

seeks quashing of the cryptic rejection order of the Chief of Army Staff dated 02.07.2008 and forwarding letter dated 04.07.2008.

2. The petitioner was enrolled in the ASC on 29.07.1998 after having obtained training at ASC Centre(S) Bangalore. Petitioner put in 18 years and 117 days colour service. While serving in 517 ASC Bn he was granted leave after expiry of which he had sought extension, but nothing was conveyed. However, as such the Petitioner reported back on duty to the parent unit but was not taken on strength and had to shuttle between his unit location and ASC Centre. Meanwhile, the petitioner had suffered 'Jaharkhurani' while enroute and later on was found by someone who could recognize the petitioner, and was treated. After recovery he went to the unit but was told to go back to ASC Centre (N), where after lot of persuasion he was taken on strength by IC-31109-F Lt Col. B.B. Baldoia of Headquarter Wing ASC Centre(N) Gaya. After that an attachment order was signed by Brig. Sukbir Singh, Commandant, ASC Center (N)

Paharpur Gaya dated 19.06.2006 attaching the petitioner to Headquarters Wing ASC Centre (N) Gaya w.e.f. 26.05.2006. Meanwhile, a Court of Inquiry had already been ordered by Commanding Officer 517 ASC Bn. vide order dated-29.10.2005 for declaring the petitioner as deserter, proceedings of which were transmitted to the ASC Centre (N) at Gaya. Thereafter a tentative chargesheet was signed by Col. P.K. Ahlawat of ASC Centre(N) on 04.08.2006 wherein two charges were framed against petitioner which reads as under:

FIRST CHARGE

DESERTING THE SERVICE

AA SEC 38(1)

In that he,

At field, on 23 Sep 2005 while serving with 517 ASC Bn absented himself, without leave from the Unit lines with effect from 23 Sep 2005, till he surrendered voluntarily to Headquarter Wing, ASC Centre (North) on 05 May 2006 at about 1800 hrs

SECOND CHARGE

*LOSING BY NEGLIGENCE CLOTHING AND EQUIPMENT THE
EQUIPMENT THE PROPERTY OF THE GOVERNMENT ISSUED
TO HIM FOR HIS USE*

AA Sec 54 (b)

In that he,

At Pharpur on 25 May 2006 was found Deficient of the following personal and EI clothing Amounting to Rs.1665 (Rupees one thousand six hundred sixty five only) the property of the Government issued to him for his use.

3. The Summary Court martial of both the charges commenced at 1215 hrs on 26.10.2006 and it was over on the same date at 1345 hrs. The petitioner pleaded guilty

to both the charges. On the basis of these findings, the petitioner was dismissed from service. Against the order of dismissal, the petitioner filed a statutory petition which was also dismissed by the Chief of Army Staff on 2.07.2008. Thereafter, petitioner filed a petition in the Delhi High Court but he subsequently withdrew the same and has filed the present petition before this Tribunal.

4. Petitioner's principle grievance is that no offence u/s 38(1) is made out as the petitioner is not a deserter and he has also submitted that so far as second charge is concerned an amount has already been deposited, therefore, petitioner could not have punished a second time. He has also submitted that Lt.Col. B B Baldoia could not conduct this Court martial as he was not qualified to preside over this by virtue of Rule 39 and he has also submitted that he was not given sufficient opportunity to defend himself as the Summary Court Martial on 26.10.2005. Lastly, it was also argued that the SCM commenced at 1215 hrs and it was over at 1345 hrs, which was too short a period to complete the SCM.

5. First and foremost question before us is that whether in the facts of the case, first charge against the accused can be sustained or not. The first charge relates to u/s 38(1) of the Army Act. Section 38(1) of the Army Act reads as under:

Desertion and aiding desertion – Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial, if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and

if he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

6. Section 38(1) of The Army Act, 1950 means that a person deserts or attempt to desert. The expression 'desert' has not been defined but plain and simple meaning / definition of 'desert' given in the dictionary is 'illegally leave the armed forces' i.e. basic ingredient is person who voluntarily leaves armed forces. But in the present case as the facts stand, the petitioner proceeded on leave and he sought an extension but the extension appears to have not been granted and petitioner reported back on duty to the parent unit, but was not taken on strength and he was

sent from one location to other location. Therefore, the question that arises is whether the necessary ingredient of desertion is present in the present case or not. If the petitioner had intended not to report back and absented himself voluntarily, then perhaps he would have fallen in the definition of desertion. It is not the case that petitioner was arrested by the police and brought under custody to the unit. Petitioner himself reported back to the unit but he was not taken on strength and he was going from pillar to post. Therefore, it is not a case which can strictly fall in the four corners of section 38(1) of desertion. More appropriately this is a case where a person has remained absented without leave i.e. section 39 of the Army Act, 1950 reads as under:

Absence without leave - Any person subject to this Act who commits any of the following offences, that is to say-

