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IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

OA No.184/2012

Ex Cpl Nitish Kumar

.....Petitioner

Versus

Union of India & Ors.

.....Respondents

For petitioner: Mr. Anil Srivastava, Advocate.

For respondents: Mr. Ajai Bhalla, Advocate

CORAM:

HON'BLE MR. JUSTICE N.P. GUPTA, JUDICIAL MEMBER.

HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER.

ORDER
07.11.2012

1. This OA has been filed under Section 15 of the AFT Act, seeking to challenge the proceedings of and punishment awarded by the DCM. The punishment being dismissal from service, reduction to ranks, and three months RI, which has been remitted by the Confirming Authority (unexpired portion of the imprisonment has been remitted).

2. The petitioner was charged for the offence under Section 39(b) of the Air Force Act, for overstaying leave without sufficient cause, in that at 13 Base Repair Depot, Air Force having been granted leave of absence from 30.03.2010 to 20.05.2010, he overstayed the said leave without any sufficient cause from 21.05.2010 until he surrendered himself at 13 Base Repair Depot on 03.08.2011.

3. The petitioner was tried for this charge by the DCM, wherein the prosecution examined JWO S.K. Yadav as PW-1, Corporal I.D. Singh as PW-2, and MWO S.B. Singh as PW-3. After examining these witnesses, the prosecution closed its evidence, then the accused chose to give his unsworn statement under Rule 66(2) of Air Force Rules, that was taken on record as

Exb.AF. Then, in compliance of Rule 66(4), questions were put to the petitioner, and then the defence has also examined two witnesses being Wing Cdr M. Guddad and Sgt S.S. Barodia. After so completing the trial, the Court Martial found the petitioner guilty.

4. Assailing the findings, learned counsel for the petitioner read to us the cross examination of PW-3 wherein that witness had deposed high about the credentials of the petitioner, by deposing him to be a dedicated air warrior, bearing good attitude towards service punctual, and cordial in his behaviour towards colleagues and so on. It is a different story that on court questioning, the witness had stated that witness was never in-charge of the accused until the accused had overstayed of leave. The witness had also deposed on court questioning that counselling was not done by him on 05.05.2009. A look at the statement of this witness recorded as examination-in-chief, shows that he has deposed that the petitioner had went on 3 day's leave form 30.03.2010 to 01.04.2010, and asked for 29 days extension, as the petitioner was suffering from Jaundice. He was granted extension upto 30.04.2010. Then he asked for further 20 days extension, which was again granted upto 20.05.2010. Then the witness received a call from the Main Guard Room on 21.05.2010 about the petitioner having become absent without leave. The witness has deposed that the accused told him about sickness of his father, and unmarried sister, two brothers working in company, and separated from family, on 05.05.2009 counselling. The accused also informed during counselling, that the accused got his father treated in January 2009 for sugar and blood pressure. The Counselling Register has been produced (relevant pages 196-197) and marked as Exb.AD. A look at this Counselling Register shows, that on interview, the petitioner is said to have given out that the father being 60 years

old, sugar patient, besides his suffering from blood poisoning and undergone treatment for the same in the month of January 2009 and that presently, father is recovering, and were staying with sister of the petitioner. The petitioner had also mentioned to be suffering from 'spondylitis' since last 6 months, and assured to behave, and to be obedient in future.

5. Then, we come to the evidence of PW-2. He has also deposed the occurrence register of the Guard Room being page 164 is Exb. AC. His evidence has not much bearing on the aspect of the guilt, except that according to this witness, the petitioner had surrendered in the Morning shift of 03.08.2011. Then remains the evidence of PW-1 JWO S.K. Yadav. He has deposed facts about the positings of the petitioner, has also proved the application for cancellation of posting, and its rejection.

6. We may pause here and observe, that the petitioner was ordered to be posted outside from Delhi to J&K on 16.02.2010 after having served at Delhi for about 3 years and 4 months. Then the petitioner had applied on 18.02.2010 for cancellation of this posting, which prayer was turned down on 22.03.2010.

7. The witness has further deposed that the petitioner proceeded on 3 days annual leave vide application dated 22.03.2010, and then he had sent a fax on 06.04.2010, requesting extension of leave, which was recommended and leave was extended upto 30.04.2010. Then the accused sent a further fax dated 02.05.2010 for extension of leave and he was granted extension upto 20.05.2010. A look at this fax, which is on record as Exb. S, shows that the extension was sought on the ground of the petitioner being suffering from Jaundice and having not recovered yet, and that the doctor suggested for rest, and not to travel. Then the witness has further stated that on the

petitioner becoming absent without leave, and having been so declared, K-broadcast signal was declared on 25.05.2010, which is on record as Exb. U. Then the accused reported at Security Section on 03.08.2011. Accordingly, another K-broadcast signal dated 04.08.2011 was sent to all concerned informing about the fact of cessation of AWL. This has been produced on record as Exb. X. This witness has been cross examined by the petitioner, and in cross examination he has deposed with reference to Exb. Y that after AOC's remarks on the accused application for cancellation of posting, a letter was addressed to 6 P&SU, to which no reply was received. Hence the case for cancellation of posting was not taken up. Then the application for voluntary discharge submitted by the petitioner on 16.03.2010 was produced on record, and was taken on record as Exb. AB.

