

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**ORIGINAL APPLICATION No. 369 of 2018**

Thursday, this the 07th day of July, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

No. 15165704Y Gnr (GD) Rakesh Kumar son of late Ram Nagina, resident of village-Kuichawar (Chawani), post office-Naina, Tehsil-Salempur, District-Deoria Sadar (UP).

Learned counsel for the: **Shri Om Prakash Kushwaha**, Advocate
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Army Head Quarter, South Block, New Delhi.
3. The OIC, Arty Records, Nasik Road Camp, Nasik.
4. Commandant Officer, 133 Medium Regiment, C/o 56 APO.

.....Respondents

Learned counsel for the : **Shri RC Shukla**, Advocate
Respondents. Central Govt. Counsel

ORDER (Oral)

1. By means of this Original Application, the applicant has made the following prayers:-

(i) Set aside the impugned order dated 27.01.2017 passed by respondent No 2/Chief of the Army Staff, Army Head Quarter, South Block, New Delhi, contained as Annexure No 1.

(ii) Set aside the impugned order dated 27.04.2012 passed by respondent No 4/Commandant Officer, 133 Medium Regiment, C/o 56 APO, contained as Annexure No 2.

(iii) Issue order or direction to the respondents to reinstate the applicant in service in Army with all consequential benefits.

(iv) Allow the instant O.A. with costs.

2. In brief the facts of the case may be summarized as under:

The applicant was enrolled in the Indian Army on 07.07.2003 and was tried by Summary Court Martial (SCM) and dismissed from service on 27.04.2012. The applicant while attached with Headquarter 9 Corps was performing the duties of Guest Room Incharge, was granted 10 days casual leave from 07.01.2008 to 16.01.2008. After completion of the said leave he failed to rejoin the duty without any bonafide reason and overstayed leave. After 30 days of absence he was declared a deserter w.e.f. 17.01.2008 and the casualty was notified vide unit Part II Order dated 19.03.2008. He surrendered at Artillery Centre, Nasik Road Camp on 18.09.2008 after illegal absence of 256 days. He was tried by SCM and was awarded two months rigorous imprisonment in military custody w.e.f. 24.01.2009. In

the SCM trial he pleaded guilty and stated-'I have made a mistake and I will not commit any such mistake in future. I request you to permit me to continue my service in the Army'. Thereafter, having undergone the imprisonment he was despatched to 133 Medium Regiment on 27.03.2009 but the applicant did not report to his unit and once again illegally absented. After 30 days of absence he was again declared a deserter w.e.f. 28.03.2009 and casualty was notified vide Part-II Order dated 24.07.2009. After absence of 686 days he voluntarily reported to Artillery Centre, Nasik Road Camp on 11.02.2011. Accordingly, his SCM was held and he was dismissed from service w.e.f. 27.04.2012. After his dismissal he filed O.A. No. 408 of 2012 challenging the order of dismissal dated 27.04.2012. This O.A. was disposed of vide order dated 27.04.2015 with liberty to the applicant to prefer a petition before the Chief of the Army Staff under Section 164 (2) of the Army Act, 1950. Accordingly, the applicant preferred statutory petition dated 07.05.2015. During pendency of this statutory petition he filed M.A. No. 820 of 2016 with a prayer for issue of directions to the respondents to decide his statutory petition. His application was disposed of vide order dated 27.09.2016 directing the respondents to decide his statutory petition within four weeks. His statutory petition was rejected by Chief of the Army Staff vide order dated 27.01.2017. Against rejection of statutory petition the applicant has filed this O.A. praying for setting aside order

dated 27.01.2017 and order dated 27.04.2012 passed in SCM proceedings.

3. The applicant was charged as follows :-

CHARGE SHEET

The accused No.15165704Y Gunner (General Duty) Rakesh Kumar Ramnagina of 133 Medium Regiment, is charged with:-

First Charge

Army Act
Section 39 (I)

Deserting the Service

In that he at Nasik on 27 March, 2009 when dispatched by Artillery Centre to 133 Medium Regiment did not report for duty to unit but absented himself without leave till he voluntarily reported to Artillery Centre Nasik Road Camp on 11 February 2011 at 1030 hours.

