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

Date of decision: 24th November 2020

+ **W.P. (C) 9332/2020, C.M. Appl. No. 30095/2020 (of the petitioner for stay)**

COL ANAND SWAROOP, SM **Petitioner**
Through: Mr. S.S. Pandey & Abhishek R.
Shukla, Advocates

Versus

UNION OF INDIA & ORS. **Respondents**
Through: Mr. Vishal Bakshi, Advocate

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

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[VIA VIDEO CONFERENCING]

ASHA MENON, J.

1. This writ petition has been filed by Col. Anand Swaroop under Article 226 of the Constitution of India for quashing of the impugned order dated 28th October, 2020 whereby he was called back from his leave which was granted to him for 2 months as Annual leave from 12th October, 2020 to 10th December, 2020. Directions have also been sought to the respondents to grant him his entitled leave from 2017 onwards including the leave for 2020 and thereafter.

2. The petitioner joined the Indian Army as a Short Service

Commission Officer and was granted Permanent Commission in 1994. He seems to have been involved in many mountaineering expeditions of the Army and had also gone to the South Pole in November 2010 to February 2011. He has also received several awards for these activities. He was a member of the North Pole Ski Expedition flagged off by respondent No. 4 on 21st February, 2012 though the expedition was aborted on 14th March, 2012 and the team had to return back to India.

3. Due to certain complaints which according to the petitioner were anonymous, an audit was directed in respect of expenditure incurred for the North Pole Ski Expedition. A Staff Court of Enquiry was convened by the HQ Delhi area to investigate into irregularities, if any, in accounting of funds allotted for the Indian Army Ski Training Expedition 2012 to Norway and North Pole on 11th October, 2012. Evidence was recorded between 31st January, 2014 to 18th June, 2014. When the findings and opinion of the Staff Court of Inquiry were not supplied to the petitioner, he filed an Original Application bearing O.A. No. 593/2015 before the Armed Forces Tribunal (AFT), Principal Bench at New Delhi on 8th August, 2015, which is still pending adjudication.

4. In the course of hearing of the aforesaid O.A., the AFT directed the respondents to proceed ahead with the processing of the case to enable the competent authority to take a decision whether or not to proceed against the petitioner departmentally. The GOC Delhi issued orders for a General Court Martial (GCM)

on 3rd July, 2017 on the basis of this direction of the AFT which also directed expeditious disposal of the GCM. The petitioner filed W.P. (C) No. 9627/2017 before this court and Order dated 31st October, 2017 was passed therein which permitted the respondents to proceed further with the GCM but not to send the findings for confirmation or promulgation. The GCM commenced on 7th November, 2017.

5. Subsequently the petitioner filed another Original Application bearing O.A. No. 63/2018 questioning the disallowing of his pleas by the GCM as being not in accordance with the statutory mandate, which was admitted on 11th January, 2018 and was directed to be tagged with the previous O.A. filed by the petitioner. In the mean-time, the GCM announced its findings on 9th April, 2018 whereby the petitioner was found guilty of the 2nd, 3rd, 4th, 5th, 7th & 8th charges and was awarded the punishment of dismissal from service subject to confirmation. This happened during the pendency of both the O.As before the Id. AFT.

6. The grievance of the petitioner prompting the present petition is that he had been granted two months' Annual leave vide order dated 14th October, 2020 and the same was cancelled vide order dated 28th October, 2020 and he was asked to return back from leave after 20 days which the respondents have treated to be casual leave.

7. We have heard Id. Counsel for the petitioner and the

respondents as well as Major Kattoch. The controversy is focused on Regulation No. 392 clause (m) of the Defence Service Regulations. According to the counsel for the petitioner, this was not applicable to him as it related to only those instances where the officer was under arrest. According to the ld. counsel, the petitioner was not under arrest and going by the directions of the High Court could not be arrested. Therefore, he was just like any other officer and governed by the leave rules under which he was entitled to Annual leave for 2 months. Thus, the withdrawal of the sanction of leave was wrong as was the conversion of the leave taken into casual leave.

8. On the other hand, the learned counsel for the respondents submitted that clause (m) sub clause (ii) of Regulation 392 was applicable and that the annual leave had been erroneously sanctioned by the Western Command which mistake was rectified by the HQ at Delhi. That was the reason why the 2 months annual leave sanctioned was recalled and the petitioner was directed to join back. It was also submitted that it was on account of the stay of the court that the dismissal order imposed as punishment on the petitioner could not be sent to the confirming authority. Therefore the sentence imposed being less than imprisonment, the petitioner was covered by clause (m) (ii) of Regulation 392 and was entitled to only casual leave which had been granted to him in the previous years as also this year.

