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**IN THE ARMED FORCES TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

TA/423/09  
IN W.P.C. No. 3375/1998

**EX SEPOY SANJAY KUMAR (EX 14 RAJPUT)  
NO.2990705N  
SON OF SH. RAJESHWAR DAYAL SHARMA  
HOUSE NO.RZ-15, GALI NO.1, DURGA PARK  
P.O.PALAM  
NEW DELHI-110 045.**

**THROUGH : SH.P.S.RATHEE, ADVOCATE**

**...PETITIONER**

**VERSUS**

- 1. THE UNION OF INDIA  
THROUGH THE SECRETARY  
MINISTRY OF DEFENCE  
SOUTH BLOCK, D.H.Q.P.O.  
NEW DELHI-110 011.**
- 2. THE CHIEF OF ARMY STAFF  
ARMY HEADQUARTERS  
SOUTH BLOCK, D.H.Q.P.O.  
NEW DELHI-110 011.**
- 3. THE GOC-IN-C  
EASTERN COMMAND  
FORT WILLIAM  
CALCUTTA-21**
- 4. THE OFFICER-IN-CHARGE RECORDS  
THE RAJPUT REGIMENT  
FATEGHARH (U.P.)-209601**
- 5. THE COMMANDING OFFICER  
14 RAJPUT  
CARE OF 99 APO.**

**THROUGH : SH. MOHAN KUMAR, ADVOCATE**  
**LT COL NAVEEN SHARMA**

**...RESPONDENTS**

**CORAM :**

**HON'BLE SH. S.S.KULSHRESTHA, MEMBER**  
**HON'BLE SH. S.S.DHILLON, MEMBER**

**J U D G M E N T**  
**DATED : 15.12.2009**

1. Challenge is made against the order made by Summary Court Martial whereby the petitioner was held guilty for absence without leave and proceeded to award extreme punishment i.e. dismissal from service which was also affirmed by the authority while rejecting representation made by the petitioner u/s.164(2) of the Army Act. The petitioner is reported to be dead and his Legal Heirs have already been substituted. It is said that the petitioner was not afforded fair trial even at the stage of framing of charges. The Commanding Officer was swayed by irrelevant considerations. The mitigating circumstances which were expressed by the deceased petitioner were not taken into consideration and after framing of charges, orders were passed for recording of evidence under Army Rule. Even at the stage of Summary of evidence the petitioner was not given any opportunity to make his statement. Fake

evidences were made so as to show the 'plea of guilt', even the compliance of Army Rule 115(2) was not observed. Further the material witnesses who were examined at the stage of framing of charges under Rule 22 were not examined in the Summary of Evidence. In the absence of non examination of those material witnesses the complicity of the petitioner cannot be said to have been established. It is also said that non-compliance of the provisions as contained in Army Rule 22 and 23 would vitiate his trial.

2. This petition was resisted from the side of Union of India. Much thrust has been laid that continuous absence on the part of the petitioner is well established from documents and those documents were sufficient for the Commanding Officer to frame the charges against the petitioner. Non examination of two witnesses who were present at that stage under Army Rule 22 would not vitiate trial when other three witnesses who were at the relevant time on duty and responsible for taking account for presence of the individual were examined.

3. In order to appreciate the rival contentions of the parties, a brief narration of facts may be made. The petitioner while posted at



Umroi Cantt (Meghalya), North-East area in August 1996 received a letter from his wife that she had been thrown out from the house by other family members and some arrangement for the stay of the family was to be ensured. That communication disturbed the petitioner and he applied for leave but was rejected. Looking to the serious domestic problem, the petitioner left his Unit and proceeded to his Village for settling the dispute which had taken place in the joint family amongst the brothers. He at his own joined the duties after 91 days i.e. on 28.11.1996 at 1800 hours. From that date he was permitted to perform normal military duty like patrolling, laying ambush, cordoning and carrying out search of insurgents in the counter-insurgency operations with his unit in field areas. Suddenly the proceedings for his absence were drawn and on 21.03.1997 the petitioner was heard by the Commanding Officer in the exercise of the powers under Army Rule 22. He explained the reasons for his absence but the Commanding Officer passed the order for convening Summary of Evidence. Even the proceedings under Army Rule 22 (3) were recorded. Further it is said that the provisions as contained in Army Rule 22 to 24 were not adhered to by the respondents and the entire proceedings were drawn against him without granting him opportunity to defend his case.

