

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI**

**O.A.No.126 of 2014**

**Monday, the 17<sup>th</sup> day of August, 2015**

The Honourable Justice V.Periya Karuppiah  
(Member-Judicial)  
and  
The Honourable Lt Gen K Surendra Nath  
(Member-Administrative)

Smt Amadala Suvarna Jyothi  
W/o Late Purushotham, aged 29 years  
r/o Yadavalli Post and Village  
Giddalur Taluq – 523356  
Prakasam District

...Applicant

By Legal Practitioner  
Mr.P.Venkata Rama Sarma

vs

1. Union of India  
Rep. by its Secretary, Ministry of Defence (Army)  
Sena Bhavan, New Delhi
2. The Chief of Army Staff, Indian Army Headquarters  
Sena Bhavan, New Delhi – 110 011
3. The Deputy Directorate General Personnel  
Quartermaster General's Branch, Integrated Headquarters of  
Ministry of Defence (Army), West Block-III, R.K.Puram  
New Delhi - 110 066
4. The Commandant, 1807 Pioneer Corps  
Pin-900493, C/o 56 APO, Bangalore, Karnataka State
5. The Senior Record Officer, Pioneer Corps, Pin-900493, C/o 56 APO  
Bangalore, Karnataka State
6. The Principal Controller of Defence Accounts (Pensions), Draupadi Ghat  
Allahabad-211014, Uttar Pradesh

... Respondents

By M.Dhamodharan, SCGSC

**ORDER**

[Order of the Tribunal made by  
Hon'ble Lt Gen K Surendra Nath, Member (Administrative)]

The applicant, w/o late LNK Purushotham Amadala has filed this OA to declare the proceedings dated 27.03.2012 and 03.03.2014 of 5<sup>th</sup> respondents as arbitrary and set aside the same and consequently declare that her husband died while in service and condone the shortfall of service of her husband and to grant her family pension and other benefits.

2. Briefly, the applicant submits that her husband, late Purushotham was enrolled in the Army on 27.04.1996 and was granted leave from 06.11.2009 to 14.11.2009 which was again extended upto 25.11.2009. On completion of the said leave, the husband was admitted to MH, Secunderabad on 25.11.2009 and further transferred to CTC Medical Hospital, Pune for better medical treatment and later at Osmania Hospital, Hyderabad. She learnt that her husband had expired on 27.07.2010 due to AIDS at the Osmania Hospital, Hyderabad leaving behind her without any children and she is also affected and taking treatment for AIDS. She would state that she had represented to respondent No.4 on 27.08.2010 to settle the pensionary benefits payable to her, she being the legal heir of her late husband. The respondents have stated that her husband was declared as a deserter with effect from 08.05.2010 by a Court of Inquiry held at 1807 Pioneer Unit. She would state that after many representations she was granted a sum of Rs.44,300/- towards terminal benefits from AFPPF and even though she has asked the 5<sup>th</sup> respondent for payment of other benefits also such as gratuity, pension and other benefits, the 5<sup>th</sup> respondent rejected her claim stating that a deserter is not eligible for service pension in terms of instructions contained in para 123 (c) of Pension Regulations for

the Army 1961. She had then approached the Hon'ble AFT Chennai through OA No.53 of 2013 seeking to declare the proceedings dated 27.03.2012 as illegal and arbitrary and to set aside the same. In the meanwhile, she was informed by DDG (Personnel), IHQ, MOD, New Delhi to the effect that the date of desertion to date of death, i.e., 07.05.2010 to 26.07.2010 has been declared as Extraordinary Leave without pay and allowances. Further, as her husband had not rendered 15 years of qualifying service to be eligible for pension and other benefits, she was not entitled to any pension. The applicant further submits that taking the above into consideration and the observations of the Hon'ble Tribunal with regard to eligibility of pension under paras 43 and 44 of Pension Regulations for the Army 2008 (Part I), she sought permission to withdraw the OA 53 of 2013 with liberty to approach the competent authority to renew her claim for family pension by invoking the said provisions. Even though she had made a comprehensive representation for pension and other benefits to the respondents, on 15.11.2013 the respondents rejected her claim for grant of family pension and other terminal benefits *vide* letter dated 03.03.2014. The applicant submits that the rejection order is illegal and was done without application of mind. As no Court Martial proceedings were conducted in the case of her husband and only a Court of Inquiry was held to declare her husband a deserter, on the death of her husband, she is eligible for seeking condonation of deficiency in service for eligibility to receive pension by her husband and other benefits. Since her husband had completed 14 years and 3 months as on date of his death, she would be entitled to grant of pension after condoning 9 months of shortfall in his service. She submits that she is also suffering from AIDS and is taking treatment with expensive drugs and in view of the foregoing, she submits that the impugned order dated 03.03.2014 be set aside and the Tribunal may condone the

shortfall in service, if any, for grant of family pension and grant her the same and other benefits at an early date.

