

**SEE RULE 102(1)****ARMED FORCES TRIBUNAL, KOLKATA BENCH**

**T. A. NO. 7/2013**  
**(Arising out of F. A. No. 427/1991)**

**THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2016**

**CORAM**

**HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)**

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

**APPLICANT(S)**

1. Dharamraj Singh, S/O Deonandan Singh, Army No. 14502488, Resident at Vill. Kamarpur, PS. Buxar, Dist. Bhojpur,
2. Shri Raj Kumar Singh S/O Late Bharat Prasad Singh, Vill. Kairpur, PS. Buxar, Dist. Bhojpur,
3. Ali Ahamed Khan S/O Mehidi Hassan Khan, Army No 13922241, Vill. Sarimpur, PS. Buxar, Dist. Bhojpur,
4. Md. Ismail, S/O Md. Mosadi, Army No. 13922240, Vill. Buxa, PS. Buxar, Dist. Bhojpur,
5. Ram Awatar Singh, S/O Shri Kawal Singh, Army No. 14283327, Resi at Vill, Kamarpur, PS. Buxar, Dist. Bhojpur,
6. Murulidhar Prasad, S/O Dowarika Singh, Army No 13922852, Resi of Vill. Kairpur, PS. Buxar, Dist. Bhojpur
7. Brijmohan Singh S/O Ram Barai Singh, Army No. 14502418, Vill. Kamarpur, PS. Buxar, Dist. Bhojpur
8. Bhim Singh S/O Inderdeo Singh, Army No. 14502574, Vill. Sarimpur, PS. Buxar, Dist. Bhojpur,
9. Tej Narayan Choudhury, S/O Ram Bachan Choudhury, Army No. 14211547, resident of village Bhitihar, P.S. Etarhi, Dist. Bhojur,
10. Satya Narayan Singh S/O Kailash Singh, Army No. 14283410, resident of village Bhitihara, P.. Etarhi, Dist. Bhojpur.
11. Rama Sarai Singh S/O late Ram Narayan Singh, Army No. 14211291, resident of vill: Kairpurwa, P.S. Buxer, Dist. Bhojpur.
12. Paras Nath Ram S/O Muni Ram, Army No. 14283409, resident of Vill: Kamarpurwa, P.S. Buxer, Dist. Bhojpur.

**-versus-**

1. Union of India through Ministry of Defence, Government of India, New Delhi.
2. The Chief of the Army Staff, Army HQ, RK Puram, Defence HQ, New Delhi
3. Major Rao S Wenkhede, Incharge, Branch Army Recruiting Office, Danapur Cantt, Patna

4. Maj Mahesh Chandra Dutta, Branch Army Recruiting Office, Danapur Cantt, Patna

5. Recruiting Officer, Zonal Recruiting Office, Calcutta – 20

**For the Appellant(s)** : Mr. Awadhesh Kumar Mishra, Advocate

**For the respondent(s)** : Mr. Dipak Kumar Mukherjee, Advocate

## **ORDER**

**PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)**

1. Whether the civil proceedings can be determined on the basis of judgment of Criminal court is the root question involved in this appeal.

2. Title Suit Nos. 64 and 132 of 1983 have been filed by the appellants/plaintiffs (hereinafter referred to as the appellants) seeking declaration to the effect that they are the personnel of regular army and are still in service and for a direction to the defendants to allow them to work on their respective posts. The appellants have also sought declaration that they have been regularly appointed and had not done any illegal act at the time of their appointment. The Trial Court dismissed the aforesaid suits vide the judgment and decree dated 30.03.1991. Feeling aggrieved therewith the appellants have preferred the first appeal before the Hon'ble High Court of Patna (Appeal No. 427 of 1991) which was transmitted by the said Hon'ble High Court to this Tribunal in view of section 34 of the Armed Forces Tribunal Act, 2007. After its receipt the same was registered as T.A. No. 7 of 2013. This is how the appeal is before us.

3. During the pendency of the appeal the appellant No. 2 died and his legal representatives were brought on record. This Tribunal also allowed the appellants' application for transposition of the name of the appellants/plaintiffs No. 6 and 7.

