SUPREME COURT OF INDIA

Balkrishna Ram

Vs.

Union of India

C.A.No.131/2020

(Deepak Gupta and Aniruddha Bose,JJ.,)

09.01.2020

JUDGMENT

Deepak Gupta,J.,

SLP(Civil)No.6999 of 2017

1. Leave granted.

2. One of the issues raised in this appeal is whether an appeal against an order of a single judge of a High Court deciding a case related to an Armed Forces personnel pending before the High Court is required to be transferred to the Armed Forces Tribunal should be heard by the High Court.

3. The Armed Forces Tribunal (AFT for short) was constituted under the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the Act), enacted with the purpose of constituting an AFT to adjudicate disputes and complaints of personnel belonging to the Armed Forces. Chapter III of the Act, deals with the jurisdiction, power and authority of the Tribunal. Section 14(1) of the Act which is relevant reads as follows:-

> "14. Jurisdiction, powers and authority in service matters.
>
> (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to all service matters."

4. Section 15 provides that the Tribunal shall exercise jurisdiction, power and authority in relation to an appeal against any order, decision, finding or sentence passed by a court martial.

5. Section 34 of the Act reads as follows:-

> "34. Transfer of pending cases.—(1) Every suit, or other proceeding pending before any court including a High Court or other authority immediately before the date of establishment of the Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based, is such that it would have been within the jurisdiction of the Tribunal, if it had arisen after such establishment within the jurisdiction of such Tribunal, stand transferred on that date to such Tribunal.
>
> (2) Where any suit, or other proceeding stands transferred from any court including a High Court or other authority to the Tribunal under sub-section (1),—
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> (a)the court or other authority shall, as soon as may be, after such transfer, forward the records of such suit, or other proceeding to the Tribunal;
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> (b) the Tribunal may, on receipt of such records, proceed to deal with such suit, or other proceeding, so far as may be, in the same manner as in the case of an application made under subsection (2) of section 14, from the stage which was reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit."

6. A Division Bench of the Allahabad High Court in *Union of India and others vs. Ram Baran*[1] held that the phrase 'other proceedings' in Section 34 of the Act would include all appeals including Letters Patent Appeals (hereinafter referred to as LPAs). It was held that since the Tribunal is a substitute of the High Court, the Tribunal could decide an appeal against the order of a single judge which was required to be transferred to the Tribunal.

7. We may point out that after the enactment of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962 Letters Patents are no longer applicable to the High Court of Allahabad. However, Special Appeals are provided against the judgment of a single judge to a Division Bench. The High Court held that the term 'other proceedings' include all such intra-court appeals.

8. This view was doubted by another Division Bench of the Allahabad High Court in W Ex *Sigman Nand Kishore Sahoo vs. Chief of Army Staff*[2]. Thereafter, the matter was referred to a Full Bench in the said case and the Full Bench by a majority held as follows:-
"In view of the foregoing discussions, we are of the considered opinion that the special appeal filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against the judgment and order of the learned Single Judge pending adjudication immediately prior to the constitution of the Armed Forces Tribunal is not liable to be transferred to the Tribunal and the decision rendered by the division Bench in Ram Baran (Supra) does not lay down the correct law."

9. Ms. Preetika Dwivedi, learned counsel for the appellant submits that the view of the Allahabad High Court is incorrect. She contends that it has been held by this Court in a

number of decisions including *Union of India And Others vs. Major General Shri Kant Sharma And Another*[3] that the AFT exercises all the powers of the High Court. She submits that it virtually substitutes the High Court in so far as matters governed by the Act are concerned, and as such an LPA or Special Appeal against the judgment of a single judge is also required to be transferred to the AFT.

10. We are not at all in agreement with this submission. Section 14(1) of the Act quoted hereinabove clearly provides that the AFT will exercise powers of all courts except the Supreme Court or High Court exercising jurisdiction under Article 226 and 227 of the Constitution of India. Section 34 is very carefully worded. It states that 'every suit', or 'other proceedings' pending before any court including a High Court immediately before the establishment of the Tribunal shall stand transferred on that day to the Tribunal. The Legislature has clearly not vested the AFT with the power and jurisdiction of the High Court to be exercised under Article 226 of the Constitution. We are not going into the question as to whether the Tribunal is amenable to the supervisory jurisdiction of a High Court under Article 227 of the Constitution but there can be no manner of doubt that the High Court can exercise its writ jurisdiction even in respect of orders passed by the AFT. True it is, that since an appeal lies to the Supreme Court against an order of the AFT, the High Court may not exercise their extraordinary writ jurisdiction because there is an efficacious alternative remedy available but that does not mean that the jurisdiction of the High Court is taken away. In a given circumstance, the High Court may and can exercise its extraordinary writ jurisdiction even against the orders of the High Court.

