

**FORM NO – 21**  
**(See Rule 102 (1))**

**ARMED FORCES TRIBUNAL, KOLKATA BENCH**

**APPLICATION NO : TA 141 OF 2010 (WP-C 8483/2008)**

**MONDAY, THIS SIXTEENTH DAY OF APRIL, 2012**

**CORAM : Hon'ble Mr. Justice Sadhan Kumar Gupta, Member (Judicial)**  
**Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)**

Sri Baban Chandra Jena, aged about 61  
Years, s/o late Nrushingha Charan Agalasingh  
Mohapatra, Vill. P.O. Janak, P S Balichandrapur,  
Dist. Jaipur

..... Petitioner

-VS -

1. Chief of Army Staff, Army Headquarters,  
New Delhi-1
2. O/C Records, Sena Seva Corps Abhilekh  
(Dakshin) ASC Records (South) Bangalore-  
560007.
3. Commanding Officer, No.511 ASC Battalion,  
C/O 56 APO.
4. Officer-in-charge, Balichandrapur P S. Dist.  
Jaipur.

..... Respondents

For the applicant : Mr. Bishikeshan Pradhan, Advocate

For the respondents : Mr. Souvik Nandy, Advocate


**O R D E R**

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

Writ petition No. WP © 8483 of 2008 was initially filed by the petitioner before the Hon'ble Orissa High Court seeking grant of family pension and other retirement dues in his favour on account of deemed death of his missing son. After the establishment of the Armed Forces Tribunal, due to the advent of the Armed Forces Tribunal Act, 2007, same has been transferred to this Bench for disposal and accordingly, it has been renumbered as TA 141 of 2010.

2. The facts of the case lie in a very narrow compass. The son of the petitioner, ex Sepoy Bira Kishore Jena was enrolled in the Army on 29.8.1995 in ASC and was last posted in the 511 ASC Battalion at Ahmedabad. From there, the petitioner's son came to home on 60 days annual leave on 6.4.2004 and was due back to duty on 7.6.2004. It is stated by the petitioner that accordingly, his son left home on 5.6.2004 in order to join his duty on 7.6.04 but thereafter he (the petitioner) never heard from his son. It was only on 16.8.2004 that the petitioner was informed by the authorities that his son was declared as a deserter and accordingly, he (the petitioner) was advised to lodge an FIR with the local police station (annexure-1 refers).

3. As stated by the petitioner in his writ petition, he approached the Officer-in-charge, of local police station at Balichandrapur to lodge an FIR to report the fact of missing of his son. However, as submitted by the petitioner, (though no written documents to substantiate), the police authorities refused to lodge any FIR at that point of time. They apparently told the petitioner that Sepoy Bira



Kishore Jena was a deserter and they were in receipt of his Apprehension Roll from Army authorities. Therefore, they were not in a position to lodge any FIR with regard to him as a missing person. This aspect has been submitted by the applicant in his writ petition but there is no corroboration from any other quarters in this regard.

4. The petitioner also submits that he went to Ahmedabad and met the respondent No. 3 i.e. Commanding Officer of the Unit in which his son was posted, in November 2004 but could not get any information about the whereabouts of his missing son. Subsequently, on 17.7.2006, the petitioner made another attempt to lodge an FIR with the local police station stating that his son was missing (annexure-3). In the meantime, the petitioner had been corresponding with the OIC Records, ASC, Bangalore, as is evident from annexure-2 series regarding his son's whereabouts. The OIC Records, intimated the petitioner on 13.6.06 that his son Sepoy Bira Kishore Jena was declared as deserter and his accounts had been closed. Accordingly, the dues, if any, were to be returned to him.

5. Consequent to above correspondence with the ASC Records, Bangalore, the petitioner sent a petition on 21.7.06 saying that his son was missing and therefore, the authorities should consider him as such. Accordingly, the petitioner prayed that he, as the dependent father of the allegedly missing soldier, should receive his pensionary benefits and family pension, as may be admissible to him. To this effect, the ASC Records called upon the petitioner to submit a few formal documents including the police report and indemnity bond that were



required before he could be declared as a missing soldier. In this regard, the petitioner drew our attention to Ministry of Defence circular dt. 3.6.1988, which lays down the procedure for payment of mandatory dues to a missing soldier.

6. The petitioner, despite all efforts, could not get his son declared as a missing soldier, thus remained ineligible to receive any of the pensionary benefits, and this has given rise to the present grievance of the petitioner. Finding no other alternative, the petitioner filed the instant writ petition before the Hon'ble Orissa High Court, which has since been transferred to this Tribunal, as stated earlier. In the writ petition, the petitioner has prayed that he should be paid all retirement benefits as would be due and admissible to him being the dependent father of the missing soldier. He has further prayed that his son ex Sepoy Bira Kishore Jena had been missing since more than 7 years from June 2004 onwards and still remained untraceable. Therefore, in terms of Sec. 108 of Indian Evidence Act, he should be declared as a missing person and presumed to be dead and accordingly, his dues may be allowed as per his entitlement.

