

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI
23.

T. A. No. 499 of 2010
Writ Petition (Civil) No. 851 of 2009

Ex. Sig Man Shiv Kumar Sharma

.....Petitioner

Versus

Union of India & Ors.

.....Respondents

For petitioner: Mr. S.R. Kalkal, Advocate.

For respondents: Mr. Anil Gautam, Advocate.

CORAM:

HON'BLE MR. JUSTICE A.K. MATHUR, CHAIRPERSON.

HON'BLE LT. GEN. S.S.DHILLON, MEMBER.

ORDER
27.04.2012

1. This writ petition was filed by the petitioner before the Hon'ble High Court and it was transferred to this Tribunal after its formation.
2. Petitioner vide this petition has prayed to quash the order dated 19.11.2005 and 20.10.2008 being most arbitrary and illegal. It is also prayed that respondents be directed to reinstate the petitioner in service with all consequential benefits.
3. Petitioner was enrolled in the regular Army as Combatant Soldier on 15.03.2002. It is alleged that husband of the petitioner's sister met with an accident and died leaving behind his father and a young widow being his sister and two months old child. Petitioner requested for leave because of sudden demise of his brother-in-law but was not granted the same. He under social obligation to look after his widow sister became absent without leave w.e.f. 05.09.2004. A Court of Inquiry was conducted to declare him deserter at his back without serving him any notice or apprehension roll.

4. Petitioner rejoined his duty voluntarily on 26.10.2004 but once the petitioner was away from his widow sister, the father-in-law of the sister of the petitioner started harassing her with an aim to dislodge her from his property. He requested for leave but was not granted thus under these circumstances again he had to become absent without leave w.e.f 01.11.2004. He again rejoined voluntarily his duty on 05.02.2005 but was not accepted by his Unit and told to report to Depot Battalion of the Signal's Regiment at Jabalpur.

5. The petitioner was tried by Summary Court Martial and was sentenced to be dismissed from service on 19.11.2005. It is alleged that before and during conduct of the Summary Court Martial, there has been violation of statutory provisions of law. It is submitted that there was no prosecution witness was present in the office of the CO for cross examination. He was never asked by the CO, as he wishes to make any statement to his defence or produce any witness in his defence. It is a clear cut non compliance of Army Rule 22. Petitioner was not issued any warning order which is required to be issued under Rule 34 of the Army Rules 1954 to prepare his defence at least 96 hours in advance.

6. Petitioner filed his Post Confirmation Petition under Section 164(2) of the Army Act 1950 which has been rejected by the Chief of the Army Staff vide his order dated 20.10.2008. Therefore, petitioner filed the present petition before the Hon'ble Delhi High Court seeking the aforesaid reliefs which was subsequently transferred to this Tribunal after its formation.

7. A reply has been filed by the respondents and they contested the matter. It is submitted that petitioner was a habitual offender of absenting himself without leave. He absented himself without leave for 27 days from 10.07.2003 to 05.08.2003 and was punished with 28 days Rigorous

Imprisonment by the CO. He also absented himself for 53 days from 05.09.2004 to 27.10.2004, for 96 days from 01.11.2004 to 23.06.2005, for 17 days from 07.06.2005 to 23.06.2005 and for 67 days from 18.07.2005 to 12.09.2005. He was also charged on 19.08.2005 for loss of identity card.

8. It is pointed out that in compliance of Army Rule 34, copy of charge sheet and summary of evidence was handed over to the petitioner as a warning order on 02.11.2005 to prepare his defence and the trial was held on 19.11.2005. He was also warned for trial 16 days in advance as against the legal requirement of 96 hours as required under Army Rule 34. Therefore, Army Rule 34 was substantially complied with. It is further pointed out that provisions of Army Rule 115(2) were duly complied with as the trial was conducted on the plea of guilty.

9. We have heard both the parties and gone through the material on record. Army Rule 34 which is an issue in the present case reads as under;

“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.

(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.

(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.”

10. 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.

11. Thereafter a circular dated 10.04.1995 has been issued by the Army Headquarters in which it is clearly mentioned that *“the notice of ninety-six hours or twenty-four hours, as applicable, ordained to be given to an accused vide the ibid Army Rule, prior to his arraignment before a Court Martial, is the legal minimum. It would not necessarily mean that the notice must be given for that specific period. With a view to enable an accused to prepare his defence, henceforth, 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. It is should be endeavoured that in all cases the period between handing over of the said documents and such other documents to which the accused is legally entitled, is not less than seven days. In addition to affording sufficient*

time to the accused this measure would obviate a number of please which are regularly raised by of any on behalf of accused persons either at the trials or in the writ petitions". Therefore, this circular insists that sufficient time may be given to the accused prior to commencement of trial.

12. Learned counsel for the petitioner invited our attention to a decision of the Hon'ble Supreme Court given in the case of **Union of India & Ors. Versus A.K. Pandey 2010(1) SCT 208**. In this judgment, their Lordships have examined the Army Rule 34 and after examining the Rule 34 their Lordships very categorically laid down in the paragraph no. 25 that there was a breach Army Rule 34 to the extent that the *"General Court Martial was scheduled to be held on November 6, 1995 at 1130 hours but the proceedings of the General Court Martial clearly show that the trial commenced at 1010 hours. That interval between the respondent having been informed of the charges for which he was to be tried and his arraignment was less than ninety-six hours is an admitted position. Merely because the respondent pleaded guilty is immaterial. The mandatory provision contained in Rule 34 having been breached, the Division Bench cannot be said to have erred in affirming the order of the Single Judge setting aside the proceedings of the General Court Martial"*. Therefore, their Lordships after considering the various case laws on the subject held that the provisions of Army Rule 34 is mandatory and its non compliance will result into its violation.

13. In the present case, it is admitted position that copy of charge sheet and summary of evidence was handed over to the petitioner on 02.11.2005 but the fact remains that Army Rule 34 has to be complied with before commencement of the trial. In the present case, no warning as required under Army Rule 34 was given to the petitioner before commencement of the trial

nor he was asked to give names of witness to whom he wants to examine in his defence. Since the Army Rule 34 is mandatory to be complied with before commencement of trial as discussed by their Lordships in the judgment of **Union of India & Ors. Versus A.K. Pandey (Supra)** which is not done in the present case, therefore, the whole trial renders illegal. Consequently, we set aside the order of dismissal of Summary Court Martial dated 19.11.2005 and order of the Chief of Army Staff dated 20.10.2008 whereby Post Confirmation Petition of the petitioner was rejected. It is ordered that petitioner will be reinstated back in service with all consequential benefits, however it will be open for the respondents to initiate action in accordance with law, if they so wish.

14. In view of above, petition is allowed. No order as to costs.

A.K. MATHUR
(Chairperson)

S.S. DHILLON
(Member)

New Delhi
April 27, 2012
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