

FROM NO. 4

(SEE RULE 11(1))

ARMED FORCES TRIBUNAL , REGIONAL KOLKATA BENCH

APPLICATION NO : O. A NO. 08 OF 2013

THIS 12TH DAY OF FEBRUARY, 2014

CORAM: HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Bhagyabati Mohanta
W/o late Baishnaba Mohanta,
R/O Vill. Harichandanpur, PO Khajurapat
Via Udaypur, Dist. Keonjhar,
Orissa – PIN 758 045

.....Applicant

-VS-

1. Union of India through
The Secretary, M/o Defence,
New Delhi PIN 110 011
2. The President, AWWA, Room No. 10,
South Block, Integrated Headquarters (Army)
New Delhi, PIN 110 011
3. The Officer-in-Charge, EME Records,
Secunderabad-2, PIN 900 453
C/o 56 APO
3. The Army Group Insurance Fund service through
The Managing director, AGI Bhavan, Raotula Marg,
Post Bag No. 14, PO Basant Bihar,
New Delhi-110 057

.... Respondents.

For the Applicant : Ms. Soma Chowdhury (Bandhu), Advocate

For the respondents : Mr. Mintu Kumar Goswami, Advocate

ORDER

Ms. Soma Chowdhury (Bandhu), Id. adv. appears for the applicant. The applicant is also present in person. Mr. Mintu Kumar Goswami, Id. adv. appears on behalf of all the respondents. The original application is taken up for hearing. Heard learned advocates for both the sides in details.

2. This original application has been filed u/s.14 of the AFT Act, 2007 by Smt. Bhagyabati Mohanta, widow of late Baishnaba Mohanta, who was a Havildar under the Indian Army, claiming inter alia family pension, DCRG etc. with 18% interest on the untimely death of her husband in service.

3. The facts of the case, in short, are that the husband of the applicant Hav Baishnaba Mohanta was enrolled in the Indian Army on 15.05.1986. He made an application on 12.9.08 seeking premature retirement citing personal and family grounds. When the said representation was pending consideration, the deceased soldier was issued with a movement order on 05.05.2009 directing him to proceed on temporary duty to 625 EME Records.

4. The applicant was shocked to receive a communication dated 10.10.2009 that her husband had expired on 04.10.2009 at about 7.00 P.M. by committing suicide in a lodge at Secunderabad where he was staying for the period from 08.09.2009 till 04.10.2009. He committed suicide by hanging himself from ceiling, as per police report. Subsequently, when the applicant was in a shocked and traumatized state due to sudden death of her husband, she was surprised to receive a memo. dated 13.10.2009 i.e. after the death of her husband that her husband was declared a “deserter” with effect from 06.05.2009 (Annex. P8). According to the applicant, such declaration as deserter in respect of her husband,

was absolutely illegal and invalid as the competent authority issued a movement order dated 04.05.2009 asking him to proceed to a new place on temporary duty and he was to proceed on 6.5.09. It is further submitted that the husband of the applicant served in the Indian Army for 23 years 4 months and 19 days without any complaint and therefore, he was entitled to receive pensionary benefits and thus, the applicant is also entitled to get family pension and other terminal benefits of her late husband on his premature death. She made a representation 18.12.2009 for disbursement of such benefits but to no effect. The applicant was, however, paid some benefits amounting to Rs. 4,38,744/- towards provident fund etc. but no family pension was sanctioned on the ground that her husband was a “deserter”. The applicant has challenged this decision of the authority and has prayed for payment of family pension, DCRG, full AGI benefit etc. after quashing the declaration regarding deserter as per memo. dated 13.10.2009 and 22.11.2010.

5. The respondents have contested the application by filing a counter affidavit. It is stated that the husband of the applicant Hav(Ftr) Baishnab Mohanta was enrolled on 15.05.1986. While serving with 237 Fd Workshop, part of 625 EME Battalion, he had absented without leave (AWL) with effect from 06.05.2009 at 18.00 hrs. Accordingly, an apprehension roll was issued on 20.05.2009, with copy to the present applicant. After 30 days, as per provision of Army Order 43/2001, he was declared a deserter by a duly constituted Court of Inquiry with effect from 06.05.2009 and Part II Order to that effect was also published on 27.08.2009. While the individual was on desertion, he committed suicide in a lodge at Secunderabad and died on 04.10.2009. Consequent to his death, the applicant was paid an amount of Rs.1,07,636/- and AFPP balance of Rs.4,38,744/-. The

AGI benefit as per rules was under process and the applicant was communicated accordingly.

