

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

LPASW No. 106/2008
In SWP No. 373/2001

Reserved on: 05.03.2020

Pronounced on: 06.05.2020

Punjab Singh

.....Appellant (s)/Applicant (s)

Through :- Mr. B. S. Salathia, Sr. Advocate
with Mr. Pulkit Chrungoo,
Advocate.

V/s

Union of India and others

.....Respondent(s)

Through :- Mr. Vishal Sharma, ASGI.

Coram:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJESH BINDAL, JUDGE

JUDGMENT

GITA MITTAL, CJ

1. By way of the instant appeal, the appellant has challenged the judgment dated 04.04.2008, whereby the learned Single Judge dismissed SWP No. 373/2001. The writ petition was filed challenging the legality of the Summary Court Martial conducted against the petitioner on 24.04.2000 and the sentence of dismissal from service and rigorous imprisonment of four months in a civil prison imposed pursuant thereto.

2. The appellant assailed the same by way of SWP No. 373/2001 which stands dismissed by the learned Single Judge by the judgment dated 04.04.2008.

3. We have heard Mr. B. S. Salathia, learned Senior Advocate on behalf of the appellant and Mr. Vishal Sharma, learned ASGI at length on this appeal.

Factual Narration

4. The facts giving rise to the appeal are in narrow compass and to the extent necessary we note the same hereafter.

5. The appellant was enrolled in the Indian Army in November 1994. He along with one Bihari Lal was attached with 10 Rashtriya Rifles (RAJPUT) and on 05.04.1999 was detailed for security duty at the Hambal Post.

6. As per the respondents, while at the assigned duty, the appellant along with Bihari Lal left the post without permission with arms and ammunition including an AK-47 rifle; 4 magazines with 30 rounds of ammunition each; 2 hand grenades; 30 loose rounds and one magazine (which was picked up from another Jawan without his prior information). The appellant could be apprehended only on 12.04.1999 along with the arms and ammunition.

7. In this background, a Court of Inquiry presided over by Lt. Col. P. Dutta was conducted against the petitioner to inquire into the circumstances leading to the desertion by the appellant and the Rifleman Bihari Lal.

According to the respondents, the Court of Inquiry was conducted in the presence of the appellant, who was given full opportunity to cross-examine the witnesses and all Army Rules were complied with.

8. The appellant has disputed that the provisions of Army Rule 180 which applies to conduct of the Court of Inquiry were complied with.

9. On the 20th January, 2000, the appellant was produced on a tentative charge sheet before the Commanding Officer, 10 Rashtriya Rifles (RAJPUT). Recording of the Summary of Evidence was ordered which was recorded by Capt. Tej Pal Singh.

10. We find that there is no dispute that by the communication dated 22nd April 2000, the appellant was duly informed that he would be tried by Summary Court Martial on 24th April 2000. It is also admitted that along with this communication, the appellant was handed over a copy of charge sheet; copy of the Summary of Evidence and copy of the Court of Inquiry Proceedings.

11. Bihari Lal was also put to trial in a like manner.

12. For expediency, we extract hereunder the charges on which the appellant was put to trial:

“TENTATIVE CHARGE SHEET

The accused, No. 9096389F RFN Punjab Singh of STF OP VIGIL ex 13 JAK LI, attached with 10 Rashtriya Rifles (RAJPUT), is charged with:-

FIRST CHARGE

Army Act Section 39(a)

ABSENTING HIMSELF WITHOUT LEAVE

in that he,

at field, absented himself without leave from Hambal Post from 05 Apr 99 to 12 Apr 99.

