

RESERVED
(Court No 2)

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

Original Application No. 739 of 2021

Tuesday, this the 10th day of October, 2023

**"Hon'ble Mr. Justice Anil Kumar, Member (J)
Hon'ble Lt Gen Anil Puri, Member (A)"**

Umesh Singh Yadav, S/o Lakshi Ram Singh, R/o Village-
Raipur, Tehsil-Jamania, Post-Jhatana, District-Ghazipur-
275903.

.....Applicant

Ld. Counsel for the: **Col AK Srivastava (Retd)**, Advocate
Applicant

Versus

1. Union of India, through the Secretary, Ministry of
Defence, New Delhi.
2. The Chief of the Army Staff, IHQ of MoD (Army), South
Block, New Delhi-110011.
3. The AG, IHQ of MoD (Army), South Block, New Delhi-
110011.
4. OC Signal Records, Jabalpur.
5. Pr. Controller of Defence Account, PCDA (P), Draupadi
Ghat, Allahabad-211014.

..... Respondents

Ld. Counsel for the: **Shri Yogesh Kesarwani**,
Respondents Central Govt. Counsel.

ORDER

1. This instant Original application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 by which he has sought the following reliefs:-

- (I) *Issue/pass an order or direction of appropriate nature to quash/set aside the respondents letter dated 15.11.2014 (Annexure No A-1) rejecting applicant's representation dated 13.11.2014 to grant him service and pensionary benefits w.e.f. 20.10.2014, i.e. date from which he was dismissed from service.*
- (II) *Issue/pass an order or direction of appropriate nature to summon quash/set aside orders leading to illegal dismissal of the applicant from service w.e.f. 20.10.2014 passed by the respondents and reinstate him in service with all consequential benefits w.e.f. 20.10.2014.*
- (III) *Issue/pass an order or direction of appropriate nature to quash/set aside order of dismissal from service in respect of the applicant w.e.f. 20.10.2014 passed by the respondents and reinstate him in service with all consequential benefits w.e.f. 20.10.2014.*
- (IV) *Issue/pass an order or direction of appropriate nature to grant service pension to the applicant.*
- (V) *Issue/pass an order or direction of appropriate nature to conduct a medical board and grant him disability pension w.e.f. 20.10.2014.*
- (VI) *Issue/pass an order or direction of appropriate nature as this Hon'ble Tribunal Deem appropriate in favour of the accused.*
- (VII) *Allow this application with costs and interest.*

2. Brief facts of the case giving rise to this application are that the applicant was enrolled in Indian Army (Corps of

Signals) on 28.11.2002. In the year 2010, while serving with 56 Infantry Division Signal Regiment, he was granted 30 days Part of Annual leave (PAL) for the period 28.06.2010 to 27.07.2010. On expiry of said leave, he failed to report to his unit and accordingly, apprehension roll dated 02.08.2010 was issued to various agencies. Subsequently, on his volunteer rejoining on 10.08.2010 he was punished with 14 days pay fine. Thereafter, he was granted 20 days PAL for the period 07.02.2011 to 26.02.2011 with permission to prefix 06.02.2011 and suffix 27.02.2011. After expiry of leave, he failed to report to his unit. Apprehension roll dated 28.02.2011 was issued and he was declared a deserter w.e.f. 28.02.2011 by a duly constituted Court of Inquiry (C of I) held on 01.04.2011. The applicant voluntarily surrendered to Depot Regiment on 25.04.2011 from where he was despatched to his parent unit vide movement order dated 14.05.2011. However, applicant neither reported to his parent unit nor did he report back to Depot Regiment, hence he was declared absent without leave (AWL) w.e.f. 15.05.2011 and occurrence to this effect was notified vide Part-II Order dated 28.11.2011. Apprehension roll dated 16.07.2011 was issued and after expiry of 30 days, he was

declared a deserter w.e.f. 15.05.2011 by C of I and casualty notified vide Part-II Order dated 26.11.2011. Thereafter, the applicant was neither apprehended by civil police nor did he rejoin voluntarily within 03 years of absence/desertion period, hence he was dismissed from the service w.e.f. 20.10.2014 in accordance with Section 20 (3) of the Army Act, 1950 read in conjunction with Army Rule 17 being deserter from peace area as per Para 20 (b) of Special Army Order No. 9/S/89 and occurrence notified vide Part-II Order dated 27.10.2014. Applicant has filed this O.A. to quash his dismissal order dated 20.10.2014, reinstate him into service, conduct medical board and grant service pension alongwith disability element of pension with consequential benefits.

