
(1997) 05 RAJ CK 0050
In the Rajasthan High Court
Case No : Civil Writ Petition No. 358 of 1991

Ex-Sepoy Chander Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-05-1997

Acts Referred:

Army Act, 1950 — Section 164, 40, 80
Constitution of India, 1950 — Article 14
Evidence Act, 1872 — Section 24, 25, 26, 27, 3

Citation : (1997) 2 RLW 1209 : (1997) 1 WLN 642

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

J.C. Verma, J.—The petitioner, EX-Sepoy Chander Singh son of Vir Singh, has filed this writ petition for quashing the proceedings of Summary Court Martial and for issuance of appropriate direction to quash the findings and sentence of the Summary Court Martial dated 17.9.90 with the consequential prayer to the respondents to reinstate the petitioner in service and to grant all consequential benefits.

2. The petitioner is said to have joined service in the Indian Army as Combatant Sepoy/Cook on 2.12.1983 and his last posting was in the 17th BN Mech. Inf. C/o 56 APO where he was involved in alleged misconduct/offence u/s 40(A) of the Army Act, 1950 (for short as "Act of 1950") against one Nb Subedar Jaswant Singh on 15.8.90 at about 9.00 PM. The allegations against the petitioner were that he had given slap to Nb Subedar Jaswant Singh. The petitioner was immediately arrested on 15.8.90 itself and placed under close arrest in the Military custody. It is alleged by the petitioner that on next day i.e. 16.8.90, he was ordered to be marched before respondent No. 4 i.e. Commandant who had ordered Maj. K.C. Achappa to record the Summary evidence. When the petitioner was marched before respondent No. 4, all the three prosecution witnesses were

produced before respondent No. 4 and had deposed against the petitioner. According to the petitioner, the witnesses were not produced one by one while recording the Summary Evidence. It is stated that he was not allowed to cross-examine any of three witnesses while recording the summary evidence by Major Achapa and Rule 22(1) of the Army Rules (for short as "Rules") were violated which Rule prescribes that every charge against a person subject to the Act, other than an officer, shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence.

3. The petitioner submits that when he was marched before respondent No. 4 and when summary of evidence was recorded the petitioner had not been charge-sheeted till then. Even though Mj. Achapa was asked to record the summary of evidence on 16.8.90, but the summary of evidence was infact recorded on 17.8.90. Rule 23 prescribes procedure for taking down the summary of evidence and it has been provided in that Rule that incase of summary of evidence is taken, that shall be taken in presence of accused and he will have a right to cross-examine the witnesses. The evidence is to be read over to the accused and shall be signed by him. A safeguard had been provided to the accused who is to be informed and asked whether accused wanted to make any statement and further he was to be informed that he is not obliged to make any statement or say anything and whatever he says, shall be taken down in writing and may be given in evidence against him. Any such statement shall also be taken down and read over to accused and signed by him. It is further provided that accused shall be entitled to call for the defence witnesses, if he so desires and the statement of defence witnesses shall be recorded in the language being understood by the accused,

4. It is submitted by the petitioner that summary of evidence was recorded in English language which language the petitioner did not know nor did he understand the English language. It is submitted by the petitioner that right from 15.8.90, he continued to be in detention and under close arrest in Military custody without remanding him for trial by a Court Martial which is to be done without unnecessarily delay or any other action as required vide Rule 24. Rule 24 prescribes that after recording the summary of evidence, remand of accused shall be considered by the commanding officer who shall either remand the accused for trial by a Court martial or refer the case to the proper Superior Military Authority; or rehear the case and either dismiss the charge or dispose it of summarily. It is provided in Sub-clause (2) of Rule 24 that if the accused is remanded for trial by a Court martial, the commanding officer shall without unnecessary delay either assemble a summary Court martial or apply to the proper Military authority to convene a Court martial, as the case may require. It is stated by the petitioner that he remained under close arrest (Military custody) for 34 days without having either disposing off the case summarily u/s 80 or assembly of summary Court martial for such a long period and thus no action was taken for such a long time and his liberty was curtailed without affording him

