2007 (in short Act) has been preferred by the applicant being aggrieved from declaring him deserter followed by an order passed in pursuance of Section 20 (3) of the Army Act with regard to dismissal of service w.e.f. 20.04.2013. The impugned order was passed on 15.06.2013. The relevant facts are discussed hereinafter.

FACTS :-

2. The applicant, No. 15218671H Gunner (O.P.R.) Rakesh Kumar Choudhary, was enrolled in Indian Army on 30.06.2008 and after due training was assigned duty w.e.f. 01.08.2009 in 3332 Missile Regt, C/o 56 A.P.O. He went on annual leave for a period of 64 days from 15.08.2009 to 17.10.2009. However, applicant over stayed and joined duty on 30.10.2009 i.e. after a period of almost 12 days of over staying leave.

3. The applicant had applied for 13 days casual leave which was granted for the period from 07.12.09 to 19.12.2009. He seems to have over stayed the leave and joined on 11.01.2010 after gap of almost 21 days.

4. On the 19.02.2010, the applicant absented from duty in consequence there of apprehension roll was issued by HQ Bty/3332 Missile Regt on the same day vide their letter No. 308102/HQB/130/A dated 19.02.2010. A Court of Inquiry (COI) was ordered and applicant was declared deserter in pursuance to the order contained in Section 106 of Army Act by the CO

by letter dated 26.02.2010 AWL Part II Order which was published on 21.04.2010.

5. After a gap of almost 1 year 7 months applicant resumed duty at Artillery Centre, Hyderabad on 21.09.2011. After joining he was despatched to Unit on the same day. In consequence there of the applicant resumed duty in his Unit on 30.09.2011. It appears that applicant again absented from duty on 01.10.2011. In consequence there of apprehension roll was issued by the Unit of the applicant.

6. After lapse of 1 year 8 months the applicant **resumed duty on 21.05.2013**. As a follow up action Movement order was issued on the same day and the applicant was despatched to Unit. In pursuance there of **applicant reported to Unit on 25.05.2013 and thereafter resume his work.**

It appears that all of a sudden the applicant was dismissed **by the impugned order dated 15.06.2013**. A copy of which has been filed in Annexure 'C' of the Supplementary affidavit of the respondents. In pursuance to order dated 15.06.2013 applicant was dismissed from service w.e.f. 20.04.2013. From the record it appears that no order was issued with regard to applicant's dismissal from service with due circulation to all concerned. While filing Supplementary Affidavit on 25th June, 2015, the competent authority, i.e. the Brigadier has given sanction for dismissal of 103 personnel whose names were given in the 12 list of deserters of the Regiment of Artillery. For convenience, the order of dismissal of the competent authority, viz. Rolls of Deserters/Absentees containing proposal, as well as sanction of the Competent Authority is reproduced as under :

"MINUTE SHEET

File No.1638/Dism/FSA (NE-1)

Sheet : One

Sl No	Contents	Remarks
	<p style="text-align: center;">1</p> <p>NOMINAL ROLL OF DESERTERS/ABSENTEES PROPOSED TO BE DISMISSED FROM SERVICE UNDER ARMY ACT section 20(3)</p> <p>1. Please ref. AO 43/2001/DV and Para 7 of IHQ of MoD (Army) letter No. 17774/AG/DV/-1 dated 11 Mar 1980.</p> <p>2. In terms of para 22 & 23 of AO under ref. Peace time/Field time deserters who have not surrendered/apprehended within 3 yrs/10 yrs respectively are required to be dismissed from service as per the time schedule given therein (20 Apr and 20 Oct every year). Details of deserters are as under:</p> <p style="margin-left: 40px;">a) Peace Deserters - 52</p> <p style="margin-left: 40px;">b) Field Deserters - 51</p> <p style="margin-left: 100px;">Total 103</p> <p>3. The competent authority to sanction the dismissal of deserters is the Centre Commandant/Sub Area Commander. Therefore, the nominal roll of deserters required to be dismissed is placed opposite for signature at Appx 'A' to IHQ of MoD (Army) letter No.17774/AG/DV-1 dated 11 Mar 1980 if approved please.</p>	<p>1A & 1B</p> <p>1B</p>

Sd/- Dev Giri

Lt. Col
CRO

15 Apr 2013

Col Records

- 1) Ref Note
 - 2) Submitted for signature of OIC Records in the order of dismissal of all these 103 deserters (To be dt.20 Apr 2013)
- Sd/-
16/4

Comdt Arty Centre, NRC

Sheet Registration No.AA/5021-M

Appendix 'A' to IHQ of MoD (Army) letter No
17774/AG/DV-1 dated 11 Mar 1980

The total No. of sheets comprising this Nominal Roll of deserters /absentees of the Regiment of Artillery is 12 (Twelve only) containing 103 (one hundred three names only) in all.

