

RESERVED
Court No.2

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Transferred Application No. 72 of 2012

Thursday, this the 01st day of December 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

6921699 Y (Ex.) Nk Dvr/MT Ugra Sen Singh S/O Late Shri Ram Singh, R/O Husepur, P.O. Patti Tanda Kala, District:Chandauli.

.....Petitioner

Ld. Counsel for : **Shri V.P. Pandey, Advocate**
the Petitioner

Versus

1. Union of India Through The Secretary, Ministry of Defence, South Block, DHQ PO New Delhi-110011.
2. The Chief of the Army Staff, Integrated HQ of Ministry of Defence (Army), New Delhi-110011.
3. Commanding Officer, 12 RAPID ORD UNIT, C/O 56 APO.

.....Respondents

Ld. Counsel for the Respondents : **Dr. Shesh Narain Pandey,**
Central Govt. Counsel assisted by
Maj Soma John, OIC Legal Cell.

ORDER**“Per Air Marshal Anil Chopra, Member (A)”**

1. Being aggrieved with the order of reduction in rank and dismissal from service dated 26.05.2003 and order passed by Chief of the Army Staff in exercise of appellate jurisdiction dated 28.08.2008 rejecting the statutory complaint of the petitioner, the petitioner approached the Principal Bench of Armed Forces Tribunal at New Delhi by preferring O.A. No. 355 of 2010 under Section 15 of the Armed Forces Tribunal Act, 2007 which has been transferred to this Tribunal vide order dated 21.08.2012 of the Chairperson, Armed Forces Tribunal, Principal Bench, New Delhi and renumbered as T.A. No. 72 of 2012.
2. Earlier the petitioner had also filed Writ Petition No 52518 of 2006 before the High Court of Judicature at Allahabad which was dismissed for want of jurisdiction
3. We have heard Ld. Counsel for the parties and perused the records.
4. Brief facts giving rise to the present T.A. are that the petitioner was recruited in the Indian Army in the year 1984 and while posted to 12 RAPID Ord Unit as Nk/Dvr (Military Transport) was granted 20 days leave for the period from 14.05.2001 to 03.06.2001. After expiry of leave, the petitioner was to join his unit on 03.06.2001 but without any intimation he absented himself. The next of kin of petitioner was informed vide telegram No 5001/LVE/Est dated 04.06.2001 to intimate the petitioner to

join duties but without any result. Subsequently after absence of 01 year, 06 months and 28 days, the petitioner reported at Army Ord Corps Centre, Secunderabad on 27.12.2002. Court of inquiry dated 16.07.2001 was ordered to enquire into the circumstances under which petitioner overstayed leave from 03.06.2001. Consequently, the petitioner was declared a deserter.

5. The petitioner had earlier been awarded five punishments including four red ink entries for acts of indiscipline. The details re reproduced below:

S. No.	Army	Nature of offence	Punishment awarded	Name of Unit
(a)	39(b)	Over Staying leave from 15 Feb 1990 to 17 Feb 1990	7 days R.I. Imprisonment in Military Custody	24 FAD
(b)	39(b)	Over Staying Leave from 21 Nov to 25 Dec 1994	14 days Pay Fine and 07 days extra duty	5 FOD
(c)	39(b)	Over Staying Leave from 21 Jun to 25 Aug 1996	28 days R.I. Imprisonment (Punishment remitted by 4 days)	21 FAD
(e)	5 FOD	Over Staying leave from 01 Jun to 23 Aug 1996	Severe Reprimand	21 FAD

6. Summary of Evidence was recorded on 16.05.2003. Copy of the summary of evidence and charge sheet was provided to the petitioner with an open right to ask for any person as "Friend of the Accused". Convening of Court Martial proceeding was ordered vide order dated 20.05.2003. On 26.05.2003 Summary

Court Martial commenced its proceedings at 11.00 hours wherein the applicant is said to have pleaded guilty of charge. Based on that, the petitioner was awarded punishments of : (i) reduction in rank, and (ii) dismissal from service.

7. The petitioner feeling aggrieved submitted statutory petition dated 02.07.2003. It appears that the statutory petition of the petitioner remained pending as such again a statutory petition under Section 164 (2) of the Army Act, 1950 was preferred by the petitioner dated 31.07.2007 before the Chief of the Army staff for setting aside the findings and sentence of the General Court Martial held on 26.05.2003.

8. The Chief of Army Staff rejected the petition submitted by the petitioner on 28.08.2008 with due communication to the petitioner.

