

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on : February 02, 2015
% *Judgment Delivered on : February 09, 2015*

+ **W.P.(C) 5811/2012**

PREM KUMAR Petitioner
Represented by: Ms.Jyoti Singh, Senior Advocate
instructed by Mr.Pankaj Yadav, Ms.Tinu
Bajwa, Mr.S.Sharma and Mr.Amandeep
Joshi, Advocates.

Versus

UNION OF INDIA & ORS.Respondents
Represented by: Mr.Ankur Chhibber, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. In this petition, the petitioner has impugned the dismissal order dated June 06, 2008 which was confirmed by Chief of Air Staff. as well the order dated May 16, 2012 by AFT, Principal Bench, New Delhi whereby OA No.227 of 2010 filed by the petitioner was dismissed.
2. The petitioner was enrolled as Airman in Indian Air Force on July 23, 1990 and was later on promoted to the rank of Sergeant. The petitioner was

issued show cause notice dated March 31, 2008 based on the complaints made by Sh.Suresh Yadav regarding missing of his daughter Ms.Arpana since January 15, 2008 to Police Station Sangam Vihar (DD No.19-B dated January 16, 2008) as well to Air Force Authorities. Ms.Arpana was later on found to have reached Patna at the house of her sister which fact was duly informed by Sh.Suresh Yadav to the concerned Police Station as well to Air Force Authorities. On February 11, 2008 Sh.Suresh Yadav alongwith his daughters visited the unit where Ms.Arpana submitted a written complaint against the petitioner for being sexually exploited by him by making a false promise to marry her. The complaints were investigated and it was revealed that on January 15, 2008 the petitioner had taken away Ms.Arpana from her house without the knowledge of her family and took her to the residence of his younger brother LAC Sujeet at AF Stn. Bakshi Ka Talab and engaged in sexual intercourse with her on almost every day.

3. Noticing the above noted conduct of the petitioner to be prejudicial to the community living besides being against the moral ethics of the society and thus detrimental to the reputation of the Indian Air Force, the petitioner was called upon to show cause within 10 days of receipt of notice as to why he should not be dismissed from service under Section 20(3) of Air Force Act, 1950 read with Rule 18 of the Air Force Rules, 1969.

4. In the reply to show cause notice, the petitioner denied all the accusations against him claiming that the same has been conspired against him by the provost staff at the instance of Warrant Officer K.S.Upadhyay and the complaint by Sh.Suresh Yadav against the petitioner was also under the advice

of WO Upadhyay. Apart from that, the petitioner also claimed that Ms.Arpana, daughter of the complainant had gone to the house of her sister residing at Patna, Bihar. This fact was informed to Police Station Sangam Vihar and the matter was closed. He also accused WO Upadhyay to be the person instigating Ms.Arpana and her father to make complaint against the petitioner otherwise had there been any truth in the complaint, Ms.Arpana would have reported the matter to the civil police. Explaining the circumstances that old and infirm parents were dependent upon him and that a conspiracy has been hatched against him by WO Upadhyay in collusion with wicked and greedy family of Sh.Suresh Yadav and his unblemished record of almost 18 years with India Air Force, the petitioner requested that show cause notice dated March 31, 2008 be withdrawn.

5. The respondents considered the reply to the show cause notice, the written complaint submitted by Ms.Arpana and the report submitted by 28 provost with other material and arrived at the conclusion that:-

- (i) The proceedings initiated against him were in accordance with the statutory provisions laid down under Section 20(3) of Air Force Act, 1950 read with Rule 18 of Air Force Rules, 1969 and said powers of administrative removal/dismissal are totally distinct and independent of the powers of disciplinary proceedings provided under the Air Force Law.
- (ii) Principles of natural justice have been complied with.
- (iii) Allegations against WO Upadhyay date back to the year 1999 and are farfetched and too remote to the instant case having no relevance to the incident referred to in the show case notice.

(iv) Allegations of conspiracy and collusion between WO Upadhyay and Sh.Sh.Suresh Yadav, father of Ms.Arpana was not supported by any evidence.

6. In view of the evidence on record the Disciplinary Authority considered the misconduct on the part of the petitioner to be grave in nature, against the moral ethics of the society and prejudicial to the community living in the Air Force. Thus the petitioner was ordered to be dismissed from service in terms of Section 320(3) of the Air Force Act, 1950 read with Rule 18 of the Air Force Rules, 1969. Statutory petition was filed before the Chief of Air Staff on October 12, 2008 which was dismissed vide order dated February 04, 2009 and communicated to the petitioner under covering letter No.Air HQ/C23407/157 9/PS dated February 09, 2009.

