

**Reserved**  
**Court No.1**

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

**T.A. No. 349 of 2010**

Wednesday, the 10<sup>th</sup> day of October, 2018

**Hon'ble Mr. Justice SVS Rathore, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

Ramayan Mishra, S/o Late Shri Rama Shankar Mishra, Ex-  
No 6373502P NK (TS) Vill-Korara Harishandra, Post Peokol  
(Bhatani) District: Deoria.

.....Petitioner

Ld. Counsel for the Applicant: **Shri V.A. Singh, Advocate**

Versus

1. Union of India through its Secretary, Ministry of Defence.
2. Chief of Army Staff, Army Bhavan, New Delhi.
3. Army Supply Core (AT) Paharpur, Gaya-5 (Bihar).
4. C.D.A. Pension, Allahabad.

.....Respondents

Ld. Counsel for the Respondents: **Shri Anurag Mishra, Advocate**

**ORDER**

**Per Justice SVS Rathore, Member (J)**

1. Initially, the petitioner had preferred a Writ Petition bearing No. 64355 of 2007 before Hon'ble Allahabad High Court and vide order dated 02.04.2010, the same was

transferred to this Tribunal and registered as TA No. 249 of 2010.

2. By means of this petition, the petitioner has made the following prayers:

*“(i) Issue a writ, order or direction in the nature of mandamus commanding the respondent authorities to pay the retiral benefits of the petitioner alongwith an interest of 9% annually.*

*l(a) Issue a suitable order or direction to quash/set aside the discharged order of the applicant dated 01.08.1993 (Annexure No. 4 of T.A.)*

*l(b) Issue a suitable order or direction to quash/set aside the rejection orders dated 18.08.1993, 24.01.1994, 15.07.2005 and 25.08.2005 are being annexed collectively as Annexure No.14.*

*(ii) Issue suitable direction to the respondent to pay balance of salary for the years which applicant was entitled to serve from 01 August 93 to 01 August 93 (next four years (sic)).*

*(iii) Issue any other suitable writ, order or direction which this Hon'ble Tribunal deems fit and proper in the fact and circumstance of the present case.*

*(iv) To allow the TA with cost of Rs. 02 lakhs as the old army man had been harassed for years and denied his pension by quoting wrong provisions and facts, hiding actual service document when it exists.”*

3. We have heard learned counsel for the parties and perused the record.

4. During the course of arguments, learned counsel for the petitioner has restricted his prayer only to restoration of the

forfeited period of service of the petitioner for the purpose of calculation of pensionary benefits. This prayer has been made on the basis of Regulation 123 of the Pension Regulations for the Army, 1961, Part-I.

5. In brief, the facts necessary for the purpose of instant case may be summarized as under:

The petitioner was enrolled as Sepoy in Army on 14.07.1978. After completion of training, he was posted to Army Supply Corps (ASC) at Dehradun in the month of May, 1979. During the course of his service, he was posted to several places. While he was posted in Shilong, he suffered from some cold related problems and was admitted in Military Hospital. However, he could not recover from his illness, hence he sought leave from the Station Commander for taking care of his ill health but the same was not granted. In the meantime, the petitioner received a message from home about the illness of his elder son. He again prayed for leave but the same was not granted. Ultimately, the petitioner was discharged from the Military Hospital at Shilong on 20.12.1983. He immediately rushed to home for taking care of his ailing son. In March 1984, his son recovered from illness and became completely fit. Thereafter the petitioner approached his Unit at Silchar, but it refused to accept him and directed him to report at ASC Centre (South) Bangalore. The petitioner went to ASC Centre (South) Bangalore and reported for duty, but he was not permitted to

join his duty. From March 1984 to March, 1987, the petitioner ran from pillar to post but he was not accepted for duty. Ultimately, ASC Centre (South) Bangalore accepted his reporting and served a charge-sheet on him on 04.03.1987. The same day, i.e. on 04.03.1987, the petitioner was sent to jail for serving 89 days of imprisonment as punishment for his unauthorized absence. After serving 89 days' imprisonment, the petitioner was posted to 20 1st Platoon ASC stationed at Jodhpur, hence the period of his absence from service stood regularized. Thereafter the petitioner served the Army with unimpeachable integrity and to the full satisfaction of his superior authorities. Considering his commitment, he was given the time-scale of Lance Naik in the month of August, 1990. The petitioner was transferred again from 20 1st Battalion ASC stationed at Jodhpur to 360 Company ASC stationed at Leh-Laddakh in the month of October, 1990. After completing regular, continuous and satisfactory service of 12 years, the petitioner was promoted to the rank of Naik. On completion of 15 years of service, the petitioner superannuated from 360 Company ASC on 31.07.1993.

