**Reserved**

**Court No. 1**

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

**TRANSFERRED APPLICATION NO 77 of 2016**

Monday, this the 16th day of April, 2018

**Hon'ble Mr. Justice SVS Rathore, Member (J)**
**Hon'ble Air Marshal BBP Sinha, Member (A)**

No. 15463762H Sawar Ashok Kumar son of Shri Vijai Pal Singh, Resident of Village and Post Office Mandona, Tehsil Siyana, district Bulandshahr.

….Petitioner

Ld. Counsel for the petitioner: Shri KKS Bisht**,** Advocate.

Verses

1. The Union of India through the Secretary, Ministry of Defence, New Delhi.

2. The Chief of the Army Staff, Army Headquarters, New Delhi.

3. The Officiating Commandant/Judge, Summary Court Martial, 47, Armoured Regiment, C/o. 56 APO.

.....Respondents

Ld. Counsel for the Respondents : Dr. S.N. Pandey,
Addl. Central Government Counsel
assisted by Maj Salen Xaxa,
OIC Legal

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

**ORDER**

1. Initially, the petitioner had approached Hon'ble the High Court of Judicature, Allahabad by filing Writ Petition No. 20596 of 2001. The said writ petition in pursuance to order dated 26.05.2016 has been transferred to this Tribunal under the provisions of Section 34 of the Armed Forces Tribunal Act, 2007 and has been registered as T.A. No. 77 of 2001.

2. By means of the instant T.A. the petitioner has made the following prayers:

(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 30.6.2000 and 1.10.1999 passed by Respondent nos. 2 and 3 as contained in Annexure Nos '4' and '2' respectively.

(ii) to issue a writ, order or direction in the nature of mandamus commanding the Respondent authorities to treat the petitioner in active service on the post of Sawar in the office of B. Sqn, 47 Armoured Regiment c/o 56 A.P.O. from 1.10.1999 till the final orders are passed in the above noted writ petition and to pay arrears of salary and other allowances and dues etc. to the petitioner.

(iii) to issue any other suitable writ, order or direction in the nature of writ which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iv) to award special costs.

3. The facts necessary for the purpose of the instant T.A. as averred in the petition are that the petitioner was recruited in the Indian Army as solider in the year 1995. On 16.06.1999 the petitioner had to leave the Unit Lines without proper leave certificate for the reason that his father was seriously ill. The petitioner approached the JCO and the Stn. Commander for 10 days' leave, but no reply was given. As petitioner's father was informed to be seriously ill, as such, the petitioner after

informing the aforesaid officers proceeded for home. The petitioner was detained since he had to take care of his father who was hospitalised and after petitioner's father regained his health, the petitioner reported for duty on 19.08.1999. On rejoining, the petitioner was given movement order and some official mail to be delivered at exercise location of Unit at Pokharan. As directed, the petitioner delivered the same to the officiating Adjutant and came back to his house. On reaching his house, the petitioner found that his father-in-law has become patient of throat cancer. The petitioner's father-in-law took him to the Unit in the exercise location at Pokharan where the petitioner was put to quarter-guard and petitioner remained there from 06.09.1999 to 30.09.1999. Because of unauthorised absence of the petitioner, Summary of Evidence was recorded. Case of the petitioner is that Summary of Evidence was recorded in his absence while he was in quarter-guard. The petitioner was not provided opportunity of hearing and was also not provided proper opportunity to defend his case. The medical certificates submitted by the petitioner to the authorities were not taken into consideration and behind the back of the petitioner, the entire proceedings were completed. The petitioner was held guilty under Army Act Section 39 (a) and the impugned order of dismissal from service was passed on 01.10.1999. Against the order of dismissal, the petitioner preferred appeal before Respondent no. 2 on 21.01.2000 attaching along with the appeal medical certificate issued by the competent doctor and other relevant documents. The Respondent no. 2 without discussing and appreciating the grievances of the petitioner in true perspective

dismissed the appeal of the petitioner vide order dated 30.06.2000. Review petition was filed by the petitioner raising some legal grounds, which were not considered by respondent no. 2. It is pleaded that the petitioner was not given the charge sheet containing clear and definite charges as required under the provisions of Army Act, 1950 and the evidence in support of the charges. Thus, by means of this T.A., the petitioner has challenged the order of dismissal from service passed by the Summary Court Martial (for short, SCM).

