REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 823 OF 2013

Union of India & Ors. ....Appellant(s)

Vs.

Devjee Mishra ...Respondent(s)

J U D G M E N T

A. M. KHANWILKAR, J.

This appeal challenges the judgment of the Division Bench of the High Court of Judicature at Patna dated 23rd June, 2009, in LPA No. 995 of 2008. By that decision the Division Bench disposed of the appeal preferred by the appellants, while affirming the order of the learned Single Judge of the same High Court in CWJC No.6289 of 2005, decided on 15th July, 2008.

2. Briefly stated, the respondent at the relevant time was working in the rank of Corporal in 27th Wing of Air Force and was posted at the Air Force Bhuj Station in the State of Gujarat.

Departmental action was taken against him for over staying the leave period. Charge sheet was served on him dated 18th June 2004, which reads thus:-

CHARGE SHEET

The accused, 722779 H Cpl Mishra D MT Tech of 27 Wing, AF an airman of the regular Air Forces is charged with :-

First Charge
Section 39(b) AF ACT 1950

WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM

In that he,
At 27 Wing. AF having been granted leave of absence from 12 Apr 03 to 27Apr 03, overstayed the said leave without sufficient cause until he surrendered himself to 629555 Sgt Singh RK IAF/P at Main Guard room of 27 Wing, AF at 1000 hrs on 20 Mar 2004.

Second Charge

Section 39(a) AF ACT 1950

ABSENTING HIMSELF WITHOUT LEAVE

In that he,
At 27 Wing, AF absented himself without leave from 0730 hrs on 22 March 04 until he was apprehended by 629394 Sgt Sunil P IAF/P and 795130 Cpl Singh A IAF/P of 6 F&S Dett at Jagatpur Village, Parasurampur PO, Krishnagarh PS, Bhojpur Dist, Bihar at 1000 h on 30 APR 04.

(V Gaur)
Wing Commander
Station Commander
27 Wing, AF

Place : 27 Wing, AF
Date : 08 Jun 04

3. Proceedings of District Court Martial against the respondent commenced on the basis of the said charge sheet. Shri A.D. Upadhyay, Wing Commander, acted as the Presiding Officer. In the said proceeding, the respondent pleaded guilty to both the charges. Even after being given opportunity to reconsider his confession, the respondent maintained his confession. This can be discerned from the proceedings and contemporaneous record. Finally, punishment of three months rigorous imprisonment to be followed by dismissal from service and also reduced in rank was recommended against him. On 25th June, 2004, the findings and sentence given by the Court was confirmed by the Competent Authority but on remitting such portion of rigorous imprisonment as would remain un-expired on the date of promulgation. On that basis the respondent stood dismissed from service. The contents of the proceedings was explained to the respondent on 2nd July, 2004 which fact has been acknowledged by the respondent.

4. The respondent then submitted an application against the District Court Martial order dated 17th June, 2004, under Section 161 of the Air Force Act 1950, addressed to the Air Chief Marshal on 11th October, 2004. The respondent was informed vide

letter dated 12th January, 2005 issued under the signature of the Wing Commander, Officiating Director Personal Services, for Air officer-in-charge Administration, that his application was considered and has been rejected.

5. Aggrieved, the respondent filed a writ petition in the High Court as aforementioned. That writ petition was opposed by the appellants by filing a detailed reply affidavit and restating the fact that the respondent had pleaded guilty to both the charges which culminated in the punishment of sentence and order of dismissal from service. The learned Single Judge of the High Court allowed the writ petition essentially being impressed on four counts. Firstly, that the impugned order makes no reference to the fact that the respondent was a habitual deserter or in the habit of overstaying his leave period. Whereas, the order proceeds mainly on the basis of acceptance of guilt by the respondent. Secondly, the averments made in the Memo of Appeal as also in Paragraph 26 of the writ application - that the petitioner never accepted his guilt - had remained uncontroverted in the reply affidavit filed by the appellants. Thirdly, the contents of the letter dated 21st May, 2004 – Annexure 24 (in writ proceedings), addressed to the Station

