

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL
BENCH, NEW DELHI**

T.A NO. 192 OF 2010
(WRIT PETITION (C) NO.4699 OF 2005)

MUKESH KUMAR

...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS

...RESPONDENTS

FOR APPELLANT
MR. PRAKASH GAUTAM, ADVOCATE

FOR RESPONDENTS
MR. ANIL SRIVASTAVA, ADVOCATE
WITH
LT. CDR. VARUN SINGH

CORAM :

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S.DHILLON, MEMBER

J U D G M E N T
13.08.2010

1. This Writ Petition under Article 226 of the Constitution of India was filed before Delhi High Court challenging the Court Martial proceedings initiated against the appellant whereby he was held guilty for the offences under Section 420 of the Indian Penal Code read with

Sections 51 and 77(2) of the Navy Act, 1957 and sentenced him to undergo rigorous imprisonment for twenty-four months and to be dismissed from service with disgrace, which was subsequently remitted by the Chief of Naval Staff to rigorous imprisonment for sixteen months with dismissal from service. This petition was received on transfer from Delhi High Court in view of Section 34 of the Armed Forces Tribunal Act, 2007 (hereinafter called "the Act") and was thus treated to be an appeal under Section 15 of the Act.

2. It is contended that the accused/appellant was falsely roped into charges of embezzlement and cheating. The entire proceedings were initiated against him without affording any opportunity to counter the evidence produced by the prosecution. He was deprived of the opportunity to cross examine the prosecution witnesses. He was placed under close custody since 17.08.2003 and was put in solitary confinement for more than eight months before recording his conviction. Because of such torture and tremendous pressure, the respondents could obtain 'plea of guilty' on the charges levelled against him so as to safeguard the senior officers involved in the offence. The accused/appellant was also denied the assistance of a legally qualified person/Advocate. That apart, the

evidence collected in the course of trial could not establish the guilt against the accused/appellant.

3. It has next been contended by the accused/appellant that his services were all the time appreciated and on 26.01.1997 he was awarded commendation of his professional competency and skills by the Project Director. He was awarded for his excellent performance on 26.01.1998, 15.08.1998 and 30.06.2000. The accused/appellant was posted as Petty Officer Writer with INS Hansa, Goa. He was granted leave initially for 30 days with effect from 27.03.2003, which was subsequently amended to 20 days with effect from 24.03.2003. He was to report back on 13.04.2003. On 27.03.2003, some communication was made to him by Logistic Department from the Syndicate Bank Extension counter, INS Hansa, wherein the Bank had notified that the remittance slip, which was sent to the Bank on 21.03.2003 along with an Imprest Cheque of Rs.3,58,648/-, had a mismatch of name and account number as the Bank did not have any such account number there and refunded the said amount. This sum was desired to be credited to Account No.12436 of P. Kumar LA (AH), Number 117428 B. The said amount/demand draft was deposited and later on credited to the imprest account of INS Hansa.

The accused/appellant fell ill on 17.04.2003 and thereafter he was taken by two officers on 09.06.2003 on the strength of the so called warrant of arrest.

4. This appeal is resisted by the Union of India contending that there is ample evidence to prove the guilt of the accused/appellant on all the three charges which were levelled against him. He forged documents namely application-cum-payment voucher for LTC/TA/DA/Permanent Duty Advances and thereby dishonestly made the withdrawal of the amount belonging to Imprest Account of INS Hansa to the tune of Rs.2,36,100/-, Rs.1,58,600 and Rs.3,22,900/- on different dates. The accused/appellant pleaded guilty for all these three charges, including that of his absence from 20.04.2003 to 14.08.2003. Full and fair opportunity was given to the accused/appellant to contest his case. Even before recording of the 'plea of guilt' tendered by the accused/appellant, he was given caution that the 'plea of guilt' would be read against him. There was no reason for obtaining 'plea of guilt' from the accused/appellant under pressure. He pleaded guilty voluntarily. The embezzlement to the tune of Rs.5,70,600/- is established against the accused/appellant. The plea of the appellant that after completion of the fixed term of service he

was not subject to the Navy Act is barren of substance. When the individual is subjected to inquiry/trial, one is not retired automatically unless the order of discharge was passed.

5. It may be mentioned that the accused/appellant was charged for the following offences:

(1) Did between the thirty first day of May 2001 and the thirty first day of March 2002, cheated Indian Navy namely Imprest Account being maintained by Logistics Officer, Indian Naval Ship Hansa, Goa by forging documents namely application-cum-payment vouchers for drawal of LTC/TA DA/ Permanent Duty Advance in the name of fictitious sailors of Indian Navy purportedly borne with Indian Naval Ship Hansa and thereby dishonestly induced Assistant Logistics Officer (Pay), Indian Naval Ship Hansa to do delivery of Public money to the tune of Rs.2,36,100.00 (Rupees Two Lakh Thirty Six Thousand and One Hundred Only) belonging to the Imprest Account of Indian Naval Ship Hansa in cash to himself, which caused loss to the Imprest Account of Indian Naval Ship Hansa in monetary terms and thereby committed an offence punishable under section 420 of the Indian Penal Code read in conjunction with Section 77(2) of the Navy Act, 1957.

