RESERVED
COURT No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION No. 388 of 2010

Thursday, this the 04th day of January, 2018

"Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal BBP, Sinha, Member (A)"

Brijesh Kumar Singh S/o Sri Ujagar Singh R/o. Upper Durga Colony, Bholepur Fatehgarh, District Farrukhabad

…… **Petitioner**

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

Versus

1. Union of India, through Secretary Ministry of Defence, Raksha Mantralaya Bharat Sarkar, New Delhi

2. Chief of the Army Staff Army Head Quarters, Sena Bhawan New Delhi

3. Commanding Officer 107 DSC Platoon Attached to Ordnance Clothing Factory, Shahjahanapur

------ **Respondents**

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

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

ORDER

"Per Hon'ble Air Marshal BBP Sinha, Member (A)"

1. Present case for grant of Family Pension was initially filed in the High Court of Judicature at Allahabad in the year 2004 for the relief of quashing the proceedings of Summary Court Martial, findings, conviction and sentence recorded on 06.09.2004 whereby the petitioner was dismissed from service. In due course of time, the said writ petition stood transferred to this Tribunal under section 30 (1) of the Armed Forces Tribunal Act, 2007 and was renumbered as T.A.No 388 of 2010.

2. The facts in nutshell are that the petitioner are enrolled in the Indian Army on 27.03.1980 and was discharged from service on 30.04.1996 with consequential benefits of pension and gratuity. After discharge from regular Army, the petitioner was re-enrolled in Defence Security Corps (DSC) on 06.11.1998. In the course of service in the regular Army, it is alleged that the petitioner was involved in a criminal case being case crime No 98 of 1990 under section 399, 402 IPC and case no 99 of 1990 under section 25 and 27 of Arms Act. At the time of re-enrollment in the DSC, the petitioner did not divulge his involvement in a criminal case in the prescribed form. When a verification was done, the involvement of the petitioner came to light through a report received from the concerned

District Magistrate Farukhabad. As a result, the petitioner was tried by the SCM on 06.09.2002. The aforesaid SCM converged to the conclusion of petitioner's being guilty and he was awarded sentence of dismissal from service. It is in this backdrop that the aforesaid writ petition was filed assailing the order of dismissal.

3. We have heard learned counsel for the petitioner as also learned counsel for the respondents. We have also gone through the materials on record.

4. The learned counsel for the petitioner canvassed that as a matter of fact, the petitioner was made a scapegoat as he had made some complaint against the irregularities rampant in 107, Platoon DSC Deptt involving some Army officers as a consequence of which a formal inquiry was carried out by Lt Col S.L.Gautam. In ultimate matter, the officers involved were let off the hook and the petitioner was made the scapegoat. The legal points urged by the learned counsel for the petitioner are that Rule 22 of Army Rules were not observed in compliance inasmuch as the petitioner was not allowed to cross examine the witnesses. The further contention is that provisions of section 116 (1) of the Army Act were not complied with inasmuch as on 01.09.2002 Col SF Haque was the commanding officer of the accused and instead of holding of summary Court Martial by himself, he had detailed Lt Col DD Sharma. He further canvassed that the decision of punishing the

petitioner was dictated by higher authorities and in the circumstances Lt Col DD Sharma cannot be said to have arrived at any independent decision. It was next canvassed that on 03.09.2002 at 1600 hrs the petitioner was served copy of tentative charge sheet dated 2.09.2002. On 06.09.2002 Summary Court Martial commenced giving the petitioner only 68 hours to prepare his defence as against the mandate of Rule 34 (1) which postulates that charge and summary of evidence must be given at least 96 hours in advance. It is next canvassed that the trial started at 1200 hours on 06.09.2002 and it was wrapped up at 1230 hrs on the same day.

5. Per contra, the contention advanced across the bar is that since the petitioner had given false information at the time of re-enrollment in the DSC and had concealed his involvement in a criminal case, which came to light on verification of antecedents and characters from the report of the Distt Magistrate Fatehgarh, the SCM was instituted which in ultimate analysis, converged to the conclusion of petitioner being guilty of charges. The learned counsel denied the submission of authorities being biased against the petitioner. He also denied that any order to punish the petitioner was received from higher ups in the Army. It is vehemently contended that the entire SCM was conducted in a very fair and impartial manner observing in strict sense the provisions of the Army Act, Rules and Regulations.