4. Submission of learned counsel for the petitioner is that the entire SCM proceedings were completed within thirty minutes on the same day. The SCM recorded plea of guilty, but the plea of guilty was not signed, therefore, there was violation of Rule 115 and Rule 116 (4) of Army Rules, 1954. It is also argued that the impugned order of dismissal of service is not tenable inasmuch as there was violation of Rule 33 (7) and Rule 34 of the Army Rules, 1954 and because of this procedural infirmities, the entire SCM proceedings were also bad in the eyes of law.

5. On behalf of the respondents, it is vehemently argued that it is nowhere the case of the petitioner that he was not absent without leave on two occasions, so the plea of guilty of the petitioner cannot be said to be wrong only for want of signature below it. It is submitted that the cause as pleaded by the petitioner is that because of illness of his father and thereafter because of illness of his father-in-law, the petitioner could not perform his duties and was absent without leave. It has been argued that the petitioner had pleaded guilty, therefore, conclusion of the SCM proceedings within thirty minutes was very logical. It has further been

argued by learned counsel for the respondents that the petitioner has nowhere stated as to how his defence was prejudiced by any procedural infirmity in conducing SCM proceedings.

6. Before proceeding further, we feel it appropriate to reproduce the charge sheet:

*"CHARGE SHEET*

*The accused NO. 154363762H Sawar Ashok Kumar, 47 Armd Regt is charged with:*

*Army Act* *First charge.*

*Sec 39(a)* ***ABSENTED HIMSELF WITHOUT LEAVE***

*In that he, at C/o 56 APO absented himself without leave, without arms from unit lines on 16 Jun 99 at 2200 he till he voluntarily rejoined on 19 Aug 99 at 1900 h at the Regt Permt/Rear loc.*

*(Period of absence – 64 days)*

*Army Act* *Second charge.*

*Sec 39(a)* ***ABSENTED HIMSELF WITHOUT LEAVE***

*In that he, at C/o 56 APO absented himself without leave, without arms from ex loc (OP VIJAY) unit lines on 24 Aug 99 at 2300 he till he voluntarily rejoined the Regt in ex loc (OP VIJAY) on 06 Sep 99 at 0800 h at the Regt Permt/Rear loc.*

*(Period of absence – 13 days)*

*Total period of absence 1st charge and 2nd charge – 77 days)"*

7. In the instant case, great emphasis has been laid by learned counsel for the petitioner since signatures of the petitioner were not obtained on the plea of guilty, as such, it is violative of Rule 115 of the Army Rules, 1954. Army Rule 115 is reproduced as under:

*"115. **General plea of "Guilty" or "Not guilty"**.— (1) The accused person's plea — "Guilty" or "Not guilty" (or if he refuses to plead, or does not plead intelligibly either one or the other, a plea of "Not guilty")-shall be recorded on each charge.*

*(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but before it is recorded, the court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.*

*[(2-A)Where an accused pleads "Guilty", such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner: -*

*"Before recording the plea of "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(s) to which he had pleaded "Guilty". The court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge(s) and the effect of his plea of "Guilty", accepts and records the same. The provisions of rule 115(2) are thus complied with.]"*

*(3) Where an accused person pleads guilty to the first of two or more charges laid in the alternative, the court may, after sub-rule (2) of this rule has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges without requiring the accused to plead thereto, and a record to that effect shall be made upon the proceedings of the court."*

8. A bare reading of Rule 115 (supra) shows that it is nowhere made mandatory that signature of the charged employee (petitioner in this

case) must be obtained on his entering into plea of guilty. During course of arguments we have inquired from learned counsel for the petitioner as to whether the petitioner was on duty or he was absent from duty without leave during said period, to which he has fairly conceded that the petitioner was absent without prior sanction of leave. However, he tried to justify absence of the petitioner on the ground that firstly his father and thereafter his father-in-law had fallen ill. It may be an explanation, but so far as charge of absence without leave, which was the contents of the charge sheet, is concerned, it is admitted. Therefore, in the peculiar facts of this case, even though the plea of guilty was not signed by the petitioner, it cannot be said that the petitioner was prejudiced in his defence in any manner on account of the fact that his signatures were not obtained on his plea of guilty.

