

ARMED FORCES TRIBUNAL REGIONAL BENCH, LUCKNOW

Transfer Application No. 73 of 2011

Thursday, the 31st day of March, 2016

**(Reserved)
Court No. 1**

**“Hon’ble Mr. Justice Abdul Mateen, Member (J)
Hon’ble Lt. Gen. A.M. Verma, Member (A)”**

No. 15146452H Ex Gunner (Operator) Kamal Kishore Shukla, son of Shri Ramkishore Shukla, resident of village Dhandhi, Post Hardi, Tehsil Gurh, District Rewa (M.P.)

..... Petitioner/Applicant

By Shri Rohit Kumar, learned counsel for the applicant.

Versus

1. Union of India through Secretary, Ministry of Defence, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. General Officer Commanding-in-Chief, North East Command, Army Headquarters C/o 99 APO
4. Commanding Officer, 57, Field Regiment (Sittang Yenangy Aung), C/O 56 APO.
5. The Commandant, Headquarters Artillery Centre Nasik, P.O. Nasik Road Camp, Maharashtra.
6. Col. Ashwani Kapoor, Presiding Officer General Court Martial

.....Respondents.

By Shri Asheesh Agnihotri, Counsel for the Respondents alongwith Maj Soma John, Departmental Representative.

ORDER

1. Writ Petition No. 7314 of 2009 was received by this Tribunal from Hon'ble High Court of Madhya Pradesh at Jabalpur on 30.5.2011 and was renumbered as above.

2. The petitioner has sought the reliefs of quashing the order dated 29.4.2005, to reinstate the petitioner in service and any other relief deemed fit.

3. Brief facts of the case are that the petitioner was enrolled in the Army on 6.1.2001 and was thereafter posted to 57 Field Regiment. He absented himself without leave for 56 days with effect from 13.11.2004. Thereafter he absented himself without leave for 27 days from 13.1.2005 and again absented himself without leave from 14.2.2005 for a period of 27 days. He was tried for these offences by a Summary Court Martial held on 29.4.2005 on charges as follows:

“CHARGE SHEET

*The charge (s) against No. 15146452H Rank Gnr
(OPR) Name Kamal Kishor Shukla of HQ Bty/57 Field
Regiment (Sittang Yenangyaung):-*

FIRST
CHARGE

ARMY ACT
SECTION
39(a)

ABSENTING HIMSELF WITHOUT
LEAVE

In that he, at field, on 13 Nov 2004 at about 0800 hrs absenting himself without leave from unit location, till he voluntarily surrendered himself at Artillery Centre, Nasik Road Camp on 07 Jan 2005.

SECOND
CHARGE

ARMY ACT
SECTION
39(a)

ABSENTING HIMSELF WITHOUT
LEAVE

In that he, at Nasik Road Camp, on 13 Jan 2005 when dispatched by Artillery Centre, Nasik Road Camp to report to HQ 17 Mtn Arty Bde, failed to do so and absenting himself without leave till he voluntarily surrendered himself at Artillery Centre, Nasik Road Camp on 08 Feb 2005.

THIRD
CHARGE

ARMY ACT
SECTION
39(a)

ABSENTING HIMSELF WITHOUT
LEAVE

In that he, when dispatched by Artillery Centre, Nasik Road Camp on 14 Feb 2005 to report to 57 Fd Regt failed to do so and absenting himself without leave till he voluntarily rejoined the unit on 12 Mar 2005 at 1915 hrs.

Sd/ -

(Ashwani Kapoor)

Colonel

Commanding Officer”

Place: Field

Date : 29 Apr 2005

The punishment awarded to the petitioner by the SCM was dismissal from service.

4. The petitioner was represented by Shri Rohit Kumar, his learned counsel. He claims that his wife was in advanced stages of pregnancy and his son had died. His wife was mentally disturbed, because of which he absented himself without leave on many occasions. He was awarded punishment of 21 days' R.I on 22.9.2004 for being absent without leave. The petitioner states that he was given orders on 28.10.2004 to move to 57 Field Regiment. In the Unit i.,e. 57 Field Regiment, the Commanding Officer abused and slapped him and also took away his clothes. According to him, he stayed there without food and shelter for two days. He claims that he left the Unit on 13.11.2004 and went to Regimental Centre where he was not allowed to rejoin. Then he represented to the Commandant on 16.4.2004, following which an escort party was sent to bring him. On route, at Pipariya Railway Station, the petitioner claims, he got down to take water, during which the train moved out and he was unable to board the train. He came back home and then reported to his Unit on 12.3.2005. Thereafter disciplinary proceedings were initiated and he was dismissed from service with effect from 29.4.2005. The petitioner states that Army Rule 34 was violated.

