

Brahm Dutt Sharma Vs. State of U.P.

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Court : Allahabad

Decided On : Dec-18-1991

Reported in : 1992CriLJ1820

Judge : P.P. Gupta, J.

Acts : Uttar Pradesh Provincial Armed Constabulary Act, 1948 - Sections 6, 7 and 8

Appeal No. : Criminal Appeal No. 2926 of 1983

Appellant : Brahm Dutt Sharma

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : S.K. Mishra and ;A.N. Bhargawa, Advs.

Disposition : Appeal allowed

Judgement :

P.P. Gupta, J.

1. This is a criminal appeal filed by the accused-appellant, Brahm Dutt Sharma, against the judgment and order dated 23-11-1983 passed by the then Sessions Judge, Chamoli, in Sessions Trial No. 1 of 1983, convicting the appellant under

Section 6(e) of the U. P. Provincial Armed Constabulary Act, 1948 (hereinafter referred to as the 'Act') and sentencing him to a fine of Rs. 500/-.

2. The brief facts of the case are that in 1981 the IXth Battalion Special Police Force was posted at Joshimath and Chandrika Ram Yadav was its Sector Commander (hereinafter referred to as 'SC'). Its J Company was posted at Somna and Ratan Dev Sharma was its Assistant Company Commander (hereinafter referred to as 'ACC'). The accused, C/12879 Brahm Dutt Sharma, was serving in the said 'J' Company at Somna as a Constable.

3. In March, 1981 the accused had gone on casual leave and had returned back to Somna on 3-4-1981. On 9-6-1981 he moved an application to his ACC, Somna, that due to pain in his tooth he might be referred to S.P.F. Hospital, Joshimath. He was so referred on the recommendation of the Pharmacist of 'J' Company, Somna. At S.P.F. Hospital, Joshimath, Dr. S.K. Rastogi admitted the accused on 14-6-1981, but he discharged him on 15-6-1981 with the remark that he had got the filling of his tooth done by some private practitioner.

4. On 14-6-1981 the accused received a telegram at Joshimath that the marriage of his younger brother had been fixed for 24-6-1981 and thereupon he filled in the form on 15-6-1981 for 30 days' earned leave with effect from 16-6-1981. On that very date the SC, Joshimath, sent a radiogram to the ACC, Somna, for sending recommendation on the matter of one month's earned leave for the accused with effect from 16-6-1981, in connection with the marriage of his younger brother. The ACC, Somna, replied by radiogram dated 15-6-1981 itself that the accused had gone on 15 days' casual leave very recently and that he had been sent from Somna to Joshimath for his treatment and not for proceeding on leave. The result was that on 16-6-1981 the SC, Joshimath, directed the accused in writing to go back to Somna along with three other Constables. Thereupon, on the same day, the SC, Joshimath, enquired from the accused as to why the ACC, Somna, was not recommending leave to him, but the accused could not give any satisfactory reply to that query. Even then the SC, Joshimath, was considerate and told the accused that there were still eight days for the marriage and so he must go back to Somna and that he would take up the matter of his leave with the ACC, Somna,

and would inform him by a radiogram, so that he might be able to reach for the marriage well within time. Thereupon the accused left the office of the SC, Joshimath, promising that he would be going back to Somna.

5. On 16-6-1981 itself the SC, Joshimath, sent a radiogram to the ACC, Somna, to give specific reasons for not recommending the leave of the accused and in case of no such reasons, recommend earned leave or casual leave to him for seven days. The ACC, Somna, replied on the same day by a telegram that no leave could be recommended to the accused as he had returned back from 15 days' casual leave only very recently on 3-4-1981. The accused did not proceed from Joshimath Camp to Somna on 16-6-1981 but he just slipped from the Camp and could not be found out in Joshimath and only his application for one month's earned leave was found lying outside the office. Thereupon the SC, Joshimath, reported the matter to the Commandant, Moradabad on 17-6-1981 and on his note dated 18-6-1981 he sent the report dated 19-6-1981 to P.S. Joshimath where Head Constable Anandmani Nautiyal scribed the Chick (Chit?) on 20-6-1981 at 8-15 a.m. and registered the case under Section 6 of the P.A.C. Act.

6. The accused, who was charged for deserting the services from the Camp, did not plead guilty to the charge and claimed to be tried. In support of his case the prosecution examined P.C. Darwan Singh, PW 1, and H.C. 15 C.P. Head Constable Anandmani Nautiyal. Sri Chandrika Ram, Dy. S.P., Bahraich, U. P., who was posted as SC, Joshimath, from April 1981 to 12-8-1981, was examined as a court witness.