SECOND CHARGE

Army Act Section 54(a)

MAKING AWAY WITH EQUIPMENT THE PROPERTY OF GOVERNMENT ENTRUSTED TO HIM

in that he,

at field on 05 Apr 99, while absenting himself without leave carried with him the following arms and ammunition the property of the government entrusted to him:-

- a) *Rifle AK-47 Registered No. TP 5827 Quantity – 01.*
- b) *Magazine AK-47 Quantity- 04.*
- c) *Ammunition AK-47 rounds Quantity-150.*
- d) *Hand Grenade M-36. Quantity-02.*

Station: Field

Sd/-

(Udai Pratap Singh)

Colonel

Commanding Officer

10 Rashtriya Rifles (RAJPUT)”

Dated: 20 Jan 2000

13. The Summary Court proceedings were conducted by Lt. Col. S. K. Banot, who was Commanding Officer, 10 Rashtriya Rifles (RAJPUT). The respondents have submitted that the appellant as well as his co-accused Bihari Lal pleaded guilty to both the charges with which they were charged.

14. In this background, by the order of sentence dated 24th April 2000, the sentence as above noticed, was imposed upon the appellant.

15. Aggrieved thereby the appellant filed SWP No.373/2001 which was dismissed. This order of dismissal is being considered hereby by us.

Appellant's Contentions

16. The appellant has assailed the trial by Summary Court Martial on primarily three-fold submissions.

17. The first ground of challenge is that the procedure mandatorily required to be complied with prescribed under Rule 115(2) of the Army Rules

was not complied with. It is contended that the plea of guilt has been recorded in violation of the procedure prescribed under Rule 115(2) and as a result, the trial as well as the sentence imposed upon the appellant stand vitiated.

18. The second ground on which the challenge stands laid is that prior thereto no hearing of the charge as mandated under Army Rule 22 was given and that the appellant was deprived of an opportunity to cross-examine the witnesses and production of defence witnesses.

19. In support of this submission, Mr. B. S. Salathia, learned senior counsel has relied on pronouncement reported at *1991 KLJ 513, Union of India v. Ex. Havildar Prithpal Singh*.

20. It is lastly submitted that there is a dispute as to whether a court of inquiry was held.

21. Mr. B. S. Salathia, learned Senior Counsel has pressed these grounds as the basis of his challenge to the action of the respondents and the judgment of the learned Single Judge. We shall consider these two pleas in seriatim.

Whether Army Rule 115(2) was Complied with?

22. Before examining the factual basis on which the challenge is premised, we may set out the Rule in extenso which reads as follows:

“115. General plea of “Guilty” or “Not Guilty:

115(1) xxx

(2). If an accused person pleads “Guilty”, that plea shall be recorded as the finding of the court; but before it is recorded, the court shall ascertain that the accused understands the nature of

the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.

(2A) Where an accused pleads "Guilty", such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner:—

“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.

xxx”

(Emphasis supplied)

23. The court martial is thus enabled to record a finding of guilt of an accused based on his admission of guilt. By virtue of Rule 115 (2), the court is mandatorily required to ascertain that the accused understands the nature of the charge to which he has pleaded guilty. The court is further required to inform him of the general effect of that plea and in particular of the meaning of the charges to which he has pleaded guilty. It is also the requirement of the Rules that the court must inform the person charged who is standing trial, as to the difference in the procedure which would be followed in the event of a plea of

guilt and advise him to withdraw that plea of guilty if it appears to the court martial, from the summary of evidence if recorded, or otherwise, that the accused ought not to plead guilty.

24. Sub rule 2A of Rule 115 sets out the manner in which it is obligatory that the factum of compliance with sub rule (2) has to be recorded by the Court.

25. We have examined the record of the case and find that the learned Single Judge has examined the original record which was produced by counsel for the respondent. The impugned order notes that the compliance as required by Sub Rule 2-A of Rule 115(2) was found recorded on a paper pasted on the printed format of the record of proceedings. The learned Single Judge has found that it was manifest that the procedure for recording the plea of guilt of the appellant had been complied with. The learned Single Judge has also drawn a presumption of correctness and genuineness of official record.