7. OA No.227/2010 filed by the petitioner impugning the order of dismissal, was dismissed mainly for the following reasons:-

(i) Show cause notice dated March 31, 2008 signed by Group Capt. N.K.Sharma was on behalf AOC-in-C which was verified by the AFT after examining the record.

(ii) The show cause notice contained all the accusations including the copy of the complaints filed by Ms.Arpana and her father.

(iii) Manual of Air Force Police and duties assigned to IAF authorised Provost Unit APM Rajokri to investigate the complaints received from Sh.Suresh Yadav and from Ms.Arpana.

(iv) Sh.Suresh Yadav withdrew the complaint but the complaint filed by Ms.Arpana was not withdrawn.

(v) The investigation report filed by APM Rajokri contained statement of

LAC Sujeet Kumar the younger brother of applicant, who was posted at Air Force Station Dhobi Ka Talab, Lucknow. LAC Sujeet Kumar confirmed that the petitioner accompanied by one girl namely Apru aged about 22 years, who was not related to them, visited him. Both of them stayed together, had intimate relations and the petitioner planned to marry her as he was not having any issue from his wife.

(vi) In the complaint dated February 11, 2008 which had not been withdrawn till date, Ms.Arpana alleged that she was forcibly taken by the petitioner to Lucknow. The petitioner promised to marry her and sexually exploited her. He also pressurized her to compel her father to withdraw the complaint lodged by him at PS Sangam Vihar. The petitioner also compelled her to go from Lucknow to her elder sister's house in Bihar.

(vii) At that time the petitioner was married to Ms.Reena Tripathi.

(viii) Divorce petition was filed on February 26, 2008 and divorce was granted on July 21, 2008.

(ix) Much before filing a petition for divorce, the petitioner had been sexually exploiting Ms.Arpana and such conduct was not befitting a member of Force.

(x) The order of dismissal dated June 05, 2008 under Section 23 of Air Force Act read with Rule 18 of Air Force Rules, 1969 does not suffer from any infirmity or illegality as the Competent Authority is vested with a right to discharge a person under the above provisions.

8. During the course of hearing of writ petition, the petitioner along with his wife and two young daughters was present in the Court. Ms.Jyoti Singh,

learned Senior Advocate for the petitioner has submitted that it is not a case of sexually exploiting Ms.Arpana on false promise to marry her. She has drawn the attention of this Court to the marriage certificate (Annexure P-15) which shows that petitioner had married the complainant Ms.Arpana on September 02, 2008. Learned counsel for the petitioner submitted that since Mr.Suresh Yadav had withdrawn his complaint and Ms.Arpana had married the petitioner, the petitioner does not deserve the penalty of dismissal from service. The petitioner is still very young and so far as his professional conduct is concerned it was unblemished. Since the date of dismissal from service the petitioner could not find any employment and is staying with his in-laws. The wife of the petitioner is also unemployed and they have two minor daughters and their future is dark unless the petitioner gets suitable job. Thus, the punishment may suitably be modified/reduced by granting him such relief which has the effect of reinstatement.

9. Learned counsel for the respondent while refuting the above contentions submitted that petitioner was already married at the time when he had taken away Ms.Arpana to Lucknow where he had sexual relations with her. This fact stands confirmed by the younger brother of the petitioner with whom he stayed in Lucknow. The complaint filed on February 11, 2008 by Ms.Arpana as well her statement recorded during investigation contained very serious allegations against the petitioner and said complaint was never withdrawn by her. He submitted that in the given facts and circumstances and in view of the misconduct of the petitioner of sexually exploiting young girl despite he being

already married, he did not deserve to be a member of Indian Air Force hence has rightly been dismissed from service.

10. So far as question of culpability is concerned, it is not in dispute that petitioner was married to Ms.Reena Tripathi and during survival of a valid marriage, he entered into physical relations with Ms.Arpana in the year 2007 when she was minor (As per the marriage certificate the date of birth of the petitioner is October 05, 1973 and that of Ms.Arpana is January 06, 1990) and attained the age of majority a few days prior to January 15, 2008 when taken away to Lucknow by the petitioner. The petitioner was not only married but older to her by more than 16 years.

11. While issuing show cause notice the petitioner was supplied with the copy of complaint made by Ms.Arpana as Annexure 'A' referred to in para 4. The petitioner does not dispute that this complaint had not been withdrawn by Ms.Arpana, who is now married to him. Record of Disciplinary Authority also revealed that Sh.Suresh Yadav, father of Ms.Arpana informed Air Force Authorities about he being pressurized by the petitioner to withdraw the complaints.

