

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
(Circuit Bench at Nainital)**

ORIGINAL APPLICATION No. 182 of 2021

Tuesday, this the 16th day of November, 2021

**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

Army No 3387616 Ex Sep Bache Singh, Son of Harak Singh,
R/o Kanda Panchgoda, Kanda, Bageshwar District-
Bageshwar.

..... Applicant

Ld. Counsel for the : **Ms. Deepa Arya, Advocate.**
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, (Army), Central Secretariat, New Delhi.
2. Commanding Officer, 8 Sikh Regiment, C/o 56 APO.
3. Senior Record Officer, 8 Sikh Regiment Records, C/o 56 APO
4. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad (U.P.)-211014.

.....**Respondents**

Ld. Counsel for the : **Shri Rajesh Sharma,**
Respondents. **Central Govt. 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.

The Hon’ble Tribunal may graciously be pleased to issue appropriate order or direction to the respondents to reinstate the applicant in service or in alternate grant pension to the applicant considering his past services for a period of 07 years, 05 months wef 15.06.1994, the date of discharge.

Such other suitable order be deemed fit and proper in the facts and circumstances of the case may also kindly be passed to meet the interest of justice.

2. Briefly stated facts of the case are that applicant was enrolled in the Indian Army on 15.01.1987. He was granted leave to attend death ritual of his father but could not join duty in time. In January 1993, he was granted two months leave but he failed to join his duty in time due to mental illness. In January 1999 applicant recovered and he requested respondents to reinstate him in service but he was not allowed. Applicant was discharged from service on 04.04.2004 under Army Act Section 20 (3). It is in this perspective that the applicant has preferred the present Original Application for grant of disability pension.

3. Ld. Counsel for the applicant pleaded that the applicant was enrolled in the Army on 15.01.1987. Father of the applicant died on 18.08.1990 in his native village and applicant was informed through telegram. Applicant approached the Commanding Officer for grant of leave to perform after death ritual of his father. The applicant was the only son of his father. The applicant was granted leave after 24 days of death of his father. He got severe shock due to non grant of leave to perform after death rituals of his father. After completion of leave, applicant joined his duty at Jammu from where he was posted to Tangdhar. The applicant was granted two months leave in January 1993. On completion of leave the applicant left his native place to join his duty. While he reached Bareilly (U.P.) due to unsound mental condition the memory of the applicant got lost and some known person brought back the applicant at his home and applicant was given treatment and in January 1999, the applicant recovered his health and requested the respondents to join duty but no heed was paid. Applicant served the army for 7 years and 5 months and his entire service career remained unblemished. On 01.08.2002, was issued certificate stating that he has served army for about 8 years. Discharge certificate of the applicant was issued on 29.08.2014. Learned counsel for the applicant submitted that applicant was

illegally and arbitrarily discharged from service and was deprived for grant of pensionary benefits. He pleaded that, on account of aforesaid, applicant be reinstated in service and pension be granted to him.

4. On the other hand, Ld. Counsel for the respondents submitted that applicant was awarded punishment twice for the offence committed under Army Act Section 39 (a) i.e. for absent without leave for 41 days with effect from 02.10.1990 to 29.11.1990 and again for absent without leave for 50 days from 02.10.1992 to 20.11.1992. The Medical Category of the applicant is SHAPE-1. The applicant was granted 60 days leave from 03.02.1994 to 03.04.1994. He was required to report at 213 Transit Camp Jammu on 03.04.1994 but he did not report. Accordingly, he was declared deserter by a court of inquiry. He was dismissed from service after 10 years from the date of his desertion with effect from 04.04.2004. The applicant submitted appeal after lapse of more than 26 years from the date of desertion and after lapse of 16 years from the date of his dismissal from service for his reinstatement or in alternate grant pension to him considering his past service, which is barred by limitation. Learned counsel for the respondents submitted that as per Paras 376 to 381 of Regulations for the

Army (Revised Edition 1987) there is no restriction on such deserter from joining the unit. However necessary disciplinary proceedings are required to be initiated against such deserter upon his rejoining under Army Act Sec 39 (b). Since the applicant deserted from field area and did not report to his unit within a period of continuous 10 years from his desertion, hence he was dismissed from service. There is no provision either to reinstate him into service nor to grant him pension. No procedural lapse has been pointed out by the applicant in his dismissal. He pleaded that in the facts and circumstances, as stated above, Original Application deserves to be dismissed.

