

**Court No. 1**  
**Reserved Judgment**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**Transferred Application No. 38 of 2016**

**Tuesday this the 27<sup>th</sup> day of February 2018**

**Hon'ble Mr. Justice S.V.S. Rathore, Member (J)**  
**Hon'ble Lt. Gen. Gyan Bhushan, Member (A)**

Kripal Singh Sep/SKT No.6392483 K ...,  
Son of Bhagwan Singh,  
R/o Amheda Tehsil Mandi Dhanoura,  
Distt. Jyotaba Phule Nagar.

.....**Petitioner**

By Legal Practitioner: Shri Rohit Kumar,  
learned counsel for the petitioner.

Versus

1. Union of India, through the Secretary,  
Ministry of Defence,  
New Delhi.
2. Commanding Officer, Headquarters,  
Wing, ASC Centre (South), Bangalore.
3. Headquarters, Sub-Area, Allahabad through  
Legal Cell, Allahabad.

..... **Respondents**

By Legal Practitioner: Shri RKS Chauhan,  
Learned counsel for the respondents.

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

1. Initially the petitioner filed Civil Misc. Writ Petition No.44067 of 2000 before the Hon'ble High Court of Judicature at Allahabad. Vide order dated 31.05.2016, the said writ petition was transferred to this Tribunal and registered as T.A.No.38 of 2016 in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and now processed for hearing after exchange of affidavits.

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

(i) *issue a writ, order or direction in the nature of certiorari the impugned order dated 18.03.2000 (Annexure No.3 & 4) passed by the respondent no.2 to the writ petition.*

(ii) *Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the salary with all consequential benefits to the petitioner and keep him in service.*

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

(iv) *to award cost of the petition to the petitioner."*

3. In brief the facts giving rise to the instant T.A. may be summarised as under :

4. The petitioner was appointed on the post of G.D. Clerk at ASC Centre (South), Bangalore on 23.09.1995. During the service period, the petitioner was granted leave w.e.f. 31<sup>st</sup> December 1996 to 06<sup>th</sup> March 1997. He rejoined his duty on 31.01.2000. In view of this long absence of leave, the petitioner was charge-sheeted as under :

**CHARGE SHEET**

*The accused no. 6392483 –K Sep/SKT Kripal Singh of 557 ASC Bn. Attached with H.Q. Wing, Depeot Coy (supply) ASC Centre (south) is charged with:-*

**DESERTING THE SERVICE****Army Act Section 38 (1)**

*In that he,*

*At field, on 7 Mar, 1997 on active service and having been granted leave of absence from 31 Dec. 96 to 06 Mar, 1997 to proceed to home did not rejoin at field on the expiry of the said leave but absented himself with intent to avoid such active service”.*

5. The Summary Court Martial (in short ‘SCM’) proceedings were conducted and ultimately during SCM proceedings, the petitioner pleaded guilty to the charge and accordingly, he was punished. The SCM, which was held on 18<sup>th</sup> March 2000, considered the gravity of the offence and plea of guilt and he was awarded punishment to serve three months’ R.I. in civil prison and was dismissed from service.

6. The submission of the learned counsel for the petitioner is that the petitioner was charged under Section 38 (1) which is absolutely wrong and the petitioner ought to have been tried under Section 39 (a) and (b) of the Army Act. The next submission of the learned counsel for the petitioner is that the SCM proceedings were concluded within a very short time on the same day. Since the charge was under Section 38(a) of the Army Act, therefore, no SCM ought to have been initiated against the petitioner because the punishment provided for Section 38 of the Army Act cannot be awarded by the SCM as it postulates higher punishment, which the SCM is not competent to inflict.