7. On an assessment of the entire evidence the learned Sessions Judge held that the accused had committed a technical offence under Section 6(e) of the Act and so taking a lenient and sympathetic view, sentenced him till the rising of the court and to a fine of Rs. 500/-only.

8. Feeling aggrieved from the said judgment and order dated 23-11-1983, passed by the learned Sessions Judge, Chamoli, the accused-appellant has come up in appeal before this Court. Learned counsel for the appellant and the learned A.G.A. were heard and the record of the case was perused.

9. The accused has admitted all the above noted facts except that he left Joshimath without permission. His contention is that he left Joshimath Camp after the verbal permission of Sri Chandrika Ram Yadav, SC, Joshimath, after giving him an application for leave and on which he assured that he might leave and his leave would be sanctioned.

10. Sri Chandrika Ram Yadav was examined as a court witness. He denied that the application for earned leave, Ex.Ka-10, had been given to him and that he had verbally told the accused to go to his home and that the orders for the earned leave would follow. On the other hand, he stated that he had told the accused to go back to Somna and that he would be writing to the ACC, Somna for sending recommendation for his leave and that thereby he would still be able to reach in time to attend the marriage ceremony of his brother. There is nothing to disbelieve Sri Chandrika Ram Yadav on this point. It is, therefore, proved from the prosecution evidence that the accused left Joshimath Camp after leaving his application for earned leave in the office, without obtaining any prior permission of leave, either orally or in writing, from the SC, Joshimath.

11. The question to be decided, in the circumstances of the case, is whether the accused deserted the service and committed an offence under Section 6(e) of the Act.

12. What is desertion has not been defined by the Act. However, under Section 6(e) of the Act it is made an offence. Section 6(e) lays down that an officer of the Pradeshi Armed Constabulary who deserts the service shall, on conviction, be punished with imprisonment for life or with imprisonment for a term which may extend to 14 years and shall also be liable to fine. It is mentioned as one of the more heinous offences.

13. Under the category of 'less heinous offences' enumerated under Section 7 of the Act, Sub-clause (g) mentions the category in the following words :

'quit his post guard, picquet, party or patrol without being regularly relieved or without leave.'

There is yet another category for which minor punishments are provided under Section 8 of the Act. Such punishments are attracted for the commission of an offence against discipline, which is not otherwise provided for in the Act. Sections 6 and 7 make a clear distinction between 'desertion' and 'absence without leave'. Clearly every absence without leave cannot be treated as 'desertion'. The distinction between 'desertion' and 'absence without leave' must necessarily depend on the animus. If there is animus deserendi the absence is straightway desertion. The words used in Section 6(e) of the Act are 'deserts the service'. It clearly shows that it means forsaking one's service. 'Desertion' is distinguished from 'absence without leave', 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 one 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.

14. 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.

15. A person is guilty of the offence of absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If, when he so absented himself, he intended either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. Therefore, the distinction between 'desertion' and 'absence without leave' consists in the intention.

16. On the facts and circumstances of the case, it is established that the accused had no intention to desert the service. He was not entrusted any such duty which

he wanted to avoid. He applied for leave to attend the marriage of his brother. The ACC, Somna, did not recommend his application for leave on the ground that he had recently returned from leave. The SC, Joshimath, was very considerate and sympathetic and was of the view that the leave should be granted to him and for this reason he called for reasons for not recommending the leave to the accused from the ACC, Somna. The accused had a feeling that he may not be able to attend the marriage of his brother, if he waited for the sanction of leave and, therefore, left the Camp after leaving an application for leave in the office. His conduct clearly shows that he had no intention to leave the service or not to return. As such, it is not established that the accused had deserted his service. He did not comply with the direction of the SC, Joshimath, to go to the ACC, Somna, and to request him for recommending his leave. It may, therefore, be a case of indiscipline, attracting minor punishment under Section 8 of the Act. But in no case, the accused has committed an offence under Section 6(e) of the Act.

17. It may also be mentioned here that the accused has since been taken into service. An order dated 3-4-1991 to this effect has been filed.

18. Looking to all these facts and circumstances of the case, I am of the opinion that this appeal must be allowed.

19. In view of my above discussions, the appeal is allowed and the conviction and sentence of the accused-appellant, Brahm Dutt Sharma, under Section 6(e) of the Act are set aside. The accused, who is on bail, need not surrender. His bail bonds are cancelled and sureties are discharged.