5. We have heard Ld. Counsel for the parties and perused the material placed on record.

6. The question which requires our consideration in the circumstances mentioned hereinabove is, 'whether the applicant can be reinstated in service or not?

7. In the instant case, if the applicant would have joined his duty voluntarily, then for his absence over and above the period of leave sanctioned, he could have been proceeded only for over staying of leave and not as a deserter. He remained absent after expiry of the leave which cannot be ignored at all. Such a long absence clearly demonstrates that the intention of

the applicant was to desert the service. He absented himself on earlier two occasions but later on joined his duty. He finally deserted from service wef 04.04.1994 and did not join his duty but only wrote letters for joining.

8. Request of the applicant for joining duty as and when suited him does not wipe off his intention of deserting service. The applicant was provided sufficient opportunity to complete his pensionable service but he is a habitual offender. He has not produced any medical documents to ascertain that he was mentally ill. His Medical Category is SHAPE-1.

9. Primary issue emerging for consideration is whether the absence of the applicant after expiry of the leave granted to him would constitute an offence of desertion under Army Act. Basically, continuous absence of the applicant for such a long time after expiry of the leave granted to him has led to the disciplinary action of dismissal after completion of 10 years from the date of desertion. In this context Section 39 (b) being relevant is reproduced as under:-

“39. Absence without leave.--Any person subject to this Act who commits any of the following offences, that is to say,-

(a) xx xx xx xx

(b) without sufficient cause overstays leave granted to him; or

10. In this context Section 106 of the Act which mandates an enquiry into the absence without leave before a person is being proceeded for such absence has decisive effect. Section 106 of the Act reads thus:

“106. Inquiry into absence without leave.-- (1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.”

11. Sub-section (1) of Section 106 states that if the absence from duty without authority continued for a period of 30 days then a Court of Inquiry has to be proceeded with and if the factum of absence without permission or other sufficient cause is proved then the Commanding Officer has to declare any such

absence. Sub-section (2) of the above section which has got much significance in resolving the question posed for consideration states that if the person who has been declared absent under sub-section (1) of the Section does not afterwards surrender or is not apprehended then he 'shall be deemed to be a deserter'. So, declaration of absence after a Court of Inquiry and issue of apprehension roll for his arrest would not make the declared absentee a deserter if he surrenders voluntarily after such declaration or is apprehended. An absentee who afterwards surrenders or is apprehended cannot be considered as a deserter for the simple reason that he had been previously declared as an absentee after a Court of Inquiry conducted over his absence. Once the declared absentee surrenders or is apprehended and he is permitted to join duty, he cannot be proceeded as a deserter. In such contingencies, a declared absentee can be proceeded only for 'absence without leave' under any of the sub-clauses in Section 39 of the Act as applicable to. The whole gamut of the facts and circumstances involved in the case require to be examined and analysed in scrutinising the challenge raised against the order of dismissal passed against the applicant, who, admittedly, remained continuously absent unauthorisedly for a long period after the expiry of the leave granted to him.

Leaving the period of his absence, the period of his service excluding non qualifying service is roughly six years and few months only. For his continuous absence for a long time he had advanced a case of his illness and of his treatment by a private Doctor without producing any medical documents.

12. The fact that the accusation over the unauthorised absence of the applicant was imputed under a wrong provision of law cannot be given unmerited consideration. We do not find any circumstance in the case indicative of any prejudice having been caused to the applicant. The explanation offered for his absence on account of his illness and for non-reporting to the unit is unworthy of any value or merit. The proved facts and circumstances presented in this case would show that he had no justifiable reason or explanation for his absence and the case of illness pleaded by him is totally unreliable.

13. The applicant absented himself from duty thrice during his short period of seven years of service. His absence from duty, that too repeatedly, is not condonable in Army, a disciplined Force. Any leniency shown to such a recalcitrant soldier would lead to indiscipline and demoralising the Force in which discipline and adherence to duty is inviolable. We do not find

any merit in the challenge raised by the applicant against dismissal.

14. In view of the above, the Original Application is devoid of merit and deserves to be dismissed. It is accordingly **dismissed**.

15. No order as to costs.

16. Pending applications, if any, are disposed of accordingly.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 16 November, 2021

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