7. Learned counsel for the respondents has argued that in this case, the language of the charge sheet is very clear and there is nothing in the language of the charge sheet except the wrong mentioning of the Section, which may mislead the petitioner to explain as to what charge he has to defend. He has also argued that simply because the wrong section has been mentioned, it would not by itself, vitiate the proceedings unless and until the petitioner establishes that he was prejudiced in his defence by such mistake of wrong mentioning of section. It has also been argued that since the language of the charge sheet was very clear, therefore, the SCM was competent to proceed with the trial and the SCM awarded the punishment which was within the competence of the SCM to inflict. It has also been argued that the total absence of the petitioner without leave was more than 1033 days and the petitioner had no explanation for such a long over staying of leave. During the SCM proceedings, he has pleaded guilty and has also stated that he has committed a serious mistake and made a request that he be given one more chance.

8. Learned counsel for the petitioner has placed reliance on several pronouncements, which we shall deal with at the relevant part of the judgment.

9. First we will deal with the point of wrong mentioning of the Section. Sections 38 and 39 of the Army Act regarding which the controversy has been arisen, are being reproduced as under :

**38. Desertion and aiding desertion.— (1)** 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.

(2) Any person subject to this Act who, knowingly harbours any such deserter shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(3) Any person subject to this Act who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

**39. Absence without leave.—** Any person subject to this Act who commits any of the following offences, that is to say,—

(a) absents himself without leave; or

(b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or

(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or

(e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place, prohibited by any general/ local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there;

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.”

10. Thus, so far as the submission of the learned counsel for the petitioner is concerned that wrong section was mentioned in the charge sheet, is absolutely correct. The charge would have been under Section 39 (b) of the Army Act. In the instant case, the language of the charge sheet is very clear, wherein the period for which he was granted leave, was

mentioned and it is nowhere mentioned that he was a deserter and the language of the charge sheet, as quoted in the earlier part of the judgment, very clear and is not incapable of two meaning. So far as the mistake of wrong section mentioned in the charge sheet is concerned, we would like to reproduce Section 464 of the Code of Criminal Procedure, which reads as under :

***“64. Effect of omission to frame, or absence of, or error in, charge.***

*(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*

*(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-*

*(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;*

*(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:*

*Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”*

11. Thus, even in the Code of Criminal Procedure, a mistake in the charge sheet would not vitiate the proceedings unless and until the accused can show that he was misled by such wrong mentioning of section. During the course of arguments, learned counsel for the respondents has produced the original record pertaining to this case for our perusal and it was also perused during hearing by the learned counsel for the petitioner also. A perusal of the original record shows that the petitioner had pleaded guilty to the charge and thereafter the due procedure was followed. The petitioner has also stated in reply to the question whether he wants to make any statement in reference to the charge that “ I have done the mistake which is a great offence. I may please be given one more chance.” He was again asked whether he wants to call any witness for his defence. This question was also replied in negative and thereafter the petitioner was inflicted with the punishment which is under challenge. Thus, even at that stage, he had no explanation to offer for his such a long absence.

12. On this point, we may also refer to the pronouncement of the Hon’ble Apex Court in the case of **State of A.P. V. Thakkidiram Reddy (1998) 6 SCC 554** . There was no charge under Section 302 read with Section 149 IPC, but the accused was convicted with the aid of Section 149

IPC and Hon'ble Supreme Court in the circumstances held that no prejudice has been caused to the accused and held that it would not vitiate the trial.

13. Likewise, in the case of **Bajraje vs State of Maharashtra** (2010) 6 SCC 673, where the accused was convicted under Section 302 read with Section 149 IPC. However, he was convicted under Section 302 IPC simplicitor and in that case, the Hon'ble Supreme Court has upheld the conviction and on the basis of the mistake in the charge, was held to be not significant because from the very beginning, there was specific allegation that it was the accused, who had assaulted the deceased. In the instant case also, the language of the charge is very clear that he had overstayed the leave, therefore, mere mentioning of Section 38(1) in the charge sheet would not in any manner adversely affect the SCM proceedings.

14. So far as the next submission of the learned counsel for the petitioner is concerned that the SCM was conducted within a very short time on the same day, has no substance, because in this case, after the summary of evidence, the petitioner had pleaded guilty. We can take note of the fact that the SCM proceedings are recorded on a prescribed proforma, therefore, it takes very little time when there is a plea of guilt as in the instant case.

