IN THE ARMED FORCES TRIBUNAL

REGIONAL BENCH, GUWAHATI

OA-22/2013

P R E S E N T

HON'BLE MR.JUSTICE B.P.KATAKEY, MEMBER (J)

HON'BLE AIR MARSHAL D.C.KUMARIA, MEMBER (A)

Ex. No.76214K Rfn (GD)Mr. Utpal Hazarika.

7th Battalion, the Assam Rifles

Presently residing at Vill : Pithial Gaon,

PO DhakuaKhana DhakuaKhana Sub Division

PS DhakuaKhana District North Lakhimpur,Assam.

…….. **Applicant**

Mr.HG Baruah

Miss. Namita Modi

Legal practitioner for Applicant

-Versus-

1. The Union of India,

   Represented by the Secretary to the Govt.of India,

   Ministry of Defence, North Block, New Delhi-110001.

2. The Director General Assam Rifles, Mahanideshalaya

   (The Directorate General Assam Rifles)

   Shillong, Meghalaya Pin -793 011.

3. The Commandant, 7th Battalion, the Assam Rifles,

   C/O 99 APO Pin 932007.

…….. Respondents.

Mr.Nilutpal Baruah, **CGSC**

Legal practitioner for Respondents

Date of Hearing : 29.02.2016,02.03.2016

Date of Order : **11.03.2016**

O R D E R

(B.P.KATAKEY,J)

The applicant, who was enrolled in Assam Rifles as Rifleman (GD), has filed this application challenging the Summary Court Martial proceedings (in short SCM) held against him on 02.11.2005 and also the sentence of dismissal from service passed therein, which was promulgated on 03.11.2005, apart from challenging the speaking order dated 18.07.2014 passed by the Inspector General, Assam Rifles (North) rejecting the post confirmation petition dated 04.01.2013 filed under section 164 of the Army Act, 1950 (hereinafter referred to as 1950 Act).

[2] The brief facts leading to the filing of the present OA are that the applicant was enrolled in the Assam Rifles as Rifleman (GD) on 28.12.2001, who was granted 30 days Earned Leave by the Commandant 7th Battalion, Assam Rifles w.e.f. 13.01.2004 to 11.02.2004. On expiry of the period of leave though the applicant was to resume his duties on 12.02.2004, he rejoined duty on 31.03.2004 and thereafter, he again absented himself without taking any leave from the Unit line from 31.03.2004 till again he resumed his duty on 01.12.2004. A Court of Inquiry was convened on 13.03.2004 to investigate into the circumstances under which the applicant has failed to rejoin his duty on expiry of his leave on 11.02.2004 and still was

absent without any communication. In the said Court of Inquiry, the statements of three witnesses were recorded. The Court of Inquiry, on the basis of the statements so recorded opined that the applicant be declared absent without leave w.e.f. 11.02.2004 and disciplinary action may be initiated against him for being absent without leave. The Commandant 7th Battalion, Assam Rifles, concurred with the opinion of the Court of Inquiry and vide order dated 14.04.2004 directed declaration of the applicant as deserter w.e.f. 12.02.2004, apart from recovering a sum of Rs. 4,535.00 being the cost of personal clothes and equipments taken by him from his IRLA. The applicant was accordingly declared as deserter. On 26.10.2005, the Commandant has informed the applicant that he would be tried by SCM on 31.10.2005 at 1000 hours for the offence under Sections 39(a) and 39 (b) of the 1950 Act, enclosing therewith the summary of evidence, additional summary of evidence and also the charge- sheet pertaining to the charges levelled against him. By the said order dated 26.10.2005, the applicant was also informed that the Assistant Commandant, Rajesh Kumar of the Unit has been detailed to act as the friend of the accused, namely, the applicant. The said communication, as is evident from the records produced by the respondents, was received by the applicant on 27.10.2005, which was acknowledged by the applicant by putting his signature in the receipt. The SCM, due to some unavoidable circumstances, could not, however, be held on 31.10.2005 as fixed earlier, which was subsequently held on 02.11.2005. The applicant was accordingly informed vide communication dated 31.10.2005 about the change of date. In the SCM held on 02.11.2005, the applicant was present, the charge sheet dated 22.10.2005 was read out and

explained to the applicant. Two officers, apart from the Commanding Officer conducting the SCM**,** attended the trial. The friend of the accused appointed on 26.10.2005 was also present during the SCM. In the said SCM, the plea of "guilty" of the applicant against both the charges under Sections 39(a) and 39(b) of 1950 Act was recorded. The Court also quoted in verbatim the provisions of Sub Rule 2 (A) of Rule 150 of the Army Rules 1954, (hereinafter referred to as 1954 Rules) in the said SCM relating to the plea of "guilty". The SCM, as it appears from the record, commenced at 1030 hours and concluded at 1130 hours. The sentence which was imposed in the SCM was of dismissal of the applicant from service, which was promulgated on 03.11.2005. Hence, the present OA.

