

Chief Justice's Court

Case :- SPECIAL APPEAL No. - 261 of 2006

Appellant :- Hari Prakash Singh

Respondent :- Union of India Thr. Secy Minsitry of Defence and 2 ors

Counsel for Appellant :- A.M.Tripathi, Anupriya Srivastava, O.P.Srivastava with Kaushalendra Yadav, V.K.Dubey

Counsel for Respondent :- Dipak Seth, S.B. Pandey (D.S.G.I.) with Anand Dwivedi, Neerav Chitravanshi, Shreeprakash Singh, Siddharth Dhaon

Hon'ble Arun Bhansali,Chief Justice

Hon'ble Jaspreet Singh,J.

1. This appeal is directed against order dated 31.01.2006 passed by learned Single Judge in writ petition No. 480 (S/S) of 2001.
2. The writ petition was filed by the appellant, *inter alia*, aggrieved by the dismissal order dated 28.04.1995 from the post of Clerk (GD). The appellant was appointed in Indian Army as clerk (GD) on 08.03.1984. At the relevant time, he was posted in 230 Medium Regiment, Artillery Records, Nasik Road Camp, Nasik, Maharashtra. He left the place of posting without seeking permission from the competent authority on 25.05.1991. However, he got himself admitted in the Military Hospital, Meerut on 21.06.1991 and remained there up to 28.08.1991, whereafter he did not report back to duty at Nasik and remained continuously absent from duties. The appellant was dismissed from service with effect from 28.04.1995. The writ petition was filed on 23.01.2001.
3. A response was filed, *inter alia*, indicating that after discharge from Hospital on 28.08.1991, the appellant should have joined his duties at Nasik Maharashtra, apprehension orders were issued to him through SSP, Lucknow but he did not surrender. He remained absent for over three years, the Court of Inquiry declared him to be a 'Deserter' under Section 106 of the Army Act, 1950 ('the Act') and a formal order of dismissal under proviso to Rule 17 of Army Rules, 1954 ('the Rules') was passed on 28.04.1995, following due procedure.
4. The appellant attempted to justify his absence by filing supplementary rejoinder affidavit indicating that he was ill and suffering from neurological

disorder and was taking treatment at Delhi and Lucknow and was declared fit to perform duties by doctors at Lucknow on 17.08.1995, however, he was not permitted to join.

5. Learned Single Judge, after hearing the parties, came to the conclusion that there was nothing on record to demonstrate that the petitioner had, in fact, sought permission to leave the place of posting or he was granted leave on medical ground by the competent authority. The petition was filed after lapse of more than five years from the date of issuance of order of dismissal and therefore, the same suffered from laches. Learned Single Judge came to the conclusion that as the appellant was treated as deserter from Army, after holding Court of Inquiry, the dismissal was just, legal, valid and proper and that such behaviour was not expected from an Army personnel, a member of the disciplined forces and therefore, the Court did not find any ground to interfere with the order and dismissed the writ petition.

6. It is submitted by learned counsel for the appellant that learned Single Judge was not justified in dismissing the writ petition. Submissions have been made that for imposing punishment of dismissal, though the respondents were required to follow provisions of Rule 17 of the Rules, no opportunity of hearing was provided to the appellant as no inquiry worth the name was held. Further submissions have been made that even while treating him as deserter, no opportunity was provided to the appellant and therefore, the entire action of the respondents stood vitiated. It was claimed that as the appellant was suffering from neurological disease, he was admitted in Hospital and thereafter, on account of his illness for a long time, he could not report back on duty and though he was declared fit by the doctors on 17.08.1995, prior to that on 28.04.1995, he was dismissed from service, which is not justified and against all canons of law.

7. Learned counsel for the respondents supported the order impugned. Submissions have been made that the entire conduct of the appellant-petitioner is writ large, wherein after serving from 1984 till 1991, without taking leave, he left the headquarter and then got himself admitted at the Military Hospital and on discharge on 28.08.1991, he did not join the duties

and remained absent without any information. Submissions have also been made that the appellant had on 17.09.1993, approached the respondents clearly indicating that he was not in a position to come back on duty and therefore, he may be paid whatever is due.

8. It is submitted that inquiry of his absence without leave, under Section 106 of the Act, was held and as the appellant did not surrender despite the specific orders and attempts made in this regard, he was declared a deserter on 31.12.1991 with effect from 28.08.1991 and as a consequence of such declaration, he was imposed with the punishment of dismissal, which is justified in the circumstances of the case. Further submissions have been made that the entire plea raised pertaining to the neurological disease, as claimed in the writ petition, is clearly incorrect inasmuch as the medical treatment documents produced by the appellant as part of the supplementary rejoinder affidavit show that all the prescriptions are that of skin and VD related doctors. It is prayed that the petition be dismissed.

