**ARMED FORCES TRIBUNAL CHANDIGARH REGIONAL BENCH**
**AT CHANDIMANDIR**
*******

**O.A No. 05 of 2010**

Netarpal Singh … Petitioner
v.
Union of India and others … Respondents

ORDER
04.08.2010

**Coram : Justice N. P. Gupta, Judicial Member**

**Lt Gen A. S. Bahia (Retd), Administrative Member**

For the Petitioner : Mr. Brig. Rajinder Kumar,Advocate

For the Respondents " Mr. Mohit Garg, CGC

**JUSTICE N. P. GUPTA**

This petition has been filed under Section 14 and 15 of the Armed Forces Tribunal Act seeking to challenge the judgment and decree of the Civil Judge, Senior Division, Ambala, dated 26.08.2009 passed in Civil Suit No.106 of 2003 dismissing the suit.

Necessary facts are that the plaintiff/petitioner alleged that the Unit of the plaintiff came for field firing in Mahajan Ranges on 24.08.2000. At that time due to paucity of officers, Capt. Sudhir Sarari was performing the duties of Officiating Battery Commander, while permanent Battery Commander Major P. Shanker was performing the duties of Unit 2nd in Command and had stayed in the Unit. Thus, at the relevant time, the Battery Commander was a Junior

Officer. It is alleged that as per programme, the Commanding Officer Col. Bharat Kumar proceeded on leave, leaving the unit command under Major G.S. Kalkat, who was Romeo Battery Commander while the petitioner was BHM of 'Q' Battery. Then, it is alleged that after function of camp fire was over, Opr Balkar Singh brought his personal camera and wanted to photograph the entire Regiment battery–wise. In order to oblige Major G. S. Kalkat, he first photographed the Romeo Battery. Thereafter, 'P' Battery was photographed, then Workshop, RHQ and then 'Q' Battery, by which time the Commanding Officer left the function. According to the plaintiff, on the next day, being 19.09.2000, **Capt. Sudhir Sarari** also left the Unit location on leave and **Major Kalkat**, taking advantage of absence of any senior officer, punished the Battery by ordering them to go on route march in full battle order. This, according to the petitioner, was a punishment inflicted upon the personnel including the petitioner. According to the petitioner, the photography was not a part of the official function. Then, it is alleged that after award of punishment, the Commanding Officer 130 AD Regiment on 22.10.2000, summarily tried the petitioner under Section 41 AA for disobedience of lawful command for not getting the Sub-unit photographed during camp fire on 18.09.2000. The petitioner pleaded not guilty. The Commanding Officer found him guilty and awarded punishment.

This award of punishment was challenged by the petitioner by way of filing the suit on the grounds of the punishment to be suffering from the vice of double jeopardy, violation of Army Rule 22, non - examination of witnesses in presence of the petitioner in orderly room, non carrying out of investigation under Para 402 of Defence

Service Regulations 1987 and so on. The statutory complaint of the petitioner was rejected vide order dated 23.01.2002. Then, after serving notice under Section 80 CPC, this suit has been filed.

In the written statement, the stand was taken to the effect that the photography was a planned affair as part of the function, and order for the same was passed by the Officiating Commanding Officer and was conveyed to the sub units by the Subedar Major. No civilian professional photographer was requisitioned, as the unit was at field firing range, and presence of civilians was considered undesirable from the security point of view. Then, the sequence of photography was disputed and it was contended that the Officiating Commanding Officer was very much present throughout and there is no question of taking advantage of absence. Regarding route march, it was pleaded that it was a part of routine training event and not mass punishment. Copy of the training programme was filed. It was maintained that the petitioner disobeyed the orders and the matter was viewed seriously, and was reported to the Commanding Officer on telephone at his leave station, but the Commanding Officer instructed that no action be taken till the entire matter is thoroughly investigated. It was maintained that it is not a case of double jeopardy. It was maintained that the petitioner pleaded guilty, and was, therefore, punished in a legal manner. Compliance of Rule 22 was maintained. It was also pleaded that the petitioner was also given option to be tried by authority superior to the Commanding Officer, the witnesses present during trial, being Sudhir Sarari and Subedaar AIG V. K. Pandey were examined in the presence of the petitioner, the petitioner was given full liberty to cross- examine, but

he declined, and pleaded guilty. It was maintained that the charge against the petitioner was investigated by the Officiating Battery Commander and after due consideration, the petitioner was brought to the Commanding Officer. All other allegations were also denied.

