

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW****ORIGINAL APPLICATION No. 671 of 2020**Monday, this the 17<sup>th</sup> day of January, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**  
**Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)**Pramod Kumar, son of Sri Udai Singh, R/o House No-2A,  
Banke Biharipuram Colony, Sakhipuram, Dahtora, Sikandara,  
District-Agra.

..... Applicant

Ld. Counsel for the : **Shri Anand Dubey**, Advocate.  
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence,  
D.H.Q., Post Office-New Delhi.
2. The Chief of Army Staff, Army Staff, D.H.Q. Post-New  
Delhi.
3. Centre Commandant, Rajputana Rifles Regimental  
Centre, Cantt-10, New Delhi.
4. The Commanding Officer, 20 Rajputana Rifles, 167  
Infantry Brigade, Shahjahanpur (23), Infantry Division.
5. Officer-in-Charge, Records, the Rajputana Rifles, PIN-  
900106, C/o 56 APO.
6. PCDA (Pensions) (Army), Draupadi Ghat, Allahabad (UP)-  
211014.

.....Respondents

Ld. Counsel for the  
Respondents.**Dr. Shailendra Sharma Atal**,  
Central Govt. Standing Counsel

**ORDER (Oral)**

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

(a) That this Hon'ble Tribunal may kindly be pleased to direct the opposite parties to allow the petitioner to join his services with effect from 26 April 2016 on the post of Rifle Man before opposite party No-4 or the opposite parties may be directed to sanction pension to the petitioner as his retirement is due in the month of 26<sup>th</sup> March, 2018.

(b) That any other orders which this Hon'ble Tribunal deems fit and proper in the circumstances of the case may also be passed in favour of the petitioner.

(c) That this Hon'ble Tribunal may graciously be pleased to allow the claim petition with all consequential benefits and with directions to the respondents to award the cost of the claim petition.

2. Applicant, No 16011550L Rifleman Pramod Kumar was enrolled in the Indian Army on 26.03.2001. During the course of service he was granted 15 days casual leave for the period 11.04.2016 to 25.04.2016. He was to report back for duty on 26.04.2016 but he failed to do so. An apprehension roll was issued on 27.04.2016 (annexure 'D'). Thereafter, a Court of Inquiry under Section 106 of Army Act, 1950 was held on 25.05.2016 which declared him deserter w.e.f. 26.04.2016. Since applicant neither rejoined his unit nor reported anywhere including his Training Centre, he was dismissed from service w.e.f. 20.10.2019 i.e. after 03 years from the date of desertion, being a peace area deserter, under the provisions of Army Act Section 20 (3) read with Rule 17 of Army Rules, 1954. Applicant has filed this O.A. for issuing

directions to the respondents to allow him to join the service and thereafter grant of service pension

3. Learned counsel for the applicant submitted that the applicant has worked in the Army with full devotion and dedication and his conduct was always appreciated by the higher authorities. He further submitted that while serving with 35 Infantry Brigade his Deputy Commandant was annoyed with him as he refused illegal orders given by him. He further submitted that due to the above reason, he was harassed frequently by conducting certain Court of Inquiries against him, however no punishment was awarded to him. His other submission is that after expiry of leave when he reported the unit, he was not allowed to join the duty. He further submitted that applicant has written three letters dated 15.03.2017 and 22.12.2017 to various authorities for his joining the service but no response has yet been received. He pleaded for issuing direction to the respondents to allow the applicant to join the Army and grant service pension as he has completed pensionable service.

4. On the other hand submission of learned counsel for the respondents is that the applicant while posted with 35 Infantry Brigade was involved in misbehaviour with seniors, drunken brawls and constant request for leave extension. He further submitted that despite repeated counselling, there was no improvement in his behaviour and discipline. His further

averment is that the applicant was a habitual offender who was punished several times on account of his overstaying leave and misbehaviour. He asserted that in the year 2016 when the unit was about to move for Exercise With Troops (EWT) the applicant preferred to proceed on 45 days part of annual leave to avoid moving with the Battalion. His other submission is that he was to report back for duty on 26.04.2016 but he never reported back and deserted from service. Accordingly, an apprehension roll was issued followed by a Court of Inquiry which declared him as a deserter. Learned counsel for the respondents further submitted that case under civil offences (IPC) 384 (offence of extortion), 377 (disgraceful conduct of an unnatural kind) and 511 is pending/subjudice against the applicant at the Learned Metropolitan Magistrate, Dwarka, Delhi for the offences committed by him on 21.06.2004. Besides the aforesaid offences, an FIR No 86/12 has also been lodged against him under IPC 342, 323, 504 and 509 and the case is pending at District Court, Mathura. He pleaded for dismissal of O.A. on the ground that since the applicant has never reported back to the unit from leave w.e.f. 26.04.2016, he was dismissed from service w.e.f. 26.04.2016 in terms of Section 20 (3) of Army Act, 1950 and a dismissed Army person is not entitled to gratuity and pension.

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

6. Admittedly, the applicant overstayed leave w.e.f. 26.04.2016 and never returned from leave granted to him on 11.04.2016. An apprehension roll was issued and after clear 30 days of absence, a Court of Inquiry was held and he was declared a deserter. After expiry of three years, he was dismissed from service. In absence of any reliable explanation for absence, the only conclusion was that applicant deserted the service voluntarily and intentionally.

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 peace area, can be dismissed from service after three 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 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.

12. While perusing the records, we also find that the applicant has been a habitual offender who was punished several times on account of his lapses as under:-

S. No.	AA Sec	Date of punishment	Punishment awarded	Awarding officer	Type of offence
1.	39(b)	27.10.2003	28 days RI	Col RP Joshi, CO 20 Raj Rif	OSL (Fd/Nowshera)
2.	39(b)	18.10.2006	07 days RI	Col Gurjap Singh, CO 20 Raj Rif	OSL (Peace/Faizabad)
3.	63	29.06.2011	28 days RI	Col Rajeev Kumar, CO, 20 Raj Rif	Prejudicial to Good Order and Mil Discp (Peace/Delhi)
4.	39(a)	04.10.2012	14 days RI	Col Anirudh Chauhan, CO, 20 Raj Rif	AWL (Peace/Delhi)
5.	39(a)	07.03.2013	07 days RI	Col Anirudh Chauhan, CO, 20 Raj Rif	AWL (Peace/Delhi)
6.	48	19.05.2014	14 days RI	Col Anirudh Chauhan, CO, 20 Raj Rif	Intoxication (Fd/Glacier)
7.	39(a)	07.10.2015	28 days RI	Col Rajneesh Tyagi, CO, 20 Raj Rif	AWL (Peace/Shahjahanpur)

The aforesaid punishments awarded by different Commanding Officers clearly show that the applicant had no respect towards the disciplined organization like Army.

13. The applicant was about to complete his pensionable service and keeping that view in mind a lenient view would have been taken to grant service pension, but in our considered opinion desertion is the abandonment of a military duty without permission and therefore, a deserted soldier has no sympathy.

14. Keeping in view the aforesaid legal position when we examine the facts and circumstances of the instant case, it is clear that the defence of the applicant, that he tried to join