[3] We have heard Mr. H.G.Baruah, learned counsel appearing for the applicant and Mr.N.Baruah, learned CGSC assisted by Col Anand, OIC,AFT, Legal Cell, appearing for the respondents.

[4] The learned counsel appearing for the applicant referring to the pleadings in the OA as well as the provisions contained in sections 38, 39 and 130 of the 1950 Act, apart from Rules 34,115 and 182 of 1954 Rules, has submitted that the sentence of dismissal from service awarded in the SCM against the applicant needs to be interfered with for violation of the aforesaid provisions of law and also for non compliance of safeguard available to the applicant in such proceedings. Referring to the provisions contained in Sections 38 and 39 of the 1950 Act, it has been contended that since the applicant has been declared as a deserter, he cannot be tried for the offence either under Section

39(a) or under Section 39(b) of the said Act., as in the case of deserter, the authority has to proceed under Section 38 of the said Act only.

[5] The further contention of the learned counsel for the applicant is that the provision of Section 130 of the 1950 Act , which provides the safeguard to the person against whom SCM is held, has been violated, inasmuch as, the applicant was not asked whether he objects for being tried by any officer sitting in the SCM as required under Sub Section(1) of Section 130 of the 1950 Act and hence, according to the learned counsel for the applicant, the entire SCM , including the sentence of dismissal from service awarded in such proceedings, cannot stand the scrutiny of law because of the basic infirmity in the proceeding in not complying with the procedural safeguards provided in the said provisions of law, even though the applicant, for argument sake, pleaded guilty to the charges leveled against him under sections 39(a) and 39(b) of the 1950 Act.

[6] The learned counsel further submits that the 1950 Act and 1954 Rules constitute a self contained Code**,** specifying offences and the procedure for detention, custody and trial of the offenders by the Court-Martial. It has been submitted that the procedural safeguard contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the Court-Martial and the severity of the consequence that visit persons subject to the jurisdiction and hence, even if the accused pleads “guilty” to the charges leveled against him, if the procedural safeguard embodied in Sub Section(1) of Section 130 of 1950 Act has not been

complied with, it would vitiate the entire court martial proceedings. The leaned counsel in support of his contention has placed reliance on a Judgment passed by the Hon'ble Supreme Court ***in Ranjit Thakur appellant Vs. Union of India and others respondents*** *reported in* ***AIR 1987 SC 2386***.

[7] The learned counsel, in support of the challenge made to the sentence of dismissal awarded in the aforesaid SCM**,** has submitted that the SCM has also been vitiated for non-compliance of the mandatory requirement of Sub Rule (2) of Rule 115 of 1954 Rules, which requires the Court to ascertain that the accused understands the nature of the charge to which he has pleaded guilty apart from informing the accused of the general effect of that plea and in particular, of the meaning of the charge to which he has pleaded "guilty" apart from the difference in procedure which will be made by the plea of "guilty" It has also been submitted that mere insertion in the foot-note the requirement of Rule 115(2), which is in a typed form, cannot be held to be sufficient compliance of the provisions of the Rule 115(2) of the 1954 Rules. Referring to the SCM, it has been submitted by the learned counsel for the applicant that it is apparent therefrom that the Court has used the pre-typed proceedings where a foot -note has been inserted, quoting in verbatim the provision of Sub Rule(2A) of Rule 115 of the aforesaid Rules, which exists before asking the applicant whether he pleads guilty to the charges or not and hence, it is evident that the Court before recording the plea of "guilty" did not comply with the provisions of Rule 115(2) of 1954 Rules.

