

E-court**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION No. 335 of 2021**

Friday, this the 11th day of November, 2022

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

Smt Prem Lata Singh, wife of No 3194020F Sep Late Surendra Kumar Singh, resident of village & Post-Kheshua, Tehsil-Basti, District-Basti, Uttar Pradesh, PIN-272001.

..... Applicant

Ld. Counsel for the : **Shri Manoj Kumar Awasthi**, Advocate
Applicant

Versus

1. Union of India through its Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. The Chief of the Army Staff, Integrated HQs of MoD (Army), Post-DHQ, New Delhi-110011.
3. Commanding Officer, 15 JAT Regiment, PIN-911215, C/o 56 APO.
4. Senior Record Officer, JAT Regiment, Records the JAT Regiment, PIN-900496, C/o 56 APO.
5. PCDA (P), Draupadi Ghat, Allahabad, Uttar Pradesh.

.....Respondents

Ld. Counsel for the: **Shri Devesh Kumar**, Advocate
Respondents. Central Govt Counsel

ORDER (Oral)

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

“(i) To issue/pass an order or directions to quash/set aside the order dated 30.08.2018 passed by senior Record Officer, JAT Regiment, Record Office by which claim of family pension of the applicant has been rejected.

(ii) To issue/pass an order or directions to the respondents to sanction/pay family pension since 25.11.2013.

(iii) To issue/pass an order or directions to the respondents to give arrears of family pension and other consequential benefits with prevailing rate of interest to the applicant.

(iv) Any other relief which the Hon’ble Tribunal may deem fit and proper in the fact and circumstances of the case is also granted alongwith cost of the O.A.”

2. Brief facts of the case are that applicant’s husband was enrolled in the JAT Regiment of the Indian Army on 15.03.2000. While posted with 15 JAT Regiment her husband absented without leave on 24.11.2013 and accordingly, apprehension roll was issued on 25.11.2013. After expiry of 30

days absence, a Court of Inquiry (C of I) was conducted on 01.01.2014 and he was declared a deserter w.e.f. 25.11.2013 and occurrence to this effect was notified vide Part-II Order dated 20.01.2014. Prior to his dismissal from service, a Show Cause Notice dated 29.10.2016 was issued to the applicant at his home address and when no response was received till 30 days, he was dismissed from service under Section 20 (3) of the Army Act, 1950 read with Rule 17 of the Army Rules, 1954 and Army Order 43/2001/DV w.e.f. 25.11.2013 and casualty to this effect was notified vide Part-II Order dated 10.04.2017. In the year 2014 applicant submitted applications to the respondents to know where about of her husband but she was informed that her husband was absent without leave. On 29.08.2017 applicant lodged FIR to Police Station Vaishali Nagar, Jaipur (Rajasthan) with regard to her missing husband. Applicant has also approached Zila Sainik Kalyan Evam Punarvas Karyalaya, Basti (UP) and in turn they had written to 15 JAT for grant of family pension to the applicant but since applicant's husband had already been dismissed from service, no action could be taken in this regard. Applicant has filed this O.A. for grant of family pension of her missing husband.

3. Learned counsel for the applicant submitted that her husband was enrolled in the Army on 15.03.2000 and while posted with 15 JAT he went missing from 25.11.2013. He further submitted that all efforts were made to search the individual but he could not be located. In regard to this the applicant submitted numerous representations to Army authorities including Zila Sainik Kalyan Evam Punarvas Karyalaya, Basti (UP) but every effort became futile. The learned counsel further submitted that applicant finally lodged FIR with Police Station Vaishali Nagar, Jaipur (Rajasthan) on 29.08.2017 with regard to her missing husband but till date his whereabouts are not known.

4. Learned counsel for the applicant further submitted that village Pradhan of Panchayat, Khesua, District-Basti has issued a certificate to the effect that applicant's husband has not been heard or seen since 25.11.2013, therefore, presuming him missing presumed dead, applicant be granted family pension. It was further submitted that in response to letter dated 05.05.2016 addressed to Zila Sainik Kalyan Evam Punarvas Karyalaya, Basti (UP), Records the JAT Regiment vide letter

dated 13.06.2016 intimated applicant that her husband has been declared a deserter under Section 39 (a) of the Army Act, 1950. Further, the respondents vide Show Cause Notice dated 29.10.2016 intimated that her husband was likely to be dismissed from service if he did not report within 30 days from the issue of Show Cause Notice.

5. Learned counsel for the applicant further submitted that applicant was trying to get financial dues of her husband and hence she was approaching the authorities concerned frequently. It was submitted that in pursuance to her applications, the respondents intimated her vide letter dated 24.11.2016 that her dues shall be paid in April, 2017. It was further submitted that in response to letter dated 07.08.2018 from Zila Sainik Kalyan Evam Punarvas Karyalaya, Basti (UP), Records the JAT Regiment intimated the applicant on 30.08.2018 that she is not entitled to family pension as her husband was dismissed from service.