26. Mr. B. S. Salathia, learned Senior Counsel has contended that this finding was erroneous for the reason that during recording of evidence and the Summary Court Martial, the signatures of the appellant were obtained on blank and printed forms and such record cannot be held to be sufficient compliance of requirement of the Rules.

27. We find that in the writ petition which was filed in February 2001, it was the specific plea of the appellant that during the alleged recording of the Summary of Evidence and the proceedings of the Summary Court Martial, signatures of the petitioner were obtained on blank and unfilled printed papers which appeared to have been used against him, for passing of the order of dismissal and sentencing him to rigorous imprisonment of four months.

28. We find that the appellant has taken the same stand taken in Ground (e) of the present appeal. The appellant has also specifically asserted that the respondents obtained his signatures on blank papers and that, it goes without saying, these blank papers on which the respondents obtained signatures of the appellant, have been used for fabricating a false certificate in terms of Sub rule 2 of Rule 115 of the Army Rules.

29. Given this objection of the respondents, we had called for production of the original record of the Summary Court Martial. We find that though the proceedings of the Summary Court Martial are on a printed format which have been filled in hand, so far as compliance of Army Rule 115(2) is concerned, the same has been recorded in hand on a piece of paper which has been pasted on to the printed format. This hand written certificate is in the following terms:

“Compliance of Army Rule 115(2)

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 Army Rule 115(2) are thus complied with.

Sd/-

(Signature)

No.9096389 F

Rifleman

Punjab Singh

Accused

Date: 24 Apr 2000”

(Signature)

IC 40421L

Lt Col

SK Bhanot

The Count

Date:24 Apr 2000

30. A perusal of this compliance clearly manifests that the appellant has signed only after the certificate stood endorsed on the paper. The placement of the signatures on this certificate show that the signatures have undoubtedly been affixed after the certificate has been scribed. We also find that the date in the certificate has been filled by the appellant in his own hand.

31. Even otherwise, it was the categorical plea of the appellant that he affixed signatures on blank “*unfilled printed forms*”. The original record shows that compliance of Army Rule 115(2) is not on a printed form but is scribed in hand on a half sheet of plain paper.

32. It is noteworthy that the Summary of Evidence was recorded before the appellant received the notice dated 22nd April 2000 regarding Summary Court Martial. Admittedly copy of the documents was received along with by the appellant. The appellant has, at no point of time, made any grievance or complaint that he was made to sign on blank and unfilled printed papers during the recording of the Summary of Evidence. Such plea has been taken for the first time in the writ petition which was filed in February 2001, almost one year after the receipt of the copy of the document as well as completion of the Summary Court Martial proceedings and sentencing.

33. There is no ground for disbelieving the respondents or setting aside the finding recorded by the learned Single Judge with regard to the compliance of Sub Rule 2 of Rule 115. The plea of the appellant is clearly an afterthought.

34. In *Ex. Havildar Prithpal Singh*, the Division Bench of this court has held that the requirement of compliance with Rule 115(2) was mandatory.

There can be no dispute with the principles laid down by the Division Bench. In the instant case, we have concluded that the respondents have complied with Rule 115(2).

35. We see no reason to disagree with the observations of the learned Single Judge on this objection of the appellant.

Whether there was a Court of Inquiry?

36. In the present case, the appellant has contended that there was no court of inquiry. However, in para 13 of the writ petition, the petitioner has admitted that along with letter No. 035/Discp/BL/AI dated 22nd April 2000 informing him that he would be tried by court martial, the respondents had handed over the '*charge sheet; copy of summary of evidence and copy of court of inquiry proceedings*'. The appellant has himself placed a copy of these proceedings of this Court of Inquiry which was received by him on record.

37. In the counter affidavit, the respondents have submitted that the Court of Inquiry was conducted in the presence of the appellant and that the requirement of Army Rule 180 was complied with.

38. The record of the proceedings of the Court of Inquiry placed by the appellant before the writ court and this appeal supports the stand of the respondents.