4. The appellants' case, in brief, is that they are legally and validly recruited members of Indian Army, recruited in the month of July and August 1970 after undergoing medical check their names were entered in the Army register kept for this purpose and were sent to different training centers. Before moving to the concerned training centers Rahadari certificates, railway warrant and advance for ration were issued to them. After reaching to the training center they have

submitted their papers and were issued with service memos. Monthly salaries were also paid to them. However, defendant No. 3 Major Rao S Wankhede, who was in-charge of defendant no. 4, that is, Major Mahesh Chandra Dutta, broke the stitch of the Enrolment register, removed the names of the appellants from the register alleging defendant No. 4 that he for his personal benefit issued Rahadari certificates in appellants' favour. He lodged FIR with the S.P, CBI and S.P., Intelligence, Bihar branch against the appellants and some other persons. Charge-sheet was issued against 18 persons including the appellants. However, the Special Judicial Magistrate, Patna, vide his judgment dated 30.01.1981 acquitted all the appellants. After acquittal the appellants knocked all the doors of the respondent but they did not get any suitable reply. Thereafter, the suits have been filed.

5. According to the plaintiffs, they were recruited in Indian Army as per rules and/or still members of the Army since 1970 as they were neither discharged nor issued any discharge certificate nor have been served with any show-cause notice. They were also acquitted by Criminal Court. The evidence adduced before the Criminal Court and its findings and judgment acquitting the appellants binds the respondents and they are entitled to be treated in service.

6. By filing the Written Statement the respondents have denied the appellants' claim. According to the respondents, the appellants are not legally and validly recruited Army personnel. According to them, the Branch Recruiting Officer, Patna, intimated A.M.C. centre that some persons have managed to get themselves fraudulently enrolled into Army during the period 3<sup>rd</sup> February 1970 to 28<sup>th</sup> November, 1970. He has also forwarded roll of 82 recruits actually enrolled by the centre. On verification it was found by the AMC Centre and School that the names of the appellants were not forwarded by the B.R.O., Patna. This discrepancy was brought to the notice of B.R.O., Patna and the B.R.O., Patna, confirmed that these individuals had never been actually recruited by them. The fact was brought to the notice of Headquarters for taking up the case with higher authorities and to intimate decision regarding disposal of matter. The Headquarter Central Command directed all concerned A.M.C. Centre and School to dispatch the recruits to Bihar Regimental Centre, Dinapore Cantonment under escort because a Court of Inquiry to investigate into these cases was ordered and the matter was already in progress. All the appellants were sent to Bihar

Regimental Centre Dinapore Cantonment according to the direction of Headquarter Central Command. Some appellants were examined during the Court of Inquiry where they admitted that they adopted the way to get themselves enrolled illegally and fraudulently by paying money to one Lal Babu and some others and that they were also not even examined medically. The said Lal Babu was also examined and some of the plaintiffs also recognized him that he was the person through whom they manipulated. Major Mahesh Ch. Dutta(defendant No.4), the then Recruiting Officer was also examined and he denied the signature purported to be his signature on many important documents. The measurement of weight, height and chest of such persons were also examined and it was found that the measurements in the documents were not correct and in some cases it was less than acceptable standards as laid down in the recruiting manual for Bihari's. It was also found that some of the appellants were suffering from some disease due to that they were not fit for selection. Therefore, the Headquarter of Bihar and Orissa Sub-area intimated on 08.06.1971 that all the concerned are to be treated as civilian, no formality with regard to their discharge from service was necessary and, accordingly, A.M.C. Centre and School cancelled the enrolment Part-II order in respect to the appellants. According to the respondents, the appellants are not entitled to even claim such relief as sought for in the plaint.

7. On the basis of the pleadings of the parties the Trial Court framed the following issues :

- A. Is the suit as framed maintainable ?.
- B. Has the court jurisdiction to try the suit ?
- C. Have the plaintiffs' cause of action for the suit ?
- D. Is the suit barred by Law of Limitation, estoppels, waiver and acquiescence ?
- E. Is the court fee paid sufficient ?
- F. Have the plaintiffs been appointed legally and their appointment is legal and regular in the Indian Army ?
  
