

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 670 of 2017**Tuesday, this the 11th day of January, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Suresh Chand Pandey S/o Dev Narain Pandey, Permanent Resident of Village-Dhanipur, Post Office-Asgara Raniganj, District-Pratapgarh.

Through

Pushpa Devi pandey W/o Lal Sursh Chand Pandey Resident of Village-Dhanipur, Post Office-Asgara Raniganj, District-Pratapgarh.

..... Applicant

Learned counsel for the Applicant : **Pankaj Kumar Shukla**, Advocate.

Versus

1. Union of India through Secretary Ministry of Defence, South Block, New Delhi.
2. The Chief of Army Staff, South Block, New Delhi-110011.
3. EME Records, Secunderabad, C/o 56 APO.
4. Principal Controller of Defence Accounts (pensions) Draupadi Ghat, Allahabad.

..... Respondents

Learned counsel for the Respondents. : **Shri Ashish Kumar Singh**,
Central Govt. Counsel

ORDER

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- (a) *To issue / pass an order to set-aside /quash the impugned order dated 25.11.2004 passed by the respondent No.3 by which the applicant had been declare deserter from service and Rejection of Appeal dated 08.01.2007.*
- (aa) *to issue/pass an order or directions to set-aside/quash the Discharge Certificate in lieu of IAFY-1948 (A) dismissal order on 14.11.2018 and Part II Order of applicant's husband passed by the respondents.*
- (b) *To issue an order or directions to the respondents to grant for all consequential service benefits along with interest on the arrears of dues so accrued.*
- (c) *To issue / pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*
- (d) *To allow this original application with costs.*

2. The facts necessary for the purpose of adjudication in instant Original Application may be summed up as under.

3. Applicant's husband was enrolled in the Indian Army (Corps of EME) on 13.04.1987 as a Sepoy. While serving with 6055 (I) Mech Bde Wksp he was granted 20 days casual leave for the period 17.09.2002 to 06.10.2002. On expiry of the said leave, individual failed to rejoin his duty on 07.10.2002 and remained absent. Accordingly, an apprehension roll dated 10.10.2002 was issued to police authorities and a copy was also forwarded to the applicant Smt Pushpa Devi Pandey. Court of Inquiry was conducted on 06.11.2002 and he was declared a deserter w.e.f. 07.10.2002. Applicant is stated to have approached various authorities for grant of pensionary benefits in respect of her husband but every time she was informed that since her husband is a deserter, he is not entitled to pension. Meanwhile information was received from police authority Jethwara, Distt-Pratapgarh (UP) that individual refused to join

duty. The police also obtained his written statement dated 29.01.2003 mentioning therein that he refused to join the duty (Annexure R-1). Consequent to desertion from service, statement of account in respect of applicant's husband was finalised with credit balance of Rs 4,191/- which was remitted to the applicant through cheque No. 373743 dated 16.09.2003. On 17.08.2007 applicant submitted an appeal to Chief of the Army Staff for grant of pensionary benefits which was disposed off vide EME Records letter dated 23.10.2007. Later, after expiry of 10 years period from the date of desertion, applicant's husband was dismissed from service w.e.f. 07.10.2002 under Army Act Section 20 (3) and occurrence to this effect was notified vide Part II order dated 27.10.2016. Earlier, the applicant had filed Writ Petition No. 23966 of 2009 before the Hon'ble High Court of Judicature at Allahabad for grant of pension and other service benefits of her husband which was dismissed vide order dated 04.11.2009 on the ground of jurisdiction. This O.A. has been filed for grant of service pension to applicant's husband on the premise that her husband had a pensionable service of 15 years to his credit at the time when he was dismissed from service.

3. Submission of learned counsel for the applicant is that when applicant's husband was availing leave at home he became mentally ill and he used to run away from home. Applicant's further submission is that her husband got treatment at Mental Hospital, Varanasi and Dr. Ram Manohar Lohia Hospital, New Delhi but despite regular treatment there was no improvement. The applicant further submitted that on 05.04.2010 she went to EME Records, Secunderabad along with her husband but she was denied entry on the ground that her husband was a

deserter from field area w.e.f. 07.10.2002. Further submission of learned counsel for the applicant is that keeping in view of mental illness of applicant's husband and also keeping in view of his pensionable service, dismissal order/discharge certificate dated 14.11.2018 be quashed and service pension be granted to applicant's husband so that applicant, who is an illiterate and poor lady, is able to manage 'bread and butter' for her family.

4. On the other hand, learned counsel for the respondents submitted that applicant's husband was serving in field area where he was granted 20 days casual leave which was to expire on 06.10.2002. He further submitted that after expiry of leave when the serving soldier did not rejoin duty, apprehension roll dated 10.10.2002 was issued with an intimation to his wife. He further submitted that when the soldier did not rejoin leave after expiry of leave, a Court of Inquiry was constituted on 07.10.2002 which declared him a deserter w.e.f. 07.10.2002 and casualty to this effect was notified vide Part II Order dated 16.12.2002. His further submission is that on receipt of apprehension roll dated 10.10.2002 the police authority District-Pratapgarh met with him on 29.01.2003 but he refused to join the duty. His other submission is that applicant's husband being a habitual offender was also earlier punished SEVEN times during the period 03.01.1993 to 21.10.2000. He pleaded for dismissal of O.A. on the ground that since applicant's husband has been dismissed from service, he is not entitled to service pension in terms of para 113 of Pension Regulations for the Army, 1961 (Part I).