due opportunity to either consult any on/seek legal advice and/or to prepare his defence as required under Rule 33. On 15.9.90, when Col. M.K. Nanda, the commandant had composed the summary Court, only then the petitioner was served with copy of order alongwith summary of evidence and charge-sheet in the after-noon of 15.9.90, copy of charge-sheet dated 15.9.90 has been attached as Annex. 2 and 3, it was directed that petitioner would continue to be under Military Custody till the trial was completed. The petitioner submits that he was not afforded a proper adequate opportunity of hearing as required under Rule 33(7) wherein a minimum of 96 hours of notice ought to have been given to the accused petitioner before his trial by a summary court martial. The petitioner submits that he was not explained the contents of charge-sheet nor apprised about the provision of being represented by a friend of the accused nor asked as to whom he would like to represent him at his trial except handing over the copy of the charge-sheet, summary of evidence and routine order no other thing was done. The petitioner was also not asked whether he wished to produce any witnesses in his defence. The petitioner submits that Rule 34(1) of the Rules were grossly violated. Rule 34 provides 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, whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly. It is further provided that interval between his being as informed, and his arraignment shall not be less than 96 hours or where the accused person is on active service, then not less than 24 hours. The petitioner submits that he was tried by summary court martial on 17.9.90 i.e. after 2 days of arrangement and was awarded punishment of 6 months" R.I. in civil prison and dismissal of service. Number of grounds have been mentioned in the writ petition whereby the procedure adopted has been challenged. It is stated that on the same day, the petitioner was sent to civil prison vide Annex. 5 and he was handed over the letter informing of his right of filing the petition/appeal to the higher authorities, when he was in jail on 17.9.90 itself.

5. The petitioner has challenged the so-called summary of evidence and trial of summary court martial conducted by respondent No. 4 being in gross violation of certain provisions of Army Act and Rules, Indian Evidence Act and principles of natural justice. It is submitted by the petitioner that from the jail, he was sending reminders to respondents for supplying him the documents for presenting the appeal/petition and had also issue notices on various dates by registered posts, but no reply had been sent to him in response to any of his letter nor any document has been supplied.

6. The petitioner has challenged the summary Court proceedings being illegal on number of grounds i.e. (i) that no opportunity to cross-examine any prosecution witnesses was afforded to the petitioner which was in violation of Rule 22(1) of the Rules and the principles of natural justice were violated; (ii) recording of summary evidence by Major K.C. Achappa and putting the petitioner in close arrest right from the first hour of the offence on 15.8.90 till the end of summary

trial was illegal; (iii) no copy of charge-sheet had been given to the accused petitioner before recording a summary of evidence (iv) the petitioner being not literate was handicapped in knowing the proceedings of summary evidence which were conducted in English; (v) close arrest of petitioner during all these period and not providing him with opportunity of defence, was in violation of Sections 24 to 27 of the Indian Evidence Act; (vi) the petitioner was not released from arrest nor remanded for trial by a court martial by respondent No. 4 without unnecessary delay which was contrary to the provisions of Rule 24(2) of the Rules. (vii) The petitioner was kept in confinement and custody, thus depriving the petitioner of his liberty, in clear violation of his rights. (viii) The petitioner was not even given the minimum statutory period of 96 hours (4 days) warning before his arrangement, therefore, it was in clear violation of mandatory Rule 34(1) and thus his right was Jeopardised. (ix) The petitioner was not even asked as to whom he would like to have a friend for his defence. (x) The plea of guilty as recorded by Commanding Officer was in violation of Rule 52(2) and Rule 115(2) of the Rules.

7. The petitioner has attached as Annex. 1, statements of Subedar Jaswant Singh, Hawaldar Balveer Kumar, Hawaldar Harnek Singh which were recorded on 17.8.90 itself as summary evidence before issuance of the charge-sheet. He has also attached his own statement which is said to have been recorded during the summary of evidence wherein petitioner is said to have taken plea that after collecting his food, the petitioner had projected certain problems to the Adm JCO regarding his rest, leave and sick report. He had requested to Sub. Jaswant Singh that he had not been given sufficient rest and not allowed to proceed on leave and was not keeping well. He had stated that Sub. Jaswant Singh asked him not to talk nonsense and abused him in the name of his mother and he had called Harnek Singh from inside the dining hall and ordered to place guard on the petitioner till he makes the report to the Subedar Major. He says that there was some altercation when he was abused by Sub. Jaswant Singh, complainant in the name of his mother.

