



**Court No 1 (e-court)****ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW****ORIGINAL APPLICATION No. 480 of 2020**

Friday, this the 08<sup>th</sup> day of April, 2022

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

Ex Sep No 13992883H Dharmendra Kumar Singh, resident of village-Chakiya, PO-Kurkuri, PS-Paliganju, Distt-Patna. Presently residing at 01/933, Ruchi Khand, Type-II, LIG Sharda Nagar Yojna (LDA), Raebareilly Road, Lucknow.

..... Applicant

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

Versus

1. Union of India and others through the Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. Chief of the Army Staff, Integrated HQ of MoD (Army), DHQ, PO-New Delhi-110011.
3. CRO, AMC C & C Lucknow.
4. Commanding Officer, 401 Fd Hosp, C/o 56 APO.

.....Respondents

Ld. Counsel for the  
Respondents.

**Dr. Shailendra Sharma Atal**,  
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:-

- (a) To quash and set aside the order of dismissal dated 20 Oct 2014 as too harsh (never served).
- (b) To mitigate the punishment by discharge and direct the respondents to consider afresh applicant's right to service pension.
- (c) To pass orders which their lordships may deem fit and proper in the existing facts and circumstances of the case.
- (d) Allow this application with cost of Rs 50,000/-.

2. Applicant, Ex Sep Dharmendra Kumar Singh was enrolled in the Indian Army on 13.10.1995. While posted with 401 Field Hospital he was granted 13 days casual leave w.e.f. 19.09.2011 to 01.10.2011 with permission to prefix 18.09.2011 and suffix 02.10.2011. He was to report for duty on 03.10.2011 but he failed to do so. An apprehension roll was issued to civil authority to apprehend him. Next of Kin (NOK) of the applicant was informed by 401 Field Hospital. Thereafter, a Court of Inquiry under Section 106 of Army Act, 1950 was held on 02.12.2011 which declared him a deserter w.e.f. 03.10.2011. Since applicant neither rejoined his unit nor reported anywhere, including his Training Centre, he was dismissed from service w.e.f. 20.10.2014 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 and casualty to this effect was notified vide

Part II Order No 1/0499/005/2014 dated 30.10.2014. The applicant had submitted an appeal dated 06.07.2017 for grant of service pension. He was informed vide letter dated 18.07.2017 that he is not entitled to service pension as he was already dismissed from service. This O.A. has been filed for quashing of dismissal order dated 20.10.2014 and grant of service pension with all consequential benefits.

3. Learned counsel for the applicant pleaded that in the year 1999 while he was participating in Corps Day celebration he suffered severe ligament tear and was placed in low medical category S1H1A2(P)P1E1. He further submitted that while posted with 401 Field Hospital the applicant suffered from severe eye infection and was treated in Military Hospital, Patiala (Annexure 01). His submission is that while under treatment, due to negligence of nursing staff, he was infected with HIV. Applicant's learned counsel further submitted that while on leave, the applicant went into severe depression and he was treated in Mental Hospital, Ranchi (Annexure 02) for the period from 04.12.2012 to 29.10.2015 and became normal only on 29.10.2015. His other submission is that since his father, an ex-serviceman, was also suffering from cancer and was referred to Army Hospital, R&R, Delhi Cantt, this also prevented him from joining his unit. He pleaded to quash discharge order dated 20.10.2014 and grant him service pension.

4. On the other hand submission of learned counsel for the respondents is that the applicant was granted 13 days casual leave for the year 2011 and he was required to report back for duty on 03.10.2011, which he failed to do and in consequence thereof apprehension roll was issued followed by a Court of Inquiry dated 02.12.2011. The Court of Inquiry opined that applicant be declared deserter. Thereafter, after completion of three years of desertion, he was dismissed from service w.e.f. 20.10.2014 under Section 20 (3) of Army Act, 1950 read with Army Rule 17 and casualty to this effect was notified vide Part II Order No. 1/0499/005/2014 dated 30.10.2014. Further averment made by learned counsel for the respondents is that the applicant was also informed 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. 03.10.2011 and never returned from leave granted to him on 19.09.2011. 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. 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) of Pension Regulations for the Army-2008 (Part-I) 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. 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 undergoing prolonged treatment in civil mental hospital, Ranchi for his mental illness, 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 (Ranchi is a military station having military hospital) for treatment rather than going to civil hospital. Medical fitness certificate dated 29.10.2015 issued by civil hospital is not acceptable in these circumstances. The

