



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



D.B. Special Appeal Writ No. 1434/2011

Sohan Lal S/o Shri Jesa Ram, aged about 49 years, resident of
VPO Tejsar Distt - Sikar Raj.

-----Appellant/Petitioner

Versus

1. The Union Of India through the Secretary to the Govt. Of India, Ministry Of Defence, New Delhi - 1100 11
2. The Director General Corps Of Signals, General Staff Branch through Chief of the Army Staff, Army Headquarters (Now Integrated HQ MOD (Army), DHQ PO New Delhi - 1100 11
3. The Officer Commanding Southern Command Composite Signal Regiment (AREN), C/o 56 APO

-----Respondents

For Appellant(s) : Mr. Rajendra Singh Bhadauria
For Respondent(s) : Mr. Ashish Kumar

**HON'BLE THE ACTING CHIEF JUSTICE MR. SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJEET PUROHIT**

ORDER

RESERVED ON:-

03/09/2025

PRONOUNCED ON:-

13/10/2025

REPORTABLE

Per, HON'BLE MR. SANJEET PUROHIT, J:

1. The present special appeal has been preferred by the appellant assailing the validity and propriety of the judgment dated 24.03.2009 passed by the learned Single Judge whereby, the writ petition filed by the appellant-employee challenging the proceedings and order dated 30.03.1993 of Summary Court Martial was dismissed.



Brief facts germane to the present controversy as narrated in the writ petition are as under :-

2. The appellant initially entered into the service of the Indian Army, being enrolled in the rank of Signaller on 24.01.1987. The appellant applied for and was granted 13 days' casual leave from 19.12.1992 to 31.12.1992. During the period of leave, the appellant's father suffered from the disease of 'hemophilia' and was advised treatment and rest for a period of three months. Thus, on 30.12.1992, he sent a telegram and one inland letter seeking extension of leave.

Since the appellant did not report for duty a Court of Inquiry (COI) presided over by Lieutenant G.K. Deb Roy was composed and the COI declared the petitioner as deserter. The appellant voluntarily rejoined duty on 16.03.1993 after overstaying leave for 75 days, and he was placed under close arrest in the unit Quarter Guard.

On 22.03.1993, the appellant was served with a tentative charge-sheet under Section 38(1) of the Army Act, 1950 (for brevity referred as "**AA**") and he was informed that he would be tried by a Summary Court Martial on 30.03.1993. Lieutenant Colonel G.K. Deb Roy was nominated as his "friend of the accused".

The appellant was also served with a Summary of Evidence (for brevity referred as "**SOE**"), wherein it was shown that the accused had declined to cross-examine the witnesses and on 22.03.1993 itself, on a typed communication his declaration was



recoded that he did not wish to call any defense witnesses. As per the pleadings of the petitioner, his signatures were obtained forcibly, while in close arrest.

During the proceedings of the Summary Court Martial on 30.03.1993, the appellant was served with a final charge-sheet for offence under Section 39(b) of the AA i.e for overstaying leave without sufficient cause for 75 days. The 'plea of guilty' of appellant was recorded and consequently, the punishment of dismissal from service imposed upon the appellant.

The appellant preferred a petition under Section 164(2) of the AA, challenging the SCM proceedings on various grounds, the same was kept pending for considerable long time. Therefore, the appellant preferred the writ petition praying for quashing of the SCM proceedings dated 30.03.1993 and also prayed for reinstatement in service with all consequential benefits.

3. A reply to the writ petition was filed on behalf of the respondent-employer, denying the averments made in the writ petition and justifying the SCM proceedings. The factum of telegram for extension of leave was admitted; however, it was stated that immediately a telegram was sent denying the extension of leave. Further, the appellant was rightly declared as deserter by COI.

It was averred that proceedings of SOE were undertaken in his presence and the appellant refused to cross-examine the witnesses and appended his signature. The nomination of Lieutenant G.K. Debroy as 'friend of accused' was also done with





the consent of the appellant. On 22.03.1993 itself, the appellant was duly informed that SCM proceedings will be held on 30.03.1993, therefore sufficient time was available and there is no violation of Rule 34 of the Army Rules ('AR').

