

Court No.2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 213 of 2010

Friday this the 1st day of December, 2017

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

Hon'ble Lt Gen Gyan Bhushan, Member (A)

Ex-Sepoy Shriman Narayan (No. 4272592N)
of 4 Bihar Regiment,
Son of Shri Shrawan Kumar,
Permanent resident of Village & Post Office – Noawan,
Tehsil – Jehanabad, District – Jehanabad (Bihar)
Presently residing at Devi Khera, Telibagh,
Lucknow – 226002 (UP)

..... **Applicant**

Versus

1. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence, South Block, New Delhi - 110011.
2. Commandant, Bihar Regimental Centre, Danapur, Patna.
3. Commanding Officer, Administrative Battalion, 04 Battalion of The Bihar Regiment, C/o 56 APO.
4. Commanding Officer, 04 Battalion of The Bihar Regiment, c/o 56 APO.

..... **Respondents**

Ld. Counsel appeared for the Applicant	-	Shri P.N. Chaturvedi Advocate
Ld. Counsel appeared for the Respondents	-	Shri Namit Sharma Central Government Counsel

ORDER**“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”**

1. The instant Original Application has been filed on behalf of the applicant under Section 15 of the Armed Forces Tribunal Act, 2007. The applicant has made the prayer for the following reliefs :-

“(a) Issue/pass an order or direction of appropriate nature to the respondents to quash/set-aside the SCM proceedings held on 18.09.008 being per se illegal, arbitrary and capricious in nature.

(b) Issue/pass an order or direction to the respondents to give him all the consequential benefits including the pay and allowances with effect from 18.09.2008, the day he was illegally dismissed from service by the SCM.

(c) Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.

(d) Allow this application with costs.”

2. Learned counsel for the parties were heard and original documents were also produced before us during hearing. Case of the applicant is that he was enrolled in the Army on 28.12.1994. During service in the year 2006, he was granted 30 days part of annual leave from 10.09.2006 to 09.10.2006. Submission is that it was misfortune of the applicant that he fell seriously ill and suffered from mental illness. Under such circumstances he was taken to the psychiatrist namely Dr. B.P. Sinha, Neuro Psychiatrist, Mental Hospital, Ranchi and Shri Mahendra Kumar Sharma, Physician and Surgeon. The family members of the applicant were not educated and they were not aware as to in which hospital he had to be admitted, so he was admitted in a private hospital. When he was declared fit by the treating doctor then he voluntarily reported at The Bihar Regimental Centre at Danapur at 0600 hrs on 25.08.2008. He had presented the medical certificate to the authorities and requested them that he should be

permitted to join the service. No heed was paid on his request and he was told that the disciplinary action would be taken against him. Consequent to that, he was given a Tentative Charge Sheet dated 03.09.2008. Summary of Evidence was recorded wherein the applicant disclosed the heart ailment of his wife and also informed that he was upset and depressed due to the medical problem of his wife. These facts, as per the averment of the O.A. were communicated to the officer recording Summary of Evidence but he did not record the facts properly and refused to receive the certificates from the doctors and the applicant was asked to append his signatures on the recorded statement in English. Thereafter Charge Sheet was given to the applicant under Section 38(1) of Army Act and after completing the SCM, the applicant was dismissed from service w.e.f. 18.09.2008.

3. The submission of the learned counsel for the applicant is that the charge framed against the applicant was under wrong section. There was violation of Army Rule 34 (2). No receipt was prepared about the medical certificate of the mental illness of the applicant and that was also not taken on record. There was no compliance of Army Rule 115 (2).

4. **Per contra**, learned counsel for the respondents has argued that the defence taken by the applicant is false. He had taken his treatment in a private hospital in Ranchi while there is a high standard hospital of the Army with facility for the treatment of mental illness in Danapur which is situated at a very short distance from his home town. The applicant could not file any document showing that he suffered from any mental illness. It has also been argued that wrong mentioning of section in the Charge Sheet is of no consequence. It has also been argued that the applicant is a habitual absentee and during his service, he has committed seven such offences for which he was punished every time. It is submitted that the applicant has over stayed leave for 685 days and

no valid cause, reason or explanation for such a long absence could be furnished by the applicant.

5. Alternatively, learned counsel for the applicant has prayed that the sentence awarded to the applicant was disproportionate to the mistake committed by him keeping in view his illness.

