

ARMED FORCES TRIBUNAL, REGIONAL BENCH, GUWAHATI

ORIGINAL APPLICATION NO.32 OF 2022

No. 4349072L Ex Hav Bhubaneswar Gogoi]
 Aged about 65 years,]
 R/o Vill.-Na-Karonga, PO-Barpathar,]
 Dist.-Golagahat, PIN-785602.].. Applicant

Versus

1. The Union of India]
 Represented by the Secretary,]
 Ministry of Defence, Sena Bhawan,]
 New Delhi - 1.]
2. The Officer-in-Charge]
 Records The Assam Regiment,]
 PIN (Army)-900332, C/o 99 APO.]
3. Additional Directorate General]
 Personnel Services, PS-4(d),]
 Adjutant General's Branch,]
 IHQ of MoD (Army), DHQ,]
 PO-New Delhi.]
4. The Principal Controller of Defence]
 Accounts (Pension), Allahabad,]
 Pin-211 014, Uttar Pradesh.] ..Respondents.

.....
 Mr. AR Tahbildar, Advocate for the Applicant.

Mr. PJ Barman, Central Govt. Pleader for the Respondents.

**CORAM : SHAIENDRA SHUKLA, MEMBER (J) AND
LTGEN C. P. MOHANTY, MEMBER (A)**

JUDGMENT RESERVED ON : 20.02.2025

JUDGMENT PRONOUNCED ON : 11.03.2025

JUDGMENT (Per Shailendra Shukla, Member (J))

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007, whereby the applicant has sought following reliefs :-

- "a) To quash and set aside the illegal and arbitrary order of dismissal of the applicant from service and convert the order of administrative dismissal to discharge on compassionate ground, order for payment of service pension to the applicant w.e.f. the date of his discharge from service on 16.11.1974 with interest thereon.*
- b) To direct the authorities to pay service pension to the applicant w.e.f. 08.06.1998 and all other benefits to which the applicant is entitled to on his discharge from service."*

2. Facts of the case of the applicant are that the applicant was enrolled as Sepoy in the Army on 11.08.1977. In the due course, the applicant was promoted to the rank of Havaldar. During the service period, the applicant was also awarded "The United Nations Medal" in recognition of his meritorious service.

3. The applicant further submits that while discharging duty in 60 Assam Girls Bn NCC, the applicant on 05.06.1996 had submitted an application before the Commanding Officer requesting to discharge him from service on

compassionate ground detailing the problems going on in his family. The Commanding Officer had forwarded the application to the Records, the Assam Regiment for necessary action but the same was not responded by the authorities. Thereafter, the applicant applied for granting him leave and the applicant was granted Annual Leave w.e.f. 29.06.1997 to 23.08.1997 and subsequently on the prayer of the applicant stating his mother's illness and other family problem, leave period was extended w.e.f. 24.08.1997 to 22.09.1997 but the applicant did not join his duty on expiry of the leave period and as such the authorities vide letter dated 06.10.1997 issued an Apprehension Roll for apprehending the applicant. However, after a few days of over staying leave due to family problem, the applicant reported to his Unit and on his return the authorities allowed him to re-join duty after following due process of law and thereafter the applicant continued discharging his duties to the satisfaction of all concerned.

4. The applicant further states that due to the continuous family problem, the applicant sought permission to grant him Casual Leave and the authorities granted him Casual Leave from 18.05.1998 to 06.06.1998. However, he could not join his duty after expiry of the leave period and after 20 days of over stay of leave at home went to the Unit for re-joining but he was not allowed to enter into the Unit. Thereafter, the applicant went to the Record

Office and reported there. At the Record Office, the applicant narrated his family problem and requested the authorities to allow him to rejoin service and thereafter consider his application dated 05.06.1996 praying for discharge^{ing} him on compassionate ground. On his request, the applicant was suggested to submit an application for discharge on compassionate ground afresh and accordingly, the applicant again on 02.01.1999 submitted an application which was forwarded by the Records, the Assam Regiment to the Commanding Officer, 1st Assam Regiment for further action. A copy of the forwarding was also marked to the applicant with an advice to report to the Commanding Officer for discharge from service on extreme compassionate grounds.

5. The applicant further^{states} that as advised, the applicant went to the Unit to meet the Commanding Officer, 1st Assam Regiment for completing the formalities of discharge on compassionate ground. But this time also, he was not permitted to enter the Unit and as such not finding any alternative way, the applicant returned home.

