

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

% *Judgment Reserved on : January 27, 2015*
Judgment Pronounced on : February 02, 2015

+ **W.P.(C) 336/2014**

SUSHIL KUMAR SHARMAPetitioner

Represented by: Mr.Alok Kishor, Advocate

versus

UOI & ORS.Respondents

Represented by: Mr.Ankur Chhibber, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

WP(C)No.336/2014 and CM No.664/2014

1. The writ petitioner has laid a challenged to the order dated April 30, 2012 passed by the Armed Forces Tribunal, Principal Bench, New Delhi dismissing TA No.243/2010 filed by the writ petitioner.
2. The writ petitioner had prayed before the Tribunal that the orders dated May 05, 2006 and May 08, 2006 rejecting his representation concerning his trial and conviction at a Summery Court Martial proceedings be set aside on account of new material surfacing.
3. The petitioner was enrolled in the Indian Army on July 29, 1988 as a Clerk and after training was attached to the Corps of Engineers. He was posted to 201 Engineering Regiment.

4. The petitioner submitted an application seeking advance annual leave for 30 days which was sanctioned. The next year he applied for 60 days' annual leave which was sanctioned to him on March 11, 1994. Before expiry of the leave he was asked to report back and in respect of which the case of the respondents is that a telephone message was sent to him to return which fact was recorded in the telegram log book on April 09, 1994.

5. The reason why sanctioned leave was curtailed from 60 days was the allegation by the respondent that the petitioner, who was in-charge of the leave record, falsified his record concerning leave due to his credit and had not accounted for 30 days' leave which he had availed in the year 1993.

6. It was in respect of this allegation that the petitioner was tried at a Summary Court Martial for having committed an offence punishable under Section 63 of the Army Act. The charge against him was as under:-

“At field, on 11 Feb 94, while performing the duties of Head Clerk 15 Field Company, 201 Engineer Regiment, got for himself 64 days Annual Leave for 1994 sanctioned by knowingly suppressing with intend to defraud the fact of his having availed 30 days Advance of Annual Leave for 1994 during 1993 from 09 Sep to 08 Oct 93.”

7. The writ petitioner pleaded guilty and the punishment of being dismissed from service was inflicted upon him. Petitioner filed a statutory complaint under Section 164 of the Army Act on August 09, 1994 which was disposed of. He filed WP(C)No.804/1995 in this Court in which directions were issued on March 08, 1995 that his statutory complaint be disposed of within two months. On July 07, 1995 the statutory complaint was dismissed against which petitioner filed a writ petition in this Court challenging the proceedings at the Summary Court Martial and he being

dismissed from service. The said writ petition was dismissed by this Court against which the Supreme Court refused to grant leave to appeal.

8. On the ground that if some relevant material surfaces which was not to the knowledge of the person found guilty at a trial before a Summary Court Martial, petitioner exercised the said right by relying upon a certificate which he had obtained from the Postal Authorities on August 26, 1997 that the Army Authorities had not as a matter of fact sent any telegram to him as claimed by them and as entered in the telegram log book on April 09, 1994.

9. The said representation was dismissed by the competent authority on the ground that whether the telegram in question sent or not hardly mattered with respect to the gravamen of the charge against the petitioner for which he was tried, which was that while performing the duties of a Head Clerk he obtained 64 days' annual leave in the year 1994 by knowingly suppressing that he had availed 30 days' advance leave for the year 1994, during the year 1993. Needless to state evidence was that being in-charge of the record, the petitioner had fudged the record.

10. The said decision being challenged before the Tribunal vide TA No.243/2006 has resulted in the Tribunal dismissing the same.

11. Another attempt made by the petitioner to challenge the verdict of guilt at the Summary Court Martial has been repelled by the Tribunal on the plea that the earlier writ petition filed by the petitioner challenging the verdict of guilt having been dismissed by this Court against which the Supreme Court refuses to grant leave to appeal, the matter could not be re-agitated by the petitioner for infirmities in the trial. The Tribunal held that the only issue which needed to be considered was whether the postal

certificate obtained by the petitioner from the Postal Authorities that no such telegram as claimed by the department was sent had any impact on the trial.

12. The Tribunal held against the petitioner that the issue of the telegram being sent or not was irrelevant. The issue pertaining to the indictment was whether the petitioner had knowingly fudged the record and got himself wrongly sanctioned 64 days' advance leave in the year 1994 being fully aware that in the year 1993 he had availed of 30 days' advance leave which had to be adjusted in the year 1994.

13. Learned counsel for the petitioner during arguments cited the decision of the Supreme Court reported as AIR 1978 SC 1283 Workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust & Anr. to urge that if the Supreme Court refuses to grant leave to appeal, the decision of the Supreme Court would not be treated as affirming the view taken in the decision impugned, and thus would urge that the Tribunal was wrong in holding that it could not go into the merits of the illegality of the trial at which the petitioner was indicted.

14. The argument overlooks the fact that in the earlier round of litigation the Delhi High Court i.e. this Court, had gone into the issue and had looked into relevant record. A decision on merits was pronounced against the petitioner holding that there was no infirmity at the trial conducted against him in which he was indicted. Said decision obviously would bar the Tribunal, and even this Court, to re-look into the illegality of the trial at which the petitioner was convicted.

15. The only issue which could be re-opened was with respect to the new material on which the petitioner was relying upon.

16. This new material was a certificate obtained by the petitioner on August 26, 1997 that no telegram as was claimed to be sent to him on April 10, 1994, in respect of which an entry was made in the telegram log book on April 09, 1994, was not sent.

17. Whether or not said telegram was issued would be irrelevant for the reason the charge against the petitioner at the trial was not of not reporting back when he was intimated that the leave which he had got sanctioned was curtailed when it was detected that the petitioner had availed the same by fraud. The charge against the petitioner was of cheating the department by manipulating the record and thus managing 64 days' advance leave in the year 1994 knowing fully well that in the year 1993 he had availed of 30 days' advance leave which was to be accounted for in the year 1994. In other words, simply put, the 30 days' leave which the petitioner had availed of in the year 1993 was manipulatively not got reflected in the record. The legal right which the petitioner had was the obligation of the authorities to re-look into the issue of the trial if some subsequent material was shown by the petitioner concerning the trial and the indictment at the trial.

18. Noting as above we find no merit in the writ petition which is dismissed.

19. As regards CM No.664/2014, we find that the documents sought for by the petitioner related to the trial. The said documents have not to be given to the petitioner for the reason the second round of proceedings concerned the trial with respect to the limited issue whether the petitioner has some new material with him warranting a re-look at the trial. The

documents concerning the trial otherwise would be irrelevant and thus the application is also dismissed.

20. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 02, 2015

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