Commander on that very day of the Summary Court Martial proceedings were certified (i.e. on 21st May, 2004), complained of the fact that the respondent was being pressurized by his superiors to plead guilty, and also to permit him to engage a private advocate. Lastly, the Authorities had illegally kept the respondent in confinement in a cell during the enquiry in contravention of Section 107 of the Air Force Act, 1950, which entailed in violation of his right to life without following the due process of law, infringing Articles 21 and 22 of the Constitution of India. For these four reasons, the learned Single Judge quashed the order dated 17th June, 2004 passed by the Court Martial and the Disciplinary Authority of dismissing the respondent and also the order dated 2nd July, 2004 promulgating the same. The learned Single Judge instead deemed it appropriate to remit the case back to the Station Commander for holding disciplinary proceedings in accordance with law after furnishing the requisite documents demanded by the respondent and allowing him to engage a private lawyer of his choice. Direction was also issued to the Station Commander to permit the respondent to join his service but the issue about his

arrears of salary from the date of dismissal to such rejoining was made subject to the result of Disciplinary Proceedings.

6. This decision was challenged by the Department by way of Letters Patent Appeal. The Division Bench, even though found merits in the contention of the appellants that there was no material to doubt the bonafides of the concerned officials who had conducted the Court Martial Proceedings, yet declined to interfere with the decision of the learned Single Judge of remitting back the Court Martial Proceedings because it was not in a position to give a positive finding as to whether the Annexures 19 and 24 relied by the respondent were forged and fabricated (which were indicative of the fact that the respondent was not accepting his guilt and instead wanted to engage a private counsel to defend himself). The Division Bench, however, observed that the respondent may make request for permitting him to engage a private lawyer, which request can be considered in accordance with law. It was made clear that the respondent would not become automatically entitled to arrears of salary and that claim shall abide by the final decision in the Court Martial Proceedings which were ordered to be concluded within four months.

7. Being aggrieved, the appellants have challenged the abovesaid decisions of the learned Single Judge and the Division Bench in the present appeal. The main argument of the appellants is that the basis on which the learned Single Judge interfered with the order passed by the competent authority is untenable and not substantiated from the record. In that, the first reason stated is belied from the proceedings. The second reason that the appellants have failed to refute the averments in Paragraph 26 of the writ application, is also an error apparent on the face of the record. The learned Single Judge failed to analyse the reply and further affidavit filed on behalf of the appellants to oppose the writ petition in proper perspective, which not only restated the facts mentioned in the Court Martial Proceedings that the respondent admitted his guilt with full understanding of the stand taken by him and in spite of being duly explained about the consequence thereof by the officials. He was also provided assistance of a law qualified officer at the relevant time. The third reason weighed with the learned Single Judge on the basis of Annexure 24, was also manifestly wrong. In that, the said document was not part of the Court Martial Proceedings. Further, the respondent had not named any official

against whom allegations of pressurizing him to accept his guilt either in the subject document, in contemporaneous representation/appeal submitted by him to the Competent Authority or in the Writ Petition. The fact that Annexures 19 and 24 were not part of the Court Martial Proceedings has been answered by the Division Bench in the affirmative, after perusal of the original record. Those documents were filed along with the rejoinder affidavit for the first time. The appellants had also doubted the genuineness of the said documents, being forged for the reasons stated in affidavit of the authorised official. However, the High Court has not analysed those matters at all. In that, the respondent had approached the Court with unclean hands and was successful in creating subterfuge and confusion and walk away with the relief of conducting fresh Court Martial Proceedings notwithstanding his unconditional and voluntary acceptance of guilt of the two charges. The Division Bench having found that the bonafides of the officials who conducted the Court Martial Proceedings cannot be doubted, ought to have reversed the direction issued by the learned Single Judge. The fourth reason stated by the learned Single Judge, according to the appellants, is also untenable. In that, it is not a