6. It is submitted by the respondents that as per Reg.113 (A) of Pension Regulations for the Army, the applicant is not entitled to any family pension. It is clarified that since only four months had elapsed after desertion of applicant's husband, he could not be formally dismissed. As per AO 43/2001 action to dismiss a deserter, who does not surrender, can be taken only after a minimum period of three years of absence in peace area; but it is to be treated as a case of deemed dismissal. Since the deceased husband of the applicant was not entitled to any pension being a deserter, the applicant is not entitled to any family pension.

7. The applicant has filed a rejoinder wherein she has reiterated her challenge to the impugned desertion order on various grounds.

8. Ms. Soma Chowdhury (Bandhu), Id. Adv. for the applicant has contended that the husband of the applicant could not be lawfully declared as a deserter with effect from 06.05.2009 because he was under order of transfer w.e.f. that date. It may be possible that because of some problems he might have absented himself without leave but certainly it was not a case of desertion because there was no proof that he had any intention to desert, especially when he had already rendered more 22 years of service and almost completed his term of engagement. In fact, the husband of the applicant proceeded to join his duty at the new place but subsequently he was found dead and no information was received by his family during the interim period. The respondents have also not dismissed him from service and, therefore, he should be deemed to have been continuing in service till the time of his death. Hence, the applicant cannot be denied her lawful claim of family

pension and other entitled terminal benefits. It is also submitted by Ms. Chowdhury that the applicant is at young age with two minor children along with aged mother-in-law. It is very difficult for her to maintain and survive with the meager lump sum amount she got from the respondents which was nothing but the balance of his salary account and own savings in Provident Fund. She has placed reliance on two decisions –1) Hon'ble Delhi High Court's judgment in CW3799/1995 decided on 27.03.2001 (**Sm. Harnandi vs. UOI**) reported in 2002 (1) Forces Law Judgement Page-66 and the other of the Principal Bench of AFT in O.A. No.189/2009 dated 04.08.2010 (**Sm. Sunita Devi vs. UOI**) (unreported). She submits that the ibid decisions are squarely applicable in the present case and has lastly made a fervent prayer for issuing a direction upon the respondents for sanction of family pension and other benefits to the applicant as admissible under the rules.

9. Mr. Mintu Kumar Goswami, Id. adv. appearing for all the respondents including respondent No.4 i.e. AGI authorities has contended that the husband of the applicant did not report to his duty place after he was issued with movement order dated 05.05.2009. When within 30 days thereafter he did not join his duties, a Court of Inquiry was held and the individual was declared a deserter under Army Order 43/2001 with effect from 06.05.2009 and Part II Order was also issued on 27.08.2009. As per provision of the said Army Order, if within certain specified period the individual does not report back he is to be dismissed from service but in this case on 4th of October, 2009 before completion of statutory period, the husband of the applicant committed suicide and, therefore, he could not be formally dismissed from service. Under such situation, it should be treated as case of "deemed dismissal" and in that event, the applicant is not entitled to any family pension in terms of para.113(a) of Pension Regulations. He has further submitted that the

AGI authorities have paid whatever amount was admissible to the applicant and she is not entitled to get any other benefit from AGI as it is a case of death during desertion.

10. We have given our anxious consideration to the rival contentions, have gone through all averments and perused various documents and rules that have been produced and referred before us.

11. It is undisputed that the husband of the applicant was enrolled in the Army on 15.05.1986 and died by committing suicide on 04.10.2009. It is also the admitted position that the husband of the applicant served for more than 23 years and was otherwise eligible for pensionary benefits. According to the applicant, who is present during hearing, her husband was going through mental anxiety as his family consisting of his wife (Applicant herein), two children and aged widowed mother were living by themselves in home town without any male member to look after them. His mother was also not keeping good health. He, therefore, sought for voluntary retirement on extreme compassionate ground vide an application dt. 12.9.08 that had remained unactioned. Instead, he was issued with a movement order on 04.05.2009.(Annex.P3) to proceed from 237 Field Workshop to the 625 EME Battalion HQ (both located in Rajouri sector which is field area in J & K) and from there to proceed on permanent posting to 7021 Workshop at Bhopal. It appears that the applicant's husband did not reach his initial destination of 625 EM Battalion at Rajouri and therefore, he was treated as AWL. Apprehension roll was issued on 20.05.2009 and subsequently he was declared a deserter. According to the respondents, in para.5(a), it has been stated that a Court of Inquiry was held and the individual was declared a deserter as per Army Order 43/2001 with effect from 06.05.2009 and a Part II Order was also published on 27.08.2009.