Station : Nasik Road Camp
Date : 16 Apr 2013

Sd/- (Basudev Sharma)
Col
Col Records
Artillery Records

ORDER OF THE COMPETENT AUTHORITY

The dismissal of the persons whose names appear in the Nominal Roll containing 103 (One hundred three names only) names in all has been sanctioned onApr 2013 under Army Act Section 20(3). It has not been practicable to comply with the provisions of Army Rule 17 in their cases.

Station : Nasik Road Camp
Date : 20 Apr 2013

Sd/- Y. Sravan Kumar
Brigadier
Commandant, Arty Centre, Nasik"

7. While filing affidavit in para 3 it has been stated that the competent authority has sanctioned the dismissal of Deserters who are 103 in number in pursuance of letter dated 11-3-1980. It has been stated that in the bottom of the said note sheet the Colonel Records put his note and signed it and thereafter the Commandant, Artillery Centre , NRC approved it.
8. No materials has been brought on record to show that after approval of the competent authority/official the order was issued communicating to the applicant with regard to decision taken by the competent authority for dismissal of service.
9. On the other hand, the discharge certificate in pursuance to power conferred in Section 23 of the Army Act, 1950, were issued on 30th June, 2013, pointing out that the applicant has been absent without leave and dismissal order takes place from 20th April, 2013 (supra).
10. Neither from the Supplementary Affidavit, nor from the original records submitted to the Tribunal, it may be enforced that the same order was passed with regard to dismissal with due communication to all concerned.

11. Office Note or sanction granted for dismissal does not seem to fulfill the requirement of law unless order is based with regard to dismissal with due communication to the authority concerned.

12. Apart from above, the sanction has been granted at a stroke of pen for dismissal of 103 Army Personnel without application of mind to the individual cases, which resulted in arising of anomaly as is evident from material on record with regard to the applicant.

13. It is an admitted fact that as a follow up action, the applicant was issued with the Notice on 3rd June, 2013, wherein it has been mentioned that the applicant had been dismissed on 20th April, 2013. The impugned discharged order has been issued under Section 23 of the Army Act, 1950 and Army Rule 12 is reproduced as under :

“ DISCHARGE CERTIFICATE IN LIEU OF AFT – 1964
(Issued in accordance with Army Act Sec 23 and Army Rule 12)

No.15218671H Rank DISMISSED GNR Name RAKESH KUMAR CHAUDHARY of REGIMENT OF ARTILLERY is dismissed from the service by the order of the Commander, Arty Centre, Nasik Road under Army Act Section 20(3). His dismissal takes effect from 20 APR 2013. Cause of dismissal – ABSENT WITHOUT LEAVE Date of enrolment 30 JUN 2008.

Place : Nasik Road Camp
Date : 03 JUN 2013

Sd/Maj/Capt
SRO
Arty Records”

14. It appears that only after issue of discharge certificate, the applicant came to know about his dismissal from service. In consequence thereof, he submitted statutory complaint under Section 26 of the Army Act, 1950, duly affirmed by an Oath Commissioner, High Court, Allahabad with the prayer that the dismissal order dated 18-6-2013 passed by the respondent be set aside. In para 1 of the application he stated that the dismissal order dated 18-6-2013 was passed by Maj Harjinder Singh, Sr. Recording Officer, which was received by him in July, 2013.

15. He filed a petition on 9th June, 2013 in response to which by an order dated 18-6-2013 he was communicated that he has been dismissed from

to dismissal of service of the applicant since no mind has been applied to the factual matrix of the case to the individual case of the applicant.

