

(Reserved)

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

Original Application (Appeal) No. 399 of 2021

Tuesday, this the 11th day of July, 2023

“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”

No. 1580573-N. Ex-Nk, Radhey Shyam Yadav, Son of Jogdish Yadav, Resident of: Village & Post Office: Pirounta, District - Ballia, (U.P.) PIN – 277403.

..... **Appellant**

Ld. Counsel for the Appellant: **Shri Sudhir Kumar Singh, Advocate.**

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, New Delhi, PIN - 110011.
2. The Chief of Army Staff, Integrated Headquarters, Ministry of Defence, South Block III, Sena Bhawan, New Delhi, PIN -110011
3. Additional Directorate, General, Discipline & Vigilance (DV-3), Adjutant General’s Branch, Integrated Headquarters of Ministry of Defence (Army), DHQ PO, New Delhi, PIN - 110011.
4. Commanding Officer, AbhilekhKaryalaya, Record Office, Bombay Engineer Group, PIN – 900462, C/o 56 APO.
5. Commanding Officer, 116 Inf. Bn. (T.A.) PARA, Devlali, PIN - 433401.
6. Commanding Officer, 1103 F.M.A. Bhuj C/o 56 APO.

.....**Respondents**

Ld. Counsel for the Respondents : **Shri RC Shukla, Advocate
Central Govt Counsel.**

ORDER

“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

1. The instant Original Application (Appeal) has been filed on behalf of the appellant under Section 15 of the Armed Forces Tribunal Act, 2007, whereby the appellanthas sought following reliefs:-

- “(I) Quash the finding and sentence dated 20.01.2003 passed in SCM, which is annexed as Annexure No. 1 to this appeal.*
- (II) Direct the respondent to reinstate the appellant with all consequential benefits.*
- (III) Pass the order of exemplary compensation for false prosecution and illegal imprisonment, in the interest of justice.*
- (IV) Pass any order which this Hon’ble Tribunal deem fit and proper under the facts and circumstances of the case in favour of the the petitioner, in the interest of justice.*
- (V) Allow the Original Application with exemplary cost.”*

2. There is delay of 15 years, 10 months and 21 days in filing of this O.A. (A). The reasons stated in affidavit filed in support of application for condonation are sufficient. Delay condonation application is allowed and delay in filing application is condoned.

3. Brief facts of the case are that the appellantwas enrolled in the Indian Army on 29.12.1989. During his attachment to 1103 FMA Bhuj he was levelled with the allegation of carnal intercourse with a 10 years boy. Court of Inquiry was held on 27.05.2002 to investigate the case and the appellant was found guilty. Summary

of Evidence was recorded and SCM held on 20.01.2003. appellant was awarded punishment of dismissal from service and rigorous imprisonment of one year in civil prison. Appellant submitted representation against the punishment which was not replied by the respondents. Being aggrieved, appellant has filed instant O.A. to reinstate him in service.

4. Ld. Counsel for the appellant submitted that appellant was enrolled in Army on 29.12.1989 and performed his duties with full zeal and dedication with unblemished service record. He was attached to 1103 FMA Bhuj at Gujrat. He was levelled with the allegation of carnal intercourse with a 10 years boy on 26.05.2002. He was taken in military custody on 27.05.2002 on the basis of identification by victim. No FIR was lodged despite the offence fall with the ambit of Section 377 of IPC which is cognizable offence. He was in custody from 27.05.2002 to 20.01.2003 and was not permitted to take any legal advice in his defence. FIR should have been lodged and criminal court should have tried the offence instead of SCM as the victim is not subject to Army Act. Appellant was detached to 116 Inf Bn (T.A) Para situated at Devlali in Maharashtra for disciplinary action against the provision of Para 453 of regulation. Thereafter, hearing of charge under Army Rule was done on 08.06.2002 wherein the appellant was not provided any opportunity of cross examine the witness. Summary of

Evidence (SoE) was ordered only on the basis of Court of Inquiry (Col) and without application of mind. Copy of Col was not provided to the appellant which is violation of Army Rule 184. The order of SoE was without any evidence, without any material on record and without assigning any reason. SoE is cryptic and unreasoned which vitiated the whole SCM proceedings.

