RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

O.A. No. 232 of 2017

Thursday, this the 09th day of May, 2019

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

No: 783046L Cpl (Now Sgt.) Surya Prakash, Son of Shri Kumar Upendra Narayan, R/o Village- Mananbigaha, P.O.- Sarta, District- Jahanabad, (Bihar) and presently posted at DCN Node, C/0 HQ CAC IAF, Bamrauli, Allahabad- 211012 (UP)

…. Applicant

Ld. Counsel for the: **Shri Om Prakash, Advocate**.
Applicant

Versus

1. Union of India, Ministry of Defence, South Block, New Delhi-110106.
2. The Chief of Air Staff, Air Head Quarter, Vayu Bhavan, Rafi Marg, New Delhi- 110106.
3. AOC-in-C, HQ CAC, IAF Bamrauli Allahabad- 211012.
4. Station Commander, 29 Wg AF Station Bamrauli, Allahabad- 211012.
5. Commanding Officer, DCN Node C/o HQ CAC IAF Bamrauli Allahabad- 211012.

...Respondents

Ld. Counsel for the: **Shri Kaushik Chatterjee, Advocate.**
Respondents.

ORDER

"(Per Hon'ble Mr Justice SVS Rathore, Member (J)"

1. By means of this O.A. under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has prayed for the following reliefs :-

> "A. To summon HQ CAC IAF to supply the copy of note on file bearing approval and signature of competent authority on 28.09.2015 to expunge the illegal punishment and order for re-trial of applicant for same offence which does not fall under the exemption clause of RTI Act 2005.
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> B. To issue directions/ orders to respondents to cancel the punishment entry on account of re-trial for same offence which is prohibited under Section 120 of AF Act, 1950 and it leads to double 'Jeopardy'.
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> C. Any other relief which this Hon'ble Tribunal may deem fit and proper under the circumstances of the case, may be granted in favour of the applicant.
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> D. Award the cost of original application in favour of Applicant."

2. In brief the facts of the case are that the applicant during his service period reported on posting to DCN Node C/O Head Quarters CAC Indian Air Force on 22.01.2015. The applicant while on the posted strength of 29 Wg Air Force, became AWL (absent without leave) w.e.f. 28.11.2014 till 20.12.2014 i.e. 22 days due to compelling reasons at his home town when leave was denied to him. The applicant was routed by 29 Wg Air Force on posting to local Unit DCN Node C/O HQ CAC as authorised without disposal of pending charge for AWL and reported to new Unit on 21.01.2015. On 04.02.2015 the applicant was directed by

respondent no.5 to report to respondent no.4 for trial of charge of AWL and the applicant reported accordingly. The proper procedure as laid down in Rule 24 of Air Force Rules, 1969 was followed and the applicant was awarded 'admonition' by respondent no.4 on 06.02.2015 for his absence without leave. Since the trial of the applicant was conducted without his attachment to respondent no.4, who was not the Commanding Officer of the applicant on 06.02.2015 as the applicant had already reported on posting to respondent no.5. The applicant was only verbally ordered to report to respondent no.4 and no movement order was issued for attachment on disciplinary grounds which violated the provisions laid down under Para- 663 (b) of Regulations for the Air Force. Therefore the charge trial was held illegally in the absence of authority of Command Head Quarters for attachment. On this ground the applicant on 15.06.2015 submitted an application to expunge the aforementioned illegal award of punishment. The respondent no.3 on 28.09.2015 after examining the case directed to expunge the punishment and retry the applicant in terms of Rule 33 of Air Force Rules, 1969, which was intimated to 29 Wg Air Force by CJA of respondent no.3. A plain reading of the said letter shows that the punishment was expunged on the ground of lack of jurisdiction and not on merits. As such the applicant was directed to be tried afresh by respondent no.4 for the same offence of AWL after attaching the applicant from respondent no.5 to respondent no.4. Applicant was subsequently tried by respondent no.4 and

same punishment of admonition was awarded to him. The applicant has challenged the said punishment of admonition by this O.A. on the basis of Section 120 of Air Force Act, 1950 on the ground that the second trial for the same offence is not permissible under law.

