

Court No 2
(Ser No. 17)
RESERVED

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

Original Application No. 482 of 2020

Tuesday, this the 21st day of February, 2023

"Hon'ble Mr. Justice Anil Kumar, Member (J)
Hon'ble Maj Gen Sanjay Singh, Member (A)"

No. 15145716N Gnr Kumar Pal Sarawat, 71 Medium Regiment (Jhansi), C/o 56 APO, resident of village Vas Chinta, Post Office-Vas Sudama, Police Station and Tehsil-Iglas, District-Aligarh (UP)-202145.

..... Applicant

Versus

1. Union of India, through Secretary of Defence, Ministry of Defence, New Delhi.
2. Commanding Officer, 71 medium Regiment (Jhansi), C/o 56 APO through its HQ 373 (I) Arty Brigade, C/o 56 APO.
3. Officer-in-Charge, Artillery Records, Top Khana Abhilekh, Nashik Road Camp, C/o 56 APO.
4. PAO (OR), Head Quarter, Arty Centre, Nashik Road Camp, Nashik-9, Maharashtra.
5. Senior-in-Charge, CDA Pension, Allahabad.
6. District Sainik Welfare and Punarwas Office, District-Aligarh.

..... Respondents

Ld. Counsel appeared -**None for the applicant.**
 for the Applicant

Ld. Counsel appeared -**Shri Adesh Kumar Gupta**, Advocate
 for the respondents

ORDER

1. By means of this Original Application, filed under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has prayed for the following reliefs :-

(a) Direct the respondents to reinstate the petitioner in his service with all consequential benefits.

(b) Quash the impugned order dated 25.05.2009 passed by the respondent No 3.

(c) Issue any other necessary order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(d) Award the cost of the application of the applicant.

2. The facts necessary for the purpose of adjudication in the instant Original Application may be summarised as under:-

The applicant was enrolled in the Indian Army on 04.12.2000. After completion of military training he was posted to 71 Medium Regiment. Thereafter, he was posted to 29 Rashtriya Rifles Battalion (29 RR Bn). During the course of his service with Rashtriya Rifles Battalion (RR Bn), he overstayed leave for 55 days for the period 03.09.2004 to 27.10.2004 and accordingly, he was awarded 07 days rigorous imprisonment (RI) in military custody and 14 days pay fine. On completion of tenure

with RR Bn, he was reverted back to his parent unit i.e. 71 Medium Regiment where during the year 2004-2005 he was awarded 28 days rigorous imprisonment and 14 days pay fine on 25.05.2005 due to 50 days absent without leave (AWL) and 28 days RI and 14 days pay fine on 23.11.2005 due to 153 days overstaying leave. In the year, 2005 while being on 20 days casual leave for the period 20.11.2005 to 10.12.2005, when he did not rejoin after completion of leave, apprehension roll dated 12.12.2005 was issued to concerned agencies and after 30 days, Court of Inquiry (C of I) under Section 106 of the Army Act, 1950, was conducted on 10.06.2006 and he was declared a deserter w.e.f. 11.12.2005. Since the applicant failed to report for duty even after three years of his being declared as a deserter, he was dismissed from service w.e.f. 20.04.2009 under Section 20 (3) of the Army Act, 1950 read with Para 22 (b) of Army Order 43/2001/DV. After dismissal from service, casualty was notified vide Part II Order dated 27.04.2009. On 25.05.2009 Artillery Records Nasik Road Camp informed Ex Servicemen's Welfare Office, District-Aligarh (UP) under intimation to applicant with an advice to apply for terminal benefits (Annexure CA-2 and CA-3). This O.A. has been filed by the

applicant to re-instate him into service with all consequential benefits.

4. Submission of learned counsel for the applicant is that after completion of 20 days leave, while returning to report for duty, someone had given him narcotic substance with the result he became unconscious and in that his suitcase containing his Identity Card and other belonging was stolen at Jhansi railway station. It was further submitted that the applicant, on being found in unconscious condition at Block Barun, District Aurangabad, Bihar, was admitted by Block Pramukh Archana Chandra in a hospital where he was treated for long and thereafter, on referral he was being treated in Mental Hospital, Agra.

