

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

**RESERVE
(Court No. 2)**

Original Application No. 47 of 2014

Wednesday, this the 23rd day of November, 2016

**“Hon’ble Mr. Justice D.P. Singh, Member (J)
Hon’ble Air Marshal Anil Chopra, Member (A)”**

Army No 3192522L Sep Hardev Singh 9 JAT Battalion (The Jat Regiment) Resident of Vill-Abhedipura, PO-Kirwali, Distt-Agra (UP).

.....Applicant

By Shri Ashok Kumar, counsel for the applicant.

Versus

1. Union of India Through Secretary Ministry of Defence, South Block, New Delhi.
2. Chief of the Army Staff, Army Headquarters Integrated Headquarters, New Delhi-110011.
3. Commandant-cum-Chief Records Officers, JAT Regimental Centre & Records, Bareilly.
4. Commanding Officer, 9 JAT Battalion, 99 APO.

.....Respondents.

**By Shri Amit Sharma duly assisted by Major Soma John,
Departmental Representative.**

ORDER**“Per Air Marshal Anil Chopra, Member ‘A’**

1. Being Aggrieved with the impugned order of dismissal dated 22.09.2012 passed in Summary Court Martial (SCM) proceeding by Commanding Officer, 9 JAT Battalion, Meerut Cantt, the applicant had approached this Tribunal under Section, 14 of the Armed Forces Tribunal Act, 2007.
2. We have heard Ld. Counsel for the parties and carefully perused the records.
3. The applicant was enrolled in the Indian Army in JAT Regiment on 25.01.1999. While serving in 45 RR Battalion then located in Jammu & Kashmir, on 06.05.2002 he was granted leave for 10 days which was to expire on 15.05.2002. He fell prey to “Jahar Khurani Expert” and reportedly suffered loss of memory and was loitering and was found in shattered health with torn cloths in Mathura/Vrindaban area in March 2006. After being brought home by some family friend, he was found suffering from Bypolar Mood Disorder and was treated at Mansik Rog Vikar Kendra. The applicant had failed to join his duty on expiry of sanctioned leave. The case of the applicant is that after being declared fit on 24.02.2007 he reported for duty but was not allowed to join duties. On 07.03.2007 the applicant submitted a statutory petition. Subsequently the applicant

preferred Writ Petition No 39063 of 2007 in the High Court of Judicature at Allahabad. On establishment of the Tribunal the petition was transferred to this Tribunal and re-numbered as T.A. No. 1113 of 2010. The T.A. was disposed of vide order dated 28.09.2010 with direction to respondent No 2 to the T.A. to dispose of applicant's statutory complaint. The applicant surrendered as a deserter at the JAT Regiment Centre on 08.12.2010 after eight years and seven months and was taken on strength with effect from 09.12.2010. Court of inquiry proceedings were initiated in connection with his overstayal of leave. On 14.09.2011 evidence was directed to be reduced in writing. However on 31.01.2012 hearing of charge was cancelled. On 08.02.2012 the Commanding Officer of 9 JAT Battalion directed for initiating Summary Court Martial proceedings. The applicant preferred O. A. No. 200 of 2012 which was dismissed as withdrawn with liberty to the applicant to file afresh vide order dated 30.07.2013.

4. At this juncture it would be appropriate to notice that when the applicant proceeded on sanctioned leave, he was serving in active field area, though he surrendered in 9 JAT (peace area) and thus was not on active service at the time of trial in terms of Section 3 (i) of the Act. Thus, 96 hours minimum time gap was

mandatory between the communication of the charge sheet and the commencement of trial.

5. On 15.06.2012 summary of evidence was recorded. Summary Court Martial was convened and commenced on 20.09.2012 and ultimately the applicant was dismissed from service on 22.09.2012.

6. The applicant preferred statutory representation against the findings and sentence awarded to him by Summary Court Martial to the Chief of the Army Staff which was rejected on 30.12.2014 by speaking and reasoned order. The order was duly communicated to the applicant vide communication dated 02.01.2015 (Annexure No B-1 to the amendment application).

7. The first limb of arguments advanced by Ld. Counsel for the applicant is that the applicant was not afforded reasonable opportunity to defend his cause. In para 16 of the counter affidavit the respondents have explicitly denied the averments made in para 1.4 of the O.A. and it is submitted that the applicant was given full opportunity to defend his cause in compliance of Army Rules. For convenience sake para 16 of the counter affidavit is reproduced as under:-

“16. That the contents of para 1.4 of the original application are incorrect hence denied. It is submitted that the applicant was given full opportunity as per army rule. In this

connection following letters are relevant for kind perusal for this Hon'ble Court:

(i) 9 JAT letter no. 3192522/A dated 01.09.2012 regarding nomination of friend of accused.

(ii) Letter dated 01.09.2012 received from the applicant regarding calling of defence witnesses.

(iii) Letter dated 10.09.2012 received from the applicant regarding postponement of SCM proceeding.

(iv) 9 JAT letter no. 3192522/A dated 10.09.2012 regarding postponement of SCM proceeding upto 20.09.2012.

(v) Receipt of summary of evidence, Charge sheet, Special BRO part I order dated 01.09.2012.”