9. The respondents filed a counter affidavit to the Transferred Application, but the petitioner did not file rejoinder affidavit to the counter affidavit. In the Transferred Application and the written arguments the petitioner has taken the following grounds to assail the impugned order of reduction in rank and dismissal from service:

- (i) There was non compliance of statutory provisions of Rule 115 (2) of the Army Rules, 1954. The ground raised by the petitioner is that the general plea of 'guilty' or 'not guilty' was not recorded within the four corners of Rule 115 (2)

(supra) inasmuch as the petitioner was not read over the consequences of pleading guilty;

- (ii) petitioner was not given proper notice as prescribed in Rule 34 (1) of the Army Rules, 1954 inasmuch as petitioner was served with summary of evidence and charge sheet on 25.05.2003 and the Summary Court Martial proceedings took place at 1100 hrs on 26.05.2003, as such there was infraction of Section 34 (1) of Army Rules, 1954 which mandatorily provides for interval of ninety six hours between serving of summary of evidence and charge sheet and convening Summary Court Martial;
- (iii) petitioner was not afforded opportunity to take legal assistance from friend of accused or cross examine the witnesses during summary of evidence;
- (iv) the Summary Court Martial commenced at 1100 hrs and closed at 1300 hrs i.e. within one hour and thirty five minutes; and
- (v) no inquiry was conducted as envisaged under Section 106 of the Army Act, 1950 by the Commanding Officer.

10. The moot question for adjudication in this petition is : has the provision in Rule 34 (1) of the Army Rules, 1954 that the interval between the accused being informed of charge for which he is to be tried and his arraignment shall not be less than ninety-six hours mandatory, been not complied with?

11. The Army Rules, 1954 contains a procedure with regard to service of summary of evidence and charge sheet. For convenience sake, Rule 34 of the Rules, 1954 is reproduced as under:

“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 is on active service less than twenty-four hours.*

(2) *The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.*

(3) *The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in court-martial other than summary courts-martial.*

(4) *If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with his rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced.*

(Emphasis supplied)

12. In view of Rule 34 (1) of the Army Rules, 1954 the interval between the accused is charge sheeted and arraigned shall not be less than ninety six hours or where the accused is on active service less than twenty four hours. Active service has been defined in Section 3 (i) of the Army Act, 1954, which is reproduced as under:

“active service” as applied to a person subject to this Act, means the time during which such person—

(a) is attached to, or forms part of, a force which is engaged in operation against any enemy, or

(b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to or forms part of a force which is in military occupation of a foreign country;”

Admittedly, the petitioner at the time of his arraignment and Summary Court Martial proceedings was not on active service.

13. The averments made in the T.A. with regard to non compliance of provision of Section 34 (1) of the Army Rule, 1954 are made in para 4 (F) which for convenience sake is reproduced as under :-

“The petitioner was dismissed from the service on account of sentence awarded by the respondents on the charge made against him under Section 39 (b) of the Army

Act. Before dismissing from the service he was at first demoted to lower rank prior to issuance of charge sheet a summary evidence was recorded by the army officials with regard to the charge and on the basis of summary evidence the commanding officer had ordered convening of summary court martial on 26.05.2003 for which the orders were allegedly passed on 20.05.2003 but received on the evening of 25.05.2003.”

14. Reply to para 4 (F) of the T.A. given by the respondents is contained in para 17 of the counter affidavit which may be reproduced as under :-

*“17. That the contents of paragraph-4 (F) of instant OA are incorrect, hence denied. A copy of summary of evidence and charge sheet was handed over to the petitioner dated **on 26 May 2003** but the petitioner did not preferred as he himself accepted the charge labelled against him during summary Court Martial trials...”*

15. The respondents have brought on record as Annexure CA-3 letter dated 20.05.2003; an intimation to the petitioner of his trial by the Summary Court Martial on 26.05.2003. This letter mentions that copy of Summary of Evidence and charge sheet is enclosed. However, the respondents could not bring on record any document which would evidence that letter dated 20.05.2003 was served on the petitioner on 20.05.2003 or any subsequent date. As such, it would not amount to serving copy of the Summary of Evidence and charge sheet on the petitioner and cannot be taken note of by the Tribunal.

16. Thus, there is no dispute that the Summary of Evidence and charge sheet was served on the petitioner either on 25.05.2003 (as per pleadings of Para 4 (F) of the T.A.) or on 26.05.2023 (as per pleadings of the counter affidavit made in para 17.

