

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED
(Court No. 3)

Original Application No. 195 of 2011

Thursday the 30th day of April, 2015“Hon’ble Mr. Justice Abdul Mateen, Member (J)
Hon’ble Lt. Gen. A.M. Verma, Member (A)”Ex-Sepoy Vivek Kumar (Army No. 4575460-K) of 13 MAHAR Battalion,
aged about 27 years, son of Late. Parshuram, resident of Village – Baurdih,
Post- Pachperwa, Tehsil – Gola Bazar, - Gorakhpur (U.P.)

..... Applicant.

By Shri P.N. Chaturvedi, counsel for the applicant.

Versus

1. Chief of Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi- 110 011.
2. Commander 8 Infantry Brigade, C/O 56 APO
3. Commanding Officer, 12 MAHAR Regiment Battalion, C/o 56 APO.
4. Officer-in-Charge , MAHAR Regimental Centre, Sagour (MP.)
5. Company Commander, Delta Company, 12 MAHAR Regiment Battalion, C/O 56 APO.

..... Respondents.

By Shri Bhanu Pratap Singh Chauhan along with Capt. Ridhishri Sharma,
Departmental Representative.

ORDER

1. This Original Application has been filed by the applicant seeking the following reliefs :

“(a) Issue/pass an order or direction to the respondents to quash/set-aside the arbitrary and illegal Summary Court Martial proceedings lacking jurisdiction held on 23-05-2011 by Commanding Officer 12 MAHAR, respondent No. 3 committing several illegalities mentioned in preceding paragraphs and having no jurisdiction to subject the applicant to the trail by Summary Court Martial.”

(b) Issue/pass an order or direction to the respondents to reinstate the applicant in service with effect from 23-05-2011 with all service and monetary benefits.

(c) Issue/pass an order or direction awarding the exemplary compensation because of violating Articles 14 and 21 of the Constitution of India and sending him to Central Jail, Bikaner with no offence whatsoever having been committed by him.

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

(e) Allow this application with costs.

2. The facts of the case are that the petitioner was enrolled in the Indian Army on 21.2.2002 and was posted to 12 MAHAR. On 25.4.2009 he was tried by SCM for being absent without leave and was awarded a punishment of 89 days’ RI and thereafter was retained in service. On 23.2.2011 he was again tried by SCM and was awarded sentence of 3 months’ RI in civil jail and dismissal from service on the following charges:

“First Charge

*Army Act Section 52 (a) : COMMITTING THEFT OF PROPERTY
BELONGING TO A PERSON SUBJECT
TO MILITARY LAW*

*In that he,
At Bikaner, on 27 February 2011 committed theft
in respect of a Mobile phone (Nokia 5233), the
property of No 4581914H Sepoy Dipak
Rajbangsi, of the same unit.*

Second Charge

Army Act Section 52(a): COMMITTING THEFT OF PROPERTY

*BELONGING TO A PERSON SUBJECT TO
MILITARY LAW*

*In that he,
At Bikaner, on 17 March 2011 committed theft in
respect of the following items, the property of No
4581002K Sepoy Iangole Ravindra Bhimrao of
the same unit:*

- (a) Indian Army Combat Dress - 01*
- (b) Long Shoes (One pair) -01*
- (c) Civil Shoes (One pair) -01*
- (d) Perfume -01*
- (e) Body spray (Temptation) -01*
- (f) Body spray (Rewa) -01*
- (g) Face Wash (Neema) -01*

Third Charge

*Army Act Section 63 : AN ACT PREJUDICIAL TO GOOD ORDER
AND MILITARY DISCIPLINE*

*in tht he,
at Bikaner, on 17 March 2011, was improperly in
possession of an ICK belt, the property of No
4568722M Nk Dakshineswar Pal of the same
unit,*

Fourth Charge

Army Act Section 63: AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

*in that he,
at Bikaner, on 17 March 2011, was improperly in possession of following unauthorized rubber stamps of the Delta Company of his unit:-*

(a) Company Commander's Stamp.

(b) Round Stamp.

Fifth Charge

Army Act Section 39(a): ABSENTED HIMSELF WITHOUT LEAVE

*in that he,
at Bikaner, on 21 Mar 2011 absented himself without leave from unit until he surrendered himself voluntarily on 26 March 2001 at 2230hours”.*

3. Aggrieved by the award of sentence, the petitioner filed the present Original Application.

4. Shri P.N. Chaturvedi, learned counsel, has argued the case of the applicant. The applicant in his O.A. has stated that he received information of his father's death on 20.1.2011 and approached the CO for leave, an act which was not liked by his Company Commander and consequently false charges were levelled against him and he was put in Unit Quarter Guard on 26.3.2011. The applicant claims that while in custody his signatures were obtained on some document of which he has no knowledge. False evidence was created against him by indicating that certain items were found in his box when there was no concrete evidence. The provision of Army Rule 22 were not complied with. The petitioner claims that he was kept under arrest

for 58 days and this fact has been mentioned in the SCM proceedings. The Friend of the Accused, who was detailed to assist him during the trial, had no legal knowledge. The most significant point of challenge by the applicant is that the charge-sheet was not handed over 96 hours in advance of the trial, as provided in Army Rule 34. The applicant has attached a copy of the SCM proceedings wherein the charge-sheet is dated 23.5.2011, the date on which SCM trial took place. The applicant goes on to say that when he was in civil jail on 12.6.2011 a party led by Capt. K.K. Reddy along with Hav. Pawan and Sep. Barun Chakraborty visited him with charge-sheet dated 19.5.2011 with a request to return the charge-sheet dated 23.5.2011. The applicant states that he did not return the charge-sheet dated 23.5.2011.