- G. Are the plaintiffs entitled for pay and allowances from the date they were removed from the Army ?
- H. Are the plaintiffs entitled to any relief or reliefs, if any?

8. The appellants examined themselves whereas the respondents examined defendant Nos. 3 and 4.

9. The Trial Court, finding inter alia; the appellants' appointments in the Indian Army cannot be termed as legal and regular and they are not entitled for the relief claimed, dismissed the suit. Hence, this appeal.

10. Mr. Awadhesh Kumar Mishra, learned counsel for the appellants submitted that the Trial Court has committed serious error in not considering the evidence adduced and the findings arrived thereupon by the Criminal Court and its judgment. According to the appellants' counsel, the Trial Court ought to have drawn adverse inference against the respondents for not producing the material documents produced by CBI before the Criminal Court. According to the appellants' counsel, the judgment of Trial Court, being not based on proper appreciation of evidence and materials brought on record ignoring the Criminal Court judgment, is vague and deserves to be set aside and their appeal deserves to be allowed.

11. On the other hand, Mr. Dipak Kumar Mukherjee, learned counsel appearing for the respondents while supporting the judgment and decree of the Trial Court would contend : The finding and judgment of the Criminal Court is not admissible for the purpose of civil case ; the appellants have utterly failed to prove their case ; as per Article 58 of the Limitation Act suit being not filed within three years from the date of accrual of cause of action needs rejection in limine ; the appellants have neither summoned the records of the criminal case nor have examined the witnesses examined in criminal case ; the Trial Court having found documents not in respondents' possession but were in possession of CBI rightly rejected the appellants prayer for drawing adverse inference against the respondents ; and, therefore, the appeal deserves to be dismissed by imposing heavy costs upon the appellants.

12. We have heard the learned counsel for the parties and perused the Paper Book.

13. Indisputably, the appellants have not filed any document evidencing their recruitment and medical examination. The appellants have further failed to examine the witnesses examined before the Criminal Court. They have only examined themselves. In their depositions they have admitted that they do not have any appointment letter and they also do not know the name of doctor who

medically examined them before their appointment. Their names were absent in the Enrolment Register produced by the respondents before the Trial Court ; some of the appellants' age in the year 1971 were below 18 years. It is also not in dispute that the appellants have been acquitted by the Criminal Court giving them benefit of doubt.

14. The law relating to the admissibility of a judgment in a criminal proceedings vis-à-vis the civil proceedings and vice versa is governed by the provisions of The Indian Evidence Act, 1872. Section 43 of the said Act relevant for this purpose reads thus :

*“43. Judgment, etc., other than those mentioned in sections 40 to 42, when relevant, - Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.*

#### *Illustrations*

*(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libelous is true, and the circumstances are such that it is probably true in each case, or in neither.*

*A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.*

*(b) A prosecutes B for adultery with C, A's wife.*

*B denies that C is A's wife, but the Court convicts B of adultery.*

*Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife*

*The judgment against B is irrelevant as against C.*

*(c) A prosecutes B for stealing a cow from him, B is convicted.*

*A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.*

*(d) A has obtained a decree for the possession of land against B, C, B's son, murders A in consequence.*

*The existence of the judgment is relevant, as showing motive for a crime.*

<sup>29</sup>*[(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.*

*(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue”].*

15. In terms of the aforementioned provisions, the judgment in a criminal case shall be admissible provided it is a relevant fact in issue. Its admissibility otherwise is limited. The Supreme Court in the case of **Syed Askari Hadi Ali Augustine Imam and another vs. State (Delhi Administration) and another reported in (2009) 5 SCC 528** considering the pronouncement in the case of K.G. Premshanker v. Inspector of Police (2002) 8 SCC 87 and M.S. Sheriff v. State of Madras (AIR 1954 SC 397) has held in paragraphs 25 and 28 as under:

