

COURT NO 1
RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No 614 of 2017

Thursday, this the 23rd day of August, 2018

“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

Smt Poonam Devi wife of Late Sep Rajeev Kumar (No. 14630365X), Village-Sherpura, Post-Sadipur, Distt-Gaya (Bihar) now residing at C/o Shri Ankur Kumar, 1321, Kidwai Nagar, Allahpur, Allahabad-211006 (U.P.).

...Applicant

Counsel for the applicant: **Shri R. Chandra**, Advocate

Versus

1. Union of India, through, the Secretary, Ministry of Defence, Government of India, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), DHQ, Post Office-New Delhi-11.
3. The Officer-in-Charge, EME Records, PIN-900453, C/o 56 APO.
4. Officer Commanding, 625 EME Battalion, C/o 56 APO.
5. PCDA (P), Draupadi Ghat, Allahabad-14 (U.P.).

.... Respondents

Ld. Counsel for the Respondents :**Shri Ramesh Chandra Shukla**,
Central Government Counsel

ORDER**“Per Hon’ble Air Marshal BBP Sinha, Member (A)”**

1. Being aggrieved with denial of family pension, the applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 and prayed for the following reliefs:-

(a) That this Hon’ble Tribunal may be pleased to set aside orders dated 28.03.2016 (Annexure No A-1) passed by respondents.

(b) That this Hon’ble Tribunal may be pleased to issue order and direction to respondents to grant family pension to the applicant w.e.f. 04.07.2008 with interest at the rate of 18% per annum.

(c) That this Hon’ble Tribunal may be pleased to issue order and direction to Respondents to release Death Cum Retirement Gratuity (DCRG) and other retiral benefits as per entitlement alongwith interest.

(d) That this Hon’ble Tribunal may be pleased to pass any other appropriate order or directions, which this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

2. Brief facts of the case are that the husband of the applicant (No 14630365X Late Sep Rajiv Kumar) was enrolled in the Indian Army in Corps of Electrical and Mechanical Engineering (EME) on 28.12.1995. While the deceased soldier was serving with 237 Field Workshop (Fd Wksp) he was granted 36 days of part of annual leave for the period from 06.08.2002 to 10.09.2002. He failed to rejoin duty on expiry of said leave and over stayed leave (OSL) w.e.f. 11.09.2002. Since he remained on OSL for more than 30 days, a court of inquiry was convened and he was declared deserter from field area in terms of Section 106 of the Army Act, 1950. Husband of the applicant died on 03.07.2008. Representation for grant of ordinary family pension to NOK, i.e.

the applicant, was rejected vide order dated 28.03.2016 on the ground of non completion of mandatory pensionable service i.e. 15 years as per para 132 of Pension Regulations for the Army, 1961 and was communicated to the applicant on 22.04.2016.

3. Contention of Ld. Counsel for the applicant is that husband of the applicant was undergoing treatment w.e.f. 22.08.2002 at various clinics in Patna for 'Tuberculosis Meningitis' and he died thereafter. Ld. Counsel submitted that since the services of applicant's husband had not been dismissed on the grounds of desertion therefore the applicant was entitled for family pension. It is further submitted that as per existing Rules on the subject a deserter can be dismissed after three years in peace area and after ten years from a field area. In the instant case the applicant's husband died within 6 years of being declared a deserter from field area and ten years had not yet elapsed and no dismissal order had been passed against the husband of the applicant till his death which took place on 03.07.2008. Ld. Counsel for the applicant further submitted that there is no provision in the Army Act or Rules envisaging automatic termination of service of a member of Armed Forces on declaration of desertion and before completion of specified period for dismissal. On the other hand, Army Regulation 376 provides to the contrary and says that a deserter does not belong to cease from the corps though he is no longer shown in its returns. Ld. Counsel in support of his argument placed reliance on para 376 of

8Regulations for the Army which for convenience sake, is quoted below:-

*“376. **Deserters from the Regular Army.** A person subject to Army Act who is declared absent under Army Act, Section 106 does not thereby cease to belong to the Corps in which he is enrolled though no longer shown on its returns, and can, if subsequently arrested, be tried by Court Martial for desertion. When arrested he will be shown on returns as rejoined from desertion.”*

4. He concluded that in light of the above facts and the settled law on the matter of death during desertion but before dismissal, family pension should be granted to the applicant. He further argued that as per sub section 2 of the Regulation 212 of the Pension Regulations for the Army, 1961, which deals about family pension, ordinary family pension is admissible when an individual dies on account of any causes which were neither attributable to nor aggravated by military service, therefore as per the said Regulations, the applicant is entitled to ordinary family pension. Para 2 of the Regulations 212 of the Pensions for the Army, 1961, reads as under:-

“2. Ordinary Family Pension when Admissible. When an individual dies on account of causes which are neither attributable to nor aggravated by military service:-

(i) Either while in service provided he had been found fit after successful completion of the requisite training and medical examination for commission or at the time of enrolment in the case of personnel below officer rank.