12. Now, the main issue that arises for consideration is, what was the status of the husband of the applicant at the time when he died on 4.10.2009. If he was dismissed on being declared as deserter, then, according to the rules, the applicant herein will not be eligible for any pensionary benefits.

13. In order to ascertain the facts, we directed the respondents to cause production of original records, including the court of inquiry proceeding that was held to declare the applicant's husband as a deserter when he failed to report to duty after 6.5.09. Accordingly, the respondents have produced the original documents and a report of court of inquiry. However, we find that the court of inquiry that has been produced before us relates to incident of his death on 4.10.09 and not with regard to desertion.

14. However, Id. adv. for the respondents has drawn our attention to the declaration made by the court of inquiry which was held on 12 June 09. It will be relevant to quote the said declaration as under :-

“

In lieu of IAFD-918

Note :- This form is to be used in compliance with AA Sec 106(1) not by a C of I, but by the CO of the absentees. It is then admissible under AA Sec 142(4) – see Army Rule 183.

Record of the declaration of Court of Inquiry at 237 Fd Wksp Coy EME (625 EME Bn.) on 12 Jun 2009 for the purpose of investigating and recording the extent of the absence, without due authority from his duty, and the deficiency, if any, in the property of the Govt. entrusted to his care or of any arms, ammunition, Equipment, instruments, clothing or necessities of No. 145952A Hav Ftr (FD) B. Mohanta of 237 Fd Wksp Coy (625 EME Bn.)

DECLARATION

The court declares that No. 145952A Hav Ftr (FD) B. Mohanta of 237 Fd Wksp Coy EME (625 EME Bn.) C/o 56 APO illegally absented himself without leave at 1800 h on 06 May 09 from Battalion location and is still absent from his duty without leave. He has carried his entire kit along with him; hence kit deficiency cert can not prepared. “

15. It will appear from the above declaration that the court of inquiry that was held on 12th June 2009, declared the late husband of the applicant as on AWL w.e.f. 6th May 09 and not as deserter. The concerned part II order dated 6th July 2009 is also available in the record. Although it states as “desertion” and “Absent without Leave” but authority of the court of inquiry referred to is dated 12th Jun 2009 i.e. the one reproduced above. As mentioned earlier, the C of I did not declare him as “deserter” but on “AWL” which is a fact already discussed above. Therefore, it can safely be presumed that no court of inquiry was ever held to declare the husband of the applicant as a ‘deserter’.

16. At this stage, we are of the view that before going into the issues raised by the Id. Advocates for both sides, we need to apply our mind on two important points. They are, firstly, was the husband of the applicant (deceased soldier) a ‘deserter’ or was he one of those soldiers who was “absent without leave” (AWL) at the time of his death? Secondly, once we get answer to the first question, we need a further analysis to analyse the rule position, as is available for a deserter/AWL, as regards eligibility of the applicant to receive pension/family pension. Accordingly, we proceed to analyse the above two issues- one emerging out of the other.

17. In this connection it is very important for us to go through the Army Order 43/2001/DV on the subject of “Desertion and AWL”, which has also been quoted by the respondents in their A/O.

18. The *ibid* Army Order lays down not only the principles as to how to treat a deserter or AWL person but also the ingredients and proof to determine desertion. It also lays down on the issue of requirement of court of inquiry etc. For the purpose, we quote the following important aspects, with emphasis provided by underlining/bolding :-

“AO 43/2001/DV

Ingradients and Proof of Desertion :

Distinction Between Desertion and Absence Without Leave (AWL) :

4. *The distinction between desertion and AWL consists in the intention.* A person is guilty of the offence of AWL, 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 absent himself, he intends either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. In other words, desertion is absence without leave accompanied by either of the intentions mentioned above and a court, before convicting a person for desertion, must be satisfied that he had one or the other of these intentions. When a person is tried for absenting himself with intent to avoid some duty, the intent must be averred in the particulars of the charge.

