FORM NO – 21
(See Rule 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: TA 30 OF 2011 (WP (C) 9223 of 2009)

THIS 7th DAY OF AUGUST, 2014

CORAM: Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

Smt. Kadambari Mallik, aged about 40 years.
W/o Late Bipra Charan Mallik,
R/o Vill. Nuasahi, PO Balaskumpa,
PS Khajuripada, Dist. Phulbani

…….. Petitioner

-VS –

1. Union of India through the Secretary,
Ministry of Defence, South Block, New Delhi

2. Officer-in-Charge, Records Signal,
Signal Abhilekh Karyalaya,
Post Box. No. 5, Jabalpur (MP)

3. The Senior Record Officer,
For OIC, Records, The Record Signals,
PIN 908770, C/o 56 APO

…… Respondents

For the petitioner : Mr. Subhash Chandra Bose, Advocate

For the respondents: Mr. S.K.Bhattacharyya, Advocate

O R D E R

Per Lt. Gen. K.P.D, Samanta, MEMBER (Administrative)

This matter was initially filed before the Hon'ble Orissa High Court as a Writ Petition being WP(C) No.9223/2009, in which the applicant, Smt. Kadambari Mallik, who is the widow of a deceased soldier, late Bipra Charan Mallik, a sepoy in the corps of Signal in the Indian Army, prayed for payment of family pension and other pension related benefits on the death of her husband while in military service. After coming into force of the AFT Act, 2007, the said Writ Petition was transferred to this Tribunal in terms of the Section 34 of the said Act and upon transfer it has been renumbered as TA 30/2011.

2. The brief facts of the case are that the husband of the applicant, Bipra Charan Mallik, was enrolled in the Army in corps of Signal, as a Sepoy (Signal Man) in washer-man trade on 9.12.1983. He was granted two months' leave from 9.10.90 to 9.12.90. He came to his home during leave. While enjoying the leave, he fell ill and suffered from PID for which he was admitted in the Phulbani District HQ Hospital on 26.11.90 as an indoor patient. Subsequently, he suffered from Pyrelia and was again admitted in the hospital on 6.9.91. Subsequent thereto he was again admitted in the hospital due to heart problem and he died on 5.3.93. According to the applicant, his father intimated the death of his son and husband of the applicant to his authorities on 6.3.93. Surprisingly, the father of the applicant received a communication dated 4.3.94 (annexure-3) to the effect that his son Bipra Charan Mallik was dismissed from Army service w.e.f. 20.4.94 as per provision of Army Act, Sec. 20(3). The applicant approached and made representations to the authorities on 26.10.94 for disbursement of family pension and other benefits but she was paid only a sum of Rs. 6520/- towards AGI benefit. When continuous

efforts of the applicant to get family pension and other dues failed despite approaching various authorities including local District Magistrate and Zila Sainik Board, she filed a writ petition before the Hon'ble Orissa High Court being OJC No. 2679 of 2001 which was disposed of on 20.4.2001 by issuing the following directions :-

> "An unfortunate young widow has approached this Court challenging inaction on the part of the authorities in granting family pension. The husband of the petitioner late Bipra Charan Mallick while working as Signal Man under OPP. Part No. 2, expired on 5.3.93. It is alleged that she is otherwise entitled to family pension but the authority is not granting the same.
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> In view of the simple grievance, no useful purpose will be served in admitting this writ application. The same is disposed of with a direction that the OPP parties shall duly consider the application said to have been filed by the petitioner on 21st November 1995 vide Annexure-5 and if there is no impediment, and the petitioner is otherwise entitled to, the same may be release within a period of six months from the date of receipt of this order.
>
> It is made clear that we have not expressed any opinion regarding merit of the case and the decision shall be taken strictly in consonance with law and communicated .."

3. Pursuant to this direction, the authorities passed a speaking order on 10 Sep 2001 (annexure-8) wherein it is stated inter alia as under :-

> "3. Your husband No. 14253428 Signalman B. C. Mallick was enrolled in the Army on 09 Dec 83 and was granted annual leave from 09 Oct 90 to 09 Dec 90. He was due to report back in his unit on 09 Dec 90 but he did not rejoin unit and overstayed leave and was declared deserter wef 10 Dec 1990. On his desertion from Army, an apprehension roll was issued but neither the individual was apprehended by the police nor he surrendered himself. Since he did not rejoin duty within 3 years from the date of desertion, he was dismissed from service on 20 Apr 94 under Army Act Sec 20(3). The final settlement of account was carried out and it was closed with a debit balance of Rs. 4452. The amount of AGIF Rs. 7598/- has already been paid to you through your banker

vide cheque No. …. Date 11 July 1995. A sum of Rs. 2560/- on account of AFPP Fund will be paid on receipt of cheque from the PAO (OR) Corps of Signals.