(ii) Or after retirement/discharge from services and was on the date of death in receipt of or eligible for retiring/special/reservist/ disability/invalid/war injury pension.

(iii) Death due to suicide does not disqualify the heir from ordinary family pension.”

5. On the other hand, Ld. Counsel for the respondents submitted that since husband of the applicant remained OSL for more than thirty days, he was declared deserter from field unit by a duly constituted Court of Inquiry in terms of Section 106 of Army Act, 1950. He further submitted that husband of the applicant had rendered only six years, eight months and thirteen days of service on the date of desertion, therefore, as per policy, death benefits are not entitled in case of death of an individual while on desertion. In reply to arguments advanced by Ld. Counsel for the applicant justifying desertion on the ground of treatment of the deceased soldier at various clinics at Patna on account of suffering from 'Tuberculosis Meningitis', he submitted that the treatment should have been taken in Military Hospital where best medical facilities are available. He further contended that husband of the applicant did not complete minimum qualifying service for earning service pension i.e. 15 years, in terms of paras 47 and 132 of Pension Regulations for the Army, 1961, hence the competent authority has very rightly denied grant of ordinary family pension to the applicant.

6. We have heard both the parties at length and gone through the averments made in the Original Application, counter affidavit and rejoinder affidavit. We have also taken note of the Pension Regulations for the Army, 1961. In this particular case the only question which arises before us is as to whether a deserter is to be treated as in harness if he dies before dismissal from service

and is his wife entitled for family pension if he dies after desertion but before his dismissal?

7. We have given our anxious thoughts on this issue and we have found that the subject matter is no more RES INTEGRA. The law on this matter is settled. In a similar case the judgment of High Court of Delhi reported in 2001 (91) DLT 54, **Hamandi vs Union of India & ors**, the Hon'ble Court held that persons who died during desertion period should be deemed to have died in harness. The relevant portion of judgment is as follows:-

"7. There is no provision in the Act or Rules envisaging automatic termination of service of a member of armed forces on declaration of desertion. On the other hand, army regulation 376 provides to the contrary and says that a deserter does not cease to belong to corps though he is no longer shown on its returns. This regulation reads thus:-

*"376. **Deserters from the Regular Army.** A person subject to Army Act who is declared absent under Army Act, Section 106 does not thereby cease to belong to the Corps in which he is enrolled though no longer shown on its returns, and can, if subsequently arrested, be tried by Court Martial for desertion. When arrested he will be shown on returns as rejoined from desertion."*

8. Similarly, army letter, dated 11 March, 1980, also says that a deserter would be dismissed from service after completion of 10 years of his absence. So does Army Instructions A1-112/4 provide for his termination if he failed to surrender within three years or was not apprehended within that period.

9. It was thus evident that a desertion by itself did not and would not bring about cessation or termination of the service of a member of the armed forces whose service dismissed, removed or discharged under an appropriate order passed by the competent authority under the Act and the Rules.

10. Family pension is admissible to the widows of Junior Commissioned Officers/other ranks, who die in service but of causes which are neither attributable to nor aggravated by military service. Army Pension Regulation 246 provides for this and regulation 247 prescribed the rate on which such pension/gratuity would be payable. There is no other regulation or rule which provides for any other conditions/eligibility for claiming family pension. In other words family pension becomes payable to the widow of a deceased member of the armed forces, who dies in service and whose death is not attributable to military service.

11. Applying the first test, it cannot be said or held that petitioner's husband did not die in service. It is the admitted case that no order of dismissal, removal or discharge was passed against him before or after he was declared a deserter. Nor could declaration of his desertion terminate his service automatically. He also did not cease to belong to corps in which he was enrolled though he was no longer shown on its returns in terms of army regulation 376. He was, therefore, to be treated to have died in harness, satisfying the first test in the process.

12. It is also nobody's case that petitioner's husband died due to causes which were attributable to or aggravated by military service. He had allegedly died due to some ailment and there is no record or material available about the cause of his death and to suggest otherwise. In any case, he had not died in any action or while rendering any military service. Therefore, petitioner was eligible for grant of family pension so long as army pension regulation 123 did not come in her way. Since the whole controversy now turns on this regulation, it would be advantageous to reproduce it as under:-

"123. (a) A person who has been guilty of any of the following offences-

- (i) desertion, vide S. 38 of the Army Act,
- (ii) fraudulent enrolment, vide S. 43 (a) of the Army Act, shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by Court-Martial of the offence.

