

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: O A 43 OF 2012

THIS 15TH DAY OF SEPTEMBER, 2014

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

Smt. Sharda Devi,
W/o Sri Indradeo Rai,
R/o Vill. Narayanpur, PS Mohiuddin Nagar,
Dist. Samastipur, Bihar

..... Petitioner

-VS -

1. Union of India through the Secretary,
Ministry of Defence, New Delhi
2. Officer-in-Charge, Records,
Army Air Defence Artillery Record,
Nasik Road Camp, Nasik
3. Major, Battery Commander,
9/26, Air Defence Regiment,
C/o 56 APO
4. PAO (OR) Artillery, Lekha Nagar,
Nasik, C/o 56 APO
5. AD Arty Records,
Nasik Road Camp,
Nasik, C/o 56 APO

..... Respondents

For the petitioner : Mr. T.K.Mullick, Advocate

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

O R D E R**Per Lt. Gen. K.P.D, Samanta, MEMBER (Administrative)**

This is an application by the mother of a deceased soldier of Indian Army, who died in mysterious circumstances, seeking family pension and other terminal benefits.

2. The brief facts of the case are that the son of the applicant Shri Dhananjoy Kumar Roy was enrolled in the Army on 17th May 1998 as Gunner. After completion of basic training he was posted to 129 Air Defence Regiment on 22-8-1999. Thereafter he was posted on 26 Air Defence Regiment on 2 Sep 2001. While serving in that Unit he was granted 62 days annual leave with effect from 7-1-2003 to 9-3-2003. He was subsequently granted casual leave from 6-5-2003 to 19-5-2003. However, after expiry of the leave period, the said Shri Dhananjoy Kumar Roy did not rejoin his duties. Therefore, the respondent authorities issued an Apprehension Roll on 10-6-2003 to the Superintendent of Police, Samastipur (Bihar). After 30 days of absence, a court of inquiry was held in terms of Sec 106 of Army Act and he was subsequently declared a 'deemed deserter' from Field Area with effect from 20-5-2003. However, it subsequently came to light that the said Dhananjoy died on 27-8-2003, i.e. after three months of the scheduled date to rejoin his duty after leave. At that point in time the respondents or the Unit had no knowledge about the demise of their jawan. According to the respondents, since he was already declared a 'deemed deserter' from field area, the authorities were required to wait for 10 years as per rules before taking any further action for his dismissal from service as per Army Order 43/2001/DV. Obviously, the respondents did not know about the death of the Ex-Soldier at that point of time.

3. The applicant sent a letter to the respondent authorities on 20th February, 2007 seeking disbursement of the admissible dues as also family pension in favour of the applicant, disclosing that her unmarried son Dhanjoy Kumar Roy died on 27.8.2003. In reply to this representation, the respondent authorities issued a letter on 8-3-2007 (Annexure 2), wherein

they have stated that her son did not rejoin on 20.5.2003 on expiry of the casual leave. Therefore, Apprehension Roll was issued on 10-6-2003 and a Court of Inquiry was also held after 30 days of absence and he was also declared as 'deemed deserter' w.e.f. 20th May, 2003. It was further stated that he would be dismissed from service after completion of 10 years from the date of desertion, i.e. on or after 10th May, 2013 since he deserted from field area. However, upon getting to know about death of the soldier, the applicant was informed that balance dues held in AFPP fund and AGI Fund with regard to her deceased son would be paid to the applicant after dismissal of the said ex-soldier. They have further intimated that payment of credit balance etc. would be made on receipt of necessary documents and accordingly the applicant was informed to submit necessary death certificate etc.

4. It further appears that the applicant lodged an FIR with the Police at P.S. K Hat, Dist. Purnia, on 4.11.04 complaining that her son was murdered. It is also revealed that post-mortem etc. was also done and death certificate was issued indicating that the death occurred on 27-8-2003 at Old Power House, Electrical Division Colony, Purnia, Bihar. The applicant sent all the documents to the respondent authorities but did not get any favourable response. Therefore, she approached the Hon'ble Patna High Court by filing Writ Petition being Case No.16146 of 2011 which was dismissed on 19-9-2011 for lack of jurisdiction with the liberty to approach this Tribunal for appropriate relief. Accordingly, the present application has been filed for the relief as stated above.

5. The respondents in their counter affidavit have not denied the factual position as stated above. However, their case is that since the son of the applicant was declared as a deserter and he died in the meantime, his status is that of a deserter. It is stated that in terms of Army Order 43/2001/DV, since the deceased soldier deserted from field area, he will be dismissed from service only after 10 years i.e. in May 2013. But in the meantime, since he has died, question of his dismissal does not arise. However, since the deceased soldier was

already declared a 'deemed deserter', the applicant's prayer for family pension cannot be accepted in terms of regulation 212 of Pension Regulations for the Army, 1961. It is also clarified by the respondents that the applicant's son did not render qualifying pensionable service; therefore, family pension is not admissible to her in terms of this regulation. So far as other dues are concerned it is stated in page 4 of the counter affidavit that whatever dues are admissible as per rules, have already been paid to the applicant.