6. Submission of learned counsel for the petitioner is that after serving the punishment of 89 days' imprisonment for unauthorized absence, his services stood regularized and he was taken back in service. He further submits that thereafter the petitioner served the Army for more than 15 years without any break to the entire satisfaction of the higher authorities. He

was granted promotions to higher ranks and there was not even a single red or black ink entry during the said period, hence the alleged unauthorized absence from service ought to have been restored by the competent authority entitling him to pension, admissible to him on completion of 15 years of colour service.

7. **Per contra**, it has been pleaded on behalf of the respondents in the counter affidavit that the petitioner was a habitual offender of unauthorized absence. He was punished for absence without leave on 18.07.1981 for one day. He was again absent without leave for 76 days from 25.10.1982 to 08.01.1983 and further 03 years & 63 days from 20.12.1983 to 21.02.1987. He was awarded punishment of RI for 89 days by the SCM for his unauthorized absence. Service gratuity, AFPP Fund, AGI and Credit balance have been paid to the petitioner on his discharge. According to the respondents, the aforesaid period of absence without leave was non-qualifying service for pension, hence the petitioner was not having requisite 15 years of service to his credit; the petitioner's claim for pension was, therefore, rightly declined by the respondents.

8. Learned counsel for the petitioner has placed reliance on Regulation 123 of the Pension Regulations for the Army, 1961, Part-I (hereinafter referred to as the Pension Regulations), which reads as under:

*“123. (a) A person who has been guilty of any of the following offences:*

*(i) Desertion, vide Section 38 of the Army Act.*

*(ii) Fraudulent enrolment, vide Section 34 (a) of the Army Act, shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by court martial of the offence.*

*(b) A person who has forfeited service under the provisions of the preceding clause but has not been dismissed shall, on completion of any period of three years further service in the colours and/or service in the reserve with exemplary conduct and without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity.”*

On the strength of aforementioned Regulation, it has been argued that after a long absence, when the petitioner was taken on strength and he served the Army to the full satisfaction of the authorities concerned and during this period, his service was unblemished and exemplary and there was not even a single red ink or black ink entry to his credit, hence by virtue of aforesaid Pension Regulation, the forfeited period of service, during which he had remained absent, stood restored and the petitioner is eligible to reckon the forfeited service towards pension.

9. Learned counsel for the respondents has relied upon Regulation 11 of the Pension Regulations, which reads as under:

“122. (a) All service from the date of appointment or enrolment/transfer for man's service to the date of discharge shall qualify for pension or gratuity with the exception of:

(i) Any period of service on a temporary establishment or for which a special rate of pay is granted on the understanding that no pension is admissible.

(ii) Any period of service rendered before reaching the age of 17 years.

(iii) Any period of unauthorised absence unless pay and allowances are admitted for the period of absence;

(iv) Any period of absence without leave, which is, regularised as extraordinary leave without pay and allowances.

(v) Any period intervening between the date of dismissal/discharge/release and that of its cancellation, which is regularised as extraordinary leave without, pay and allowances.

(vi) Any period of absence as a prisoner of war, unless pay and allowances are admitted for the period of absence.

(vii) Any period of detention in civil custody before being sentenced to imprisonment or fine, unless the President, in a special case, issues orders reducing the period that shall not count.

(viii) Any period of imprisonment by sentence of a civil court: or of a court martial.

(b) In cases of claims to disability pension all service from the date of appointment or enrolment to the date of discharge shall qualify for pension or gratuity subject to exceptions (i) and (iii): to (viii) above.”

9. Argument of learned counsel for the petitioner is that the aforesaid Pension Regulation 122 says only about the exception in qualifying service of an individual, hence it is of no help to the respondents.

10. Submission of the respondents is that as per aforesaid Pension Regulation, vide Section 38 of the Army Act the period of absence owing to desertion can be condoned while the petitioner was charged under Section 39(a) of the Army Act, which is meant for absence without leave or overstay of leave without any sufficient cause; therefore, the petitioner is not entitled to pension, as claimed by him under Regulation 123(b) of the Pension Regulations.