17. A mechanical order of an authority without applying mind to material on record suffers from vice of arbitrariness, hence hit by Article 14 of the Constitution of India.

18. In the absence of any order passed individually with regard to applicant, only the order of discharge dated 3-6-2012 seems to be lone communication with regard to dismissal of service. It is well settled proposition of law that the order of dismissal/termination commences from the date of its communication. It has been brought on record that on account of loss of identity card, the applicant was once punished for a week imprisonment in accordance with rule.

Dismissal

19 One strange fact came to light is that in any case even if the period is taken from 2010, it shall not complete three years of period and this fact has been noticed by the Senior Record Officer Lt. Col Shatrughan Singh, in his comment dated 12-11-2013 pointing out that the applicant has voluntarily reported on 21-09-11 to Artillery Centre, Hyderabad and dispatched to his Regt. i.e. 3332, MSL Regt. along with movement order on the same date. Hence, the period of three years required for the dismissal of service with effect from 20-4-2013 being not completed is not permissible. The Note remark of Sr Record Officer dated 12-11-2013 is reproduced as under :

“15218671/LC/46/NE-5(A)

12 Nov 13

NER AND PENSION GROUP : NE-5 (LEGAL CELL)

OA No.100/2013 FILED BY NO.15218671H EX GNR RAKESH KUMAR CHOUDHARY OF UNIT 463 VS UOI & OTHERS FOR QUASHING DISCH ORDER & RE-INSTATE INTO SERVICE IN ARMED FORCES TRIBUNAL, KOLKATA REGIONAL BENCH)

1. A copy of OA No.100/2013 filed by No.15218671H Ex Gnr Rakesh Kumar of Unit 463 before Hon'ble AFT Kolkata (Regional Bench) is fwd herewith.

2. As per service records the petitioner has been dismissed from serve wef 20 Apr 13 being a peace deserter under Army Act Sec 20(3). It is pertinent to mentioned here that, the petitioner has been declared deserter by his unit wef 19 Feb 2010. Thereafter, he voluntarily reported to Arty Centre, Hyderabad on 21 Sep 11 and subsequently desp to his Regt i.e. 3332 Msl Regt by Arty Centre, Hyd alongwith mov order on 21 Sep 11(AN). A copy of mov order issued to the petitioner has been fwd to all concerned incl Army Records by Arty Centre Hyd. Vide their mov order No.307801/Msl/A2 dt.21 Sep 11. On reporting to 3332 Msl Regt. The petitioner again become AWL wef 01 Oct 11 and apprehension roll in this regard was issued to all concerned vide Unit 436 letter No.308102/16.A of 01 Oct 11.
3. As per AO 43/2001/DV, a peace deserter be dismissed from service after completion of three yrs of his desertion. In this instant case the petitioner has voluntarily reported at Arty Centre Hyd on 21 Sep 11.
4. In view of the above, you are requested to clarify how the petitioner has been dismissed from service wef 20 Apr 13 in accordance with AA Sec 20(3) with Army Ruyle 12 after he voluntarily reported at Arty Centre Hyd on 21 Sep 11 and subsequently desp to his unit. Also fwd specific parawise comments on the instant OA to this office latest by 15 Nov 13.

Sd/ Shatrughan Singh
Lt Col
Senior Record Officer"

20. While filing supplementary affidavit dated 19.08.14 by Lt Col Anil Chandra, OIC Legal Cell, HQ Bengal Area on behalf of the respondents, it has been asserted that Army has right to pass an order of dismissal of a deserter after completion of 3 years of his desertion. That is why the applicant has been dismissed w.e.f. 20.04.2013. Relevant portion of AA 43/201/DV & 3(b) of the Supplementary Affidavit (Supra) is reproduced as under :-

“3(b) In reply to the queries of Para (b) and (c) of the aforesaid order of this Hon’ble Tribunal it is submitted that the applicant was absent without leave (AWL) with effect from 19th February, 2010. As per procedure, the unit concerned had issued Apprehension Roll to all concerned vide 3332 Missile Regiment letter No. 308102/HQB/130/A dated 19th February 2010 and subsequently declared him deserter with effect from 19th February 2010 after 30 days AWL. As per Army Order 43/2001/DV, a peace deserter’s to be dismissed from service after completing of three years of his desertion. Therefore, the applicant herein was dismissed from service with effect from 20th April 2013 being a peace deserter for more than three years under the provisions contained in section 20 and sub section (3) of Army Act read in conjunction with Army Order 43/2001/DV after obtaining sanction of competent authority.