8. What is significant to note is, that in the cross examination of this witness, nothing was suggested about existence of any sufficient cause for the petitioner becoming absent without leave. The application for cancellation of posting, being Exb. N dated 18.02.2010 shows that, it is a general application for cancellation of posting on medical grounds, and in this application, the ground for cancellation of posting projected was, about his having completed only 3 years and 4 months, and father suffering from spinal disorder and blood poisoning, and having underwent surgical operations for spinal disorders (laminectomy) at Apollo Hospital, Delhi in September 2008, and to be still suffering from blood poisoning (septicaemia) and under continuous treatment and medical observation, and also giving out, his two brothers having separated, and the father requiring petitioners assistance for periodical check up at Apollo Hospital Delhi.

9. This is the whole state of affairs of the prosecution evidence.

10. Then according to the unsworn statement of accused given under Section 66(2) also, the father had been seriously ill in December 2008, and in January 2009 ventilator was removed as it was advised that the condition was very serious with no hope of survival. Then father was shifted to Apollo Hospital, Kolkata. This he has given the story of 2008-2009. Then the condition of father improved, and only required to be reviewed frequently, which was being looked after by the younger sister and the petitioner himself. It is then given out that the petitioner's father had lost his memory, and got paralysed by right leg, and affected with the disease gangrene, therefore, was bed ridden. The father is said to have operated upon unsuccessfully for 'lumber laminectomy' in the year 1991 and again in 2008. Then on insistence of the parents, the younger sister was got married in May 2009. Then he has stated about the request for cancellation of posting, and then submitted an application for seeking voluntary discharge, which was not accepted. This application of voluntary retirement is said to have been submitted on 16.03.2010. Then he has stated to have contacted Jaundice, and then in para 24, he has stated that the condition of the father is still unstable, though the petitioner was recovering from Jaundice, though not fully.

11. Thus, the long and short of the story even as projected by the petitioner in his unsworn statement is, about the father having undergone surgery in 1991 and 2008, and thereafter in May 2009 his brothers having separated and in May 2009 is sister having married. He had applied for three days annual leave on 22.3.2010, which was sanctioned from 30.03.2010 and was sought to be extended on the ground of petitioner having suffered Jaundice and having not recovered. In those applications, there is no reference about the father's ailment. Then, of course application was filed for cancellation of

posting giving the ground of father's ailment, which of course was rejected, and then he applied for voluntary discharge, which was also rejected on 17.05.2010. As noticed above, the application for cancellation of posting was filed on 18.02.2010.

12. This shows that the petitioner was feeling his positing out of Delhi to have been ordered prematurely, which was not acceptable to him, may be for legitimate considerations according to the petitioner, but then, he made a request for its cancellation , and that was declined, and since then, it appears that the petitioner was in no mood to serve, as on 16.03.2010 he applied for the voluntary discharge, and then on 22.03.2010, applied for three days annual leave, and then that leave was got extended on the ground of his suffering from Jaundice, and even after recovering from Jaundice, he did not shown up till 03.08.2011.

13. In these circumstances, so far the charge is concerned; nothing is shown that the petitioner had any sufficient cause for being absent without leave. It is a different story that no sufficient cause for absence was even suggested to any of the prosecution witnesses.

14. Learned counsel for the petitioner after reading the statement of the petitioner recorded under Rule 66(4), did raise a grievance that the statement was in the spirit of cross examination of the petitioner which was in violation of Rule 66(4). We need not go into this aspect, for the simple reason, that even before us it is not in dispute that the petitioner remained absent without leave, and as observed above after scanning through the entire record that no sufficient cause for being absent without leave was projected either to any of the prosecution witnesses, or even in the unsworn statement of the petitioner. In that view of the matter, the manner of recording of statement under Rule

66(4) does not in any manner adversely affect the merits of the trial held by the DCM.

15. We may at this stage, refer to and rely upon couple of the judgment of Hon'ble Supreme Court being in Shivaji Sahabrao Bobade V/S State of Maharashtra reported in AIR 1973 S.C. 2622, in Basavaraj R. Patil VS State of Karnataka reported in AIR 2000 S.C. 3214 and in State (Delhi Administration V/S Dharampal reported in AIR 2001 S.C. 2924, that even in cases where the compliance with the provisions of Section 313 Cr.P.C., which is claimed to be in pari-materia with Rule 66(4), has not been properly made, that does not ipso facto vitiate the trial, and in appropriate case even the Appellate Court itself may call the accused, and record the statement afresh. Keeping in view the letter and spirit of that judgment also, we heard learned counsel for the petitioner to find out if there be any sufficient cause in existence for the petitioner remaining absent without leave for all this period of time, but nothing could be made out.

16. Thus, we do not find any error in the findings of the DCM finding the petitioner guilty.

17. Then coming to the aspect of punishment; the qualifying service of the petitioner is less than ten years, and therefore, irrespective of whether the petitioner is discharged or dismissed, he does not get any pension. Learned counsel for the petitioner however submitted that dismissal may be converted into discharge so that the dismissal may not come in his way in his seeking other employment anywhere else by way of rehabilitation, which he is likely to get in view of the professional proficiency possessed by him.

18. To this extent, this prayer is not very seriously opposed by the learned counsel for the respondents.

19. Consequently, while declining to interfere with the finding of guilt, only in order to enable the petitioner to get himself rehabilitated by way of seeking other employment anywhere else, that he may be able to get, we convert the punishment of dismissal into discharge.

20. The appeal is accordingly partially allowed, as above.

M.L. NAIDU
(ADMINISTRATIVE MEMBER)

N.P. GUPTA
(JUDICIAL MEMBER)

New Delhi
Dated 07th November , 2012