Second Charge

Army Act
Section 39 (a)

Absenting himself without leave

In that he at Nasik, on 11 February 2011, when dispatched by Artillery Centre to report to 133 Medium Regiment, absented himself without leave until he voluntarily reported to the unit on 18 February 2011 at 1430 hours.

4. In the said SCM, prosecution witnesses were examined and the applicant was also examined. Finding the evidence to be sufficient, he was found guilty of all the charges and accordingly, the punishment of dismissal from service was passed against him. The finding and sentence was promulgated on the same day and countersigned on 12.05.2012 by Brigade Commander, 16 Artillery Brigade as per the provisions,

5. Learned counsel for the applicant submitted that after award of two months rigorous imprisonment at the Artillery Centre, Nasik Road Camp the applicant requested for leave because his wife was seriously ill but it was denied. He further submitted that when he was dispatched to his parent unit on 27.03.2009 he did not join the parent unit and went to his house for the sake of his wife. Thereafter, when his wife's condition became normal, he tried to report to his unit on 24.10.2010 and 25.11.2010 but he was not allowed to enter the unit. He further submitted that after issue of letter dated 11.02.2011 from Arty Centre, Nasik Road Camp he was allowed to surrender in 133 Medium Regiment and accordingly, he surrendered in the unit on 18.02.2011. His SCM was conducted and he was dismissed from service w.e.f. 27.04.2012.

6. Learned counsel for the applicant has raised certain legal questions in support of his arguments that the proceedings of SCM were void because the mandatory provision of Rule 22(1) of the Army Rules, 1954 was not followed. The submission of the learned counsel is that under Army Rule 22(1) it was legally necessary to record the statements of the prosecution witnesses in writing. The Commanding Officer being a quasi-judicial authority, is supposed to pass a speaking/reasoned order to exercise one of the options given to him in Army Rule 22(3).

7. Learned counsel for the applicant has further raised the issue of Rule 129 of the Army Rule, 1954 and submitted that he

was not provided with friend of accused during SCM proceedings. He further submitted that the applicant was not provided charge sheet and summary of evidence as per Rule 33 (7) and 34 of the Army Rules, 1954.

8. Learned counsel for the applicant has submitted that Army Rule 22, 129, 34 and 33 (7) have not been complied with but his main thrust is that Army Rule 22 (1) was not complied with which would render the SCM void.

9. Before proceeding further in this matter, we would like to quote Rule 22 of the Army Rules, 1954 which deals with the hearing of a charge by the Commanding Officer:-

"22. Hearing of Charge.

(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence: Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with: Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-

(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial: Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a

summary general court-martial for the trial of the alleged offender unless-

(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge."

10. It is, therefore, incumbent on all Commanding Officers proceeding to deal with a disciplinary case to ensure that "Hearing of Charge" enjoined by Army Rule 22 is scrupulously held in each and every case where the accused is a person other than an officer and also in case of an officer, if he so requires it. In case an accused officer does not require "Hearing of the Charge" to be held, the Commanding Officer may, at his discretion, proceed as described in Army Rule 22(2) or Army Rule 22(3).

11. It may be clarified that the charge at this stage is a 'Tentative' charge which may be modified after the hearing or during the procedure as described in Army Rule 22 (3) (c) or during examination after completion of the procedure under Army Rule 22(3) (c), depending upon the evidence adduced. Further, as long as the Commanding Officer hears sufficient evidence in support of the charge (s) to enable him to take action under sub-rules (2) and (3) of Army Rule 22, it is not necessary at this stage to hear all possible prosecution witnesses. As a matter of

abundant caution it would be desirable to have one or two independent witnesses during the hearing of the charge(s).

12. After the procedure laid down in Army Rule 22 has been duly followed, other steps as provided in Army rules 23 to 25, shall be followed both in letter and spirit. It may be clarified that the statutory requirements of Army Rules 22 to 25 cannot be dispensed with simply because the case had earlier been investigated by a court of Inquiry where the accused person might have been afforded full opportunity under Army Rule.