6. The applicant being ignorant sat silent at home with the impression that though he was not allowed to enter into the Unit, his application dated 02.01.1999 for discharge on compassionate ground forwarded by the Records, the Assam Regiment to the Commanding Officer, 1st Assam

Regiment for further action would be considered and he would be discharged from service on compassionate ground and consequently would be granted Service Pension and other retiral benefits since he had completed 21 years of service as on 06.06.1998 i.e. the date on which his duly granted Casual Leave was over.

7. The applicant further states that even after elapse of considerable period of time, when he did not receive any communication from the respondents, the applicant sent a legal notice dated 24.06.2001 through an advocate to the concerned authorities with a request to do the needful to discharge the applicant from service on compassionate ground in pursuance of his application dated 02.01.1999 and grant him service pension as well as other retiral benefit as per law.

8. In response to the aforesaid legal notice, the Record Officer, Records, The Assam Regiment sent a letter dated 15.12.2001 to the concerned advocate informing that since the applicant did not report for duty after expiry of his casual leave on 06.06.1998, he was declared as a deserter w.e.f. 07.06.1998 and the applicant would be administratively dismissed from service after 10 years from the date of desertion since he had deserted from field area and his legitimate dues would be paid accordingly. Subsequently, vide letter dated 22.10.2008, Senior Record Officer, the Assam Regiment

informed the father of the applicant that his son has been administratively dismissed from service w.e.f. 07.06.1998 being a deserter.

9. The applicant further states that on receipt of the letter dated 15.12.2001 from the OIC Records, The Assam Regiment to the effect that he would be administratively dismissed from service after 10 years from the date of discharge, the applicant preferred an representation before the Army Headquarter with copies to the Records, The Assam Regiment and The Commanding Officer, 1st Assam Regiment respectively requesting the authority to discharge him from service on compassionate ground in pursuance of his previous applications seeking discharge on compassionate ground. Further, he also submitted that considering length of 21 years of his service till the date of alleged desertion, he should be granted service pension at the earliest, but the applicant was not granted service pension by the authorities.

10. The applicant further states that he has been illegally deprived from his legitimate pension for no fault of him and without pension or other source of income, the applicant and his family has been living a life of penury for years and as such the applicant again on 06.03.2021 submitted a representation to the OIC, Records through the Zila Sainik Welfare Officer, Golaghat (Assam) requesting to grant him pension converting the order of dismissal to discharge

on compassionate ground but same couldnot evoke any positive response from their end.

11. The applicant further states that the applicant had completed 21 years of service till the date of illegal dismissal from service i.e. more than the qualifying period of service of 15 years as required to earn service pension and since the action of the respondents' authority in dismissing the applicant from service is illegal, the applicant is entitled to receive service pension.

12. The applicant further states that he never had any intention to desert service but it was due to his family problems, he was compelled to over stay for 20 days even after completion of casual leave duly granted to him. After 20 days of over stay of leave, the applicant went to the Unit for re-joining but he was not allowed to enter into the Unit. Thereafter, the applicant went to the Record Office and reported there and as such the action of the respondents' authority in declaring the applicant as a deserter and subsequently dismissing him from service is bad in law and liable to be interfered with.

13. The applicant states that after completion of casual leave, when the applicant did not report to his Unit, the authorities ought to have inquired into the reasons or circumstances which compelled the applicant to over stay leave as required in terms of Section 106 of the Army Act, 1954. The

authorities even did not issue Apprehension Roll, as required to apprehend a person who remains absent without leave before declaring him to be a deemed deserter, but the authorities did not follow the procedure as required under the law and arbitrarily declared the applicant to be a deemed deserter and subsequently administratively dismissed the applicant from service. Hence, this OA.

14. *Per contra*, learned counsel for the respondents submits that the applicant was enrolled in Army on 11.08.1977 and he was posted to 1st Assam Regiment and granted 20 days casual leave w.e.f. from 18.05.1998 to 06.06.1998. On expiry of leave, the applicant did not report back to his parent Unit i.e. 1st Assam Regiment and overstayed leave w.e.f. 07.06.1998. Accordingly, 1st Assam Regiment had initiated Apprehension Roll to Officer-in-Charge, Police Station, Sibsagar (ASSAM) and Deputy Commissioner, Sibsagar (ASSAM) vide letter dated 20.07.1998 to apprehend the individual. The wife of the applicant was also advised to send back her husband for duty vide 1st Assam Regiment letter dated 20.07.1998. After 30 days of desertion, the applicant did not report either at Unit or Regimental Centre. Subsequently, he was declared deserter from service w.e.f. 07.07.1998 by convene a Court of Inquiry as per the provisions of Para 17 of SAO 9/S/89 and Section 106 of the Army Act, 1950 and accordingly,

occurrence/regarding Over Stayed Leave (OSL) and desertion has been published vide 1st Assam Regiment Part II Order Nos 0/140/0001/98 & 0/151/0001/98 dated 07.06.1998 respectively. At the time of desertion, the applicant had rendered 20 years, 09 months and 27 days of service (including 290 days non qualifying service).