11. We have given our anxious consideration to the submissions of rival parties. Admittedly, the petitioner was taken back on strength on 04.03.1987 and was discharged on 31.07.1993. Thus, the petitioner has served for a period of more than five years after his being taken on strength. Learned counsel for the respondents has fairly conceded that after his being taken on strength, there was not even a single red ink or black ink entry or any kind of adverse remark whatsoever against the petitioner and his service was unblemished and exemplary. It has also been admitted that during the said period of service, he was also granted promotions.

12. We are not impressed by the argument of learned counsel for the respondents that since petitioner overstayed the leave, for which he was charged under Section 39(a), therefore, he was not entitled to the benefit of restoration of forfeited period of service under Regulation 123 of the Pension Regulations, because the said Regulation deals with only



Section 38 of the Army Act. Sections 38 of the Army Act deals with desertion and Section 39 of the Act deals with offences relating to absence without leave. Absence without leave or unauthorized absence from duty is a condition precedent to declare an individual a deserter. On expiry of 30 days of absence from duty, an army personnel is declared deserter and as per policy, after a period of three years from the date of desertion in peace area and after a period of 10 years in field area, he may be dismissed from service. Therefore, the absence without leave or unauthorized absence is a condition precedent to declare a person deserter. Hence, offence under Section 39(a) of the Army Act is virtually the minor offence of Section 38 of the Army Act. In the instant case, the charge-sheet served upon the petitioner also helps us a lot in reaching to a correct conclusion. It reads as under:

**“Charge sheet**

*The accused No. 6373502P Sxp/SHFP Ramayan Mishra of 825 ASC Bn. (Air Maint) attached with Adm. Bn. ASC Centre (South) Bangalore charges with:-*

*Army Act Sec  
39(a)*

*DESERTING THE SERVICE*

*In that he,*

*at Shillong on 20<sup>th</sup> December, 1983 When discharged by M.H Shillang to proceed to his attachment Unit 16 101 Area, parent Unit (825 ASC Bn. (An), absented himself enroute with the intention to desert the*

*service until surrendered voluntarily to this Centre on 21 Feb 1987 at 1350.*

*Station- Bangalore-7  
Dated: 04<sup>th</sup> March, 1987.*

*( A.Rama Krishnan)  
Lt. Col  
CO Admn Bn ASC Centre (South).”*

13. As is evident from above, though Section 39(a) was mentioned in the charge-sheet, but the language used in the charge shows that the petitioner was virtually charged for deserting the service; he was absent from duty from 20.12.1983 to 21.02.1987. Even otherwise, a person who remains absent without leave for a period of 30 days has to be declared a deserter. We fail to understand as to why the petitioner was not declared a deserter. On this point, the counter affidavit filed by the respondents is silent. As is evident from the record, after waiting for a period of 03 years 02 months and 01 day, the petitioner was taken back on strength and he served the Army thereafter to the entire satisfaction of the authorities for a period of more than five years and was also granted promotions.

14. Now, the question is, whether, after being taken back on strength, the petitioner is entitled for restoration of forfeited period of service. Keeping in view the unblemished service which the petitioner has rendered after being taken on strength, we are of the considered view that the petitioner is entitled to

the benefit of Regulation 123 of the Pension Regulations quoted above and his forfeited service period ought to have been restored by the respondents. The denial by the respondents to restore the said period is, therefore, unsustainable under law.

15. Accordingly, this TA deserves to be allowed and is hereby **allowed**. The orders passed by the respondents denying the restoration of the forfeited service period of service of the petitioner are hereby set aside. The respondents are directed to restore the forfeited period of petitioner's service only for the purposes of calculation of his pensionary benefits. The respondents shall, after restoring the forfeited period of service shall calculate the pension of the petitioner, including arrears and the same shall be paid to him. This entire exercise shall be completed within a period of four months from today.

Since this petition was filed before the Hon'ble Allahabad High Court on 27.11.2006, therefore, we direct that the arrears of pension shall be restricted to only for a period of three years prior to the date of filing of the petition.

No order as to costs.

**(Air Marshal BBP Sinha)**  
**Member (A)**

**(Justice SVS Rathore)**  
**Member (J)**

Oct 10, 2018  
LN/-