

(2011) 02 J&K CK 0020

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2878 of 2001 and CMP No. 2880 of 2001

Chuni Lal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-02-2011

Acts Referred:

Army Act, 1950 — Section 106
Army Rules, 1954 — Rule 115(2)

Citation : (2011) 2 JKJ 618

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hasnain Massodi, J.—The Petitioner enrolled in EME Corps of Indian Army on 6th August, 1986, has been dismissed from service vide

order dated 16th August, 2001 on the charge of unauthorized absence. The Petitioner through medium of instant writ petition, throws challenge to

his dismissal.

2. Before summarizing the grounds of challenge, it would be appropriate to take a bird's eye view of background facts.

3. The Petitioner when posted with 628 EME Bn at Kupwara (Kashmir) was on 8th May, 2001 asked to attend the Upg Course VM (MV CI-1)

commencing from 14th May, 2001 at 3 EME Centre Bhopal. The Petitioner after the Movement Order was issued on 8th May, 2001 left

Kupwara on his way to Bhopal, but on reaching Jammu, instead of proceedings to Bhopal, went to his native village in District Rajouri, to meet his

family and thus, was not able to make it in time to Bhopal. The Petitioner

reached Bhopal on 19th May, 2001, but was not allowed to enter premises of 3 EME Centre Bhopal and had to return back. The Petitioner reported to the Transit Camp of Jammu on 16th June, 2001 and reached his Battalion i.e. 628 EME Bn stationed at Kupwara on 20th June, 2001. The Authorities, however, did not permit the Petitioner to enter the battalion premises and the Petitioner was asked to report to EME Depot Bn. at Secunderabad, where the Petitioner reported on 6th July, 2001. The Petitioner was served a tentative charge-sheet followed by recording of Summary of Evidence, whereafter the Petitioner was ordered to be tried by Summary Court Martial. The Summary Court Martial was held on 16th August, 2001. The Petitioner according to Respondents pleaded guilty to the charge and was, vide impugned order, awarded the punishment of dismissal from service.

4. The Petitioner questions the dismissal order on the grounds that the Summary Court Martial proceedings are vitiated on account of non-compliance with Rule 22 Army Rules 1954 as also on the grounds that Summary Court Martial proceedings were not conducted in accordance with Section 106 Army Act 1950 and Rules 115(2) and 177-183 of Army Rules 1954. It is insisted that the attachment of the Petitioner to EME Depot Bn was not in consonance with the requirements of the para 381 of Army Regulations and that in any case, the punishment awarded is not commensurate with the alleged mis-conduct.

5. The Petitioner in his rejoinder controverted the explanation made in the counter affidavit/reply by the Respondents and insisted that as the Petitioner claimed to have been declared ""deserter"" on I.A.F.D. 918 by 628 EME Bn, it was obligatory on the part of Respondents to constitute a 'Court of Enquiry' in terms of Section 106 of the Army Act, 1950 and follow the procedure laid down in Rule 180 Army Rules, 1954. It is reiterated that ""plea of guilty"" was recorded in violation of mandate of Rule 115 (2) Army Rules and that the punishment awarded was harsh . and disproportionate to the misconduct alleged against the Petitioner.

6. The Petitioner denies to have pleaded guilty to the charge and insists that his signatures on the blank paper were used to attribute ""plea of guilty to the Petitioner as was evident from the Respondents record, wherein the printed form to be used to record ""plea of guilty"" is left unfilled.

7. The petition is opposed on the grounds that the Petitioner has not availed alternate remedy available under Rule 164 of the Army Rules 1954

inasmuch as the Petitioner in the event, he was aggrieved with the findings recorded by the Summary Court Martial, ought to have filed a petition to

the Central Government (Chief of Army Staff) or any competent officer superior in command. The Respondents while disputing the facts set out in

the petition to justify short absence from duty of the Petitioner, insists that Summary Court Martial Proceedings were conducted in accordance

with Rules and that the Petitioner though afforded an opportunity to cross-examine the witness and to adduce evidence in the defence ignored to

avail of the opportunity. It is pointed out that the Petitioner during Summary Court Martial proceedings on 16th August, 2001, admitted his guilt,

requested for pardon and the Petitioner declined to avail an opportunity to contest the charge. It is pleaded that as EME Depot Bn, in terms of

Army HQ letter No-50451/AG/DV-I ' dated 28th July, 1992 and SAO 9/S/89, is competent to take disciplinary action against the deserters

whose units are located in the High Altitude Areas/Counter Insurgency Operations/Mission abroad/Andaman and Nicobar Islands, the Petitioner

deployed in Counter Insurgency Operations (CI Ops) was rightly attached with EME Depot Bn and para 381 of the Regulations for Army were

not violated. The Petitioner is said to have been explained and made to understand the charge before his ""plea of guilty"" was recorded. It is insisted

that mandate of Army Rule 115(2) was not violated. The DJAG, HQ Southern Command, it is pointed out, on perusal found Summary Court

Martial Proceedings, in accordance with rules and the punishment awarded just and commensurate with the charge leveled against the Petitioner.