5. Heard learned counsel for the parties and perused the material placed on record.

6. The moot question in this case is that whether a dismissed soldier may be granted service pension. It is not disputed that applicant is wife of dismissed soldier No. 14605465X Sep/Dvr (MT) Lal Suresh Chandra Pandey. Applicant's husband was granted 20 days leave for the period 17.09.2002 to 06.10.2002. On his not rejoining duty after expiry of leave, apprehension roll dated 10.10.2002 was issued. The police authorities met applicant on 29.01.2003 (Annexure R-1) but he refused to rejoin duty on the ground that he was the only person at home to look after family. For convenience sake, relevant part of report submitted by the police authority is reproduced as under:-

“निवेदन है कि उक्त GVR No 518/02 Sep/Dvr (MT) लाल सुरेश चंद पाण्डेय उपरोक्त की जांच किया गया तो उक्त लाल सुरेश चंद पाण्डेय अपने निवास पतुलकी में मिला उसको बताया गया उक्त GVR के संबंध में, तो उसने कहा कि मैं घर का अकेला व्यक्ति हूँ हमारे घर पर न रहने से हमारे परिवार की दैनिक दशा खराब हो जाती है। नौकरी करने में असमर्थ हूँ।”

7. Thus, from the aforesaid it is clear that applicant was reluctant to join service on the ground that he was alone to look after family affairs. The contention of applicant that her husband being mentally ill deserted from house in October, 2002 is not tenable on the ground that when police authority visited on 29.01.2003 he was at home and made statement that he would not like to join the service.

8. The respondents contention that applicant's husband while in service has been a habitual offender is justified in the light of punishments awarded to him under various sections of Army Act which are reproduced below:-

S. No.	Army Section	Act	Date of Offence	Date of Punishment	Punishment Awarded
1.	AA Sec 39(b)		03.01.1993	16.01.1993	14 days pay fine
2.	AA Sec 39(b)		23.05.1994	06.07.1994	14 days RI
3.	AA Sec 40(c)		10.02.1995	06.04.1995	28 days RI
4.	AA Sec 63		05.08.1995	07.08.1995	07 days RI
5.	AA Sec 39(b)		02.03.1996	11.05.1996	14 days RI
6.	AA Sec 39(b)		16.02.1997	20.02.1997	07 days pay fine
7.	AA Sec 39(a)		17.10.2000	21.10.2000	21 days RI

9. Admittedly the applicant remained absent without any sanctioned leave w.e.f. 07.10.2002 and after 30 days, a Court of Inquiry was held and he was declared a deserter and after expiry of ten years, he was dismissed from service. The only defence of the applicant is that during this period, applicant's husband was mentally ill and was taking treatment at various hospitals like Mental Hospital, Varanasi and D. Ram Manohar Lohia Hospital, New Delhi. It is nowhere the case of the applicant that the applicant's husband was given treatment in any Military Hospital. It is unbelievable that an Army person who has been suffering from mental ailment for several years was not taken to a nearby Military Hospital for treatment. In absence of any reliable explanation for absence, the only conclusion would be that the applicant's husband deserted the service voluntarily and intentionally remained absent without sanction of leave and without permission for a long period. At this stage, we would like to quote para 22 of Army Order 'AO/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.”*

Thus aforementioned Army Order provides for ten years period for dismissal from service in case of a deserter from field area.

10. 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 Hon'ble 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."

11. 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.”

12. In Black’s Law Dictionary the meaning of the expression ‘desertion’ in Military law 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.”

13. 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.

14. In another case of **Shish Ram vs. Union of India & Ors**, (2012) 1 SCC, page 290, the appellant in that case was declared a 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.

15. Keeping in view the aforesaid legal position when we examined the facts and circumstances of the instant case, then it is clear that the defence of the applicant, that her husband has been mentally ill and on account of that he could not join duty is absolutely without substance. There is absolutely no documentary evidence with regard to treatment of her husband in Military Hospital 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's husband, a Court of Inquiry was held and he was declared a deserter from the date of his absence. Ten years from the date of desertion, applicant's husband 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 ten years as provided in the Army Order quoted above. Hence, we do not find any illegality or irregularity in the impugned order. 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.

16. So far as the claim for service pension is concerned, a dismissed Armed Forces personnel is not entitled to service pension. In this connection Regulation 113 of the Pension Regulations for the Army 1961 is referable. The husband of the applicant is not entitled to service pension due to him being dismissed from service.

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

18. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 07th January, 2022

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