

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 17.1.2008

+ **LPA No. 254/2001**

The Chief of Army Staff and Ors. Appellants

Versus

Ex. 14257873 K Sigmm
Trilochan Behera ... Respondent

Advocates who appeared in this case :

For the appellants : Ms.Jyoti Singh, Advocate

For the respondent : Mr. N.L.Bareja, Advocate

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE J.M. MALIK

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

J.M. MALIK, J. (Oral)

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1. The facts of the above-said letter patents appeal are these.
The respondent, Trilochan Behera, was enrolled as

Sepoy/tailor(Unit) in the Army Corps of Signal in June, 1984. On being tipped off, the search of the belongings of the respondent was conducted by Lt. Kuldip Singh adjutant of the same unit in the presence of other two witnesses on 26th February, 1994, but in the absence of the respondent and the following incriminating materials were recovered :

- “(a) Rubber Stamp Adj -
4 Corps Engineering Signal Regmt.
- (b) Rubber Stamp -
Authorised to travel by AC Sleeper
- (c) Bottle containing ink remover.
- (d) Old concession vouchers and
railway warrants.”

2. The summary court martial held that the charge against the respondent stood proved and dismissed the respondent from service. Aggrieved by that order the respondent filed a writ petition before this Court and this Court vide order dated 6th February, 2001 accepted his writ petition and declared that the proceedings of the summary court martial were void because it had failed to follow the Army Rules 22 and 115(2). The learned Single Judge also came to the conclusion that there is nothing on the record to show that the preliminary enquiry under Rule 22

was held. It was also observed that the document produced along with the counter affidavit in Annexure B, which is stated to be the record of proceedings itself, shows that it was recorded on 28th March, 1994. However, the case of the appellants is that the hearing of charges commenced on 28th February, 1994 at 12:45 hours and was closed at 13.30 hours. The signatures of the respondent were not obtained anywhere on the entire proceedings running into 13 pages. The appellants themselves claim that summary evidence was recorded on 05.03.1994 and 07.03.1994 and additional summary evidence was recorded on 19th March, 1994. The learned Single Judge observed, "A perusal of the record would show that the relevant rules prescribing the procedure had not been followed. The whole thing is clearly made-up." It was further held that the appellants while holding the summary court martial, had proceeded on the basis that the respondent had admitted the guilt and the provisions under Army Rule 115 were not complied with.

3. Aggrieved by this order, the appellants have approached this Court. We have heard the learned counsel for the parties. Counsel for the appellants vehemently argued that all the mandatory rules were complied with. She submitted that there is

no requirement of law that the accused must sign the plea of guilt. She argued that the respondent had made the confession out of his own volition and now he wants to wriggle out of it by turning around and finding faults with the proceedings. She argued that the wrong mention of date appears to be a human error and hence a typographical mistake crept in. In spite of writing it as 28th February, 1994 it was wrongly typed as 28th March, 1994. She explained that there is no allegation of bias. The respondent himself made a statement, "I repent for the mistake I have done. I want to continue serving as my family is dependent on my income only." Counsel for the appellants also drew our attention towards the statement of Kuldeep Singh, who stated that he identified the accused who was present before the Court. Then, there is a certificate issued by Major P.K. Agarwal, the officer who recorded the summary of evidence, wherein he certified, "I certify that I had cautioned the accused No. 14257873K UINK (Tailor 'U') Trilochan Behera in terms of Army Rule 23(3). The individual declines to make any statement in the presence of independent witness JC-367262F Nb Sub MH Biswas." Lastly, she pointed out that all the proceedings were held in the presence of witnesses and the question of manipulation of any

document does not arise.

4. We find force in the order of Single Judge in a measure, however, our reasoning is wee bit different. The appellant has produced before us the true copies of the record. This record goes to show that no ordersheet was ever prepared. The respondent has also placed on record the copies furnished to him. All these copies go to show that the proceedings were initiated on 28th March, 1994. It is pertinent to note that 28th March, 1994 was written on a paper with a heading, "trial by summary court martial under the Army Act". Annexure P-1 reveals that the date is mentioned as "28th March, 1993". The next connected paper mentions the date as 28th March, 1994. The certificate of Col. K.C. Mehta, Commanding Officer, also mentions the date as 28th March, 1994. Succinctly stated ExPI mentions the date as "28th March 1993", three other papers out of abovesaid 13 pages mention the date as 28th March, 1994, the charge sheet mentions the date as 22nd March, 1994. There can be human error at one place. If the same type of human error occurs at so many places, an integument of suspicion envelopes the entire proceedings of the above-said Court Martial. It is difficult to fathom as to how this type of mistake occurred time and again. Although, there is

no allegation of bias, yet the possibilities of its being manipulated cannot be ruled out particularly when the record is being produced for the scrutiny of this Court.

