

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

O.A. NO. 100/2010

SEP/DVR (MT) TORAN SINGH

.APPELLANT

VS.

**THE SECRETARY,
GOVERNMENT OF INDIA & ORS**

.RESPONDENTS

ADVOCATES

**MR. D.S KAUNTAE FOR THE APPELLANT
MR. ANKUR CHIBBER FOR THE RESPONDENTS**

CORAM

**HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT.GEN. S.S.DHILLON, MEMBER**

**J U D G M E N T
12.11.2010**

1. This writ petition has been filed by the appellant under Section 15 of the Armed Forces Tribunal Act 2007. The appellant is aggrieved with the fact that he was illegally court-martialled on 27th

October, 2006 by his CO, Col. S D Mathur and sentenced to be dismissed from service. It was alleged that the Court Martial was conducted in an illegal and arbitrary manner, the proceedings of which were not sustainable in the eyes of law. The appellant seeks to be reinstated in service with all consequential benefits.

2. The appellant was enrolled in the Indian Army as a Driver in the Corps of Electrical and Mechanical Engineers on 24th December, 1994. On 11th April, 1998 he was posted to 509 Army Base Workshop, Agra Cantonment from where he was Court-martialled and dismissed. The appellant alleges that the Senior Officers in the workshop, namely Col. A K Dass and Maj. Sanjeev Mishra were involved in corruption, in that they were accepting money from civilians for giving them jobs in the workshop. The appellant resented this because one such civilian i.e. Dharambir, who had paid money for a job was from his Village. On 9th June 2002 when the appellant had completed his tenure at Agra and was moving on posting to Assam, he was called for an interview by Col. A K Dass. It was during this interview that he asked Col. Dass to return the money given by Dharambir. Col. Dass and Major Mishra got annoyed with the appellant and immediately after the interview he was told that he will not proceed on

posting and that some inquiry would be initiated against him. At 1300 hrs. on the same day a local tout, Rajan Lal entered the Office of Col. A K Dass. At 1345 hrs, the appellant was taken into Military custody by Hav. Amrik Singh, who was in-charge of Quick Reaction Team. Being apprehensive of the connivance between Col. A K Dass and Sh. Ranjan, the local tout, and fearing a threat to his life, the appellant escaped from Military custody and proceeded to his official quarter, which he found locked. He presumed that his wife had left for his village which was barely 20 k.m. away, the appellant also went to his village. On reaching his village, one of the villagers informed him that Army personnel had come with weapons and handcuffs looking for the appellant. On 11th April, 2005 the appellant surrendered before a Sub Inspector from his Local police station, from where he was handed over to the Army Authorities.

3. Counsel for the appellant urged that a very sketchy Summary of Evidence, wherein only 3 witnesses deposed against him. On the basis of such Summary of Evidence he was court martialled on 22nd October, 2006 and dismissed from service. The first and foremost legal submission made by the appellant was that he had not signed the mandatory certificate as required by Army Rule 115(2). Although his signatures

appear on page 'B' of the Summary Court Martial proceedings, the certificate as mandatorily required vide Army Rule 115(2)(a) had not been signed by him and therefore his plea of guilty was not sustainable. Recording of plea of guilty by giving a mere certificate of compliance of Army Rule 115(2) was insufficient. The CO obtained the signatures of the appellant in a mechanical manner on an overleaf and attached it to the proceedings after the trial. Therefore, in all fairness and in accordance with law, his plea of "guilty" should have been converted, under the provisions of Army Rule 116(4), to "not guilty" and the Summary Court Martial held accordingly. Since this was not done it has fatally vitiated the trial which therefore stood void. It was also argued that the charge which had been framed against him was under Army Act 38(1) i.e. desertion, while the contents of the charge clearly show that it was a case of absence without leave and not desertion and therefore he should have been tried under Army Act section 39(a). The distinction has been drawn under Notes 2, 4, 5 and 6 which have statutory force and has been upheld by Delhi High Court in case of **L. Nk. Vishav Priya Singh v. Union of India (147 (2008) DLT 202 (DB))**. Accordingly, the charge itself is not specific, vague and defective and should be considered as void. Even the tentative charge during the hearing under Army Rule 22 was similarly framed,

thereby denying him opportunity to put across his defence. It was also alleged that the preparatory trial documents i.e. Summary of Evidence and charge sheet were not provided to him 96 hrs. before the trial as is mandated by Army Rule 34 (1). It was also argued that no hearing under Army Rule 22 was held in his case and neither was any tentative charge sheet furnished to the appellant, which therefore deprived him of his basic right of defence. The trial itself was completed in a period of 50 min. which was well nigh impossible, keeping in view the various actions that are to be taken during the SCM proceedings. It was also alleged that the provisions of Army Act 130 which provided procedural safeguards were violated in his case. Furthermore, Lt. Col. K N Suresh who had deposed as PW-1 in the Summary of Evidence had also been detailed as member of the SCM, which was grossly illegal. Counsel for the appellant urged that the trial was barred by Limitation under Army Act Section 122, especially when the SCM itself was convened on 22nd October, 2006 while he had surrendered on 10th April, 2005. Lastly, it was urged by the appellant that his overall record, barring this incident, was "Excellent".

