

IN THE ARMED FORCES TRIBUNAL
REGIONAL BENCH, GUWAHATI
O.A.No. 04/2016

Smt. Yashimenla Longchar,
W/o. No. 4366564A late Nk Moatemjen Ao,
Chumukedima, Ward No.8,
Dimapur, Nagaland,
Mobile No. 09612039153.

.....Applicant
By legal practitioners
for Applicant
Mr.I Imti Longchar & Associates

-Versus-

1. Union of India
Through the Secretary to the Govt. Of India,
Ministry of Defence, New Delhi – 11.
2. The Director General,
Assam Regimental Centre,
Happy Valley, Shillong – 797007.
3. The Record Officer,
Assam Regiment Abhilek Karyalaya,
Assam Regimental Centre,
Happy Valley, Shillong – 797007,
C/o. 99 APO.
4. The Controller of Defence Acctts
Allahabad, Uttar Pradesh.
5. The Secretary, Rajya Sainik Board,
Nagaland, Kohima.

6. The Welfare Officer,
Zilla Sainik Welfare Office,
Govt. of Nagaland,
Dimapur, Nagaland.

7. The Welfare Officer,
Zilla Sainik Board,
Mokokchung, Nagaland.

.....Respondents
By legal practitioners
for respondents
Mr. D.C. Chakravarty, CGSC

PRESENT

HON'BLE MR.JUSTICE B.P.KATAKEY, MEMBER (J)

HON'BLE VICE ADMIRAL M.P.MURALIDHARAN, AVSM & BAR, NM, MEMBER(A)

Date of hearing : 22.03.2017

Date of order : 19.04.2017

ORDER

(By Vice Admiral MP Muralidharan):

1. The Original Application has been filed by Smt.Yashimenla Longchar, widow of late Naik Moatemjen, No.4366564A, seeking family pension and other associated service benefits from the date of death of her husband.

2. The applicant's husband was enrolled in the Army (Assam Regiment) on 11 July 1998 and while serving with 10 Assam Regiment was deputed to proceed on temporary duty to Command Hospital, Kolkata for review of his medical category in December 2011 (Annexures 10, VI). Since he did not report to the Command Hospital, a Court of Inquiry (COI) was convened and based on the findings/opinion of the Court, late Naik Moatemjen was declared a deserter with effect from 06 January 2012 (Annexures VI, VII) and was eventually dismissed from service with effect from 20 April 2015.

3. **Shri Imti Longchar, the learned counsel for the** applicant, submitted that the applicant's husband who was fully fit at the time of enrolment developed various ailments from June 2009 and was eventually diagnosed as having Carcinoma Nasopharynx. A medical board held at Military Hospital, Shillong in July 2011, assessed it to be a disability attributable to service due to possible viral infection contracted while in service (Annexure 6). The applicant's husband was deputed to proceed to Command Hospital, Kolkata for review of his medical category on 28

December 2011 (Annexure 10). However due to his critical medical condition he could not proceed to Kolkata. He was admitted to a Cancer Institute in Guwahati and was also treated at Christian Institute of Health Sciences and Research at Dimapur (Annexure 12) and other civil hospitals at Dimapur. The learned counsel submitted that his Battalion was kept informed of the treatment being undertaken the late soldier telephonically. The applicant's husband late Naik Moatemjen succumbed to his illness on 07 January 2015 (Annexures 13,14).

4. On expiry of her husband, the applicant appealed to the respondents for grant of family pension (Annexure 15). The applicant was however informed by the respondents that since her husband had been declared a deserter from the Army with effect from 06 January 2012 and died as non-pensioner, she was not entitled to family pension (Annexure 16). Later the applicant was also informed that her husband had been dismissed from service with effect from 20 April 2015 (Annexure 17). Subsequently the applicant made another appeal through the Zilla Sainik Welfare Officer, Dimapur for grant of

family pension (Annexure 19), which was also rejected as the applicant's husband had died as a non-pensioner (Annexure 20).