3. Submission of learned counsel for the applicant is that while returning to his unit after availing leave, the applicant became victim of 'Zahar Khurani Gang' in Tinsukhia Intercity Express near Dimapur Railway Station on 31.07.2010 in which he lost his belongings including Identity Card, CSD Smart Cards and money. He got down at Dimapur platform and searched his belongings but failed to trace his items. While carrying out search of his items, the applicant fell down unconsciously which was noticed by CRPF personnel who took

him to Varanasi and handed him over to Shri Sonu Yadav, his brother-in-law. He was admitted in District Hospital, Varanasi on 04.08.2010 and was discharged on 06.08.2010.

4. Learned counsel for the applicant further submitted that after discharge from the hospital, his brother-in-law accompanied applicant and handed him over to his unit personnel who lodged FIR on 09.08.2010. It was further submitted that due to headache and irritating sensation applicant was treated in 302 Field Hospital MI Room for over 06 months from August 2010 to January 2011 till he was referred to 162 Military Hospital on 11.01.2011 but his unit did not allow him to proceed to 162 Military Hospital for treatment and instead sent him on 20 days PAL w.e.f. 06.02.2010 to 26.02.2010.

5. Learned counsel for the applicant further submitted that during the course of his leave, his father got him treated in BHU Medical College, Varanasi and during the treatment a telegram dated 17.02.2011 was received from his unit directing applicant to rejoin duty for finalization of impending Court of Inquiry held for loss of Identity Card. It was further submitted that father of the applicant spoke to Company Commander requesting him for extension of leave stating that

he would rejoin duty once he is in reasonably better health but his plea was not acceded and he was declared a deserter. It was further submitted that applicant surrendered at Depot Battalion from where he was despatched to his unit vide movement order dated 15.05.2011 where he was not allowed to enter. On return, he underwent treatment in civil hospital from April 2011 to 16.07.2021.

6. Learned counsel for the applicant further submitted that based on apprehension roll dated 14.07.2011 applicant was dismissed from service w.e.f. 20.10.2014 without giving an opportunity of hearing and without issuing show cause notice. Therefore, his dismissal is liable to be quashed being illegal.

7. Learned counsel for the applicant further submitted that on 07.11.2014 applicant reported to Depot Battalion and requested to allow him to continue in service but he was informed that he has already been dismissed from service. It was further submitted that thereafter, he submitted representation for grant of pension which was rejected vide letter dated 23.01.2017. Concluding his submission learned counsel for the applicant submitted that applicant be reinstated into service w.e.f. 20.10.2014 as (i) no proper and mandatory C of I was conducted prior to his dismissal from

service, (ii) neither the applicant nor his representative (dependents-wife/children) were given an opportunity to participate in the C of I prior to declaring him a deserter or dismissal, (iii) no show cause notice was issued prior to his dismissal from service and (iv) he was dismissed from service after completion of 3 years whereas being a field area deserter he should have been dismissed from service after 10 years.

8. On the other hand, learned counsel for the respondents submitted that No. 15678750P Ex Sigmn Umesh Singh Yadav was enrolled in the Army on 28.11.2002 and was declared deserter w.e.f. 15.05.2011. He was dismissed from service w.e.f. 20.10.2014 under the authority of Army Act Section 20 (3) read in conjunction with Army Rule 17 and Para 20 (b) of Special Army Order No. 9/S/89 being peace area deserter.

9. Further submission of learned counsel for the respondents is that the applicant while serving with 56 Artillery Brigade Signal Company was granted 30 days Part of PAL from 28.06.2010 to 27.07.2010 but after failing to report for duty, apprehension roll dated 02.08.2010 was issued. Subsequent to which applicant rejoined duty voluntarily on 10.08.2010 and was awarded 14 days pay fine for offence

committed under Section 39 (b) of the Army Act, 1950. It was further submitted that in the year 2011, applicant proceeded on 20 days PAL which was due to expire on 27.02.2011, but after expiry of leave he again failed to report for duty and was declared a deserter w.e.f. 28.02.2011. He surrendered voluntarily to Depot Regiment on 25.04.2011 and under the authority of movement order dated 14.05.2011 he was directed to report to his unit, however, applicant neither reported to his parent unit nor did he report back to the Depot Regiment, hence he was declared a deserter w.e.f. 15.05.2011 and after completion of three years, he was dismissed from service w.e.f. 20.10.2014.