(b) A person who has forfeited service under the provisions of the preceding clause but has not been dismissed shall, on completion of any period of three years further service in the colours and/or service in the reserve with exemplary conduct and without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity."

13. This regulation, on a plain reading, provides for forfeiture of whole prior service amongst others of deserter convicted by Court-Martial of the offence under S. 38 of the Army Act. It also envisages reckoning of such forfeited service towards pension and gratuity in certain circumstances. In any case, it does not provide for irrevocable forfeiture of service and where it does, the first condition to be satisfied for this is that a person must be convicted by the Court-Martial of the offence of desertion. In the present case, petitioner's husband was not brought before any Court-Martial not to speak of having been convicted by it. He admittedly died before he could be tried by the Court-Martial. Naturally, therefore, provisions APR 123 could not be made applicable to the case to deprive petitioner of her otherwise legitimate claim of family pension because her husband's service was liable to be forfeited only if he was convicted by the Court-Martial.

14. It is submitted by learned counsel for respondents that there was no occasion to try petitioner's husband by Court-

Martial because of his death on 6 November, 1984, and as such, he should be deemed to have committed offence of desertion without being convicted. The submission appears fallacious on the face of it because mere declaration of desertion may not necessarily lead to the conviction by the Court-Martial. If that was so, there was no need to hold a Court-Martial to try a deserter for the offence of desertion. As such, there was no scope to fictionally deem the deceased gunner convicted by Court-Martial to satisfy the pre-condition for application of APR 123 and so long this provision stood in its present form it would not be attracted to the case at all.”

8. The law emerging out of above judgment has further been upheld in Armed Forces Tribunal, Regional Bench Chhennai in O.A. No. 158 of 2013 in **Smt Kukkala Mangla Devi Vs Union of India & Ors.** The operative portion of the above said judgment is as under:-

“15. On a careful understanding of the dictum laid down by the Hon’ble Delhi High Court, it is clear that any individual who was not dismissed from service as per the procedure contemplated under Army Act and he died during the desertion period, should be treated as died in harness and the desertion would not in any way affect his right to get benefits and consequently any family pension to his next of kin. The submission of the learned JAG Officer that the deserter is always a deserter cannot be accepted in view of the principle laid down by the Hon’ble Delhi High Court in the aforesaid judgment. The facts and circumstances as discussed in that judgment are squarely similar to the facts and circumstances of this case. The respondents are not producing any other judgment against the principle laid down by the Hon’ble Delhi High Court. Therefore, we are of the considered view that the applicant’s husband who died during desertion period should be treated as an individual died in harness.

16. Admittedly, the applicant’s husband had completed 15 years of service which would fetch a pensionable service to the applicant’s husband. The only case of the respondents would be that the applicant’s husband forfeited the previous service and therefore, he was not eligible for pension or gratuity. In view of the fact that the applicant’s husband should have been deemed as died in harness, the provisions of Para 123 of the Pension Regulations for the Army 1961 or Para 43 of Pension Regulations for the Army 2008 are not applicable. Therefore, we are of the opinion that the applicant’s husband should have been treated as died while on the rolls of the army, i.e., died in harness. Since he had already completed qualifying service of 15 years for pension on the date of his desertion, i.e., 8.12.2009, he is eligible for pensionary and other benefits. Since the applicant’s name was entered in Part-II Records as next of kin, she is certainly entitled to family pension as asked for by her from the date of death of her husband.

17. x x x x x

18. Point No.3: In view of our findings reached in Point Nos.1 and 2, that the applicant is entitled for the grant of family pension with effect from 22.09.2010, i.e., the date of death of her husband, the impugned order passed by the second respondent dated 21.12.2012 is liable to be quashed and the application is therefore has to be allowed.

19. Accordingly, the application is allowed. The respondents are directed to pay the arrears of family pension to the applicant on and from 22.09.2010 and to issue Pension Payment Order in favour of the applicant within a period of three months from today. In default, the respondents shall be liable to pay the said arrears with interest at 9% per annum till the date of payment. No order as to costs.”

9. In the circumstances, the O.A. deserves to be allowed, hence the O.A. is **allowed** setting aside the impugned order dated 28.03.2016, and directing the respondents to release the ordinary family pension to the applicant who is the legal wife, with effect from 04.07.2008 within four months from the date of receipt of certified copy of this order. Default will invite interest @ 9% per annum.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : 23 August 2018
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