8. Nothing had happened after recording the summary evidence for about a month. It was on 15.9.90 that he was charge-sheeted vide Annex. 2 u/s 40-A of the Army Act for slapping on the face of Naib Subedar Jaswant Singh and vide Annex. 3 on the say day, summary Court martial was composed which was to assemble on 17.8.90 at 9 hours to try the petitioner and even name of the friend of accused had been mentioned in the order Annex. 3 dated 15.9.90. On 17.8.90 summary Court martial was held by the Commanding Officer himself. Under the Army Act and Rules framed thereunder for a summary Court martial, Commanding Officer himself converts him to be the summary Court martial for the purpose of trial. One Col. M.K. Nanda, who was Commanding Officer became the only member of summary Court martial. On 17.9.90, as per Annex. 4 it was recorded by Col-Nanda as under:

By the Court How say you No. 1491128 3Y SEp/QK(U) Chander Singh are you

guilty or not guilty of the only charge preferred against you?

"Guilty"

Sd/:

(M.K. Nanda)

Col

The Court

It was also recorded as under:

"The accused having pleaded guilty to only charge the provision of Army Rule 115(2) are here complied with. Sd/- (MK Nanda)

9. There and then on the same time, he was found guilty of the charge and sentenced as mentioned above i.e. to undergo rigorous imprisonment for 6 months and dismissal from service. The order of sentence has been attached as Annex. 4, which reads as under:

Taking all these matters into consideration. I now sentence the accused No. 1491128 3Y Chander Singh, he 12 Mech Inf (Recce & sp) to:

(a) To suffer rigorous imprisonment for six months and direct the sentence of rigorous imprisonment be carried out in Civil Jail.

(b) To be dismissed from the service.

The accused is recommended Division "C"(Gr. III), If there are two divisions of prisoners, the accused is recommended Division "B" (Gr.II) while undergoing sentence in Civil Jail. Sd/- (M.K. Nanda) col COMD.

10. Accused had made a petition u/s 164 of Army Act, 1950 to the GOC-IN-C, Southern Command Headquarters, Pune, copy of petition is attached as Annex. 8 to the writ petition, to which no action has been taken as yet. Hence the accused petitioner filed the present writ petition.

11. A reply has been filed on behalf of respondent nos. 1 to 4. The facts as stated are not denied. It is submitted that after undergoing the sentence, the petitioner was released from the Central Jail, Jodhpur on 22.2.91. It is admitted that petitioner was marched before the Commandant on 16.8.90 and it is also admitted that Major K.C. Achappa was detailed to record the summary of evidence. It is admitted that summary of evidence was recorded, but it was based on tentative charge-sheet and charge-sheet was prepared only on perusal of the summary of evidence and not before that. It is also admitted that summary of evidence was recorded on 17.8.90. It is admitted that summary of evidence was recorded in English language, but it is submitted that it was only translation. It is admitted that there was inordinate delay in holding the trial but that was unintentional and on account of reasons beyond the control of the

officer who was to hold the trial as the Chief of the Army Staff was to visit Station in the last week of August, 1990 and the officer who was to hold the trial was also given responsibility about the conduct of the visit of the Chief of the Army Staff. It is not denied that proceedings of Court martial as demanded, were not immediately given, but it is stated that proceedings were sent to Sh. S.K. Nanda, Attorney of the petitioner on 3.11.90 when he approached the respondent No. 4 in his office. It is denied that there is any violation of any Act or Rule. It is stated in sub para (vii) of para 27 of the written statements that unit being in the field area, the warning of 24 hours was given to the petitioner and there was no necessity to give warning of 96 hours. A vague reply has been given that petitioner had left the choice with the Adjutant for detailment and, therefore, friend of accused was appointed by the authorities themselves. It is denied that there was any breach of principles of natural justice.