5. Ld. Counsel for the appellant further submitted that the statement of the victim was recorded in English language. Evidence of witnesses recorded in SoE were riddled with material contradictions. Copy of SoE was not served to the appellant. Charge sheet was framed very late on 15.01.2003 under section 46(a) of Army Act despite the offence as alleged does not come under the purview of Section 46(a). Its copy was also not provided to the appellant. Moreover, SCM was ordered without taking sanction from Judge Advocate General of HQ as no charge sheet and SoE was sent for his consideration. SCM was ordered to be held on 20.01.2003, through a non speaking order. SCM held on 20.01.2003 despite the offence was committed on 22.05.2002. There was no urgency and immediate action to conduct SCM was not required as the SCM is exception not a rule. None of the witness was examined during SCM, only SoE was read and none of the witness had made their signature on their statements. General plea of guilty and confession of the appellant was

recorded under the threat and coercion which was commenced at 1220 hrs and concluded at 1540 hrs on 20.01.2003 including the lunch break from 1300 hrs to 1500 hrs which shows that conducting of SCM was mere formality and conducted in very hasty manner. SCM awarded sentence of dismissal from service and rigorous imprisonment of one year in civil prison without any evidence on record which is violation of provisions of Army Act, Army Rules, Defence Service Regulation hence, liable to be quashed.

6. Learned counsel for the appellant urged that respondents have failed to prove the guilt of appellant as none of the ingredient of Section 377 of IPC was proved. Appellant is innocent and he was falsely implicated as the appellant refused to provide liquor asked by the father of the victim. Learned counsel for the appellant further submitted that a writ petition No. 49855 was filed before the Hon'ble High Court for providing the documents including the copy of SCM. The same was transferred to this Tribunal and was registered as T.A. No. 174/2010. The Tribunal allowed the T.A. directing the respondents to provide the copy of SCM proceedings. Thereafter, an appeal dated 22.02.2018 was filed which has not still been decided by the respondents. Learned counsel for the appellant pleaded that punishment of dismissal

awarded by SCM be quashed and appellant be reinstated in service.

7. On the other hand, Ld. Counsel for the respondents submitted that the appellant was enrolled in Army on 29.12.1989 and posted with 269 Engr Regt. While attending upgrading course w.e.f 01.04.2002 at HQ BEG & Centre, Kirkee, Pune, he was sent on Ty Duty to 1103 FMA Bhuj. On 26.05.2002 at around 1600 hrs the appellant forcefully took a 10 years boy to his room where he committed carnal intercourse of the unnatural kind with the victim and threatened the boy that he would kill him if he reveals the matter to anyone. Victim reported matter to his mother. Victim alongwith his uncle and two non-commissioned officers of 16 BIHAR reached the spot where the victim identified the accused/appellant. A Colwas held on 27.05.2002 at 1103 FMA Bhuj to investigate the matter. Appellant was found guilty. He was attached to 116 Inf Bn TA (PARA) and Summary of Evidence was recorded. SCM was ordered on 20.01.2003 and appellant was found guilty under Army Act Section 46(a) – Disgraceful conduct of an unnatural kind. He was awarded punishment to be dismissed from service and to suffer rigorous imprisonment for one year in civil Jail. Accordingly, appellant was dismissed from service on 20.01.2003 and was sent to civil jail, Nashik. As requested by appellant vide his application dated 20.01.2003, copy of SCM and

other documents were provided to him under acknowledgement. Appellant had committed very serious and heinous crime and he could have been punished with minimum ten years to life time imprisonment under IPC and POSCO Act, but he was given lesser punishment under Army Act. There is no lacuna and defect in trial proceedings.