4. Since No. 4253428 Signalman B C Mallick was deserter and dismissed from service, you are not entitled for any pensionary benefits in terms of para 113(a) of Pension regulations for the Army, Part I (1961)."

4. Being aggrieved by this communication, the applicant once again approached the Hon'ble Orissa High Court by filing the instant writ petition seeking quashing of this order and also for a direction to the respondents for payment of family pension and other pensionary benefits as admissible. As already stated, the said writ petition has stood transferred to this Bench of the Tribunal for disposal.

5. The respondents in their counter affidavit have not disputed the facts averred by the applicant; but according to them, no intimation regarding death of the soldier was ever received by the authorities. It is also stated that the husband of the applicant in the past also remained on AWL (absent without leave) on two occasions; once in June 1987 for 45 days and again in March 1988 for 275 days. On this occasion, when he did not rejoin on expiry of leave on, an apprehension roll was issued on 7 Feb 1991 to the Superintendent of Police, Phulbani but neither the individual could be arrested nor did he voluntarily rejoin. As per policy in vogue, a court of inquiry was conducted under Section 106 of the Army Act on 4 Mar 1991 and the soldier was declared a deemed deserter w.e.f. 10 Dec 1990. The deceased soldier had rendered seven years service in the Army including 320 days of non-qualifying service. Since the applicant did not report back even after having been deserter, he was dismissed u/s 20(3) of Army Act after waiting for 3 years as he deserted from peace station, as per rules.

6. We have heard Mr. Subhash Chandra Basu, ld. adv. for the applicant and Mr. S.K.Bhattacharyya, ld. adv. for the respondents. We have also carefully perused the departmental records as produced by the respondents. On conclusion of hearing, both parties have filed written notes of arguments which we have perused.

7. Mr. Basu has contended that the procedure followed by the respondents in declaring the applicant's husband as a deserter was illegal. His contention is that no charge-sheet or tentative charge sheet was framed against the accused (deceased soldier) after 30 days of AWL u/s 38(a) of Army Act. There was no such charge. Further during the alleged court of inquiry u/s 106, no notice under Army Rule 179(3) was issued either to the deceased soldier or to his next of keen. The court of inquiry was conducted behind the back of the individual and even the report of COI was not signed by the PO or any Member. The dismissal order was passed one year after the expiry of the soldier and as such it is liable to be quashed. He has further contended that dismissal order was passed under administrative order u/s 20(3) of AA but no show cause notice was issued which is mandatory. It also does not say about forfeiture of past service and therefore, family pension cannot be denied to the applicant. He has explained that it is due to prolonged illness that the deceased soldier could not rejoin his duties nor could he inform the authorities. The applicant is also an illiterate lady living in a remote tribal village of Orissa and was not aware of the address where to inform. It was only after she came to know the details that she made representation in September 2009 vide annexure-4. But the authorities took no step to correct their wrong and by simply making payment of a meager amount, they wanted to close the matter. He has placed reliance on the following decisions:-

i) Order dt. 12.2.2014 (unreported) passed by AFT, Kolkata Bench in OA 8 of 2013 (Bhagabati Mahato –vs- UOI & Ors)

ii) Daya Shankar Tiwary –vs- Chief of Army Staff, 2002(6) SLR 787

iii) Vidya Devi –vs- UOI & Ors, 2003 Lab IC 3633(DB)
iv) Havildar J.S.Bansal –vs- UOI & Ors, 2003(4) SLR 563
v) Smt. Haranadi –vs- UOI & Ors, 2002(1) Forces Law Judgements page 66
vi) OA 189/2009 (Smt. Sunita Devi –vs- UOI), decision dt. 4.8.2010 of AFT, Principal Bench (unreported)
vii) Meera Devi –vs- UOI (CWJC No. 1008/97 dt. 6.3.200 of Patna High Court)

