

(2001) 03 DEL CK 0049

In the Delhi High Court

Case No : CW 3799/95

Smt. Harnandi

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 27-03-2001

Acts Referred:

Citation : (2001) 4 AD 420 : (2001) 91 DLT 54 : (1999) 59 DRJ 561

Hon'ble Judges : B.N. Chaturvedi, J;B.A. Khan, J

Bench : Division Bench

Advocate : Mr. V.P. Sharma, for the Appellant; Mr. A.K. Srivastava, for the Respondent

Judgement

Khan, (J)

1. Petitioner's husband, a gunner, enrolled in Army in 1961 returned home on two months' sanctioned leave on 13.5.1982. He failed to report back on duty on the expiry of leave period. An apprehension warrant was issued against him on 17.7.82 and a court of inquiry was held on 16.8.82 and he was cleared a deserter on 25.8.82.

2. Petitioner's version is that her husband came back home in a failing health condition and later died as a result on 6.11.84. She informed the concerned authorities about his death and made representations thereafter claiming family pension which were rejected on the ground that he was declared on deserter and was struck of the unit strength on 14.7.82.

3. Petitioner's case is that her husband had died in harness as competent Army authority had failed to pass any order of dismissal or discharge to do away with his service. Even if it was accepted that he was validly declared a deserter, that by itself could not terminate this services and he continued to remain subject to the Army Act and Rules till his death. Even otherwise also he was liable to be dismissed from service on completion of 10 years' absence from the date, he was declared a deserter under army instructions AI No.A-14/I which provided

that where a deserter failed to surrender or was not apprehended within three years from his first absence, he was liable to be dismissed under the orders of Commandant. Lastly it is submitted that he had put in over 20 years" service excluding the alleged period of desertion and had thus qualified for service pension under army Regulation No. 132.

4. The stand of respondents, on the contrary, is that the deceased gunner had forfeited his whole service prior to desertion in terms of Army Pension Regulation 123(a)(i). It is submitted that Family Pension was liable to be granted where the deceased received any pension during his life time. It is, however, admitted that a deserter was to be dismissed from service on completion of 10 years of absence from the date of desertion under Army Headquarters Letter AHL 17744/AG/DV-I dt.11.3.80.

5. All that, Therefore, remained to be seen was whether petitioner could be denied family pension in the face of Army Pension Regulation APR 123(a)(i). However, before, examining that aspect it would be worthwhile to have a bird's eye view of the concept of desertion under the Army Act only to find out whether it was by itself enough to terminate the services of a member of armed forces.

6. "Desertion" or "deserter" is not defined either in the Army Act or the Rules made there under. Black's Law Dictionary, However, defines desertion when Any member of armed forces, without authority goes or remains absent from his unit or place of duty with an intent to remain away permanently or (b) quits his quit with an intent to avoid hazardous duty or to shirk important service or enlists or accepts an appointment elsewhere without regular separation from the army.

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 belong to cease to corps though he is no long 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. Similarly, Army Letter dt. 11.3.80 also says that a deserter would be dismissed from service after completion of 10 years of his absence. So does Army Instructions AI-112/4 provide for his termination if he failed to surrender within three years or was not apprehended within that period.

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. It is also nobody's case that petitioner's husband died due to causes which were attributable to or aggravated by military service. He had allegedly died due to some ailment and there is no record or material available about the cause of his death and to suggest otherwise. In any case, he had not died in any action or while rendering any military service. 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 u/s

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 here 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. It is submitted by L/C for respondents that there was no occasion to try pensioner's husband by court-martial because of his death on 6.11.84 and as such, he should be deemed to have committed offence of desertion without being convicted. The submission appears fallacious on the face of it because mere declaration of desertion may not necessarily lead to the conviction by the court-martial. If that was so, there was no need to hold a court-martial to try a deserter for the offence of desertion. As such, there as no scope to fictionally deem the deceased gunner convicted by Court Martial to satisfy the pre-condition for application of APR 123 and so long this provision stood in its present form it would not be attracted to the case at all.

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. Petitioner is resultantly held entitled to family pension from 6.11.84. Respondents are directed to take steps to grant this pension to her including all arrears till date within four months from receipt of this order.