4. The brief circumstances of the case are that the appellant absented himself from the unit line from 10th June 2002 and remained so

absent till 10th April, 2005 and a charge as appended below was drawn up against him:

ARMY ACT

SECTION 38 (I) DESERTING THE SERVICE

in that he,

at Agra, on 10 Jun 2002, absented himself without leave from 509 Army Base Workshop, until apprehended by the Civil Police on 10 Apr 2005.

5. The respondents argued that the background to the incident was that the appellant had been involved in a lot many illegal cases of accepting money for enrolment into the Army from unsuspecting civilians. In fact in his own statement at the Summary of Evidence he has accepted that he owed Rs.60,000/- to the "so called tout" Sh. Rajan, who had complained against the appellant. In fact he was interviewed by the Col. Administration of the base workshop for this reason on 9th June 2002. Thereafter he was ordered to be detained with the quick reaction team while investigations into this case were ordered. While being detained in the QRT location he managed to escape and deserted the service on 10th June 2002 and remained so absent till 10th April, 2005. The Summary of Evidence was recorded on 5th May 2006 wherein three witnesses were

produced. Lt. Col. K N Suresh (PW-1) was performing the duties of battalion commander 509 Army base work shop when the appellant was apprehended by the civil police and handed over to the Army authorities on 10th April, 2005 at 1430 hrs. He also produced documents to certify that the appellant was declared deserter on 10th July 2002. Nb Sub. Shakti Singh (PW-2) has stated that he was the JCO adjutant of the military wing of 509 Army base workshop on 10th April, 2005 when the appellant was handed over by the police authorities to the duty JCO of 509 Army base workshop. Sub. D B Dutta (PW-3) has testified that on 8th June 2002 he took the appellant to the Col. Administration for his interview, thereafter he was informed by the Battalion commander that the appellant would not go on posting as some inquiry has to be conducted against him. The witness was directed to keep the appellant under observation with the QRT guard commander. On 10th June 2002 he was informed that the appellant had fled the unit lines and was absent. The testimony of all three witnesses remained unchallenged.

6. The first and foremost aspect addressed by counsel for the respondents was the signing of plea of "Guilty" in accordance with Army Rule 115 (2). It was contended that the plea of guilty during the Summary

Court Martial on 27th October, 2006 has been signed by the appellant on the original copy and the CO has also endorsed that the provisions under Army Rule 115(2) have been complied with and a certificate to this effect, duly signed by the appellant and the CO, has been attached with the proceedings. However, the certificate which has been annexed to the proceedings instead of reading:

"Before recording the plea of "Guilty" of the accused the court explained to the accused the meaning of the charge (s) to which he had pleaded "guilty" and ascertained that the accused had understood the nature of the charge (s) 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 understands the charge (s) and the effect of his plea of "Guilty", accepts and records the same. The provisions of rule 115 (2) are thus complied with."

has been recorded as

"it is certified that provisions of Army Rule 115 (2) have been complied with in the SCM proceedings in respect of No. 14623987W Sep/Dvr(MT) Toran Singh of 509 Army Base Wksp. Agra Cantt. who has pleaded "Guilty" of the said charge.

While it was conceded that the language of the certificate is not as required by Army Rule 115 (2) (a), but the endorsement refers to the fact that the essence of the rule was explained to the appellant. It was further argued that the certificate of compliance of Army Rule 115(2) has been endorsed both, in the original record of the Summary Court Martial as well as on the certificate which was attached with the proceedings. The date of both certificates i.e. on the original record and on the annexure is the same i.e. 27th October, 2006. It was further argued by counsel for respondents that the material issue was not merely that of a technicality of language of endorsement but the facts and circumstances of the case in its totality. It has been proved to the hilt that the appellant was absent from his unit from 10th June 2002 to 10th April, 2005 (2 years and 10 months) as charged. In addition, his statement at the Summary of Evidence, i.e:

"On 10 Jun 2002 I was again called in Col. Adm's Office at 1000 hrs and I found that Col. Adm was annoyed with me and told that he would take strict disciplinary action and hand me over to the police and carryout court martial. There after he went for the daily tea conference. After he came back, I requested Col. Adm that I be pardoned and promised never to repeat the mistake. But he did not agree and repeated the same course of action, what he had told me in the morning. While I was in the office, Col. Adm went out of his office. I waited for him for 10-15 minutes but he

did not turn up. I was under a lot of tension. I left Col. Adm's office and went to my quarters which was nearby. On reaching my house, I found it locked. My wife was not at house. I assumed that they had gone to my village as journey to my house at village takes only one hour from Agra. As a result I also went to my village. On reaching my village I met a person named Chandan Singh, a resident of my village, who told that certain Army personals had come to my house enquiring about me with rifle and handcuffs. I got scared further and after they left I went to my house. Next day this news of my absconding came in the local newspaper of Agra. It contained the news that I had run away taking seventy five lakh rupees. I came in further duress and left my village and went to my relatives near Bharatpur.