15. That as per service records, it is found that the applicant was a habitual offender being overstayed leave during his service period before desertion from service w.e.f. 07.06.1998 and he has been awarded with following punishment for the offences as mentioned against each :-

<u>Sr. No.</u>	<u>Under Army Act Section</u>	<u>Unit</u>	<u>Punishment Awarded</u>	<u>Date of Award</u>
1	AA Sec 39(b)	1 Assam	28 days RI & 14 days detention in Military Custody	19.11.1979
2.	AA Sec 39(b)	60 Assam Girls Bn NCC	Service Reprimand <i>Severe</i>	11.07.1995
3	AA Sec 39(b)	1 Assam	Reprimand & 14 days pay fine	14.09.1998

16. Thereafter, after prolonged gap of 03 (three) years, a Legal Notice dated 24.06.2001 under Section 80 Cr. P.C from one Parag Moni Deka, Advocate on behalf of applicant was received by the office on 30.06.2001. Accordingly, reply of the Legal Notice was forwarded to IHQ of MoD (Army), Inf-6 (Pers) and requested to advise further course of action to be

taken by this office on the Instant Legal Notice vide Records The Assam Regiment letter dated 07.07.2001.

17. As per direction of IHQ of MoD (Army), Inf-6 (Pers) vide letter dated 16.10.2001 stated that the applicant deserted from the Unit deployed in a field area, hence he will be administratively dismissed from service after 10 years from the date of desertion and his legitimate dues will be paid on or after 10 years from desertion. Hence, Legal Notice lacks substance and may be ignored. Accordingly, Suitable reply of the Legal Notice was forwarded to Shri Parag Moni Deka, Advocate, Guwahati High Court (Guwahati) vide Records The Assam Regiment letter dated 15.12.2001. Since, the applicant was deserter w.e.f. 07.06.1998 and as per existing rules, desertion from service cannot be treated as discharge/retirement from service. As the applicant ^Awas deserted from field area, he was administratively dismissed from service after 10 years under Army Act Section 20 (3) w.e.f. 07.06.2008 and the facts of dismissal were also communicated to the NoK i.e. Shri Ghaniram Gogoi, father of applicant including Deputy Commissioner, Sibsagar (ASSAM), the Superintendent of Police, Sibsagar (ASSAM) vide Records The Assam Regiment letter dated 22.10.2008. On being declared desertion, Final Settlement of Account (FSA) was carried out by PAO (OR), The Assam Regiment with following credit/debit balance –

<u>Sr. No.</u>	<u>Details</u>	<u>Amount (Rs)</u>
1	Debit Balance	15,737/-
2	AFPP Fund Balance	30,949/-
3	Army Group Insurance Fund Maturity Benefits	51,830/-

18. Further, the applicant requested for information under Right to Information Act, 2005 dated 24.02.2021 for requirement of documents. Information alongwith documents were forwarded to the applicant vide Records The Assam Regiment letter dated 24.03.2021. Applicant having felt aggrieved by the reply submitted First Appeal under RTI Act, 2005 dated 09.06.2021 to Appellate Authority. Accordingly, Speaking Order from First Appellate Authority was forwarded to the applicant vide Records The Assam Regiment letter dated 19.07.2021 and again informed to the applicant vide letter dated 30.10.2021.

19. We have heard learnedcounsel for the applicant as also learnedcounsel for the respondents. The main questions for consideration are as follows: -

(i) Whether the dismissal of the applicant is liable to be set aside?

Alternatively

(ii) Whether the dismissal is liable to be converted into discharge?