17. In the Apex Court decision in the case ***Union of India (UOI) and Ors vs. A. K. Pandey***, MANU/SC/1665/2009: 2010 (3) AWC 2359 (SC) followed by another judgment of this Bench in O.A. No 239 (A) of 2014 ***LNK Chet Bahadur Khadka vs. Chief of Army Staff & Ors*** decided on 26.08.2016 the Apex Court has enunciated the proposition of law that non observance of mandatory provision of Rule 34 (1) of the Army Rules, 1954 would vitiate the entire Summary Court Martial proceedings ab initio.

18. In the case ***Union of India (UOI) and Ors vs. A.K. Pandey*** (supra), wherein Section 108 of the Company's Act 1956 was dealt with in the case of ***Mannalal Khetan and Ors vs. Kedar Nath Khetan and Ors***, (1977) 2 SCC 424, their Lordships of the Supreme Court held that the provision providing minimum period during course of proceeding is mandatory. In ***Union of India (UOI) and Ors vs. A.K. Pandey*** (supra) their Lordships of the Supreme Court held as under :-

“22. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such. There being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours interval between the accused being charged for which he is to be tried and his arraignment and interval time in Rule 34 must be read absolute. There is a purpose

behind this provision: that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours. A trial before General Court Martial entails grave consequences. The accused may be sentenced to suffer imprisonment. He may be dismissed from service. The consequences that may follow from non-observance of the time interval provided in Rule 34 being grave and severe, we hold, as it must be, that the said provision is absolute and mandatory. If the interval period provided in Rule 34 is held to be directory and its strict observance is not insisted upon, in a given case, an accused may be called upon for trial before General Court Martial no sooner charge/charges for which he is to be tried are served. Surely, that is not the intention; the timeframe provided in Rule 34 has definite purpose and object and must be strictly observed. Its non-observance vitiates the entire proceedings.

19. In view of settled proposition of law, considering the averments made in the T.A. that Summary of Evidence and charge sheet was served on the petitioner on 25.05.2003 (or 26.05.2003 as per pleadings made in the counter affidavit) and Summary Court Martial commenced at 1100 hrs on 26.05.2003, i.e. within 19 hours, no clear 96 hours time was provided to the petitioner to submit reply to the charge sheet, the entire subsequent proceeding vitiates along with order of punishment awarded to the petitioner. It is apposite to mention that even in the order Chief of the Army Staff while rejecting the statutory complaint of the petitioner

preferred under Section 164 (2) of the Army Act, 1950 dated 28.08.2008 the Chief of the Army Staff has mentioned that the petitioner was informed of his trial by Summary Court Martial on 26.05.2003. Relevant portion of order of the Chief of the Army Staff dated 28.08.2008 is reproduced as under:-

“.....12 RAPID Ordnance Unit letter No PC/6921699/USS/Est dated 20 May 2003 which has also been signed by the petitioner in the presence of two witnesses, reveals that he was given a copy each of charge sheet and summary of evidence and was also informed of his trial by Summary Court Martial on 26 May 2003.....”

20. Since we have held that the Summary Court Martial proceedings were held in utter violation of provisions of Rule 34 (1) of the Army Rule 1954, we do not wish record findings on other grounds espoused by the petitioner. It may also be observed that since the respondents in reply to para 4 (F) of the T.A. have pleaded in the counter affidavit that Summary of Evidence and charge sheet was served on the petitioner on 26.05.2003, the necessity of filing of rejoinder affidavit contradicting the averments made in the counter affidavit so far as they relate to the grounds mentioned above, is dispensed with.

21. The respondents have come with a specific case in the supplementary counter affidavit that the petitioner was having antecedents not expected of Army personnel. He was earlier awarded five punishments including four red ink entries (supra) for his indiscipline act and slackness of duty. These averments have not been negated by the petitioner.

22. In view of our observations made hereinabove, the T.A. deserves to be allowed; hence **allowed**. The impugned order of dismissal of the petitioner dated 26.05.2005 and order dated 28.08.2008 passed by Chief of the Army Staff rejecting the Statutory Complaint preferred by the petitioner are hereby set aside with all consequential benefits. However keeping in view the gravity of charges we decline to grant back wages but provide continuity of service with post retiral service benefits to the petitioner treating him to have served to the full length of rank and status. Let service benefits be provided to the petitioner within four months from the date of production of a certified copy of this order.

23. T. A. is **allowed** accordingly.

No order to costs.

(Air Marshal Anil Chopra)
Member (A)

anb
01.12.2016

(Justice D.P. Singh)
Member (J)