6. The applicant has filed a rejoinder reiterating the facts as stated earlier and prayed for pension as she was eligible for the same. She has stated that her son died in service; therefore family pension and other related dues were entitled to her as per rules which should not be denied to her just because the news of his death on 27.08.2003 could not be communicated to the authorities till 2007.

7. Mr. Mullick, the Id. Advocate for the applicant, during his oral submissions, has forcefully argued that the son of the applicant, while returning to join his duty after leave, died in mysterious circumstances and appropriate FIR was also lodged with the concerned police station after the applicant came to know about the tragic event. A criminal case was also started, which was still pending. In such circumstance, it cannot be considered to be a case of desertion as claimed by the respondents but a case in which the deceased soldier was unable to rejoin because of his death in transit. It cannot also be stated that the deceased soldier had any intention not to rejoin or desert from service. Admittedly, he was also not dismissed from service prior to his death and, therefore, family pension cannot be denied to the applicant who is the mother of the deceased soldier who was a bachelor and did not have a family of his own.

8. Per contra, Mr. Bhattacharyya while making his arguments has submitted that admittedly, the deceased soldier did not rejoin after expiry of leave (6-5-2003 to 19-5-2003) and the authorities took action in accordance with rules, by first issuing an apprehension rule

to the concerned District Magistrate and, thereafter holding a court of inquiry in terms of Sec. 106 of Army Act; thereafter he was declared as a 'deemed deserter' from field area. Since it is a case of desertion from field area, the authorities have to wait for ten years to formally dismiss him from service unless he voluntarily rejoins. In that event appropriate court martial proceeding u/s 38 of Army Act would be initiated. However, in this case, for the first time, the respondents came to know in Feb 2007, when the applicant intimated that her son died on 27.8.03. In the meantime, he was already declared a deserter, therefore, his status remained as that of deserter. Therefore, the applicant is not entitled to any family pension. However, other dues as admissible have already been paid. He has further contended that since a criminal case is pending involving the allegation of murder of the ex soldier, outcome of the said criminal proceeding should be awaited.

9. We have heard Mr. T.K.Mullick, Id. Counsel for the applicant and Mr. S.K.Bhattacharyya, Id. Adv. for the respondents and also gone through all affidavits and averments made by both sides. We have also gone through the relevant original documents as submitted by the respondents in detail. Admittedly, the applicant's son was enrolled in the Army in May 1998. It is also undisputed that he was granted casual leave from 6th May 2003 to 19th May 2003 to proceed to his home town. He was scheduled to rejoin on 20th May, 2003. It is also not in dispute that he did not rejoin after expiry of leave. As it appears from the record that apprehension roll was issued on 10th June 2003 for his arrest. Thereafter, court of inquiry was held after waiting for 30 days as required under Army Act Sec 106 and he was declared a 'deemed deserter' w.e.f. 20 May 2003.

10. Along with the OA, the applicant has annexed some documents which are in Hindi. Mr. Bhattacharyya has submitted that English version was not made available to him. However, we find that such English translations have been filed before this Court and should have been made available to him by the applicant that was later confirmed that a set of

English translation of Hindi documents were handed over to the O I/C Legal Cell. It is seen that an FIR was lodged on 4.11.04 before PS K.Hat vide Case No. 382/04 in which it was alleged that the son of the applicant was murdered and names of three persons who were alleged to be involved in the incident had been mentioned. It also appears that on 28.3.2003, one Shri Lal Mohan Rai, Inspector from PS K Hat visited District Hospital, Purunia and took the body of the son of the applicant (Dhananjoy) for post mortem and thereafter the body was handed over to the family. A death certificate was also issued, copy of which is available in the record.

11. It is also found from a petition filed by the applicant in the court of Ld. Chief Judicial Magistrate, Purnia in case No. 1214 of 2003 that the deceased soldier came to his native place on leave on 10 May 2003. On 17 May 2003 he left home along with the accused persons stating that he was going back to his unit. However, in June 2003 some inquiry was made that he did not rejoin his unit. Thereafter the family members made thorough search to know the whereabouts of the son. Ultimately it came to the knowledge of the family that ex soldier was murdered on 27.8.03 and his body was lying at Purnia Hospital.

12. Thus, the fact remains that son of the applicant was allegedly murdered on 27.8.03. Therefore, question of his rejoining or any other action as contemplated by the respondents could not have been taken against him. It is the specific contention of Mr. Bhattacharyya that as the deceased soldier died while he was already declared as 'deemed deserter' after holding a court of inquiry as required u/s 106 of Army Act, therefore, his status at the time of his death on 27 Aug 2003, was that of a deserter. On our specific query, Mr. Bhattacharyya has admitted that he was not dismissed as yet because as per Army Order 43/2001/DV a deserter from field area can only be dismissed after ten years and such ten years elapsed in 2013. But in the meantime intimation regarding his death was received in Feb 2007. Therefore, there was no question of his formal dismissal; but his status as deserter is not changed and he

remained in that state at the time of his death. Therefore, there is no question of payment of any family pension. Moreover, Mr Bhattacharria reiterated that the deceased soldier had to his credit only about five years of colour service which did not make him eligible for any pension. Consequentially, according to him, family pension was not entitled to the applicant. We, however are reminded of the regulations that stipulate for entitlement of family pension to the claimant in case a soldier died in harness, 'in service', no matter at what length of service. The regulation being relied upon by Mr Bhattacharria relates to entitlement of family pension to the claimants of a pensioner or who is not in active service. The issue that would actually need our attention is to analyse whether the death of the soldier (son of the applicant) was while he was 'out of service' or 'in service', ie, death in harness?