21. Ld Counsel for applicant submits that order of dismissal suffered from vice of arbitrariness hence not sustainable. It is also submitted that procedures prescribed by law has not been followed. However, Id counsel for the respondents defended the impugned order. From supplementary affidavit further it appears that after OSL casual leave (supra), a COI was convened and findings were recorded that applicant may be declared deserter from 19.02.2010. The report of enquiry seems to be started from 06.04.2010 till its final conclusion. Photocopy of the report does not contain the actual date when the Court of Inquiry submitted its findings alongwith opinion. Section 106 of the Army Act provides that in case a person is absent from duty without leave, a COI shall be convened and Court may declare such absence and period thereof and said deficiency, if any, CO may express opinion declaring such person as deserter and recommend it to be **entered in the Court Martial Book**. Sub Sec 2 (106) further provides that a person declared absent if absentee surrenders or is not apprehended for the purpose of Army Act shall deem to be deserter.

22. The Army Order 43/2001 of DV further provides that in case a person is absent continuously for **the period of 3 years or for more than 3 years**, then he may be dismissed from service in pursuance of power under Sub Section 3(1) (Supra). For convenience the relevant portion of Army Order 43/2001 of the DV is reproduced as under :-

Dismissal Procedure

23. 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 17 E 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 Reserved 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.

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

24. The following procedure will be adopted for dismissal of OR :

(a) A nominal roll in respect of such absence/deserters will be prepared by Record Officer concerned in triplicate in the form set out in Annexure-1 to Appendix 'F'. The nominal roll (in duplicate) will then be forwarded to the Commandant Centre/Depot concerned having Brigade Commander's power under Army Act Section 8 or, if he has no such powers, to the Sub Area Commander in whose jurisdiction the record office is located, for sanctioning dismissal under orders given in Para 24 below. If the nominal roll consists of more than one sheet, each sheet will be serially numbered. The nominal roll will be accompanied by a statement as per Appendix 'E' which will be pinned to the top sheet of the nominal roll. Such nominal rolls will be submitted to the authority concerned, i.e. Centre Commandant/Sub Area Commander by 20 Apr and 20 Oct each year.

(b) On the discharge certificate required under Army Act Section 23 read with Army Rule 12, reasons for dismissal may be shown as "absence without leave". The discharge certificate need not be issued on IAFY-1964. A simplified form that can be

used is at Appendix 'G'. This will be both in English and in the regional language of the person dismissed. An officer, not being an enrolled person, is not furnished with a discharge certificate.

(c) Such discharge certificate may be retained by record offices and dispatched under registered cover only when demanded specifically by the person to whom the discharge certificate pertains. This will avoid financial loss to the State resulting from the discharge certificate being sent to the last known address of the deserter by registered post and returned undelivered.

(d) After obtaining orders for the dismissal of the persons mentioned in the normal roll, one copy of the nominal roll will be returned to the Record office concerned.

(e) As soon as a person is dismissed from service, the civil police authorities will be informed simultaneously. In cases mentioned at Para 22 (a) (ii), (iii) and (iv) above, the civil police will be informed to effect arrest of these persons and proceed against them in civil courts for offences (other than desertion) committed by them. In other cases, it may be stated that it will no longer be necessary for the civil police to secure the arrest of the person concerned.

(f) No disciplinary action will be taken against a deserter/absentee, who is proposed to be dismissed in accordance with sub para (a) above, even though he is apprehended or voluntarily surrenders before he is dismissed.