7. In the course of oral submission, Id. advocate for the petitioner, Mr. B. Pradhan submitted a few decisions of sister Benches of Armed Forces Tribunal viz. Principal Bench, Chennai Bench, as also a few judgements of different High Courts on the subject.

8. On perusal of those decisions, we find that two decisions rendered by the Principal Bench and Chennai Bench of the Tribunal are relevant to the present case. They are :-

- i) OA 216 of 2009 ( Smt. Koyal Devi –vs- UOI & Ors) decided by the Principal Bench on 16.9.2010



- ii) TA 34 of 2010 ( Vere Ramulamma –vs- Commanding Officer & Anr) decided by Chennai Bench on 7.9.2010

9. We shall discuss these decisions at a later stage.

10. The respondents have contested the application by filing counter affidavit in which they have accepted the fact with regard to Sep. Bira Kishore Jena's enrolment and him proceeding on annual leave for 60 days, as indicated by the petitioner. However, the respondents have submitted that the said Sepoy on completion of his annual leave, was due back in the unit on 7.6.2004 but he never returned. Therefore, in accordance with rules and regulations on the subject and on completion of 30 days of not reporting for duty, the concerned Unit (511 ASC Battalion) conducted a court of inquiry and declared Sepoy Bira Kishore Jena as a deserter. Accordingly, all connected documents were forwarded to the Records. Having remained a deserter for more than 4 years, the said Sepoy Bira Kishore Jena was dismissed from service w.e.f. 25th April 2008 in terms of Sec. 20(3) of Army Act, and this fact was intimated to the present petitioner vide ASC Record letter dt. 8.5.2008 (annexure-10).

11. In the counter affidavit filed by the respondents, they have emphasized that all actions taken by the Unit or by the OC Record were absolutely in accordance with the rules on the subject (SAO 9/S/89) i.e. in the matter of declaring a soldier as a deserter and circumstances thereof. The Sepoy was subsequently dismissed from service on 25.4.08 under Sec. 20(3) of Army Act.

12. With regard to the claim of the petitioner that his son was not a deserter but was a missing person, the respondents flatly denied such claim and they



brought to our notice the report submitted by the Balichandrapur PS in this regard dt. 17.11.07, which is annexed to the letter dt. 4.1.08 OC, Record addressed to the petitioner (annexure-9). In the said report, the OC, Police station, Balichandrapur forwarded an extract of their station diary entry, (annexure-9), which suggests that the Sepoy Bira Kishore Jena, son of Baban Chandra Jena (petitioner herein) reported to his duty station on completion of his annual leave and confirmed his safe arrival over telephone to his father i.e. present petitioner. Except this fact, there is no other relevant investigation details that are given in this annexure, which appears to be merely a "station diary entry".

13. Ld. advocate for the respondents, Mr. Nandy also brought to our notice a letter written by 511 ASC Battalion addressed to ASC Record (South) vide No. 8887/AS/Discp/ST-12 dt. 17 Jul 2007 (Annexure-A9 series). According to ibid letter, the unit had gone through the aforesaid report of the police station of Balichandrapur and came to the conclusion that it was a case of desertion and not a case of missing soldier. Therefore, no further action was required, as submitted by them.

14. We have heard the submissions of the Id. advocates of the both the sides and examined the relevant facts and attached documents as submitted by the parties. As already indicated above, there are two relevant judgements of coordinate Benches, to which the Id. advocate for the applicant has placed much reliance. They are -



1) OA 2016 of 2009 ( Smt. Koyal Devi) (supra). This case is similar in nature with the case in our hand where the Principal Bench has discussed a judgement delivered by the Hon'ble Delhi High Court in the case of Smt. Kalawati –vs- UOI (vide para 6 of the Principal Bench judgement). In the aforesaid case, the soldier remained missing and his parent unit did not carry out any meaningful investigation while rejecting the claim of pensionary dues of the missing soldier to the applicant therein being the wife of the missing soldier. The Principal Bench also observed in para 5 of its judgement that the authorities must take note of the provision of the Indian Evidence Act, Sec. 108 in case a soldier was reportedly missing for more than 7 years. That apart, the spirit of Ministry of Defence circular dt. 3.6.88 has been adequately explained in the later part of para 5 of the ibid judgement wherein a provision exists to the effect that after expiry of one year of missing, the family benefits would have to be released. There are, of course, certain other formalities and conditions that had to be complied with before such benefits are released. The ratio of this judgement to the extent it directed the authorities to carry out a thorough enquiry in a fixed time frame and to accord retirement benefits to the widow and diminish her misery and suffering, squarely applies to the present case. The Principal Bench in its judgement has also awarded penal interest in case payment of such amount was delayed.