Regarding Question No. (i) :-

20. A perusal of record shows that the applicant was enrolled on 11.08.1977. While doing field duty, he obtained leave from 18.05.1998 to

06.06.1998, however, he did not report for duty thereafter. Learned counsel for the applicant submits that due to pressing family problems, specially, mother's health condition, he had taken leave but due to persisting problems, he could not join his duties. He submits that the applicant went to rejoin in 1999 but was not allowed to rejoin. He went once more, however, he was not permitted to join. However, no proof has been submitted by the applicant such as bus ticket etc. which would have shown that he had gone to Shillong to rejoin. Learned counsel submits that an application was moved by him which was also rejected. However, no such copy of application has been produced. Annexure B-1 is the response of respondent authorities to his application and perusal of the same shows that the applicant had, in fact, sent an application for discharge from service which was rejected. Annexure B-1 shows that it was dispatched to the applicant in January, 1999. Learned counsel for the applicant submits that the applicant thereafter sent a notice also. However, copy of the notice has also not been filed and only the response to the notice has been filed at Annexure 'C'. A perusal of this response also shows that prayer was to treat dismissal into discharge/retirement which has been rejected. Thus, there is no document or any other material to show that the applicant had tried to rejoin service. It appears that it was applicant's wife who has made correspondence with the

respondents. As far as the applicant is concerned, it appears that he was seeking his discharge from service. Learned counsel had earlier submitted that show cause notice was not issued to him, however, during the course of argument, the respondents submitted show cause notice which had been issued to the applicant and the learned counsel readily agreed that such notice was, in fact, issued to the applicant, however, it was not received. It is, however, presumed that show cause notice must have been delivered to him and there is no reason to believe otherwise.

21. The period of absence of applicant was from field position and, therefore, he was dismissed from service after 10 years of the expiry of his leave. The past record of the applicant has also not remained clean and as stated by the respondents, he had been punished thrice prior to the final act of absence. The chart of punishment depicted in the reply has not been controverted by the applicant. The prayer for discharge on extreme compassionate ground was not supported with adequate reason. The applicant has not stated that his mother was terminally ill. Other family problems also have not been depicted. The process undertaken by the respondents after the applicant did not rejoin duties was in accordance with Section 106 of the Army Act. The Apprehension Roll was also duly issued. Issuance of Apprehension Roll itself shows that the respondents wanted to

procure presence of the applicant so that he may be subjected to disciplinary proceeding and in such scenario, it cannot be stated that the applicant was not allowed to rejoin. Thus, the act of dismissal of applicant who was a habitual offender was not improper and the same is affirmed. Hence, question (i) is answered accordingly.

Regarding Question No. (ii) :-

22. The applicant's counsel submits that the applicant had already completed minimum qualifying service for pension and if he is discharged, he may sustain himself and his family and, therefore, it is prayed that dismissal be converted into discharge.

23. Submission was considered. It would be appropriate to refer to a Judgment of Principal Bench of Armed Forces Tribunal, New Delhi pronounced in the case of **Ex LAC Sunny Vs. Union of India** in OA (Appeal) No. 629/2022 dated 04.08.2023. In this judgment, the Hon'ble Tribunal has referred to two judgments of Hon'ble Supreme Court and ~~one~~ another judgment of AFT. The judgments of Supreme Court are those of **S. Muthu Kumaran Vs. UoI & Ors.**, (2017) 4 SCC 609 and **UoI & Ors. Vs. Ex LAC Nallam Shiva** in Criminal Appeal No. 967/2017 dated 10.08.2017. The judgment of AFT, PB, New Delhi referred to in the judgment is that of **Ex Cpl Nitish Kumar Vs. UoI & Ors** in OA No. 184/2012 decided on

07.11.2012. The sum and substance of these judgments are that if the discharge results into pension, reinstatement etc, the same would not be allowed, whereas the discharge does not result in grant of pension but only affords the applicant to engage in civil employment, the dismissal may be converted to discharge. The following portion of the final order dated 04.08.2023 in case of Ex LAC Sunny (supra) is excerpted as under: -

"9. In the case of S. Muthu Kumaran (Supra) decided by the Hon'ble Supreme Court, the employee was inducted as a Havildar/Clerk in the Indian Army on 26.04.1994 and was involved in a fraudulent recruitment racket by obtaining illegal gratification. He was served with a show-cause notice on 07.06.2010, based on his confessional statement and the reply to the show-cause notice etc. the services of the appellant were terminated on 18.02.2011 under Section 20 (3) of the Army Act read with Rule 17 of the Army Rules. Challenging the termination, the matter came to this Tribunal and while the matter was so pending, this Tribunal after taking note of the facts of the case, as being devoid of merit, dismissed the application. Aggrieved thereof the jurisdiction of the Hon'ble Supreme Court was invoked under Section 30 of the Armed Forces Tribunal Act, 2007 and while considering the statement made and after taking note of the various provisions in Para 11 the Hon'ble Supreme Court recorded the following finding:

"No doubt, the dismissal order passed against the appellant was within the powers of the authorities concerned. However, as far

as the dismissal from service is concerned, it is an extreme punishment imposed against the appellant. The appellant has to thrive in civil life by doing an appropriate job suitable to his qualification. In the facts and circumstances of the present case, we are inclined to modify the punishment of dismissal from service into discharge from service."

