

Court No. 2
Reserved Judgment

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

Transferred Application No. 1279 of 2010

Thursday, this the 05th day of October, 2017

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

Naresh Kumar, Son of Shri Satya Pal Singh, R/o Village-
Kadargarh, Post Office – Hasanpur Lahari, Tahsil-Shamli,
District- Muzaffarnagar.

..... **Petitioner**

By Legal Practitioner: Shri PN Chaturvedi, Advocate
Learned Counsel for the Petitioner.

Versus

1. The Union of India, through the Chief of Army Staff,
New Delhi.
2. The General Officer Commanding, Headquarter Western
Command Chandi Mandir, 56-A.P.O.
3. The Commanding Officer, Western Command Chandi
Mandir, 56-A.P.O.

..... **Respondents**

By Legal Practitioner: Shri Bhanu Pratap Singh, Learned
Standing Counsel for the Central
Government alongwith Maj
Rajshri Nigam, Departmental
Representative.

ORDER

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

1. Initially the Writ Petition No. 11043 of 2003 was filed by the petitioner Naresh Kumar before the Hon'ble High Court of Judicature at Allahabad and it was transferred to this Tribunal vide order dated 25.03.2010 and renumbered as T.A. No. 1279 of 2010. By means of this T.A. the petitioner has prayed for the following reliefs:-

“(i) issue a writ, order or direction in the nature of Certiorari quashing the impugned order of dismissal dt 15.3.3002 passed by Summary Court Martial..

(ii) Issue/pass an order or direction of appropriate nature to the respondents to quash/set-aside the directions dated 04.04.2003 and 12.11.2003 passed by the General Officer Commanding in-Chief, Western Command, Chandigarh on the petition submitted by the applicant, because these orders are not speaking order and have been passed without application of mind.

(iii) Issue a writ, order or direction in the nature of mandamus commanding the Summary Court Martial to reviewed the punishment order and reinstate the petitioner in service and pay full back wages in accordance with law..

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

(v) and award cost of the petition to the petitioner.”

2. The brief facts necessary for the purposes of instant T.A. is that the petitioner Naresh Kumar was enrolled in the Army on 28.06.1995. While posted to 20 Mech Inf, he absented himself without leave w.e.f. 24.03.2001 and voluntarily reported at EME Depot Bn, Secunderabad on 13.12.2001 after absence of 264 days. The petitioner was brought from EME BN, Secunderabad to Unit. His charge-sheet was prepared

and he was found guilty and order to record of Summary of Evidence was passed. He was tried by Summary Court Martial and was awarded punishment 'dismissal from service'. He preferred representation before authority concerned but no relief was granted. Being aggrieved, he preferred petition before High Court of Judicature at Allahabad which has been received by this Tribunal by way of transfer and re-numbered as T.A. No 1279 of 2010.

3. Heard Shri PN Chaturvedi, learned counsel for the petitioner, and Shri Bhanu Pratap Singh, learned counsel for the respondents assisted by Maj Rajshri Nigam, Departmental Representative and perused the record.

4. Learned counsel for the petitioner submitted that the petitioner was enrolled in the army on 28.06.1995. While posted to 20 Mech Inf, he absented himself without leave w.e.f. 24.03.2001 due to mental illness. After regaining his mental health, he visited the unit and appeared before the Commanding Officer alongwith Medical Certificates but the same was thrown on his face by the Commanding Officer in the presence of others. It has also been pleaded that the petitioner became mentally ill before absenting himself from the unit due to stress and strain of Military Service and harassment by his immediate superior officers. The petitioner voluntarily reported at EME Depot Bn, Secunderabad on 13.12.2001 and then he was brought from EME Bn, Secunderabad to unit and was tried by Summary Court Martial and was awarded punishment 'dismissal from service'. The Summary Court Martial was held on 15 March 2002

and on the same day, the petitioner was dismissed from the service. Neither the dismissal order nor the details of the proceedings of Summary Court Martial have been provided to the petitioner till date. Some incomplete papers of Summary Court Martial were handed over to the petitioner which is annexed in the Writ Petition. The plea of mental disorder of the petitioner was not properly appreciated during Summary Court Martial and he remained in the unit after Summary Court Martial for a period of 89 days. Neither the petitioner was served charge sheet nor it was read out in his presence. Para 1 and 14 of Summary of Evidence was not given to the petitioner for signature. Petitioner was not even provided opportunity to cross examine the prosecution witnesses during the proceedings of Summary Court Martial. The officer presiding over Summary Court Martial ignored the principles of natural justice and also provisions of Army rules as contained under Rules 22, 23, 33 and 34. The petitioner has maintained the highest degree of character and the punishment awarded was disproportionate to the mistake committed by the petitioner. The petitioner preferred a petition dated 20.07.2002 against his dismissal from service before the competent authority but the same has not been replied so far. Keeping in view above irregularities, order of dismissal from service be set aside and petitioner be reinstated in service with full back wages.