[8] Drawing the attention of the Tribunal to the requirement of Rule 34 of 1954 Rules, the learned counsel further submits that though it is mandatorily required that there shall be not less than 96 hours of interval between the time when the accused person is informed about the charges before he is arraigned and his arraignment, in the instant case, it is evident from the SCM that the charge sheet was read over and explained to the applicant at 1030 hours on 02.11.2005 and immediately thereafter, his plea of "guilty" was recorded and the sentence of dismissal from service was passed within an hour i.e. at 1130 hours on the same day, thereby violating the mandatory provision of Rule 34 relating to the time interval. The learned counsel in support of his contention has placed reliance on a decision of the Hon'ble Apex Court in the case of ***Union of India VS. A.K.Pandey*** *reported in* ***(2009)10 SCC 552.***

[9] The further submission of the learned counsel for the applicant is that despite there being a bar under Rule 182 of the 1954 Rules for use of any statement made at the Court of Inquiry against the persons subject to the Act in the SCM conducted against the applicant, the statement of witnesses examined during the Court of Inquiry were used against the applicant and hence, the entire SCM including the sentence of dismissal from service have been vitiated. The learned counsel, therefore, submits that the sentence of dismissal from service awarded in such SCM conducted in violation of the aforesaid provisions of law needs to be set aside and the respondents may be directed to reinstate the applicant in service with full service benefits.

[10] Per contra, Mr.N.Baruah, learned CGSC appearing for the respondents, supporting the sentence awarded in the SCM has submitted that the provisions of section 130 of the 1950 Act are not applicable in the case in hand, as it is evident from the language used in sub Section (1) of that Section that the requirement of asking the accused whether he objects to be tried by any officer sitting in the Court is applicable in case of trials by general**,** district or summary general court martial and not in the SCM,the types of which are specified in section 108 of the 1950 Act. Hence, according to the learned counsel, the SCM cannot be interfered with on the said ground.

[11] Referring to the SCM held on 02.11.2005, the learned counsel for the respondents also submits that it is apparent therefrom that the Court before recording the plea of “guilty” of the applicant explained to him the meaning of the charges to which he had pleaded guilty and also ascertained that he understood the nature of charges, apart from informing him the general effect of that plea as well as the difference in procedure which will be followed consequent to such plea. It is also submitted that the Court having satisfied itself that the applicant understood the charges and the effect of the plea of “guilty”, has accepted such plea of guilt and recorded the same. The learned counsel also submits that the provisions of Sub Rule (2) of Rule 115 has been followed in the said SCM and hence there is no violation of the requirement of aforesaid Rules.

[12] The learned counsel for the respondents, referring to the communication dated 26.10.2005, which has been annexed by the applicant as Annexure XIII to the OA, has submitted that it is evident therefrom that apart from the summary of evidence, additional summary of evidence, charge sheet pertaining to the charges were also forwarded to the applicant, which the applicant has acknowledged receipt in writing on 27.10.2005, as is evident from the records. It has also been submitted that the applicant in the OA has never pleaded that though he was served with the aforesaid communication dated 26.10.2005, he, however, has not been supplied with a copy of the charge sheet pertaining to the charges levelled against him. Hence, according to the learned counsel, the provisions of Rule 34 of 1954 Rules have been complied with, the applicant having been informed of the charges for which he has to be tried before his arraignment on 27.10.2005 i.e. more than 96 hours of convening the SCM on 2.11.2005 at 1030 hours.

[13] Responding to the submissions made by the learned counsel for the applicant that the applicant having been declared as deserter, he can be proceeded only under Section 38 of 1950 Act and not under sections 39(a) and 39(b) of the said Act, it has been submitted by the learned counsel for the respondents that there is no bar in 1950 Act for trying for the offence under sections 39 (a) and 39(b) in respect of a deserter, who can also be proceeded against under section 38 of the aforesaid Act. Referring to the procedure laid down in Rule 160 of 1954 Rules to be followed after the plea of “guilty”, it has been submitted by the learned counsel for the respondents that

the summary of evidence was supplied to the applicant on 27.02.2005 and was again read over on 02.11.2005, only to determine the sentence after the applicant has pleaded guilty and has not been used as evidence against the applicant as he has already pleaded guilty to the charges brought against him and hence, the provisions of section 182 of the aforesaid 1954 Rules are not applicable in the case in hand.

[14] The learned counsel for the respondents further submits that though the applicant was awarded the sentence of dismissal from service on 02.11.2005, which was promulgated on 03.11.2005, he never objected to the same till filing of the petition under section 164 of the 1950 Act on 04.01.2013 i.e. more than 7 years of awarding the sentence which, however, was rejected by the authority vide order dated 18.07.2014. The learned counsel for the respondents, therefore, submits that the applicant is not entitled to any relief and hence, the instant OA may be dismissed with costs.

