

E-Court

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

Original Application No. 206 of 2021

Monday, this the 14th day of November, 2022

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

No 13963801M Ex L/Nk/AA Konda Anja Goud, Son of Shri Konda malla Goud, R/o Village-Kubeer, Post-Kubeer Mandal, District-Nirmal (Telengana), PIN-504103.

..... Applicant

Versus

1. Union of India, Through the Secretary, Ministry of Defence, Government of India, New Delhi-110011.
2. The Chief of Army Staff, Army Headquarters, DHQ, Post Office-New Delhi-110011.
3. The Officer-In-Charge, Records Army Medical Corps, Lucknow-226002 (UP).
4. The Chief Controller, Defence Accounts (Pension), Draupadi Ghat, Allahabad-14 (U.P.)

..... Respondents

Ld. Counsel appeared for the Applicant -**Shri R Chandra**, Advocate

Ld. Counsel appeared -**Shri Pushpendra Mishra**, Advocate for the respondents

ORDER (Oral)

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) This Hon'ble Tribunal may be pleased to set aside the dismissal order (order of dismissal not served to the applicant) and order dated 02.02.2021 (Annexure No A-1) be set aside.

(b) The Hon'ble Tribunal may be pleased to direct the respondent No 3 to condone the shortfall period 04 months and 13 days in service to grant service pension.

(c) Any other appropriate order or direction which this Hon'ble Tribunal may deem just and proper in the nature and circumstances of the case including cost of the litigation.

2. The facts necessary for the purpose of adjudication of the present controversy are as under:-

The applicant was enrolled in the Army on 17.07.1985. During the course of his service, on

29.12.1999, he was sent on 60 days leave-cum-posting from Army Hospital (R&R) Delhi Cantt to Command Hospital (Eastern Command) Kolkata alongwith preparatory leave and journey period as applicable. After completion of said leave, the applicant failed to report his new duty station. Accordingly, Command Hospital, Kolkata declared him over staying leave (OSL) w.e.f. 06.03.2000 and Part-II Order dated 10.03.2001 was published. Later, he was declared a deserter by a Court of Inquiry held on 13.03.2001 and after completion of stipulated period of three years he was dismissed from service on 20.04.2003 under Section 20 (3) of the Army Act, 1950 and Army Order 439/1963. After dismissal from service, occurrence was notified vide Part-II Order dated 02.10.2003. Against his dismissal order applicant submitted a mercy petition dated 22.10.2017 which when not decided he filed O.A. No. 710 of 2020 before this Tribunal. This O.A. was

disposed of vide order dated 09.12.2020 with directions to the respondents to decide his mercy appeal within a period of four months. Accordingly, his mercy appeal was decided and rejected by speaking and reasoned order dated 02.02.2021. Applicant has filed this O.A. for setting aside order dated 02.02.2021 and grant him service pension by condoning shortfall in service.

3. Learned counsel for the applicant submitted that the applicant was enrolled in the Army on 17.07.1985. He further submitted that on 29.12.1999 he was sent on permanent posting from Army Hospital (R&R) Delhi Cantt to Command Hospital (Eastern Command) Kolkata alongwith 60 days annual leave (excluding preparatory leave and journey period). It was further submitted that while availing leave at home he met with an accident which resulted in his head injury and he took medical treatment from civil hospital and therefore, could not rejoin the new unit. It was further submitted that

consequent to non receipt of discharge/dismissal order he preferred a mercy petition 22.10.2017 and when this was not decided he filed O.A. No. 710 of 2020 which was disposed of vide order dated 09.12.2020 directing the respondents to decide his mercy appeal within a period of four months.

4. Learned counsel for the applicant further submitted that after Tribunal's order dated 09.12.2020, the respondents decided his mercy appeal and rejected vide order dated 02.02.2021 in arbitrary manner as shortfall of 04 months and 13 days service could have been condoned to enable the applicant to get service pension. In support of his contention, learned counsel for the applicant has stated that the applicant may be granted service pension in terms of Para 113 of Pension Regulations for the Army, 1961 (Part-I) as per which "an individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect

of all previous service but in exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date.” He pleaded that since the applicant had preferred mercy petition for grant of service pension, he would have been granted the same by condoning shortfall in service, if any.