5. **Per contra**, learned counsel for the respondents submitted that the petitioner was enrolled in the army on 28 June 1995. The petitioner is a habitual offender as he had previously also absented

himself without leave for a period of 38 days w.e.f. from 08.10.2000 to 14.11.2000 while serving with 9 Mech Infantry, where he was awarded 14 days pay fine. Again while he was posted to 20 Mech Inf, he absented himself without leave with effect from 24.03.2001 and voluntarily reported at EME Depot Bn. Secunderabad on 13.12.2001 after 264 days. He was brought under escort from EME Depot Bn Secunderabad to the Unit on 18.12.2001. He was marched upto Col Rajat Das, the then Commanding Officer 20 Mech Inf. The Charge-sheet was read over to the accused in presence of Maj Amit Jha, Officer recording Summary of Evidence, Adjutant, and Subedar Jarnail Singh, Officiating Subedar Major of the unit. Lt K.B. Lal was appointed as friend of the accused. This fact has not been denied by learned counsel for the petitioner. He was given full liberty to cross examine the witnesses during Summary of Evidence and also during hearing of witnesses under Army Rules 22(1) which he declined. Before ordering the Summary of Evidence, the preliminary investigations were carried out as required under Army rule 22 and Army Order 24/94. The Commanding Officer found him guilty and ordered to record the Summary of Evidence. The petitioner signed on page C (Proceedings on a plea of guilty) of Summary Court Martial Proceedings. The petitioner was tried by Summary Court Martial and was awarded the punishment 'Dismissal from service' as per offence under Army Rule Section 71. The petitioner was medically examined and was found fit by the medical board prior to commencement of Summary Court Martial. The petitioner has not

produced any documentary evidence of mental illness leading to his long absence without any leave. During Court of Inquiry and Summary of Evidence, the petitioner never claimed any mental disorder. Summary Court Martial of the petitioner was conducted on 15.03.2002, sentence of dismissal was awarded and promulgation parade was carried out on the same day. The petitioner was struck of strength w.e.f. 16.03.2002 thus the claim that he was kept in unit for 89 days without pay is false. The proceedings of the Summary Court Martial were reviewed by the DJAG and the sentence of dismissal was found just and legal. Keeping in view the gravity of offence and past record of the petitioner, the sentence awarded is absolutely just, proper and legal.

6. Submission of the learned counsel for the petitioner that since the appellant had taken plea of illness so it was obligatory on the officer conducting Court Martial to adjourn the proceedings and to confirm the plea of illness. Since this procedure has not been followed in the Summary Court Martial, therefore, Summary Court Martial was conducted in violation of Army Rules 143. It has also been argued that there was no compliance of Army Rules 22(1). He has also argued that while recording Summary of Evidence it was obligatory on the part of the prosecution to produce all the documents in accordance with the provisions of the Indian Evidence Act which has not been done therefore those documents could not be considered during the Summary Court Martial. It is also argued that the plea of guilty of petitioner was recorded without following the procedure

prescribed under rules and on the basis of the same he has been held guilty. It has been submitted that because of the non compliance of the mandatory provisions, the proceeding of Summary Court Martial stands vitiated. Learned counsel for the petitioner has laid great emphasis on Annexure CA-3 and has argued that as per this document there was no compliance of Army Rule 22(1).