3. The respondents in their reply statement would submit that the applicant was enrolled in the Army on 27.04.1996 and while serving with 1807 Pioneer Unit , was granted 9 days of balance of annual leave from 06.11.2009 to 14.11.2009 and this period was further extended by 11 days with effect from 15.11.2009 to 25.11.2009 debit against the annual leave for the year 2010. On completion of leave, he was admitted to MH, Secunderabad on 25.11.2009 and further transferred to MH, Pune on 15.12.2009 are not disputed. The applicant's husband absented himself from MH, Pune on 07 May 2010 (AN) and an Apprehension Roll was issued by the Commanding Officer to the Superintendent of Police, Prakasam District and District Magistrate and the applicant's husband was declared a deserter with effect from 08.05.2010 by a Court of Inquiry. The mother of the applicant's husband Smt A Karmelamma, *vide* petition dated 30.09.2010 had informed that the applicant's husband had expired on 27.07.2010 at Osmania General Hospital, Hyderabad. They would state that as per rules in vogue, the next of kin of a deserter is not eligible for any pensionary benefits except terminal credit balance, AFPP Fund and AGIF contributions. They would further state that if an individual dies during the period of desertion, family pension is also not admissible to the next of kin as the individual died as a non-pensioner. They would state that the applicant had been paid all his dues with respect to AGIF, AFP Fund and credit balance. They would further state that even though the applicant had approached this Tribunal in OA 53 of 2013, the application was withdrawn with liberty to approach the competent authorities for the renewal of family pension claim. The respondents would further state the applicant had applied for condonation of shortfall in service for eligibility for

pension. However, the same was not in order in terms of para 43 (a) of Pension Regulation for Army 2008 (Pt I) which states that a deserter forfeits the whole of his prior service towards pension and gratuity upon being convicted by court martial of the offence whereas para 44 of Pension Regulation for Army 2008 (Pt I) is only applicable for condonation of shortfall of service if period is 12 months or less. Further, as per Army Instructions 51/80, family pension is admissible to the next of kin only if the individual dies during service or as a pensioner.

4. In view of the foregoing, the respondents aver that the applicant's request for family pension on the death of her husband is not tenable in accordance with the existing rules. Therefore, they pray for the OA to be dismissed being devoid of merits.

5. We have heard the arguments of Mr.P.Venkata Rama Sarma, learned counsel for the applicant and Mr.M.Dhamodharan, learned Senior Central Government Standing Counsel assisted by Maj Suchithra Chellappan, learned JAG Officer (Army) appearing for the respondents and perused all the documents placed before us.

6. Flowing from the pleadings on either side, the following questions emerge for consideration:

- (i) Whether the applicant's husband is attracted within the provisions of para 43 of Pension Regulations for the Army 2008 (Part I);
- (ii) Whether the plea of applicant for condonation of shortfall of service of her husband for purposes of grant of family pension and gratuity in terms of para 44 of Pension Regulations is tenable?

(iii) Whether order passed by the 5<sup>th</sup> respondent dated 03.03.2014 is sustainable?

(iv) What relief, if any, the applicant is entitled to?

7. The facts with regard to applicant's husband's enrollment, his having been given Annual Leave that was subsequently extended, his admission in MH, Secunderabad on 25.11.2009 and subsequent transfer to MH, Pune and his absenting without leave from 07.05.2010, declaration as deserter under Section 106 of Army Act and his subsequent death on 27.07.2010 at Osmania General Hospital, Hyderabad are not disputed by either side.