10. Learned counsel for the respondents further submitted that the applicant is not entitled to service pension under the provision of Para 41 of Pension Regulations for the Army, 2008 (Part-I) as per which "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." He pleaded for dismissal of O.A. stating that since the applicant was dismissed from service by following due process, he can neither be reinstated into service nor can he

be granted service pension.

11. Heard learned counsel for the parties and perused the records.

12. Applicant was enrolled in the Army on 28.11.2002. In the year 2010, he was granted 30 days PAL which was due to complete on 27.07.2010. On expiry of leave, applicant failed to report for duty, hence he was declared overstaying leave w.e.f. 28.07.2010 and apprehension roll dated 02.08.2010 was issued. On his rejoining voluntarily w.e.f. 10.08.2010, he was awarded 14 days pay fine. Again in the year 2011, he was granted 20 days PAL which was due to expire on 27.02.2011 but after expiry of leave he failed to report for duty and apprehension roll dated 28.02.2011 was issued and he was declared a deserter w.e.f. 28.02.2011. On 25.04.2011, he voluntarily surrendered at Depot Regiment from where he was despatched to 56 Infantry Division Signal Regiment but he neither reported to his receiving unit nor did he report back to the Depot Regiment, hence he was declared absent without leave (AWL) w.e.f. 15.05.2011. Apprehension roll dated 16.07.2011 was issued followed by a C of I which declared him as a deserted w.e.f. 15.05.2011. The applicant was neither apprehended by civil police nor did he rejoin duty

voluntarily within 03 years from the date of declaring him a deserter, hence he was dismissed from service w.e.f. 20.10.2014 under Army Act Section 20 (3) read in conjunction with Army Rule 17 being a deserter from peace area as per Para 20 (b) of Special Army Order No. 9/S/89 and occurrence was notified vide Part II Order dated 27.10.2014. Later, this fact was intimated to Superintendent of Police, Ghazipur vide letter dated 10.11.2014.

13. Applicant had submitted application dated 07.11.2014 for grant of service pension which was turned down vide letter dated 15.11.2014. For convenience sake extract of letter dated 15.11.2014 is reproduced as under:-

- "1. Refer your petition dated 07 Nov 2014.*
- 2. It is intimated that you were enrolled in the Army (Corps of Signals) on 28 Nov 2002 and declared deserter with effect from 15 May 2011 and subsequently dismissed from service on 20 Oct 2014 under Army Act Sec 20 (3). Hence, as per para 113 (a) of pension regulations 1961, you are not eligible for grant of service pension or any other pensionary benefits."*

14. On 17.11.2016 applicant represented his case for grant of pension through Centralised Public Grievance Redress and Monitoring System (CPGRAMS). The said representation was considered on its merits and rejected vide letter dated 07.01.2017 intimating that dismissed soldiers are not eligible for grant of any pension in terms of Para 113 (a) of Pension

Regulations for the Army, 1961 (Part-I). For convenience sake, copy of letter dated 07.01.2017 is reproduced as under:-

"1. Refer to your petition dt 17 Nov 2016 received through CPGRAMS registration No PMOPG/D/2016/0352581 dated 23 Nov 2016 and IHQ of MoD (Army) vide letter No B/44411/Sigs (B-3)/PC-1724 dated 21 Dec 2016.

2. It is intimated that you were enrolled in the Army (Corps of Signals) on 28 Nov 2002. At the time of serving with 56 Inf Div Sig Regt you became OSL w.e.f. 28 Feb 2011 and subsequently a C of I was conducted and you were declared deserter w.e.f. 28 Feb 2011 by 56 Inf Div Sig Regt. You have not reported within 3 yrs from date of desertion, hence you were dismissed from service w.e.f. 20 Oct 2014 by Comdt 1 Sig Trg Centre under Army Act Sec 20 (3) vide Signals Records Part II Order No NER/360/16/14 dated 27 Oct 2014.

