

RESERVED

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

Original Application No. 689 of 2020

Thursday this the 07th day of July, 2022

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

No. 14455851W Ex Hav Mohd Idu Ansari, S/o Algu Ansari, R/o Village-Chandrauta, P.S.-Turk Patti, Tehsil-Tamkohi Raj, Distt-Kushinagar.

..... Applicant

Versus

1. Union of India, through Secretary of Defence, Ministry of Defence, 227-B Wing, Sena Bhawan, New Delhi-110011.
2. The Chief of Army Staff, Integrated Headquarters of MoD (Army), Sena Bhawan, DHQ, PO-New Delhi-110011.
3. The Commandant, Artillery Centre, Nashik Road Camp, Distt-Nashik (Maharashtra).

..... Respondents

Ld. Counsel appeared -**Col RC Dixit (Retd)**, Advocate
for the Applicant

Ld. Counsel appeared -**Dr. Shailendra Sharma Atal**, Advocate
for the respondents

ORDER

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 :-

(a) That the applicant's illegal dismissal certificate dated 29 September 1995 dismissing him w.e.f. 28 April 1995 may be quashed as respondents have failed to observe the natural justice principle of Audi alteram partem-as per which no one should be condemned unheard. They have also failed to observe various provisions as stated in O.A., 43/2001/DV, DSR para 377, Army Rules 180, 183, 140 along with Act Section 20 (3) to be read in conjunction with A.A. Sections 105 and 106 on the issue pertaining to dismissal of the applicant.

(b) Keeping in view the serious procedural lapses committed by respondents, applicant may be notionally reinstated in service, granted his regular discharge along with pensionary benefits as he was entitled to serve minimum till 24 years in service as Havaldar, vide DSR para 134 to be read in conjunction with Ministry of Defence letter No F. 14(3)/98/D(AG) dated 03 September, 1998. Applicant is in possession of restricted/classified documents i.e. identity card, pay book etc. Respondents may be directed to take back applicant's identity card, pay book etc (in his possession which he is not entitled to retain) to any Army representative for further disposal as per the directions of Hon'ble Tribunal.

(c) The Hon'ble Tribunal may pass any other order as it deems appropriate in the matter along with cost.

2. The facts necessary for the purpose of adjudication in instant Original Application may be summarised as under:-

3. The applicant, Ex Hav Mohd Idu Ansari was enrolled in the Indian Army on 17.07.1978. After completion of military training he

was posted to 138 Medium Regiment and while serving there he was awarded three punishments i.e. (i) 14 days rigorous imprisonment in military custody under Army Act Section 39 (a) for absenting himself without leave, (ii) 28 days rigorous imprisonment and 14 days detention in military custody under Section 39 (b) for overstaying leave and (iii) 14 days pay fine under Section 39 (b) for overstaying leave. He was suffering from 'Sciatica (Lt)' and was placed in low medical category for one year from 24.10.1991 to 23.04.1992. 138 Medium Regiment was ordered to move from peace to field location, therefore, he being placed in low medical category, was despatched to Artillery Depot Regiment vide movement order dated 04.11.1991 alongwith 20 days casual leave with instructions to report the Depot Regiment on 27.11.1991. However, he did not report there and overstayed leave from 28.11.1991. Apprehension roll dated 28.11.1992 was issued to all concerned and after 30 days Court of Inquiry was held on 07.10.1993 which declared him as a deserter w.e.f. 28.11.1991. Thereafter, after three years he was dismissed from service w.e.f. 28.04.1995 and casualty to this effect was notified vide Part II Order dated 06.05.1995. Applicant has filed this O.A. for quashing the dismissal order, notionally re-instate him into service and grant him regular discharge along with pensionary benefits.

4. Submission of learned counsel for the applicant is that during casual leave the applicant developed some mental delusions and

fragmentation behaviour and as a result of which he behaved like a manic and laid under the cot apprehending his death due to earthquake. He further submitted that due to his mental condition he had been under treatment of Shri Sulaiman Ali, B.U.M.S. (Aligarh) for a long time. Thus, the applicant spent long time under treatment of aforesaid doctor. In the year 1995, applicant's wife received a letter from the respondents and she came to know that her husband has been dismissed from service w.e.f. 28.04.1995. In protest she submitted a letter dated 18.11.1995 to Chief of the Army Staff and Human Rights Commission (Annexure A-6). Wife of the applicant was paid dues in respect of her husband vide letter dated 11.12.1995 (Annexure A-8). Applicant has filed this O.A. to set aside dismissal order dated 28.04.1995, notionally re-instate him in service and grant service pension accordingly.