8. Mr. Bhattacharyya on the other hand submits that Sec 39 of Army Act deals with AWL which includes over-staying of leave. He contends that it is the obligation of the authorities u/s 106(1) of Army Act to initiate CoI if an individual remains absent for more than 30 days and to declare him as 'deemed deserter' after holding a CoI. He further contends that CoI proceeding is not a judicial proceeding u/s 152 and its proceedings are not admissible as evidence under rule 182 of Army Rules. He further contends that proceedings under Sec 38 or 38 of the Army Act can only be initiated in the event the individual surrenders or is apprehended by police. Trial can be held u/s 38 of the AA only if the individual is present. His further contention is that Army Order 43/2001/DV is not applicable in CoI proceedings but only in judicial proceedings like court marital. If a trial could be held under the provision of the Act, then only it could be ascertained if the desertion was due to intention to quit service or to avoid a particular duty or for any bona fide ground. Mr. Bhattacharyya has further contended that failure of the deceased during his lifetime to surrender cannot alter the position that he was declared a deserter and therefore his death could not be termed as a case of 'died in harness'. He has submitted that the applicant being his legal heir, has no right to sue or make an appeal for quashing the dismissal order. In support, he has placed reliance on the decision of the Hon'ble Apex Court in the case of **Bondada Gajapati Rao –vs- State of Andhra Pradesh**, AIR 1964 SC 1645. He has further contended that the earlier decision of this Tribunal in **OA 8 of 2013 (Bhagabati Mahato –vs-**

UOI & Ors) decided on 12.2.14 has no application in this case since in that case the army personal had completed his qualifying service for earning pension.

9. We have given our thoughtful consideration to the contentions advanced by both sides and the rule position as placed before us. However, before we consider the legal aspects as argued before us, we would like to observe that the facts as revealed in this case shocks our conscience at the callous and inhuman attitude of the respondent authorities, who without proper application of mind, rejected the claim of the applicant, a young widow of their own soldier who died after prolonged illness and shown her, with two minor children, the door to fend for themselves without any plausible explanation. Even the deceased soldier's own savings through provident fund (AFPP Fund) has so far been denied to him.

10. Admittedly, the husband of the applicant was granted leave for two months from 9.10.90 to 9.12.90 but he did not rejoin on expiry of leave. As it appears, during leave he came to his home at a remote village in the tribal area of Phulbani district of Orissa, where he fell ill due to various ailments and was admitted in Govt. hospital for various periods, though not continuously and ultimately died on 5.3.93 while in hospital. Thus, he remained at his home for three years after expiry of leave and then died. It is alleged by the applicant that the death news was communicated to the authority by his father, which the respondents have denied to have received. Even no evidence is on record in that regard. In view of this factual position, the respondents followed the procedure and issued the apprehension roll, held a court of inquiry after a month of absence, declared him as a deemed deserter and after lapse of three years, dismissed him from service w.e.f. 20.4.94 under Sec. 20(3) of Army Act by way of administrative action. Obviously, the dismissal order was passed one year after the expiry of the soldier on 5.3.93. It is, therefore, apparent that a penal order of dismissal from service was passed against a dead person,

which is absolutely illegal. It is of course the case of the respondents that they were not aware that the individual had died in the meantime as no intimation was given by his next of keen nor he could be apprehended by police. Up to this stage, the stand of the respondents cannot be questioned. But as it appears from annexure-4, the applicant made representations on 17.9.94 and 26.10.94 i.e. immediately after receipt of the communication from the respondents dt. 4.8.94 (annexure-3) intimating the family that the husband of the applicant was dismissed from service. On receipt of the ibid representations from the applicant, the respondents came to know that the soldier died one year before the date of dismissal. They ought to have taken immediate steps to set right the wrong done, may be unknowingly as the situations suggests. They did not do so and instead citing rule position stated that she was not entitled to any family pension. Even after the direction of the Hon'ble Orissa High Court in the earlier writ petition filed by the applicant, the respondents did not do anything and simply reiterated their stand through the impugned speaking order. Such action of the respondents is totally unacceptable and unjustified.