13. Learned counsel for the applicant in support of his argument has placed reliance on a judgment dated 03.04.2012 delivered by the AFT, Principal Bench, New Delhi in the case of Pradeep Kumar Singh. We have carefully examined the aforesaid judgment. In the facts of that case we find that the applicant had put in more than 18 years service and while availing leave he requested for extension of leave which when not granted, he overstayed leave on account of domestic compulsions and after approx 07 months he surrendered in the unit to which he was posted and punished accordingly. Therefore, the facts of this case are different with the case in hand. In this case the applicant was not on leave but while proceeding to his parent unit under the authority of movement order dated 27.03.2009 he deserted and surrendered after 686 days. The Commanding Officer had carried out hearing of charge of the applicant in accordance with Army Rule 22, provided opportunity to the applicant for his defence against the

offence for which he was tried. The charge against the applicant was read over and explained to him by the Commanding Officer and provided opportunity to cross examine the prosecution witness, make any statement in his defence and call any witness in his defence, which he declined. The hearing of charge was conducted in the presence of two independent witnesses. Therefore, there seems to be no procedural lapse in conduct of hearing of charge. On conclusion, the Commanding Officer ordered to record Summary of Evidence (S of E) with an aim to afford maximum opportunity to produce his defence in order to provide natural justice to the applicant. Thus, Army Rule 22 has been complied with.

14. Further, we find that since Capt K Surendra was provided by the Commanding Officer as a friend of accused as per Army Rule 129, submission of the applicant that Army Rule 129 has not been complied with, is not true. Applicant has also stated that he was not provided charge sheet and summary of evidence as per Army Rule 34. In this regard we find that the aforesaid documents were provided to the applicant on 23.04.2012 and a certificate was obtained from the applicant. The trial commenced on 27.04.2012 and concluded on the same day.

15. Before proceeding further, we would like to quote the pronouncement of Hon'ble Delhi High Court in the case of **Lance Dafedar Laxman Singh vs. Union of India & Ors.** (1992) SCC OnLine Del 371) in paras 9 and 10 as under :

"(9). The scope of investigation which is preliminary in nature to be conducted under the Army Rule 22 has strictly to be adhered to. The word 'Charge' came up for interpretation before the Division Bench of this Court in the case of *Ex Sappy Rajbir Singh Vs. Union of India & Ors.* in Crl.W. No.43/1985 decided on 27th May, 1988. It was pointed out that the word 'charge' referred to means a simple complaint or allegation against the soldier concerned. The rules lay down a clear distinction between the 'charge sheet' and the 'charge'. Charge has been defined in subrule (2) of Rule 28 under this very chapter. It reads as under:

(10) The "charge-sheet" has to be framed after the preliminary investigation during which the statements of the witnesses and the plea of the accused are not to be recorded in writing. However, the nature of the offence has to be made known to the accused and the witnesses are to be examined in support of those allegations in his presence. The accused has also to be given full liberty to cross examine those witnesses deposing against him. The Commanding officer after holding the preliminary investigation has been given three options in sub-rule (3) of Rule 22. If the Commanding officer is satisfied then the case should proceeded. He will adjourn it for purposes of having the evidence reduced into writing. The procedure for recording evidence is laid down in Army Rule 23.

16. The Hon'ble Apex Court in the case of **Prithi Pal Singh Bedi Lt. Col. Vs. Union of India**, AIR 1982 SC 1413 in para 37 has discussed the procedure laid down for conducting the Summary Court Martial, which is reproduced as under :-