It was stated that the entire SCM proceedings were conducted while complying with the mandatory requirement of AA and AR and the petitioner participated in the same without any objection. The grounds raised in the present petition are concocted and afterthought.

Further, the appellant failed to provide any justifiable reason for overstaying leave for 75 days. Considering that the said offence being committed on repeated occasions, the punishment of dismissal was justified. The respondents prayed for dismissal of the writ petition.

4. During the pendency of the writ petition, the authority, i.e. the Chief of Army Staff, rejected the petition preferred by the appellant vide order dated 19.09.1996. The appellant while placing the order dated 19.09.1996 on record, prayed for quashing of the said order on the ground that the same was passed without proper application of mind and without assigning any reasons.

5. The writ petition filed by the appellant was decided by the learned Single Judge vide judgment dated 24.03.2009, while observing that the procedure prescribed under Rules 22 and 23 of the Army Rules had been substantially followed. Since the accused-appellant had declined to cross-examine the witnesses and had pleaded guilty, no fault can be found in the findings of the





SCM. Since the offence alleged was the third instance of overstaying leave, the punishment of dismissal is wholly justified.

The learned Single Judge further observed that the reason advanced for overstaying leave i.e. the illness of the appellant's father, could not be treated as sufficient cause. Accordingly, the writ petition filed by the appellant was dismissed.

Hence, the appellant has preferred the present appeal.

Arguments on behalf of the Appellant :-

6. The learned counsel for the appellant argued that the specific grounds were raised that the non-compliance of the mandatory provisions of AA and AR more specifically rule 22, 23, 34, 115 and 129 of AR resulted in denial of proper opportunity to defend his case and the relevant case laws cited in that behalf have not been considered by the learned Single Judge. The writ petition was dismissed merely based on the plea of guilty illegally recorded by the respondents. The issue regarding the proportionality of punishment was also not judiciously decided by the learned single judge. Reliance placed upon the past conduct was also not justified, as the same was not the Charge or consideration while imposing punishment. The finding that the reason for overstaying on leave i.e. sudden illness of appellant's father is not the sufficient cause, is also erroneous.

It was argued that being confined within the close arrest, the appellant's signatures were obtained forcibly during SOE on typed papers which were not prepared under his instructions. strict compliance of Rule 22 and 23 of AR has not been done. The



finding of learned Single Judge that substantial compliance of the rule 22 and 23 is sufficient, runs contrary to the settled position of law.

Further, genuine reason for overstaying leave and extension of leave had duly been communicated to the respondent authorities through telegram, therefore, the punishment of dismissal so imposed is shockingly disproportionate. The judgments cited on behalf of the appellant were neither discussed nor considered while passing the judgment impugned.

Learned counsel for the petitioner has relied on the following judgments :

- 1. Lt. Col. Prithi Pal Singh Bedi v. Union of India reported in (1982) 3 SCC 140**
- 2. Ex-Sepoy Chander Singh v. Union of India, 1997 SCC OnLine Raj 165 : (1997) 2 RLW 1209**
- 3. Chief of the Army Staff v. M.Z.H. Khan, 2006 SCC OnLine All 1465.**
- 4. Ranjit Thakur v. Union of India, (1987) 4 SCC 611,**
- 5. Central Industrial Security Force & Others vs. Abrar Ali [(2017) 4 SCC 507]**

Arguments on behalf of the Respondent :-

7. Reiterating the contents of the reply, the learned counsel for the respondent stated the scope of interference of the Hon'ble High Court under article 226 of the Constitution of India, in the cases of Court Martials is very limited and since in the present case the substantial compliance of the requirements of Army Rules were duly done therefore, no interference is called for.