8. From the Court of Inquiry proceedings under Section 106 of Army Act wherein the applicant's husband was declared a deserter, we note that the Court of Inquiry observed that the applicant was suffering from "Pulmonary Koch's Immuno Surveillance Disease" and it was for that purpose, he was admitted to MH, Secunderabad and later transferred to MH (CTC), Pune for treatment. In the proceedings of the earlier OA No.53 of 2013, the respondents had submitted that the period of absence of applicant's husband from the date of desertion till the date of death was regularized by the grant of Extraordinary Leave without pay and allowances. Relevant paragraph of the order is as follows:

*"6. Therefore, the absent period from the date of desertion to the date of death (reported died whilst on absent period) i.e., 07 May 2010 to 26 Jul 2010 has been regularized by grant of extra ordinary leave without pay and allowances vide 1807 Pnr Unit Part II Order No. 0/0047/001/2011 (Copy attached). Accordingly, the case of deceased soldier has been re-submitted to PA (OR) Pnr*

“8. ....Therefore, it has become necessary for us to give an opportunity for the applicant to renew her claim for Family Pension by invoking the provisions of Para 43 of Pension Regulations for the Army, 2008 (Part-I) with the competent authority and this would also give the competent authorities to consider the said claim of the applicant under the correct provisions in the Pension Regulations for the Army, 2008 (Part-I). Furthermore, it would enable the applicant to seek her remedy under Para 44 of Pension Regulations for the Army, 2008 (Part-I), which would also pave way to exhaust the remedy before the competent authorities to exercise its option to pass an order regarding condonation of deficit service of the applicant's husband in the given facts and circumstances of the case.”

"1.           XX                         XX                         XX

2. *It is intimated that your contention in the above petitions is not agreed to in this case since your late husband was a deserter at the time of death. It is also stated that under the provision of para 44 of Pension Regulations for the Army 2008 (Part I) in the case of desertion the service rendered by your late husband stands forfeited and thus he is not eligible for service pension."*

The learned counsel for the applicant would state that this is contrary to the judgment of Hon'ble Delhi High Court in the case of Harnandi vs Union of India, 2001 Law Suit (Del) 382 held that an individual who was not dismissed from service as per the procedure contemplated under Army Act and dies during the desertion period, should be treated as died in harness. For a clearer understanding, extracts of para 43 of Pension Regulations for the Army, 2008 (Pt I) is reproduced below:

***“FORFEITURE OF SERVICE FOR CERTAIN OFFENCES AND ITS RESTORATION***

43. (a) *An individual shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by court martial of the offence:*

- (i) *desertion, vide Section 38 of the Army Act, 1950*
- (ii) *fraudulent enrolment, vide Section 43(a) of the Army Act, 1950.”*

(b)   xx                   xx                   xx

A plain reading of the Pension Regulations would go to show that forfeiture of previous service is contingent upon a person being convicted by a Court Martial for the offence of desertion under Section 38 of the Army Act, 1950. As is clearly evident, the applicant's husband was neither convicted by a Court Martial for desertion nor he was administratively dismissed from service under Section 20 (3) of Army Act 1950 for desertion. A Court of Inquiry was held under Section 106 of Army Act and the applicant's husband was declared a deserter. Section 106 (2) of the Army Act states that *if the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purpose of this Act is deemed to be a deserter.* Defence Service Regulations for the Army 1987 states that even when a person is deemed to be a deserter upon the findings of the Court of Inquiry; the deserter does



not cease to belong to the corps though he is no longer shown on its returns. The relevant portion 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.”*

Similarly, regulations state that a deserter is liable to be dismissed from service after 10 years of service if the desertion has occurred in active service and after 3 years if the desertion occurs not on active service provided the deserter fails to surrender within that period. The Hon'ble Delhi High Court in its judgment in the case of Harnandi vs Union of India (Supra) held that desertion by itself would not amount to bring about cessation of service. The relevant extracts of the judgment are reproduced below:

“1-8   xx   xx   xx

*9. 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 Rules.*

*10. 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 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.*

*11. Applying the first test, it cannot be said or held that 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."*

Observing that the applicant's husband had not been dismissed by Court Martial the Hon'ble Delhi High Court held that the applicant was entitled to family pension. The relevant extract is as follows:

1-14    xx                                  xx                                  xx

*15. 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 or aggravated by the military service. Consequently Army Pension Regulation was not applicable to the case.*

*16. Petitioner is resultantly held entitled to family pension from 06.11.84....."*

10. In the extant case, the applicant's husband had absented himself from leave and was declared a deserter by a Court of Inquiry. However, he was neither convicted by a Court Martial nor administratively dismissed under Section 20(3) of Army Act prior to his death on 27.07.2010. It is clear that provisions of para 43 (a) of Pension Regulations are not applicable to the applicant's husband. Therefore, the applicant's husband's previous service is not liable to be forfeited for the purpose of grant of pension, gratuity and other benefits and the order of the 5<sup>th</sup> respondent dated 03.03.2014 is liable to be set aside.