(2) Did between the first day of April 2002 and the twenty fourth day of March 2003, cheated Indian Navy namely Imprest Account being maintained by Logistics Officer, Indian Naval Ship Hansa, Goa for forging documents namely application-cum-

payment vouchers for drawal of LTC/TA DA/ Permanent Duty Advance in the name of fictitious sailors of Indian Navy purportedly borne with Indian Naval Ship Hansa and thereby dishonestly induced Assistant Logistics Officer (Pay), Indian Naval Ship Hansa to do delivery of Public money to the tune of Rs.1,58,600.00 (Rupees One Lakh Fifty Eight Thousand and Six Hundred only) belonging to the Imprest Account of Indian Naval Ship Hansa in cash to himself, which caused loss to the Imprest Account of Indian Naval Ship Hansa in monetary terms and thereby committed an offence punishable under section 420 of the Indian Penal Code read in conjunction with Section 77(2) of the Navy Act, 1957.

(3) Did between the first day of April 2002 and the twenty fourth day of March 2003, cheated Indian Navy namely Imprest Account being maintained by Logistics Officer, Indian Naval Ship Hansa, Goa by forging documents namely application-cum-payment vouchers for drawal of LTC/TA DA/ Permanent Duty Advance in the name of fictitious sailors of Indian Navy purportedly borne with Indian Naval Ship Hansa and thereby dishonestly induced Assistant Logistics Officer (Pay), Indian Naval Ship Hansa to do delivery of Public money to the tune of Rs.3,22,900.00 (Rupees Three Lakh Twenty Two Thousand and Nine Hundred only) belonging to the Imprest Account of Indian Naval Ship Hansa by cheque to himself, which caused loss to the Imprest Account of Indian Naval Ship Hansa in monetary terms and thereby committed an offence punishable under section 420 of the Indian Penal Code read in conjunction with Section 77(2) of the Navy Act, 1957.

(4) Did remain absent over Part Balance of *Annual Leave* of 2003 for Two Thousand Seven Hundred Eighty Six hours and Fifteen minutes, namely from 1200 hours on the twentieth day of April 2003 to 1415 hours on the fourteenth day of August 2003, this being an aggravated offence of leave breaking, and thereby committed an offence punishable under Section 51 of the Navy Act, 1957.

6. The first and foremost argument raised from the side of accused/appellant is that even if the evidence adduced by the prosecution is accepted on its face value, it would not make out an offence. The first three charges are pertaining to fabricating/forging of the documents for making withdrawal of the huge amount with dishonest intention. As regards these charges, it is submitted by the learned counsel for the accused/appellant that the plea of guilt, which was obtained by threat and coercion, would not be sufficient for recording conviction of the accused/appellant.

7. Prosecution examined PW1 Lt. Cdr. Sanjay Kumar Singh, PW2 Lt. Anil Kumar and PW4 Cdr. Bibhash Chandra. They are formal witnesses who have stated about the character of the accused/appellant. PW1 Lt. Cdr. Sanjay Kumar Singh, who was on duty from October 2002

to March 2004 as Deputy Logistics Officer (Pay), Deputy Civilian Establishment Officer, Officer-in-Charge of Naval Public Fund, Divisional officer of Senior Sailors Logistics Department and Officer-in-charge of Naval Public Fund Civilian Welfare, stated that the service documents and the assessment reports from January 2002 till date specifically IN 703 and Annual Assessment Reports of accused/appellant was maintained.

8. The prosecution has also produced documentary evidence to establish that the withdrawal of money was made by the accused/appellant. Such withdrawals were not disputed. Even the voluntary statement given by the accused/appellant substantiates such allegations. The chain of circumstantial evidence against the accused/appellant is complete so as not to leave any reasonable ground to arrive at the conclusion about the complicity of the accused/appellant and in all human probability, the money was drawn illegally and the same was misappropriated. Reliance may be placed on the decisions in **Mahmood v.. State of U.P.** (1976(1) SCC 542), **Shankarlal Gyarsilal Dixit v. State of Maharashtra** (1981(2) SCC 35), **Sharad Birdhichand Sarda v. State of Maharashtra** (1984(4) SCC 116), **Omwati v. Mahendra Singh**

(1998(9) SCC 81), **Sudama Pandey v. State of Bihar** (2002(1) SCC 679) and **Ram Reddy Rajesh Khanna Reddy v. State of A.P.** (2006(10) SCC 172).

9. The accused/appellant pleaded guilty. Even in the course of trial, caution was given to him that under Rule 115(2A), his 'plea of guilt' would be read against him. Even then, the accused/appellant maintained his 'plea of guilt' in his voluntary statement. In his voluntary statement, the accused/appellant admitted his guilt. There is self serving statement of the accused/appellant which is supported by the positive evidence.