Justifying the final charge-sheet served on the day of SCM, it was stated that taking a lenient view, the charge had been converted from an offence under Section 38(1) of the AA to Section 39(b) of the AA, which is a less serious charge and therefore, the same cannot be said to have caused any prejudice to the appellant. Also the "friend of the accused" was appointed with the consent of the appellant himself and he actively assisted him.

The learned counsel for respondent contended that in the disciplined uniform service, the third instance of overstaying leave is serious offence, hence the punishment of dismissal was justified for a habitual offender like the appellant.

Learned Counsel for the respondent supported the Judgment impugned and also contended that appellant has raised several new grounds during the appeal, which is not permissible.

Learned counsel for the respondent referred to the judgments passed in the cases of (i) **Union of India v. Major A. Hussain, (1998) 1 SCC 537;** (ii) **Mohd. Akram Ansari vs. Chief Election Officer and Ors., (2008) 2 SCC 95** and (iii) **S.N. Mukherjee v. Union of India, (1990) 4 SCC 594.**

8. We have perused the record, in the light of the judgments cited before us and considered the rival contentions.

Analysis and Reasoning :-

9. The challenge to the impugned SCM, in the present case has been given principally on the ground that the mandatory provisions of the AA and AR were not adhered '*stricto sensu*',



which vitiates entire SCM proceedings. The appellant alleged that entire proceeding was undertaken while keeping him in close arrest and the procedural requirements on various stages were not adhered resulting in denial of proper opportunity to defend the case.

Raising the ground of violation of rule 34(1) of the Army Rules, it was stated that the final charge-sheet under Section 39 of AA was served upon the appellant on the very same day of SCM i.e. on 30.03.1993. The required interval of 96 hours as per rule 34(1) of the AR was not provided to the appellant for preparation of his defence, resulting in prejudicing the right of the appellant to defend his case.

On the other hand, the respondent's counsel argued that the date of SCM i.e. 30.03.1993 was duly informed to the appellant-accused on 22.03.1993 which is sufficient compliance of rule 34(1) of the AR. Since the charge levelled in the tentative charge-sheet was changed to a less grave offence thus, the final charge-sheet served on the date of SCM i.e. 30.03.1993 was justified. No prejudice was caused to the appellant.

9.1 To adjudicate the said issue, we may first refer to Rule 34 of the Army Rules, which 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 or 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.

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any) , of the officers who are to form the court, and where officers in waiting are named, also of those officers in courts-martial other than summary courts-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced.

The clear and unambiguous language of rule 34 of the AR not only conveys its mandate but also reflects the object of providing adequate time and reasonable opportunity to the accused to prepare and put-forth his defence.

9.2 To buttress his contention, counsel for the appellant has relied upon the judgment passed by the Hon'ble Division Bench of this Court in case of **Ex-Sepoy Chander Singh (supra)**. The relevant extract of the said judgment is quoted below :-

"18. 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 Rules 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 (1), 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 preemptory. It states that "the interval between his being so informed and his arraignment shall not be less than 96 hours "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."**

26. 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 arraigning after the charge is made, is that the accused should have at least 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 Sec. 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."

9.3 The judgment passed by this Hon'ble also gets support from the judgment passed by the Hon'ble Apex Court in the case of **Union of India v. A.K. Pandey (2009) 10 SCC 552**, wherein while explaining the mandatory nature of the said provision, it has been held as under:

"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 consequences 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 are 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."**

9.4 The undisputed chronology of the present case reveals that COI has declared the appellant as deserter and the tentative charge-sheet was served upon the appellant on 22.03.1993 upon the said charge only i.e. under Section 38 of the AA. The final charge-sheet with altered charge was served upon the appellant on the day of SCM itself i.e. on 30.03.1993 and the verdict was also pronounced on the same day. Thus, no time at all was allowed to the appellant-accused to understand the nature of charge alleged against him and to prepare his defence accordingly.