11. It is trite that no penal action can be taken against a dead person. In this case the applicant's husband was declared a 'deemed deserter' for his prolonged absence without any intimation either to the applicant or his NOK at their address on record. Proceedings u/s 106 of AA was also initiated and court of inquiry was held. Under the rules; therefore he was an absconder or deserter which is a serious offence under the Army Act and liable for trial u/s 38 of the Act without any limitation period. All said and done, it is also settled position of law that no punishment can be issued to a dead person. For our this view, we lend support from the decision of the Hon'ble Supreme Court in the case of **Bondada Gajapati Rao –vs- State of Andhra Pradesh**, AIR 1964 SC 1645, as relied on by Mr. Bhattacharyya, the ld advocate for the respondent to obtain strength to his argument. In Para 12 of the ibid decision it is held as under:-

> "12. There is good reason for holding that a criminal prosecution in which the State is anxious to bring an offender to book with a view to getting him punished for a crime comes to an end on the death of the person arraigned."

12. In view of this legal position, we have no hesitation to hold that the dismissal order dt. 20.4.94 which was admittedly passed after death of the individual on 5.3.93, i.e. one year prior, is to be treated as in-fructuous and thus non-est in the eye of law. In that situation, the husband of the applicant is to be treated in service till the date of his death on 5.3.93 may be as a 'deemed deserter or AWL'. Until and unless the service is terminated either by administrative decision or by way of punishment in a court martial trial, the master and servant relationship does not cease. As such, on the date of death, the husband of the applicant still remained in Army Service and governed by Army Act.

13. The case law in **Bondada Guajarati Rao** case (supra) as cited by Mr. Bhattacharyya has no application in this case to support his stance, because that is a case where an appeal was preferred by the appellant upon his conviction and sentence of imprisonment for life by a criminal court. During the pendency of the appeal, he died and his legal heirs wanted to seek leave to continue to pursue the appeal. The case in hand is totally different. Here, the husband of the applicant was not punished prior to his death but after death, which obviously cannot stand good in the eye of law. The applicant herein, being his widow, is claiming family pension and other pensionary benefits that are admissible in terms of rules framed by the respondents. Therefore, the cited case is of no avail.

14. In an earlier decision, viz. OA 8 of 2013 (**Bhagabati Mahato –vs- UOI & Ors**) decided on 12.2.14 (unreported), this Bench has elaborately considered the issue by analyzing relevant Army Order (A O No. 43/2001/DV) on the subject of desertion. The Army Act as also decisions

of the Hon'ble Apex Court and other High Courts have discussed and analysed thread-bare in the ibid decision. The difference between 'AWL' and 'desertion' was also considered in detail with reference to the decision of the Hon'ble Apex Court in the case of **Capt Virendra Kumar through his wife –vs- Chief of the Army Staff, New Delhi etc.** reported in (1986) 2 SCC 217 where the distinction between deserter and AWL has been very graphically explained by analyzing the Army Act and Rules on the subject. It will be appropriate to quote the relevant paragraphs as under:-

"12. *** *** *** ***

Section 106 provides for an inquiry into absence without leave and the deeming of a person declared by the court of inquiry to be an absentee to be a deserter. It says:

(1) When any person subject to this act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, an the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

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 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.

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13. ……..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 without 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' 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 either surrendered nor been arrested."

Based on the above interpretation of the relevant Sections of Army Act, this Tribunal in **Bhagabati Mahato –vs- UOI & Ors**) observed in Para 32 as under :-

> "32. From a careful reading of the above decision of the Hon'ble Apex Court it is quite evident that whether it is a case of AWL or desertion is only to be decided on the basis of intention of the individual who remains absent without any authority beyond a certain period of time and as we have discussed above, our conclusion that the deceased soldier could not be declared as deserter in the facts and circumstances of the case and at best he could be treated to be one who was on AWL, is also supported and fortified by the above quoted decision of the Hon'ble Apex Court."

15. We need not discuss those issues here again because we have already held that the impugned dismissal order has no existence in the eye of law and as such, the husband of the applicant has to be treated as in service till the date of his death. That apart, it cannot be disputed that the intention to desert has not been proved in this case, as would be evident from the hospital certificates annexed, the husband of the applicant was suffering from various ailments and was being admitted in hospital intermittently and ultimately died. It is not a case where the individual

deserted with intention to leave the army service to pursue other vocations or he wanted to avoid any particular duty in emergency as admittedly he was posted in peace station.