[15] The submissions advanced by the learned counsel for the parties have received our due consideration. We have also perused the pleadings of the parties apart from the records produced by the respondents including the records of SCM.

[16] We shall first consider the rival contentions relating to violation of different provisions of 1954 Rules in conducting the SCM. Rule 34 of the aforesaid Rules requires the accused, before he is arraigned, to be informed by an Officer of every charge for which he is to be tried, apart from intimating the names of witnesses whom he

desires to call in his defence and that reasonable steps will be taken for procuring their attendance. Sub Rule (1) of the said Rules provides that 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. In the Instant case, the interval has to be not less than 96 hours, the applicant being not on active service.

[17]. The Apex Court in the case of ***A.K.Pandey*** (supra) has held that the time interval provided in Rule 34 is absolute and mandatory. It has also been held that its non-observance vitiates the entire proceedings. Relevant paragraphs, i.e., paragraphs 15 and 16 of the said judgment are reproduced below :

> " *15. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequence that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such. There*

being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours' interval between the accused being charged for which he is to be tried and his arraignment and interval time in Rule 34 must be read as absolute. There is a purpose behind this provision: that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours."

16. A trial before the General Court Martial entails grave consequences. The accused may be sentenced to suffer imprisonment. He may be dismissed from service. The consequences that may follow from non-observance of the time interval provided in Rule 34 being grave and severe, we hold, as it must be, that the said provision is absolute and mandatory. If the interval period provided in Rule 34 is held to be directory and its strict observance is not insisted upon, in a given case, an accused may be called upon for trial before the General Court Martial no sooner charge/charges for which he is to be tried

and served. Surely, that is not the intention; the time-frame provided in Rule 34 has definite purpose and object and must be strictly observed. Its non-observance vitiates the entire proceedings".

[18] The applicant himself, in the OA filed, has pleaded receipt of the communication dated 26.10.2005, which has been annexed as Annexure–XIII to the OA. It is evident from the said communication that apart from the copy of the summary of evidence, additional summary of evidence, charge sheet pertaining to the accused were attached to the said communication. The applicant in the OA has not pleaded that though he has been served with the aforesaid communication dated 26.10.2005,he, however, has not been served with the charge sheet pertaining to the charges leveled against him under section 39(a) and 39 (b) of 1950 Act. The records produced by the respondents reveal that the said communication along with charge sheet was served on the applicant on 27.10.2005, in token of which the applicant has put signature in the receipt. The applicant was arraigned on 02.11.2005 and the SCM was held on that day at 1030 hours, which is more than 96 hours after the applicant was informed about the charge for which he has to be tried, before his arraignment. The contention of the applicant that the mandatory provision of Rule 34 of 1954 Rules has been violated cannot, therefore, be accepted.

[19] Rule 182 of the 1954 Rules provides that proceedings of a court of inquiry, or any confession, statement or answer to a question made or given at a court of inquiry shall not be admissible in evidence

against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for willfully giving false evidence before that court. The proviso to the said rule provides that nothing in that rule shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross examination of any witness.

[20] Rule 116 of 1954 Rules lays down the procedure to be followed after the plea of "guilty". Sub Rule (2) of the said Rules provides that after the record of the plea of " guilty" on a charge (if the trial does not proceed on any other charge), the court shall read the summary of evidence and annex it to the proceedings or if there is no such summary, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence. It also requires taking of evidence in like manner as is required in case of a plea of "not guilty".

[21] In the instant case, what was read over to the applicant was the summary of evidence for the purpose of determining the sentence and not used as evidence against the applicant in the SCM, as, according to the respondents, the applicant has already pleaded "guilty". That being the position, we are of the considered opinion that the contention of the applicant in that regard also cannot be accepted.

[22] This leads to the determination of the question as to whether the provisions of Sub Rule (2) of Rules 115 of 1954 Rules have been

complied with before recording the plea of "guilty" by the applicant in the SCM. Sub Rule (2) of Rules 115 requires that if an accused person pleads "guilty", such plea shall be recorded as 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. That apart, the Court is required to inform the accused person of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and 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. Sub Rule 2(A) of the aforesaid Rules requires recording of the aforesaid compliance by the Court in the manner provided therein.

