Reserved

Court No. 1(List A)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION No 1036 of 2010

Thursday, this the 9th day of March 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

15493475 N Rect Jaswant Singh AC son of Sri Sukhpal Singh resident of village Raghunathpur Post Raghunathpur Pergana Ahar District Bulandshahr.

……Petitioner

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. Commanding Officer Driving and Maintenance Regiment Armoured Corps. Centre and School Ahmed Nagar 414002……..**Respondents.**

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Learned counsel for the Petitioner : Shri S.K.Mishra

Learned counsel for the Respondents :Dr. Chet Narain Singh **Advocate, C.G.S.C**

Assisted by OIC Legal Cell **: Maj Soma John**

Order

(Per Hon'ble Air Marshal Anil Chopra, Member (A)

1. The instant Petition was initially preferred before the High Court of Judicature at Allahabad initialling seeking the relief of mandamus commanding the respondents to supply copy of final order and further relief of mandamus directing the respondents to pay arrears of salary with effect from 01.01.2004 after deducting partial salary paid to him. The aforesaid writ petition was received by transfer on 22.07.2010. It was by way of order dated 21.03.2013 that the order of dismissal dated 09.03.2005 was challenged by incorporating relief (aa) on 04.04.2013. The petition on being transferred under section 34 of the Armed Forces Tribunal Act was re-numbered as T.A. No. 1036 of 2010.

2. The facts in brief are that the petitioner was enrolled in the Indian Army and was posted for training on 01.01.2004 which was completed on 05.06.2004. Thereafter, he was granted 14 days' leave and after availing of leave, he resumed duty for further training on 20.06.2004. It is alleged that he fled away from the Unit at Ahmad Nagar while he was still undergoing training on 03.09.2004. The father of the petitioner reportedly brought him back to the Unit on 20.12.2004. It is alleged

that immediately thereafter, he was detained in Quarter Guard initially for five days and thereafter again for 25 days in Jan 2005. Charge-sheet was served to the petitioner on 10.02.2005, the crux of which was he absented himself unaccountably between 03.09.2004 to 20.12.2004. The total period for which the petitioner remained absent was 109 days. The disciplinary proceedings were embarked upon and the petitioner was tried by Summary Court Martial under Army Act AA Section 39 (a). It is alleged that he pleaded guilty to the charge. In ultimate analysis, the petitioner was dismissed from service vide order dated 09.03.2005. Immediately after dismissal, the petitioner filed the writ petition in the Allahabad High Court without exhausting the statutory remedy of preferring appeal or representation as envisaged in Section 164 of the Army Act read with Army Rule 201.

3. We have heard learned counsel for the Petitioner as also learned counsel for the respondents at prolix length and have also been taken through the materials on record.

4. The crux of submission advanced across the bar by learned counsel for the petitioner is that the petitioner was neither informed in respect of departmental enquiry

nor about the enquiry officer and that he also not afforded sufficient time to reply to charge sheet. The further submission is that the petitioner was also not afforded opportunity to reply to the show cause notice as envisaged under Article 311 (2) of the Constitution of India. The further submission is that Section 80 of the Army Act was not observed in compliance inasmuch as respondent no 2 was not empowered to compulsorily retire any staff below the rank of non commissioned officer. The last submission is that the petitioner was not served with the order of dismissal and therefore, he was prejudiced in effectively preferring any statutory remedy or assailing the said dismissal order.

5. **Per contra**, learned counsel for the respondents repudiated the above submissions. At the very outset, he contends that the petitioner had hardly completed one year as recruit in the Army. He further contends that Summary Court Martial was commenced in March 2005 for his unauthorized absence from duty for a total period of 109 days and in completion of proceeding resulting in his dismissal, the petitioner was immediately supplied with complete set of SCM proceeding. He further contends that the dismissal order was handed over to the petitioner on 09.03.2005. He also contends that the petitioner without exhausting the statutory remedy immediately

filed the writ petition as envisaged in Section 164 of the Army Act read with Army Rule 2001.

6. The first argument which is taken up for consideration is that the Petitioner was afforded sufficient time to reply to the charge-sheet as provided under Rule 34 of the Army Rules which envisaged that all the documents were required to be furnished 96 hours prior to commencement of the Trial. Rule 34 being relevant is quoted below.

> ***"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.*
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> *(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.*
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> *(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.*
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> *NOTES*
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> *1. For power to dispense with this rule see AR 36.*
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> *2. The duty of complying with the provisions of this rule will usually devolve upon the CO in the case*

of summary and the prosecutor in the case of other courts martial, who should, in any case, satisfy himself before the trial that it has been properly performed. Even if this rule is dispensed with under AR 36 ,the accused must have information of the charge, and opportunity of calling his witnesses.