3. On behalf of respondents the fact stated by the applicant are admitted and it is submitted that in view of Air Force Rule 33 there is no illegality in the order since the first trial of the applicant was without jurisdiction, therefore it was a nullity. It has also been pleaded by the respondents that the applicant has challenged the first trial and the order passed there upon by the respondent no.4 and when his prayer was allowed then he is challenging the second punishment on the ground that the second trial for the same offence is not permissible. It is argued that virtually the second trial was in the interest of the applicant because by awarding the second punishment, which was admonition, it does not affect his career or the chances of his promotion in any manner and it is simply to regularise his period of absence and if such period of absence was not regularised through a charge trial, then his absence has to be treated as break in service and the applicant shall face problems in his claim for pension after retirement. Therefore the applicant without realising this technicality has challenged his second trial and punishment. It is also submitted that even after the said punishment the applicant has been promoted to his next higher post.

4. Keeping in view the rival submissions before proceeding further, we would like to reproduce Section 120 of Air Force Act, 1950, which reads as under:-

> "**120. Prohibition on second trial**.—When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under section 82 or section 86, he shall not be liable to be tried again for the same offence by a court-martial or dealt with under the said sections. Even if the finding of guilty recorded by a court-martial is not confirmed, the accused cannot be retried for same charges; G.B. Singh v. Union of India, 1973 Cr LJ 485:1973 ALJ 504."

5. At this juncture we would also like to quote Rule 33 of Air Force Rules, 1969, which reads as under:-

> "33. Revision of minor punishments awarded under section 82.—
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> (1) If a minor punishment awarded under section 82 appears to the Central Government, the Chief of the Air Staff, or any officer superior in command to the officer who awarded the punishment, to be wholly illegal, such authority shall direct that the award be cancelled and the entry in the records of the accused be expunged.
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> (2) If such minor punishment appears to the authority specified in sub-rule (1) to be in excess of the punishment authorised by law, such authority may vary the punishment awarded so that it shall not be in excess of the punishment authorised by law, and the entry in the records of the acused shall be varied accordingly.
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> (3) If such minor punishment appears to the authority specified in sub-rule (1) to be unjust or too severe having regard to all the circumstances of the case, such authority may mitigate or remit the punishment awarded or commute that punishment for any other punishment or punishments lower in the scale laid down in section 82, which the commanding officer or other officer exercising powers under that section could have validly awarded, and such

mitigation, remission or commutation shall be entered in the records of the accused:

Provided that for the purpose of this sub-rule, the punishment of field punishment shall be deemed to be higher in scale than detention:

Provided further that the punishment of field punishment shall not be commuted for punishment of detention for a term exceeding the term of such field punishment or detention shall not be commuted for a punishment of confinement to the camp for a term exceeding the term of such field punishment or detention.

(4) Any authority specified in sub-rule (1) may, in addition to or without any order passed under sub-rule (1), (2) or (3), issue such direction in any case as may appear to such authority to be necessary for doing justice in the matter."

6. Keeping in view the rival submissions, the point to be considered is what would be the effect of so called first trial of the applicant, which on his own representation has been set aside on the ground of being without jurisdiction. After setting aside the first punishment awarded by respondent no.4 whether the trial and punishment subsequently by respondent no.4 can be challenged on the ground that the applicant has already been tried earlier by the respondent no.4 ?

7. A perusal of Section 120 of Air Force Act shows that this Section is part of Chapter-X, which deals with Court Martial. However, the argument of learned counsel for the applicant is that it also covers the punishment awarded under Section 82 or Section 86. Sections 82 and 86 read as under:-

"82. **Punishment of persons other than officers and warrant officers**.—Subject to the provisions of section 84, a

commanding officer or such other officer as is, with the consent of the Central Government, specified by the Chief of the Air Staff, may, in the prescribed manner, proceed against a person subject to this Act otherwise than as an officer or warrant officer who is charged with an offence under this Act and award such person, to the extent prescribed, one or more of the following punishments, that is to say,—

(a) detention up to twenty-eight days;

(b) confinement to the camp up to fourteen days;

(c) extra guards or duties not exceeding three in number;

(d) deprivation of acting rank;

(e) forfeiture of badge pay;

(f) severe reprimand or reprimand;

(g) fine upto fourteen day's pay in any one month;

(h) penal deductions under clause (g) of section 92;

(i) admonition;

(j) any prescribed field punishment upto twenty-eight days, in the case of a person on active service."