7. Learned counsel for the respondents has argued that all the mandatory provisions have been complied with. It has been submitted that Annexure-3 of the Counter Affidavit is virtually not the part of the Summary Court Martial Proceeding. It is only when the appellant appeared before the Coy Cdr then he was remanded to Commanding Officer. It was only thereafter the Commanding Officer has initialled the proceedings. Since Coy Cdr was not competent to initiate the Summary Court Martial Proceeding, therefore, Annexure-3 of the Counter Affidavit is of no help to the petitioner. It has been argued that Charge-sheet was read over to the petitioner and he has pleaded guilty and has signed the replies given by him. While admitting his mistake, he was warned by the officer conducting the Summary Court Martial regarding the result of the said plea of guilty and he was also informed that on the basis of the said plea final verdict may given by the Commanding Officer. Consequently on the basis of such plea of guilty the punishment was inflicted on him. Therefore, there is no illegality of procedure, no provision of the Army Act and Army Rules has been violated.

8. Since in the facts of this case, petitioner has been punished on his plea of guilty there before proceeding further we would like to quote Army Rules 116 which deals with Summary Court Martial:-

“116. Procedure after plea of “Guilty”. (1) Upon the record of the plea of “Guilty”,. If there are other charges in the same charge-sheet to which the plea is “Not Guilty”, the trial shall first proceed with respect to the latter charges, and, after the finding of these charges, shall proceed with the charges on which a plea of “Guilty” has been entered; but if they are alternative charges, the court may either proceed with respect to all the charges as if the accused had not pleaded “Guilty” to any charge, or may, instead of trying him, record a finding upon any one of the alternative charges to which he has pleaded “Guilty” and a finding of “Not Guilty” upon all the other alternative charges.

(2) After the record of the plea of “Guilty” on a charge (if the trial does not proceed on any other charges), the court shall read the summary of evidence, and annex it to the proceedings or if there is no such summary, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence. The evidence shall be taken in like manner as is directed by these rules in case of a plea of “Not Guilty”.

(3) After such evidence has been taken, or the summary of evidence has been read, as the case may be, the accused may address the court in reference to the charge and in mitigation of punishment and may call witnesses as to his character.

(4) If from the statement of the accused, or from the summary of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of “Guilty”, the court shall alter the record and enter a plea of “Not Guilty”, and proceed with the trial accordingly.

(5) If a plea of “Guilty” is recorded and the trial proceeds with respect to other charges in the same charge-sheet, the proceedings under sub-rules (2) and (3) shall take place when the findings on the other charges in the same charge-sheet are recorded.

(6) When the accused states anything in mitigation of punishment which in the opinion of the court requires to be proved, and would, if proved, effect the amount of punishment, the court may permit the accused to call witnesses to prove the same.

(7) In any case where the court is empowered by section 139 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment, or where it could, after hearing the evidence, have made a special finding of guilty subject to exceptions of variations in accordance with sub-rule (3) of rule 121, it may, if it is

satisfied of the justice of such course accept and record a plea of guilty of such other offence, or of the offence as having been committed in circumstance involving such less degree of punishment, or of the offence charged subject to such exceptions or variations”.

9. In order to appreciate the arguments, we have also examined the original records of the Summary Court Martial. It transpire from the perusal of records that Appellant was charge-sheeted as under:-

“CHARGE SHEET

The accused No 14627243H Cfn Naresh Kumar of the LRW 20 MECH Inf, is charges with :-

Army Act
Sec 32 (a)

ABSENTING HIMSELF WITHOUT LEAVE

*in that he,
at Field, absented himself without leave from Unit lines,
from 24 Mar 2001 to 13 Dec 2001.*

Place : Field (Raowala)

Sd/-x x x x x

(Rajat Das)

Colonel

Dated : 10 Mar 2002

*Commanding Officer
20 MECH INF”*

10. It transpire from the perusal of records that Lt. K.B. Lal was appointed as the friend of accused. After the Charge-sheet was read over the petitioner had pleaded guilty. A certificate was given by Col. Rajat Das, Commanding Officer, 20 Mech Inf which reads as under:-

“CERTIFICATE

Ans.2 “Before recording the plea of guilty offered by the accused, the court explained to the accused the meaning of the charge to which he had pleaded guilty and ascertained that 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 understands the charge and the effect of his plea of guilty accepts and records the same. The provisions of Army Rule 115 (2), are thus complied with.”