[23] The records of the SCM reveal insertion of a note reproducing in verbatim what has been mentioned in Rule 2(A) of the aforesaid Rules by way of quotation. It also reveals from the said SCM that a pre-typed form containing the said note with typed format has been used, where name of the accused was left blank apart from the list of charges and answer to the questions to the accused. The said typed format was filled up by putting the name and number of the accused and also number of the charges and the answer of the applicant to the questions put to him i.e. "Plea of Guilty". It is no longer *res integra* that compliance of the provision of Sub Rule (2) of the Rule 115 of the aforesaid Rules is mandatory. Quotation of Sub Rule 2(A) of the aforesaid Rules, as a foot note, in view of the above, cannot be held to be sufficient compliance of the requirement as well as discharge of the

duties and responsibilities of the SCM as mandatorily required under Sub Rule (2) of Rule 115.

[24] This regional bench of the Tribunal in **TA 49/2010 (Bhopal Ram Oseka Vs Union of India and others** decided on **6.6.2011**; in **OA 8/2011 (Prem Bahadur Thapa Vs Union of India and ors** decided on **9.4.2012** and in **TA-6/2012 (Sri Amar Nath Yadav Vs. Union of India)** decided on **05.02.2013 ,** the aforesaid view has been taken.

[25] As held above, there is infraction of provisions of sub Rule (2) of Rule 115 of the 1954 Rules and hence, the entire SCM is vitiated. The sentence of dismissal from service awarded to the applicant on 02.11.2005, which was promulgated on 03.11.2005, therefore, needs to be set aside, being based on such SCM which has been conducted in violation of mandatory provision of Sub Rule (2) of Rule 115 of the Rules 1954, which we accordingly do.

[26] Having held so, we do not consider it necessary to record any finding relating to the other two submissions advanced by the learned counsel for the applicant, i.e. violation of provisions contained in section 130 of the 1950 Act and the submission that the applicant having been declared as deserter cannot be proceeded against under section 39(a) and 39(b) of Act 1950 and can only be dealt with under section 38 of the said Act.

[27] The next question which requires our consideration is what

consequential relief is to be granted to the applicant. Admittedly, the applicant though was sentenced to dismissal from service on 02.11.2005, which was promulgated on 03.11.2005, he did not challenge the said proceedings for more than 7 years and for the first time on 04.01.2013 filed an application under section 164 of the 1950 Act which was rejected vide order dated 18.07.2014. The applicant, therefore, did not avail any legal remedy available to him for a long period of more than 7 years i.e. from 03.11.2005 to 04.01.2013. Normally, the consequence of setting aside the sentence of dismissal from service imposed in the SCM conducted against an accused is though reinstatement in service, but it does not necessarily mean that he will be entitled to arrear salary from the date of his dismissal, (in the instant case, 02.11.2005), till the date of reinstatement. The applicant having not challenged the aforesaid order dated 02.11.2005 till 04.01.2013, we are of the view that the applicant would not be entitled to salary for the said period and would be entitled to salary w.e.f. 04.1.2013 till the date of his reinstatement in service pursuant to this order. The said period of service of the applicant i.e. from his date of dismissal till the date of reinstatement shall have to be counted for all other purposes, including pension. The applicant admittedly is not in service w.e.f. 02.11.2005 and more than 10 years have elapsed in the meantime. The applicant being a Rifleman (GD), also cannot be taken back in service unless he is medically fit for that purpose.

[28] We, therefore, direct that the respondents shall immediately conduct medical examination of the applicant by the Medical Board to ascertain his fitness for service. If he is found to be

medically fit, he shall be reinstated in service immediately thereafter. The said exercise shall be carried out by the respondents within a period of one month from the date of receipt of this order. In the event the applicant is not found to be medically fit, he shall be paid his due pension taking into account his period of service including the period from 02.11.2005 till the date of passing of the appropriate order by the authority relating to his medical condition. The applicant shall be paid arrear salary from 04.01.2013 till the date of taking such decision by the respondent authority, irrespective of whether he is found to be medically fit or not. The applicant shall also be entitled to other service benefits apart from the arrear salary for the aforesaid period.

[29] The Original Application is, accordingly, allowed to the extent indicated above.

[30] However, having regard to the facts and circumstances of the case, we do not make any order as to costs.

MEMBER (A) **MEMBER (J)**

mc