case of confession given by the respondent while in custody which may be inadmissible in law. In the present case, the respondent gave confession during the Court Martial Proceedings, who was competent to take that on record and act upon the same. The fact that at the relevant time the respondent was kept in a cell would not make the confession inadmissible. Especially, when the contemporaneous record goes to show that the respondent was given enough opportunity to reconsider his stand, by explaining to him the consequences flowing from such confession. The Judge Advocate having reassured himself that the confession given by the respondent is voluntary, proceeded in the matter on that basis. Hence it was neither a case of inadmissible confession nor illegal detention of the respondent. Even the Division Bench has completely brushed aside these crucial aspects and has affirmed the erroneous order passed by the learned Single Judge. According to the appellants, in the fact situation of the present case, the High Court committed manifest error in interfering with the order of punishment imposed in the Court Martial Proceedings against the respondent. The reasons recorded by the learned Single Judge and

affirmed by the Division Bench, to say the least is error apparent on the face of the record, if not perverse.

8. Counsel for the respondent, on the other hand, has supported the decision of the learned Single Judge as also the Division Bench. According to him, the documents relied by the respondent in the shape of Annexures 19 and 24 reinforces the fact that the plea of guilt attributed to the respondent was extracted forcibly from him. It was not a voluntary confession at all. Further, the respondent was being victimized by his superiors and who misled him to give that confession. He submits that the medical record produced by the respondent justified his absence during the relevant period due to illness. The respondent having produced that record, there was no reason for him to confess to the two charges framed against him. The illness of the respondent forced him to overstay his leave period. The respondent had surrendered on the first occasion on his own, which presupposes that the respondent had intention to resume his service. On the second occasion, the respondent was trapped and shown as arrested from his home town. Moreover, the respondent believing his superiors gave his statement. The respondent had no other option because

he was kept in a cell during the relevant period. According to the respondent, therefore, no interference is warranted in this appeal against the equitable order passed by the High Court to do substantial justice.

9. Having heard the learned counsel for the parties at length, we may first deal with the four reasons noted by the learned Single Judge and affirmed by the Division Bench of the High Court. As regards the first reason, we find merits in the stand taken by the appellants that the same is error apparent on the face of the record. The impugned order does make reference to the fact that the respondent had faced action for similar misconduct in the past, as can be discerned from Paragraph 6 which reads thus:-

> "The Court examined the characters and service particulars of the accused IAFF(P)-1655(revised)(Exh-'J'), in respect of the accused which reveals that the accused is of about 31 years and 05 months of age and has put in about 13 years and 04 months of service. His conduct sheet reveals that punishment entries, of which two are of similar in nature for AWL for 17 days and 19 days and one entry is for losing by neglect his AFIC. The accused was earlier also tried by a DCM for the offence of AWL for 75 days and he was awarded sentence of three months detention and reduce to the ranks. The court awarded the following sentence to the accused:-
>
> (a) To suffer RI for three months;
> (b) To be dismissed from the service; and
> (c) To be reduced to the ranks."
>
> (emphasis supplied)

The analysis of evidence therein is not only in respect of acceptance of guilt by the respondent, but other aspects as well. Hence this reason weighed with the learned Single Judge cannot stand the test of judicial scrutiny.

10. The second reason which found favour with the learned Single Judge is that the averments made by the respondent in Paragraph 26 of the writ application had remained uncontroverted. Even this finding, in our opinion, is an error apparent on the face of the record. The High Court committed manifest error in presumably, referring to Paragraph 21 of the counter affidavit alone. On the other hand, the High Court should have evaluated the averments in the counter affidavit as a whole. The substance of the averments in the counter affidavit filed by the appellants was that the summary of evidence was recorded during the Court Martial Proceedings, in which plea of guilt of the respondent was recorded by the DCM. The record would leave no manner of doubt that sufficient opportunity was given to the respondent to defend himself and including by appointing law qualified officer to defend him. The respondent himself declined to have a civil Advocate. Notably, the respondent was provided assistance with law qualified

officer appointed by the Authority who was not from the Air Force Station, Bhuj but from other Air Force Station. The reply affidavit unambiguously denied the plea of the respondent that he was forced to give confession. On the other hand, it is asserted that proper procedure was followed in the Court Martial before and after recording of the confession of the respondent during the trial. The averments in Paragraphs 28, 29, 30, 32 and 36 of the counter affidavit would make it amply clear that the appellants had challenged the stated fact asserted by the respondent in the writ petition, that he was forced to give his confession. The same reads thus:-