"37. The submission is that before a general court martial is convened as provided in rule 37 it is obligatory for the commanding officer to hear the charge made against the accused in his presence giving an opportunity to the accused to cross examine any witness against him and to call any witness and make any statement in his defence and that if the commanding officer is so satisfied he can dismiss the charge as provided in sub-rule (2) of rule 22. If at the conclusion of the hearing under rule 22 the commanding officer is of the opinion that the charge ought to be proceeded with, he has four options open to him, one such being to adjourn the case for the purpose of having the evidence reduced to writing, called summary of evidence. Rule 23 prescribes the procedure for taking down the summary of evidence which, inter alia, provides recording of the evidence of each witness, opportunity to the accused to cross-examine each such witness, etc. Rule 24 provides that the summary of evidence so recorded shall be considered by the commanding officer who at that stage has again three courses open to him, to wit, (a) remand the accused for trial by a court-martial, (b) refer the - case to the proper superior

military authority; and (c) if he thinks it desirable, re-hear the case and either dismiss the charge or dispose - it of summarily.

17. Apart from it, in the case of **Major G.S. Sodhi vs. Union of India & Ors**, (1991) 2 SCC 382, the Hon'ble Supreme Court has considered Army Rule 22 and the other Rules. The relevant part of the said judgment reads as under:-

"6..... Rule 22 provides for the hearing of charges. Rule 23 lays down the procedure for taking down the summary of evidence. Rule 24 deals with remand of accused and lays down that the summary of evidence recorded under Rule 23 shall be considered by the Commanding Officer who thereupon shall either remand the accused for trial by a court-martial or refer the case to the proper superior military authority and if the accused is remanded for trial by a court-martial the commanding officer shall without unnecessary delay either assemble a summary court- martial or apply to the proper military authority to convene a court-martial. Rule 25 provides for the procedure to be followed on a charge against an officer. Rule 28 deals with framing of charges and lays down that the charge-sheet shall contain the whole issue or issues to be tried by a court-martial. Rule 33 deals with the defence by the accused personxxxxxx.

11. xxxxx Rule 22 contemplates that every charge against a person other than an officer, shall be heard in the presence of the accused, and the accused shall have full liberty to cross- examine any witness against him, and to call any witnesses and make any statement in his defence. Rule 25 lays down the procedure on a charge against officer and is to the effect that where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held, and the evidence be taken in his presence in writing, in the same manner as required by Rules 22 and 23xxxx."

18. The main ground raised on behalf of the applicant to show that the mandatory provision of Army Rule 22(1) was not complied with, is that it was not reduced into writing. In this regard we are of the considered view that there was no requirement that evidence under Army Rule 22(1) has to be reduced into writing as held by the Hon'ble Apex Court in the case of **Lt. Col. Prithi Pal Singh Bedi vs Union of India &**

others, 1982 AIR SC 1413, therefore, this ground of attack does not support the case of the applicant.

19. Thus, from the aforesaid there is no requirement of law that the evidence under Army Rule 22 (1) must be reduced into writing. This is the main ground of challenge of the learned counsel for the applicant. Applicant has fully participated in the proceedings. Even otherwise, Army Rule 22 (1) is only a pre-trial/investigation stage, therefore, keeping in view the pronouncement of Hon'ble Supreme Court that if there is sufficient evidence, then any irregularity in the pre-trial or the investigation stage becomes immaterial, this argument pales into significance.

20. Now we come to the other limb of the argument of the learned counsel for the applicant that the COAS has not applied his mind while rejecting appeal of the applicant. We have perused the order dated 27.01.2017 passed by the COAS and we find that while deciding his appeal the authority after taking note of every aspect has rejected his statutory appeal. For convenience sake paras 6 to 8 are reproduced as under:-

"6. And whereas, perusal of the SCM proceedings and connected documents reveal that :-

(a) In terms of Army Act Section 106, a Court of Inquiry (C of I) is required to be held when any person subject to Army Act has been absent from his duty without due authority for a period of thirty days. In the instant case, since the absence of the petitioner as averred in the second charge was less than 30 days, there was no occasion to hold a C of I for the said absence. A C of I with regard to his absence as

averred in the first charge was held in terms of Act Section 106, while he was absent.

