

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

**ORIGINAL APPLICATION No. 359 of 2021**

Friday, this the 03<sup>rd</sup> day of February, 2023

**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

**“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”**

Smt. Bittan Devi, W/o Ex L/NK Ramesh Kumar (Mentally unstable)

Army No. 693525K, R/o Vill: Hishyampur, Post - Dhanikhera

The - Purwa, District – Unnao - 209801

..... **Applicant**

Ld. Counsel for the Applicant : Shri Om Prakash, Advocate

Versus

1. Union of India, through Secretary Ministry of Defence, South Block New Delhi - 110106.
2. OIC Records, The AOC Records, PIN-900453, C/o 56 APO.
3. Commanding Officer, 8 Mtn Div Ord Unit, PIN - 909008, C/o 56 APO
4. Commandant, Comd Hosp (WC), Chandi Mandir Cantt, Panchkula - 134107 (Haryana)

.....**Respondents**

Ld. Counsel for the Respondents. :Shri Kaushik Chatterjee,  
Central Government Counsel.

**ORDER**

**“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs :-
  - (A) *To allow the application of the applicant and set aside the order dated 29.10.2016 (Annexure No. A-1) passed by Office of respondent No. 2 stating that the applicant’s husband has been dismissed from service wef 13.08.2003 vide Pt II Order No. 1/0570/0013/15 dated 26.10.2015.*
  - (B) *To issue suitable orders/directions commanding the respondents to conduct fresh RSMB of the applicant’s husband to assess his mental disability by Medical Board in the nearest Military Hospital and to consider his case for grant of disability pension from 13.08.2003.*
  - (C) *To issue suitable orders/directions Commanding respondents to release Gratuity and other admissible NE benefits payable to the applicant’s husband.*
  - (D) *Any other relief which this Hon’ble Tribunal may deem fit and proper under the facts and circumstances of the case may be granted in favour of the applicant.*

(E) *Award the cost of original Application in favour of the applicant.*

2. Brief facts of the case are that husband of the applicant, Ex L/Nk Ramesh Kumar was enrolled in the Indian Army 27.04.1994. He absented himself without leave in the year 1995 and re-joined voluntarily on issuance of apprehension roll. He further absented without leave in the year 2003. Apprehension roll was issued and after 10 years he was dismissed from service. He represented his case for reinstatement in service which was denied. Being aggrieved, wife of the applicant has filed instant O.A. with the prayer to quash dismissal order and to conduct re-survey medical board and grant disability pension.

3. Learned counsel for the applicant pleaded that husband of the applicant while posted in Field Area, fallen sick and on investigation he was diagnosed a case of **Abnormal Behaviour** and was admitted in 153 General Hospital, Leh on 17.07.2003. He was further transferred to Command Hospital, Chandi Mandir, On 12.08.2003 he was directed to report to his unit without sick attendant. Husband of the applicant has been alleged to have deserted the service wef 12.08.2003 whereas husband of the

applicant was in a state of vagrancy and had gone out of psycho ward because no escorts were detailed to monitor his activities in psycho ward resulting into his missing from ward which has been construed as desertion. Applicant received a letter from respondent No 3 asking applicant to sent back her husband to resume duties. Applicant raised query for knowing whereabouts of her husband. In second week of August 2004, husband of the applicant reached home in very shabby conditions. After improving his condition, he went to Record Office, Secunderabad for joining duty but he was not allowed to join duty. A court of inquiry was held on 28.05.2004 to investigate about the absence of husband of applicant from 13.08.2003. Applicant came to know that her husband has been dismissed from service after 10 years of desertion. In fact, the applicant's husband was further posted out from respondent No 3 to 12 ROU and he was to report to new unit on 31.01.2004. Learned counsel for the applicant submitted that dismissal of applicant's husband is irregular and arbitrary because no show cause notice was issued to husband of the applicant in terms of Rule 17 of Army Rules 1954. No movement order meant for patient was issued. Learned counsel for the applicant submitted that keeping in view length of service of husband of the applicant, directions be given to respondents to quash impugned dismissal order dated 29.10.2016 and to conduct re-survey medical board of

the husband of the applicant to assess him mental disability and to consider his case for grant of disability pension.

4. On the other hand submission of learned counsel for the respondents is that husband of the applicant absented himself without leave from unit wef 22.07.1995. Apprehension Roll was issued and husband of the applicant was declared deserter. He was brought unit by his wife and he was taken on strength from 04.02.1996. Husband of the applicant again absented himself from Command Hospital. A court of inquiry was held which opined that applicant be declared deserter and after 10 years from the date of desertion, husband of the applicant was dismissed from service wef 13.08.2003 under Section 20 read with Army Rule 17. Learned counsel for the respondents submitted that since husband of the applicant was dismissed from service, neither he is entitled any pension nor he is entitled any relief as claimed and instant O.A. is liable to be dismissed.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. The question before us to decide is “whether dismissal order of the husband of the applicant can be quashed and re-survey medical board of the husband of applicant can be held”?

