

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 527 of 2021

Thursday, this the 09th day of December, 2021

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

Rajveer Singh Ex-Sepoy (Safai Wala) No. 4426408H of 15th Assam Regiment, Record Office-Shillong, son of Sri Nafe Singh Valmiki, Resident of Village-Bhatgaon Dungram, Tehsil-& District-Sonapat (Haryana)

Present address:- Sarangpur Basti, Bhauro Ki Sair (Near Anaj Mandi) Kalka Mitra Panch-Kuda (Haryana).

..... Applicant

Ld. Counsel for the : **Shri Indra Prasad Yadav, Advocate.**
 Applicant

Versus

1. Commanding Officer, 15th Assam Regiment, C/o 56 APO.
2. Senior Record Officer Records the Assam Regiment, Pin (Army)-900332, C/o 99 APO.
3. Union of India, Ministry of Defence, South Block, New Delhi-110011 through Secretary.
4. Chief of the Army Staff, Army Headquarters, South Block, New Delhi-110011.
5. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad, PIN-211014.

.....Respondents

Ld. Counsel for the: **Shri Yogesh Kesarwani,**
 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:-

(A) To set aside the order dated 20.07.1989, 16.05.1992 and 09.02.2010, 16.01.2016 passed by Respondent No 1, 2, 4 and Additional District Judge Sonipet.

(B) To direct the respondents to grant the entire service benefits to the applicant dues with effect from 16.05.1989 alongwith seniority and others promotional benefits.

(C) To direct the respondents No 5 to grant the pension/disability pension to the applicant after superannuation of the applicant.

(D) To issue any order or direction which this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case.

(E) To award cost of this original application in favour of the applicant.

2. Applicant, Ex Sep Rajveer Singh was enrolled in the Indian Army as Safaiwala on 20.11.1979. During the course of service he was granted 60 days annual leave for the period 17.03.1989 to 15.05.1989. He was to report for duty on 16.05.1989 but he failed to do so. Thereafter, a Court of Inquiry in terms of para 17 of SAO 9/S/89 & under the provisions of Section 106 of Army Act, 1950 was held and he was declared a deserter and occurrence with regard to desertion was notified vide Part II Order dated 04.08.1989. He was dismissed from service w.e.f. 16.05.1992 under Section 20 (3) of

Army Act, 1950 in terms of para 20 (b) of SAO 9/S/89 i.e. after three years of the date of desertion and occurrence to this effect was notified vide Part II Order Number 1/051/0073/1992 and the same was communicated to the authorities to which apprehension roll was submitted. The applicant had rendered more than 09 years of service at the time of dismissal. A legal notice dated 17.11.2006 on behalf of applicant was sent by Shri Sube Singh Nagwan, Advocate to re-instate him into service. Since applicant was already dismissed from service, therefore, it was replied suitably on 11.12.2006. Thereafter, applicant filed suit No 182 of 2007 before Additional Civil Judge, Sonipat which was dismissed with costs vide order dated 23.04.2009. Against aforesaid order, applicant filed Appeal No 39 of 2009 which was also dismissed vide order dated 09.02.2010. O.A. No. (Nil) of 2015 (Dy No 51/2015) filed by applicant in this Tribunal was dismissed vide order dated 30.04.2015 due to lack of jurisdiction. Applicant had also preferred a representation dated 16.10.2014 to Chief of the Army Staff. This O.A. has been filed for quashing of order dated 20.07.1989, 16.05.1989, 09.02.2010 and 16.01.2016 passed by respondent No 1, 2 and 4 including the order passed by Additional District Judge, Sonipat and grant pension/disability pension to applicant as applicable.

3. Learned counsel for the applicant pleaded that applicant was granted annual leave for the year 1989 and while on leave on account of illness of his sister and thereafter her demise he could not join duty in time. His further submission is that earlier while undergoing training he had sustained head injury which resulted in his insanity and he was under treatment in civil clinic i.e. Anand Clinic. His further submission is that after undergoing prolonged treatment when he became fit he went to unit concerned to rejoin duty but he was not allowed. Learned counsel for the applicant further submitted that keeping in view of his length of service he should be reinstated into service to enable him to earn service pension.

4. On the other hand submission of learned counsel for the respondents is that applicant was granted leave for the year 1989 and he was required to report back for duty on 16.05.1989, which he failed to do and in consequence thereof apprehension roll was issued followed by a Court of Inquiry. The Court of Inquiry opined that applicant be declared deserter. Thereafter, on completion of three years of desertion, he was dismissed from service w.e.f. 16.05.1992 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. 1/051/0073/1992. Further averment made by learned counsel

for the respondents is that the civil authorities were also intimated about his dismissal. Learned counsel for the respondents submitted that applicant is habitual offender being absented without leave and prior to this occasion i.e. 16.05.1989, he overstayed leave on two more occasions and was awarded punishment of Rigorous Imprisonment. As per service records held, the applicant neither reported to his parent unit nor intimated regarding reasons of absence from leave to any agency. Hence, no question arises for his sustaining head injury during Basic Physical Efficiency Test. At the time of desertion, the applicant was in SHAPE-1 category. He did not rejoin his parent unit till dismissed from service, hence he is not entitled for grant of service pension and disability pension. Para 132 of Pension Regulations 1961 (Part-1) is applicable for those who have completed minimum 15 years of service for earning of service pension which is not applicable to the applicant as he was dismissed from service being a deserter prior to completion of 15 years of service. On being declared deserter, final settlement of account of the applicant was carried out and applicant was paid Debit Balance Rs. 8,535/- and AFPP Fund Balance Rs, 7,712/-. He filed suit for grant of service pension as well as for reinstatement in service before District Court, Sonipat which was dismissed. The applicant preferred representation for grant of pension and for his

reinstatement in service. He was suitably replied that he is not authorised any benefits as claimed. He concluded that since dismissal of applicant was done by following due process, the applicant is not entitled to any pensionary benefits and instant O.A. deserves dismissal 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. 16.05.1989 and never returned from leave granted to him on 17.03.1989. 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 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 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. 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 hospital for his mental illness, is absolutely without substance. If applicant was a case of mental illness, his relatives could have brought him to a nearby military hospital for treatment rather than going to civil hospital. Medical fitness certificate issued by civil hospital is not acceptable in these circumstances. The applicant was a deserter and did not report to any authority after 16.05.1989. 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. 16.05.1989. 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 Armed forces discipline cannot be overlooked in military matters especially overstaying leave and desertion. 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) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)
Dated: 09 December, 2021
Ukt/-