13. The above points raised in this case have already been decided by this Tribunal in earlier two cases viz. OA 8 of 2013 (**Bhagabati Mahato-vs- UOI & Ors**) decided on 12.4.2014 (unreported) and **Smt. Kadambari Mallick –vs- UOI & Ors**, TA 30 of 2011 decided on 7.8.14 (unreported). In those cases, identical issue was raised to the effect that if an army person, on being granted leave did not return to the duty and was declared a 'deemed deserter', but subsequently it came to light that he died in that state; whether in such a case family pension would be entitled to the family or not. In our said judgements we have discussed in detail all the points that have now been raised in this case as also the rule position as brought out before us. It was held that in such cases, until and unless an army person, who is declared a 'deemed deserter', is not dismissed from service, he still remains in service and master and servant relation does not extinguish. Therefore, in such case, it is to be considered as a case of death in harness and hence all benefits including family pension is admissible to the NOK. It will be appropriate to reproduce the relevant portion of the order from **Smt. Kadambari Mallick** (supra) in which earlier decision in **Bhagabati Mahato's** case (supra) was extensively relied on, as under :-

“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) {2002(1) Forces Law Judgement, page 66} as strongly relied upon by the Id. 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:-

“ 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. “

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.

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. “

14. Now coming to the question of the prayer for family pension in favour of the applicant who is the mother of the deceased soldier and was solely dependent on her deceased son, this aspect was also considered in detail in our earlier decisions. The relevant portions are quoted below:-

“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:-

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

“

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 Id. adv. for the applicant, in **Sm. Sunita Devi vs. UOI** (supra) {OA 189/2009 decided on 4.8.2010 by AFT Principal Bench} 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.

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. “

15. Now, in this case the respondents have relied on reg. 212 of Pension Regulations (annexure-R1) which is reproduced below:-

“212. Sec AI 51/80 reproduced in officicer section.

1. ** ** **

2. Ordinary Family Pension when admissible. - When an individual dies on account of causes which are neither attributable to nor aggravated by the Military Service.

(i) either while in service provided he had been found fit after successful completion of the requisite training and medical examination for commission or at the time of enrolment in the case of personnel below officer rank.

(ii) or after retirement/discharge from services and was on the date of death in receipt of or eligible for Retiring/ Special/Reservist/ Disability/Invalid/War Injury Pension.”

16. The respondents have placed reliance on sub-para (ii) above to deny the claim of the applicant to get pension by contending that the deceased employee was not on the date of death was in receipt or eligible for any kind of pension and, therefore, the applicant is not entitled to ordinary family pension. We fail to understand as to how such a plea can be taken. As we have held that the deceased soldier is to be treated to be in service on the date of his death even though he was a deserter but not yet dismissed. Therefore *ibid* para (ii) is not at all applicable in this case. On the contrary, the first para (i) is squarely applicable because admittedly the deceased soldier at the time of this death had already been in service for about 5 years at the time of death and thus he died while in harness.

17. This issue was also considered in our earlier decision in **Smt. Kadambari Mallick’s** case. Relevant portion is quoted below:-

“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 *Id. 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.....”**

18. It has not yet been brought to our notice that any of the aforesaid decisions rendered by us has been reversed by any higher court. Therefore, we are to follow our decisions in this case as well where facts and prayer are almost identical.

19. In the result, this original application is allowed on contest by issuing the following directions:-

i) The respondents are directed to treat the son of the applicant Dhananjay Kumar Roy, in service on the date of his death on 27.8.2003 and his death while in service be treated as a case of “died in harness”.

ii) The respondents are directed to pay ordinary family pension to the applicant being the dependent mother, as per rates admissible, but arrears will be restricted with effect from. 1.1.2008 i.e. three years prior to the date when he first approached the Hon’ble Patna High Court by filing writ petition No. 16146/2011. The order shall be implemented within 90 days from the date of this order.

iii) However, considering the hapless condition of the mother of the deceased soldier and her old age, respondents shall take urgent step to at least grant family pension at the minimum rate i.e. Rs. 3500/- per month plus DR as admissible within one month from the date of communication of this order, subject to, however, adjustment after finalisation of family pension claim and issue of PPO within 90 days as directed failing which interest @ 9% per annum will be admissible on the arrear amount of family pension.

iv) No cost.

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

21. 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)