"86. **Punishment of officers and warrant officers**.—An officer having power to convene a general court-martial or such other officer as is with the consent of the Central Government, specified by the Chief of the Air Staff may, in the prescribed manner, proceed against an officer below the rank of squadron leader or a warrant officer, who is charged with an offence under this Act, and award one or more of the following punishments, that is to say,—

(a) forfeiture of seniority, or in the case of any of them whose promotion depends upon length of service, forfeiture of service for the purpose of promotion for a period not exceeding twelve months, but subject to the right of the accused previous to the award to elect to be tried by a court-martial.

(b) severe reprimand or reprimand;

(c) stoppage of pay and allowance until any proved loss or damage occasioned by the offence of which he is convicted

is made good but subject to the right of the accused specified in clause (a);

(d) forfeiture of pay and allowances for a period not exceeding three months for an offence under clause (e) of section 42 in so far as it consists of neglect to obey flying orders or under section 62 or section 63."

8. Thus, admitted fact situation is that when the applicant remained absent without leave, he was under the command of respondent no.4 but by the time he came back after his absence period, he was moved on posting to another Unit locally i.e. respondent no.5 and the respondent no.4 was no more his Commanding Officer and on this ground the applicant himself challenged his punishment, which has rightly been set aside on the ground that the respondent no.4 had no jurisdiction to try him as at that time respondent no.5 was his Commanding Officer and the applicant was not attached to respondent no.4 for trial. A plain reading of Section 120 of the Air Force Act, 1950 shows that it pre-supposes a valid first trial. When a person is tried by the competent authority, having jurisdiction to try and to inflict the punishment, such a person under Section 120 cannot be tried for the said offence so long first punishment is in force. But in case the initial trial has been held to be without jurisdiction and that too on the application of the applicant himself then this plea is not available to the applicant. In this case the applicant has taken the plea that the punishment awarded to him by the respondent no.4 by way of second trial after attachment by Commanding Officer cannot be sustained. When we go through the provisions of law

on the point the conclusion is that the submission is devoid of merit. It is no where the case of the applicant that the officer who has set aside the punishment order has no authority to set aside the same and the order of punishment by first trial is still in force and that while it was in force he was tried again. When a competent authority has set aside the punishment, now the applicant cannot raise this argument on the pretext that the first trial was in force. Section 120 cannot be applied where the first trial has been held to be void and punishment awarded by the respondent no.4 has already been set aside on the ground that the authority had no jurisdiction. Punishment awarded by the respondent no.4, in first trial was void because admittedly the said order was without jurisdiction as neither the respondent no.4 was the Commanding Officer of the applicant nor the applicant was attached to him at that point of time.

9. What would be legal consequence of an order passed without jurisdiction is the point to be considered. Hon'ble Apex Court in the Case of **Kanwar Singh Saini vs. High Court of Delhi** reported in (2012) 4 SCC 307 in Para- 22 has held as under:-

> "22. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or

> execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction……"

10. In the facts of the instant case the first order of punishment was without jurisdiction and the same was challenged by the applicant and it was rightly set aside by the competent authority. Therefore, the applicant now cannot be permitted to challenge the second order on the ground that respondent no.4 could not impose punishment on him as he has already been punished by the respondent no.4 earlier. The argument of the learned counsel for the applicant would have force, if the punishment awarded by the respondent no.4, during initial trial was in force. But as the same has been set aside being without jurisdiction, then the very existence of trial and punishment awarded to him by respondent no.4 became non-est. The said punishment awarded to the applicant was void ab initio being without jurisdiction and has no legal sanctity and the same had already been set aside by the competent authority. The Air Force Rule 33(4) on which the learned counsel for the respondents has placed reliance, is to be considered at this stage, whereby the power has been given to the authority to pass any order in addition to or without any order passed under sub-rule (1), (2) or (3) for doing justice in the matter. Though the authority had jurisdiction to pass any order to do complete justice but in the instant case the ground taken by the applicant is that second trial by respondent no.4, with attachment of applicant by Command Head Quarters was barred in view of

Section 120 of Air Force Act. It is further clear since the punishment awarded by respondent no.4 in first trial was without jurisdiction and the same was set aside on grounds of jurisdiction therefore the said punishment cannot be treated to be in existence at the time of second trial by respondent no.4 after meeting all the legal requirement of jurisdiction.