9. We may take note of the fact that the SCM proceedings are conducted on a duly prescribed proforma. Thus, once the petitioner pleads guilty, then only the relevant columns were required to be filled-in and the non applicable parts of said proforma have to be scored out. Thus, it was a short procedure and no adverse inference can be drawn only on the ground that SCM proceedings were concluded within thirty minutes. On this point, we may refer to the order of co-ordinate Bench of this Tribunal in the case of ***Brijesh Kumar vs. Union of India & ors,*** O.A. (A) No. 192 of 2014 decided on 25th September 2017, wherein in paras 10 and 11, it has been held as under:-

> *10. Next argument of learned counsel for the appellant that SCM concluded within few hours but this by itself is no ground in absence of any*

*procedural irregularity of any mandatory provisions. In the case of Rajinder Singh vs Armed 13 OA (Appeal) No 192 of 2014 Brijesh Kumar Forces Tribunal Regional Bench and others, Chandigarh, Hon'ble Punjab and Haryana High Court in CWP No 4801 of 2013 has held as under:-*

> *"We have given our thoughtful consideration to the said contention of the petitioner regarding the proceedings having been concluded and a finding of guilty being recorded and thereafter the sentence imposed in twenty minutes. The matter, in our view could have been adjudicated upon and concluded within the period of twenty minutes and we are unable to hold the proceedings to be invalid on this count. The petitioner had pleaded guilty and the proceedings recorded after informing him of its effect and consequences. This could well be concluded within the said time. A photocopy of the Court Martial proceedings has been shown during the course of hearing. A perusal of the same shows that it is on a printed form. The questions to be asked are printed and the answers are handwritten or typed. Besides, where ever required, the printed portions have been scored of and/or tick marked. This process could indeed have been completed in the time as has been recorded. Besides, there is a presumption in law that judicial and official acts have been regularly performed."*

*11. When we examined the original record of the instant case, we find that the facts of this case are also identical and therefore simply because the SCM proceedings were concluded within a few hours cannot, by itself, be a ground to vitiate the SCM proceedings. It has also been argued that the copies of relevant record were not provided to him. Receipt dated 18 Oct 2011 filed along with counter affidavit, is on record whereby the appellant Brijesh Kumar has received the copy of summary 14 OA (Appeal) No 192 of 2014 Brijesh Kumar of evidence and this receipt has been counter signed by two witnesses, Lt Sajet Joseph and Subedar Brijlal Yadav. It has also been signed by appellant himself. Charge sheet was also received by him on the same date.*

10. The ratio of law discussed on this point was also considered and nodded in approval by the Bench of this Tribunal in T.A. No. 38 of 2016, ***Kripal Singh vs. Union of India & ors.***

11. In view of the aforementioned pronouncement, merely because the SCM proceedings were concluded within thirty minutes, it cannot be said to be ground to vitiate the SCM proceedings. A perusal of the record shows that by means of movement order, the petitioner was asked to go to Pokharan, which was filed area where OP VIJAY was going on, wherefrom the petitioner absented himself without leave. This fact is amply clear from the rejection order passed by the Chief of the Army Staff by which the appeal preferred by the petitioner was rejected wherein it has been mentioned as under:-

> *"2. The petitioner was tried on two charges, both laid under Army Act Section 39(a). Particulars of the first charge averred that he, at C/o 56 APO absented himself without leave, without arms from unit lines on 16 Jan 99 at 2000 hours till he voluntarily rejoined on19 Aug 99 at 1900 hours at the regiment's rear location; period of absence being 64 days, particulars of the second charge averred that he, at C/o 56 APO absented himself without leave, without arms from exercise location (Operation Vijay ) on 24 Aug 99 at 2300 hours till he voluntarily rejoined the regiment in exercise location (Operation Vijay) on -06 Sep 99 at 0800 hours; period of absence being 13 days. He pleaded guilty to both the charges and made a statement at the trial, "I made a mistake. I don't want to serve the Army". After complying with the provisions of Army Rules 115 (2) and (2A), the court found him guilty and sentenced him to be dismissed from the service."*

