

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

% Judgment Reserved on : 4th March, 2011
Judgment delivered on : 7th March, 2011

+ **W.P.(C) 3489/2010**

RISHI RAJ TYAGI Petitioner
Through: Major K.Ramesh, Advocate
versus

UNION OF INDIA & ORS. Respondents
Through: Mr.Aman Ahluwalia, Advocate for
respondent Nos. 1 to 3.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. Prayer made in the writ petition reads as under:-

"A. Issue a writ, order or direction in the form of writ of Certiorari to the Respondents to quash and set aside the Sentence awarded by Summary court Martial (page 27/28 of the Paper Book) as also the AOC Discharge Order dated 06 June 2009 operative with effect from 30 June 2009 (Page 7 of the Paper Book) and issue a writ of Mandamus to the Respondents to grant promotion to the petitioner with immediate effect as he stands promoted vide order dated 29 Sep 2003 (Page 29 of the Paper Book) to meet the ends of equity, justice and fair play."

B. Pass such other and further orders as may be deemed just and proper by this Hon'ble High Court for the consequential benefits to the petitioner in the circumstances of the case."

2. Pleadings on which prayer is predicated reads as under:-

"3. That this is undoubtedly a sad case of death of two small school going children, but their life being snuffed out is not at all because of any negligence on the part of the School Bus Driver Havildar Rishi Raj Tyagi, Applicant herein. As per the usual norms the Petitioner was driving the School Bus around 1500 hrs on the fateful day of 02 Feb 2001 and after almost reaching the Parking Area he got off the main road and was driving in the katcha area at 1-2 Kmph speed towards the Parking slot. Seeing the school bus all the children started running from the School Gate and in the stampede two children toppled and fell down and were crushed to death from the rear wheel. The Civil Police did the formal inquiry and after full deliberations of the case they exonerated the driver which stands ratified by the District Magistrate also. But the Army authorities tried him by Summary Court Martial and awarded him a forfeiture of 3 years for promotion, 1 year past service for pension and severe Reprimand against which a Statutory petition was filed which was rejected.

*4. That though the death could be sad and unfortunate but despite exoneration by Civil Court, the Army authorities trying the Petitioner on the same charge for the **second time** is legally an unsustainable action per se and the Sentence needs to be set aside which automatically will debar the authorities from discharging the Petitioner prematurely on 30 June 2010."*

3. To understand what the petitioner is saying as also to bring out the logic of the prayer made, relevant would it be to note that the discharge order dated 06.06.2009 is being questioned with reference to the punishment inflicted upon the petitioner. The petitioner desires that the punishment be set aside and he be promoted. As a result of the promotion, petitioner would be entitled to served for another two years.

4. Unfortunately, due to bad legal advice given to the petitioner, we express our inability to grant any relief to the petitioner.

5. Facts to be noted are that the petitioner was employed as a driver by the Indian Army and as of the year 2001 had earned promotion to the rank of Havaldar. He was handed over a Tata Delux Bus. His duty was to drop the children of COD Agra to Kendriya Vidyalaya No.II and bring them back.

6. On 02.02.2001, one child got crushed under the rear left wheel of the bus driven by the petitioner.

7. A Court of Enquiry was held and as per opinion of the Court of Enquiry, the death of the child took place on account of the bus reaching late and in the process, the children, on seeing the bus running towards bus to occupy a seat. One child got pushed or tripped. He got crushed under the bus.

8. It may be noted that the evidence which surfaced during Court of Enquiry was that the bus was not being driven rashly or negligently. Finding returned is that had the bus parked itself outside the school in time the children would

have not running towards bus.

9. We need not to go into the theory of reasonable care not an area where children would be expected to be running around. Our reason for this would be brought out soon hereinafter.

10. Bases on the findings of the Court of Enquiry, a charge was led against the petitioner of committing civil offence that is causing death by a rash or a negligent act. At the Summary court Martial petitioner pleaded guilty as recorded in the proceedings dated 27.01.2004. As a result of the petitioner pleading guilty penalty of forfeiture one year's past serviced and severe reprimand was inflicted upon the petitioner on 29.01.2004. Statutory petition filed was rejected on 15.09.2004.

11. The result thereof is the petitioner not earning any promotion and attaining the age of superannuation qua the post/rank held by the petitioner.

12. The petitioner challenged the verdict of guilt returned by the Summary court Martial which we note is a result of the plea of guilt entered by the petitioner by filing writ petitioner before the Allahabad High Court which was registered as Civil Miscellaneous Writ Petition NO.50710/2004. For unexplainable reason, the petitioner unconditionally withdrew the writ petition on 26.08.2009. The order dated 26.08.2009 passed by the Allahabad High Court reads as under:-

“Learned counsel for the petitioner states that he does not want to press this petition and

the same may be dismissed as withdrawn. Sh.S.S.Singh, learned counsel for the respondent has no objection.

Accordingly, the writ petition is dismissed as withdrawn”

13. Needless to state that having filed a writ petition challenging the verdict of guilt returned by Summary court Martial and the penalty levied pursuant thereto and having unconditionally withdrawn the same, petitioner cannot predicate an action on the same cause.

14. This is the reason why we need not to go into merits of the controversy which learned counsel for the petitioner sought to urge.

15. In view of the fact that petitioner cannot maintain a second writ petition on the same cause of action, on which he had proceeded before the Allahabad High Court but choose to unconditionally withdraw the writ petition without any right reserved to file a fresh petition on the same cause of action, we are constrained to hold that the prayer made in the writ petition to set aside the sentence awarded by the Summary court Martial has to be rejected. The inevitable consequences thereto has to be that the penalty would stand in the way of the petitioner, disentitling him to a further promotion and in the meanwhile qua the rank held by the petitioner he having reached the age of superannuation, the discharge order cannot be faulted.

16. The writ petition is dismissed but without any orders as to costs.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**MARCH 07, 2011
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