3. Learned counsel for the applicant submitted that while the applicant was availing casual leave, he became manic and was under prolonged treatment under a civil doctor which resulted in his dismissal from service w.e.f. 28.04.1995. He further submitted that after receipt of dismissal certificate, applicant's wife wrote to Chief of the Army Staff and Human Rights Commission on number of occasions but every time she was informed that since her husband has been dismissed from service, he is not entitled to service pension. Learned counsel for the applicant further submitted that the respondents have not followed the provisions laid down in para

377 of Defence Regulations for the Army, 1987 according to which next of kin should have been informed about absence without leave or desertion but in this case family of the applicant was not informed by any of the agencies. He submitted that since the mandatory rules/regulations have not been followed, all proceedings against the applicant including dismissal from service vitiates. His other submission is that concurrence of the Central Govt is mandatory provision to be followed before dismissal or removal from service is ordered vide Section 19 of the Army Act, 1950. He submitted that applicant or his wife (since applicant was a case of mania) was never given any chance to prove applicant's innocence as Army Rule 17 directs that no person shall be dismissed or removed from service under sub section (1) or sub section (3) of Section 20, unless he/she has been informed of the particulars of the cause of action against him/her and allowed reasonable time to state in writing any reasons he/she may have to urge against his/her dismissal or removal from service. The learned counsel further submitted that no proper inquiry was conducted prior to declaring applicant a deserter as held by the Hon'ble Apex Court in **CL Subramaniam vs Collector of Customs**, 1972 AIR 2178. He pleaded that since procedure for dismissal from service has not been followed as per rules, applicant's dismissal from service is hit by Article 311 of the Constitution of India.

4. On the other hand, learned counsel for the respondents submitted that the case is barred by the limitation act as the applicant has filed the instant O.A. after a lapse of almost 25 years. He further submitted that the applicant being a habitual offender was punished three times earlier from 1980 to 1984 due to absent without leave/overstayal of leave. His further submission is that the applicant by committing the aforesaid offences had shown utter disregard to military discipline and had set an extremely bad example to other disciplined soldiers in the unit. Certain norms and standards of behaviour and a high degree of discipline is expected from military persons, but the applicant never cared for his future prospects and demonstrated no improvement in this regard. He further submitted that as per service records held with Artillery Records, it has been revealed that there is no evidence to prove his claim regarding his mental illness. He further submitted that the applicant was suffering from 'Sciatica (It)' and he was given maximum opportunities to utilize medical facilities available within Armed Forces as also he was placed in low medical category 'CEE'. He submitted that while the applicant was ordered to report to Depot Company of the Artillery Centre, he failed to report after expiry of leave and instead absented without leave. After waiting for 30 days Court of Inquiry was held on 07.10.1993 and he was dismissed from service after expiry of three years by following due process and intimation was given to Zila Sainik Board, Deoria and

applicant with an advice to apply for discharge certificate. He pleaded for dismissal of O.A. on the ground that since applicant never reported to the Artillery Regimental Centre, he was dismissed from service in accordance with rules on the subject.

5. Heard Col RC Dixit (Retd), learned counsel for the applicant and Dr. Shailendra Sharma Atal, learned counsel for the respondents and perused the material placed on record.

6. There is no dispute that the applicant was enrolled in the Army on 17.07.1978. In the year 1991/1992 he was diagnosed to be suffering from 'Sciatica (Lt)' and was placed in low medical category. His unit was to move to field area and he, being placed in low medical category, was ordered to report to Artillery Regimental Centre with 20 days leave and after expiry of leave but he did not report there and absented without leave. After clear 30 days a Court of Inquiry was conducted as per Section 106 of the Army Act, 1950 which declared him as a deserter. Thereafter, after waiting for three years as per policy in vogue being a peace area deserter he was dismissed from service under the provisions contained in Army Act, Section 19 read with Army Rule 14, Army Act Section 20 (3) read with Rule 17 and Army Order 43/2001/DV and casualty to this effect was notified vide Part II Order dated 06.05.1995. After dismissal of the applicant intimation to this effect was given to Zila Sainik Board, Deoria (UP) and the applicant.

7. Applicant's has contended that he was suffering from mental illness (Mania) and was under treatment of Dr. Sulaiman Ali, B.U.M.S. (Aligarh) for a long duration. The only defence of the applicant is that during period of his absence, he was mentally ill and was taking treatment at his home town. 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 authorized doctor or any reputed hospital rather he was treated by a local doctor. 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 sanctioned 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.”

8. Thus aforementioned Army Order provides for three years period for dismissal from service in case of a deserter.

9. In this regard, 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."*

10. 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.

11. Keeping in view the aforesaid legal position when we examine 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 prolonged period and hence could not approach the Tribunal 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.

12. 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 against the applicant. The

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

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

14. No order as to costs.

15. Miscellaneous application(s), pending if any, stand disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 07 July 2022
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