24. In case of officers, the unit/formation Headquarters will inform the AG's Branch MP-5, [MP-6 and DGMS (Army-10)]. Discipline and Vigilance Directorate (DV-2) and MS Branch [MS-7/MS(x)] at Army HQ regarding the declaration entered by the Commanding officer of such persons in IAFD-918. CDA (Officers) will also be informed. After making necessary entries in the officer's record and special folio maintained for deserters, the AG's Branch [MP-5, MP-6 and DGMS (Army-1)], will await further information about the officer being arrested or rejoining the duty voluntarily. In the absence of any such information and after waiting for 10 years, AG's Branch [MP-5, MP-6 and DGMS (Army-1)] will forward the case file to the Discipline and Vigilance Directorate for preparation of case and obtaining Govt. Sanction for the dismissal of the officer deserter. The Unit/Formation, where the officer had served before deserting the service, will separately intimate AG's Branch (DV Dte) to initiate the case for dismissal within 30 days of completion of 10 years period. After the dismissal orders have been received from the Central Govt. the Discipline and Vigilance Directorate will inform the unit. AG/MP-5, MP-6 and DGMS (Army-1) and MS Branch [MS-7/MS-7/MS(x)]."

25. It appears that Section 106 further provides that name of the deserter shall be entered into Court Martial Book for follow up action but

Army Order gives stretch to it providing to wait for 3 years before exercise of power conferred by Sub Sec 3(20). In the present case applicant had reported to duty after absence w.e.f 01.10.2011, on 21.05.2013 and **thereafter joined the Unit on 25.05.2013**. Between period from 25.05.2013 to 30.05.2013 applicant seems to have discharged duty. In view of the above impugned order which has been passed on 15.06.2013 is prior to completion of three years mandatory period as provided vide Para 22 (b) of Army Order 43/2001/DV (Supra). Para 22 (b) of Army order 43/2001/DV stipulates that an individual who becomes AWL, while serving in a peace station can be **dismissed from service only "after three years of absence"**. Army Authority had issued order of dismissal without holding any enquiry or trial in pursuance to appropriate Court Martial, hence impugned order seems to suffer from exceeding of jurisdiction hence not sustainable.

PREMATURE DISCHARGE :-

26. Other facts which has been to be brought on record in pursuance of order passed by the Tribunal is that applicant submitted an application dated 14.01.2010 for his voluntary release from the Army stating that mentally he has been failed to adjust himself in Army Service and want to continue with study. Hence he may be released. Application dated 14.01.2010 was processed for compassionate discharge which was approved by order dated 02.02.2010 w.e.f. 30.04.2010. The order No.1377/CUO/Prem/NCOs/OR/08/RA-6 dated 02.02.2010, which is in the original record submitted to this Tribunal, is reproduced as under:

Artillery Records
Nasik Road Camp
Pin-422102
APS PIN-908800

1377/CUO/Prem/NCOs/OR/08/RA-6

02 Feb 2010

(Unit concerned)

PREMATURE DISCH ON COMPASSIONATE GRNDS
NON PENSIONABLE CASES

1. Premature disch on compassionate grnd in r/o the following pers has been approved :-

Ser	Army No, Rank, Trade & Name	Unit	DOE/DOB	Caste/State
(a)	15172914F Gnr (TA) Gnr (TA) Muslim/Kerala Ishaque C	861 Msl Regt	<u>28 Sep 04</u> 16 Jun 84	
(b)	14424701Y Gnr (GD) H/Dogra/Pb Pawan Kumar	217 Fd Regt	<u>24 Dec 97</u> 10 Nov 80	
(c)	15218671H Gnr (OPR) H/Bihari/Jh Rakesh Kumar Choudhary	3332 Msl Regt	<u>30 Jun 08</u> 02 Aug 88	

2. They will be discharged from service locally wef 30 Apr 10 (AN), if not in debit. They should have availed AL for the year before dispatching to home.

3. The cause of disch will be as under :-

“Discharged from service as his own request before fulfilling the conditions of his enrolment under item III (iv) of the table annexed to Army Rule 13 (3)”

4. Pl ensure that all docu in their respect are completed as per existing instrs and that their disch is finalized.

5. Instrs for carrying out local disch and submission of disch docu. Para 579 © and 603 of ARI 2000 may please be complied with. Disch will be sanctioned on a form as per specimen given in Para 1 (o) to Annx I of Appx ‘H’ of Ser 10 of ARI 2000, as they are not entitled for pension/gratuity. Pl ensure that disch docu alongwith the u/m addl docu are fwd to this office (ER Gp) imdt after local disch of the indl, so as to ensure final settlement of accounts and payment of dues to the indl is paid without any undue delay :-

(a) Details of Medal(s) if any not recd by the indl with auth of Part II Order.