6. A great emphasis has been laid by the learned counsel for the applicant on Charge Sheet which has been framed under Section 38 (1) of the Army Act. It is submitted that charge must have been framed under Section 39(b) of Army Act. The Charge Sheet given to the applicant which has been filed as Annexure 2 of the Original Application is reproduced as under :-

*“Annexure I
Refer to Para 1 of
Appendix ‘A’ to AO 24/04)*

CHARGE SHEET

The accused, Number 4272592N Sep Shreman Narayan of 4 BIHAR attached to Duty Company, Administrative Battalion, The Bihar Regimental Centre, Danapur Cantt is charged with :-

*Army Act
Section 38 (1)*

DESERTING THE SERVICE

In that, he,

At peace, on 10 Oct 2006, having been granted 30 days part of annual leave from 10 Sep 2006 to 09 Oct 2006 enroute on being RTU to parent unit (4 BIHAR), did not rejoin duty on expiry of said leave, till he surrendered voluntarily at The Bihar Regimental Centre, Danapur Cantonment on 25 Aug 2008 at 0600 hours.

Station : Danapur Cantonment

(Santosh Kumar Prusty)

Colonel

Dated : 13 Sep 2008

Administrative Battalion

Commander

The Bihar Regimental Centre”

7. A perusal of the Charge Sheet makes it clear that at the left side of the charge sheet Section 38(1) is written and heading is

“DESERTING THE SERVICE”. However, the words used to explain the charge which the applicant has faced does not mention about desertion. Words used in the charge sheet are very clear and specifically mention only about over staying leave and not for desertion. It is true that once a person surrenders in the Centre then the charge for desertion can not to be framed. The correct section which should have been mentioned in the charge sheet is Section 39 (b) of the Army Act. Now the question that arises for our consideration is as to what would be the effect of such wrong mentioning of Section in the charge sheet. Keeping in view the language used in the charge sheet, it is clear that no charge of desertion was framed, nor the language used in charge is misleading or confusing. Charge sheet conveyed the exact charge to the applicant which he had to face and i.e. over staying leave. Even in the The Code of Criminal Procedure, 1973, no error, mistake in the charge is considered to be fatal for the trial. We may like to reproduce Section 464 of The Code of Criminal Procedure, which reads as under :-

“464. Effect of omission of frame, or absence of, or error in , charge. – (1) No finding , sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may –

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit”

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

We are of the view that this argument of the learned counsel for the applicant has to be considered keeping in mind the same principle of law.

8. Apart from it, the mistake to quote wrong section has been considered by the Hon’ble Apex Court in several cases and the law is settled that an order does not become invalid only because it has been passed under a wrong section. Mere wrong mentioning of section would not invalidate the order which is otherwise within the power of the authority making it. Reference on this point may be made to pronouncement of the Hon’ble Apex Court in the case of **Ram Sunder Ram vs. Union of India and others 2007 (9) SCALE Page 197** and **Mani vs. Sangita Theater and others 2004 (12) SCC Page 278**. Therefore simply because Section 38 (1) has been mentioned at the left side of the charge sheet instead of 39 (b) would not render the entire proceedings invalid unless and until the accused satisfies the Tribunal that language of the charge was so confusing that he was unable to understand as to what charge he has to defend. In the facts of this case language used in the charge sheet is very clear that he has not reported to duty even after expiry of the sanctioned leave on 09.10.2006 and he surrendered on 25.08.2008. Thus keeping in view the aforesaid legal position and the facts of the present case, we are of the view that wrong mentioning of the section 38 (1) of the Army Act in the charge sheet has not caused any prejudice to the applicant and therefore this argument is of no help to the applicant.

9. The next argument of the learned counsel for the applicant is that there was violation of Army Rule 34. Army Rule 34 reads 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 person 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 names, also of those officers in courts-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 this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced.”

10. The submission is that after giving Charge Sheet, there should be a gap of 96 hours in holding Summary Court Martial proceedings and it has not been done in the facts of the instant case. Learned counsel for the respondents on the basis of original record has argued that this contention of the applicant is not correct. We have examined the original record in this regard during course of hearing. The Charge Sheet was prepared on

13.09.2008 and Summary Court Martial was commenced on 18.09.2008 and was finalised on the same day. So, there was a gap of about five days which is more than 98 hours. The perusal of the original records shows that Maj Rajat Tripathi, a Company Commander was appointed as friend of the accused who has defended the applicant during SCM. This point was not raised during SCM by the friend of the accused also. The Battalion Commander ordered for the recording of the Summary of Evidence on 10.09.2008. The applicant has signed the certificate which reads as under :-

“I, Number 4272592N Sepoy Shriman Narayan have been explained charge against me. I have also been explained my rights as the accused as mentioned in the Army Rule 23 and 33 notes thereto. I have also been shown the order of the Administrative Battalion Commander, The Bihar Regimental Centre dated 03.09.2008 for recording of Summary of Evidence.”