From the reading of the provision as well as the judgments cited above, it is clear that the object behind providing interval of 96 hours under Rule 34(1) of AR is to provide proper opportunity to the accused to prepare for his defence and a departure from the said mandate tantamount to denial of the said valuable right. The mandate of Section 34 is founded on the fundamental principle of free and fair trial. The manner in which the respondents have proceeded to disclose the charges to the accused only on the day of court martial and punished him on the same day, is not permissible in the eye of law. In view of the judgments referred (supra), the non-compliance of Rule 34(1) in the present case, vitiates the SCM in question.

10. Further the appellant has also questioned the SCM proceedings on the ground that great prejudiced has been caused to him as he was not allowed to appoint the 'friend of accused' of his own choice and the friend of accused nominated by the Department has not assisted and defended him in any manner.

Countering the same, it has been contended by the respondents that the appellant had been informed that if he wishes to engage any civil lawyer, then he can do it on his own cost. Thereafter, Lieutenant G.K. Deb Roy has been nominated with his own consent.

10.1 In the present case, on one hand the request of the appellant to engage friend of accused of his choice was turned on the count that the same can be appointed on his own cost and on the other hand the authorities themselves nominated Lt. G.K. Deb



Roy (who was the Presiding Officer of COI against the appellant) as his friend of accused.

The argument so advanced on behalf of the respondents apparently runs contrary to the Rule 129 of the Army Rules, which nowhere provides engagement of friend of accused on the cost of accused, rather gives right of the accused person to request for assistance of any legal advisor or any other person of his choice as his 'friend of accused'. The rule 129 of AR reads as under:

"129. Friend of accused.—In any summary court-martial, an accused person may have a person to assist him during the trial, whether a legal advisor or any other person. A person so assisting him may advise him on all points and suggest the questions to be put to witnesses, but shall not examine or cross-examine witnesses or address the court."

10.2 To explain the crucial role of "friend of accused", the appellant has relied upon the judgment passed by the Hon'ble Supreme Court in the case **M.Z.H. Khan (supra)**. The relevant extract of para 27 is quoted below:

27.

From the pleadings, it is, therefore, apparent that the petitioner sought to engage a defence lawyer and it does not appear that the respondents had any objection to such request of the petitioner-respondent, but from the record it appears that he was not allowed to engage a defence lawyer but the "friend of accused" was thrust upon him by the authorities. This Court in Union of India v. Rameshwar Mahto 1993 AWC 883 and Union of India v. Ram Adhar Tiwari, 2002 (4) ESC 86, has held that an accused person is entitled for the assistance of a "friend of accused" of his choice and denial thereof would vitiate the proceedings. Considering the pleadings and material on record and in view of the discussions made above, we are inclined to hold that the petitioner-respondent was denied assistance of "friend of accused" of his choice as provided under Rule 129 and there is breach of the aforesaid provision. We, therefore, upheld the finding of the Hon'ble single Judge that there is violation of Rule 129 of the Army Rules in the present proceedings."



10.3 We have also noticed that the respondent authorities on their own have nominated Lt. GK Deb Roy as 'friend of accused' of the appellant. the record of the case nowhere suggest that the consent in this regard was given by the appellant. Even the materials on record nowhere shows any active participation of the said nominated 'friend of accused' during the entire proceedings. We have no hesitation to hold that the friend of accused nominated by the respondents have provided no assistance nor has defended the appellant-accused in any manner. The denial of a friend of accused of his own choice and the unilateral nomination of the same strikes at the very root of the fair trial as in such situation the accused remains unrepresented even in the presence of his so called representative.

10.4 There apart even the nomination of Lt. Gk Deb Roy as appellant's 'friend of accused' was inherently unfair. Admittedly, with regard to the same incident, Lt. GK Deb Roy himself presided over the Court of Inquiry and declared the appellant as 'deserter'. Even by normal prudence, it cannot be reasonably presumed that a person who himself being the Presiding Officer of COI declared the appellant as 'deserter', will have his independent and unbiased mindset in favour of the appellant. Thus, the nomination Lt. G.K. Deb Roy as friend of accused has apparently compromised the appellant's right to receive impartial assistance and violated his right to have proper opportunity of defence during the trial under the Army Rules.