8. We have given our anxious consideration to the rival arguments advanced by Ld. Counsel for the parties. In para 1.4 of the O.A. the applicant has not mentioned any instance as to how he was denied reasonable opportunity to defend his cause. From the record it is evident that the applicant was informed in writing on 01.09.2012 to produce defence witness, copy of which was received by the applicant on 01.09.2012 itself. The applicant informed the Commanding Officer that one Shri Ashok Singh, Advocate be permitted to act as Friend of the Accused/Advisor. Yet again on 10.09.2012 the applicant moved

application for adjournment of Summary Court Martial on the ground that his Friend of the Accused would be available on 20.09.2012. The prayer of the applicant was granted on the condition that no further time would be granted. The applicant was afforded opportunity to engage a defence lawyer and the Summary Court Martial proceedings were also deferred on the asking of the applicant himself. Thus, we are of the opinion that the applicant was afforded reasonable opportunity to defend himself. The argument, thus, is not tenable and is accordingly rejected.

9. The second limb of submissions of Ld. Counsel for the applicant is that the impugned order of dismissal is violative of mandatory Rule 129 of the Army Rules, 1954. Submission is that the applicant was not provided the assistance of friend of the accused. For convenience sake Rule 129 of the Army Rules, 1954 is reproduced as under:-

*“129. **Friend of Accused.**-In any summary court-martial, an accused may have a person to assist him during the trial, whether a legal advisor or any other person. A person so assisting him may advise on all points and suggests the question to be put to witnesses, but shall not examine or cross-examine witnesses or address the court.”*

10. In this regard it would suffice to mention that the applicant has not made any such pleading in his O.A. The submission made by Ld. Counsel for the applicant on this count is not tenable since no pleading has been made by the applicant. In case the applicant suffered on account of any omission or commission on the part of respondents or non observance of any mandatory rule, he should have come with specific pleadings in the original application. Moreover, it has been explicitly submitted by Ld. Counsel for the respondents, which could not be repelled by Ld. Counsel for the applicant, that services of Lt Col D Moitra were provided to the applicant to act as Friend of the Accused. Thus, the foundation of argument of Ld. Counsel for the applicant falls and no indulgence may be granted to the applicant on this count.

11. The other limb of submissions of Ld. Counsel for the applicant is that in compliance of mandatory provisions of Rules 33 and 34 of the Army Rules, 1954 the applicant was not provided 96 hours interval between his being informed and his arraignment. Rules 34 of the Army Rules, 1954 contains a procedure with regard to service of charge sheet and further the time lag between his being so informed and his arraignment which shall not be less than ninety-six hours. 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.”

12. In view of Rule 34 (1) of the Army Rules, 1954 the interval between when the accused is charge sheeted and is arraigned shall not be less than ninety six hours or where the accused is on active service less than twenty four hours.

13. From the record it is borne out that the applicant was served with the summary of evidence and charge sheet on 01.09.2012 (vide Annexure-9 to the counter affidavit) and was tried by Summary Court Martial on 20.09.2012. Thus the intervening period from the date of receipt of summary of evidence and charge sheet by the applicant and convening of Summary Court Martial is eighteen days, i.e. more than 96 hours. This negates the submission of Ld. Counsel for the applicant that the order of dismissal deserves to be set aside on the ground of denial of 96 hours clear time to the applicant to defend his cause.

14. Reliance was placed by Ld. Counsel for the applicant on the Division Bench decision of Allahabad High Court in the case of ***Ram Parvesh Rai vs. Union of India and ors*** 1988 (I) UPLBEC 783. In the case of ***Ram Parvesh Rai*** (Supra) the petitioner was not handed over the summary of evidence and charge sheet 96 hours in advance. The charge sheet was drawn

on 23.3.1982 and the sentence was also passed on the same day. It was in this context that it was observed in the case of **Ram Parvesh Rai** (supra) as under:

“9. Admittedly the requirements of giving a copy of the charge-sheet and the summary of evidence before ninety-six hours of the actual trial, and allowing a gap of ninety-six hours between petitioner being informed and his actual trial were not complied. In the absence of dispensation under Rule 36 compliance of the requirements of Rules 33 and 34 is a must and non-compliance would vitiate the proceedings.”

15. In the case on hand, as observed above, the applicant was given copy of summary of evidence and charge sheet on 01.09.2012 and the Summary Court Martial convened and commenced on 20.09.2012. Thus, the mandatory requirement of Rule 34 of the Army Rules, 1954 stood complied with in letter and spirit and no exception can be taken by the applicant on this count to argue that the Summary Court Martial proceedings and consequential punishment awarded by it stood vitiated.

16. The applicant overstayed leave from 16.05.2002 to 07.12.2012. Total period of overstay without sanctioned leave is amounting to eight years and seven months. As per Army Act Section 38, considering long absence of the applicant from a

field area, the charge under desertion was framed. In compliance of set provisions for deserting the service, no reasons are needed to be given when charge was framed in accordance with law for constructive desertion.

17. The entire conduct of judicial proceedings against the applicant was as per instructions contained in Army Rules/Army Act. After serving copy of the summary of evidence and charge sheet which was received by the applicant on 01.09.2012 the Summary Court Martial was convened and proceeded on 20.09.2012. The Summary of Evidence was conducted in a systematic and exhaustive manner. The Commanding Officer ordered the Summary Court Martial of the applicant on the charges which were legally valid as per Army Act. Before conducting the Summary Court Martial, the applicant was given adequate opportunity. The Summary Court Martial was conducted as per guidelines given in Army Rules/Army Act.

18. Army Act Section 38 (1) is reproduced below:-

“Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial,

if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and

if he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned”.

19. A plain reading of Section 38 (1) indicates that a person committing the offence could be liable to be suffering in imprisonment for 7 years or any other punishment mentioned in this Section. Therefore the applicant under this Section could have been punished for dismissal from service. The petitioner has been tried for the charge under Section 38 (1) for deserting from field area.

20. A conceptus of our observations made hereinabove is that the applicant has failed to make out a case and the O.A. deserves to be dismissed.

21. It is accordingly **dismissed**.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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