3 As to arraignment, see AR 48 and notes thereto.

4. The duty of procuring attendance of witnesses at GCM and DCM devolves, under AR 137(1) upon the CO or convening officer or, after assembly of the court, the presiding officer. The duty of procuring attendance of witnesses at SCM devolves under AR 137(2) upon the CO.

5. The request of an accused person for witnesses to be called on his behalf should only be refused if it is quite clear that their evidence would be immaterial, or if their attendance cannot be secured within a reasonable time. If the request is refused, the refusal and reasons for it should be communicated to the court, who will deal with the matter under sub-rule (4) and AR 138. If an essential witness is absent, the court should always adjourn for the purposes of enabling him to attend or of procuring his examination on commission.

6. For form of summons to witnesses, see Appendix III, Part III.

7. A copy and translation of the charge-sheet must always be given, unless this rule has been dispensed with under AR 36. Even where it is so dispensed with, the charges must be clearly explained to the accused, as otherwise he may not have proper opportunity to prepare his defence. If the accused objects to the charge he will have an opportunity of making his objection when called on to plead (AR 49).

8. The list of names, rank and corps of the members of the court should normally be delivered to the accused, irrespective of any demand on his part, as soon as the names of the members are known."

7. In the instant case, it is amply clear that the charge sheet was served to the petitioner on 10.02.2005 at 1230 hrs 2005 while warning letter was served to him on 05.03.2005. The trial commenced on 09.03.2005 as 1230 hrs. In Para 13 of the T.A it is stated that the petitioner

was handed over the charge sheet dated 10.2.2005 on 05.03.2005 while in Para 11 of the T.A it is stated that the petitioner was served charge sheet on 05.03.2005. In Para 14, it is stated that on 08.03.2005, the petitioner was issued a warning vide letter dated 05.03.2005 to the effect that he should submit his reply by the same date. In the said Para, it is alleged that the petitioner, at the time of serving charge sheet was not intimated as to who was the Enquiry officer. It is further stated that on the same day, he was produced before Maj A.K.Sharma, Officer recording the summary of inquiry and obtained his signatures on few typed pages out of which three pages were handed over to him by the aforesaid Officer. In Para 15, it is stated that on 11.03.2005, he was served a letter with printed forms of pension wherein his finger prints were taken. It is alleged that the petitioner was neither given copy of the inquiry report nor any opportunity to reply to show cause notice.

8. As per Army Rule 34, a warning has to be given to the accused before commencement of trial. It clearly says that 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 or 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. It is admitted on all hands and there is no gain-saying that the charge sheet was served on 05.03.2005 while the trial commenced on 09.05.2005. Thus, there is sufficient compliance with the provisions of Army Rule 34 which envisaged that the interval between his being so informed and his arraignment shall not be less than ninety six hours. Thus there was sufficient compliance with Army Rule 34.

9. It is not the case of the petitioner that he had not pleaded guilty. It is admitted case that the petitioner had pleaded guilty. From a perusal of the original record, it would transpire that before recording the plea of guilty of the accused, the court had explained to the accused the meaning of the charge to which he had pleaded guilty and ascertained that the accused understands the nature of the charge 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 understood the charge and the effect of the plea of guilty, accepted and recorded the

plea of guilt. Thus there is sufficient compliance with Rule 115 (2) of the Army Rules.

10. It is denied that dismissal order was not served to him submitting that as a matter of fact, it was served on the same date when order of dismissal was passed. In this connection, a preliminary objection was raised by learned counsel for the respondents that the petition was barred by time as the petitioner had not challenged the dismissal order which was served to him on 09.04.2005 while he moved the amendment Application in the year 2010 and incorporated the amendment by means of the order dated 21.03.2013. In this connection, he referred to the averments made in Para 1 of the Amendment Application in which it is conceded that the respondent while filing counter affidavit has annexed the copy of alleged dismissal order vide Annexure 8 to the counter affidavit. It would thus transpire that the petitioner came to know of the dismissal through counter affidavit. This fact is admitted in the amendment Application filed on 15.04.2010, while in Para 5 of the objection to the Amendment Application, it is clearly averred that the counter affidavit was filed in the year 2005 enclosing therewith the dismissal order. Besides, in Para 20 of the counter affidavit, the petitioner had moved an Application before the respondent no. 2 on 09.03.2005 stating