5. Learned counsel for the applicant further submitted that due to his mental condition he had been under prolonged treatment at Mental Hospital, Agra and that was the sole reason he could not rejoin his duty. It was further submitted that neither a show cause notice nor any opportunity of hearing was provided to the applicant before dismissal from service and AFPP and AGI funds were released in favour of applicant's father without his consent. It was also submitted that the Commandant ought to have

taken a sympathetic view in favour of the applicant owing to his mental condition. He pleaded that in such circumstances the applicant deserves to be re-instated in service with all consequential benefits.

6. On the other hand, learned counsel for the respondents submitted that No. 15145716M Ex Gnr Kumar Pal Saraswat was enrolled in the Army on 04.12.2000. On completion of military training at Artillery Centre, Hyderabad, he was posted to 71 Medium Regiment w.e.f. 25.11.2001 and further posted to 29 Rashtriya Rifles Battalion (29 RR Bn) on Extra Regimental Employment (ERE) w.e.f. 02.03.2003. He further submitted that while serving with 29 RR Bn the applicant was awarded 07 days RI and 14 days pay fine on 04.11.2004 under Army Act Section 39 (b) on account of overstaying leave for 55 days. It was further submitted that on completion of ERE period the applicant was reverted back to his parent unit i.e. 71 Medium Regiment where he was awarded following punishments:-

<u>Offences</u>	<u>Period of absence</u>	<u>Punishment awarded</u>
Army Act Sec 39 (a)	<u>05.12.2004</u> 23.01.2005	28 days RI and 14 days pay fine
Army Act Sec 39 (b)	<u>23.04.2005</u> 22.09.2005	28 days RI and 14 days pay fine

7. Learned counsel for the respondents further submitted that on being granted 20 days casual leave w.e.f. 21.11.2005 when he did not report back for duty, apprehension roll dated 12.12.2005 was issued and after 30 days a C of I was conducted on 10.06.2006 which declared him as a deserter w.e.f. 11.12.2005. It was further submitted that when the applicant failed to report for duty even after elapse three years, after obtaining sanction of the competent authority, he was dismissed from service w.e.f. 20.04.2009 under Section 20 (3) of the Army Act, 1950 read in conjunction with Para 22 (b) of Army Order 43/2001/DV, being a peace area deserter and occurrence to this effect was notified vide Part II Order dated 27.04.2009.

8. Learned counsel for the respondents further submitted that after dismissal of the applicant, letter dated 25.05.2009 was sent to Ex-Servicemen's Welfare Office, District-Aligarh (UP) intimating them to advise the applicant for drawal of his terminal benefits. It was further submitted that there is no provision to re-instate a dismissed Army person into service. Concluding his pleadings, learned counsel for the respondents submitted that a dismissed soldier is not entitled to service pension

under Para 113 (a) of Pension Regulations for the Army, 1961. He pleaded for dismissal of O.A.

9. Heard Shri Adesh Kumar Gupta, learned counsel for the respondents assisted by Capt Bharat Keshav, Departmental Representative for the respondents and perused the record. Despite sufficient opportunity being given none appeared for the applicant to address the Tribunal.

10. There is no dispute that the applicant was enrolled in the Army on 04.12.2000. It is also not disputed that the applicant was awarded following punishments during the course of his service:-

S No	Offences	Period of Absence	Date of Award	Punishment Awarded
(a)	Army Act Section 39 (b)-without sufficient cause overstaying leave granted to him	03.09.2004 to 27.10.2004 (55 days)	02.11.2004	28 days RI in military custody and 14 days pay fine
(b)	Army Act Section 39 (a)-Absenting himself without leave	05.12.2004 to 23.01.2005 (50 days)	25.05.2005	28 days RI in military custody and 14 days pay fine
(c)	Army Act Section 39 (b)-without sufficient cause overstaying leave granted to him	23.04.2005 to 22.09.2005 (153 days)	23.11.2005	28 days RI in military custody and 14 days pay fine

11. While on 20 days casual leave w.e.f. 21.11.2005 the applicant never reported back to his unit after expiry of leave. As per procedure, apprehension roll dated

12.12.2005 was issued to all concerned agencies and after clear 30 days a C of I was conducted as per Section 106 of the Army Act, 1950 which declared him as a deserter. Thereafter, after waiting for three years, as per policy in vogue, being a peace area deserter, he was dismissed from service under the provisions contained in Army Act, Section 19 read with Army Rule 14, Army Act Section 20 (3) read with Rule 17 and Army Order 43/2001/DV and casualty to this effect was notified vide Part II Order dated 27.04.2009. After dismissal of the applicant, intimation to this effect was given to Ex-Servicemen's Welfare Office, District-Aligarh (UP) and the applicant.

