

Court No.2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 112 of 2017

Friday this the 22nd day of December, 2017

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

Hon'ble Air Marshal BBP Sinha, Member (A)

No. 14236550 Ex Signalman, Bhim Singh
Son of late Joga Singh Adhikari
Resident of Village - Malli Rauni
Post Office – Majkhali
District – Almora – 263652 (Uttarakhand)

..... **Applicant**

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delhi.
2. The Chief of Army Staff, Integrated Headquarter of Ministry of Defence (Army), New Delhi - 110011.
3. Officer In-charge, Signals Abhilekh Karyalaya, Signal Records, PIN – 908770 C/o 56 APO.
4. Commandant, 1 Signal Training Centre C/o 56 APO.
5. Directorate General, Signal Mahanideshalaya/Sigs 4, General Staff Shakha, General Staff Branch, IHQ of MoD (Army) DHQ PO, New Delhi – 110011.
6. Principal Controller of Defence Account, Draupadi Ghat, Allahabad.

..... **Respondents**

Ld. Counsel appeared for the Applicant	-	Shri V.P. Pandey Advocate
Ld. Counsel appeared for the Respondents	-	Shri G.S. Sikarwar Central Government Counsel

ORDER**“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”**

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 :-

“(i) To quash/set aside the impugned Part-II order dated 28 June 1999 communicated on 25 Feb 2016 in respect of applicant enumerated on serial No. 13 and the date of dismissal mentioned as 30 April 1999, as contained in Annexure No. A-1.

(ii) To issue an order or directions to Respondents to grant service pension to the applicant w.e.f. date of dismissal i.e. 30 April 1999.

(iii) Any other relief as considered proper by this Hon’ble Tribunal be awarded in favour of the applicant.

(iv) Cost of the appeal be awarded to the applicant.”

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

3. The applicant, Ex Signalmán Bhim Singh was enrolled in the Indian Army on 08.08.1980. From 19.11.1995, he remained absent from service without any specific reason and without leave. Therefore, Court of Inquiry was conducted and the applicant was declared deserter w.e.f. 19.11.1995 by Southern Command Divisional Signal Regiment vide Part II Order No. 0/039/0004/96 dated 14.02.1996. Subsequently the applicant was dismissed from service with effect from 30.04.1999 by the competent authority under Army Act Section 20 (3) on completion of three years from the date of desertion vide Part II Order dated 28.06.1999.

4. The case of the applicant is that the order of dismissal was conveyed to his wife on 06.05.2000. Thereafter his wife represented to the Ministry of Defence on 19.01.2000 and also to Respondent No. 3 on 06.06.2005. On 10.12.2014, the applicant preferred an appeal to the Respondent No. 2 and the same has been replied vide order dated 16.02.2015.

5. On 26.05.2015, the applicant preferred the O.A. which was registered as M.A. No. 118 of 2015 and was decided by this Tribunal wherein liberty was given to the applicant to file a fresh O.A. after receiving the dismissal order dated 06.05.2000.

6. It is pertinent to mention here that according to the date and the order of dismissal was communicated to the wife of the applicant on 06.05.2000.

7. It has been submitted by the applicant that he received Part II Order of dismissal from service on 25.02.2016 and thereafter he has approached this Tribunal for filing the instant O.A.

8. Before proceeding further, it is pertinent to mention here that admittedly the dismissal order was conveyed to the wife of the applicant on 06.05.2000 and thereafter for the first time the applicant preferred an appeal on 10.12.2014 i.e. after a very very long period of 14 years. The case of the applicant is that he has not been in sound mental condition during all these years and his wife has been looking after him. It was informed by the Signals Records, Jabalpur that for grant of service pension, the whole of

the service rendered by the applicant has been forfeited as he has been dismissed from service under Army Act Section 20 (3), hence he is not entitled for any kind of pensionary benefits.

9. It is submitted that the applicant has recovered from his unsound mental condition after a prolonged period but not even a single document of the treatment of the applicant, anywhere or in any hospital has been filed. It is pertinent to mention here that the applicant's wife had moved a representation for grant of pension. Copy of the representation dated 06.06.2005 has been filed. Admittedly the applicant remained absent without any sanction or leave and after 30 days, a Court of Inquiry was held and he was declared deserter and after expiry of three years, he was dismissed from service. The only defence of the applicant is that during this period, he was mentally ill and was taking treatment at his home. It is nowhere the case of the applicant that the applicant 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 Doctor or any hospital. 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 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 three years period for dismissal from service in case of a deserter.

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 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."

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. 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 he was mentally ill for a period more than 14 years 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. 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.

13. 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 applicant was not qualified to earn pension due to his dismissal from service.

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

15. No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

Dated : December, 2017
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(Justice S.V.S. Rathore)
Member (J)