> "28. That the statement made in paragraph no. 34 is denied. The DCM was conducted strictly as per the laid down procedure. The petitioner accepted all the charges before the DCM and pleaded guilty and the same recorded by the DCM. It is wrong that the defending officer was hostile. As already stated above, defending officer was chosen from a different Station and not from Air Force Station, Bhuj to give the applicant a fair trial. The Judge Advocate explained to the petitioner the nature, meaning and ingredients of the charges to which accused answered in affirmative. The Judge Advocate also informed the petitioner the general effect of his plea and the different procedure which will be made on the plea of guilty. The co. also confirmed from the petitioner whether he was pleading guilty of his own free will without any threat, coercion, promotion or inducement. The petitioner submitted that he is pleading guilty of his own free will. The defending officer also explain to the petitioner nature, meaning and ingredients of the charge and general effects of the plea of guilty. The petitioner further stated, while he submitted a request to mitigate punishment that he has pleaded guilty.
>
> A copy of the request submitted by the petitioner enclosed as Annexure 'P'

29. That the statement made in paragraph no.35 is denied. The petitioner at the time of recording evidence stated that he was sick and suffering from various problems, he also took treatment from various doctors, and due to health problems overstayed his leave. The court did draw petitioner's attention towards his statement and advised him that if he wants to eligible this as his line of defence, he may withdraw the plea of guilty and may plead not guilty. The petitioner confirmed to the court that he does not wish to withdraw his plea of guilty. Hence, court proceeded with the trial on the plea of guilty.

30. That the statement made in paragraph No 36 is denied. The petitioner did not apply for the copy of court proceedings or copy of the punishment. The sentence of the court was conveyed to the petitioner orally in the open court and after confirmation, it was promulgated to him by his CO. After release from cell on 02 Jul 04, the petitioner disappeared from the Air Force Station, Bhuj and did not inform his move details to the authorities.

31. ....

32. The statement made in paragraph no.38 is denied,. As stated above the petitioner was given full opportunity to defend himself, but the petitioner accepted all the charges and pleaded guilty.

33. ....

34. ....

35. ....

36. That the statement made in paragraph no. 42 is denied. The Court Martial was conducted strictly as per the procedure, and the petitioner was provided full opportunity to defend himself. The petitioner himself declined to have a civil advocate to defend him, hence a law qualified officer was provided to defend him. It is also stated that the petitioner had made his statement of his own free will and wherever he has signed, he has signed without coercion, threat or promise.

...."

The learned Single Judge committed grave error in assuming that the appellants had not disputed or controverted the assertion made by the respondent in Paragraph 26 of the writ application.

11. The High Court was then impressed by contents of the letter dated 21st May, 2004 – Annexure 24, wherein the respondent had asked for permission to engage a private counsel. The High Court completely glossed over the plea taken by the appellants that this document (Annexure 24), was not a part of the Court Martial Proceedings. Therefore, it cannot be made the basis to grant any relief to the respondent much less to doubt the bonafides of the officials involved in the conduct of Court Martial Proceeding. On the other hand, the record of Court Martial Proceedings not only revealed that the respondent voluntarily admitted his guilt to both the charges with full understanding and knowing the consequence therefor; but in spite of opportunity given to him to reconsider his stand, he did not change his confession. As a matter of fact, reference to letter dated 21st May, 2004 has been made for the first time only in the rejoinder affidavit filed by the respondent. No tangible explanation is forthcoming as to what prevented the respondent from referring to this communication in the first place in the Court Martial Proceedings or at least in the appeal preferred by him, under Section 161 of the Act to the Competent Authority. Notably, such case was not made out even in the original writ