16. Having held so, we may now come to the question as to the entitlement of the applicant on the date of death of her husband while declared as a deemed deserter. In this connection, we may refer to our earlier decision in **Bhagabati Mahato's** case (supra) where this issue was elaborately dealt with. It will be appropriate to reproduce the relevant portion as under:-

> "34. At this stage we are inclined to go through the judgement of the Hon'ble Delhi High Court in the case of **Harnanadi –vs- UOI** (supra) as strongly relied upon by the ld. advocate for the applicant. In that case also the petitioner's husband remained absent without leave and was treated as deserter, who ultimately died. In that context, the Hon'ble Delhi High Court held as under:-
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> > " **It was thus evident that a desertion by itself did not and would not bring about cessation or termination of the service of a member of the armed forces whose service remained otherwise intact despite being declared a deserter, unless, of course he was dismissed, removed or discharged under an appropriate order passed by the competent authority**. "
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> 35. The ratio of this judgement leads us to the point that even if an army personal has been declared a deserter, yet he would still be considered to be in harness until dismissed from service by following due procedure.
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> 36. In the instant case, it is the admitted fact that the deceased soldier was never dismissed from service. In that view of the matter, we have no hesitation to hold that the husband of the applicant was not dismissed, removed or discharged under an appropriate order after following the prescribed procedure. Therefore, there is no way to deny the fact of his being in service at the time of his death. Under such circumstances, it has to be held that he was in service at the time of his death on 4th Oct 2009, may be on AWL w.e.f. 6th May 2009. This aspect must be taken note of by the respondents. The submission of the respondents made in Para 14 of the A/O that the deceased soldier was a deserter at the time of death does not hold any ground in view of the discussion made above.
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> 37. The averment made by the respondents in Para 5(a) that he was declared deserter by a duly constituted court of inquiry and a casualty to that effect was published on 27.8.09 does not stand substantiated by record nor has any valid document been produced before us to prove this position. It may be noted that the court of inquiry referred by the respondents was held to declare him as on AWL and not deserter. As has been discussed on the authority and spirit of the orders and instructions of Army Order, the beginning as

well as end of absence without authorized leave needs to be proved along with intention to desert. All these aspects had not come out in the ibid court of inquiry. Therefore, it would be most inappropriate to consider him as a deserter. It is possible that his unit might have considered him as "deemed deserter" for the purpose of removing him from their strength. But he cannot be removed from the strength of Indian army based on a court of inquiry and finding of absence without leave.

38. It is very unfortunate that in Para 14 of the A/O the respondent authorities made a submission that "since the deceased soldier had committed suicide after four months from desertion, he could not be dismissed from service". It appears that the respondents were looking for excuse to dismiss him from service which was denied to them because of the death of the soldier. Such unfortunate submission on oath does not speak well of an organisation that is known to care for the emotional sentiments of its soldiers and their families. The truth remains that the deceased soldier could not have ever been dismissed unless desertion was proved and the prescribed time lapsed after 3/10 years. It is not understood why the respondents, who are well aware of the rules and the provisions of Para 22 of Army Order 43/2001, could not consider this aspect.

39. Now, the question arises as to the entitlement of the applicant, who is the widow of the deceased soldier. The respondents have placed much reliance on regulation 113(a) of Army Pension Regulations to contend that she is not entitled to get any pensionary benefits and whatever was due to her, was paid.

40. We may now consider Reg. 113(a) of Pension Regulations for Army which is quoted below:

> "Reg. 113(a) : **An individual, who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service**. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. "

41. A bare perusal of this provision makes it quite clear that pension is not admissible only when a person is dismissed under the provisions of Army Act, which is not the case here, as discussed above. In this context, we may also quote Reg. 123 of same Pension Regulations, which is also relevant:

> "Reg, 123 (a): A person who has been guilty of any of the following offences:-
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> **(i) Desertion, vide Section 38 of the Army Act**
>
> (ii) **F**raudulent enrolment, vide Sec. 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.
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> *** *** ***
>
> "

Analyzing this provision, it has been held by the Hon'ble Delhi High Court in **Smt. Harnanadi's case (supra)** as follows:-

> "This regulation, on a plain reading, provides for forfeiture of whole prior service amongst others of deserter convicted by court-martial of the offence under Section 38 of the Army act. It also envisages reckoning of such forfeiture service towards pension and gratuity in certain circumstances. In any case, it does not provide for irrevocable forfeiture of service and where it does, the first condition to be satisfied for this is that a person must be convicted by the court-martial of the offence of desertion. In the present case, petitioner's husband was not brought before any court-martial not to speak of having been convicted by it. He admittedly died before he could be tried by the court martial. Naturally, therefore, provisions of APR 123 could not be made applicable to the case to deprive petitioner of her otherwise legitimate claim of family pension because her husband's service was liable to be forfeited only if he was convicted by the court martial. " (emphasis supplied by us)