5. The learned counsel for the applicant further submitted that the late soldier had been declared a deserter, without following the due process of law. His Unit was well aware that the late soldier who was terminally ill was being treated at various specialist hospitals/at home as they had been kept informed about his whereabouts. The learned counsel also submitted that in a similar case the Hon'ble Delhi High Court in **Smt.Harnandi vs. Union of India & Ors., CW.No.3799 of 1995**, had held that the husband of the petitioner therein 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 making her eligible for family pension. Hence the applicant who is similarly situated was also entitled to family pension. The learned counsel further submitted that the Regional Bench of this Tribunal at Chennai had held a similar view in **OA.No.158 of 2013, Smt.Kukkala Manga Devi vs. Union of India & Ors.** The learned counsel therefore prayed that the applicant's

husband be granted full salary entitled to him from 01 January 2012 till the date of his demise ie 07 January 2015 and the applicant be granted family pension with effect from 08 January 2015.

6. The respondents in their counter affidavit have submitted that the husband of the applicant, late Naik Moatemjen, who was enrolled in the Army on 11 July 1998 had served for 13 years 05 months and 25 days which included non qualifying service of 03 months and 18 days. On being found to be absent from duty without leave with effect from 06 January 2012, an order for his apprehension was issued (Annexure I). The learned counsel further submitted that the late soldier who had been diagnosed as a case of Carcinoma Nasopharynx had been under treatment at various service hospitals and had also been downgraded to low medical category with effect from 13 April 2010. He was directed to proceed on temporary duty to Command Hospital, Kolkata for review of his medical category on 28 December 2011 (Annexure VI). The late soldier however did not report to the hospital and on completion of 30 days of

unauthorized absence from duty he was declared a deserter with effect t from 06 January 2012 based on a COI convened (Annexures VII, VIII). On completion of three yeas of desertion period, the late soldier was dismissed from service with effect from 20 April 2015 in accordance with Section 20(3) of the Army Act 1950 and provisions of the Army Orders on the subject. The applicant had been informed of the decision (Annexure XVI).

7. The respondents further submitted that the applicant who appealed for grant of family pension and other benefits (Annexure XI), was informed that she was not entitled for family pension as her husband who was a deserter had died as a non-pensioner (Annexure XII). The applicant who preferred another appeal for pension through the Zilla Sainik Welfare Officer, Dimapur, was once again informed that she was not entitled to family pension as her husband was a non-pensioner (Annexure XV).

8. Sri Chakravarty, the learned Central Govt. Counsel submitted that the late soldier prior to desertion in January 2012,

had been punished for being absent without leave in 2010 on two occasions with a cumulative absence of 108 days. Further the late soldier was not eligible for any salary for the period from January 2012 to January 2015 as claimed by the applicant, as he had been a deserter. The learned counsel also submitted that the applicant and family of the late soldier were well aware that he had deserted from Army service. Further, even though the applicant is now claiming that the late soldier was undergoing treatment at various civil hospitals, no intimation of the same had been given to the respondents at the relevant time. The learned counsel also submitted that as the late soldier was not eligible for any pensionary benefits being a deserter at the time of his death on 07 January 2015, his next of kin, the applicant, was also not entitled to any family pension.

9. Heard rival submissions and perused records.

10. It is not disputed that the applicant's husband late Naik Moatemjen was suffering from Carcinoma Nasopharynx and was under treatment at various military hospitals and was deputed to

proceed to Command Hospital, Kolkata for his re-categorisation. The late soldier however did not report to the hospital and succumbed to his ailments on 07 January 2015.

11. The case of the applicant is that her husband late Naik Moatemjen who was critically ill, could not travel to the Command Hospital, Kolkata and was therefore treated at various specialist civil hospitals. The applicant has also contended that the family had kept the unit informed of the late soldier's whereabouts. The stand of the respondents, on the other hand, is that neither the applicant reported to Command Hospital as directed, nor did he return to his unit despite issue of Apprehension Roll. The respondents have also contended that they were not aware at the relevant time that he was under treatment in civil hospitals. The respondents have further contended that since the applicant had been declared a deserter in accordance with the Army Act and had been eventually dismissed from service, he was not eligible for grant of pension. Hence the applicant was also not entitled to grant of family pension.

12. As observed, a COI was convened on 12 February 2012, to investigate circumstances under which the late Naik Moatemjen (applicant's husband) had absented himself without leave while proceeding to Command Hospital, Kolkata for medical review. Based on the COI, the applicant's husband was declared a deserter with effect from 06 January 2012. It is also observed that the late soldier was dismissed from service with effect from 20 April 2015 (Annexure XVI). The death certificate produced by the applicant (Annexure 13) establishes that the applicant's husband died on 07 January 2015. The fact that the applicant's husband died during desertion period is not disputed by the respondents. In our view, therefore, the issue for consideration is whether the applicant's husband who died during the period he was declared a deserter, but prior to his dismissal from service, can be considered to have been in service at the time of his death.