12. Defence of the petitioner is that he was having valid reason to be absent without sanctioned leave on account of serious illness his father

and subsequently of his father-in-law. It is pleaded that he had given medical certificates issued by the competent doctor, but the same were not considered and he had also annexed copies of said medical certificates along with the appeal preferred by him, but the same were not considered while disposing of the appeal by the Chief of the Army Staff. In para-10 of the petition, it has been averred that the petitioner preferred appeal before respondent no. 2 on 21.1.2000 attaching medical certificate issued by the competent doctor and other relevant documents. It is pertinent to mentioned it here that a perusal of medical certificate, a typed copy of which has been filed along with Annexure-3 to the petition, shows that Vijai Pal Singh, father of the petitioner, was treated as out-door patient for infective Jaundice from 13.06.1999 and he remained under treatment of the doctor upto 25.08.1999. However, there is no medical certificate of father-in-law of the petitioner. Apart from it, it is difficult to perceive as to how the petitioner got information of illness of his father-in-law at field area Pokharan during OP VIJAY. Ground of illness of father-in-law also appears to be false as the petitioner has himself pleaded that his father-in-law took him to the Unit. It shows that his father-in-law was healthy enough to escort the petitioner to his Unit. In the absence of any medical certificate of father-in-law in support thereof, it appears that simply to avoid OP VIJAY, the petitioner deliberately absented himself and went to his house without proper sanction of leave.

13. Learned counsel for the petitioner has drawn our attention towards certain Army Rules. It is submitted that Rule 116 (4) of the Army Rules,

1954 has not been followed. For convenience sake, Rule 116, in its entirety, is reproduced as under:

> *"116, **Procedure after plea of "Guilty"**.—(1) Upon the record of the plea of "Guilty", if there are other charges in the same charge-sheet to which the plea is "Not guilty", the trial shall first proceed with respect to the latter charges, and, after the finding of those charges, shall proceed with the charges on which a plea of "Guilty" has been entered ; but if there are alternative charges, the court may either proceed with respect to all the charges as if the accused had not pleaded "Guilty" to any charge, or may, instead of trying him, record a finding upon any one of the alternative charges to which he has pleaded "Guilty" and a finding of "Not guilty" upon all the other alternative charges.*
>
> *(2) After the record of the plea of "Guilty" on a charge (if the trial does not proceed on any other charges), the court shall read the summary of evidence, and annex it to the proceedings or if there is no such summary, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence. The evidence shall be taken in like manner as is directed by these rules in case of a plea of "Not guilty".*
>
> *(3) After such evidence has been taken, or the summary of evidence has been read, as the case may be, the, accused may address the court in reference to the charge and in mitigation of punishment and may call witnesses as to his character.*
>
> *(4) If from the statement of the accused, or from the summary of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of "Guilty", the court shall alter the record and enter a plea of "Not guilty", and proceed with the trial accordingly.*
>
> *(5) If a plea of "Guilty" is recorded and the trial proceeds with respect to other charges in the same charge-sheet, the proceedings under sub-rules (2) and (3) shall take place when the findings on the other charges in the same charge-sheet are recorded.*

> *(6) When the accused states anything in mitigation of punishment which in the opinion of the court requires to be proved, and would, if proved, affect the amount of punishment, the court may permit the accused to call witnesses to prove the same.*
>
> *(7) In any case where the court is empowered by section 139 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment, or where it could, after hearing the evidence, have made a special finding of guilty subject to exceptions or variations in accordance with sub-rule (3) of rule 121, it may if it is satisfied of the justice of such course, accept and record a plea of guilty of such other offence, or of the offence as having been committed in circumstances involving such less degree of punishment, or of the offence charged subject to such exceptions or variations."*

14. It is clear from the charge sheet that the petitioner was charged for absence from duty without sanctioned leave. There is neither any doubt with regard to said absence nor there is any ambiguity in the charge sheet which would have misled the petitioner. The petitioner himself has admitted that he remained absent for the period mentioned in the charge sheet. Therefore, by no stretch of imagination it can be presumed that the petitioner did not understand the effect of his pleading guilty. On the contrary, the proceedings show that the petitioner has in unequivocal terms stated during SCM proceedings that he did not intend to serve the Army and denied to give any explanation for his unauthorised absence from duty. Therefore, in this perspective, it cannot be said that there was violation of Rule 116 (4) of the Army Rules, 1954.