4. The first and foremost point raised from the side of petitioner is that the provisions as contained in Army rule 22 to 24 are mandatory and non compliance of those provisions would vitiate the trial. Even in this case, the Commanding Officer examined IC 53605H 2 Lt Dalel Singh and JC 168848A Sub Jagmal Singh during the hearing under Rule 22, who are material witnesses and on the basis of their examination the charges were framed against the petitioner for his absence without leave. In that context, arguments were advanced. It was obligatory on the part of the Officer recording the Summary of Evidence to have examined these two witnesses who were heard by the Commanding Officer at the time of framing of charges. To appropriate an answer to the question of the Learned Counsel for the petitioner, it shall be useful to refer the extract of Rule 23(1) which reads as under:

***Procedure for taking down the summary of evidence***

***– (1) Where the case is adjourned for the purpose of having the evidence reduced to waiting, at the adjourned hearing evidence of the witnesses who were present and gave evidence before the Commanding Officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs.***



5. From reading of this Rule, it is clear that those witnesses who were examined/heard by the Commanding Officer were essentially required to be examined at the time of Summary of Evidence. The provisions as contained under Rule 23(1) of the Army Act are mandatory and the non examination of those two witnesses would materially affect the case. Reference may be made to *State o U.P. vs. Singhara Singh (1981) 1 SCC-485* to understand the exercise of the statutory powers. Where power is given to do a certain thing in a certain way, the same must be done on that way or not at all and that other methods of performance are necessarily forbidden.

6. However, the explanation had been given that other three witnesses namely JC-203670W Subedar Barkat Ram, No.2975731H Havaladar Harbans Lal and No.2979315L Nk Jagdish were examined by the prosecution and they have stated about the absence of the petitioner. Further there is no denial from his side as is ascertainable the applicant declined to cross examine these witnesses. The fact remains that the material witnesses namely IC 53605H 2 Lt Dalel Singh and JC 168848A Sub Jagmal Singh were not examined and there was no explanation from the side of the respondent for withholding these material witnesses. It was held in the case of *Capt Virendra Kumar Vs. Union of India (1981) 1*

*SCC Page 485*, that where the statutory rules or prescribed procedure was not followed, the termination of service of the individual would be illegal.

7. Moreso evidence was recorded on the next date, surprisingly the presence of Dalel Singh was shown at the time of Summary of Evidence by showing him as an independent witness before whom the proceedings were drawn and statements were recorded. These circumstances render to conclude that these proceedings were not drawn as per rules.

8. A note of this fact may also be taken that plea of the accused/petitioner was also not recorded to ascertain whether he pleaded guilty or not. Specifically it was required to be mention but from the format adopted for the Summary of Evidence there was signature of the petitioner not conveying his plea of guilt. Moreover it was obligatory on the part of the Court Martial to have explained the effect of pleading guilty to the petitioner as required under Army Rule 115(2). Such glaring deficiencies would effect the entire trial and the order sentencing the petitioner cannot stand for judicial scrutiny. It has next been contended that the Commanding Officer was satisfied taking into consideration the



compelling reasons for which the petitioner had to leave. This argument desired to be substantiated from the facts that soon after his reporting back he was assigned different duties and continued to work about four months. Further no proceedings under section 116 of the Army Act were drawn in the meantime against the petitioner.

9. Having regards to the facts and circumstances, the impugned order is not sustainable and is hereby set aside. The petitioner shall be deemed to be in service from the date of his dismissal till he attained the age of superannuation but he shall not be entitled to back wages for that period. However, this deeming period shall be considered for pensionary benefits. Petition is disposed off accordingly.

**S.S.DHILLON**  
(Member)

**S.S.KULSHRESHTA**  
(Member)

**PRONOUNCED IN THE OPEN COURT  
TODAY ON DATE 15.12.2009**