I came back to my village after a few days and continues staying there. During my stay in my village, an ex-serviceman named Ram Avtar became my friend and advised me that I should join back as my absence period was less than three years, hence, even after getting punishment my job would be protected and future of my children would be safe. One day when I was in the vicinity of Fatehpur Sikri Police Stn. Ram Avtar informed the police and I was apprehended. Later Ramavatar told me that this he did for my welfare. On 10 Apr 2005 I was handed over to 509 Army Base Wksp."

clearly shows that he was absent from the unit from 10 Jun 2002 to 10 Apr 2005. In fact even in this Writ Petition at page 19, Para 5.3, it is stated **"..... appellant remained peacefully at his own for a complete period of more than three years i.e. from June 2002 to April 2005"**. Even during the SCM proceedings he has opted not to make any statement

instead of putting across his defence. Therefore, in this eventuality it was but logical for the appellants' plea of "Guilty" at the SCM to be accepted by the CO and there was no necessity whatsoever of converting the plea to "Not Guilty" under Army Rule 116(4). In these circumstances, it was argued that this legal deficiency stood "cureable" in terms of Army Rule 149, which clearly provides that unless any injustice has been done to the offender these aberrations / deviations could not be construed as fatal to the Summary Court Martial proceedings. Army Rule 149 is appended below:

"Validity of irregular procedure in certain cases

– Whenever, it appears that a court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilt to justify such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from the rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid, they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any

responsibility for any wilful or negligent disregard of any these rules.”

7. It is therefore an admitted, conceded and proven fact that the appellant was absent from the Unit for almost three years as charged.

8. Respondents contended that there was no duality or doubt about framing of the charge. In this case, the charge has been framed in compliance of the schedule of Army Rules, wherein the format, as specified in the Army Rules, has been adopted and there was no dichotomy on this fact. The appellant was merely attempting to confuse the issue. The aspect of limitation of period of trial as pleaded by the appellant was not relevant as Army Act section 122(2) and (3) clearly stipulated that the period of limitation of 3 years for trial was not valid for an offence for desertion as was applicable in the appellant's case. In fact, the period spent in evading arrest is to be discounted. Therefore, there is no clause under which 'limitation' can be pleaded in this case. The charge under Army Act Sec. 38(1) was very much in order as the appellant deserted the service and had not been given any leave. The entire pre-trial documents i.e. charge sheet, Summary of Evidence and copy of the court of inquiry were given to the appellant on 19th October, 2006 well

before the mandatory 96 hours before the SCM. With regard to the delay in the conduct of the Court Martial, respondents argued that while the appellant was apprehended on 10th April 2005, his court martial could only take place on 22nd October, 2006 because the entire documents had to be recalled from the record office at Secunderabad, necessary inquiry/ investigation/ Summary of Evidence had to be recorded and witnesses had to be arranged since most of the personnel had moved out on posting. In any case, the Summary Court Martial was conducted well within the period of limitation and no prejudice has been caused to the appellant. To the contrary he has been given adequate time to prepare his defence. Appellant also argued that the hearing under Army Rule 22 was conducted in accordance with Army Act and Rules on 23rd February 2006 and the signatures of the appellant were taken on these proceedings. Army Act Section 130 refers to challenge to Members of GCM, SGCM and DCM and is not applicable for SCM. Lt. Col. K N Suresh who was PW-1 as well as officer attending the trial has not committed any illegality and neither has it prejudiced the appellant in any manner. The officer who "attends the trial" is not part of the Court and has no role to play in the proceedings. Respondents also urged that Lt. Col. C J George had been detailed as Friend of Accused and provided all possible assistance to the appellant. As

regards hiring a civil counsel was concerned, it was for the appellant to do so and at no stage has he ever expressed any such desire. It was also stated by respondents that while his record may have been "Excellent", his absence of almost 3 years warrants the punishment awarded to him. In fact considering the circumstances it was a lenient punishment as he could have been given imprisonment of upto seven years in addition to the dismissal.

9. Accordingly, we do not find any reason to interfere with the impugned proceedings of the SCM. The appeal is dismissed.

S.S.DHILLON
(MEMBER)

S.S.KULSHRESTHA
(MEMBER)