6. From the above rival contentions, the quintessence of the arguments is that only 68 hours were given to the petitioner to prepare his defence as against the mandate of of Rule 34 (1) of the Army Rules which postulates that the charge and summary of evidence must be given at least 96 hours in advance. The other argument is that the trial began at 1200 hours and was concluded at 1230 hrs on 06.09.2002.

7. As regards the first contention, in reply to para 12 of the writ petition, it is averred in para 11 of the counter affidavit that as provided in Rule 34 (1), the interval between his being so informed and his arraignment shall not be less than 96 hrs or where the accused person is on active service less than 24 hours. It is further averred that since the petitioner was on active duty at the time of Summary of Evidence, in the case of the petitioner the period should not be less than 24 hours. The averments made in para 11 of the counter affidavit being relevant are quoted below.

> *"That in reply to the content of paragraph no. 12 to 15 of the writ petition, it is submitted that as per Rule 34(1) of the Amy Rule 1954, the interval between his being so informed his arraignment shall not be less than 96 hour or where the accused person is 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 petitioner the period should not be less*

than 24 hours and accordingly the Summary of Evidence and Charge sheet was given to the petitioner before the stipulated period."

8. As regards the argument that the trial was completed within half an hour, para 11 of the counter affidavit which is in reply to para 12 of the writ petition, is conspicuous by silence.

9. The contention made in para 11 of the counter affidavit is that since petitioner was on active duty at the time of summary of evidence, hence period should not be less than 24 hours in terms of Rule 34 (1) of the Army Rules. In para 3 of the Rejoinder affidavit, the aforesaid contention has been vehemently repudiated. The relevant portion of para 3 of the rejoinder affidavit being germane is quoted below.

"It has been wrongly mentioned that 107 DSC Platoon was on active service it needs no emphasis that there are certain places like J&K and in the North-East which has been declared on active service while statutory rules and order SRO 17(E) dated 05 Sept. 1997. A copy of which is annexed herewith as ***Annexure No.R-1****. Accordingly there was statutory requirement that charge sheet must have been served 96 hours before the trial which has not been done in this case, thus as per the establish position of law has held in the case of Union of India Vs. A.K. Pandey SCT 2010 pages 208 (SC). The entire trial is vitiated on this count only.*

10. The respondents in reply to Rejoinder affidavit, filed the Supplementary counter affidavit and in reply to averments made in para 3 of the rejoinder affidavit, the respondents have not spoken even a word with regard to the fact that the 107 DSC Platoon was on active duty. The respondents have dwelt elaborately on other aspects but have evaded reply to the specific averments made in para 3 of the rejoinder affidavit. However in the present case, the gap between service of notice and commencement of trial is only of half an hour. What is intriguing in the instant case is that the respondents have not disclosed the exact date when the charge sheet was served. Thus, the ground that the petitioner being on active duty at the time of tentative charge-sheet the period should not be less than 24 hours falls to the ground and does not commend to us for acceptance. It would thus appear that there is apparent violation of mandatory provision of Rule 34 (1) of the Army Rules. we may profitably refer to the decision of the Hon'ble Apex Court rendered in **Union of India & Ors Vs. A.K. Pandey reported in 10 SCC 552** wherein Army Rule 34 has been interpreted as a mandatory one.

11. The next aspect to be considered is that the trial was concluded within 30 minutes on the same day on which it was commenced. Copy of Summary Court Martial proceeding has been filed alongwith counter affidavit from which it is borne out that Summary Court Martial was held

on 06.09.2002 at 12.00 hours and was concluded at 1230 hrs on the same day. It was a sacred and mandatory duty of the authority conducting the Summary Court Martial to advice the individual to withdraw his plea of guilty. This was, regrettably, not done. Instead, the Summary Court Martial proceedings were completed with undue haste i.e. within 30 minutes and within this 30 minutes the requirement of reading and explaining the charge and further explaining the provisions of the Army Rule 115(2) and also reading and explaining the summary of evidence of witnesses that had been examined, were to be complied with. After doing all these, the punishment proceeding was also completed within this 30 minutes. Inspite of the certificate of compliance of Army Rule 115(2), we are of the view that it is not humanely possible to complete all these steps within just 30 minutes, the result of which was to the conviction of the appellant. We, therefore, hold that the appellant was found guilty in this case only after completing an empty formality by way of the summary trial proceeding without following the requirement of law.

12. 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 s 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.

13. 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."*

14. 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.

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

16. 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 BBP Sinha)
Member (A)

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

Dated: January, 2018
MH/-