6. Further submission of learned counsel for the applicant is that policy letter dated 03.06.1988 as amended from time to time provides that in the case of a missing Armed Forces

personal, the family can apply for grant of family pension based on FIR. It further provides that NOK of the missing soldier does not have to wait for seven years for grant of family pension which can be sanctioned based on an enquiry. He submitted that since the applicant's husband is not traceable hence he may be presumed dead in terms of Section 108 of the Indian Evidence Act and accordingly, applicant be granted family pension which has been denied vide letter dated 30.08.2018 (Annexure No 1 to the O.A.).

7. On the other hand, learned counsel for the respondents submitted that applicant's husband was enrolled in the Army on 15.03.2000. He further submitted that while serving with 15 JAT he was awarded four red ink entries for overstaying leave and absenting without leave which reveals that he was a habitual offender and had no regards for the Army discipline. The learned counsel further submitted that in the year 2006 he was referred to 92 Base Hospital (Srinagar) for treatment but he did not report there and absented himself without any leave/permission w.e.f. 12.02.2006 and after

almost 03 years he surrendered in the unit on 29.05.2009 and punished accordingly.

8. Learned counsel for the respondents further submitted that on 24.11.2013 at about 2000 hrs, applicant's husband while residing with family in civil hired accommodation, deserted from Jaipur (Rajasthan). Accordingly, apprehension roll was issued and after due C of I he was declared a deserter w.e.f. 25.11.2013. Since husband of the applicant neither re-joined the duty voluntarily nor was he apprehended by civil/military police up to 03 years, a Show Cause Notice dated 29.10.2016 was served upon him and since there was no response within the stipulated period, he was dismissed from service under the provisions of Section 20 (3) of the Army Act, 1950, read with Army Rule 17 and Army Order 43/2001/DV and casualty was notified vide Part-II Order dated 10.04.2017. It was further submitted that after closure of final statement of account, dues payable were remitted to the applicant.

9. Relying upon policy letter dated 23.12.2014 learned counsel for the respondents submitted that since applicant's husband deserted from the Army service, no lenient view could

be taken as mentioned in Para 2 of the aforesaid policy letter as per which family pension is not entitled in the cases of desertion. It was further submitted that as per beneficial provisions applicant's family pension could have been considered had she submitted a non-traceable certificate duly signed by the competent authority, but since this certificate has not been produced, his family pension cannot be considered. Further, since applicant's husband has been dismissed from service, in the circumstances no family pension can be granted to the applicant.

10. Learned counsel for the respondents further submitted that in response to letter of Zila Sainik Kalyan Evam Punarvas Karyalaya, Basti (UP) applicant was intimated that since her husband was not in receipt of any type of pension, as such she is not entitled to family pension. It was further submitted that no relief can be granted to family of a dismissed Army person who was a perpetual offender and was punished for overstaying leave and absent without leave on many occasions. He pleaded for dismissal of O.A.

11. Heard Shri Manoj Kumar Awasthi, learned counsel for the applicant and Shri Devesh Kumar, learned counsel for the respondents and perused the record.

12. No. 3194020F Ex Sep Surendra Kumar Singh was enrolled in the Army on 15.03.2000. During the course of his service he was awarded following punishments on account of overstaying leave/absent without leave:-

S No	Offence Committed	Date of Offence	Army Act Section	Punishment awarded
(a)	Without sufficient cause over staying leave granted to him	09.12.2002	39 (b)	14 days RI
(b)	Without sufficient cause over staying leave granted to him	08.06.2003	39 (b)	07 days RI and 14 days pay fine
(c)	Without sufficient cause over staying leave granted to him	05.11.2003	39 (b)	28 days RI and 14 days pay fine
(d)	Absenting himself without leave	12.02.2006	39 (a)	28 days RI

13. It appears from the record that in the year 2006 when the soldier was referred to 92 Base Hospital for treatment, he deserted from service and surrendered voluntarily after 03 years. The period of 03 years was sufficient for his dismissal

from service but keeping in view of welfare of his family he was punished leniently in that he was only awarded 28 days RI.

14. In the year 2013 while he was posted at Jaipur and living with his wife and children in a civil hired accommodation, he escaped on 24.11.2013 and never returned either to unit or to his native place. Consequent to that his wife was despatched to her native place. He was declared a deserter w.e.f. 25.11.2013 by a duly constituted C of I and one month prior to his dismissal from service a Show Cause Notice dated 29.10.2016 was issued to which there was no response till his dismissal from service.

15. Admittedly, learned counsel for the applicant has tried to persuade us that applicant's husband should be treated as missing presumed dead and in the event she should be entitled to family pension. In regard to this we have referred Para 2 of policy letter dated 23.12.2014 according to which NOK of a deserted soldier, who was dismissed from service, is not entitled to family pension. For convenience sake the aforesaid Para is reproduced as under:-

"2. It has now been decided to issue consolidated instructions in suppression of previous instructions as mentioned above regarding grant of family pension to the eligible members of family of the Armed Forces Personnel/pensioner/family pensioner reported missing and whose whereabouts are not known. It included those kidnapped by insurgents/terrorists but does not include those who disappear after committing frauds/crime/desertion etc."