(b) Cert regarding disposal of Identity card of the indl as per instructions contained in AO 12/2000.

(c) Fwd combined AGI Claim (Mutually and extended Insurance Benefits) on new format in quadruplicate imdt on receipt of this disch order as per Army HQ letter No. 56271/03/AC/Ins/Coord dt 22 Apr 91. One copy of joint photograph be pasted on the right corner of the original claim. Four copies of joint photographs after quoting No., Rank, Name and date of disch duly attested by an Offr on reverse side and placed in an envelope be att alongwith the claim.

6. If the indl is placed in low medical category, he will be brought before a Release Medical Board for assessment of cause, nature and degree of disability before locally discharge.

7. Pl ack.

Edalath)

(Haridasan

Capt
RO
For OIC Records

Copy to :-

PAO (OR) Arty (CC/LPC Cell) - for further action place.
Lekha Nagar, Nasik – 422 009

Internal

RA-1(A), RA-4, RA-5, RA- 5(SA), RA-7, RA-7(A), ER Coord, ER-9, - for further action.
R&D Sec, PLC, R&R Cell, Pen-1
Pen-2, NE-3, NE Lib & ECHS Cell.

ER – (2) Application for premature disch and connected docu in r/o the above
indl are
encl for your further action. Part II Order No. and date of local disch may
pl be
intimated to this section imdt after local disch of the indl.”

27 A plain reading of the **order dated 02.02.2010 shows that applicant shall deem discharged from 30.04.2010** and will be entitled to avail Annual Leave for the year 2010 before discharging him. **It appears that aforesaid order dated 02.02.2010 approved pre-mature discharge on compassionate ground was never communicated to the applicant.** The reason is not understandable. There is gross negligence on the part of the army authorities in not communicating the aforesaid order for the reasons best known to them. In case the order would have been communicated, subsequent events after 03.02.2010 would not have been taken place and the applicant would have gone to his home to join family without any stigma. Even after the applicant has absented from duty on 19-2-2010 makes no difference since more than 2 weeks time was sufficient to

communicate the order beginning from 2-2-2010 through FAX or other means seems to be the practice in Army.

28 We further note that there are several letters on record submitted by the applicant shows that he has been declared deserter and none of the letters reveals that he has been communicated with for voluntary release on compassionate grounds from army, in pursuance to the provisions contained in Sub Rule No. (ii)(iv) of Rule No. 13 of AR. In the Original record there are about 5 letters including dated 08.10.2010 and dated 20.12.2010 speaks volumes. For convenience letter dated 20.12.2011 (English translation) in its totality is reproduced as under :-

To

The Senior Record Officer
Topkhana Abhilekh
Artillery Records
Nasik Road Camp - 422102

SUB : RETURN OF DOCUMENTS FOR CIVIL EDUCATION
ORIGINAL RECEIVE LETTER, PROVISIONAL CERTIFICATE,
CERTIFICATE, REGISTRATION NUMBER RESIDENTIAL
CERTIFICATE, CASTE CERTIFICATE.

Sir,

With due respect I, Army No. 15218671H Gnr (O.P.R.) Rakesh Kumar Choudhury, was serving with 3332 Msl Regiment, under Unit 463 Headquarter as a Gunner. Due to my misunderstanding, I have become deserter during Oct 2011. After being deserter twice I went to my Unit but they did not allow me to stay. As soon as I went to my unit, my Unit **Nb Sub Raj Kumar caught my shirt collar and abused me. He also told me that you get out, else I will do your Court Martial and I will not keep you here.** He pushed me out of that sight. After tht I went to Nasik Road, they sent me to Hyderabad Centre. There I asked to rejoin and also asked for my original documents. They told me nothing can be done from here; your unit can do

this entire thing. Afterwards once again **I went to my unit along with my father and brother and waited in the main gate for two days without food and water and I requested to meet the Colonel or Major Sir but our Nb Sub Raj Kumar did not allow me to meet any one of them. S During this time once Major Bahuruba seen us but he too did not bother to meet us. Now I am unemployed and my life is getting spoiled. I want to continue my further studies.**

Hence it is sincere request that kindly **do justice with me return me my entire original Certificate alongwith proper discharge.** I will remain ever grateful for your kindness.