13. We observe that neither the expression 'deserter', nor the expression 'desertion' is defined in the Army Act. The Black's Law Dictionary defines 'desertion' as "the wilful and unjustified

abandonment of a person's duties or obligations especially to military service or to a spouse or family." 'Deserter' has been defined as follows:

"A member of the armed forces who leaves national military service with the intention of reneging on military obligations either permanently or for the duration of a military operation; a member of the armed forces who illegally abandons a military force, often by seeking refuge in a foreign territory or by joining enemy forces."

14. The Manual of Military Law, Volume II in the Notes appended to Section 38 of the Army Act (pertaining to desertion and aiding desertion) amplifies 'desertion' as follows:

"2. Sub sec.-- (1) Desertion is distinguished from absence without leave under AA. s. 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 picquet 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-enrols himself, or although in the first instance his absence was legal (e.g. authorised 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 absentee under AA. s. 106 is not by itself a deciding factor if other evidence suggests the contrary."

15. In the instant case the Apprehension Roll (AR) issued by the respondents on 06 January 2012 (Annexure I) indicates that the applicant's husband was absent without leave with effect from 06 January 2012. It is further observed that post COI convened on 12 February 2012 (Annexure VII), he was declared a deserter with effect from 06 January 2012. It is however observed that Witness No.1, CHM Mani kumar Manger, has

clearly stated to the Court that the late soldier's mother had informed him that the late soldier did not proceed to Command Hospital, Kolkata but was at home. This aspect has been confirmed by Witness No.2 Subedar Bhadra Gogoi who indicates that he was informed by Witness No.1 that the late soldier had not reported to Command Hospital, Kolkata but was at his home. Evidently no steps were taken by the Unit of the late soldier, to apprehend him or contact him to find out as to why he did not report to the Command Hospital. While an AR was issued to the Police to apprehend the late soldier, when the unit became aware of the exact location of the late soldier viz his residence, the reason as to why no one from the unit was despatched to the known location of the late soldier, is not clear. More so, as Reg 378 of the Regulations for the Army clearly indicates that the unit will collect their deserters/absentees from the Regimental Centre or Units, to whom the civil authorities have handed over the soldiers/absentees. In our view, therefore, the unit had shirked its responsibility of getting hold of the late soldier who was absent without leave and in a routine manner proceeded to

declare him a deserter despite being aware of his ailment and whereabouts.

16. The eligibility for family pension of the spouse of a military person who had been declared a deserter, but had died prior to his dismissal from service, was looked into by the Hon'ble High Court of Delhi in **Smt.Harnandi (supra)** and held as follows:

"7. Section 38 of the Army Act makes desertion an offence and provides for its punishment. Section 105 provides for the capture of deserter and Section 106 prescribes the procedure to be followed when a person absent without leave is to be deemed to be a deserter.

8. There is no provision in the Act or Rules envisaging automatic termination of service of a member of armed forces on declaration of desertion. On the other hand, Army Regulation 376 provides to the contrary and says that a deserter does not cease to belong to the corps though he is no longer shown on its returns. This regulation reads thus: -

"376. Deserters From the Regular Army.-- a person subject to AA who is declared absent under AA, Section 106 does not thereby cease to belong to the corps in which he is enrolled though no longer shown on its returns, and can, if subsequently arrested, be tried by

court-martial for desertion. When arrested he will be shown on returns as rejoined from desertion."

9.

10. 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 under the Act and the Rules.

11. Family pension is admissible to the widows of Junior Commissioned Officers/other ranks, who die in service but of causes which are neither attributable to nor aggravated by military service. Army Pension Regulation 246 provides for this and Regulation 247 prescribes the rate on which such pension/gratuity would be payable. There is no other regulation or rule which provides for any other conditions/eligibility for claiming family pension. In other words family pension becomes payable to the widow of a deceased member of the armed forces, who dies in service and whose death is not attributable to military service.