3. In view of the above, as per para 113 (a) of Pension Regulations 1961 as amended vide Para 41 of Revised Pension Regulations for the Army, 2008 (Part-I), persons those who were dismissed from service are not eligible for earning service pension and pensionary benefits.

4. This is for your information."

15. The aforesaid letter makes it clear that applicant was dismissed from service due to being a deserter from Army for continuously three years.

16. The only defence of the applicant is that during the absence period, he was under treatment in civil hospital w.e.f. April 2011 to 16.7.2021 as brought out in Para 4.22 of O.A. It is unbelievable that an Army person who has been suffering from mental ailment for several years and ultimately recovered to some extent from such mental ailment has not approached to Military Hospital for treatment by any Army

Doctor. If applicant was unable to approach Military Hospital, his relatives could have brought him to the nearby Military Hospital for his treatment which has not been done in this case.

17. Annexure A-4 is copy of General Diary dated 27.08.2010 as per which applicant lost his Identity Card and Canteen Smart Cards at Guwahati Railway Station due to rush of passengers. The above report of GRP seems to be valid on the ground that it was lodged by unit personnel after the incident. In absence of any reliable documents of the point on the ground of absence i.e. mental illness, the said defence of the applicant cannot be relied upon. Therefore, 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 sanction of leave and without permission for a long period. The true fact is that applicant deserted the Army and never turned up.

18. At this stage, we would like to quote para 22 of Army Order 'AO/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 from peace area.

19. 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 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 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 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."*

20. 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.

21. Thus, keeping in view the aforesaid legal position when we examined the facts and circumstances of the instant case, then it is clear that the defence of the applicant, that he could not surrender to his regiment being mentally ill for a prolonged period and undergoing treatment in civil hospital, is absolutely without substance. There is absolutely no

documentary evidence to support such pleading that he was under treatment in BHU for the period April, 2011 to 16.07.2021 i.e. for ten years. Hence, this defence is only an afterthought which does not inspire confidence. 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. Three years from the date of desertion, he was dismissed from service. It is nowhere the case of the applicant that the authority passed the order was not competent to pass such order or the order of dismissal was passed before expiry of period of three years as provided in the Army Order quoted above. Hence, we do not find any illegality or irregularity in the impugned order. Therefore, we do not find any substance in the present O.A. which deserves to be dismissed.

22. So far as the claim for service pension is concerned, a dismissed Armed Forces personnel is not entitled to service pension in terms of Para 41 (a) of Pension Regulations for the Army, 2008 (Part-I) which, for convenience sake, is reproduced as under:-

"41 (a). An individual who is dismissed under the provisions of Army Act, 1950 or removed under 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."

23. A prayer has also been made for conduct of medical board and grant of disability pension. w.e.f. 20.10.2014. On perusal of record we find that during the period he was in service his medical category was never downgraded to low medical category which warrant order of his re-medical board.

24. In view of the above, the Original Application has no merit, deserves to be dismissed and is accordingly **dismissed**.

25. No order as to costs.

26. Miscellaneous applications(s), pending of any, stand disposed off.

(Lt Gen Anil Puri)
Member (A)

Dated: 10.10.2023

rathore

(Justice Anil Kumar)
Member (J)

RESERVEDCourt No 2

Form No. 4

{See rule 11(1)}
ORDER SHEETARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

O.A. No. 739 of 2021

Umesh Singh Yadav

Applicant

By Legal Practitioner for the Applicant

Versus

Union of India & Ors

Respondents

By Legal Practitioner for Respondents

Notes of the Registry	Orders of the Tribunal
	<p data-bbox="505 1728 639 1757"><u>10.10.2023</u></p> <p data-bbox="505 1763 1114 1800"><u>Hon'ble Mr. Justice Anil Kumar, Member (J)</u></p> <p data-bbox="505 1806 1024 1843"><u>Hon'ble Lt Gen Anil Puri, Member (A)</u></p> <p data-bbox="599 1900 875 1935">Judgment pronounced.</p> <p data-bbox="599 1954 1008 1989">O. A. No. 739 of 2021 is dismissed.</p> <p data-bbox="599 2007 1398 2042">For orders, see our judgment and order passed on separate sheets.</p> <p data-bbox="505 2150 730 2225">(Lt Gen Anil Puri) Member (A) <i>rathore</i></p> <p data-bbox="1144 2150 1370 2225">(Justice Anil Kumr) Member (J)</p>