9. It would be useful to reproduce Regulation 392 here, for

ready reference:

“392. Arrest. – (a) *The power of an officer, JCO, WO or NCO ;to place an offender in military custody is defined in Section 101 of the Army Act.*

(b) *An officer, JCO or WO may be placed under arrest by a competent authority when charged with an offence, but he will not ordinarily be placed under arrest by an authority other than his CO unless the needs of discipline so require, nor will he be kept under arrest unless his CO is satisfied, on investigation, that it will be necessary to proceed with the case and to report it to superior authority.*

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) xxx xxx xxx

(g) xxx xxx xxx

(h) xxx xxx xxx

(j) xxx xxx xxx

(k) *In any case the accused will be placed under close arrest before the commencement of the court-martial. During the course of his trial he will remain under close arrest except where the convening officer or an authority superior to him directs otherwise.*

(l) *Where the sentence awarded in the open court is imprisonment or higher, the accused, if already under close arrest, will remain under close arrest; and if not under close arrest, will be taken into custody, unless the convening or confirming officer or an authority superior to him directs otherwise. Where*

the sentence announced in open court is lower in the scale of punishment's than imprisonment, the accused, if under arrest, will normally be released from arrest immediately after the trial without prejudice to re-arrest, provided that –

(i) Where the sentence is or includes forfeiture of seniority of rank or reduction in rank, he shall not, unless the exigencies of the service demand it or unless the confirming authority or an authority superior to the confirming authority so directs, be placed on any duty until the sentence has been promulgated.

(ii) Where the punishment, in the case of an OR, is or includes field punishments, the accused may continue to be kept in custody, if it is necessary for the purpose of carrying out this sentence.

(m) An accused person whose case is awaiting confirmation of sentence may be granted leave as under-

(i) If the sentence announced in open court as subject to confirmation is lower in scale of punishment than dismissal, he may be awarded such leave as due to him, subject to the approval of the confirming authority.

(ii) Where the sentence is either cashiering or dismissal, he may, at the discretion of the competent authority or an authority superior to him, be released from the above arrest without prejudice to re-arrest and granted casual leave or leave on medical grounds.

(iii) In all other cases he shall not be granted any leave.”

10. We are unable to agree with the submissions of the learned counsel for the petitioner. No doubt the title of the section is “Arrest”. However, the interpretation that is being placed by the Id. Counsel would be stretching the interpretation too far. As of now, the petitioner is not under arrest. On 20th October 2017, the petitioner had sent a written request that in exercise of such powers conferred upon the Convening Authority he be released from any kind of arrest, while himself admitting to the fact that he had been placed under arrest. The court vide orders dated 31st October 2017 in W.P.(C) 9627/2017, had not quashed the arrest of the petitioner. The order of the General Officer Commanding, Delhi Area of the same date releasing the petitioner from close arrest on the undertaking furnished by him was taken on record. The assurance of the respondents that no further orders of close arrest would be issued against the petitioner and that during the pendency of the OA before the Id. AFT the findings returned by the GCM would not be sent for confirmation were made binding on the respondents. That does not wipe out the fact that the petitioner had been under close arrest. He has been released by a competent authority. Therefore, his case is covered by clause (k) of Regulation 392 that though he was arrested but he had been released on directions of the superior authority. He is not like any other officer of the Army governed by the General Rules for grant of leave

11. Further the petitioner has been awarded the punishment of dismissal in open court and under clause (l) of Regulation 392, he

would have been released in normal course even if the court had not directed so. There can be no doubt that the case of the petitioner is covered by clause (m) (ii) of the Regulation 392, as he is waiting for confirmation of the sentence which has been stalled by court orders. In other words, he is entitled only for grant of casual leave for 20 days. The cancellation of the Annual leave granted to him vide order dated 28th October, 2020 was in accordance with the Regulations and cannot be faulted. In fact, the grant of the Annual leave was against the Regulations, which mistake has been rectified by the impugned order dated 28th October, 2020.

12. Thus, we do not find any merit in the present petition. However, considering the facts of the present case, we dispose of the petition directing the petitioner to either take leave with loss of pay till 10th December 2020 or else return as directed by the respondents immediately.

13. Ordered accordingly.

ASHA MENON
(JUDGE)

RAJIV SAHAI ENDLAW
(JUDGE)

NOVEMBER 24, 2020
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