10. In the case of *Ex Lac Nallam Shiva (supra)*, the employee therein was enrolled in the Indian Air Force on 28.03.2006 and was promoted as the Corporal. While serving so, he overstayed the casual leave granted to him from 20.10.2012 to 11.04.2014 on account of his ill health. He was served with a charge-sheet and a District Court Martial was held which finally found him guilty of over staying the leave. He was sentenced to undergo four months Rigorous Imprisonment and dismissal from service and reduction of rank. However, at the stage of confirmation, the RI was reduced from 4 months to 3 months. The employee challenged the same before the Armed Forces Tribunal, Regional Bench at Chennai. The Tribunal evaluated the submissions of the parties, rejected the plea of the employee that the disciplinary action suffered from legal infirmity but was impressed with the plea that there were compelling circumstances which compelled the employee to over stay the leave and after taking note of the Regulations 754 (c) of the Defence Service Regulations for Air Force held that the punishment awarded was excessive and therefore, interfered with the punishment and directed for reinstatement of the applicant holding the punishment too harsh. Challenging the interference into the punishment, the UOI appealed to the Hon'ble Supreme Court and the Hon'ble Supreme Court in Para 11

dealt with the matter in the following manner and converted the dismissal into discharge.

"Counsel for the respondents made a fervent alternative submission that even if the direction given by the Tribunal to reinstate the respondent in service was to be set aside, this court may take a sympathetic view as the respondent has already suffered the sentence period for the stated offence. He submitted that this Court may modify the order of dismissal from service to one of discharge from service, so that the respondent may not be disqualified from applying for employment elsewhere, considering that he is young and has to support his family. The counsel for the appellants, in all fairness, submits that so long as the respondent is not ordered to be reinstated in the Indian Air Force Service and there is no financial implication for the department, he may leave it to the discretion of this court to pass orders as may be deemed appropriate."

11. In the case of *Ex Corporal Nitish Kumar* (Supra) decided on 07.11.2012, the punishment awarded by the DCM in the matter of overstaying of leave by an employee of the Air force was interfered with by this Tribunal. The reasons for converting the dismissal into discharge recorded in Para 17 of the order are reproduced herein below:

"Then coming to the aspect of the punishment; and the qualifying service of the petitioner is less than ten years, and therefore, irrespective of whether the petitioner is discharged or dismissed, he does not get any pension. Learned counsel for the

petitioner however submitted that dismissal may be converted into discharge so that the dismissal may not come in his way in his seeking other employment anywhere else by way of rehabilitation, which he is likely to get in view of the professional proficiency possessed by him."

12. On the contrary, the judgment relied upon by the respondents in the case of *Ex Sepoy Madan Prasad (Supra)* is totally different both on facts and grounds. In this case, dismissal of the appellant on the ground of overstaying of leaving challenged before the AFT Regional Bench, Lucknow was dismissed and the Supreme Court upheld the same on the ground of maintaining discipline and decorum in the Armed Forces Service and it was held that the punishment of dismissal is an appropriate punishment. However, the issue with regard to conversion of dismissal into discharge, relied upon by Shri Ajit Kakkar, learned counsel for the appellant, was not an issue before Hon'ble Supreme Court in the aforesaid case nor was any prayer made before the Hon'ble Supreme Court converting the dismissal into discharge. In other two cases treating desertation to be a serious misconduct Regional Bench, Lucknow of this Tribunal in the case of *Ram Sajivan Pandey (supra)* and *Narendra Kumar Rai (supra)* simply stated that the punishment cannot be converted into discharge and we find that in both those cases the employee had completed the qualifying service for earning pension."

24. In view of above, the applicant's dismissal is not liable to be converted into discharge because in that case, the applicant who has been habitual offender and who had failed to rejoin while posted in field area and chosen to

not return, not rejoin and continue to remain absent for 10 long years, would still be enjoying the benefit of pension ~~which is~~ like a normally retired soldier. The conversion of dismissal into discharge in such situation is likely to send wrong message to other military personnel resulting in break down of discipline which is the bed rock of military service.

25. In final analysis, we uphold the dismissal of the applicant and decline prayer for conversion of ~~dismissal of a~~ applicant into discharge. The OA stands **dismissed**.

26. Misc. Application, if any, stands disposed of.

27. No order as to costs.

(Lt Gen C. P. Mohanty)
Member (A)

Date -
Amk/-

(Justice Shailendra Shukla)
Member (J)