Yours sincerely,

Date : 20.12.2011

Army No. 15218671H
 Rank : Gnr (O.P.R.)
 Name:RakeshKumar Choudhury
 Father:Ram Ch. Prasad Choudhury
 Vill. & P.O. - Chulhiya
 P.S. : Ohanpur
 Dist. – Deoghar (Jharkhand)
 PIN : 814157

29. Contents of letter (supra) speaks volume and inference may be drawn that the applicant being discharged from army while running from pillar to post and accepted the allegation of desertion for return of records. Fact remains that order dated 02.02.2010 which approved applicant's discharge on compassionate grounds could not see the light of the day for some unforeseen reasons. Army authorities had not taken the note of the contents of the letter dated 20.12.2011 to find out genuineness of the applicant's grievance as well as reasons for non-communication of order dated 02.02.2010. In case the order of pre-mature release dated 02.02.2010 would have been communicated with further proceedings in accordance with the Rules there would have been no situation for the applicant's to face the present dilemma. Army Authorities should look into

this aspect of the matter and fix accountability according to Rules , for follow up action.

Malice in Law.

30 The factual matrix on record discussed herein above are responsible for the suffering but may not be malice on fact since no one have impleaded, however, it seems to be because of malice in law. The State is under obligation to act fairly without ill will or malice-in-law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide Jaichand Lal Sethia Vs. The State of West Bengal & Ors., AIR 1967 SC 483; A.D.M. Jabalpur Vs. Shiv Kant Shukla, AIR 1976 SC 1207; State of A.P. Vs. Goverdhanlal Pitti, AIR 2003 SC 1941).

31 The respondents seem to have treated the applicant in an unfair manner by withholding the order of pre-mature voluntary release from Army that too which was duly approved by the competent authority. The

applicant has been dismissed from service retrospectively within three years from the date of desertion without due court martial proceedings in accordance with the rules, Army Act or Regulations, hence suffers from vice of arbitrariness.

32. Since the impugned order/letter dated 03.06.2013 of dismissal from service has been issued retrospectively i.e. 28.04.2013 it is substantially illegal in view of settled proposition of law. Dismissal order may not be given retrospective effect.

COST :-

33. In a case reported in 2011 Vol 8 SCC 249 **Ramrameshwari Devi and others v. Nirmala Devi and others**, Hon'ble Supreme Court lays emphasis to compensate the person, who has been forced to indulge into litigation. The same view has been adopted by the Supreme Court in subsequent case reported in 2012, Vol 6 SCC 430 - **A. Shanmugam v. Ariya Kshetriya Rajakula Vamasathu Madalaya Nandhavana Paripalanal Sangam represented by Its President and others**. In the case A. Shanmugam (supra) Hon'ble Supreme Court has considered its earlier pronouncement, which are as under :-

Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161;

Ram Krishna Verma v. State of U.P., (1992) 2 SCC 620;

Kavita Trehan v. Balsara Hygiene Products Ltd. (1994) 5 SCC 380;

Marshall Sons & Co. (I) Ltd. V. Sahi Oretrans (P) Ltd., (1999) 2 SCC 325;

Padmawati v. Harijan Sewak Sangh, (2008) 154 DLT 411;

South Eastern Coalfields Ltd. V. State of M.P. (2003) 8 SCC 648;

Ramrameshwari Devi and others (supra).

34. In the case of South Eastern Coalfields Ltd (supra), the Apex Court while dealing with the question held as under :-

“28..... Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory order favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.”

35. In the case of **Amarjeet Singh v. Devi Ratan**, (2010) 1 SCC 417 the apex Court held as under :-

“17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit*, which means the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus any underserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized, as

the institution of litigation cannot be permitted to counter any advantage on a suitor from delayed action by the act of the court.”

36. In a case reported in 2012 Vol 3 SCC 1, **Centre for Public Interest Litigation and others v. Union of India and others** – while allowing the petition Hon’ble Supreme Court directed the respondents to pay a cost of Rs. 5 crores each and some of the respondents to pay a cost of Rs. 50 lakhs each, out of which 50% was payable to the Supreme Court Legal Services Committee to provide legal aid to poor and indigent litigants and remaining 50% was directed to be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

37. In other case reported in 2013, Vol 7, SCC 416 – **National Textile Corporation (Uttar Pradesh) Limited v. Bhim Sen Gupta and others**, Supreme Court imposed a cost of Rs. 50000/- since the correct facts were not placed before the court.