15. On this point, we may refer to the order of this Tribunal in the case of **Brijesh Kumar vs. Union of India & others** (O.A. (A) No. 192 of 2014 decided on 25<sup>th</sup> 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 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.”*

16. Learned counsel for the petitioner has placed reliance on the pronouncement of this Tribunal in the case of **Smt Kalindi Dwivedi & others vs. Chief of the Army Staff & others** (O.A.No.33 of 2010) decided on 22<sup>nd</sup> April 2015, but he facts of that case was different with this case. In that case, the petitioner had over stayed of leave only for 20 days and it was also observed in Para 21 that this case shall not be treated as precedence in any other case. The main applicant Ex L/NK KK Dwivedi had died during the pendency of this O.A. and it was contested by his legal heir for the purpose of family pension, therefore, that case is different with this case and the applicant is not entitled to get any benefit of that case.

17. Reliance has also been placed on the pronouncement of the decision of AFT, Principal Bench, New Delhi in the case of **Pradeep Kumar Singh vs The Chief of Army Staff & others** (T.A.No.545 of 2009) decided on 03.04.2012. In that case also, though there was a mistake in the section, but the conviction of the petitioner was converted under Section 39 of the Army Act instead of Section 38 of the Army Act and this mistake was not made a basis to vitiate the proceedings.

18. Reliance has also been placed on the pronouncement of the Hon'ble Supreme Court in the case of **Capt Virendra Singh through his wife vs. Chief of Army Staff & others** (W.P.No.1741 of 1981) decided on 13<sup>th</sup> February 2016. In that case, the applicant was released from Army having been placed in permanent low category. He challenged his release by filing writ petition in Delhi High Court, which was dismissed. However, his Civil Appeal No.475 of 2016 was allowed by the Hon'ble Apex Court. After going through the judgment, we find that the facts of that case were entirely different, therefore, the applicant is not entitled to any benefit of this judgment.

19. Reliance has also been placed on the pronouncement of AFT, Gauhati in T.A.No.49 of 2010 decided in June 2011. In that case the SCM

proceedings were conducted within 1½ hours. It transpires that in that case the provisions of Army Rule 34 were not followed. However, the facts position is different in the case in hand.

20. Even during course of argument, learned counsel for the petitioner has not given any reasonable or plausible explanation as to why and under what compelling circumstances, the petitioner remained absent after his leave for a period of 1033 days. If he had no explanation for the same and has accepted his guilt during SCM proceedings, then how he can say that he was prejudiced in his defence during SCM proceedings.

21. In the instant case, a tentative charge sheet was given to the accused and thereafter the charge sheet was given on 10<sup>th</sup> March and SCM proceedings commenced on 18<sup>th</sup> March and finally concluded on the same day. Therefore, in this case, it cannot be said that there was any violation of Army Rule 34.

22. Reliance has also been placed on the pronouncement of the AFT, Principal Bench, New Delhi in the case of T.A.No.40 of 2009 decided on 03<sup>rd</sup> April 2010. In that case also, the Hon'ble Supreme Court has reduced the punishment of dismissal from service into discharge as there was also punishment for imprisonment. This submission has substance because due to dismissal, the applicant would not be qualified to get any Government job. So his dismissal deserves to be converted into discharge. Applicant had only 5 years, 8 months and 24 days of service at the time of his discharge. So he is not entitled to pension etc.

23. In view of the discussions made above, we are of the considered view that there was no illegality or irregularity in the SCM proceedings. The SCM proceedings were conducted in accordance with the procedure prescribed therefor.

24. This O.A. deserves to be partly allowed and is hereby **partly allowed**. The punishment of the applicant shall be treated to be under Section 39(b) of the Army Act instead of Section 38(a) of the Army Act. His dismissal is hereby converted into discharge. He is not entitled to any other relief

No order as to costs.

(Lt Gen Gyan Bhushan)  
Member (A)

(Justice S.V.S.Rathore)  
Member (J)

Dated: February , 2018.  
PKG