

ARMED FORCES TRIBUNAL REGIONAL BENCH, LUCKNOW

Transferred Application No. 1337 of 2010

Thursday, the 24th day of September, 2015

Reserved
(Court No. 2)

**“Hon’ble Mr. Justice Abdul Mateen, Member (J)
Hon’ble Lt. Gen. A.M. Verma, Member (A)”**

Shailendra Kumar, son of Sri Kedar Nath, resident of Village Habbo Nagar, Post Jahangirabad, P.S. Saini, Tehsil Sirathu, District Kaushambi.

..... Applicant

By Shri S.P.Singh, learned counsel for the applicant.

Versus

1. Union of India through the Secretary, Ministry of Defence, Government of India, New Delhi.
2. The Chief of Army Staff, Army Head Quarters, DHO PO New Delhi-110011
3. The Commanding Officer, 33, Armoured Division, Provost Unit, C/o 56 APO

.....Respondents.

By Shri Prakhar Kankan, learned counsel for the respondents alongwith Capt Soma John, Departmental Representative.

ORDER

1. Writ Petition No. 39190 of 1998 was received by transfer from Hon'ble Allahabad High Court vide High Court's order dated 12.3.2010 and was renumbered as Transfer Application No. 1337 of 2010.
2. The petitioner seeks the relief of quashing the order of Summary Court Martial dated 4.4.1997 and rejection of his appeal by the Chief of Army Staff dated 13.8.1998 and thereafter reinstate him in service with all consequential benefits.
3. Facts of the case are that the petitioner was enrolled in the Army on 21.7.1987. On 14.2.1993 he was posted in 33 Armoured Division, Provost Unit. He was granted balance of Annual Leave for 23 days from 9.12.1996 to 31.12.1996. At the end of this leave, he did not report to the Unit on due date and reported voluntarily on 14.3.1997, thus being absent for 73 days. He was tried by a Summary Court Martial on 4.4.1997 and awarded the punishment of R.I for six months in civil prison and dismissal from service. The competent authority remitted three months R.I on 10.5.1997. The petitioner filed a statutory complaint against the said punishment before the Chief of Army Staff but that too was rejected on 13.8.1998. Aggrieved against the said orders, the petitioner filed the said writ petition which was transferred to this Bench of Armed Forces Tribunal.
4. The petitioner was represented by Shri S.P.Singh, his learned counsel. According to the petitioner, he was granted leave of 23 days

from 9.12.1996 to 31.12.1996. However, his wife's health condition was not good, hence he was compelled to stay on and look after her. He sent numerous telegrams to the Unit for extension of leave, but the same was not extended. His wife was under treatment of Dr. A.Mishra, who gave a certificate on 8.3.1997, following which he rejoined duty on 14.3.1997. On 4.4.1997 the trial by Summary Court Martial started and during the proceedings of the said trial, the petitioner was made to sign some documents, the import of which he did not know. It is claimed by the respondents that the petitioner had pleaded guilty which is not correct as he had not pleaded guilty nor was he allowed to cross-examine any witness during the trial, which makes it clear that the proceedings of Summary Court Martial are arbitrary and illegal. The petitioner filed a statutory complaint on 24.6.1997, which was not responded to by the Chief of Army Staff, whereupon he filed a writ petition in Allahabad High Court which was disposed of by an order dated 12.1.1998 with the direction to the Chief of Army Staff to decide the statutory complaint within a period of three months. Consequent to this, the Chief of Army Staff passed his order dated 13.8.1998 on the statutory petition rejecting the same. The petitioner states that the punishment awarded was too harsh and against the weight of evidence since he was forced to overstay leave due to compelling circumstances.

5. The petitioner claims that before the trial he was not given any opportunity to prepare his defence. He was not given a copy of the charge-sheet prior to the commencement of the trial as is the mandate of

Rules 34(1) and 33(7) of the Army Rules. Learned counsel for the applicant pleaded that on this count alone, the proceedings of the Summary Court Martial are illegal and deserve to be quashed.

6. The respondents were represented by Shri Prakhar Kankan, duly assisted by Capt. Soma John, Departmental Representative. The respondents admitted that the petitioner was enrolled in the Army on 21.7.1987 and was posted in 33 Armoured Division, Provost Unit in February, 1993. He was granted 23 days balance of Annual Leave. The respondents say that no telegrams as alleged were received except the one on 25.12.1996 in which the petitioner had requested for extension of leave when only 5 days were left for his leave to terminate. The petitioner has produced medical certificate from a private medical practitioner. However, the military hospital at Allahabad is close to his town and he could have very conveniently taken his wife to Allahabad rather than to give her medical treatment in a private hospital. Also the respondents would plead that the diagnosis by the said private medical practitioner was not such as to qualify as a very serious illness of his wife. The respondents would state that the statutory petition was considered by the Chief of Army Staff and was rejected by his order dated 13.8.1998. The entire proceedings of the Summary Court Martial were as provided in law.