(b) The Commanding Officer (CO) had heard three prosecution witnesses at the hearing of charge under Army Rule 22. The petitioner was afforded an opportunity to cross examine the prosecution witness, he however, declined to cross-examine them. The petitioner also declined to make a statement and did not produce any defence witness. Subsequently, at the Summary of Evidence (S of E), statements of four prosecution witnesses were recorded, whom the petitioner declined to cross examine. He however, made a statement, "I have made a mistake and accept that I am guilty. I should be excused. I will not repeat the mistake again". The petitioner has appended his signature underneath the statement of each witness and his own statement. Thus, the provisions of Army 22 and 23 were duly complied with.

(c) In the first instance, the petitioner absented himself without leave for a period of about two years from 27 March 2009 to 11 February 2011. Keeping in view the prolonged period of absence, he was rightly charged for 'deserting the service' under Army Act Section 38 (1). The unduly long period of absence of the petitioner showed his intention of not returning to the unit. Hence, the charge for 'deserting the service' was correctly framed. In the second instance, the petitioner on 11 Feb 2011, absented himself again and reported to the unit on 18 February 2011. The petitioner was accordingly charged for 'absenting himself without leave'. The judgment of AFT (PB), New Delhi dated 03 April 2012, in the case of Pradeep Kumar Singh vs The Chief of Army staff & Ors was rendered in altogether different set of circumstances and therefore, not applicable to the case of the petitioner.

(d) The contentions of the petitioner are unsubstantiated and appear to be afterthoughts. The records reveal that the petitioner had unequivocally pleaded guilty to the charges before the trial, he was handed over a copy each of the S of E and the Charge Sheet by an officer at 0830 hrs on 23 April 2012. A certificate duly signed by the petitioner and said officer is part of the record. Provisions of Army Rules 33 (7) and 34 were thus complied with.

(e) 133 Medium Regiment vide letter dated 20 April 2012, had asked the petitioner to give name of his choice to act as 'friend of accused', who was accordingly detailed. The friend of accused was present throughout the proceedings to assist the petitioner during the trial.

(f) Provisions of Army Rule 115 (2) were duly complied with. The certificate with regard to the compliance of Army Rule 115 (2), endorsed on page B of SCM proceedings bears the signature of friend of the accused as well as the petitioner. Further, when the petitioner was asked if he wishes to make any statement in reference to the charges or in mitigation of punishment, he stated, "I have done mistake and I want to serve in the Army". The contention of the petitioner is, therefore incorrect.

(g) Petitioner was never forced at any point of time to give confessional statement. The petitioner had unequivocally pleaded 'Guilty' to the charges. He has appended his signature underneath the certificate regarding compliance of the provisions of Army Rule 115 (2). Even in his statement in mitigation, he had stated, "I have done mistake and I want to serve in the Army". That being the case, no statement as such has been made by the petitioner under duress.

7. And whereas, the SCM proceedings were conducted in accordance with the provisions of Army Act, 1950 and the rules made thereunder. The sentence 'to be dismissed from the service' awarded to the petitioner by the court, in view of the gravity of the offences committed by him, and his previous conviction, is just and legal and does not call for any interference.

8. Now therefore, considering the case in its entirety, I reject the petition dated 07 May 2015, submitted by Number 15165704Y Ex Gunner (General Duty) Rakesh Kumar Ramnagina, as it lacks merit and substance."

21. The evidence led by the prosecution, was fully proved and there was sufficient evidence in support of the charge with regard to desertion for approx 02 years.

22. We further take a note that while rejecting applicant's appeal dated 07.05.2015, the COAS passed order dated 27.01.2017 vide which his appeal was rejected by speaking and reasoned order.

23. In view of the above discussions, we do not find any procedural illegality or irregularity in conducting the SCM and findings recorded on the basis of the evidence are also in

accordance with the rules. Also, order dated 27.01.2017 passed by the COAS is speaking and reasoned based on the fact that the applicant deserted from service for approx 02 years and pleaded guilty. In our considered opinion the applicant is a habitual offender and needs no sympathy.

25. In view of the discussions made above, we do not find any merit in the present O.A.

26. Thus, this O.A. lacks merit, deserves to be dismissed and is hereby **dismissed**.

27. Pending application (s), if any, stands disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 07.07.2022
rathore