5. Secondly, the signatures of the respondent were not obtained on any of these proceedings. The plea of the respondent was recorded on a printed format. The column of arraignment reads as under :

“By the Court-How say you No. 14257873K ULNK Trilochan Behera are you guilty or not guilty of the charge preferred against you?”

The answer is recorded as “Guilty”. It does not mention what was the charge though a separate chargesheet has been placed on record which is dated 22nd March, 1994, which is not signed by the respondent. The complete plea of guilt of the respondent was not recorded.

6. In *Sashidhara Kurup Vs. Union of India and Ors.*, 1994 Cri.L.J., 375 (Gauhati), his Lordship Dr.H.K.Sema, the then judge of the High Court, was pleased to hold:

“7..... Recording of the plea of the accused as nearly as possible in the words which is used by the accused has an important significance because unless the plea of the accused is recorded as nearly as possible in the words which is used by the accused the appellate court is deprived of the privilege to examine as to

whether the plea made by the accused amounts to admission of guilt or not.”

However, in the next page, the following question was put to the respondent:

“Do you wish to make any statement in reference to the charge or in mitigation of punishment?

This question was put to the respondent after he had pleaded guilty, to which the respondent replied,

“I repent for the mistake I have done. I want to continue serving as my family is dependent on my income only.”

It is also noteworthy that no date is mentioned on this paper. Not even under the signatures of the Judge, Col. K.C.Mehta.

7. Counsel for the respondent has drawn our attention towards guide to Summary Court Martial issued in the year 1984, Heading (b) Arraignment at pages 7 & 8, it is mentioned :

“(iii) If the accused pleads guilty to the charge, the implications of the plea should be explained to the accused(s) by the officer holding the trial vide AR 115(2). He should also make the following record on page 'B' of the proceedings in the presence of the accused and obtain his signature thereon :-

“Before recording the plea of guilty offered by the accused, the Court explains to the accused the meaning of the charge(s) to which he had pleaded guilty and ascertains that the accused understands the nature of

the charge(s) – to which he has pleaded guilty. The Court also informs the accused the general effect of that 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 complied with.”

(Signature)

Accused

(Signature)

The Court

(iv) Failure to comply with the procedure explained in sub-para 16(b) (iii) above will amount to violation of the procedural safe guard provided in AR 115(2) and violation of Article 14 of the Constitution of India and the punishment awarded will have to be set aside.

(Auth : HQ Western Command letter No 0337/1/A3 dated 30 Oct 84 attached as Appx F and Judgment of J & K High Court, see Pritpal Singh v. Union of India (J & K) 1984 (3) SLR 680.)”

8 In Prithpal Singh Vs. Union of India and others(supra) that is, 1984(3) SLR 675 (J & K), it was held :

“9. Coming to the present case, I have stated the requirement of Rs. 115 and 129 of the army Rules. The procedure laid down in the said Rules cannot be observed in breach by Summary Court Martial. It is revealed from the record that at no stage the petitioner had accepted Mr. Arun Dhar as a friend under R. 129 yet he was imposed on him against his wish. This would amount denial of right to the person

in having a friend to assist him as required by R.129 of the Army Rules. So the proceedings conducted cannot be termed to be fair because an important right of the petitioner was arbitrarily taken away in violation of Art. 14 of the Constitution. He was to be given equal protection of laws that protection has been denied to him. Therefore, the decision taken by the Summary Court Martial in awarding punishment to the petitioner is tainted with arbitrariness and unfairness.

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 R.115 of the Army 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. If it 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 R. 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. The protection afforded by the procedure should not have been denied to the petitioner if it was intended to proceed against him under the Army Rules. As to whether charges were correct or not as

already observed this court cannot go into that aspect of the matter. But certainly this court will set aside the punishment which is awarded to the petitioner on the ground that the decision to punish the petitioner was taken by contravening the mandate of Rules. Such a decision would be arbitrary and shall be violative of the guarantees contained in Art. 14 of the Constitution. The argument of the learned counsel for the respondent that the petitioner was not prejudiced in any manner during the Summary Court Martial proceedings is devoid of force. The petitioner has suffered punishment of dismissal from service and the punishment is awarded by conducting proceedings in such a manner which were neither fair nor judicial. Could the Summary Court Martial observe the Rules governing the conduct of Summary Court Martial in breach. Answer to this question will be emphatic no in view of the glory of the Constitution and rights guaranteed by it."