12. The averments made in written statements have been denied by way of filing rejoinder by the petitioner and it has been stated that Rule 115(2) of the Army Rules have been grossly violated and violation of such Rules is fatal to the proceedings of Court martial. It is further submitted that Rule 22(1), 23(4), 27(1), 33(7), 34(1), 52(2), 76(2) and 115(2) of the Army Rules, 1954 have been violated and trial has been held in violation of Sections 24 and 26 of the Indian Evidence Act, 1872. It is stated that Rules 22 and 34(1) are mandatory and violation of such Rules vitiate the trial itself. It is further averred in the rejoinder that petitioner was not on Active Service as the active service has been defined in Section 3 of the Army Act, meaning thereby, that if a person is attached to a unit which is engaged in operations against an enemy or is engaged in military operations in or is on the line of march to a country or place wholly or partly occupied by an enemy or is attached to or forms part of a force which is in military occupation of a foreign country. It is submitted that none of the requirement as mentioned in Rule 3 is made out in the case of the petitioner for being in active service and, therefore, under Rule 34(1), 96 hours warning notice was required for arrangement, so that petitioner could make proper arrangement for his defence. It is stated in the rejoinder that his representation was rejected in March 1991.

13. A reply to the rejoinder has also been filed wherein in para No. 6, it is stated that charge-sheet was given at 2030 hours on 15.9.90. while the trial was conducted at 10 hours on 17.9.90. Thus the petitioner was given warning notice of 37 and half hours. In sub-para (vii) of para 10 of the reply to the rejoinder filed on behalf of respondents, it has been specifically mentioned that u/s 9 of the Army Act, Central Government is authorised to issue notification for declaring the place and class of person on active service and it has been mentioned that in this case the unit being in field was declared "On Active Service" by way of notification and, therefore, Rule 34(1) has been complied with.

14. From the above narration of facts, the first question which arises for determination is whether under Rule 34(1) of the Army Rules, the mandatory

requirement of warning of holding the trial after a notice of 96 hours had been complied with or not or whether any notification had been issued u/s 9 of the Army Act for declaring this unit to be a unit "On Active Service".

15. The counsel for the respondents was asked to produce the notification in this regard and the counsel very fairly conceded that there is no notification and, therefore, the assertion that the petitioner was in active service is not pressed. Meaning thereby, the counsel for the respondent had withdrawn the argument that the petitioner was on active service, but the counsel states that provisions of Rule 34(1) are not mandatory. According to counsel, even if 96 hours minimum notice is not issued for arrangement, the trial does not fall.

16. Mr. S.S Lal, counsel appearing for the respondents has fairly conceded that even though such averments have been made to the fact that there was a notification to the fact the field area where the petitioner was working was notified as on active service, but he does not press such averments in defence. It is the duty of every officer whosoever files the written statement to first properly verify the facts and only then make the correct averments in the written statements which should be borne out of the record. The Officer who has filed the affidavit has not brought out correct facts as they are not based on record and if any notification is relied upon and mentioned in written statement as having been issued such notification should invariably be attached with the written statement or atleast be produced at the time of hearing. Mr. Lal, counsel for respondents further conceded that there was no such notification ever issued u/s 9 of the Army Act and therefore the case of the petitioner does not fall under class of "Active Service".

17. Now admittedly as per admission in written statements, 96 hours notice of arrangement was not given to the petitioner. It is also admitted that from the date and hour of committing such alleged offence, the petitioner was kept in solitary confinement in the custody of Army and was not allowed to contact any person from outside. He was arrested on 15.8.90 itself and till arrangement on 17.9.90, when the sentence was passed, he was in custody and after passing of sentence, he was straightway sent to civil prison. It is apparent that during all this period, right from 15.8.90 till the arrangement on 17.9.90, when summary Court martial was conducted and sentence was passed, the petitioner had no chance of producing any defence or contacting any person for the purpose of defence. Thus definitely the provisions in regard to providing the defence and opportunity of defence which are salutary provisions, have been violated. It is necessary to examine Rule 34 of Army Rules and the effect of non-compliance of the same.

Rule 34(1) 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 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.