12. Applying the first test, it cannot be said or held the petitioner's husband did not die in service. It is the admitted case that no order of dismissal, removal or discharge was passed against him before or after he was declared a deserter. Nor could declaration of his desertion terminate his service automatically. He also did not cease to belong to corps in

which he was enrolled though he was no longer shown on its returns in terms of Army Regulation 376. He was, Therefore, to be treated to have died in harness, satisfying the first test in the process.

13. . . . Therefore, petitioner was eligible for grant of family pension so long as Army Pension Regulation 123 did not come in her way. Since the whole controversy now turns on this Regulation, it would be advantageous to reproduce it as under: -

"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 Section 43(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.

(b) A person who has forfeited service under the provisions of the preceding clause but has not been dismissed shall, on completion of any period of three years further service in the colours and/or service in the reserve with exemplary conduct and without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity."

14. 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 APR 123 could not be made applicable to the case to deprive petitioner of her otherwise legitimate claim family pension because her husband's service was liable to be forfeited only if he was convicted by the Court Martial.

15.

16. We accordingly hold that petitioner's 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 and that declaration of desertion did not lead to automatic cessation of his service and that he had not died of causes attributable to or aggravated by the military service. Consequently Army Pension Regulation 123(a)(i) was not applicable to the case."

17. It is observed that while the Regulations quoted by the Hon'ble High Court at Para 11 of the judgment in Smt.Harnandi

(supra) on admissibility of family pension has been since revised vide AI 51/80 and subsequently vide Reg 63 of the Pension Regulations for the Army 2008, the salient aspect on admissibility as observed by the Hon'ble High Court has remained unchanged. The salient aspect on admissibility continues to be that ordinary family pension remains admissible to families of Armed Forces personnel who died while in service of causes which are neither attributable to nor aggravated by military service. Therefore even if the applicant's husband had died of causes which were not attributable/aggravated by military service, she would have been eligible for award of family pension provided he was in service.

18. It is also observed that the Hon'ble Apex Court in **Sheel KR Roy vs. Secretary, Ministry of Defence & Ors, (2007) 12 SCC 462**, had examined the case of punishment awarded to the appellant therein, post a Court Martial for absence from place of duty, when the appellant had remained in one or the other hospital for treatment. The Apex Court had held that there was

arbitrariness on the part of the respondents in the punishment awarded to the appellant therein.

19. In the instant case, the respondents were well aware that the late soldier who had not reported to the Command Hospital as ordered, was at his residence undergoing treatment. Therefore the COI declaring him a deserter, despite the fact that his whereabouts including the details of his ailment were known to the unit, without making any apparent effort to apprehend him, indicates arbitrariness. Further, even though the late soldier was declared a deserter, he died prior to his dismissal from service. Therefore, in our view, in keeping with the principles enunciated by the Hon'ble High Court of Delhi in **Smt.Harnandi** (supra) the applicant's husband should be deemed to have died in harness, as no order of dismissal or discharge was passed against him till his death. As a consequence, the applicant would be eligible for grant of family pension. It is also observed that a similar view was taken by the Regional Bench of this Tribunal at Chennai in **Kukkala Manga Devi** (Supra).

20. The applicant's husband was enrolled in the Army on 11 July 1998 and died on 07 January 2015 making his service in the Army 16 years and 06 months. Therefore even after discounting the non-qualifying period of 03 months and 18 days, the applicant's husband would still have more than 15 years of qualifying service making him eligible for pension. Hence, in our view, the applicant would be eligible for grant of family pension from one day after the date of death of her husband. As regards the applicant's claim for grant of pay and arrears to her husband from the date of his absence from his unit till the date of his death, since he was absent without leave, following the principle of "no work no pay" enunciated by the Hon'ble Apex Court in **Union of India vs. BM Jha, (2007) 11 SCC 632**, he would not be eligible for any pay or allowances from the date of his desertion from the Unit till the date of his death.

21. In view of the foregoing, the Original Application is partly allowed and the applicant is held eligible for grant of family pension from one day after the death of her husband, ie with effect from 08 January 2015. The respondents are directed to

pay family pension along with arrears, with interest @ 9% per annum from the aforesaid date to the date of payment, to the applicant within a period of four months from the date of receipt of a copy of this order.

22. There will be no order as to costs.

23. Issue free copy to the parties.

MEMBER (A)

MEMBER (J)

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