10.5 The law in this regard is well settled that where the facts of a case give rise to reasonable apprehension or likelihood of bias,





the same makes the whole proceeding or order a nullity. The law in the regard was summed up in the case of **Union of India Vs. Sanjay Jethi reported in (2013)16 SCC 116**, wherein the Hon'ble Apex Court has held as under :-

44. In *Chandra Kumar Chopra v. Union of India* [(2012) 6 SCC 369 (2012) 2 SCC (L&S) 152] it has been held that : (SCC p. 379, para 25)

"25. ... mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record would show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum."

48. At this juncture, we think it apt to refer to the pronouncements in *Ranjit Thakur v. Union of India* [(1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113] and *Major G.S. Sodhi v. Union of India* [Major G.S. Sodhi v. Union of India, (1991) 2 SCC 382 : 1991 SCC (Cri) 357] . In *Ranjit Thakur* case [(1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113] the Court was dealing with justifiability of an order of dismissal passed by the summary court martial of which one of the Members was Respondent 4 therein. The said respondent had sentenced the appellant to suffer sentence of 28 days' rigorous imprisonment for violating the norms for representation to higher authorities and the representation that was sent to the higher authorities pertained to the ill-treatment at the hands of Respondent 4. Keeping the said factual backdrop in view the Court referred to the procedural safeguards provided under Section 130 of the Act and opined that the proceedings of summary court martial was infirm in law. Thereafter, the learned Judges proceeded to deal with the second limb of arguments also. It related to bias on the part of Respondent 4 therein. In that context, the Court observed as follows : (*Ranjit Thakur* case [(1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113], SCC p. 618, para 16)

"16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial coram non iudice. (See *Vassiliades v. Vassiliades* [AIR 1945 PC 38] .)"





51. *The principle that can be culled out from the number of authorities fundamentally is that the question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being coram non judge. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. It is to be kept in mind that what is relevant is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition."*

Law is well settled that "justice should not only be done, but the same also seem to have been done". The right to be represented by a friend of accused of his own choice is an essential and necessary ingredient of free and fair trial embodied under Rule 129 of the Army Rules and the authority conducting the Court Martial must ensure compliance of the Rule 129 of the Army Rules in its true letter and spirit, which was completely missing in the present case.

In the present case the valuable right of the accused to be represented by an independent and impartial friend of accused of his own choice has been denied and a person who can reasonably be presumed to have bias against the appellant was being nominated as his friend of accused, without his consent. The same has vitiated the entire SCM impugned in the present case.

11. The appellant in the present case has also contended that the recording of his "plea of guilty" was against the mandate of Rule 115 of the Army Rules and relied upon the relevant paras of the



judgment passed in the case of **Ex-Sepoy Chander Singh (supra)** to support the same. The appellant has questioned the same on the ground that while being kept in close arrest, he was brought to the SCM proceedings and without informing the petitioner about the nature of charge levelled against him and consequences thereof, his plea of guilty was recorded and based on the same the punishment was imposed.

On the other hand, the counsel for the respondents argued that due compliance of Rule 115 was made and the appellant after understanding the general consequence of the same has himself pleaded guilty. The allegations so levelled in the writ petition are nothing, but an afterthought.

11.1 The argument so put forth by the respondents does not seem to be valid. Admittedly, during the entire proceedings, the appellant was under close arrest and was not allowed to contact or meet any person. Thus, the appellant had no opportunity to register his grievance regarding undue pressure and duress. Immediately after his release, on the first available opportunity, the appellant has raised the said objections in the petition preferred under Section 164 and same ground has been raised in the writ petition. Thus, the theory of 'afterthought' as put forth by the respondents is not sustainable.