5. Proof of intention to Desert :

- (a) **General** : The existence of an intention like any other fact, must be proved by evidence. Its existence is proved, when facts are established from which the intention may reasonably be inferred. In the eyes of law, every man is presumed to understand the natural and probable consequence of his acts. If, therefore, it is proved that the accused knew that his battalion has been ordered to attack the next morning and that he absented himself without leave and remained absent until the attack was over, the court would be justified in finding that he intended to avoid taking part in the attack, unless he can satisfactorily account for his absence. Similarly, if an accused absents himself without leave knowing that he has been detailed for a difficult training mission or escort duty and remains so absent until the duty is over, it would be once again justified to infer intention to desert, unless the absence can be explained satisfactorily.
- (b) **Intention to Quit the Service Altogether** : The existence or otherwise of this intention may be decided on the basis of the natural inferences to be drawn from the circumstances proved in evidence e.g. the length of absence though this by itself may not be conclusive) : the distance from his unit and circumstances and locality of his arrest or surrender. The possession of arms, equipment, papers and other marks of identity would be relevant considerations. Disguise or evasion of interrogation would be

most material and wearing of uniform or plain clothes might be of great importance depending on the orders in force.

(c) **Intention to Avoid a Particular Duty (Called “Constructive Desertion”)**

(i) In order to establish this intention, evidence must be produced to show the following :-

(aa) the accused knew with reasonable certainty that he was required or was likely to be required, for this particular duty.

(ab) he absented himself and thereby avoided, or attempted to avoid, the duty.

(ii) To establish the fact at (i) above, it should be shown that :-

(aa) the accused was warned; or

(ab) the unit or sub-unit as a whole was warned, if possible, on a parade at which the accused is proved to have been present; or

(cc) the imminence of the duty must have been known to him from such circumstances as the usual customs or beliefs, preparations for attack in which he would have taken part, or the move of his unit, with his knowledge into the area of operations or detailment on a difficult training mission/escort duty. Evidence may be adduced as to the dates and nature of the particular duty evaded; or

(ad) the period of absence was long enough to suggest that the accused must have known with certainty that he would avoid an operational task or important duty by such long absence.

(iii) The evidence indicated above would establish a prima facie case for the accused to answer. Desertion involves an intention and invariably to knowledge co-exists. Where, therefore, the accused has been absent for a short time only, it is incumbent on the prosecution to prove that the accused knew, with reasonable certainty, that he would be required for some particular duty. If the evidence shows only that he absented himself and no evidence is produced to indicate what must have been present in his mind, the court cannot make any assumption as to his intention and they can convict him of absence only. It should be noted that knowledge of impending particular duty must be brought home directly to the accused by such

facts as are indicated. Such statements as “the accused knew” “it was common knowledge” or “the whole company knew” are not evidence.

6. **Beginning and Termination of the Period of Absence :**

(a) Where desertion or absence is charged, it is generally necessary to show with approximate certainty, the time and circumstances of the beginning and termination of the period of absence. As regards the beginning, where a court of inquiry has been held under Army act Section 106, the production of IAFD-918 (Appendix-A) by a witness on oath or affirmation is sufficient. Failing this, the best evidence is usually that of a person who called the roll and found the accused absent. If this evidence is not available, owing to casualties or other reason, evidence can often be given by some other person that on or about a certain date or hour the accused was present with and at a later period absent from, his section or platform or place of duty.

(b) When no other evidence of the beginning of absence is available the unit Part II Order, or a certified true copy thereof, is admissible to prove this fact. The entry of absence without leave must be one that is made in unit order in pursuance of military duty. The orders must purport to be signed by the commanding Officer or the officer whose duty it is to make such record. If a true copy is used, it must be certified to be true by the officer having the custody of the original. The document must be produced by a witness on oath or affirmation and the accused identified as the person referred to in the entry.

