

Form No. 4

{See rule 11(1)}

ORDER SHEET

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No. 1 (Sl. No 31)

O.A. No. 190 of 2022

**Ex Cfn Suneel Kumar Shakya**  
By Legal Practitioner for the Applicant

Applicant

Versus

**Union of India & Others**  
By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p><b><u>09.10.2022</u></b>  <b><u>Hon'ble Mr. Justice Ravindra Nath Kakkar, Member (J)</u></b>  <b><u>Hon'ble Vice Admiral Atul Kumar Jain, Member (A)</u></b></p> <p>1. Heard Shri Pankaj Kumar Shukla, learned counsel for the applicant and Ms. Deepti Prasad Bajpai, learned counsel for the respondents.</p> <p>2. O.A. is <b>dismissed</b>.</p> <p>3. For orders, see our judgment passed on separate sheets.</p> <p>(Vice Admiral Atul Kumar Jain) (Justice Ravindra Nath Kakkar) Member (A) Member (J)</p> <p>Ukt/-</p>

**Court No 1**

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

**ORIGINAL APPLICATION No.190 of 2022**

**Monday, this the 09<sup>th</sup> day of October, 2023**

**Hon'ble Mr. Justice Ravindra Nath Kakkar, Member (J)**

**Hon'ble Vice Admiral Atul Kumar Jain, Member (A)**

No. 17018924-P Ex Cfn Suneel Kumar Shakya, S/o Shri Bala Prasad Shakya, R/O – Vill : Surawali, P.O. : Dhamma, Tehsil : Madhogarh, Distt : Jalaun – 285126 (Uttar Pradesh)

..... Applicant

Ld. Counsel for the Applicant : **Shri Pankaj Kumar Shukla, Advocate.**

Versus

1. Union of India, through Secretary, Ministry of Defence, (Army), South Block, New Delhi-110011.
2. Chief of Army Staff, Integrated HQ of MoD (Army), South of Block-III, New Delhi-110011.
3. OIC Records, EME Records, PIN-900453 C/o 56 APO.

..... Respondents

Ld. Counsel for the Respondents.

**Mrs. Deepti P Bajpai,  
Central Govt. Counsel**

**ORDER**

**“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”**

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 order or directions to the respondents to suitable directions to the respondents to set aside the Dismissal order (Part II order No. 1/3569/2020 Dated 22.10.2020, (Date of Dismissal 20.10.2020) & respondents letter dated 26.08.2021.

(b) To issue order or directions to the respondents to reinstate the applicant in Army Services, with all consequential benefits from the date of deserter i.e. 03.05.2017 with all back wages along with @9% interest on arrear in the interest of justice.

(c) Any other relief as considered proper by the Hon’ble Tribunal be awarded in favour of the applicant”.

2. Applicant, ExCfn Suneel Kumar Shakya was enrolled in the Indian Army on 21.09.2011. Hewas granted 60 days Annual Leave w.e.f. 02.02.2017 to 03.04.2017. During leave he fell sick and admitted to District Hospital Morena, M.P. where he was diagnosed with Neuro problem. He applied for extension of leave and his leave was extended for 29 days as Advance of Annual leave with effect from 04.04.2017 to 02.05.2017. He further applied for extension of leave which was denied. Applicant’s father received letter dated 31.10.2020 from EME Records intimating that his son was dismissed

from service wef 20.10.2020. Applicant submitted statutory petition dated 22.06.2021 for re-instatement in service which was rejected. This O.A. has been filed for quashing of dismissal Part II order dated 22.10.2020 and reinstate him in service.

3. Learned counsel for the applicant pleaded that applicant was granted casual leave from 22.02.2017 to 04.03.2017. He fell sick during leave. He was treated at District Hospital Morena, M.P. He was diagnosed with Neuro problem and for further treatment he requested for extension of leave which was extended many times. Applicant's father received intimation vide EME Records letter dated 31.10.2020 that his son has been dismissed from service wef 20.10.2020 under Army Act Section 20 (3) being Over Staying Leave (OSL) since 03.05.2017. Applicant submitted Statutory Petition dated 22.06.2021 under Section 26 of Army Act read with Para 562 of army Regulations 1987 Vol-2 against his dismissal from service. His petition was rejected by the respondents vide order dated 26.08.2021. He pleaded to quash discharge Part II Order dated 22.10.2020 and reinstate him in service.