It is clear that Legislature has provided the minimum period of 96 hours from the issuance of charge-sheet to the period of arraignment which is to be afforded to the accused, so that he can prepare his defence or contact any of his friend or taking necessary steps. Admittedly this Rule has been grossly violated. There is no denial of fact that 96 hours period was never afforded to the petitioner. Rather it has been admitted in the written statements that total period for arraignment which was afforded to the petitioner was 37 hours. The question arises whether compliance of such rule is mandatory and does the violation vitiates the trial. The learned Counsel for the petitioner relies on a Division Bench decision of Allahabad High Court in Uma Shanker Pathak v. Union of India and Ors. 1989 (3) SLR 405 wherein it was held that provision of Rule 34 of the Army Act are mandatory and if it is not complied with, the whole of the trial is vitiated. It was held as under:

We are unable to agree. Even if we assume that the petitioner was informed of the details of the trial on Oct. 16, 1982, Rule 34 would not be deemed to have been complied with in that notice would still fall short of ninety six hours. In our opinion, the requirement that at least ninety six hours notice should be given to the accused, is mandatory. The language used in Rule 34 is peremptory. It states that "the interval between his being so informed and his arraignment shall not be less than 96 hours "(emphasis added). Such an interpretation is also consistent with the principle of natural justice in that the purpose of the rule is to enable the accused to have sufficient notice so that he may prepare his defence. That being so, the breach of Rule 34 must vitiate the entire trial.

The petitioner has also challenged the court martial proceedings being violation of Rule 115(2) of the Army Rules. This Rule reads as under:

115. General plea of "guilty" or "not guilty"

1....

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 plead, and in particular of the meaning the charge to which he has pleaded guilty, k 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.

18. The provisions of this Rule have salutary effect. The accused is to be told the consequence of the fact if he pleads "guilty". It is mandatory on the part of Commanding Officer before he records the plea of "guilty" to ascertain that accused understands the nature of the charge to which he pleaded guilty and it is also obligatory on the part of Commanding Officer/Court to 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 his pleading of guilty and shall advise him to withdraw that plea if it appears from the summary of evidence or otherwise that the accused ought to plead not guilty. To support the proposition, counsel for the petitioner relies on 1989 (3) SLR 405 (Uma Shanker Pathak v. Union of India (All.)) wherein the Division Bench had held as under:

10. The provision embodies a wholesome provision which is clearly designed to ensure that an accused person should be fully forewarned about the implications of the charge and the effect of pleading guilty. The procedure prescribed for the trial of the cases where the accused pleads guilty is radically different from that prescribed for trial of cases where the accused pleads "not guilty". The procedure in cases where the plea is of "not guilty" is far more elaborate than in cases where the accused pleads "guilty". This is apparent from a comparison of the procedure laid down for these two classes of cases. It is in order to save simple, unsuspecting and ignorant accused person from the effect of pleading guilty to the charge without being fully conscious of the nature thereof and the implications and general effect of that plea, that the framers of the rule have insisted that the court must ascertain that the accused fully understands the nature of the charge and the implications of pleadings guilty to the same."

12. The proceedings extracted above do not, in our opinion, fulfil the requirement of the law. A bald certificate by the Commanding Officer that "the provisions Army Rule 115(2) are here complied with" is not enough. As the note quoted above and underlined by us would bear what is expected of the court where the accused pleads guilty to any charge is that the record of proceedings itself must explicitly state that the court had fully explained to the accused the nature and the meaning of the charge and made him aware of the difference in procedure. The instructions to the court printed on the proforma quoted in Annex. 1 (copy of the impugned order stating that "question to the accused and his answers both will be recorded verbatim as far as possible "make this amply clear.

19. The counsel for the petitioner also relies on another authority wherein the Single Bench of J&K High Court in the case of Prithpal Singh v. Union of India and Ors. reported in 1984(3) SLR 675 had held that violation of Rule 115 and 129 amounts to violation of Article 14 of the Constitution of India. It was observed as under:

6. The Army Rules have been framed under the Army Act. Therefore, they have a statutory force and the mandate of the Rules cannot be violated. Any procedural deviation or contravention which has the effect of adversely affecting a person bound by the Army Rules shall have to be strick down. During enquiries of such a nature and trials under the Army Act fairness and principles of natural justice are required to be punctually observed. A person bound by the Army Rules cannot be denied procedural safeguards on the plea that proceedings are of a summary nature or the persons bound by the Army Rules belong to disciplined force. What is the effect of non-observance of procedural safeguards will be stated by me a little later. The persons bound by the Army Rules do not lose their rights under Article 14 of the Constitution. They cannot be denied equality before law and equal protection of the laws.