© It is, as a rule, impossible to sustain a charge of desertion without proof as to the manner in which the period of absence terminated. It is not sufficient to call an NCO to say that on such a date the accused was brought back under escort. Absence terminates when the person surrenders or is apprehended and it is evidence on this point that is essential. Usually, a surrender or apprehension certificate will be available. If it is not, the circumstances in which he surrendered or was apprehended must be proved by witness.

(d) As regards AWL, the beginning of absence must be proved in the same way as of desertion, but the circumstances of the termination of the absence are not important. Unexplained absence for however short a time is sufficient in law to sustain a convict.”

19. The main issues that emerge from a close scrutiny of para 4 of the Army Order No. 43/2001, as quoted above, are that intention to desert must be proved before one is

declared as a deserter because offence of desertion is to be tried u/s 38 of the Army Act whereas the offence of absence without leave is triable u/s 39 of the Army Act. The punishment and gravity of offence in both cases also vastly differ. Therefore, the particular provision of this Army Order is more important where it is stipulated that element of intention to desert must be brought out through investigation/court of inquiry before one is tried for desertion or is considered as a deserter. When the same issue is analysed from the Army Act Sec. 106, it implies that any person who is absent without leave from his duty will be enquired upon for absence without leave (Army Act, Sec. 106(1). Thereafter, as per provisions of Sec. 106(2) such a person can be deemed to be a deserter, if he does not afterwards surrender or is apprehended.

20. These two aspects of analysis must be seen in the light of the contents of para 6 of Army Order 43/2001 wherein it is very clearly mentioned that “where desertion or absence is charged, it is generally necessary to show with approximate certainty, the time and circumstances of the beginning and termination of the period of absence. As regards the beginning, where a court of inquiry has been held under the Army Act Section 106, the provision of para 6(a) is to be complied with. It is provided in para 6(c) of the ibid army order that beginning and termination of absence must be proved in the same way as for desertion but the circumstances of termination of absence is not so important to be proved, if he remains absent without surrendering for very long period (10 years or less as per para 22 of A/O 43/2001)

21. It is very clear from the afore-quoted Army Order No. 43/2001 that to sustain a charge of desertion it is required to prove the beginning of absence and how the period of absence terminated. Therefore, a court of inquiry is required to go into the

circumstances of beginning of absence in order to prove the absence of AWL. In order to prove absence on desertion it is also necessary for a court of inquiry to prove the aspects of 'beginning' and 'termination'. It is possible that a person, who does not rejoin voluntarily or is not apprehended, in that case termination is to be assumed as proved because there was definite intention to desert. In such case, as per provision of ibid Army Order, the authorities ordinarily have to wait for ten years or three years, as the case may be, as stipulated in para 22 of the Army Order 43/2001. However, this period can be reduced with the specific approval of COAS, as mentioned in the ibid army order.

22. In this particular case, it is evident that subject court of inquiry, as is available from the original records, proved the beginning of absence, which is w.e.f. 6th May 09 but the end of offence, which should have happened either through surrender/apprehension or on passage of 10/3 years' time, did not occur. In the meantime, the individual succumbed to unfortunate death on 4th Oct 09 i.e. barely within five months after the proved date of absence. Under such circumstances, it appears that it will be erroneous to consider the applicant's husband to be a deserter. He can at best be considered as 'AWL'.

23. A deeper analysis of the ibid army order would reveal the dismissal procedure for a person. who remains absent from duty for a prolonged period beyond 3/10 years depending on any particular case. Para 22 of the Army Order 43/2001 is quoted below for reference :-

"AO 43/2001 :

Dismissal Procedure :

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 Rules 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 onward areas specified in Extra Ordinary Gazette SRO 17E dated 05 Sep 77, produced 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. “

24. As per ibid para, it is very clear that the military personnel, who remain absent beyond the stipulated period and termination of absence cannot be proved through any court of inquiry, then in that case he would be dismissed under the provision of Army Act, Section 20 read in conjunction with Army Rule 17 or under Army Act Sec 19 read in conjunction with Army Rule 14. In the instant case, the situation had never gone to that extent where any contemplation of dismissal could even commence because death occurred within five months of absence. It is for this reason that we have to determine the status of the deceased soldier on the date of his death based on the guidelines stipulated in the above mentioned Army Order.

