

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

ORIGINAL APPLICATION No. 439 of 2020

Tuesday, this the 05th day of October, 2021

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

No. 15412504A Ex Sep Yerramsetty Mangraju, S/o(Late) Samudralu, Resident of C/o Sri Sunil Kumar, Vill & PO-Jamalpur, Teh-Chunar, Dist – Mirjapur (UP)

..... Applicant

Ld. Counsel for the : **Shri KP Datta**, Advocate.
Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi 110011.
2. The Chief of the Army Staff, IHQ of MoD (Army) South Block, New Delhi-110001.
3. Officer in charge, AMC Records, Lucknow, Pin- 226002.
4. PCDA (P) Draupadi Ghat, Pin -211014, Allahabad (UP).
5. PAO (OR) AMC, Lucknow Pin -226002 (UP).

.....Respondents

Ld. Counsel for the
Respondents.

Shri RC Shukla,
Central Govt. Standing 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 issue/ pass an order or directions to set-aside/quash the AMC Records Office, Lucknow letter No. 15412504A/Pen/D&D/ 2020 dated 03.01.2020, in which it is mentioned that the applicant have been dismissed from service by the competent authority on 20.04.2013 is being annexed as Annexure A-I to the Original Application.

(b) To issue/pass an order or directions to consider the aspect of the matter in totally, and grant him the genuine scope to reinstate in Army service with seniority and promotion with all consequential benefits, after quash/set-aside his dismissal order, till pensionable service and completion of terms of engagement up to the age of 49 years.

(c) To issue/pass any other order or direction as Competent Authority may deem just, fit and proper under the circumstances of the case in his favour. Also give him due advantage for seniority of promotion upto the rank of Havildar with all consequential financial benefits of pay and allowances , and arrears along with 18% interest per annum from the date of dismissal, based on available circumstances and Rules in vogue.

(d) To allow this original application with costs.

2. Applicant, Ex Sep Yerramsetty Mangraju was enrolled in the Indian Army on 16.02.2001. During the course of service he was granted 30 days advance of annual leave for the the

period 22.11.2009 to 21.12.2009. He was to report for duty on 22.12.2009 but he failed to do so. An apprehension roll was issued on 26.12.2009 (exhibit R-2). Thereafter, a Court of Inquiry under Section 106 of Army Act, 1950 was held on 23.01.2010 which declared him deserter w.e.f. 22.12.2009. Since applicant neither rejoined his unit nor reported anywhere including his Training Centre, he was dismissed from service w.e.f. 20.04.2013 i.e. after 03 years from the date of desertion, being a peace area deserter, under the provisions of Army Act Section 20 (3) read with Rule 17 of Army Rules, 1954 and casualty to this effect was notified vide Part II Order No 1/065/02/2013 dated 11.05.2013 and this fact was also intimated to civil authorities to whom apprehension roll was forwarded on 26.12.2009. After about three years of his desertion, on 20.10.2017 he returned his canteen and Identity Card through Andhra Pradesh Tri Service Ex-servicemen Welfare Association (APTSEWA). Later applicant and his mother approached AMC Records through Zila Sainik Welfare Office, Vishakhapatnam for sanction of service pension, AFPP Fund, AGI Fund and credit balance of final settlement of account but they were informed that amount due towards AFPP Fund and credit balance has been paid but applicant is not entitled to pensionary benefits in terms of para 41 (1) of Pension Regulations for the Army, 2008 (Part-I). Thereafter, a representation dated 25.11.2019

was submitted to Chief of the Army Staff for grant of pension but it was rejected on the ground that dismissed person is not entitled to receive any type of pension or gratuity. This O.A. has been filed for quashing of dismissal order dated 20.04.2013 and AMC Records letter dated 03.01.2020 and re-instating applicant into service with all consequential benefits.

3. Learned counsel for the applicant pleaded that applicant was granted part of annual leave for the year 2009 and while proceeding to home town by train, some strangers had offered him biscuits and snacks. After consuming eatables he became unconscious and completely lost his memory resulting in loss of money, valuables and clothes. He, however reached his home and underwent treatment in King George Hospital and Bindu Clinic, Visakhapatnam for mental treatment. His further submission is that after undergoing prolonged treatment, applicant became fit in the year 2017 and since then he is requesting for his re-instatement into service but every time he was denied that he cannot be re-instated in service being a dismissed soldier. Learned counsel for the applicant further submitted that being an honest soldier he returned CSD Cards etc to issuing authorities so that there is no misuse of the same. He pleaded for applicant's re-instatement into service.

4. On the other hand submission of learned counsel for the respondents is that applicant was granted leave for the year

2009 and he was required to report back for duty on 22.12.2009, which he failed to do and in consequence thereof apprehension roll was issued on 26.12.2009 followed by a Court of Inquiry dated 23.01.2010. The Court of Inquiry opined that applicant be declared deserter. Thereafter, after completion of three years of desertion, he was dismissed from service w.e.f. 20.04.2013 under Section 20 (3) of Army Act, 1950 read with Army Rule 17 and casualty to this effect was notified vide Part II Order No. 1/065/02/2013 dated 11.05.2013. Further averment made by learned counsel for the respondents is that the civil authorities were also intimated about his dismissal. 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. 22.12.2009 and never returned from leave granted to him on 22.11.2009. 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 41 (a) of Pension Regulations for the Army, 2008 (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, aforesaid 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. In exceptional case, however, the competent authority on submission of an appeal to that effect may at its discretion sanction pension/gratuity or both at a rate not exceeding that which would be otherwise admissible had he been retired/discharged on the same date in the normal manner."

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. 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 undergoing prolonged treatment in civil hospital for his mental illness, is absolutely without substance. If applicant (who belonged to Army Medical Corps) 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 fitness certificate issued by civil hospital is not acceptable in these circumstances. The applicant was a deserter and did not report to any authority after 22.12.2009. 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. 22.12.2009. 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 policy in vogue.

14. No order as to costs.

15. Pending misc applications, if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated:05.10.2021
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