10. The most important aspect of the case is as to whether the petitioner had pleaded guilty to the charges as is suggested by Mr. Hussain or not plea of guilt recorded by Lt. Col. Mehta is dehors Rs. 115 of the Army Rules. In the first place the alleged plea of guilt is unsigned by the Rules. In the first place the alleged plea of guilt is unsigned by the authorities. Surprisingly the petitioner also has not signed the alleged plea of guilt. At what stage word "guilty" was recorded against each charge is not known. It is was recorded in presence of the accused-petitioner obviously his signatures would have been obtained on it. Then the minutes of the enquiry should have contained an advice to the petitioner not to plead guilty as enjoined by Rule 115 of the Army Rules. This important mandate of the Rule has been flagrantly violated. Therefore, the proceedings conducted by the Summary Court Martial which have affected the petitioner's fundamental rights as he is deprived of his job are vitiated.

On the other hand, counsel for the respondents Sh. S.S. Lal has made reliance on State Bank of Patiala and others Vs. S.K. Sharma, 1994(3) SLR 390 (Surendra Singh v. Union of India Union of India and another Vs. Ex Constable Amrik Singh, R. Viswan and Others Vs. Union of India (UOI) and Others, and 1997(4) JT (SC) 08 (Maj. Gen. Inderjit Kumar v. Union of India).

20. In State Bank of Patiala (supra), Rule 68(b)(iii) of the State Bank of Patiala (Officers) Service Regulations 1979 required that enquiring authority shall furnish to the delinquent officer the copies of statements of witnesses recorded earlier not later than 3 days for the purpose of examination of witnesses. Copies of statements of witnesses were furnished, but the delinquent officer was persuaded to peruse them and take notes therefrom prior to 3 days to the examination of witnesses. No objection was raised by the respondents during enquiry. It was held that above said Rule 68 is procedural provision which is not of substantive or mandatory in character and substantial compliance having been made therein, no prejudiced was caused to the respondents. The law laid down in this case by the Apex Court is not applicable to the case in hand. It was held by Apex Court that substantial compliance had been made in State Bank of Patiala's case (supra). The delinquent officer was allowed to inspect the record

three days prior to examination of witnesses. The case of State Bank of Patiala (supra) is distinguishable on the facts and it is not of any help to the respondents. Apart from the fact that inspection was done prior to three days of the date of enquiry, the copies had also been supplied two days before commencement of examination of witnesses which was inspected by the delinquent officer without any objection. It was held by Apex Court that conduct of delinquent officer actually amounted to wavering of his right to get the copies of statements prior to three days from the examination. In the present case, the petitioner was in custody of Army, he was kept in close solitary confinement for 34 days before the charge-sheet was issued on 15.9.90. In my opinion, the period of 96 hours to be given to the delinquent officer is for the purpose for affording opportunity to the delinquent officer to prepare his defence which having not been done, the mandatory provisions have been violated. In the present case, the freedom and liberty of the individual is involved and, therefore, a strict compliance of Rule is necessary.

21. The observations made in Union of India v. Ex Constable Amrik Singh (supra) are not applicable in the present case as for the reason that Amrik Singh's case related to the affording an opportunity of personal hearing to the delinquent officer and it was held that in case personal hearing is not afforded to the delinquent officer, it does not amount to violation of principles of natural justice.

22 R. Viswan and Others Vs. Union of India (UOI) and Others, relates to the case where the Apex Court had held that discipline in the Army force is more important than the fundamental right. There can be no dispute so far views express in R. Viswan case (supra) is concerned. In 1997 JT (4) SC 08, it was held that the Court does not sit in appeal over findings of General Court Martial. In the present case, there is no evidence recorded and, therefore, there is no question of going into the findings based on any evidence. The other case which is relied on by the petitioner is Single Bench Authority of Panjab & Haryana High Court reported in 1994(3) SLR 390 [Surinder Singh v. Union of India and Ors] wherein the Court had held that Rule 34 is directory and not mandatory. The learned Single Judge of Punjab & Haryana High Court had held that even though the summary court martial had started on the following day within 24 hours and even though it is true that the Rule 34 requires that an accused has to be informed of every charge for which he is to be tried and the interval between his being so informed and his arrangement shall not be less than 96 hours. Admittedly, in the case, the interval is less than 96 hours. The question that arose for consideration was as to what was the effect when the interval between the information and the arrangement was less than 96 hours. However, it was held that observance of Rule 34 can be dispensed with if under Rule 36 it appears to the officer, convening a Court Martial, that military exigencies or necessities of discipline render it impossible or inexpedient to observe that Rule. For invoking the contingency as provided in Rule 36, the officer holding the summary court martial has to make a declaration to the effect specifically in regard to such exigencies or necessities if they existed. The reasons given by

learned Single Judge of Punjab & Haryana High Court is that because of reason that Rule 36 provides for dispensing with provision of Rule 34, if there is any contingency, therefore, provision of Rule 34 are directory and not mandatory.