petition for reasons best known to the respondent. Obviously, taking that plea in the rejoinder affidavit for the first time was with a view to confuse the issue, so as to resile from the voluntary confession already given in the Court Martial Proceedings. That cannot be countenanced. For, such a belated plea ought not to be entertained by the High Court, that too in a casual manner; and especially when the appellants in further affidavit had mentioned the circumstances in support of the assertion that the document relied by the respondent is a forged document. The respondent was called upon to produce the original, which he never did. Neither the learned Single Judge nor the Division Bench analysed the plea of the appellants in this behalf, and yet granted relief to the respondent by directing remand of the Court Martial Proceedings in spite of a finding that the said document was not part of the Court Martial Proceedings. That has resulted in awarding premium to the respondent who had approached the Court with unclean hands and to give opportunity to resile from the voluntary confession made by him, which fact was justly recorded in the Court Martial Proceedings by the concerned officials whose integrity is impeccable. The High Court should not have entertained the plea

of the respondent that he was pressurized to give confession, in absence of disclosure of names of those officials and who had no opportunity to counter the allegations made against them. Hence, this reason weighed with the High Court must also fail.

12. The last reason weighed with the High Court is also devoid of substance. The learned Single Judge has merely referred Section 107, without analyzing as to how the confinement of the respondent in a cell was in breach thereof or would vitiate the plea of guilt of the respondent. Section 107 of the Air Force Act, 1950 reads thus:-

> **"Section 107**
> 107. Inquiry into absence without leave.—
> (1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries, and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any; and the commanding officer of the unit to which the person belongs shall enter in the court-martial book of the unit a record of declaration.
>
> (2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter."

No reason has been recorded by the High Court as to how the enquiry against the respondent was vitiated because of this

provision. The learned Single Judge having observed that keeping the respondent in a cell was against this provision, went on to hold that it resulted in impinging upon the right to life of the respondent without observing due process and thus violative of Articles 21 and 22 of the Constitution of India. It is unfathomable as to how this reasoning can be sustained in the fact situation of the present case. The official record, however, substantiates the fact that the respondent had overstayed his casual leave between 12th April to 27th April, 2003, with effect from 28th April, 2003, without sufficient cause until he surrendered himself on 20th March, 2004. After surrendering, the respondent once again absented himself without applying for leave till he was apprehended by IAF/P of P&S(U), AF at Jagatpur, Distt. Bhojpur, Bihar on 30th April, 2004, and was proceeded by way of Court Martial Proceedings immediately thereafter which culminated in passing of the impugned order of sentence and punishment. Thus, even the fourth reason stated by the learned Single Judge can be no basis to overturn the Court Martial Proceedings much less to doubt the voluntary confession made by the respondent in those proceedings made before the DCM.

13. No other reason has been noted by the High Court to warrant remand of Court Martial Proceedings. Even the Division Bench has failed to consider the matter in right perspective and especially to examine the plea of the appellants asserted in the two counter affidavits filed to oppose the writ petition, including on the question of genuineness of Annexures 19 and 24. Notably, the Division Bench having perused the original records and found that the letters were not part of the Court Martial Proceedings and that the Officials of the District Court Martial had acted bonafide and fairly, should have accepted the plea of the appellants that these letters (Annexures 19 and 24) were afterthought and in any case cannot be made the basis to question the validity of Court Martial Proceedings and in particular the voluntary confession made by the respondent thereat.

14. In our opinion, in the fact situation of the present case, the High Court committed manifest error in interfering with the impugned decision of the Competent Authority of awarding sentence and punishment to the respondent for the two charges in respect of which he had pleaded guilty.