4. On the other hand submission of learned counsel for the respondents is that the applicant while serving with 234 Field Workshop Company EME was granted 60 days Annual Leave wef 02.02.2017 to 03.04.2017. His leave was further extended for 29 days

as advance of annual leave with effect from 04.04.2017 to 02.05.2017 on request of applicant. On completion of said leave, applicant failed to report back to his unit for duty. An apprehension Roll was issued vide letter dated 16.05.2017 to apprehend the individual. Neither the applicant was apprehended nor he surrendered before army authority. He was declared deserter wef. 03.05.2017 by Court of Inquiry. Casualty to this effect was published vide Part II Order dated 08.11.2018. A show cause notice was issued vide EME Records letter dated 27.09.2020 under Army Rule 17. The applicant failed to file reply to show cause notice. After prescribed period of 3 years as deserter in peace, the applicant was dismissed from service wef 20.10.2020 under Army Act Section 20 (3) vide EME Records Part II Order dated 22.10.2020. Applicant's father was informed about dismissal of his son. Certain forms were forwarded to the applicant for his signature for closing his account. The applicant failed to submit those forms. He submitted Statutory Petitioner dated 22.06.2021 to set aside dismissal order and to reinstate him in service. The said petition was rejected vide EME Records letter dated 20.08.2021. He was informed to take treatment from Military Hospital vide letter dated 04.10.2021. There is no provision to reinstate of a dismissed person. He concluded that since dismissal of applicant was done by following due process, this O.A. deserves to be dismissed on merit.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. Admittedly, leave of the applicant was extended on number of occasions. His further leave was not extended beyond 02.05.2017 in terms of Para 11 (b) of Leave Rule for the services volume -1 (Army) (Revised Edition) which stipulates *that “Annual Leave for the year may at the discretion of the sanctioning Authority, be extended to the next Callender year without prejudice to the annual leave authorised for the year in which the extended leave expires, but further annual leave will NOT be admissible until the individual again performs duty”*. Since the applicant’s leave was already extended by granting 29 days as Advance of Annual leave with effect from 04.04.2017 to 02.05.2017 on request of applicant, hence further extension of leave was not admissible until the applicant again performs duty as per ibid leave rule. On expiry of sanctioned leave, he could not join duty w.e.f. 03.05.2017. He was required to contact his unit for necessary advice or may visit nearest Military Hospital for his treatment. He neither informed to his unit nor he visited nearest Military Hospital. An apprehension roll was issued and after clear 30 days of absence, a Court of Inquiry was held and he was declared a deserter. A show cause notice dated 27.09.2020 was issued to which applicant failed to file reply. After expiry of three years, his services were dispensed with.

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 for reinstatement in service is sustainable. Applicant has rendered only about 5 years of qualifying service. Para 41 (a) of Pension Regulations for the Army, 2008 (Part-I) 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) of Pension Regulations for the Army-2008 (Part-I) 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. In the case law referred by the applicant, Show Cause Notice was not issued to the applicant and applicant reported to his unit along with his father. In this case applicant was issued Show Cause Notice but he did not submit his reply. Further, he never reported for duty. Since facts of case law referred by the applicant are based on different facts, hence not applicable in the instant case.

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, Morena (M.P.) has no substance as Military Hospitals have better medical facilities. 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. The applicant was a deserter and did not report to any authority after 03.05.2017. 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. 03.05.2017. 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 when an individual is granted leave and he never reports back to his unit. Therefore, we do not find any substance in the present O.A. which deserves to be dismissed. It is, accordingly **dismissed**.

13. No order as to costs.

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

**(Vice Admiral Atul Kumar Jain) (Justice Ravindra Nath Kakkar)**  
**Member (A) Member(J)**

Dated: 09 October, 2023

Ukt/-