25. In our view, having gone into the contents of the ibid Army Order and the provisions of Army Act Sec. 106, it would at best be proved that the husband of the applicant was absent without leave. In this regard we also take note of a letter written by the applicant (wife of the deceased soldier) addressed to OC 237 Fld Workshop, the

parent unit from where the husband of the applicant is said to have commenced his absence without leave vide annexure-R3 to the A/O. The entire circumstances under which the applicant's husband was subjected since the time he absented himself without leave i.e. from 6.5.09 have been, to a great extent, submitted in the ibid letter. What is important is that the deceased soldier after having absented himself without leave w.e.f. 6.5.09 went to home on 10.5.09 and told his wife (applicant) that he was on leave-cum-posting to 7021 EME Battalion (B)n at Bhopal. However, after receipt of the apprehension roll dt. 30.5.09, it dawned on the applicant that her husband must quickly rejoin his duty. Accordingly, as it appears from the ibid letter, the deceased soldier left home on 6.6.09 in the evening saying that he was going to the new place of posting at Bhopal i.e. 7021 EME Bn. However, after 18 days on 24.6.09, he again came back to home saying that he was on 7 days' leave-cum-temporary duty to go to Secunderabad. He stayed at home for a week, suffered various illness including fever, vomiting etc., thereafter, went back on 3.9.09. In fact, he called upon the applicant on 6.9.09 saying that he had reached Bhopal safely. Thereafter, all of a sudden on 4.10.09, she was intimated that her husband had, in fact, committed suicide in a lodge at Secunderabad.

26. From the above narration made by the applicant at that point of time, which has not been contested by the respondents; rather they have themselves annexed this communication in their A/O at Annexure-R3, it squarely reveals that there was some problem that was worrying the deceased soldier although he intended to make efforts to rejoin the unit voluntarily with similar assurance made to his wife, who is the applicant. Since presently he is dead, details cannot be ascertained at this stage even through a court

of inquiry. However, the applicant's letter reveals that the deceased soldier, perhaps, had no intention to desert the army.

27. That apart, we find that the husband of the applicant had rendered more than 23 years of service as on the date of his going on AWL i.e. 6th May 2009 and ultimately, he committed suicide on 4th Oct 2009. He was a Havildar and his terms of engagement was 24 years extendable by two years. Therefore, he was nearing completion of his initial term of engagement. At this stage, it cannot not reasonably be believed that he would take the risk and desert the army as a result of which he will lose his pension and other service benefits at the fag end of his service.

28. We also find from a medical report available in the record that he was suffering from "Alcohol dependence syndrome" since 2003. It also appears from a specialist's opinion dt. 19.4.05 that he was under treatment for psychotic disorder. The opinion is quoted below :-

“ Details of history and perusal of med documents revealed that this NCO initially came under psychotic observation for this disability in Sept. 2003 with history of excessive drinking, frequent intoxication including day time drinking and deterioration in his work performance. He was managed at MH Danapur and was placed in category S3 (T-24) w.e.f. 03 Nov 2004”

29. Therefore, it is quite evident that he was a patient and was under regular treatment. Under such circumstances, it is reasonable to assume that intention to desert was, perhaps, not there. He may have other anxiety and depression due to his ibid illness which, perhaps, led him to commit suicide.

30. Be that as it may, it is quite clear that it could not conclusively be proved by the respondents that the applicant's husband was indeed a deserter. That besides, the rules (Army Order 43/2001) also do not allow the authorities to declare him as a deserter

without fulfilling the necessary conditions as stipulated in the ibid Army Order No. 43./2001. Under such circumstances, with deeper analysis of the rule position, we can conclude that at best the status of the applicant's husband was that of a army personnel who was absent without leave at the time of his death and certainly not a deserter.

31. In this context, it will also be relevant to refer to the decision of the Hon'ble Supreme 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. Now, neither the expression ‘deserter’ nor the expression ‘desertion’ has been defined by the Army Act. However, under Section 38 of the Army Act desertion and aiding desertion are made offences. Section 38(1) says :

Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial,

If he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned : and

If he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

Section 39 deals with the offences of absence without leave and it is as follows :

Any person subject to this Act who commits any of the following offences, that is to say --

- (a) absents himself without leave' or
- (b) without sufficient cause overstays leave granted to him' or
- (c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any

- department to which he belongs, has been ordered on active service, fails without sufficient cause, to rejoin without delay' or
- (d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercises or duty' or
 - (e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march' or
 - (f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or
 - (g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there'

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

Section 104 provides for arrest by civil authorities of person accused of offences under the Act and it says :

“Whenever any person subject to this Act, who is accused of any offence under this Act, is within the jurisdiction of any magistrate or police officer, such magistrate or police officer shall aid in the apprehension and delivery to military custody of such person upon receipt of a written application to that effect signed by his commanding officer.