23. With utmost respects to the learned Single Judge, proposition as answered in the above said judgment is not acceptable. Rather it confirms the view that provision of Rule 34 are mandatory and are to be complied with in all circumstances, but can only be dispensed with if there is any such contingency or necessity for which the Presiding Officer is to make a declaration under Rule 36 and only then the mandatory provisions of Rule 34 are to be dispensed with and if no such declaration is made by the Officer concerned under Rule 36, rigour of Rule 34 are to be applied with full force. Viewing from other angle also, after all the idea behind providing a period of not less than 96 hours, before being arraigned after the charge is made, is that the accused should have atleast some sufficient time and opportunity to defend himself. If it is held that Rule is directory and not mandatory, accused can be charged and tried, there and then, at the same hour and if the accused is in custody, which normally he is, what type of defence, accused can produce or prepare. Such a situation shall be totally negatory to afford an opportunity of defence to the delinquent officer and if it is held that provisions of Rule 34 are directory and not mandatory, in the defence force where principles of natural justice have no say, the delinquent officer shall be put at the mercy of Commanding Officer/Presiding Officer of the summary court martial trial. Therefore, it is held that provisions of Rule 34 are mandatory unless a declaration is made by giving reasons under Rule 36 in the contingency and in the necessity, that the trial is to be held by dispensing with all the mandatory provisions of Rules. In absence of such declaration under Rule 36, the provisions of Rule 34 shall be mandatory and for the reason that provision of Rule 34 which is right of petitioner has not been complied with substantially, the proceedings of summary court martial are to be quashed.

24. Summary trial is also to be quashed on the ground that mandatory provisions of Rule 115(2) have not been complied with. As reproduced above, Rule 115(2) of the Army Rules provides certain safeguards and cast a duty on the Presiding Officer of the summary trial to complete certain formalities before the plea of guilty is accepted. It has been also provided under Rule 115(2) of the Rules that if there is any evidence in the summary of evidence which points out the circumstance contrary to the plea of guilty, the Presiding Officer shall not accept the guilty plea of the delinquent officer. In the present case, in the summary of evidence, delinquent Officer had given a definite defence statement before Major Achappa that Subedar Jaswant Singh, complainant had abused him in the name of his mother and asked him to stop the nonsense when he had brought certain grievance of his about his weekly rest and other personal grievances. The delinquent officer had definitely stated in the summary evidence that he was asked to stay where he was, and later on certain officers were called and he was arrested without any reason. This was a matter which should have been taken into consideration by the Commanding Officer/ Presiding Officer of

the summary trial while recording the plea or guilty of the delinquent official. More interestingly the certificate as required under Rule 115(2) has not been appended by the summary trial officer nor any signature of the accused petitioner had been obtained. Non-observance of the mandatory provisions under Rule 115(2) which was of substantial nature, does vitiate the trial itself.

25. For the reasons and in view of the above discussion, that a definite prejudice had been caused in non-observing the mandatory provisions of the Army Rules which were of mandatory nature. For the reasons mentioned, as the writ petition is to be allowed, therefore, there is no necessity to go into the other grounds of attack made by the petitioner in writ petition, writ petition is allowed and the impugned order of punishment and proceedings of summary court martial trial dated 17.9.90 (Annex. 4) punishing the petitioner for 6 months rigorous imprisonment and dismissing him from service is set aside. The petitioner has already suffered the imprisonment for six months for which no monetary compensation shall be adequate. However, in the circumstances, he is entitled to costs of petition which is assessed as Rs. 10,000/-. The petitioner who was working as a cook, shall be entitled to all benefits including reinstatement in service, which shall be made to him within 2 months from the date of receipt of certified copy of this order. The writ petition is allowed as observed above.