11.2 The Rule 115(2) of the Army Rules requires that where an accused pleads "Guilty," the Court must first ensure that the accused fully understands the nature and effect of the charge, inform him of the general consequences of such a plea and explain the difference in procedure that will follow. Army Rule 115(2A)



further obliges the Court to advise the accused to withdraw the plea of 'guilt' and record a plea of "not guilty", if the summary of evidence or any other material indicates that the accused ought not to plead guilty.

11.3 Admittedly, in the present case, the appellant had his reasons/defence for overstaying the leave i.e. his father's illness, which is supported by the medical reports placed on record. In spite of having a defence available, it seems to be highly probable that the nature of charge as well as consequence of such plea was not duly being communicated to the appellant and therefore, he voluntarily pleaded guilty. Coupled with the same, the peculiar circumstances of the present case shows that the friend of accused Lt. GK Deb Roy has not extended any assistance and also not explained to the appellant the effect and consequence of such plea of guilt. Such failure to complete essential procedural steps as provided under Rule 115 of the Army Rules and to secure the accused's consent strikes at the heart of the trial's integrity. Therefore, the punishment founded on such a deficient plea of guilt cannot withstand in the eye of law, equity and fairness.

12. The record of the case reveals that consent of the petitioner was taken on a typed paper then, it is apparent that the trial was a sham. The papers had been prepared in advance and signatures were obtained from the accused who was in their custody. The entire trial would therefore be vitiated in law.

12.1 The fact that the SCM proceedings commenced at 12:45 hrs and concluded at 13:10 hrs, merely within 25 minutes clearly shows the hot-haste manner in which the entire SCM proceedings



were concluded. Where the charge-sheet has been served only during the SCM proceedings, it does not seem possible that charges could have been adequately explained, evidence examined, the consequence of plea of guilt being duly made to understand, recording of finding and awarding of sentence being completed in such a short span of time. This undue haste leads to the only conclusion that the procedure has been conducted in a pre-determined and mechanical manner, thereby violating the requirements of natural justice and the procedural safeguards prescribed under the Army Rules.

12.2 On the contrary, learned counsel for respondent stated that the SCM has been conducted in due compliance of the Statutory Provision and substantial compliance is sufficient to uphold the same. Further, it is submitted that the Court Martial proceedings are subject to only judicial review by the Hon'ble High Court and therefore, the scope of interference is very limited under Article 226 of the Constitution of India. In support of the said contentions, the counsel for the respondents referred to para 23 of the judgment passed in the case of **Major A. Hussain, (supra)**.

The relevant extract of the same is quoted below:

23.

*When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. **Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated.** One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment.*



12.3 A close reading of the said para also shows that while confining the scope of interference of the Hon'ble High Court in the cases of Court Martial, it was clearly provided that the interference can very well be made in case it has been established that prejudice has been caused to the accused and mandatory provision has been violated.

12.4 In the present case, as has been discussed in detail above, there has been apparent violation of the mandatory provisions, which has clearly caused prejudice to the appellant and therefore, the reliance placed on the said precedent is wholly misplaced and the contention must necessarily be rejected.

12.5 The facts of the present case speaks in volume that in the present case, the respondent authorities have proceeded to conduct and conclude the SCM in question in a pre-determined manner, the mandatory procedural requirements prescribed under Rule 22, 23, 34, 115 and 129 of Army Rules have not been adhered in 'strict sensu' and in its true letter and spirit. There is an apparent departure from the statutory requirements of the Army Act and Army Rules, and at some stages, only empty formalities appears to have been observed. The law in this regard is no more res integra that the provisions have its mandatory force and non-compliance of the same renders the Court Martial as nullity. In view of the judgments referred (supra), the finding of the learned Single Judge that substantial compliance of Rules 22 and 23 of the Army Rules is sufficient for upholding the SCM, is erroneous and against the settled position of law.



13. The appellant in the present case has also questioned the sentence awarded upon him on the ground of being excessively harsh and disproportionate.