38. In view of the above, present case also required to be imposed exemplary cost which is assessed to Rs. 50000/- out of which applicant may be paid an amount of Rs. 25000/- and rest 25000/- (50%) shall be retained with the Tribunal as legal aid and welfare purpose. Accordingly the O.A. deserves to be allowed, O.A. is allowed.

39. A great American Judge, Oliver Wendell Holmes rightly said to quote:- “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do

than the syllogism in determining the rules by which men should be governed.”

40. The experience shows the much secrecy coupled with absolute power results into autocracy causing pain and damage to individual as well as society collectively. The present case shows how an establishment expected to be disciplined and fair in action, failed to work in a just and fair manner.

41 While dealing with their own brethren, the applicant who could not adjust himself in army moved an application for voluntary release/discharge and the same was accepted and approved. Respondents acted in a high handedness manner. Then there was no justifiable ground on the part of the respondents to extend such shabby treatment in a hasty manner in contravention to relevant statutory provisions.

42. Roscoe Pound, Former Dean of the Harvard Law School, while dealing with humanitarian aspect of law in his treatise; “An ideal element in law” observed that in society the law is leading to a broad humanitarian conception. He said that it shall be an ideal, a picture that men have before think today increasingly bound further to affect law. Roscoe Pound further says :

“Today throughout the world the idea of satisfying the wants of men in civilized society is leading to a broad humanitarian conception both of liability in tort and of liability upon contract. Confining ourselves for a moment to the former, there is an idea that the law can be made to secure us all against the losses and injuries incident to life in society in a crowded world so that no one shall find himself deprived by political, physical, cultural, social and economic, but shall rather find himself not merely secured in these expectations but restored to the full measure of them when loss or injury or frustration befalls him.”

43. The applicant once expressed his desire to leave army being not able to adjust himself should not have been compelled to remain in army directly or indirectly. Decision on voluntary discharge should have been communicated to the applicant. It is the compulsive retention of applicant by the respondent army created the havoc for the applicant and made him deserter because of overstaying of leave. It is not a normal case when a person is over staying the leave for some unfounded reason or otherwise liable to be declared deserter. But it is a case where the applicant mentally cannot adjust himself in the Army, in consequence there of he applied for voluntary discharge which was accepted, approved but not communicated. Though we do not approve over staying of leave but facts remain that order of dismissal was passed without compliance of 3 years of the period (supra) and for unforeseen reasons, decision of voluntary discharge of the applicant on compassionate grounds taken by the competent authority was never communicated.

O R D E R

44. Hence we order as below. OA Allowed :-

- i) The impugned order/letter No. 15218671H/Dism-Apr 13/NE-1 dated 15.06.2013 as well as the Discharge Certificate dated 03.06.2013 issued by Artillery Records are set aside with all consequential benefits with liberty to proceed afresh in accordance with rules.
- ii) Respondents are further directed to consider the applicant's voluntary release from the Army expeditiously within one month in

terms of approval granted by the Competent Authority vide order dated 02.02.2010 (supra) and communicate the decision to the applicant.

(iii) No recovery shall be made from the applicant with regard to service benefit or salary provided to him during the period in question.

iv) Cost is quantified to Rs. 50000/- out of which the applicant shall be entitled to an amount of Rs. 25000/- and the rest amount of Rs 25000/- shall be remitted to the AFT Bar Association, Kolkata Bench for legal aid and welfare schemes. Let the cost be deposited within 3 months. In case the amount is not deposited, the Collector Kolkata shall recover it as arrears of land revenue and remit the same to the Tribunal. The applicant shall be entitled to receive the amount of Rs. 25000/- by cheque issued by the Registry of the Tribunal. Cost shall be recoverable from the officers by the Army.

45. Let a copy be forwarded by the Registry to the Chief of the Army Staff, New Delhi within 2 weeks for appropriate action in the matter.

46. Application is allowed accordingly.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE DEVI PRASAD SINGH)
Member (Judicial)

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