12. Applicant has contended that he could not rejoin duty after expiry of leave due to his mental ailment, death of his father and separation from his wife as she married to other person. His main contention is that he was suffering from mental illness and was under treatment at Mental Hospital, Agra for a long period. The only defence of the applicant is that during the period of his absence, he was mentally ill and was taking treatment at Mental Hospital. It is nowhere the case of the applicant that he was given treatment in any Army Hospital or in Civil Hospital. It is unbelievable that a person who is suffering from mental ailment for

several years and ultimately recovered from such mental ailment has not been given treatment by any authorized doctor or any reputed hospital, rather he was treated by a local doctor at Agra. In absence of any documents of the point on the ground of absence i.e. mental illness, the said defence of the applicant cannot be relied upon. In absence of any reliable explanation for absence, the only conclusion would be that the applicant deserted the service voluntarily and he intentionally deserted and remained absent without sanctioned leave and without permission for a long period. At this stage, we would like to quote Para 22 of Army Order '43/2001/DV- DESERTION' which reads 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."

13. Thus, the aforementioned Army Order provides for three years period for dismissal of an Army person from service in case of a deserter.

14. In this regard, we would like to refer the case of **Capt Virender Singh vs. Chief of the Army Staff**, (1986) 2 SCC 217, wherein in para 13 & 14, The Apex Court has held as under :-

"Section 38 and 39, and Section 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 straightway 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 wither (a) never to return to the service or (b) to avoid some important military duty (commonly know 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.

3. *A person may be a 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 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 states 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.

14. *As we mentioned earlier, the Army Act makes a pointed distinction between 'desertion'*

and 'absence without leave' simpliciter. 'Absence without leave' may be desertion if accompanied by the necessary 'animus deserendi' or deemed to be desertion if the Court of Inquiry makes the declaration of absence prescribed by Section 106 after following the procedure laid down and the person declared absent had neither surrendered nor been arrested."

15. 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 that is 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.

16. Keeping in view the aforesaid legal position when we examine the facts and circumstances of the instant case, then it is clear that the defence of the applicant, that he was mentally ill for a prolonged period and hence could not rejoin duty in time and also could not approach the Tribunal is absolutely without substance. There is absolutely no documentary evidence to support such pleading of the applicant. Hence this defence is only an afterthought which does not inspire confidence. Admittedly, after unauthorised absence of the applicant, a Court of

Inquiry was held and he was declared a deserter from the date of his absence. Three years from the date of desertion, he was dismissed from service. It is nowhere the case of the applicant that the authority passed the order was not competent to pass such order or the order of dismissal was passed before expiry of period of three years as provided in the Army Order quoted above. Hence, we do not find any illegality or irregularity in the impugned order.

17. Thus, from the aforesaid it is evident that the applicant being a habitual offender absented/overstayed leave without permission of superior authority. Contention of the respondents, that the applicant was interviewed by each appointment in chain of command upto his Commanding Officer while awarding each of the above punishments, is tenable. The applicant by committing the aforesaid offences had shown utter disregard to military discipline and had set an extremely bad example to other disciplined soldiers in the unit. Certain norms and standards of behaviour and high degree of discipline is expected from military persons, but the applicant never cared for his future prospects and demonstrated no improvement in making frequent offences with regard to absent without leave and overstaying leave. The Army

discipline cannot be overlooked in such matters. Therefore, we do not find any substance in the present O.A. which deserves to be dismissed.

18. It is also made clear that a dismissed Armed Forces personal is not entitled to service pension in terms of Regulation 113 (a) of the Pension Regulations for the Army 1961.

19. In our view, the Original Application has no merit, deserves to be dismissed and is accordingly **dismissed**.

20. No order as to costs.

21. Miscellaneous application(s), pending if any, stand disposed of.

(Maj Gen Sanjay Singh)
Member (A)

Dated :21.02.2023
rathore

(Justice Anil Kumar)
Member (J)