8. Ld. Counsel for the respondents further submitted that SCM was ordered on 15.01.2003 by the Commanding Officer, 116 Inf. Bn. (TA) PARA where the appellant was attached for disciplinary proceedings. SCM found the appellant guilty under Army Act Section 46(a) and appellant was accordingly awarded punishment by SCM and there is no violation of any rules or regulations. All the documents including SCM proceedings were provided to the appellant as per his request. Learned counsel for the respondents pleaded that instant appeal has no substance and is liable to be dismissed.

9. We have heard learned counsel of both the parties and perused the original proceedings placed on record. On the basis of arguments of the counsel for the parties, the only question which falls for determination is as to whether on the facts and circumstances of this case, the appellant is entitled for reinstatement in the service?

10. The procedure of Summary Court Martial shows that after service of charge-sheet upon the accused, he has to be afforded adequate opportunity of defence by permitting sufficient time to prepare his defence. Rules 33(7) and 34(1) prohibits any commencement of trial prior to 96 hours after service of charge-sheet upon the officer concerned. However, where the accused person is in active service, the inter regnum period is 24 hours. The term "active service" has been defined under [Section 3\(i\)](#) of the Act, which is reproduced as under:

3. Definitions.- In this Act, unless the context otherwise requires,

(i) "active service ", as applied to a person subject to this Act, means the tune during which such person-

(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to or forms part of a force which is in military occupation of a foreign country.

11. Admittedly, the appellant was not in active service at the time of trial in terms of [Section 3\(i\)](#) of the Act and, therefore, in his case, as per Rule 33(7) and 34(1), 96 hours minimum time gap was mandatory between the communication of charge-sheet and the commencement of trial. The **Hon'ble Supreme Court** in the case of **Union of India and others versus A. K. Pandey reported in (2009) 10 SCC 552** has held that under Rule 34 of the Army

Rules, the requirement of interval of 'Ninety-six hours' between the accused being informed of charge for which he is to be tried and his arraignment is mandatory and its non-observance vitiates the entire proceedings.

12. On the point of procedural irregularities, we would like to refer the case of **Major G.S. Sodhi vs. Union of India** (1991) 2 SCC 382), wherein the Hon'ble Supreme Court has considered Army Rule 22 and the other Rules. The relevant part of the said judgment reads as under:

“6..... Rule 22 provides for the hearing of charges. Rule 23 lays down the procedure for taking down the summary of evidence. Rule 24 deals with remand of accused and lays down that the summary of evidence recorded under Rule 23 shall be considered by the Commanding Officer who thereupon shall either remand the accused for trial by a court-martial or refer the case to the proper superior military authority and if the accused is remanded for trial by a court-martial the commanding officer shall without unnecessary delay either assemble a summary court-martial or apply to the proper military authority to convene a court-martial. Rule 25 provides for the procedure to be followed on a charge against an officer. Rule 28 deals with framing of charges and lays down that the charge-sheet shall contain the whole issue or issues to be tried by a court-martial. Rule 33 deals with the defence by the accused person.....”

“11. Rule 22 contemplates that every charge against a person other than an officer, shall be heard in the presence of the accused, and the accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence. Rule 25 lays down the procedure on a charge against officer and is to the effect that where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held, and the evidence be taken in his presence in writing, in the same manner as required by Rules 22 and 23.....”

13. It is undisputed fact that appellant was enrolled in the army on 29.12.1989. A complaint was received against him for committing unnatural sex. SCM was held and appellant was awarded punishment of dismissal from service and to suffer rigorous imprisonment for one year. He was dismissed from service on 20.01.2003. Undoubtedly, the conduct of the appellant is disgraceful of an unnatural kind under Section 46 (a) of Army Act. All acts of indiscipline must be punished appropriately. We have carefully examined the investigation and the Summary Court Martial proceedings and find that no proper procedure was followed during SCM. In his 12 years of service, the appellant has no any red ink entry and he was having unblemished service record. Learned counsel for the appellant submitted that punishment inflicted upon the appellant is disproportionate. In support of his contention, learned counsel for the appellant has cited the Hon'ble Supreme Court judgment in the case of **Union of India &Ors vs R Karthik**, Criminal Appeal No 831 of 2015 decided on 21.01.2020 and **Union of India &Ors vs AK Pandey**, Civil Appeal No 6181 of 2002 decided on 16.09.2009. Since the appellant had already done more than 12 years of service, the punishment awarded to him, in our view, is harsh and deserves intervention. Accordingly, Original Application is liable to be allowed and order of dismissal dated 20.01.2003 passed by