*“ 25. It is, however, significant to notice that the decision of this Court in Karam Chand Ganga Prasad v. Union of India, wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled stating : (K.G. Premshanker case, SCC P. 98, Para 33)*

*“33. Hence, the observation made by this Court in V. M. Shah case that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations may be Karam Chand case are in contest of the facts of the case stated above. The court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case as well as Sections 40 to 43 of the Evidence Act”.*

*Axiomatically, if judgment of a civil court is not binding on a criminal court a judgment of a criminal court will certainly not be binding on a civil court”.*

*“28. Relying inter alia on N S Sheriff, it was furthermore held; (Iqbal Singh Marwah case, SCC pp. 389-90, para 32)*

*“32. Coming to the last contention that an effort should be made to avoid conflict of finding between the civil and criminal courts, it is necessary to point out that this standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein”.*

16. The Supreme Court further in the case of **Seth Ramdayal Jat vs. Laxmi Prasad reported in (2009) 11 SCC 545** considering the Hon'ble Apex Court judgment in the cases of Anil Behari Ghosh vs. Latika Bala Dassi (AIR 1955 SCC 566), Lalmuni Devi v. Jagdish Tiwary ( AIR 2005Pat.51 and Shanti Kumar Panda v. Shakuntala Devi, (2004) 1 SCC 438 has held in paragraphs 11, 13, 15 and 16 which are as follows:

*“11. In terms of the aforementioned provision, the judgment in criminal case shall be admissible provided it is a relevant fact in issue. Its admissibility otherwise is limited. It was so held in Anil Behari Ghosh v. Latika Bala Dassi in the following terms: (AIR p. 571, Para 15)*

*“15..... The learned counsel for the contesting respondents suggested that it had not been found by the lower appellate court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu had murdered his adoptive father, though this matters had been assumed as facts. The courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is valid and genuine will, there is intestacy in respect of the interest created in favour of Charu if he was the murderer of the testator. On this question the courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life. It is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence”.*

*“13. A similar issue is dealt in some details in Lalmuni Devi v. Jagdish Tiwari wherein it was held: (AIR p. 55, Para 14).*

*“14. Relying on the judgment of the Supreme Court in Anil Behari Ghosh v. Latika Bala Dassi, a Division Bench of this Court in its judgment in Mundrika Kuer v. Bihar State Board of Religious Trusts has laid down to the same effect. Para 7 of the judgment is set out herein below for the facility of quick reference:*

*“7. It is true that, if the Board acted capriciously and arbitrarily without any material whatsoever and attempts to administer private property, saying that it is a public religious trust, this Court may have to interfere in appropriate cases: but it cannot be said here that there were no prima facie materials to show that the trust is a public religious trust. **The acquittal of the petitioner in the criminal case (Annexure A) was very much relied upon; but it is well settled that acquittal or conviction in a criminal case has no evidentiary value in a subsequent civil litigation except for the limited purpose of***



***showing that there was a trial resulting in acquittal or conviction, as the case may be. The findings of the criminal court are inadmissible”.***

*A judgment in criminal case, thus, is admissible for a limited purpose. Relying only on or on the basis thereof, a civil proceeding cannot be determined, but that would not mean that it is not admissible for any purpose whatsoever”.*

*“15. A civil proceeding as also a criminal proceeding may go on simultaneously. No statute puts an embargo in relation thereto. A decision in a criminal case is not binding on a civil court. In M. S. Sheriff v. State of Madras, a Constitution Bench of this Court was seized with a question as to whether a civil suit or a criminal case should be stayed in the event both are pending. It was opined that the criminal matter should be given precedence. In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment”.*

*“16. If a primacy is given to a criminal proceeding, indisputably, the civil suit must be determined on its own keeping in view the evidence which has been brought on record before it and not in terms of the evidence brought in the criminal proceeding. The question came up for consideration in K.G. Premshanker wherein this Court inter alia held ; (SCC p.97, paras 30-31).*

*30. What emerges from the aforesaid discussion is – (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC next provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are*

*satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.*

*31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by A on B's property, B filed a suit for declaration of its title and to recover possession from A and suit is decreed. Thereafter, in a criminal prosecution by B against A for trespass, judgment passed between the parties in civil proceedings would be relevant and the court may hold that it conclusively establishes the title as well as possession of B over the property. In such case, A may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is – whether judgment, order or decree is relevant, if relevant – its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case”.*

17. In view of above now it is settled law that save and except section 43 of the Evidence Act which refers to sections 40, 41 and 42 thereof a judgment of a Criminal Court shall not be admissible in a civil suit, what however would be admissible is the admission made by a party in a previous proceedings. In the same manner a civil suit must be determined on its own keeping in view the evidence which has been brought on record before it and not in terms of evidence brought in the criminal proceedings. In view of the aforesaid pronouncements it is crystal clear that civil proceedings cannot be determined on the basis of judgment of Criminal Court but has to be determined independently on the basis of evidence adduced before it. It is also not in dispute that the Criminal Court judgment was not based on any admission made by the respondents before it and, therefore, nothing is admissible from Criminal Court

judgment so far as the suits filed by the appellants are concerned and, thus, the contention raised by the appellants' counsel that the Trial Court ought to have considered the findings and judgment of the Criminal Court while deciding the civil suit is not correct and is, therefore, rejected.

18. Reverting to the facts of the case the respondents have denied the appellants' enrolment in the Army. According to them, with the help of some forged Rahadari certificates and railway warrant etc. they have undergone training for some period. However, when the above facts revealed they have been shown their way and as they were not legally recruited members of Army no notice was required to be served upon them. The Trial Court after considering every aspect of the matter came to a conclusion that they are not legally appointed army personnel and dismissed the suit. After considering the entire facts and materials brought on record and the arguments advanced by the parties, we are also of the opinion that the appellants utterly failed to prove their case. It is settled law that the plaintiffs have to prove their own case and they cannot base their case on the weakness of the defendants. So far as the question of adverse inference is concerned, the appellants have not summoned the records of criminal case in which the documents were exhibited nor have brought before us any material suggesting that they were really intend to call the documents in possession of the respondents which were relevant for the lis and also the fact that those documents were in fact in their possession and in such circumstances the Trial Court has rightly not drawn adverse inference against the respondents. The appellants have filed suits purely on the basis of alleged fraud practiced upon them by the respondent No. 3 Major Rao S Wenkhede . It is well settled principle of law that the question of fraud is purely a question of fact and heavy burden lies upon the appellants to prove the same. However, the appellants utterly failed to even plead the ingredients of fraud. They have also failed to adduce any cogent and clinching evidence in this regard. It is also not in dispute that the appellants were not removed on account of First Information Report (FIR) lodged against them but were removed administratively upon having found them not legally recruited by the respondents. It is also settled principle of law that no amount of evidence can be looked into without pleading the facts in that regard. According to them, they have been appointed by the respondent No.

4 Mahesh Chandra Dutta but the said Maj Dutta had denied the above fact. The appellants further failed to bring on record any material suggesting or proving the fact of their recruitment in the Army. In the above backdrop, in our considered opinion, the appellants utterly failed to prove the fact that they were legally recruited members of the Indian Army.

19. So far as the issue of limitation raised by the respondents is concerned, according to Article 58 of the Limitation Act suit has to be brought within three years from the date, first cause of action accrues in plaintiff's favour which, according to their own case, accrued in the year 1970-71. However, the Trial Court had not dealt with this issue; the appellants have also not preferred any cross-objection/cross-appeal and, therefore, it would not be proper for us to opine on the above aspect of the matter. Moreover, it will also not effect the ultimate result.

20. For the foregoing, appeal being devoid of merit is liable to be and is hereby dismissed, however, without any costs.

21. Let a plain copy of this order duly countersigned by the Tribunal Officer be supplied to the parties after observance of usual formalities.

(Lt Gen Gautam Moorthy)  
Member(Administrative)

(Justice N.K. Agarwal)  
Member (Judicial)

SS.