12. Perusal of record reveals that the petitioner as well the complainant Ms.Arpana initially claimed to be treating each other as brother and sister. Statement of Sujeet Kumar, younger brother of petitioner establishes that the petitioner had taken Ms.Arpana to Lucknow without the knowledge of her family and that they had intimate relationship at his residence in Lucknow. The complaint against the petitioner by Ms.Arpana and her father was not at the behest of WO Upadhyay but because of his own extramarital relationship

with Ms.Arpana. The accusation of being sexually exploited by the petitioner made by Ms.Arpana in her complaint filed on February 11, 2008 addressed to Air Officer Commanding, Western Air Command were very serious allegations. The incident dated December 28, 2007 narrated by Ms.Arpana in the complaint is that the petitioner asked her if he (father) could be sent out on some pretext and in the absence of her father, he tried to establish physical relations with her and was caught in an objectionable condition. Then she had also complained about the false representation made by the petitioner of obtaining divorce, making her to write a suicidal note on his dictation which was also kept by him. She asked for justice from the Air Officer Commanding, Western Air Command, New Delhi for giving justice to her and suitable action against the petitioner who had sexually exploited her taking advantage of her innocence and was capable of spoiling the life of many other innocent girls.

13. Learned Senior Advocate for the petitioner is questioning the proportionality of the penalty mainly on the following aspects :-

- (i) WO Upadhyay was inimical to the petitioner.
- (ii) The Disciplinary Authority failed to take note of the fact that Sh.Suresh Yadav, father of Ms.Arpana had withdrawn his complaint.
- (iii) The promise made by the petitioner was not false as he had already married her.
- (iv) The petitioner had rendered about 18 years of service and in the circumstances instead of dismissal the punishment may be modified in such manner that it has the effect of reinstatement and for his misconduct some other misconduct can be levied.

14. It is not the case of the petitioner that WO Upadhyay laid a honey trap for him. Rather his relationship with Ms.Arpana was independent of any issue he might have had with WO Upadhyay in distant past. So far as DD No.19-B recorded at PS Sangam Vihar was concerned it was a missing report and police was informed about the missing girl being found thereby requiring no action in the matter by the police. The complaint by Sh.Suresh Yadav to the concerned authorities was withdrawn but there is enough material on record to evince that Sh.Suresh Yadav complained to the concerned authorities that he was being pressurized by the petitioner to withdraw his complaint. It is a matter of record that serious allegations including sexual exploitation by the petitioner were made in the complaint filed by Ms.Arpana on February 11, 2008 as well in her statement recorded during disciplinary proceedings. The complaint made by her was never withdrawn. The fact that petitioner subsequently obtained divorce from his wife and soon after married Ms.Arpana could have only one effect i.e. an escape route to avoid prosecution on charge of rape by obtaining consent on false promise to marry.

15. Before examining the aspect of proportionality we note that the legal position is well settled that the penalty imposed must commensurate with the gravity of the misconduct. The order of dismissal is just like awarding capital punishment. While exercising power of judicial review, the scope is very limited and restricted requiring interference by the Court in very limited and restricted manner in exceptional cases. No doubt, while awarding penalty for proved misconduct, the purpose is to send a message to other members of the Force to have some deterrent effect on them. But at the same time it cannot be

ignored that any penalty which is disproportionate to the proven misconduct is likely to cause unrest in the mind of other members of the force.

16. The misconduct of the petitioner falls in the category that his retention in the Air Force was considered undesirable with which we also concur. The conduct of the petitioner in indulging in sexual intercourse with a girl whom he claimed to be like his sister, cannot be taken up lightly and that too when the statement of Ms.Arpana during investigation is also to the effect that to her the petitioner was like a brother in distant relation. Though agreeing with the observation by Disciplinary Authority that the persons like the petitioner do not deserve to be member of elite Indian Air Force, we feel that taking into account the number of years of service rendered he could have been dealt with some compassion by taking into account his social obligations towards his family. The petitioner is said to have rendered 18 years of service before the penalty of dismissal was imposed on him. As on date, the petitioner has responsibility to take care of his wife and two young daughters. The petitioner has married the complainant Ms.Arpana, who made serious accusations against him. Apart from this incident, in his personal life there was hardly any serious complaint of misconduct against the petitioner.

17. Ordinarily on the aspect of proportionality of the punishment the matter is required to be remanded to the concerned authorities to examine the case of the petitioner but in view of the fact that the petitioner is now settled with his wife and two children and taking into account length of his service with no blemish in the service record, the offending act being not in discharge of his official function, we modify the penalty order dated June 06, 2008 to the extent

that instead of dismissal it shall be treated as an order of discharge with all pensionary benefits. The impugned orders are modified to the above extent.

18. Writ petition is allowed to the above extent.

19. No costs.

(PRATIBHA RANI)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

FEBRUARY 09, 2015
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