5. The respondents were represented by Shri Asheesh Agnihotri, learned Standing Counsel, duly assisted by Maj Soma John, Departmental Representative. They state that this individual is a very bad case of indiscipline. He reported to 57 Field Regiment on 19.12.2001. On 25.1.2004 he was absent without leave for 2 days, for which he was awarded 14 days' pay fine. On 8.5.2004 he was again absent without leave for 82 days, for which punishment of 21 days' R.I was awarded to him. On 31.10.2004 he reported to 57 Field Regiment where he was advised by the Commanding Officer and the Subedar Major to mend his ways. Despite that he absented himself without leave on 13.11.2004 and reported to Artillery Centre Nasik on 7.1.2005. Artillery Centre Nasik dispatched him to Headquarters 17 Artillery Brigade on 13.1.2005 but the petitioner did not report to the Unit where he was sent and instead surrendered at the Regimental Centre on 8.2.2005 after an absence of 27 days. Thereafter while proceeding back to the Unit under an escort, he escaped on 19.2.2005 from Pipariya Railway Station and remained absent until he voluntarily reported to the Unit on 12.3.2005. When he reported to the Unit, he did not mention any fact of pregnancy of his wife, which appears to be an afterthought. He was a habitual offender. The SCM was conducted as provided for by law and there is no infirmity.

6. Heard both sides and examined the documents.

7. One of the principle points of challenge by the petitioner is that the provisions of Army Rule 34 had been violated, in that, he had not been given a copy of charge-sheet ninety-six hours in advance. Army Rule 34 reads as follows:

“34.Warning of accused for trial.- (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.

The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.”

8. Considering the history of the petitioner in a short span of just over four years, there is no doubt that he is a habitual offender and deserves appropriate punishment for the acts of absenting himself without leave several times. However, we have examined the procedural aspect of the case. There is a charge-sheet dated 14.3.2005, photo-copy of which has been produced by the petitioner. In the original file examined by us, there is no charge-sheet dated 14.3.2005. There is, however, a tentative charge-sheet dated 14.3.2005 which may have been suitably photocopied so as to read as charge-sheet. The charge under Army Rule 22 was heard by the Commanding Officer on 14.3.2005, during which he ordered the evidence to be recorded in writing. The Summary of Evidence was

recorded subsequent to 14.3.2005. In the original folder produced by the respondents before us, we find that there is a receipt signed by the petitioner dated 25.4.2005, according to which a copy of the tentative charge-sheet, copy of Summary of Evidence, copy of special order dated 22.4.2005 and another letter dated 24.4.2005 were handed over. There is no record in the original folder of any charge-sheet having been handed over to the petitioner. Only a tentative charge-sheet was handed over on 25.4.2004. The trial was held on 29.4.2004 on a charge-sheet which is dated 29.4.2005 and which is in the original folder. Thus, there is no evidence on record to indicate that the charge-sheet, on which the petitioner was tried by Summary Court Martial, was handed over to him ninety-six hours in advance, which is a clear violation of Army Rule 34. The Hon'ble Supreme Court in its judgment in the case of *Union of India and others versus A.K.Pandey*, reported in **(2009) 10 SCC 552**, has held that requirement of interval between accused being informed of charge for which he is to be tried and his arraignment shall not be less than ninety-six hours and non-compliance with this requirement will render the court-martial proceedings liable to be set aside. We, therefore, have no hesitation in holding that the trial of the applicant by Summary Court Martial on 29.4.2005 was illegal and deserves to be set aside.

9. Accordingly, this T.A is partly allowed. The trial of the applicant on 29.4.2005 by Summary Court Martial being illegal is hereby set aside. We direct the respondents to reinstate the petitioner in service w.e.f

29.4.2005 i.e. the date of his trial and punishment. We, however, clarify that the petitioner shall not be paid any salary for the period between 29.4.2005 and the date on which he is reinstated in service in compliance of this order. After reinstatement, the respondents are at liberty to initiate suitable legal action against the petitioner if considered appropriate. The respondents are directed to comply with this judgment/order within a period of three months from today. No order as to costs.

(Lt. Gen A.M. Verma)
Member (A)

(Justice Abdul Mateen)
Member (J)

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