

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW
(CIRCUIT BENCH, NAINITAL)**

ORIGINAL APPLICATION No. 712 of 2021

Thursday, this the 01st day of June, 2022

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

No. 4088916N Ex Rfn Chandra Mohan Singh, S/o Kamal Singh Negi, R/o Village-Budkot, P.O.-Sera Bagwan, Tehsil-Pratap Nagar, Distt-Tehri Garhwal, Uttarakhand.

..... Applicant

Learned counsel for the : **Shri Kishore Rai**, Advocate
Applicant

Versus

1. Union of India through the Secretary, Ministry of Defence, Central Civil Secretariat, New Delhi.
2. Commandant Garhwal Rifles Regiment Lansedown Pauri Garhwal.
3. Commanding Officer, 3rd Battalion Garhwal Rifles, C/o 56 APO.
4. Administration Battalion Commander, The Garhwal Rifles Regiment Centre, PIN-900400, C/o 56 APO.
5. Senior Record Officer, Record Office Garhwal Rifles, C/o 56 APO.

.....Respondents

Learned counsel for the: **Shri Neeraj Upreti**, Advocate
Respondents. 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/set aside the impugned dismissal order No 1/0667/0001/2019 dated 22.10.2019 (contained as Annexure No 1 to this Original Application).*
- (b) *To direct the respondents to notionally treated the applicant into service till the applicant become eligible for grant of service pension.*
- (c) *To direct the respondents to convert the dismissal of the applicant into discharge.*
- (d) *To direct the respondents to grant service pension, gratuity and other retiral dues as admissible to the applicant*
- (e) *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. Brief facts of the case are that the applicant after enrolment in the Army on 16.03.2004 was inducted in 3rd Battalion of the Garhwal Rifles. While serving with the unit he absented without leave w.e.f. 20.06.2016. Accordingly, apprehension roll dated 20.06.2016 was issued to Superintendent of Police, Tehri Garhwal. However, when neither the applicant was apprehended nor he surrendered till 17.07.2016, a Court of Inquiry (C of I) under Section 106 of the Army Act, 1950 was ordered vide convening order dated 18.07.2016 which declared him as a deserter w.e.f. 20.06.2016. After three years from the date of his desertion he was dismissed from service under Section 20 (3) of the Army Act, 1950 read with Army Rule 17. Earlier, on

28.12.2015 the applicant misbehaved with his Company Commander and was punished with 03 days rigorous imprisonment under Section 63 of the Army Act, 1950. Further, on 31.12.2015, he absented without leave and voluntarily rejoined on 19.01.2016. On rejoining he was punished for 14 days pay fine under Section 39 (a) of the Army Act, 1950. This O.A. has been filed after 05 years of dismissal praying that the applicant's dismissal be converted into discharge and he be granted service pension.

3. Learned counsel for the applicant submitted that the applicant was enrolled in the Army on 16.03.2004 and he has served for almost 15 years with due sincerity and dedication in 3rd Battalion Garhwal Rifles. He further submitted that on 31.12.2015 applicant received information that his father was not well, therefore he requested the authorities for leave which was denied but some other officer of the unit allowed him verbally to proceed to his village to take care of his father. He proceeded and after rejoining on 19.01.2016 was punished arbitrarily even though oral permission was granted by an officer of the unit. His other submission is that the applicant was placed in P2 (permt) medical category and since no sheltered appointment was available in the unit he was served with Show Cause Notice dated 08.06.2016 which he replied on 10.06.2016 stating therein that he was willing to service till completion of pensionable service. His submission

is that being suffered with mental distress the applicant escaped from the Battalion on 20.06.2016 without informing to his superiors. In the year 2019 when he overcame from the mental distress he wrote to the District Soldier Welfare and Rehabilitation Office asking them whether he could be re-instated into service or can be granted medical pension.

4. His further submission is that since during Summary Court Martial (SCM) proceedings, Rule 17 of the Army Rules, 1954 has not been complied with, SCM proceedings would vitiate. The learned counsel further submitted that the applicant was not given any opportunity of hearing in terms of sub section (1) of Section 20 (3) of the Army Act, 1950, therefore, the applicant is liable to re-instated into service. He pleaded for re-instatement of the applicant into service by setting aside his dismissal into discharge and grant service pension as he had completed about 15 years of service prior to his dismissal from service.

5. On the other hand submission of learned counsel for the respondents is that applicant is a habitual offender and was punished on two occasions for his misconduct and absent without leave. He further submitted that the applicant escaped from the unit on 20.06.2016 and never returned. A C of I was convened and after three years of desertion he was dismissed from service w.e.f. 20.06.2019 and casualty to this effect was notified vide Part II Order dated 22.10.2019. His

submission is that since his dismissal was carried out following due process, this O.A. be dismissed on merit.

6. We have heard learned counsel for the parties and perused the material placed on record.

7. Admittedly, the applicant deserted w.e.f. 20.06.2016 and never returned to 3rd Battalion Garhwal Rifles in which he was serving. An apprehension roll was issued and after clear 30 days of absence, a Court of Inquiry was held and he was declared as 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.

8. 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."

9. 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.

10. Contention of learned counsel for the respondents that applicant is not entitled to pensionary benefits as per para 113 (a) of Pension Regulations for the Army, 1961 (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 the aforesaid para is quoted below:-

"113(a) An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service."

11. 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".

12. 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.

13. Thus, 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 mentally depressed and therefore could not rejoin duty, is absolutely without substance. The applicant was a deserter and did not report to any authority after 20.06.2016. 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. 20.06.2016. 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 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. It is, accordingly dismissed.

14. 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 Pension Regulations for the Army.

15. The O.A. is accordingly **dismissed**.

16. No order as to costs.

17. Miscellaneous application(s), pending if any, stand disposed off.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 01.06.2022

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