5. In support of his contention learned counsel for the applicant has placed reliance on the following orders/judgments:-

(i) Civil Appeal No 9389 of 2014 decided on 20.01.2015 by the Hon’ble Apex Court in the case of ***Union of India & Ors vs Surender Singh Parmar.***

(ii) O.A. No 83 of 2015 decided on 15.07.2016 by this Tribunal in the case of ***Ex Havildar Bhairab Kumar Rai vs UOI & Ors.***

(iii) O.A. No. 407 of 2017 decided on 06.07.2018 by this Tribunal in the case of ***Desh Raj vs UOI & Ors.***

6. On the other hand, learned counsel for the respondents submitted that while serving with Army Hospital (R&R), Delhi Cantt the applicant was posted out to Command Hospital (Eastern Command) w.e.f. 30.12.1999 along with 60 days leave excluding preparatory leave and journey period and he was to report at new place of posting on 06.03.2000 which he failed to report and therefore, he was declared overstaying leave w.e.f. 06.03.2000. He further submitted that after 30 days a C of I was convened which declared him as a deserter. After completion of 03 years he was dismissed from service on 20.04.2003 under Section 20 (3) of Army Act, 1950 and Army Order 439/1963. It was further submitted that after dismissal

from service his final statement of account (FSA) was prepared and dues were remitted to him.

7. Further submission of learned counsel for the respondents is that applicant's contention with regard to his being met with an accident is not supported with any documents, therefore his submission is not trustworthy. His other submission is that after desertion in the year 2000 the applicant for the first time preferred mercy petition in the year 2017 which shows that the applicant was not inclined to even inform the authority regarding his whereabouts. It was further submitted that the applicant is not entitled to pensionary benefits in terms of Para 113 of Pension Regulations for the Army, 1961 (Part-I) being a dismissal case.

8. Learned counsel for the respondents further submitted that mercy appeal dated 22.10.2017 preferred by the applicant has rightly been rejected by the

competent authority vide order dated 02.02.2021. He further submitted that since the applicant has not completed minimum 15 years qualifying service in terms of Regulations 132 of Pension Regulations for the Army, 1961 (Part-I), he is not entitled for service pension. In support of his contention, learned counsel for the respondents has relied upon order dated 22.02.2018 passed by AFT (RB), Jabalpur in T.A. No. 269 of 2010, **Sep/AA Narayan Prasad Chamar vs UOI & Ors.** He pleaded for dismissal of O.A.

9. Heard Shri R Chandra, learned counsel for the applicant and Shri Pushpendra Mishra, learned counsel for the respondents and perused the record.

10. It is not in dispute that the applicant was enrolled in the Army on 17.07.1985. He was serving with Army Hospital (R&R), Delhi Cantt. On 30.12.1999 he was despatched on permanent posting to Command Hospital

(Eastern Command) with 60 days leave plus preparatory leave and journey period and he was to report at new place of posting on 06.03.2000 which he failed. Accordingly, he was declared overstaying leave. After 30 days a C of I was convened under 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 20 (3) and Army Order 439/1963. After dismissal of the applicant intimation to this effect was given to Supdt of Police, Adilabad (Andhra Pradesh) vide letter dated 01.10.2003.

11. The applicant was a peace area deserter w.e.f. the year 2000 and he preferred mercy appeal in the year 2017 for grant of service pension. The said appeal, which is under challenge, was decided and rejected by

speaking and reasoned order dated 02.02.2021, which for convenience sake is reproduced as under:-

"1. Whereas, the petitioner No 13963801M Ex Lance Naik Konda Anja Goud had filed MA No 274/2019 inre OA No (Nil)/2019 before the Hon'ble AFT (RB) Lucknow praying for grant of service pension. The same has been disposed off by the Hon'ble Tribunal vide their order dated 09 Dec 2020. I have gone through the relevant documents in the light of Rules and Regulations governing the subject consequent to ibid order.

2. And whereas, MA No 274/2019 inre OA No (Nil)/2019 has been disposed off by the Hon'ble Tribunal vide their order dated 09 Dec 2020 with the directions that, "Learned counsel for the applicant submits that applicant has preferred mercy petition dated 22.10.2017 to the respondents but the decision taken on mercy petition has not been communicated to the applicant. With the consent of learned counsel for the parties, we hereby dispose of the OA finally with the directions to the respondents to decide the mercy petition of the applicant dated 22.10.2017 by a speaking and reasoned order in accordance with law, if not already decided, within a period of four months from the date of receipt of this order and communicate the decision to the applicant accordingly. With the aforesaid direction, the Original Application is disposed of finally."