10. It has next been submitted that the appellant was to retire on 30.05.2003 after completing the service tenure and at the time of the initiation of the Court Martial proceedings, he was not subject to the Navy Act and so, the entire trial stands vitiated. Though the accused/appellant raised objections referring to Sections 14(1), (3), 15(2), 17(1) and 17(3) of the Navy Act, the Court Martial refused to accept his plea.

11. Before appreciating this point, it would be appropriate to note the salient provisions of the Navy Act, which read:

Section 14: Liability for service of officers and sailors : (1) Subject to the provisions of sub-section (4), officers and sailors shall be liable to serve in the Indian Navy or the Indian Naval Reserve Forces, as the case may be, until they are duly discharged, dismissed with disgrace, retired, permitted to resign, or released.

(2) No officer shall be at liberty to resign his office except with the permission of the Central Government and no sailor shall be at liberty to resign his post except with the permission of the prescribed officer.

(3) The acceptance of any resignation shall be a matter within the discretion of the Central Government or the officer concerned, as the case may be.

(4) Officers retired or permitted to resign shall be liable to recall to naval service in an emergency in accordance with regulations made under this Act, and on such recall shall be liable to serve until they have been duly discharged, dismissed, dismissed with disgrace, retired, permitted to resign, or released.

Section 16: Discharge on expiry of engagement: Subject to the provisions of section 18, a sailor shall be entitled to be discharged at the expiration of the term of service for which he is engaged unless-

(a) such expiration occurs during active service in which case he shall be liable to continue to serve for such further period as may be required by the Chief of the Naval Staff; or

(b) he is re-enrolled in accordance with the regulations made under this Act.

Section 17: Provisions as to discharge – A sailor entitled to be discharged under section 16 shall be discharged with all convenient speed and in any case within one month of his becoming so entitled :

Provided that where a sailor is serving overseas at the time he becomes entitled to be discharged, he shall be returned to India for the purpose of being discharged with all convenient speed, and in any case within three months of his becoming so entitled:

Provided further that where such enrolled person serving overseas does not desire to return to India, he may be discharged at the place where he is at the time.

(2) Every sailor discharged shall be entitled to be conveyed free of cost from any place he may be at the time to any place in India to which he may desire to go.

(3) Notwithstanding anything contained in the preceding sub-sections, an enrolled person shall remain liable to serve until he is duly discharged.

(4) Every sailor who is dismissed, discharged, retired, permitted to resign or released from service shall be furnished by the prescribed officer with a certificate in the language which is the

mother tongue of such sailor and also in the English language setting forth-

- (a) the authority terminating his service;
- (b) the cause for such termination; and
- (c) the full period of his service in the Indian Navy and the Indian Naval Reserve Forces.

From the aforesaid provisions, it is clear that the implied/automatic discharge of the sailor from service after completing the tenure of appointment is not permissible. Sections 14 and 16 of the Act make it specifically clear that the order of the discharge is essentially required to be passed. In the case of the appellant, no such discharge under Section 17 was passed making him eligible for pensionary benefits. Even no certificate was issued in his case under Section 17(4) of the Act. Under such circumstances, on completion of the tenure period of his appointment, when there was no order of discharge, he shall be deemed to have continued on the post without any further order. In the absence of anything contrary in the original order of appointment, the only possible view is that the period of his service is extended by necessary implication.

12. What is, therefore, evident is that the matter of the accused/appellant must be governed by statute/rules. Here, in this case, the statutory rules make it essential for passing an order for the discharge of the accused/appellant. In this regard, it would be appropriate to quote Section 18 of the Navy Act, which reads as under:

Section 18 - Saving of powers of dismissal by Naval tribunals –
Nothing in this Chapter shall affect the award by a naval tribunal of the punishment of dismissal with disgrace, or dismissal from the naval service under this Act.

13. In the case of an individual who is facing Court Martial, Sections 14 to 17 of the Act would not be attracted. The saving clause makes it clear that even if the term of the accused/appellant was to expire before the initiation of the Court Martial, still proceedings could be drawn against him. The provisions, as contained in Sections 14 to 17, would not come in the way. Such saving clause had negated the effect of Sections 14 to 17.

14. It has further been submitted that the accused/appellant was made a scapegoat to protect the senior officers. In this regard, it may

be mentioned that there is no evidence on record to show that other officers were also involved in the said conspiracy for withdrawing the money illegally. Even in his voluntary/mitigating statement, no such plea was taken by the appellant. The ingredients of the offence of criminal conspiracy of such senior officers are not ascertainable from the materials on record. There is nothing on record to prove that the senior officers had expressly agreed or caused to be done the illegal act of forging documents for withdrawing money illegally. The existence of such conspiracy is not established. There is nothing on record to show that one of the conspirators (senior officers) has said or done anything in furtherance to the common intention of the accused.

15. In view of the aforesaid, we do not find any merit in the appeal. The findings of the Court Martial do not require any interference. The appeal is dismissed.

S.S.DHILLON
(Member)

S.S.KULSHRESTHA
(Member)