On the other hand, the respondents have tried to justify the same on the count that the present offence is third instance of overstaying of leave of the appellant and therefore, the punishment of dismissal is justified. The learned Single Judge has also accepted the said contention and upheld the quantum of punishment of dismissal in the present case.

13.1 A perusal of the final charge-sheet as well as the Summary Court-Martial (SCM) proceedings nowhere made any reference of appellant's past conduct and has based the punishment solely on the charge of overstay of leave from 01.01.1993 to 16.03.1993.

It is only in the reply to the writ petition filed by the respondents, for the first time, the respondents contended that the punishment of dismissal is justified looking to the earlier two instances of overstay of leave of the appellant.

13.2 In view of the position of law settled by the Hon'ble Supreme Court in the case of **Mohinder Singh Gill v. The Chief Election Commissioner, (1978) 1 SCC 405**, the respondents cannot be permitted to add or supplement new grounds at later stage to justify their action.

Once an offence has been adjudicated and a penalty imposed on a particular charge mentioned in the charge-sheet, the respondents are precluded from justifying the punishment of





dismissal, while using the prior instance of overstay as a fresh ground to support the same.

13.3 In the present case, the tentative charge-sheet was issued under Section 38 of the Army Act i.e. desertion; however, the respondent authorities themselves altered the said charge to Section 39(b) of the Army Act i.e. **overstay of leave without sufficient cause.**

The medical documents placed on record establishes that the appellant's father unexpectedly fell seriously ill during the period of his sanctioned leave. The said fact was duly communicated to the respondents through Telegram before the leave expired and requested for extension. These undisputed facts demonstrate that his overstay of leave was justified by sufficient cause and reasons beyond his control. Thereafter, the appellant voluntarily rejoined the duties on 16.03.1993. It cannot, therefore, be classified as overstaying of leave without justified cause under Section 39(b) of the Army Act.

13.4 Our view finds support from the precedent laid down by the Hon'ble Apex Court in the case of **Ranjit Thakur (supra)**, which reads as follows:

25. *Judicial review generally speaking, is not directed against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised*



grounds of judicial review. **In Council of Civil Service Unions v. Minister for the Civil Service [(1984) 3 WLR 1174 (HL) : (1984) 3 All ER 935, 950]** Lord Diplock said: "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;. . ."

13.5 In a similar circumstanced case **Abrar Ali (supra)**, the Hon'ble Apex Court has held:

"19. Though we are of the view that the High Court ought not to have interfered with the order passed by the disciplinary authority, the penalty of dismissal from service is not commensurate with delinquency. The respondent was found guilty of desertion of the Force for a period of five days and not improving his conduct in spite of imposition of penalties on three occasions earlier. For the above delinquencies, the penalty of dismissal from service is excessive and harsh. In our view, the penalty of compulsory retirement would meet the ends of justice. We are informed by the counsel for the appellants that the respondent is entitled for pension as he has completed 10 years of service. In order to avoid any controversy, we direct that the respondent shall be entitled for notional continuity of service till the date of completion of minimum service required to make him eligible for pension. He will not be entitled for payment of salary and allowances for that period."

14. In view of the judgments referred (supra), we hold that the punishment of dismissal as imposed upon the appellant is shockingly disproportionate and excessively harsh. The issue regarding quantum of punishment as decided by the learned Single Judge is therefore not sustainable, in view of the observations made above.

15. The appellant has also challenged the order dated 19.09.1996 passed by the authority under Section 164 of the Army Act. The memo of petition (Annex-12) shows that various





grounds challenging the SCM proceedings were duly raised by the appellant, however, none of those grounds were taken into consideration and the petition has been rejected without assigning any reasons.

15.1 On the contrary, the learned counsel for the respondents submitted that in view of the law laid down by the Hon'ble Supreme Court in the case of **S.N. Mukherjee (supra)**, the authority confirming the findings and sentence of a court-martial is not required to record reasons for its decision.