15. Learned counsel for the petitioner commented on Rule 33 (7) and Rule 34 of the Army Rules, 1954 to contend that the petitioner was denied sufficient opportunity to prepare his defence, and as such, the

impugned order of dismissal is untenable in the eyes of law and deserves to be quashed. Rule 33 (7) of the Army Rules, 1954 is reproduced as under:

> ***"33. Rights of accused to prepare defence***.—
> *(1) .....*
> *(7) As soon as practicable after an accused has been remanded for trial by a general or district court-martial, and in any case not less than ninety-six hours or on active service twenty-four hours before his trial, an officer shall give to him free of charge a copy of the summary of evidence and explain to him his rights under these rules as to preparing his defence and being assisted or presented at the trial, and shall ask him to state in writing whether or not he wishes to have an officer assigned by the convening officer to represent him at the trial, if a suitable officer should be available. The convening officer shall be whether or not the accused so elects."*

16. Rule 34 of the Army Rules, 1954 for convenience sake 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 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 named, 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."*

17. In the instant case, the charge sheet is dated 26.09.1999 and thereafter SCM proceedings took place on 01.10.1999. Thus, there was sufficient time gap between the service of charge sheet and holding of SCM proceedings.

18. During course of arguments, we had enquired from learned counsel for the petitioner as to how the petitioner has been prejudiced in his defence by any irregularity in holding SCM proceedings. As discussed earlier, no such irregularity could be pointed out by the learned counsel for the petitioner whereby the petitioner can claim that his defence was prejudiced during SCM proceedings. It is trite law that purpose of adhering to procedure is to procure ends of justice and not to frustrate it. Every irregularity or mistake in observing procedure does not vitiate the proceedings. Such irregularity or mistake in the observance of procedure is material only when the accused establishes that by such irregularity or mistake, he has been prejudiced in defending his case. In the instant case, the petitioner could not bring to our notice any such fact whereby he can claim that his defence has been prejudiced by any irregularity committed during SCM proceedings. On this point, we may place reliance on the Supreme Court decision rendered in ***Major G.S. Sodhi vs. Union of India*** (1991) 2 SCC 382, wherein their Lordships of the Hon'ble Supreme Court have observed, to quote:-

> "*It must be noted that the procedure is meant to further the ends of justice and not to frustrate*

> *the same. It is not each and every kind of defect preceding the trial that can affect the trial as such"*

The aforesaid view expressed by the Hon'ble Supreme Court in the case of Major G.S. Sodhi (supra) has been followed in the case of ***Union of India & ors. Vs. Major A. Hussain***, 1998 (1) SCC 537, wherein it has been observed as under:-

> "*In G.S. Sodhi's case this Court with reference to Rules 22 to 25 said that procedural defects, less those were vital and substantial, would not affect the trial. The Court, in the case before it , said that the accused had duly participated in the proceeding regarding recording of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the accused."*

19. The last submission made by learned counsel for the petitioner is that the sentence imposed upon the petitioner was too harsh because on account of the order of dismissal from service, the petitioner became debarred from getting any other Government job since the order of dismissal is stigmatic. It is submitted that the petitioner had about five years of service to his credit at the relevant time. As per record, the petitioner was aged about 24 years at that time. On account of lapse of long period of pendency of this petition in the Hon'ble High Court, the petitioner must have crossed the upper age limit for getting a Government job. Further, keeping in view the requirement of strict discipline in the Army, that too from an operational area (OP VIJAY), reflects gross indiscipline committed by the petitioner which cannot be considered to be minor mistake. If a lenient view is taken in such matters than it would be against the interest of the Army and would adversely

affect the high standards of discipline of the Army. Therefore, we do not consider it appropriate to reduce the sentence of dismissal from service. The applicant has not only pleaded guilty, but he has also stated during SCM proceedings that he does not want to continue in the Army. Why the Commanding Officer conducting the SCM may enter a false plea of guilty or pass harsh sentence, as pleaded by the petitioner, does not appear to reason because no bias has been alleged against the officer conducting the SCM proceedings. There is no explanation forthcoming from the petitioner with regard to absence without prior sanctioned leave from field area Pokharan during OP VIJAY which is a very serious misconduct.

20. In view of discussion made above, we do not find any substance in the T.A. which deserves to be dismissed.

21. It is **dismissed** accordingly.

No order as to cost.

**(Air Marshal BBP Sinha)**
**Member (A)**

**(Justice SVS Rathore)**
**Member (J)**

Dated : April 2018

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