

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

ORIGINAL APPLICATION No. 714 of 2021

Monday, this the 30th day of May, 2022

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

No. 14382247A Ex Gnr Diwan Singh (male), S/o Shri Nath Singh, R/o Village-Tallihat, P.O.-Champawat, District-Champawat.

..... 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. P.C.D.A., Allahabad, Uttar Pradesh.
3. Chief of Army Staff, New Delhi-110011.
4. Senior Record Officer, Records Sena Vayu Raksha Abhilekh, Army Air Defence Records-908803, 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 dated 23.10.1998 (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. Applicant, Ex Gnr Diwan Singh was enrolled in the Indian Army on 01.04.1984. While serving with 109 Light Air Defence Regiment (Self Propelled) the applicant was granted 15 days advance of annual leave for the year 1992 from 30.12.1991 to 13.01.1992. Thereafter, his leave was extended for 47 days balance of annual leave for the year 1992 w.e.f. 15.02.1992 to 01.04.1992. Since his father was ill, 20 days advance of annual leave for the year 1993 was also granted. After expiry of said leave, he failed to rejoin the duty and was declared overstaying leave w.e.f. 22.04.1992. Subsequently, the unit issued apprehension roll dated 27.04.1992 and casualty to this effect was notified vide Part-II Order dated 15.10.1992. On 30.01.1993 the applicant was

apprehended by civil police and he was handed over to the unit. On rejoining the unit he was awarded punishment of 28 days rigorous imprisonment and 14 days detention under Section 39 (b) of the Army Act, 1950 and his leave was regularised. In the year 1995 he was granted 39 days balance of annual leave from 16.03.1995 to 23.04.1995. During the said leave he requested for 20 days advance of annual leave which was granted till 13.05.1995. However, on expiry of the said leave, he failed to rejoin duty on 14.05.1995 and overstayed leave w.e.f. 14.05.1995. Apprehension roll to this effect was issued vide letter dated 17.05.1995 and casualty was notified vide Part-II order dated 07.07.1995. Thereafter, after 30 days, a Court of Inquiry was conducted under Section 106 of the Army Act, 1950 which declared him as a deserter w.e.f. 14.05.1995 and occurrence to this effect was notified vide Part-II Order dated 15.01.1996. 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 04.10.1996 applicant's wife Smt Rewati Devi informed the Army authorities that her husband was not traceable but later she intimated on 06.10.1996 that her husband reached home and he has lost his sense. As averred the applicant was treated in various mental hospitals including Institute of Human Behaviour and Allied Sciences, GT Road, New Delhi. In the year 1998, Smt Rewati Devi approached

Sainik Kalyan Evam Punarvas Karyalaya, Champawat for issue of discharge certificate and balance amount of her husband which the respondents provided on 07.11.2008. Wife of the applicant had also submitted a mercy appeal for grant of pension which was rejected vide letter dated 18.06.2012. After lapse of 27 years from the date of dismissal applicant has filed this O.A. to quash SCM proceedings and grant service pension treating him in service.

3. Learned counsel for the applicant submitted that the applicant was enrolled in the Army on 01.04.1984 and while on leave he became mentally ill and could not rejoin duty which led to his dismissal from service. He further submitted that since the applicant was not mentally sound he was brought by Shri Kundan Singh on 06.10.1996 from Delhi. Applicant's learned counsel further submitted that the applicant had put in approx 15 years service, as such he deserves to be granted service pension. His other submission is that the applicant was dismissed from service without granting any pension in arbitrary manner without providing any opportunity of hearing. He submitted that the respondents ought to have permitted the applicant to complete minimum pensionable service as the applicant was not having any adverse entry in his record. Citing AFT, RB Chennai case No O.A. 50/2015, **B Sampangi vs UOI & Ors**, learned counsel for the applicant submitted that applicant's

dismissal be converted into discharge and he be granted service pension.

4. On the other hand submission of learned counsel for the respondents is that applicant was granted leave for the year 1992 which was extended but even then he was declared a deserter. He further submitted that after issue of apprehension roll he was apprehended by civil police after a gap of 284 days. On reporting to unit he was punished and his absence was regularised. He further submitted that in the year 1995 he was again granted leave but this time he never returned to unit. Ultimately, a C of I was ordered and after a period of 3 years he was dismissed from service in terms of Section 20 (3) of the Army Act, 1950 read with Rule 17 of the Army Rules, 1954. He submitted that once a person is dismissed from service, he is not entitled to service pension or gratuity for the service rendered in the Army. He concluded that since dismissal of applicant was done by following due process, this 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. 14.05.1995 and never returned from leave granted to him on 16.03.1995. 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 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."

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. 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 ill and 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 treatment papers related to civil hospital are not acceptable in these circumstances. The applicant was a deserter and did not report to any authority after 14.05.1995. 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. 14.05.1995. 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.

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 Pension Regulations for the Army.

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

15. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 30.05.2022

rathore