15.2 We have perused the order dated 19.09.1996 and found that the petition has been dismissed with a single line order and no reason, even for the namesake has been given in the said order. For ready reference, the order dated 19.09.1996 is reproduced hereunder :—

"I have examined the petition dated 25th March 1994 submitted by No.15357554H Ex Sigmn Sohan Lal of Southern Command Composite Signal Regiment against the finding and sentence of Summary Court Marital dated 30th March 1993.

2. The above named individual was found guilty of charge under Army Act Sec 39(b), is, without sufficient cause overstaying leave granted to him. He was sentenced to be dismissed from service.

*3. **I reject the petition as it lacks substances.**"*

15.3 Although, it is true that the authority confirming the findings and sentence of a court-martial is not required to record its separate and detailed reasons for its decision. However, the same does not authorize the authority under Section 164 of the Army Act to reject the petition with a single line order. The statutory competent authority while adjudicating the findings or sentence of Court Martial is required to show some application of mind



otherwise the same will render the provision of Section 164, nugatory.

Even otherwise, this does not affect or limit the power of this Court under Article 226 of the Constitution to examine the case on its merits. The said proposition is also clearly propounded in para 49 of the judgment passed in the case of **S.N. Mukherjee (supra)**:

"49. But that is not the end of the matter because even though there is no requirement to record reasons by the confirming authority while passing the order confirming the findings and sentence of the court martial or by the Central Government while passing its order on the post-confirmation petition, it is open to the person aggrieved by such an order to challenge the validity of the same before this Court under Article 32 of the Constitution or before the High Court under Article 226 of the Constitution and he can obtain appropriate relief in those proceedings."

15.4 Since we have found that the SCM has been conducted in violation of the provisions of Army Act and Army Rules as well as in violation of principles of natural justice, therefore, the order dated 19.09.1996 confirming the sentence is also not sustainable in the eye of law.

16. While referring to the judgment passed by the Hon'ble Apex Court in the case of **Mohd. Akaram Ansari (supra)**, the respondent has contended that new grounds, which were not pressed before the Hon'ble Single Judge, cannot be allowed to be raised at the stage of appeal. The said objection is found to be without any force. A perusal of the judgment passed by the learned Single Judge clearly shows that grounds regarding non-compliance of the mandatory provisions of Army Act / Army Rules were duly been pressed before the learned Single Judge and the precedents cited in that regard were also been referred in the





impugned judgment passed by the learned Single Judge. Therefore, the objection raised by the respondents is without any substance hence rejected.

17. In the totality of the facts and circumstances, we are of the considered opinion that the SCM impugned in the present case was held in clear defiance of the provisions of the Army Act and the Army Rules and the same has resulted in denial of proper opportunity to the appellant to defend his case. Therefore, SCM proceedings dated 30.03.1993 are not sustainable in the eye of law.

The judgment impugned passed by the learned Single Judge is therefore not sustainable in law as well as on facts. Accordingly, the impugned judgment dated 24.03.2009 is quashed and set aside. The writ petition preferred by the appellant is allowed. The SCM proceedings dated 30.03.1993 and consequential punishment order dated 30.03.1993 is quashed and set aside and petitioner would be deemed to be reinstated.

18. From the records, it is evident that the appellant is now 61 years of age, therefore, in order to balance the equity, we direct that the appellant shall be deemed to have continued in service until the date of superannuation in ordinary course.

19. Taking guidance from the judgment passed by the Hon'ble Apex Court in the case of **Abrar Ali (supra)**, we direct that the appellant shall not be entitled to actual salary or allowances for the period of his deemed continuity in service i.e. till the date of superannuation at his rank but would be given notional benefits. However, he shall be entitled for actual pensionary benefits as





directed herein. The respondents are accordingly directed to make notional fixation of the appellant's pay and allowance in terms of pay revision from time to time and further directed to calculate and pay pension as well as the other retiral benefits along with interest @ 6% per annum on the arrears within a period of three months from the date of the judgment.



(SANJEET PUROHIT),J **(SANJEEV PRAKASH SHARMA),ACTING CJ**

TN/