“Sd/-x-x-x-x-

(Rajat Das)

Col

The Court

Sd/-x-x-x-x-xx-x-x

(Signature of the accused)

No 14627243H Cfn Naresh Kumar”

15 Mar 2002

11. It is clear from the perusal of the original record that this certificate has been given separately and is not a proforma certificate and it was pasted below the plea of guilty. Thereafter the proceedings, after complying with the Army Rules 115(2) commenced. In the said proceeding the accused said I am sorry. I have committed mistake. In reply to the other question he has stated that **“I do not wish to call any witness”**. Thereafter, on the basis of his plea of guilty and considering his replies the verdict was given. Thus due procedure was followed at every stage before awarding the sentence. It transpires from the perusal of records that in the Summary of Evidence statements of PW-1 Havildar Surendra Singh, PW-2 Naib Subedar Balbir Singh and PW-3 Naik RS Mahla were recorded who have filed the documents regarding the absence of the appellant and Naresh Kumar appellant, declined to cross-examine any witnesses. Thereafter accused was also asked to make any statement if he so wish but the accused refused to give any statement. On the basis of this Summary of Evidence, the Charge-sheet was prepared to which the petitioner has pleaded guilty. It is absolutely clear from the record that under that under Army Rule 22(1) two witnesses were heard and thereafter under Army Rules 22(3), Summary of Evidence as mentioned above was recorded. Statements of three witnesses were recorded and opportunity to cross-examine those witnesses was also given to the petitioner.

12. The submission of the learned counsel for the petitioner is that evidence under Army Rules 22(3) must have been recorded in

accordance with the Indian Evidence Act has not legs to stand. It is a misconceived argument. The stage of Army Rules 22(3)(Summary of Evidence) is only a stage of investigation and not the stage of trial. It is nowhere provided under the Army Rules or under the Army Act that evidence under Army Rules 22(3) must be recorded in accordance with Indian Evidence Act. The Summary Court Martial Proceedings are conducted under special law which is contained in the Army Act and the Army Rules. Special procedure is prescribed under the Act and the Rules. In such circumstances the provisions of general law can be considered only when on any point special law is salient. Apart from it the intention of Army Rule 22(3) is only to provide the copies of the statements so recorded to the appellant so that he may face the trial without difficulty and prepare his defence. Procedure for recording Summary of Evidence is provided under Army Rule 23 which nowhere mandates that such statements must be recorded in accordance with the provisions of Indian Evidence Act.

13. In the instant case, we do not find any irregularity of procedure in recording the plea of guilty which was recorded after warning the appellant about the consequence of such plea of guilty and he was also asked to make any statement if he so wish but inspite of that he pleaded guilty and had declined to make any statement. It is pertinent to mention here that there was absolutely no whisper about his illness by the appellant while he was asked about his absence. When he was asked to make an statement then he has not stated that he was ill. Learned counsel for the petitioner has fairly conceded during

course of arguments that no medical certificate or medical documents pertaining to the illness of the appellant was filed during Summary Court Martial Proceedings. Even before this Tribunal no such document could be brought on record by the appellant. The appellant also could not file any application sent by his family member to his Unit or to any authority giving information of his illness and also that due to illness he is unable to join the duty. Therefore the plea of illness taken by the appellant has no substance as the same is not substantiated by any documentary evidence and is only an afterthought story.

14. On the contrary, Learned Counsel for the Respondents has argued that before the Summary Court Martial Proceedings, the appellant was medically examined and was declared to be in SHAPE-1. This aspect also falsifies the plea of his illness.

15. In view of discussions made above, we do not find any procedural illegality in conduct of the Summary Court Martial Proceedings. Now we proceed to consider the sentence. It has been argued that the sentence awarded to appellant was disproportionate to his misconduct. Learned Counsel for the Respondents has argued that the appellant is a habitual absentee. He remained absent on an earlier occasion for a period of 38 days with effect from 08 October 2000 to 14 November 2000 and he was inflicted on 14 days pay fine and thereafter he again absented himself without leave for a very long period of 264 days during his service span of less than seven years.

Therefore, keeping in view the repeated absence of the appellant that too without any valid reason we do not find the sentence inflicted on the appellant was disproportionate. Need to maintain high standards of Army discipline cannot be ignored.

16. In view of the discussion made above, we do not find any illegality or irregularity in conducting the Summary Court Martial Proceedings. The grounds raised on behalf of the appellant have no substance. The sentence inflicted on him cannot be said to be disproportionate in the facts and circumstance of the case. Accordingly, this T.A. has no substance and deserves to be dismissed.

17. Accordingly, T.A. No.1279 of 2010 is hereby **dismissed**.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated: October, 2017.
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