- (a) *Absents himself without leave; or*
- (b) *Without sufficient cause overstays leave granted to him; or*
- (c) *Being on leave of absence and having received information from proper authority that may corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or*
- (d) *Without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or*
- (e) *When on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or*
- (f) *When in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or*

other order, without a pass or written leave from his superior officer; or

- (g) *Without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there,*

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

7. The case of the petitioner appears to be that he was granted leave but he did not join and over stayed without sufficient cause, therefore he could have been prosecuted u/s 39 instead of u/s 38(1) of the Army Act, 1950. In the present case, the petitioner has been found guilty u/s 38(1) and he has been dismissed from service. Petitioner in Court of Inquiry appeared as witness and explained that he was on annual leave from 06.04.2005 to 06.06.2005 but due to some differences between his wife and his brother's wife he was forced to vacate the house of parents and his wife was ill since last 7 years due to stomach problem. During the leave period he could not shift his family from his parental house to rented accommodation and on termination of leave he rang up OC for grant of 30 days leave to him. OC advised and assured him to rejoin duty first on date and to seek leave

thereafter. After arriving on 06.06.2005, he learnt that his previous OC who had promised him leave has been changed and he reported his problem to new OC, Lt.Col.A.K.Sharma and requested for 20 days casual leave for the year 2005 but new OC advised him to report to 10 Compo Pl (Thango) HAA. During first week of July, 2005, he left 'C' Coy 517ASC for 10 Comp P1 (Thango) and there he was informed by Sub. Maj. Bainth Thomas that on 21.09.2005, a call has been received from his daughter that his wife was serious and also his brother's wife has forced them to separate from the house immediately. He rang up the OC 'C' Coy 517 ASC Bn regarding leave but OC 'C' Coy refused to grant leave. Therefore, due to family problem he was mentally disturbed and he was left with no option but to leave for home instead of 'C' Coy 517 ASC Bn on 23.09.2005. After resolving the problem at home he reported back to the ASC Centre (North) on 25.05.2006 after being absent for 244 days. Therefore, it is not a case of desertion. This is the case of a person who has left without leave and then reported back to the

unit. Had he intended to desert he would not have voluntarily reported back to the ASC Centre(North). Therefore, it is more of a case which fall u/s 39 and does not fall u/s 38 of the Army Act, 1950 of desertion. The cases of desertion where a person absent wilfully doesn't report back and in such cases detailed procedure is prescribed in the regulations that the incumbent is notified and then police is intimated and other necessary steps are sought to be taken to apprehend the person and bring him before the authorities. But when a person reports back, it may be after overstaying leave or after voluntarily leaving, then in such cases the proper procedure is to try him by SCM u/s 39 rather than u/s 38 of the Army Act,1950.

8. In this case our attention was also invited to note appended to section 38. The relevant portion of note reads as under:

NOTES

1. *General - (a) An offence under sub-section(1) of this section when on active service or under orders for active service should not be dealt with summarily under AA. ss.80, 83 or 84.*

(b) When a superior officer directs the case of an offender against whom a charge for desertion has been preferred to be summarily disposed of, he should order the offence to be disposed of as one of absence without leave. See notes to AA.S.39. See general AA.ss.104 and 105 and Regs Army paras 376 to 381

(c).....'

2. *Sub Sec. (1) Desertion is distinguished from absence without leave under AA.s.39; in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g. service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire picquet duty. A charge under this section cannot lie unless it appears from the evidence that once or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.*
3. *A person may be deserter although he re-enrols himself, or although in the first instance his absence was legal (e.g. authorised by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).*
4. *Intention to desert may be inferred from a long absence, wearing of disguise, distance from the duty station and the manner of termination of absence, e.g. apprehension but such facts though relevant are only prima facie, and not conclusive, evidence of such intention. Similarly, the fact that an accused has been declared an absentee under AA s. 106 is not by itself a deciding factor if other evidence suggest the contrary.*

Note which elaborates the scope of Section 38 of the Army Act, 1950 for the purposes of administrative convenience clearly says that intention has to be seen with reference to the evidence laid by the delinquent and the emphasis is on what was the intention of the delinquent.

9. In the present case as we have discussed above, the petitioner had a serious problem at the house and, therefore, that forced him to remain absent for some time but he reported

back and he was shuttling from one place to another and ultimately he was accepted by the ASC Centre (North) on 25.5.2006 and they ordered for the SCM u/s 38 of the Army Act, 1950. If the authorities, would have properly looked into the matter then they would have realised that this is a case of over staying of leave rather than desertion. If the petitioner had intended to desert perhaps he would not have reported at all. Therefore, we convert the conviction of the petitioner from Section 38 to Section 39 and reduce the sentence of the petitioner from dismissal from service to reduction to ranks.

10. So far as the second charge is concerned for loss of clothing/equipment he has already deposited Rs. 1665/- for the items he lost. Therefore, we are of the opinion that once the petitioner has been punished for loss of kit, there was no need to again punish him. Therefore, we set aside this punishment.

11. Learned counsel for the petitioner has refer to various decisions of the Hon'ble Supreme Court and tried to persuade us by certain omissions and commissions committed in

conduct of the Summary General Court Martial, but we don't wish to decide all these arguments. Suffice it to say that we are satisfied with the facts that petitioner cannot be tried u/s 38 of the Army Act, 1950, and the proper charge has to be u/s 39 of the Army Act, 1950.

12. Accordingly, we allow this petition and set aside the conviction & sentence of the petitioner u/s 38 of the Army Act, 1950. However, we convict the petitioner u/s 39 for absence without leave and punish the petitioner by reducing him to the ranks. But conviction of the petitioner for second charge is exonerated. However, this does not entitle him to be reinstated in service. The petition is allowed in part.

13. No order as to costs.

[Justice A.K. Mathur]
Chairperson

(Lt. Gen. SS Dhillon]
Member (A)

New Delhi
3rd April, 2012