8. I have gone through the pleadings as also the record made available and have heard learned Counsel for parties. The petition must succeed for

the following reasons:

1) The Court while exercising extra-ordinary writ jurisdiction in a matter like one in hand is not to sit as Appellate Court and re-examine/re-

appreciate the evidence that persuaded the Summary Court Martial to record its findings. The approach of the Court is limited one, to examine the

question as to whether the Petitioner has not been heard or the proceedings otherwise, have been conducted in violation of statutory provisions or

it is a case of no evidence. The Court may in an appropriate case even examine the question of quantum of punishment awarded and to see

whether punishment awarded is not commensurate with or is disproportionate to the misconduct attributed to the delinquent Army personnel. The

Supreme Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, has delineated the scope of Judicial review, inter alia, in the matter of Court

Martial decisions. It has been held that such a decision is subject to control of judicial review on three grounds namely "irregularity", "irrationality

and "procedural impropriety"; that if the decision of Court Martial even as to punishment is outrageous, defies logic, then the sentence would be

impugned for correction. Irrationality and perversity, the court held, are recognized grounds of Judicial review. Judicial review, it has been held,

generally speaking, is not directed against the decision but is against the decision making process. The Summary Court Martial Proceedings in the

present case are to be examined on the anvil of above discussed legal principles.

2) The impugned order as must be clear by now, is based on

plea of guilty" attributed to the Petitioner. The case set up by the Respondents in opposition to the Petitioner's case is that after tentative charge

was served on the Petitioner and Summary of Evidence recorded, the Commanding Officer conducted "hearing of charge" in accordance with Rule

22 Army Rules, 1954, where after Summary Court Martial was convened; that the Petitioner when confronted with the charge pleaded guilty to

the charge and the punishment of dismissal from service was awarded.

9. Since, the punishment awarded is based on the "plea of guilty" recorded by the Summary Court Martial, it becomes necessary to see whether

the statutory requirements were fulfilled before the "plea of guilty" was recorded. In this regard, Rule 115 (2) Army Rules, 1954, needs to be

noticed. It reads as under;

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.

10. A bare perusal of Rule 115 (2) Army Rules, 1954 reveals that before the "plea of guilty" is recorded, the court is to ascertain whether the accused understands the nature of the charge to which he has pleaded guilty. Once, the Court is satisfied that the accused understands the nature of charge, the court is to proceed to inform the accused the general effect of that plea and in particular meaning of the charge to which he has pleaded guilty. The Court is also enjoined upon to explain to the accused, the difference in the procedure which would be followed in case of "plea of guilty" and in case, the accused insists to plead not guilty. The Court after making such explanation is to proceed to advise the accused to withdraw the "plea of guilty", if it appears from the Summary of Evidence or otherwise that the accused ought to plea not guilty.

11. In the preset case, though the proceedings of the Summary Court Martial are recorded in the prescribed form compliance with Rule 115 (2) is not recorded at the place set apart for such compliance titled as "Proceedings on Plea of Guilt". The Commanding Officer EME Depot Bn has opted to record compliance with Rule 115 (2) on a separate piece of paper and the Petitioner's signature appears at the bottom of the said piece of paper leaving sufficient space between the last line of the compliance statement and the signature of the Petitioner, giving rise to the suspicion that the compliance has been recorded after the Petitioner put his signature on the piece of paper on which the compliance is written. Suspicion gets stronger by failure of the Respondents to provide copy of the compliance statement written on a separate piece of paper to the Petitioner alongwith copy of the Summary Court Martial Proceedings, when said copy was provided to the Petitioner at his request. The said copy of Summary Court Martial Proceedings appended by the Petitioner to the petition does not include the separate piece of paper on which the compliance of Rule 115 (2) is recorded. The grounds set out in the petition, that Rule 115(2) Army Rules, 1954 was not complied with, sounds convincing and finds support from the record placed on the file. This apart even compliance of Rule 115(2) as recorded on a separate piece of paper, does not conform to the letter and spirit of Rule 115(2) Army Rules, 1954.

It needs to be emphasized that compliance with Rule 115(2) is necessary before the "plea of guilty" is recorded and as held in Union of India v. Ex. Hawaldar Clerk Pritpal Singh and Ors. 1991 KLJ 513 is mandatory in nature. The compliance recorded on the separate piece of paper, it needs to be pointed out, is in "Past Participle/Perfect tense indicating that the compliance was recorded after the proceedings were concluded.

12. So viewed, the impugned order suffers from procedural irregularity inasmuch as the Commanding Officer EME Depot Bn before awarding the sentence on the basis of "plea of guilty" has not complied with Rule 115(2) Army Rules, 1954 and is liable to be quashed.

13. For the reasons discussed above, the writ petition is allowed and the order dated 16th August, 2001, whereby the Petitioner has been dismissed from service is set aside. The Respondents if so advised may convene Summary Court Martial afresh and proceed in the matter in accordance with the provisions of the Army Act and the Army Rules, 1954.
Disposed of.