3. And whereas, the petitioner was enrolled in Army Medical Corps on 17 Jul 1985. The petitioner was sent on 60 days Leave-cum-posting from Army Hospital (R&R), Delhi Cantt to Comd Hosp (Eastern Comd) Kolkata alongwith preparatory leave and journey period as applicable. After completion of said leave, the petitioner failed to report his new unit i.e. Comd Hosp (EC) Kolkata for permanent duty. Accordingly, Comd Hosp (EC) published occurrence regarding Over Staying Leave w.e.f. 06 Mar 2000 vide their Part-II No 30/06/2001 dt 10 Mar 2001.

4. And whereas, the petitioner was declared as deserter on 06 Mar 2000 by a duly constituted Court of Inquiry held at Comd Hosp (EC) Kolkata on 13 Mar 2001. Subsequently, he was dismissed from service on 20 Apr 2003 after completion of stipulated period of 03 years as a peace deserter under the provision contained in Army Act 1950, Section 20 (3) and Army Order 439/1963 vide Army Medical Corps Record Office (General) Part II Order No 113/1/2003 dated 01 Oct 2003. The petitioner has rendered 14 years, 07 months and 17 days of service. The intimation regarding dismissal of the petitioner from service was communicated to the Supdt of Police, Adilabad (AP) by AMC Records vide letter No 500115/NE/DD/SR-13963801 dt 01 Oct 2003. Final settlement of accounts of the petitioner was closed with a debit balance of Rs 5,455/-. PAO (OR) AMC vide their letter No Fund/NE Claim/2018 dated 01 Aug 2018 has intimated that a sum of Rs 21,495/- has been paid towards AFPP Fund.

5. And whereas, AGI maturity claim was submitted to AGI Bhawan, New Delhi for their adjudication vide AMC Records letter No 500602/Pen/AGI Mty/PRC dt 24 Jul 2019. However, the same was returned by the AGI with some observations vide their letter No A/56309/AG/Ins/Mat-4/AMC dated 09 Aug 2019. Accordingly, the same was processed with PAO (OR) AMC Lucknow for rectification vide AMC Records letter No 13963801M/Pen/D&D/19 dated 04 Oct 2019. After due rectification of the said observation, the same has been re-submitted to AGI Bhawan, New Delhi for their adjudication vide AMC Records letter No 500602/Pen/AGI Mty/PRC/01 dated 09 Jan 2021.

6. And whereas, the mercy application of the petitioner dated 22 Oct 2017 had not been received by AMC Records. However, a copy of the said mercy application is found attached alongwith Original Application.

7. And whereas, it is stipulated in Para 132 of Pension Regulations for the Army 1961 (Part-I) that, "The minimum period of qualifying service (without weightage) actually rendered and required for earning service pension shall be 15 years". As per Para 113 (a) of Pension Regulations for the Army 1961 (Part-I) and Para 41 (a) of

Pension Regulations for the Army 2008 (Part-I), "an individual who is dismissed under the provisions of Army Act, is ineligible for pension or gratuity in respect of all previous service". In the instant case, the petitioner was dismissed from service on 20 Apr 2003 after completion of stipulated period of 03 years as a peace deserter, after rendering 14 years, 07 months and 17 days of service.

8. *And whereas, as per the guidelines for consideration of mercy appeal contained in Para 4 of Addl Dte Gen of Pers Services, AG's Branch, IHQ of MoD (Army) letter No B/38022/Misc/AG/PS (Imp-I) dated 26 Mar 2009, "the requirement of minimum qualifying service (15 years) for pension, as laid down in Regulations 132 of Pension Regulations". In the instant case, the petitioner has rendered only 14 years, 07 months and 17 days of service, as such not entitled for any kind of pension.*

9. *And pursuant thereof, the petitioner is not entitled for service pension as per Para 113 (a) and 132 of Pension Regulations for the Army, 1961 (Part-I) and Para 41 (a) of Pension Regulations for the Army 2008 (Part-I). Hence, mercy application dated 22 Oct 2017 is disposed off and Hon'ble AFT (RB) Lucknow order dated 09 Dec 2020 passed in ibid case stands complied with."*

12. In para 4.1 of O.A. applicant has contended that while on leave he met with an accident in that he sustained head injury and underwent treatment in civil hospital. In regard to this respondents version seems to be trustworthy that had there been an accidental injury to his head, he would have reported to nearest Military Hospital being a Medical Corps personnel. However, we

find that such thing never happened and story with regard to his head injury seems to be concocted and afterthought.