15. The learned counsel for the respondent would then contend that if the impugned order was to be revived by this Court, the same be at least modified to one of discharge - so that the respondent would be able to get retiral benefits for having served for 13 years and 4 months in the Air Force. This submission though attractive at the first blush, does not commend us. The misconduct for which the respondent has been sentenced and punished is not the first of its kind committed by him. Even in the past he indulged in similar misconduct. Moreover, the respondent indulged in making reckless and frivolous allegations against his superiors even in the past and was not serious enough in serving the Air Force. He overstayed the leave period after his marriage was fixed on 10th February, 2003 on the specious ground that he was unwell and was undergoing medical treatment. The Competent Authority having taken notice of all the attending circumstances chose to impose punishment of dismissal. We cannot impose our opinion or substitute the subjective satisfaction reached by the Competent Authority in that regard.

16. The learned Counsel for the appellants further submitted that as per the Pension Regulations applicable to Air Force personnel,

the respondent will not be eligible for pension or gratuity in respect of his previous service. For that he relied on the Circular issued by the Deputy Secretary to the Govt. of India, dated 25th April, 2001, which reads thus :-

25 April 2001

"To,

The Chief of the Air Staff

Subject : Amendment to Regulation 16 and 102 of Pension Regulations for the Air Force, 1961, Part I

Sir,

1. I am directed to state that under the provisions of Regulations 102 (a) of Pension Regulations for the Air Force (Part I), 1961 as amended vide CS No. 71/IV/67 an airman who is dismissed or removed under the provisions of the Air Force Act is ineligible for pension and gratuity in respect of all previous service though in exceptional cases. President may at his discretion, grant pension gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. Similar provisions in respect of Commissioned Officers do not exist vide Regulation 16 of Pension Regulations for the Air Force (Part I), 1961. The disparity in the provisions has been engaging attention of the Government for some time past.

2. It has now been decided that all Indian Air Force Personnel including commissioned officers who are cashiered / dismissed under the provisions of Air Force Act, 1950 or removed / compulsorily retired under Rule 16 of AF Rules, 1969 i.e. as a measure of penalty, will be ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, the Competent Authority on submission of an appeal to that effect may at his discretion sanction pension / gratuity or both at a rate not exceeding that which would be otherwise admissible had the individual so cashiered / dismissed / removed been retired discharged on the same date in the normal manner.

3. An individual who is compulsorily retired or removed on grounds other than misconduct or discharged under the provisions of Air Force Act, 1950 and the rules made thereunder, remains eligible for pension and/or gratuity as admissible on the date of discharge. This will also apply to cases of dismissal/removal.

4. All appeals to the Competent Authority in this regard will be preferred within two years of the date of cashiering/dismissal/removal.
5. Competent Authority both for Commissioned Officers and PBORs for Regulations 16 and 102 of Pension Regulations for the Air Force 1961 will be the president of India.
6. Pension Regulations for the Air Force will be amended in respect of the above provisions in due course.
7. The provisions of this letter shall come into effect from the date of issue of this letter. However, past cases will be decided as hither-to-fore.

Yours faithfully,

Sd/-XXX

(Amrit Lal)
Deputy Secretary to the Government of India"

(emphasis supplied)

We are not inclined to express any opinion on this contention as we find that there is discretion vested in the Competent Authority to sanction pension / gratuity or both, in exceptional cases. Even though the respondent has been dismissed from service, he is free to pursue that remedy, if so advised. The Competent Authority may consider the said representation in accordance with law. We reiterate that we may not be understood to have expressed any opinion in that regard.

17. In view of the above, this appeal must succeed. Hence, the judgment of the learned Single Judge dated 15th July, 2008, and the order of the Division Bench dated 23rd June, 2009 are set aside.

Instead, the Court Martial Proceedings dated 17th June, 2004 as also the order dated 2nd July, 2004 promulgating the same are restored and revived.

18. Appeal succeeds in the above terms with no order as to costs.

.....CJI.
(T.S. THAKUR)

.....J.
(A.M. KHANWILKAR)

New Delhi
Dated: September 27, 2016