11. It is true that this certificate was given regarding Summary of Evidence. There is another order dated 13.09.2008 whereby the list of the witnesses to be examined in the SCM proceedings has been given to the applicant which has been signed by him. There is also a receipt signed by the applicant that along with other papers he received the charge sheet on 13.09.2008. Therefore the submission of the learned counsel for the applicant that a separate receipt for receiving the Charge Sheet has not been filed or has not been signed loses its value because the applicant has signed such receipt on 13.09.2008. In view of this, the submission of the learned counsel for the applicant that Army Rule 34 was not complied with becomes devoid of merit.

12. The next submission of the learned counsel for the applicant is regarding violation of the Army Rule 115 which is to be followed after recording plea of the guilty. Submission of the

learned counsel for the respondents is that due procedure has been followed. We have also examined the original record during hearing from this angle also.

13. SCM proceedings are conducted on prescribed printed proforma. The accused was questioned as per proforma to make any submission. Applicant has pleaded guilty.

14. Before recording the plea of the guilty by the applicant, Col SK Prusty, Commanding Officer has ensured the compliance of Army Rule 115 and has issued following certificate :-

“Before recording the plea of the guilty of the accused, the Court explained to the accused the meaning of the charge(s) to which he had pleaded guilty and ascertained that the accused had understood the nature of the charge to which the accused general effect of the plea and deference in procedure, which will be followed consequent to the said plea. The court having been satisfied itself that the accused understands the charge and the effect of his plea of guilty, accepts and records the same. The provisions of Rule 115 (2) are thus complied with.”

15. This certificate which has been signed by the applicant himself is contrary to the submission of the learned counsel for the applicant. We are of the view that provisions of Rule 115 (2) were fully complied with.

16. The charge against the applicant was that he over stayed leave for 685 days, i.e. about two years. He has taken the plea in his Original Application that his wife was ill and subsequently he also fell ill but his such plea is nowhere supported with any medical documents. It is pertinent to mention that in the Summary of Evidence, the statement of the applicant was recorded on 10.09.2008 and copy of the same has been annexed by the applicant alongwith his Original Application wherein he has given following statement :-

“Statement of the Accused

6. No 4272592N Sepoy Shreman Narayan of 4 BIHAR attached with Duty Company Administrative battalion The Bihar Regimental Centre states as under :-

“I, No 4272592N Sepoy Shreman Narayan of 4 BIHAR was enrolled in the Indian Army on 28 December 1994. After my recruit training, I was posted to 4 BIHAR presently located at Poonch sector (J&K). I was attached with The Bihar Regiment Centre and returned to unit on completion of attachment period wef 10 Sep 2006. I was granted 30 days part of Annual Leave from 10 Sep 2006 to 09 Oct 2006 enroute on being RTU from The Bihar Regt Centre to 4 BIHAR. My wife is a heart patient and during my leave her condition became critical. I admitted here in Command Hospital, Kolkata for medical treatment. After 15 days of treatment my wife discharged from hospital and I took her to my native place. Her condition was not well and no one was there who could look after my wife and children. I got upset and felt depressed due to medical problem of my wife. I could not rejoin my duty due to family problems and continued to stay at my home to look after my children and family. When the condition of my family became stable then I approached the Commanding Officer of my unit 4 BIHAR but he told me that you have absented for more than three months so you can report to The Bihar Regiment Centre. I surrendered at Bihar Regimental Centre on 25 August 2008 and thereafter I have been staying in the Duty Company lines in the Bihar Regimental Centre.

The accused declines to call any witness in his defence at this stage.

The above statement has been read over to the individual in the language he understands and he signs it as correct.

Sd/ x x x x x x
No 4272592N Sepoy
Shreman Narayan
Accused
Dated : 10 Sep 2008

Sd/ x x x x x x
JC-559136K Subedar
Leonard Mengra
independent Witness
Dated : 10 Sep 2008”

17. It is pertinent to mention herein that in his statement he has no where stated that at any point of time he was suffering from mental illness. Therefore, ground of the mental illness as a reason for over staying leave is only an after thought and does not inspire confidence.

18. Learned counsel for the respondents has also argued that the applicant has filed this O.A. without exhausting the statutory remedy. Admittedly the applicant has not preferred any petition under section 164 (2) of the Army Act. Submission of the learned counsel for the respondents is that on this very ground the O.A. should be dismissed.

19. In this case the applicant has been punished on his plea of guilty which was recorded after duly warning him and the applicant in his statement during Summary of Evidence has not taken his own illness as a ground for his over staying leave for 685 days, we, as discussed above do not find any procedural illegality in conducting the Summary Court Martial. Keeping in view the previous conduct of the applicant (seven punishments), the punishment awarded to the applicant cannot be said to be disproportionate or shocking the conscience of the court.

20. We do not find any substance in this Original Application. It deserves to be dismissed and is hereby **dismissed**.

(Lt Gen Gyan Bhushan)
Member (A)

Dated : December, 2017
SB

(Justice S.V.S. Rathore)
Member (J)