11. The learned counsel for the applicant would state that the applicant's husband had a total qualifying service of 14 years and 3 months and would request for condonation of 9 months of qualifying service to complete 15 years of service, so as to enable the applicant to be eligible for family pension. Per contra, the respondents would state that even though the absence from 07.05.2010 to 27.07.2010 has been regularized as Extraordinary Leave without pay and allowances, the said period of absence cannot be counted as qualifying service. Therefore, the qualifying service of the applicant's husband works out to 14 years and 10 days. In accordance with para 44 of Pension Regulations for the Army 2008 (Pt I), the deficiency in service for pension / gratuity may be condoned upto 12 months by the competent authority.

12. The applicant's husband was suffering from a terminal disease to which he ultimately succumbed in a Government Hospital. The circumstances of his absents without leave from the MH (CTC), Pune can also to an extent be attributed to the nature of the disease, its psychological impact on the person and the social stigma attached to such a disease in the society. These aspects should be taken into account as mitigating factors while considering such a case for condonation of deficiency in service for grant of pension. In view of the extenuating circumstances enumerated above, there are adequate grounds for condonation of deficiency in service. Even though we had, in our earlier order in OA 53 of 2013 had asked the respondents to consider the case under Pension Regulations Para 43 and 44, the respondents have dismissed the case perfunctorily and without any application of mind. A due process of examination of the case by the Army Headquarters and Ministry of Defence were also not followed. Considering the state of health of the applicant, who herself is afflicted with the same disease that her husband had, i.e.,

AIDS / HIV, we are inclined to condone the deficiency in service amounting to 355 days for grant of service pension, thereby making the applicant eligible to receive family pension. All points are accordingly answered.

13. In fine, the applicant is entitled to family pension including gratuity, DCRG and any other benefits if otherwise eligible from the date of death of the applicant's husband, i.e., 27 July 2010. Necessary PPO shall be issued and arrears shall also be paid within a period of 3 months from the date of this order. Failing to do so, an interest at 9% *per annum* on the arrears shall be paid from that date. The applicant is also entitled to facilities such as ECHS, CSD facilities and other entitlements as entitled to the widow of an ex-serviceman.

14. The O.A. is accordingly allowed. No costs.

Sd/-

Lt Gen K Surendra Nath  
Member (Administrative)

Sd/-

Justice V.Periya Karuppiah  
Member (J)

17.08.2015  
[True copy]

**Member (J)** – Index : Yes/No

Internet : Yes/No

**Member (A)** – Index : Yes/No  
*ap*

Internet : Yes/No

To

1. Secretary, Ministry of Defence (Army)  
Sena Bhavan, New Delhi
2. The Chief of Army Staff, Indian Army Headquarters  
Sena Bhavan, New Delhi – 110 011
3. The Deputy Directorate General Personnel  
Quartermaster General's Branch, Integrated Headquarters of  
Ministry of Defence (Army), West Block-III, R.K.Puram  
New Delhi - 110 066
4. The Commandant, 1807 Pioneer Corps  
Pin-900493, C/o 56 APO, Bangalore, Karnataka State
5. The Senior Record Officer, Pioneer Corps, Pin-900493, C/o 56 APO  
Bangalore, Karnataka State
6. The Principal Controller of Defence Accounts (Pensions), Draupadi Ghat  
Allahabad-211014, Uttar Pradesh
7. Mr.P.Venkata Rama Sarma  
Counsel for the applicant
8. Mr.M.Dhamodharan, SCGSC  
Counsel for the respondents
9. Officer in-Charge  
Legal Cell  
ATNK & K Area,  
Chennai-600009.
10. Library, AFT, RB, Chennai.

Hon'ble Justice V.Periya Karuppiah  
(Member-Judicial)

and

Hon'ble Lt Gen K Surendra Nath  
(Member-Administrative)

O.A.No.126 of 2014

Dated : 17.08.2015