5. Learned counsel for the applicant submitted that violation of Army Rule 34(1) makes this SCM a nullity and prays that the petition be allowed.

6. The case of the respondents is that the applicant is a habitual offender. In July, 2006 a mobile phone of Sep. Lalji Bhatt was stolen which was recovered from the possession of the applicant. Since this was the first offence of the applicant, he was let off. Thereafter he was absent without leave for which he was tried by SCM on 25.4.2009 and was awarded 89 days' RI.

7. In the instant case theft of mobile phone and some personal items were reported stolen on 17.3.2011. Consequent to this, boxes of all personnel of the Company were checked and these items were found in the

box of the applicant. Along with the stolen items, stamp of OC D Company and round stamp were also found in the box of the applicant. The respondents state that on 21.3.2011 the applicant left the Unit Lines surreptitiously and returned on his own on 26.3.2011. He was accordingly charged with the offence and charges were heard under the provisions of Army Rule 22 on 11.4.2011 and Summary of Evidence was ordered to be recorded. The respondents claim that the applicant was not placed under arrest. There was no restriction on his movement within the Company Lines. He was not kept in the Quarter Guard. The respondents further state that the charge-sheet was handed over to the petitioner personally by the CO on 19.5.2011. However, the date of 23.5.2011 was inadvertently put which was immediately rectified in the presence of the applicant. The respondents state that there is no infirmity in the SCM and the charges against the applicant have been proved and the punishment awarded is just and legal.

8. Heard both sides and scrutinized all the documents.

9. We find that the applicant on an earlier occasion had been tried by SCM on 25.4.2009 on charges under Army Act 39(a) and Army Act 57(e) and had been awarded punishment of two months and 29 days' RI. However, we are of the view that the earlier punishment should not be and cannot be a basis for awarding punishment second time and is of no relevance in the instant case.

10. In the instant case the charges under Army Rule 22 were heard on 11.4.2011 during which four witness were examined and Summary of Evidence was ordered to be recorded. After the recording of Summary of Evidence a need was felt to record additional evidence and consequently Additional Summary of Evidence was recorded. There is no infirmity in this procedure and the allegation by the applicant has no validity. During Summary of Evidence it has come out that the stolen items had been recovered from the box of the applicant. During SCM proceedings the petitioner pleaded guilty, thereby admitting that he was guilty of the offence against him. In the SCM proceedings it has been mentioned that the applicant was kept in "Arrest (Confinement)" for 58 days. The respondents' stand that the applicant was only under observation in Company Lines and not under arrest lacks force and substance and we find that this argument by the respondents is not convincing. The applicant indeed was kept under custody for a period of 58 days.

11. The significant point of challenge of the SCM proceedings is the violation of Army Rule 34. The respondents have produced the original file, on the cover page of which is written as 12th BATTALION THE MAHAR REGIMENT. This file contains the SCM proceedings in original and the entries in it have been made in ink. Along with this original SCM proceedings charge-sheet dated 19.5.2011 is found attached therewith. During hearing, however, the respondents produced another file in which was a document signed by the CO which certifies that the charge-sheet had

been handed over to the applicant on 19.5.2011. This file had a charge-sheet dated 23.5.2011. The applicant has produced copy of the SCM proceedings attached to which is a photo-copy of charge-sheet dated 23.5.2011. Thus, it is evident there is a charge-sheet dated 23.5.2011. We have not been exposed to a convincing explanation by the respondents as to what was the reason for a charge sheet dated 23.05.11 and for the certificate given by the CO that the charge-sheet had been handed over on 19.5.2011. Also the respondents have stated that the mistake in date of the charge-sheet was noticed and it was immediately corrected. However, we find no evidence of this correction. This narrative lends us to hold the view that the trial took place on the charge sheet dated 23.05.11.

12. Further the applicant was handed over to civil jail on 24.5.2011 to undergo RI for three months. The respondents submitted that on 12.06.11 officer visited the petitioner with a view to coordinate release of the applicant. Once again the respondents failed to offer convincing explanation as to what was the need for the officer and two men to visit the applicant in civil jail on 12.6.2011 to coordinate release of the applicant when sentence was to expire only in the month of August, 2011.

13. In the result of the above discussion we are inclined to impart credibility to the applicant's argument that the charge-sheet was not handed over to the applicant 96 hours in advance, as laid down in Army Rule 34. The explanation provided by the respondents in this regard is not found to be convincing and there appears to be a clear violation of Army Rule 34

which tends to make the SCM a nullity in the light of the Apex Court judgment reported in (2009) 10 Sec 552 where in the Apex Court held :-

“A. Armed Forces – Army Rules, 1954 –R. 34 – Requirement of interval between accused being informed of charge for which he is to be tried and his arraignment which “shall not be less than ninety-six hours”, held , mandatory – Rationale behind, explained – General Court Martial proceedings commenced without complying with this mandatory requirement, rightly set aside by High Court in writ petition filed by accused – Non-compliance with this requirement cannot be said to be inconsequential merely on ground that accused pleaded guilty of all the charges framed against him and therefore, no prejudice had been caused to him by such non-compliance”.

14. We, accordingly, allow this O.A. partly and quash the SCM proceedings against the applicant. The applicant will be treated to be notionally in service till he reaches the service which entitled him to pension where after he shall be paid pension and other benefits. It is clarified that the applicant shall not be entitled to any salary during the period he is considered notionally to be in service. No order as to costs.

(Lt. Gen. A.M. Verma)
Member (A)

(Justice Abdul Mateen)
Member (J)

PG.