39. We may note that the learned Single Judge has erroneously noted that there was no court of inquiry, even though the appellant has admitted that court of inquiry record was given to him. This error in the observations made by the learned Single Judge is of no benefit to the appellant.

Whether the Army Rule 22 was Complied with?

40. The third contention of Mr. B. S. Salathia, learned Senior Advocate is that there was no hearing of charge, that the appellant was not given liberty to cross-examine the witnesses who were examined by the prosecution or an opportunity of production of witness in defence. In this regard it is contended that there was violation of Army Rule 22.

41. Let us examine the requirement of Rule 22 of the Army Rules which reads as follows:

“Section 22 in The Army Rules, 1954

22. Hearing of Charge.—

(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence:

Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with:

Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time—

- (a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or*
- (b) refer the case to the proper superior military authority; or*
- (c) adjourn the case for the purpose of having the evidence reduced to writing; or*
- (d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial:*

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless—

- (a) the offence is one which he can try by a summary court-martial without any reference to that officer; or*
 - (b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.*
- (4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge.”*

42. So far as Army Rule 22 is concerned, it requires that a charge against the person would be heard by the Commanding Officer in the presence of the accused who shall have liberty to examine any witness against him and to call such witness and make statement as may be necessary. By virtue of the proviso, if the charge arises as a result of investigation by a court of inquiry wherein provisions of Army Rule 180 have been complied with in respect of that accused, the investigating officer may dispense with the procedure as prescribed in Sub rule (1).

43. Mr. Vishal Sharma, learned ASGI has submitted that in view of proviso to Army Rule 22, hearing on charge was not mandatory.

44. We have found that Army Rule 180 stands complied with. Therefore hearing of charge was not mandatory.

45. The learned Single Judge has examined the record of the respondents and further found that so far as the appellant was concerned, hearing of the charge(s) commenced on 20th January 2000 at 1300 hours. Thereafter PWs Lt. Col. R.S. Malik; Major R. R. Kotwal; Naib Subedar Som Nath; L/Havildar Pyare Lal and Naib Subedar Chavan Rameshwar were heard and their statements recorded. This record establishes that the statements of these persons were recorded in the presence of the appellant who was given liberty to cross examine the prosecution witness but each time the appellant declined the same.

46. After the evidence of the prosecution witnesses had been recorded, the appellant Punjab Singh was given an opportunity to make a statement in the presence of independent witnesses, Subedar Ram Kunawar. The caution in terms of Army Rule 23(3) was also duly given to the appellant. The appellant had declined to make any statement. Additionally, the appellant had declined to produce any witness in defence. The proceedings of the summary of evidence were recorded by Capt. Tej Pal Singh.

47. The appellant was thus given full opportunity to cross-examine every witness but of his own volition, he declined to cross-examine the witnesses. The appellant also refused to produce any witness in support of defence.

48. The Summary of evidence was recorded in the presence of following independent witnesses:

- (i) Major R.D. Singh;
- (ii) Sub. Major Ram Singh;

The record of the Summary of Evidence stands duly signed by the appellant at all places, the independent witnesses and Capt. Tej Pal Singh. Clearly the respondents had complied with all requirements of law.

49. Mr. Salathia has placed reliance on the judgment of the Full Bench of the Madhya Pradesh High Court reported at *AIR 1996 MP 233 titled as R. P. Shukia v. Central Officer Commanding-in-Chief, Lucknow*, wherein it was held that the presence of the accused was necessary during the holding of the court of inquiry and the Rule 180 of the Army Rule has to be mandatorily complied with. Again there can be no dispute with regard to the principles laid down. However, this judgment also has no application to the facts of the instant case.

Result

50. In view of our above discussion, there is no merit in this appeal, the same is hereby dismissed.

(RAJESH BINDAL)
JUDGE

(GITA MITTAL)
CHIEF JUSTICE

Jammu
06 .05.2020
Raj Kumar

Whether the order is speaking:	Yes/No.
Whether the order is reportable:	Yes/No.