SCMis liable to be quashed. In view of the judgment of Hon'ble the Supreme Court in ***Union of India and others Vs. Jaipal Singh***, 2004(1) SCT 108 = 2003 Supp(5) SCR 115 in case a person is discharged on account of criminal proceedings and conviction, he cannot claim back wages for the period he was not in service. The State cannot be made liable for the period for which it could not avail the services of the respondents. It is, therefore, clear from the above discussion that Hon'ble the Supreme Court has laid down the principle that in case there is no work, no pay shall be paid as back wages for the period the appellant was out of service in view of the orders passed.

14. It should be kept in mind that major contribution to the integrity and unity of the country is upon the shoulders of judiciary and armed forces. Neither soldiers are chosen nor appointed on the basis of cast, creed and religion. In case their anguish, anger, discontentment and frustration or a feeling of injustice continues then the country may suffer with disastrous consequences. By nature and on account of discipline, members of the armed forces ordinarily in majority of cases do not raise voice to ventilate their grievances. Trade unionism is neither justified nor practical or graceful even after retirement. However, after constitution of Armed Forces Tribunal, their grievances are attended efficaciously to impart justice.

15. In the present case, alleged offence was committed on 26.05.2002 whereas the POSCO Act was passed by the Parliament in the year 2012. The appellant was not provided any opportunity of hearing as he was in illegal custody from 27.05.2002 to 20.01.2003 where signature of the appellant was taken on blank papers under coercion and threat. The SCM proceedings was conducted in very haste manner within one hour and conducting the SCM was mere formalities as the respondents made their mind to punish the appellant by any means. SCM commenced at 1220 hrs and concluded at 1540 hrs on 20.01.2003 and there was lunch break from 1300 hrs to 1500 hrs therefore, the conducting SCM of appellant was just formality and the appellant was not having time to think and withdraw of general plea of guilty against the provisions of Army Rule. Provisions of Army Rule 22 were not followed and appellant was not provided copy of charge sheet as well as copy of SOE to prepare his defence therefore, SCM proceeding vitiates as the appellant was not provided opportunity to prepare his defence and to consult witnesses, and the mandatory 'Ninety-six hours' interval period was violated which prejudiced him and caused him miscarriage of justice. Furthermore, Statutory provisions and principle of natural justice were not complied with before and during the SCM causing serious lapses in the trial.

16. In view of discussions made above, the Original Application (A) succeeds and is partly **allowed**. Finding of sentence dated 20.01.2003 passed by SCM is quashed. The appellant has already undergone imprisonment for one year. The appellant shall be treated to be in service notionally from the date of discharge till the date of attainment of required qualifying pensionable service, for which he shall not be paid back wages on the principle of 'no work no pay'. From the date of attainment of such qualifying service for pension, the appellant shall be entitled to pension in accordance with law and rules. Applicant shall be granted pension from the date of attaining pensionable service. Due to law of limitation, arrears of pension will be restricted from three years prior to filing of Original Application. The O.A. was filed on 13.06.2019. Let the entire arrears of pension be paid to the applicant within the period of four months from the date of communication of order. Let necessary exercise be done in compliance with this order by the respondents within a period of four months from today.

17. No order as to costs.

(Vice Admiral Atul Kumar Jain) (Justice Ravindra Nath Kakkar)
Member (A) Member (J)

Dated: 11 Jul, 2023

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