42. Relying on this decision, we also hold that the applicant's late husband should be deemed to have died in harness as no order of dismissal, removal or discharge from service was passed against him till his death; neither there was a valid declaration of desertion. What was declared on the basis of finding of court of inquiry was that he was on unauthorized leave w.e.f 6th May 2009 till the date of his death on 4th Oct 2009. Such declaration on AWL or even for the sake of argument, if it is assumed that he was declared as a "deserter", then also such declaration did not ipso facto lead to automatic cessation/termination of his service. Of course, he had not died of causes attributable to or aggravated by military service.

43. In this connection, we may also consider the decision of the Principal Bench of Armed Forces Tribunal, as relied on by the ld. adv. for the applicant, in **Sm. Sunita Devi vs. UOI** (supra) where in similar facts and circumstances, it was held as under :-

> "4. Learned counsel for the applicant submitted that declaring any person as a deserter under section 38 of the Army Act read with Section 106, a court martial has to be initiated thereafter declaration is to be made that incumbent is a deserter. In this case nothing of this kind was done and EME themselves treated husband of the applicant as "Absent without Leave". Contention of the respondents that applicant's husband was deserter, therefore, he is not entitled to any pension, is incorrect. Her husband was never treated as a deserter by the Department.
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> 5. After having considered the rival submissions of the parties and going through the record, we are of the opinion that husband of the applicant died in harness; therefore, applicant is entitled to ordinary family pension. Had the husband of the applicant declared deserter then things would have been different but the record which has been produced before us and specially our attention was invited to a letter dated 10.12.2007 wherein the EME Records has treated husband of the applicant as "Absent without Leave, in that case he cannot be treated as deserter and denied pension to the applicant." (emphasis supplied)

> 44. Considering the matter from all angles, we have to hold that the husband of the applicant died in harness while in service and not a "deserter" or "deemed deserter". Therefore, the applicant is entitled to get family pension at the rate applicable where a serving soldier died in harness for reasons not attributable to nor aggravated by conditions of service. "

17. A point has been taken by the respondents in the written notes of argument that there is difference between the present case and that of **Bhagabati Mahato'**s case (supra) as in the cited case, the husband of the applicant completed pensionable service whereas in the present case the husband of the applicant had completed just seven years of service; and thus the applicant is not entitled to any family pension. We are unable to accept this submission. As per Reg. 212 ordinarily family pension is admissible under the "Family Pension Scheme, 1964" in respect of PBOR. As per the scheme, when an army personal dies while in service, 'in harness' or after retirement his eligible family members are entitled to ordinary family pension if the death is not attributable to service. However, initially the minimum one year's continuous service was required to be rendered for being eligible for family pension, but subsequently, w.e.f. 27.1.79, the condition of one year continuous active service at the time of death/invalidment of service personnel has been waived vide AI 51/80. Therefore, the submission of the ld. adv. for the respondents is liable to be rejected. We hold that the applicant is entitled to get ordinary family pension from the date of death of her husband on 5.3.93 at a rate as admissible by rules. We also find that the applicant has been pursuing the case since 1994 and also moved the Hon'ble Orissa High Court in the year 2001. Therefore, we are of the opinion that she will be entitled to get arrears of family pension or enhanced family pension as admissible under the rules from January 1998, ie three years prior to approaching the High Court.

18. In the result, the TA stands allowed on contest but without costs. The order of dismissal dt. 20.4.94 as passed by the army authorities against the deceased husband of the applicant, Bipradas Mallick be hereby set aside. The husband of the applicant be treated as in service and died in harness. The respondents are directed to pay ordinary/enhanced family pension to the applicant as per rates admissible, but arrears will be restricted with effect from. 1.1.1998 i.e. three years prior to the date when he fist approached the Hon'ble Orissa High Court. The order shall be implemented within 90 days from the date of this order.

19. Let original records be returned to the respondents on proper receipt.

20. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of usual formalities.

(LT. GEN. K.P.D.SAMANTA)
MEMBER (ADMINISTRATIVE)

(JUSTICE R.N.RAY)
MEMBER (JUDICIAL)