7. In this regard para 22 of Army Order 43/2001/DV is relevant which for convenience sake is reproduced as under:-

*“22. A person subject to the Army Act or a reservist subject to Indian Reserve Forces Act, who does not surrender or is not apprehended, will be dismissed from the service under Army Act Section 19 read with Army Rule 14 or Army Act Section 20 read with Army Rule 17, as the case may be, in accordance with instructions given below :-*

*(a) After 10 years of absence/desertion in the following cases :-*

*(i) Those who desert while on active service, in the forward areas specified in Extra Ordinary Gazette SRO 172 dated 05 Sep 77 (reproduced on page 751 of MML Part III) or while serving with a force engaged in operations, or in order to avoid such service.*

*(ii) Those who desert with arms or lethal weapons.*

*(iii) Those who desert due to subversive/espionage activities.*

*(iv) Those who commit any other serious offence in addition to desertion.*

*(v) Officers and JCOs/WOs (including Reservist officers and JCOs, who fail to report when required).*

*(vi) Those who have proceeded abroad after desertion.*

*(b) After 3 years of absence/desertion in other cases.*

*(c) The period of 10 years mentioned at sub-para (a) above may be reduced with specific approval of the COAS in special cases.”*

8. Thus, the aforesaid Army Order clearly provides that an individual, who deserts from service when serving in field area, can be dismissed from service after ten years of desertion.

9. Contention of learned counsel for the respondents that applicant is not entitled to pensionary benefits as per para 41 (a) of Pension Regulations for the Army, 2008 (Part-I) is sustainable as it provides that an individual who is dismissed from service under the provisions of Army Act, is ineligible for pension or gratuity in respect of all previous service. For convenience sake, aforesaid para 41 (a) is reproduced as under:-

*“41 (a). An individual who is dismissed under the provisions of Army Act, 1950 or removed under the Rules made thereunder as a measure of penalty, will be ineligible for pension or gratuity in respect of all previous service. In exceptional case, however, the competent authority on submission of an appeal to that effect may at its discretion sanction pension/gratuity or both at a rate not exceeding that which would be otherwise admissible had he been retired/discharged on the same date in the normal manner.”*

10. In the case reported in (1986) 2 SCC 217, **Capt Virender Singh vs. Chief of the Army Staff**, the Hon'ble Apex Court has held as under:-

*“Sections 38 and 39, and Sections 104 and 105 make a clear distinction between 'desertion' and 'absence without leave', and Section 106 prescribes the procedure to be followed when a person absent without leave is to be deemed to be deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion if the procedure prescribed by Section 106 is followed. Since every desertion necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the animus. If there is animus deserendi the absence is straightaway desertion.*

*13. As we mentioned earlier neither the expression 'deserter' nor the expression 'desertion' is defined in the Army Act. However we find paragraph 418 of the Artillery Records Instructions, 1981 refers to the distinction between desertion and absence without leave. It says:*

*418. 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. (AO 159/72). When a soldier absents himself without due authority or deserts the service, it is imperative that prompt and correct action is taken to avoid complications at a later stage.*

*We also find the following notes appended to the Section 38 of the Army Act in the Manual of the Armed Forces:*

*2. Sub Section (1)-Desertion is distinguished from absence without leave under AA. Section 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 piquet 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.*



3. A person may be a deserter although here-enrolls 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 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. Section 106 is not by itself a deciding factor if other evidence suggests the contrary.

*In Black's Law Dictionary the meaning of the expression 'desertion' in Military Law is stated as follows:*

*Any member of the armed forces who-(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion. Code of Military Justice, 10 U.S.C.A. 885”.*

11. In another case of **Shish Ram vs. Union of India &Ors**, (2012) 1 SCC, page 290, the appellant in that case was declared deserter with effect from 19.06.1978 and was dismissed from service with effect from 20.10.1981 i.e. after expiry of three years. The appellant challenged his dismissal order, however, no infirmity in the said order was found by the Hon'ble Apex Court and dismissal order was confirmed.

12. Admittedly, after unauthorised absence of the husband of the applicant, a Court of Inquiry was held and he was declared a deserter. Ten years from the date of his desertion, he was dismissed from service by following due process. Hence, we do not find any illegality or irregularity in the impugned order. So far as the claim for disability pension is concerned, dismissed Armed Forces person is not considered as an ex-serviceman and also not entitled for any pensionary benefits as per the policy in vogue. Further he has been dismissed from service, no re-survey medical board of husband of the applicant can be held.

13. In view of the above, we do not find any substance in the present O.A. which deserves to be dismissed. It is, accordingly **dismissed.**

14. No order as to costs.

15. Pending misc applications, if any, shall stand disposed off.

(Vice Admiral Atul Kumar Jain) (Justice Umesh Chandra Srivastava)  
Member (A) Member(J)

Dated:03 February, 2023

Ukt/-