In TA 34 of 2010 (Verre Ramulamma) (supra) before the Chennai Bench of AFT, the issues were also similar to the present case. In that case, the Chennai Bench of AFT was not satisfied with the efforts that were made to declare the deserted soldier as missing and, therefore, the said Bench directed



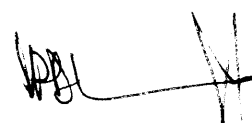
the authorities to immediately release pensionary and monetary benefits to the widow without waiting for the missing person to be declared as dead after seven years in terms of Sec. 108 of Indian Evidence Act.

15. Ld. adv. for the applicant in the case before Chennai Bench had also relied on the spirit of Ministry of Defence policy letter No. 12(16)/86D/Pension/Services dt. 3.6.1988 and contended that the benefits should have accrued to the widow after one year of the soldier being found missing. Accordingly, penal interest and cost was levied on the respondents.

16. It would be very clear from the above two decisions, which are based on the ratio of many higher court judgements, besides the Govt. of India's own directions in this regard i.e. policy letter of M/o Defence dt. 3<sup>rd</sup> June, 1988, that all expeditious efforts must be taken by the authorities to complete the investigation to decide if the soldier was missing or otherwise. On conclusion of such inquiry, in case the soldier was indeed found to be a missing soldier, then monetary benefits as would be admissible in terms of M/o Defence circular No. 3.6.88 (No. 12(16)/86D/Pension/Services), should be paid to the family after one year of the incident of absence.

17. In the instant case, we find that the authorities i.e. 511 ASC Battalion and ASC Records, South, Bangalore (respondents 2 and 3) have not taken enough measures to investigate and verify if the petitioner's son Sepoy Bira Kishore Jena was indeed missing or not.

18. The final investigation report of 511 ASC Battalion dt. 5.11.07, as annexed in annexure-9 series, is grossly inadequate of details with regard to the





investigation that might have been done prior to refusing to accept the status of 'missing soldier' in respect of the petitioner's son and holding that he was a soldier who had deserted. We find that the authorities have not conducted a proper court of inquiry to arrive at the conclusion for treating him as continued deserter as is conveyed through the ibid letter. Moreover, no proper investigation report by the local police authorities was available. The authorities have merely relied upon the extract of station diary entry of Balachandrapur PS. We are of the opinion that those details are grossly inadequate to arrive at a reasonable conclusion.

19. Sec. 154 of the Cr. PC clearly provides the procedure for lodging FIR and duties of the police authorities in case it is cognizable offence and Sec. 155 ibid deals with about non-cognizable offence. This being a missing case, should have been pursued in a proper manner. Although the officer-in-Charge, Balachandrapur PS, who is a party in the instant writ petition (respondent No. 4), did not appear before this Bench nor is he represented by any counsel. However, we find that the said respondent has filed a separate affidavit-in-opposition before the Hon'ble High Court wherein he has categorically stated that till the date of filing of the affidavit, the whereabouts of the son of the petitioner was not known after thorough investigation. It is also stated that the ex sepoy did contact the petitioner about his safe arrival at the destination station and thereafter, there was no information about his whereabouts. There is, however, no specific denial of the allegation of the petitioner that when he went to lodge the FIR for the first time, it was not accepted. We are of the view that if the



petitioner was prevented from lodging FIR, he should have reported to the Superintendent of Police as provided in Sec. 154(3) of Cr.PC.

20. Having considered matter carefully, we are of the clear opinion that the case in its entirety has been handled very haphazardly and the investigation was carried out in a very casual manner both by the civil police as well as by the military authorities. It is unfortunate that the dependent father of the soldier, who was reportedly missing for more than 7 years now, would be allowed suffer just because neither the military nor the civil authorities could reach a conclusion in an appropriate manner with regard to the status of his son i.e. whether he is missing or is a deserter.

21. On a consideration of the facts and circumstances of the case, and following the decisions of coordinate Benches as referred to above, we are of the opinion that it is a fit case where appropriate direction should be issued to the concerned authorities to make a proper and meaningful investigation as to the status of the petitioner's missing son.

22. In view of what has stated above, we allow the application in part and direct that the respondents shall make a proper inquiry from concerned police station to ascertain whether the soldier was heard alive or not. In case, the report is received that the man was not heard alive for all these years, then all monetary benefits including family pension, if admissible as per rules, shall be released to the petitioner forthwith effective from the date of filing of the writ petition, subject to fulfillment of usual formalities, as per rules. He will be in that case entitled to all arrears with interest at 12% per annum. The enquiry, as directed above, shall be

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conducted by the respondent No. 3 and must be completed within three months from the date of receipt of a copy of this order.

23. The transferred application is thus disposed of on contest but without cost.

Let plain copy of the order be handed over to both the parties.



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



(JUSTICE SADHAN KR. GUPTA)  
MEMBER (JUDICIAL)