9. During the pendency of the special appeal, the respondents were directed to produce the record, which has been produced for perusal of the Court.

10. We have considered the submissions made by learned counsel for the parties and have perused the material available on record and made available by counsel for the respondents under the directions of the Court.

11. The undisputed facts are that the appellant was appointed on 08.03.1984, he left the place of posting without seeking permission from the competent authority on 25.05.1991, get himself admitted on 21.06.1991 at Military Hospital and remained there up to 28.08.1991, whereafter on being discharged from the Hospital, he did not report back on duty.

12. On account of absence from duty with effect from 28.08.1991, the Court of Inquiry was held on 16.12.1991, wherein, after examining three witnesses, findings were recorded that the appellant had left the unit on 25.05.1991, he was admitted to the Hospital voluntarily on 21.06.1991 and discharged on 28.08.1991 and has not reported for duty and was absent without sufficient cause.

13. On 31.12.1991, the competent authority agreed with the findings of the Court of Inquiry and declared the appellant as deserter from 28.08.1991, prior to which communications dated 10.06.1991 and 13.12.1991 were sent to the Superintendent of Police, Lucknow for apprehending the appellant, which apparently failed. Another communication for apprehending the appellant-deserter was sent on 06.01.1994 to the Superintendent of Police, however, apparently, as he was not apprehended and did not appear for all these years, order dated 28.04.1995, dismissing him from service was passed.

14. The submissions made that the appellant was not afforded any opportunity of hearing before passing of the order of dismissal, in the circumstances of the present case, cannot be countenanced. The sequence of events clearly establish that the appellant, after discharge from the Hospital on 28.08.1991, did not care to report back till it is claimed that he was declared fit to perform his duties by the doctors at Lucknow on 17.08.1995, despite the fact that the respondents issued communications to the Superintendent of Police, Lucknow to apprehend the appellant on three occasions. The provisions of Section 106 of the Act reads as under:

“(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 necessities; 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.”

15. A perusal of the above provisions would reveal that when a persons has absented himself from duties without due authority for a period of 30 days, a Court of Inquiry shall be assembled, which will inquire respecting the absence of the person and deficiency, if any, in the property of the Government entrusted to his care, 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, if any. Further, if the person declared absent

does not afterwards surrender or is not apprehended, he shall be deemed to be a deserter. The requirements of the Section, in the present case, stood satisfied to the hilt and therefore, the appellant was rightly declared as deserter.

16. The order dated 28.04.1995 passed by the competent authority, *inter alia*, indicated sanction of dismissal of those named therein under Section 20 of the Act and further indicated that it has not been practicable to comply with the provisions of Rule 17 of the Rules in their case. The order contained a list of 144 persons including that of the applicant. Rule 17 of the Rules, *inter alia*, reads as under:

“17. Dismissal or removal by Chief of the Army Staff and by other officers – *Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no persons shall be dismissed or removed under sub-section (1) or sub-section (3) of section 20; unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service:*

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government.”

17. The above Rule provides for issuing show cause notice and a reasonable time to urge before a person is dismissed or removed from service. However, the proviso indicates that if in the opinion of the officer, it is not expedient or reasonably practicable to comply with the provisions of the Rule, he may, after certifying to that effect, order dismissal or removal without complying with the procedure set out in the Rule.

18. It would be seen that despite repeated issuance of communications for apprehending the appellant, admittedly, neither he could be apprehended nor he cared to report back. Further, no communication worth the name was made by him for over four years. In a case where despite issuance of communications to the Police for apprehending the appellant, he could avoid being apprehended by the Police for over four years, the conclusion arrived at by the respondents regarding it being not practicable to comply with the requirements of Rule 17 of the Rules appears to be justified. The imposition of penalty of dismissal by dispensing with the procedure prescribed under

Article 17 as applicable under proviso to Rule 17 of the Rules, in the above circumstances, cannot be faulted.

19. The punishment of dismissal, in the circumstances, was justified as observed by learned Single Judge since there was an unauthorized absence of about four years by the appellant, who had already put in seven years of service. Such conduct of a member of armed forces could not be condoned, especially in view of the fact that despite issuance of repeated communications to the Superintendent of Police, Lucknow for apprehending the appellant, the appellant continued to avoid appearing before the authorities. Learned Single Judge was also justified in coming to the conclusion that the petition suffered from laches inasmuch as the same was filed after six years of the order of dismissal and not a word was indicated in the writ petition seeking to explain the delay in filing the writ petition.

20. In view of above discussion, there is no substance in the special appeal. The same is, therefore, **dismissed**.

Order Date :- 18.12.2024

Mukesh Pal

(Jaspreet Singh, J) (Arun Bhansali, CJ)