7. On the issue of non-provision of copy of the charge-sheet prior to the trial, the respondents would state that hearing of charge under Army Rule 22 took place on 25.3.1997 and thereafter Summary of Evidence

was recorded and copies of Summary of Evidence and charge-sheet in the form of IAFD-901 were handed over to the petitioner on 27.3.1997. The trial took place on 4.3.1997. The respondents would state that on 27.3.1997 handing over IAFD-901 was a mistake and a copy of the actual charge-sheet, IAFD-901 needed to be handed over.

8. The respondents would also state that in a short span of service, the petitioner had absented himself without leave on three previous occasions ie. for 119 days, 85 days and 507 days, and combined with 73 days' absence in the instant case, the total period of absence from service is 784 days and thus the petitioner is a habitual offender and, therefore, he deserves no leniency; the punishment awarded to him is appropriate, just and legal.

9. Heard both sides and examined the documents.

10. The petitioner has annexed with his petition a medical certificate signed by Dr. A. Mishra of Allahabad dated 8.3.1997, in which it has been stated that Smt. Sursati Devi, wife of Shri Shailendra Kumar was under his treatment w.e.f. 1.12.1996 to 7.3.1997. The petitioner has also annexed copies of two letters that he had sent to the respondents for extension of his leave. However, the important question that emerges in our minds is the factum of handing over a copy of charge-sheet and summary of evidence to the petitioner before the trial. Rule 34(1) of the Army Rules reads as follows:

“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 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.”

11. According to this Army Rule 34(1), the copy of charge-sheet is required to be handed over ninety-six hours prior to the commencement of the trial. The Hon’ble Supreme Court in its judgment in the case of *Union of India and others versus A.K.Pandey*, reported in **(2009) 10 SCC 552**, has held that 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 and this is mandatory and 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. In paras 15 and 16 of the said judgment, the Apex Court held as under:

“15. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word “shall” is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory

and imperative becomes loud and clear and ordinarily has to be inferred as such. There being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours' interval between the accused being given the charges for which he is to be tried and his arraignment and interval time in Rule 34 must be read as absolute. There is a purpose behind this provision; that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours.

16. A trial before the General Court Martial entails grave consequence. The accused may be sentence to suffer imprisonment. He may be dismissed from service. The consequences that may follow from non-observance of the time interval provided in Rule 34 being grave and severe, we hold, as it must be, that the said provision is absolute and mandatory. If the interval period provided in Rule 34 is held to be directory and its strict observance is not insisted upon, in a given case, an accused may be called upon for trial before the General Court Martial no sooner charge/charges for which he is to be tried are served. Surely, that is not the intention; the time-frame provided in Rule 34 has definite purpose and object and must be strictly observed. Its non-observance vitiates the entire proceedings.”

12. In the instant case, there is a receipt in the original file produced by the respondents on which signatures of the petitioner are found. It says that copies of Summary of Evidence and IAFD-901 were received by him on 27.3.1997. This original file also contains unsigned copy of said IAFD-901, copy of which was handed over to the petitioner on 27.3.1997. We find that this document IAFD-901 is for use at Summary Trials and by the said document the petitioner was remanded to the Officer Commanding, by the Second in Command of 33 Armed

Division, Provost Unit. This is not the charge-sheet on which the petitioner was tried by Summary Court Martial. There is only one charge in the original file, which is dated 4.4.1997; it reads as follows:

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CHARGE SHEET

**BRS DAHIYA
COLONEL
*The Court.***

*The accused No, 7775431 F Rank Sepoy (MP) Trade
MP Name Shailendra Kumar of 33 Armoured Divisional
Provost Unit is charged with :-*

*Charged with:- Without sufficient cause overstaying leave granted to
Army Act 1950 him in that he, at field, having been granted 23 days
part of annual leave from 09 Dec 96 to 31 Dec 96
failed to report on duty on expiry of said leave till
rejoined voluntarily on 14 March 1997 (AN) at 1540
Hours.*

Station : Field

Date : 04 Apr 97

*Sd/- x x x x
BRS Dahiya
Colonel
Commanding Officer
33 Armoured Divisional
Provost Unit.”*

13. The respondents have admitted that erroneously copy of IAFD-901 was handed over to the petitioner on 27.3.1997 and it was not the actual charge-sheet. However, the respondents have also claimed that the petitioner was aware of the charge on which he was being tried by a Summary Court Martial and, therefore, he did have adequate time to prepare his defence. In our view, this argument does not wash and the

petitioner was denied opportunity of adequately preparing his defence by not giving him a copy of the charge-sheet ninety-six hours in advance as stipulated by law. We hold that the Summary Court Martial in the instant case is marred by a serious illegality and deserves to be quashed. Against this backdrop, the rejection order passed by the Chief of the Army Staff on 13.8.1998 is also liable to be quashed.

14. Accordingly, this T.A is partly allowed. The Summary Court Martial dated 4.4.1997 alongwith its findings and sentence is hereby quashed. We also quash the rejection order passed by the Chief of the Army Staff on 13.8.1998. However, the punishment of R.I undergone by the petitioner cannot be undone. We direct the respondents to treat the petitioner notionally in service till he attains the service which entitles him to pensionary benefits and thereafter he will be granted pension with all retiral benefits. We make it clear that the petitioner shall not be paid any salary for the period he is to be treated notionally in service. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

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