

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

ORIGINAL APPLICATION No. 372 of 2021

Wednesday, this the 12th day of January, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Service No. 13953329F Ex. Sepoy, Mooj Nath Giri, S/o Ram Giri resident of village-Badhya Phoolwariya, Post Office-Thakur Devariya, District-Devariya (UP).

..... **Applicant**

Learned counsel for the Applicant : **Shri VP Pandey**, Advocate
Shri SK Mishra, Advocate

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delh-110011.
2. The Chief of Army Staff, Integrated Head Quarter, Ministry of Defence (Army), South Block, New Delhi-110011.
3. Officer-In-Charge, Records, Army Medical Corps, Pin 900450, C/o 56 APO.
4. Principal Controller of Defence Account (Pension), Draupdi Ghat, Allahabad.

.....Respondents

Learned counsel Respondents : **Dr. Shailendra Sharma Atal**, Advocate
Central Govt 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:-

- (i) To set aside/quash the impugned dismissal order dated 20 Oct 1994 communicated on 06 July 2019 as contained in Annexure No A-1 being illegal and arbitrary.*
- (ii) To pass order or direction directing the respondents to pay service pension to the applicant with all consequential benefits.*
- (iii) Any other relief as considered proper by this Hon'ble Tribunal be awarded in favour of the applicant.*
- (iv) Cost of the O.A. be awarded to the applicant.*

2. Brief facts of the case giving rise to this application are that the applicant was enrolled in the Army Medical Corps (AMC) of the Indian Army on 31.03.1982. While serving with 315 Field Hospital and attached with Military Hospital, Jalandhar, he was granted 30 days balance of annual leave for the period 06.04.1991 to 05.05.1991. On expiry of leave, the applicant did not report for duty and overstayed leave w.e.f. 06.05.1991. An apprehension roll was issued to all concerned with intimation to applicant's wife and after 30 days Court of Inquiry dated 20.06.1991 was conducted in terms of Section 106 of Army Act, 1950 which declared him a deserter. Since the applicant was a deserter by overstaying leave granted to him without sufficient cause and remained absent for more than three years, he was dismissed from service by

Commandant, AMC Centre and School, Lucknow w.e.f. 06.05.1991 in terms of Section 20 (3) of Army Act, 1950 and Army Order 439/63 and casualty to this effect was notified vide Part II Order No. 250/04/94 dated 20.10.1994. On 22.05.2019 the applicant approached AMC Records for issue of discharge certificate which was supplied to him on 06.07.2019. This O.A. has been filed for grant of service pension to the applicant.

3. Submission of learned counsel for the applicant is that while on leave due to domestic problems the applicant became insane and therefore, he could not join the duty after expiry of leave. His further submission is that applicant was neither supplied apprehension roll nor discharge/dismissal order was supplied. Further submission of the applicant is that after recuperation when he approached the Record Office he was provided a copy of discharge order dated 06.07.2019. His other submission is that prior to his dismissal he was not provided any opportunity of hearing which is a clear violation of natural justice. He pleaded for grant of service pension on the ground that he could not join the unit being insane.

4. On the other hand submission of learned counsel for the respondents is that applicant was granted annual leave for the year 1991 and he was required to report back for duty on 06.05.1991, which he failed to do and in consequence thereof apprehension roll was issued followed by a Court of Inquiry dated 20.06.1991. The Court of Inquiry opined that applicant

be declared a deserter. Thereafter, after completion of three years of desertion, he was dismissed from service w.e.f. 06.05.1991 under Section 20 (3) of Army Act, 1950 and Army Order 439/63 and casualty to this effect was notified vide Part II Order No. 250/04/94 dated 20.10.1994. Further submission made by learned counsel for the respondents is that the civil authorities were also intimated about his dismissal. He concluded that since dismissal of applicant was done by following due process, this O.A. deserves to be dismissed on merit.

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. 06.05.1991 and never returned from leave granted to him on 06.04.1991. 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, his services were dispensed with. 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. Applicant's contention that he was not provided any opportunity of hearing prior to discharge is not sustainable as he never reported back to his unit after desertion. Contention

of learned counsel for the respondents that applicant is not entitled to pensionary benefits as per para 132 of Pension Regulations for the Army, 1961 (Part-II) and Rule 113 (a) of Pension Regulations for the Army, 1961 (Part-II) is sustainable as these regulations provide that an individual who has been dismissed from service prior to completion of 15 years, is ineligible for pension or gratuity in respect of all his previous service. For convenience sake, the aforesaid regulations are reproduced as under:-

"Para 132 of Pension Regulations for the Army, 1961 (Part-II).

Unless otherwise, provided for, the minimum qualifying colour service pension is 15 years for earning service pension."

"Rule 113 (a) of Pension Regulations for the Army-1961 (Part I). *An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service."*

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. Thus, 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 was in demented condition during the period of desertion, is absolutely without substance. If applicant (who belonged to Army Medical Corps) was a case of mental illness, his relatives could have brought him to a nearby Military Hospital for treatment rather than confining him at home. The applicant was a deserter and did not report to any military authority after 05.05.1991. This itself shows that the applicant had no intention to return to his unit. 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 i.e. 06.05.1991. Three 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. In 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. It is accordingly, dismissed.

13. So far as the claim for service pension is concerned, dismissed Armed Forces personnel is not considered as an ex-serviceman and also not entitled for any pensionary benefits as per the policy in vogue.

14. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 12th January, 2022
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