

Court No.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****TRANSFERRED APPLICATION No. 388 of 2010**

Friday, this the 07th day of July 2017

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

Brijesh Kumar Singh son of Shri Ujagar Singh resident Tof Upper Durga Colony, Bholopur, Fatehgarh, district Farrukhabad.

....Peititoner

Ld. Counsel for the : **Shri K.K. Misra, Advocate**
 Petitioner

Verses

1. The Union of India, through the Secretary, Ministry of Defence Raksha Mantralaya, Bharat Sarkar, New Delhi.
2. The Chief of Army Staff, Army Headquarters, Sena Bhawan, New Delhi.
3. Commanding Officer, 107 DSC Platoon, attached to Ordnance Clothing Factory, Shahjahanpur.

...Respondents

Ld. Counsel for the : **Shri Amit Sharma,**
 Respondents Govt Standing Counsel.

OIC Legal Cell : **Maj Salen Xaxa, OIC Legal Cell.**

ORDER (Oral)

1. Being aggrieved with the impugned order of dismissal, the petitioner filed Writ Petition NO. 48928 of 2004 in the High Court of Judicature at Allahabad. Upon constitution of the Tribunal, the said

petition has been transferred to this Tribunal under the provisions of Section 34 of the Armed Forces Tribunal Act, 2007 and renumbered as Transferred Petition No. 388 of 2010.

2. We have heard Shri K.K. Mishra, Ld. Counsel for the petitioner and Shri Amit Sharm, Ld. Counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell.

3. The petitioner got enrolled in the Defence Security Corps (DSC) and was posted at 107, Platoon DSC, Depot on 06.11.1998. After receipt of certain information with regard alleged corrupt practices on 10.10.2000, by convening order dated 01.09.2002 Summary of Evidence was directed to be recorded. On 02.09.2002 the petitioner was directed to stand trial before Lt. Col D.D. Sharma, who according to Ld. Counsel for the petitioner was not the Commanding Officer of the petitioner to into allegations under Rule 22 of the Army Rules, 1954. Summary of Evidence was recorded on 02.09.2002 and tentative charge sheet was given to the petitioner on 03.09.2002 at 04.00 PM. According to Ld. Counsel for the petitioner final charge sheet was served upon the petitioner on 06.09.2002 at 12 O'clock. On the same day, i.e. 06.09.2002 at 12.30 the Summary Court Martial was concluded followed by recording finding of guilt which resulted into dismissal of the petitioner from service. Appeal preferred by the petitioner to Chief of the Army Staff was also rejected.

4. Solitary argument advanced by Ld. Counsel for the petitioner is that the charge sheet was served upon the petitioner on 06.09.2002 at 12.00 O'clock and on the same day Summary Court Martial was held which concluded at 12.30 PM in contravention to provisions of Rule 34(1) of the Army Rules, 1954. For convenience, Rule 34 of the Army 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.”*

5. A plain reading of aforesaid provisions shows that there must be clear cut 96 hours interval between service of charge sheet and convening of Court Martial and interval of 24 hours where the accused is on active service.

6. In the present case, copy of the Summary Court Martial proceeding has been filed along with the Counter Affidavit which reveals that the Summary Court Martial was held on 06.09.2002 at 12.30 PM. In para-12 of the petition, the petitioner has categorically pleaded that charge sheet was served on 06.09.2002 at 12.00 hrs. For convenience sake, para-12 of the petition is reproduced as under:

“12. That, on 2.9.2002 the decision was allegedly taken by Lt Col DD Sharma for recording of Evidence. On 3.9.2002 at 1600 hrs the petitioner was given the copy of the tentative charge sheet dated 2.9.2002 copy of summary of

Evidence. On 6.9.2002 at 1200 hours summary Court Martial commenced diving the petitioner nearly 68 hours to prepare his defence against the mandate of Rule 34 (1) which provides that charge and summary of Evidence must be given at least 96 hours in advance. Denying the petitioner an opportunity to prepare his effective defence despite there being clearcut law is unfair, u njust and wholly illegal.”