therein that he was tried by the Summary Court Martial on 09.03.2005 and was awarded punishment of dismissal from service. In the said Application, he requested to supply the set of complete Court Martial Proceedings. As prayed, the petitioner was supplied copy of complete set of Summary Court Martial Proceeding which he had received furnishing a signed receipt. Both the Application and receipt given by the Petitioner are Annexed as Annexure CA 1 to the counter affidavit. In Para 27 of the rejoinder affidavit, the petitioner has denied to have given any such Application or receipt. The C.A 1 to the counter affidavit is an Application duly signed by the petitioner. On being confronted, no plausible explanation is forthcoming. The denial is bald and is not supported by any convincing submission. Thus, the submission that the petitioner was not supplied copy of dismissal order or other allied papers, does not commend to us for acceptance. Thus it would transpire that the petitioner came to know of the dismissal order through counter affidavit filed in the year 2005 and yet he chose to file the amendment Application on 15.04.2010. No explanation is forthcoming why the amendment Application was filed in the year 2010 while he came to know of dismissal order through counter affidavit which was filed in the year 2005. On this count, the submission that dismissal order

or other allied papers were not served to the petitioner, cannot be sustained.

11. Admittedly, the petitioner in the course of service was granted 14 days leave after completion of basic training. After availing the leave, though he was required to join the duty on 03.09.2004, but after expiry of leave he did not report for duty on that date and absented himself unaccountably till 20.12.2004. The total period of absence unaccountably was 109 days. Thereafter, Court of Inquiry was conducted against him in which a prima facie case was stated to have been found against him and accordingly he was charged under Section 39 (b) of the Army Act for the offence "without sufficient cause" overstaying leave granted to him. The Summary of Evidence was recorded. Since it is a case of pleading guilty, the trial of the case was wrapped up after observing necessary formalities.

12. With regard to submission that charge sheet dated 10.02.2005 was served to him on 05.03.2005, our attention has been drawn to a circular dated 10.04.1995 issued by the Army Headquarters. Among other things, it is also envisaged therein that with a view to enable an accused to prepare his defence, the charge sheet on which the accused is to be tried should be handed over to him soon after the same has been signed by the

Commanding officer and endorsed by the Competent Authority for trial, if so applicable, together with a copy of the Summary of Evidence recorded against him. In the instant case, it is stated in Para 13 of the T.A that the charge sheet dated 10.02.2005 was served to the petitioner on 05.03.2005 while in Para 11 of the T.A it is conceded that the charge sheet was served to the petitioner on 10.02.2005. However, in the facts and circumstances, it would suffice to say that broadly, there is compliance with the provisions of Rule 34 of the Army Rules, also considering the fact that the Petitioner was a new recruit having completed only one year of service. No doubt, he resumed duties after 109 days of absence voluntarily, but it would not mitigate the offence of absenting himself without sufficient cause and without proper intimation to the authorities concerned. It is not the case that the petitioner was ailing and was under treatment at some civil hospital. Even-if it be assumed that he was undergoing treatment at some Civil Hospital, he was under a duty to have informed his Unit or to get himself referred to Civil Hospital by the Military Hospital in case he required any specialised treatment which was not available at the nearest Military Hospital.

13. The next submission is that the petitioner was not given any sufficient time to reply to show cause notice

and provisions of Article 311 (2) were not observed in compliance. In the objection filed to Amendment Application, this fact has been denied. There is nothing on record to show that the petitioner was not given opportunity to reply to show cause notice. We feel called to say that the Armed Forces are managed by disciplined persons, who are supposed to be fully dedicated to the Nation and its security. If everybody moves from the Army, as the applicant did in this case, it would be very difficult to enforce not only discipline in the Armed Forces but also to ensure security of the Nation. So in such matters, dismissal cannot be said to illegal only on the ground that sufficient time was not given to reply to show cause notice. In the case of **Union of India and others v Major S.P.Sharma and others (2014) 6 SCC 351**, the Apex Court held that the order of termination passed under section 18 of the Act can be challenged on the ground of malafides. The Apex Court further held that indisputably defence personnel fall under the category where the President has absolute pleasure to discontinue the services. By this reckoning, the submission with regard to Article 311 (2) of the Constitution of India is not sustainable.

14. In the instant case, it would suffice to say that it was a case in which the petitioner had pleaded guilty. As

discussed above, the petitioner was given full opportunity by serving charge sheet, by affording sufficient time to reply to show cause and to the charge sheet. It cannot be said that SCM was not conducted in observance of the provisions of Article 311 (2) of the Constitution of India. On this count, the submission advanced across the bar does not commend to us for acceptance. As stated supra, from a perusal of the original record, it would transpire that before recording the plea of guilty of the accused, the court had explained to the accused the meaning of the charge to which he had pleaded guilty and ascertained that the accused understands the nature of the charge 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 understood the charge and the effect of the plea of guilty, accepted and recorded the plea of guilt. Thus there is sufficient compliance with Rule 115 (2) of the Army Rules.

15. As a result of foregoing discussion, the T.A fails and is accordingly dismissed.

(Air Marshal Anil Chopra)
Member (A)

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

Date: March, ,2017

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