11. Apart from it, we find substance in the submission of the learned counsel for the respondents that virtually the second punishment of admonition inflicted by the respondent no.4 is in favour of the applicant because it has regularised his service after unauthorised absence of 23 days and additionally the punishment of admonition would not in any manner adversely affect his service career, chances of promotion, salary fixation or retiral benefits in future. Admittedly the applicant has already been promoted after said order of punishment. If the absence of the applicant would not have been regularised then it ought to have been treated as break in service, which would have resulted into gross inconvenience/ delay of pension at the time of retirement of the applicant.

12. Now we come to the question of double jeopardy. Hon'ble Apex Court in the case of **Union of India and another vs. Purushottam** reported in (2015) 3 SCC 779 has dealt with the provisions for Army Act Section 121, which are akin to the provisions of Section 120 of the Air Force Act. In that case

Hon'ble Apex Court has considered the scope of double jeopardy and has held in Para-11 as under:-

> "11. It would be relevant to mention that modern jurisprudence is presently partial to the perusal of Parliamentary Debates in the context of interpreting statutory provisions, although earlier this exercise was looked upon askance. Suffice it to mention the analysis of the Constitution Bench in R.S. Nayak vs. A.R. Antulay (1984) 2 SCC 183 and in Haldiram Bhujiawala vs. Anand Kumar Deepak Kumar (2000) 3 SCC 250; and particularly Samatha vs. State of Andhra Pradesh (1997) 8 SCC 191, where Parliamentary Debates were studied by this Court. It appears to be beyond debate that the framers of our Constitution were fully alive to the differing and disparate concepts of autrefois acquit and autrefois convict and consciously chose to circumscribe the doctrine of double jeopardy only to prosecution culminating in a conviction. This facet of the law has already been carefully considered by the Constitution Bench in Maqbool Hussain vs. State of Bombay (AIR1953 SC 325, and we cannot do better than extract the relevant portions therefrom: (AIR pp. 328-29, paras 7 & 11-12)
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> > "7. The fundamental right which is guaranteed in Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per Charles, J. in Reg v. Miles). To the same effect is the ancient maxim "Nimo Bis Debet Puniri pro Uno Delicto", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "Pro Eadem Causa", that is, for the same cause.
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> > 11. These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to

> operate as a bar to a second prosecution and punishment for the same offence.
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> 12. The words "before a court of law or judicial tribunal" are not to be found in Article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein- 'convicted', 'commission of the act charged as an offence', 'be subjected to a penalty', 'commission of the offence', 'prosecuted, and punished', accused of any offence, would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."
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> (underlined by us)

13. A perusal of the aforesaid judgment of Hon'ble Apex Court shows that the question of double jeopardy shall be applicable where a person has been convicted for an offence by a Court or Tribunal/ or authority of competent jurisdiction. Words "Competent jurisdiction" are of great significance in this case. Admittedly in the facts of the instant case the respondent no.4 had no jurisdiction to try the applicant and therefore any punishment awarded by respondent no.4 in first trial, was without jurisdiction. Law is also well settled that any order of any authority even if without jurisdiction cannot be treated to be nullity unless and until it is set

aside by the competent authority. In the instant case the said order was rightly set aside by the competent authority on the representation of the applicant himself. Therefore the order passed by the respondent no.4 in first trial, awarding punishment of admonition to the applicant was absolutely without jurisdiction, null and void and after its having been set aside by the competent authority the same was not even in existence. Therefore there is no question of double jeopardy in the facts of the instant case. Applicant is not entitled to the benefit of Section 120 of the Air Force Act.

14. In view of the discussions made above, we do not find any substance in this O.A. Accordingly the O.A. deserves to be dismissed and is hereby **dismissed**.

15. No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated: May 09, 2019
JPT