After completing the trial, the learned Trial Court found that Army Rule 22 was complied with. The petitioner was given full opportunity to cross-examine the witnesses, but he refused. Summary trial was held under Section 80 of the Army Act, and on the evidence, his plea of guilty and refusal to cross-examine, he was punished, no irregularity in the trial was found, and the Trial Court also observed that Civil Court cannot sit as a Court of Appeal over the departmental findings, it cannot re-appreciate the evidence, and set aside the orders passed by the competent authority in departmental proceedings. Inter-alia with these findings, the suit was dismissed.

Arguing the petition, it was submitted by learned counsel for the petitioner, firstly that the order of punishment suffers from vice of double jeopardy. In our view, a look at the provisions of Article 20 (2) of the Constitution would show that it enacts a prohibition against any person being prosecuted and punished for the same charge more than once. According to the petitioner, the order of route march was an order of punishment, while according to the defendants, it was a part of routine training event and not mass punishment. There is nothing shown on the side of the petitioner, that any order of route mach was passed by way of punishment, much less after prosecuting the petitioner, in whatever summary manner. Thus, in our considered view, the contention does not hold good, and is negated.

The next submission made was about non-compliance of the provisions of Para 402 of the Defence Service Regulations and about non-compliance of provisions of Rule 22 of the Army Rules. Relying upon the judgment of the Hon'ble Supreme Court in case of **Pritpal Singh** v. **Union of India**, reported in AIR 1982 SC 1413 and **Union of India** v. **Deb Singh** reported in 2010 (1) SCC (L&S) 751, it was contended that the provisions of Rule 22 are mandatory and violation thereof vitiates the entire trial and punishment.

The contention was opposed by learned counsel for the respondents. We have considered the submissions.

Para 402 of Defence Service Regulations reads as under:

> "Investigation of Charges.- The investigation of charges will be carried out in the manner prescribed in the Army Rules. Every officer who does not summarily dispose of a charge which he investigates will carefully avoid any expression of opinion as to the guilt or innocence of the person charged.
>
> (b) Every charge against a JCO WO or OR will be investigated without delay in his presence.
>
> ( c) Every charge, whether against a JCO, WO or OR, should be investigated in the first instance by the Company Commander, at his company orderly room which will be held at such an hour as will allow of an offender remanded for disposal by the CO being ready to go before him at the appointed time."

In our view, the contention has no force, inasmuch as it is not shown as to what further formalities were required to be done in investigation. Significantly, the rule contemplates avoiding any expression of opinion as to the guilt or innocence of the person. This provision is intended only for the purpose of satisfying, as to whether the individual should be remanded for disposal by the Commanding Officer.

Then, coming to the requirement of Rule 22, the contention raised is that according to this rule a charge against a person is to be heard in presence of the accused, meaning thereby that a definite charge should be there, while in the present case, as is clear from Exh.D-5, that there is no charge contained therein. Learned counsel invited our attention to cross-examination of Sudhir Sarari, who has admitted that documents produced on record, Appendix N to Army Order 24 of 1994 (available on record at page 219) does not contain the charge, and the charge even subsequently was not produced. Thus, no charge was ever read over to the petitioner. Likewise, it was also submitted that four witnesses are alleged to have been examined under Rule 22, while Sudhir Sarari has admitted that only two witnesses, being himself and V. K. Pandey were examined, Major P. Shanker and Subedar Major Yadav were not examined. Thus, the proceedings are not correctly recorded. It was also contended that, as a matter of fact, first part of the proceedings was drawn without reading over the charge and compliance with the provisions of Army Rule 180 was recorded. Then, the petitioner’s signatures were obtained, and after the

Commanding Officer filled up the pro forma as per his own sweet will, which cannot be said to be compliance of Rule 22.

We have considered the submissions.

In our view, Sudhir Sarari has clearly deposed that the charge should be available in Record Office, and thereafter no steps were taken by the plaintiff in the direction of either getting the charge produced or establishing that no charge was there. Significantly, in the plaint, not a word has been pleaded in that regard, and in evidence also given in the form of affidavit (available on record at page 297) there is not a word about it. Likewise, there is no averment or evidence about the pro forma having been filled by the Commanding Officer after obtaining signatures from the petitioner. So far as the aspect of examining four witnesses is concerned, a look at the said documents, Annexure N does show that on the first page, names of two witnesses, Sudhir Sarari and V. K. Panday are mentioned, to have been examined and the petitioner declined to cross-examine them. So far as the other two witnesses are concerned, being Major P. Shanker and Subedar Major Yadav, they were only kept present as independent witnesses about holding the proceedings under Army Rule 22 (1). The petitioner has not chosen to examine either of them, to depose that the proceedings were not held as purported, or the like. This is one aspect of the matter.