Section 105 provides for the capture of deserters and is in the following terms :

(1) whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs, shall give written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a magistrate, and shall deliver the deserter, when apprehended into military custody.

(2) Any police officer may arrest without warrant any person reasonably believed to be subject to this Act, and to be a deserter or to be travelling without authority, and shall bring him without delay before the nearest magistrate, to be dealt with according to law.

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 necessities; 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, and 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.

13. *** *** *** **

We also find the following notes appended to the Section 38 of the Army Act in the Manual of the Armed Forces :

2. Sub-Section (1) - Desertion is distinguished from absence without leave under AA Section 39, in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or

duty only applicable to the accused like a fire piquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.

3. A person may be a deserter although he re-enrolls himself, or although in the first instance his absence was legal (e.g. authorized 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 absence under AA Section 106 is not by itself a deciding factor if other evidence suggests the contrary.

In *Black's Law Dictionary* the meaning of the expression 'desertion' in Military law is stated as follows :

Any member of the armed forces who – (1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty 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."

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.

33. Now we will analyse the second question i.e. whether the applicant would be considered eligible to receive family pension at a point of time when her husband in service died while being absent without leave. We have analysed this issue in detail. We are of the view that absence without leave does not amount to dismissal. It just means commission of an offence which has been proved by a court of inquiry. No step for dismissal could have been taken within five months of absence without leave as per provision of *ibid* Army Order para 22. Under such circumstances, it is absolutely clear that the deceased soldier would be on the strength of his parent unit of the army during the period of absence without leave and in this case till the date of death, which is on 4.10.09. Under such circumstances, we are inclined to accept the submission made by the Id adv. for the applicant that it should be treated as if her husband died in harness. There is no doubt that the period of absence without leave would be deducted from the total service of the deceased soldier because such absence has been proved through a duly constituted court of inquiry.

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 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 personnel 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.
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 any valid document has 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 :-

- (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) 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.

45. Besides, family pension the applicant has also prayed for dues as per her entitlement from the AGI Fund. In this regard we are of the view that having come to the conclusion that the death was in harness and not while on desertion or when he was dismissed, then in that case, it stands to reason that the Govt. as well as the AGI authorities should not hesitate in taking a positive stand to sanction the entire range of entitled dues including family pension and other retiral/terminal benefits admissible.

46. Accordingly, the application is allowed and stands disposed of by issuing the following directions :-

- i) The EME Records (respondent No. 3) shall publish necessary casualty (part II order) to the effect that the death of the husband happened while in harness in the light of this order, within 30 days from the date of communication of this order. His name will be removed from the list of 'deserters' if any causality to this effect has been published.
- ii) All consequential benefits that may accrue to the NOK of deceased soldier, who died in the rank of Havildar with 23 years of service, shall be paid to the applicant.
- iii) Record Office i.e. respondent No. 3 shall issue instruction to the PCDA(P) with clear instruction to issue PPO in favour of the applicant in respect of entitled family pension and other terminal benefits.
- iv) The OC Records shall also issue instruction to the AGI authorities to consider the deceased soldier as one who died while in harness and accordingly disburse the entitled amount of AGI benefits to the assigned nominees within 90 days from the date of receipt of a copy of this order.

- v) The arrears of family pension will be admissible from the date of death i.e. 4.10.2009. While such arrears shall be paid within 90 days from the date of receipt of instruction by the PCDA(P) from the Record Office, the PPO must be issued within 60 days. Any delay in making payment will accrue interest at the rate of 12% per annum after expiry of 90 days as aforesaid.
 - vi) There will be no order as to costs.
47. The original records be returned to the respondents on proper receipt.
48. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both parties on observance of due procedure.

(LT. GEN. K.P.D.SAMANTA)
Member(Administrative)

(JUSTICE RAGHUNATH RAY)
Member (Judicial)