16. Applicant has contended in her application dated 06.08.2017 addressed to JAT Regimental Centre that after desertion her husband was seen in Lucknow/Delhi along with a lady. She has also alleged that her husband was having illicit relations with some lady. In these circumstances it can very well be presumed that applicant's husband was having illicit relations with some other lady and he escaped with that lady leaving behind his wife and children in a civil hired accommodation at Jaipur (Rajasthan) and after desertion he never returned to unit or at native place.

17. While filing rejoinder affidavit applicant has contended in Para 21 that no preliminary inquiry was conducted before passing of dismissal order as held in the case of **Abhilash Singh Kushwaha vs UOI & Ors**, O.A. No. 168 of 2013 decided on 23.09.2015 and **Vijay Shankar Mishra vs UOI & Ors**, Civil Appeal No 12179 of 2016 decided on 15.12.2016. In

regard to this we observe that preliminary inquiry was not required to be held as the soldier was declared a deserter by a duly constituted C of I and before passing of dismissal order, Show Cause Notice dated 29.10.2016 was issued which was not replied.

18. In Para 21 of rejoinder affidavit it has also been contended that applicant's husband was punished twice for the same offence which is a double jeopardy. We have perused offences committed by applicant's husband and punishment inflicted during the Army service and found that he was not punished twice for the same offence (Para 12 above refers).

19. Thus, in absence of any reliable explanation for absence, the conclusion is 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 '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."

Thus, aforementioned Army Order provides for three years period for dismissal from service in case of a deserter. In the instant case since the applicant's

husband remained absent for 03 years after desertion, he was rightly dismissed from service.

20. We would like to refer the case of ***Capt Virender Singh vs. Chief of the Army Staff***, reported in (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 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 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."

21. In another case of ***Shish Ram vs. Union of India & Ors***, reported in (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.

22. 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 her husband be treated as missing presumed dead and she be granted family pension, is not true as her husband had deserted the Army service and he was dismissed from service as per rules. There is absolutely no documentary evidence to prove that her husband be treated as missing presumed dead. Applicant had lodged FIR with Police Station in the year 2017 when her husband had already been dismissed from service in the year 2016. Hence this defence is only an afterthought which does not inspire confidence. Admittedly, after unauthorised absence of the applicant, a C of I 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.

23. In response to her application for grant of family pension, Zila Sainik Kalyan Evam Punarvas Karyalaya, Basti (UP) wrote letter dated 07.08.2018 to Records the JAT Regiment, Bareilly which was replied by them stating that she is not entitled to

family pension. For convenience sake extract of letter dated 30.08.2018 is reproduced as under:-

- “1. Reference District Sainik Welfare Office, Basti (UP) पत्र संख्या ZSB/FP/443/2018 दिनांक 07 अगस्त 2018 /
2. आपको सूचित किया जाता है कि आपके पति भारतीय सेना में 15 मार्च 2000 को भर्ती हुए और वे 15 जाट में जयपुर में तैनात थे एवं 25 नवंबर 2013 को सुबह 0600 बजे वो फेमिली क्वार्टर से AWL हो गए और उसके बाद वो अभी तक वापस नहीं लौट कर आए | वो पहले भी बटालियन से चार-पाँच बार AWL हो चुके थे | आपके पति Peace Area से AWL होने के कारण उन्हें 25 नवंबर 2013 से तीन साल के बाद को सेना से बाहर (Dismissed from Service) कर दिया गया |
3. आपके पत्र संख्या दिनांक 24 अप्रैल 2014 में आपने हमें यह अवगत कराया था कि आपके पति को लखनऊ तथा नई दिल्ली में किसी अन्य महिला के साथ दिखाई पड़े थे |
4. अतः आपके द्वारा दिये गए दावे को खारिज करते हुए आपको यह अवगत कराया था कि आपके पति को सेना से किसी भी प्रकार का पेंशन प्राप्त नहीं हुई थी इसलिए आप भी पारिवारिक पेंशन के हकदार नहीं हैं |”

24. We have perused Para 41 (a) of Pension Regulations for the Army, 2008 (Part-I) according to which a person dismissed from service under the provisions of Army Act, 1950 is ineligible for grant of service pension. Applicant has stated in her applications dated 24.04.2014 and 06.08.2017 that her husband was seen with a lady in Lucknow/Delhi, therefore in such situation he may not be 'presumed dead' entitling the applicant for grant of family pension. In the circumstances,

applicant is not eligible for grant of family pension as claimed. For convenience sake, extract of 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."

25. Hence, we do not find any illegality or irregularity in the impugned order dated 30.08.2018 disentitling the applicant for grant of family pension. Therefore, we do not find any substance in the present O.A. which deserves to be dismissed.

26. The O.A. is accordingly, dismissed.

27. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated:11.11.2022
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