7. In response to pleadings made in para-12 of the petition, the respondents in para-11 of the counter affidavit have made the following averments, to quote:

“That in reply to the contents of paragraph no. 12 to 15 of the writ petition, it is submitted that as per Rule 34 (1) of Army Rule, 1954, the interval between his being so informed and his arraignment shall not be less that 96 hours or where the accused is in on active service less than 24 hours. Since the petitioner was on active service at the time of Summary of Evidence hence in the case of the petitioner the period should not be less than 24 hours and accordingly the Summary of Evidence and chargesheet was given to the petitioner before the stipulated period.”

8. A plain reading of averments made in the counter affidavit indicates that the respondents have admitted the fact that charge sheet was served upon the petitioner on 06.09.2002 and on the same day trial began at 12.00 hrs. The respondents have also admitted that the petitioner being on active service, a minimum gap of 24 hours is necessary. However, in the present case, the gap between service of notice and commencement of trial is only of half an hour. However, respondents have evaded to reply on the point as to when charge sheet was served, as such, inference may be drawn that charge sheet was served in view of pleadings of the petitioner on 06.09.2002. Thus, there appears to be apparent violation of mandatory provision of Rule 34 (1) of the Army Rules.

9. It is well settled proposition of law that a thing should be done in the manner provided under the statute, Act or the Rules framed there under.

In AIR 2005 SC 1090, Manik Lal Majumdar and others Vs. Gouranga

Chandra Dey and others, Hon'ble Supreme Court reiterated that legislative intent must be found by reading the statute as a whole.

In 2006 (2) SCC 670, Vemareddy Kumaraswami and another Vs. State of Andhra Pradesh, their Lordship of Hon'ble Supreme Court affirmed the principle of construction and when the language of the statute is clear and unambiguous court cannot make any addition or subtraction of words.

In AIR 2007 SC 2742, M.C.D. Vs. Keemat Rai Gupta and AIR 2007 SC 2625, Mohan Vs. State of Maharashtra, their Lordship of Hon'ble Supreme Court ruled that court should not add or delete the words in statute. Casus Omisus should not be supplied when the language of the statute is clear and unambiguous.

In AIR 2008 SC 1797, Karnataka State Financial Corporation vs. N. Narasimahaiah and others, Hon'ble Supreme Court held that while constructing a statute it cannot be extended to a situation not contemplated thereby. Entire statute must be first read as a whole then section by section, phrase by phrase and word by word. While discharging statutory obligation with regard to taking action against a person in a particular manner that should be done in the same manner.

10. Apart from above, Hon'ble Supreme Court in the case reported in **Union of India vs. A.K. Pandey**, reported in 2009 (1) SCC 552 has categorically held that gap of 24 hours or 96 hours, as the case may be, is mandatory and contravention of the provision shall vitiate the trial. For convenience sake, para-22 of the judgment is reproduced 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."*

11. In view of the settled proposition of law, so far as facts of the present case are concerned, the Summary Court Martial proceeding vitiates on account of non-compliance of statutory provision (supra) and consequently the punishment awarded also vitiates.

12. In view of observations made above, the T.A. deserves to be allowed.

13. T.A. is allowed accordingly. Impugned order of dismissal dated 06.09.2004 and order passed by the Chief of the Army Staff on statutory

appeal preferred by the petitioner are set aside with all consequential benefits. The petitioner shall be deemed to continue in service from the rank from which he has been dismissed and shall be paid full salary in according to rules. However, payment of arrears of salary is confined to 25 percent. The petitioner shall be entitled to regular pension from the date of his retirement on 01.01.2010. Let arrears of salary as well as arrears of pension from 01.01.2010 be paid to the petitioner within four months from today with all consequential benefits.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

Before the order could be signed, Shri Amit Sharma, Ld. Counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell informed that charge sheet was served on the petitioner on 03.09.2002.

Accordingly, list the case for rehearing on **12.07.2017**.

Maj Salen Xaxa, OIC Legal Cell shall inform Ld. Counsel for the petitioner since he has left the Court.

(Air Marshal Anil Chopra)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

Dated: 07 July, 2017

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