The other aspect of the matter is that, of course, **Pritpal Singh's** judgment has been followed by the Hon'ble Supreme Court in **Deb Singh's** case, then a close look at the judgment in **Deb Singh's** case would show, firstly, that it was a case where the individual was tried by Court Martial, and in para 3 it is clearly noticed

that in that case it was on initiation of Court Martial proceedings itself, that the individual had raised a contention, that the preliminary proceedings which attract initiation of Court Martial was in violation of Rule 22 and, therefore, the Court Martial cannot be held against him. On the other hand, the Hon'ble Supreme Court in case of **Union of India** v. **Major A. Hussain**, reported in 1998 (1) SCC 537, had clearly held that if the objection was not raised at the appropriate time and the Court Martial proceedings were allowed to continue, witnesses were cross-examined, it only amount to irregularity, and would not prejudice the delinquent officer. On the face of judgment in **A. Hussain's** case, it would suffice to notice that objection about non-compliance of provisions of Rule 22 is not shown to have been raised till before filing of the present suit. It was submitted that in the statutory complaint, the objection was raised, but then copy of that complaint has not been produced on record. Thus, it can very well be said, that in view of the facts found above, the so called non-compliance only tantamount to irregularity, and does not vitiate the punishment. At the cost of repetition, we may notice that the only ground in this regard is taken in Para 7-B of the plaint, and that too is that no searching investigation was carried out by the Commanding Officer before awarding punishment. This, it appears that the petitioner is involving himself more in inventing and engineering the grounds on the envil of non-compliance of Rule 22, which he cannot be allowed to. Thus, this contention about punishment being vitiated for non-compliance of the provisions of Rule 22, also cannot be sustained.

The next contention raised is that the provisions of Rule 34 of the Army Rules have not been complied with, inasmuch as there should have been an interval of at least 24 hours between the petitioner being informed of the charge and his arraignment, which in the present case, is not there, and relying upon the recent judgment of the Hon'ble Supreme Court in **Union of India** v. **A. K. Pandey**, reported in 2009 (10) SCC 552, it is contended that the provisions of Rule 34 are mandatory, and non-compliance vitiates the entire proceedings and punishment.

On the other hand, it was contended by learned counsel for the respondents that Rule 34 applies only where the individual is tried by Court Martial, and does not apply to such summary procedure under Section 80. It was contended that Rule 34 appears in Chapter V, which applies to investigation of charge and trial by Court Martial. Since the petitioner was not tried by Court Martial, Rule 34 has no applicability. It was also contended that the matter is rather covered by Rule 26. In rejoinder, it was contended that Rule 26 applies only to Junior Commissioned Officers and Warrant Officers and has no application to the petitioner, and it was maintained that the mere fact that Rule 34 finds place in Chapter V, is of no adverse consequence, as even Rule 22 finds place in Chapter V only. According to the learned counsel, Rule 34 and 33 find place under the caption, "Preparation for defence by accused persons" and, thus, it is intended to provide a reasonable opportunity to the accused to prepare himself for defence and, therefore, the mere fact that the petitioner was not sent for trial by Court Martial, does not detract against the applicability of Rule 34.

We have considered the submissions.

In our view, a look at Exh. D-7 (available on record at page 109, being offence report ) does show, that the punishment was awarded summarily by the Commanding Officer of the Unit and the petitioner pleaded guilty to it, so also about the statements of two witnesses, being Sudhir Sarari and Vijay Singh, having been recorded. In our view, the submission made by the learned counsel for the respondents has force, in the sense, that a proper reading of Rule 33 and 34 would show, that even in their own language, they comprehend their applicability only to cases which are tried by Court Martial. It is required to be noticed, that in Rule 33, the requirement of time lag is prescribed in sub-rule (7) by providing " as soon as practicable after an accused has been remanded for trial by General or District Court Martial, and in any case, not less than 96 hours or on active service, 24 hours before his trial, an Officer shall give to him free of charge a copy of summary evidence so as to prepare his defence and being assisted or represented by trial, …. " Likewise, in Rule 34 also, in sub-rule (3), it is provided that the Officer shall also deliver to the accused a list of names, rank and Corps ( if any), of Officers who are to form the Court, and whether Officers are waiting are named, also of those Officers in Court Martial other than Summary Court Martial. Obviously, therefore, there is no manner of doubt, that the provisions of Rule 34 are intended to apply only to cases where the individual is to be tried by a Court Martial, while in the present case, it is not in dispute, that the petitioner was not punished by any Court Martial.

In that view of the matter, the contention about non-compliance with the provisions of Rule 34 is also of no assistance to the petitioner.

The net result of the aforesaid discussion is that we do not find any force in this petition. The same is, therefore, dismissed.

**[ Justice N. P. Gupta ]**

**[ Lt Gen A. S. Bahia (Retd) ]**

Aug 4, 2010
RS