13. The applicant was dismissed from service under Section 20 (3) of the Army Act, 1950 and as per Para 113 of Pension Regulations for the Army, 1961 (Part-I), a dismissed Army person is not entitled to grant of any type of pension and gratuity. For convenience sake, the aforesaid Para is reproduced as under:-

"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. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. (b) An individual who is removed from service under Army Act, Section 20, may be considered for the grant of pension/gratuity at the rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. The competent authority may, however, make, if considered necessary, any reduction in the amount of pension/gratuity on the merits of each case. (c) An individual who is discharged under the provision of Army Act and the rules made there under remains eligible for pension or gratuity under these Regulations. Note: Those

discharged from service due to misconduct, corruption, lack of integrity or moral turpitude are not normally eligible for gratuity, but they may be sanctioned gratuity in exceptional cases at the discretion of the President at a rate not exceeding that for which they are normally qualified.

14. 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/without permission for a long period which resulted in his dismissal in terms of Para 22 of Army Order 43/2001/DV which deals with desertion. For convenience sake the aforesaid 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."

15. The only defence of the applicant is that during period of his absence, he was taking treatment for his head injury in civil hospital. It is unbelievable that a person who had suffered with head injury could not

recover from the ailment for a period of 17 years. This submission of the applicant is unconvincing. In absence of any documents related to his head injury, this defence of the applicant is unsustainable.

16. In regard to absence without leave/desertion, 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 Hon'ble 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."

17. In another case of ***Shish Ram vs. Union of India & Ors***, (2012) 1 SCC, page 290, the appellant in that case was declared a 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.

18. The facts on record reveal that the applicant deserted the Army service in the year 2000 while proceeding on permanent posting to Command Hospital (Eastern Command) and after 17 years from the date of his desertion he approached the Army authorities

through mercy appeal for grant of service pension. There is nothing on record to show that the applicant had ever tried to join or surrender from desertion. In the circumstances, it is crystal clear that the applicant deserted the Army service intentionally, therefore no lenient view should be taken in this regard.

19. In Para 5.3 of O.A. applicant has taken a stand that as per policy letter dated 14.08.2014, shortfall of 04 months and 13 days in service could be condoned. In regard to this, we have perused the aforesaid letter and we find that this letter pertains to delegation of administrative powers for condonation of shortfall in service and has no relation with the present case.

20. As Para 1(a) of Govt of India, MoD letter dated 14.08.2001 and Para 44 of Pension Regulations for the Army-2008 (Part-I) the deficiency in service for eligibility to pension/gratuity may be condoned up to 12 months in

each case by competent authority except in cases of-(a) an individual who is discharged at his own request, (b) an individual who is invalided with less than 15 years of service and (c) an individual who is eligible for special pension or gratuity under these Regulations. However, as per Para 4 and 5 of guidelines, for condonation of shortfall in qualifying service for pension, circulated vide MoD letter dated 26.03.2009, applicant seems to be not entitled to grant of condonation in shortfall of 04 months and 13 days. For convenience sake the aforesaid Paras are reproduced as under:-

"4.....Cases where the individual has completed 15 years service or more but does not have minimum qualifying service for earning pension due to spell of non-qualifying service, should normally be considered for condonation of shortfall in qualifying service."

5.....Condonation should not be allowed in cases involving moral turpitude, desertion in the face of enemy, espionage etc....."

21. In regard to condonation of shortfall in service in the cases of desertion, IHQ of MoD (Army) has clarified vide Paras 2 and 3 of letter dated 30.07.2010 that in cases of moral turpitude and desertion condonation of shortfall should not be done. For convenience sake, Paras 2 and 3 of the aforesaid letter are reproduced as under:-

"2.Cases where the individual has completed 15 years service or more but does not have minimum qualifying service for earning pension due to spell of non-qualifying service, should normally be considered for condonation of shortfall.

3. Condonation not be done in cases involving moral turpitude, desertion, espionage etc.....".

22. In the instant case since the applicant had deserted the Army service without sanctioned leave and he was dismissed from service, therefore, he is not entitled to be granted condonation of shortfall in service to earn service pension.

23. Additionally, 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.

24. In view of the above, we do not find any substance in the present O.A. which deserves to be dismissed. It is accordingly, **dismissed**.

25. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 14.11.2022

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