9. Now, we turn to the procedure laid down in Rule 115 of the Army Rules. The certificate which bears the date 28th March, 1994 is reproduced as follows:-

"Before recording of plea of guilty offered by the accused the Court explained to the accused the meaning of the charge to which he had pleaded guilty and ascertained that the accused had understood the nature of the charges 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

charges and the effect of his plea of guilty accepts and records the same. The provision of Army Rule 115 (2) are thus complied with".
There are no other proceedings in this context.

10. It clearly goes to show that this certificate was prepared after the respondent had pleaded guilty. This is apparent that the provisions of Rule 115(2) were not complied with. The said rule runs as under:

"115. General plea of "Guilty" or "Not Guilty".

(1) XXXX

(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.

(3) XXXX"

11. This formality should have been done before the plea of guilt of the respondent was recorded. There is no indication in the charge dated 22nd March, 1994 that the Commanding Officer had already undergone this formality. That is why in the absence of ordersheets and other proceedings, the position does not begin to

jell. The preparation of ordersheets would have gone a long way to illustrate the position more vividly on this hazy record. It is also not understandable as to why did the Commanding Officer fail to correct the date of 28th March, 1994. Again, the certificate given by him under Rule 115(2) of the Army Rules is on a separate paper. The possibility of its being manipulated cannot be ruled out. Such like certificates can be prepared at any time. This justifies the need for obtaining the signatures of the accused viz. to lend authenticity to such a record.

12. In a recent authority reported in *Sukanta Mitra Vs. Union of India and Ors.*, 2007 (2) 197 (J & K), it was held:

“9. This apart the fact remains that the appellant has been convicted and sentenced on the basis of his plea of guilt. The plea of guilt recorded by the Court does not bear the signatures of the appellant. The question arising for consideration, therefore, is whether obtaining of signatures was necessary. In a case *Union of India and Ors. v. Ex-Havildar Clerk Prithpal Singh and Ors.* KLJ 1991 page 513, a Division Bench of this Court has observed:

The other point which has been made basis for quashing the sentence awarded to respondent-accused relates to clause (2) of rule 115. Under this mandatory provision the court is required to ascertain, before it records plea of guilt of the accused, as to whether the accused undertakes 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 charge to which he has pleaded guilty. The Court is further required under this provision of law to advise the accused to withdraw that plea if it appears from summary of evidence or otherwise that the accused ought to plead not guilty. How to follow this procedure is the main crux of the question involved in this case. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate of the same. We may take it that the signature of the accused are not required even after recording plea of guilt but as a matter of caution same should have been taken.

13. In *Lachhman (Ex. Rect.) Vs. Union of India & Others*, 2003

II AD (Delhi) 103, it was held :

“13. The record of the proceedings shows that the plea of guilty has not been entered into by the accused nor has it been recorded as per Rule 115 inasmuch neither it has been recorded as finding of court nor was the accused informed about the general effect of plea of guilt nor about the difference in procedure which is involved in plea of guilt nor did he advise the petitioner to withdraw the plea if it appeared from the summary of evidence that the accused ought to plead not guilty nor is the factum of compliance of sub-rule (2) has been recorded by the Commanding Officer in the manner prescribed in sub rule 2(A). Thus the stand of the respondents that the petitioner had entered into the plea of guilt stands on highly feeble foundation.”

14. The learned counsel for the respondent also cited a case

reported in Uma Shanker Pathak Vs. Union of India and others,
1989 (3) SLR 405 by Allahabad High Court, wherein it was held :

“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 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 a 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.

13. It is thus apparent that the questions and answers have to be reproduced by the Court in their entirety, which, in the context of Army Rule 115 (2), means all the questions and answers must be reproduced verbatim. In the present case however, the Court has not done this. Instead the Court merely content itself with the certificate that “the provisions of Army Rule 115 (2) are here complied with”.

15. It is also noteworthy that one of the copies given to the respondent, that is, Appendix III, wherein arraignment proceedings are undertaken, is blank. The blanks in the printed format were not filled in. The copies produced before the Court and given to the respondent are at variance. It only intensifies the doubt.

16. In the light of the above discussion, we find that the above-said proceedings bristle with a number of question marks. The same stand vitiated. If dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. The L.P.A is thus dismissed. There shall be no orders as to costs.

J.M. MALIK, J.

January 17, 2008
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A.K. SIKRI, J.