11. While holding so, we place reliance upon a judgment of a Constitution Bench of this Court in *L. Chandra Kumar vs. Union of India & Ors*[4]. This court clearly held that judicial review is a part of the basic structure of the Constitution and the power of judicial review vested in the High Courts and the Supreme Court cannot be taken away. The relevant portion of the judgment reads as follows:-

> "78. .An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their

duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided."

The aforesaid observations in L. Chandra Kumar (supra) leave no manner of doubt that the power of judicial review vests with the High Court even with regard to orders passed by the AFT and this power is part of the basic structure of the Constitution.

12. In L. Chandra Kumar (supra) this Court while dealing with the issue of exclusion of the power of judicial review held that such power cannot be excluded by legislation or constitutional amendment. The relevant portion of the judgment reads as follows:-

"90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under

Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In R.K. Jain case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a

Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

13. Reliance placed by Ms. Dwivedi on the judgment of this Court in Major General Shri Kant Sharma (supra) is entirely misplaced. The issue before this Court in this case was whether the High Court was justified in entertaining writ petitions against the orders of the AFT. This is a judgment by two judges and obviously it cannot overrule the judgment of the Constitution Bench in L. Chandra Kumar (supra). The Division Bench, after referring to various judgments including the judgment in L. Chandra Kumar (supra), summarised its findings in para 36 as follows:-

"36. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including the Armed Forces Tribunal Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance."

What this Court held was that though the power of the High Court under Article 226 of the Constitution is a basic essential feature of the Constitution which cannot be taken away, the High Court should not entertain a petition under Article 226 of the Constitution if any other effective alternative remedy is available to the aggrieved person or the statute, under which the action complained of has been taken, itself contains a maxim for redressal of grievance. We have our doubt, with regard to the correctness of the directions (iii) & (iv) of the judgment, since in our opinion it runs counter to the judgment rendered by the Constitution Bench.

14. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available[5]. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by the AFT. One must also remember that the alternative remedy must be efficacious and in case of a Non-Commissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is not the law laid down in L. Chandra Kumar (supra).

15. Ms. Dwivedi, placed reliance on the observations made in Major General Shri Kant Sharma (supra) that, "jurisdiction of the Tribunal constituted under the Armed Forces Tribunal Act is in substitution of the jurisdiction of the civil court and the High Court so far as it relates to suit relating to condition of service of the persons", subject to the provisions of the Act. It is clear that the intention of the court was not to hold that the tribunal is a substitute of the High Court in so far as its writ jurisdiction is concerned because that is specifically excluded under Section 14(1) of the Act. We cannot read this one sentence out of context. It is true that proceedings on the original side even in exercise of writ jurisdiction are to be transferred to the tribunal for decision by the AFT because the original jurisdiction now vests with the AFT. This however, does not mean that the AFT can exercise all the powers of the High Court.

16. In *Rojer Mathew vs. South Indian Bank Ltd. & Ors*[6]. the Constitution Bench of this Court, of which one of us (Deepak Gupta, J. was a member), clearly held that though these tribunals may be manned by retired judges of High Courts and Supreme Court, including those established under Articles 323-A and 323-B of the Constitution, they cannot seek equivalence with the High Court or the Supreme Court. The following observations are relevant:-

> "194. Furthermore, that even though manned by retired judges of High Courts and the Supreme Court, such Tribunals established under Article 323-A and 323- B of the Constitution cannot seek equivalence with High Court or the Supreme Court. Once a judge of a High Court or Supreme Court has retired and he / she no longer enjoys the Constitutional status, the statutory position occupied by him / her cannot be equated with the previous position as a High Court or a Supreme Court judge. The rank, dignity and position of Constitutional judges is hence sui generis and arise not merely by their position in the Warrant of Precedence or the salary and perquisites they draw, but as a result of the Constitutional trust accorded in them. Indiscriminate accordance of status of such Constitutional judges on Tribunal members and presiding officers will do violence to the very Constitutional Scheme."

17. The contention of the learned counsel for the appellant, if accepted, would strike at the very root of judicial independence and make the High Court subordinate to the AFT. This can never be the intention of the Legislature. The High Court is a Constitutional Court constituted under Article 214 of the Constitution and are courts of record within the meaning of Article 215. It is obvious that the order of the High Court cannot be challenged before any other forum except the Supreme Court. The provision of intra-court appeal whether by way of Letters Patents or special enactment is a system that provides for correction of judgments within the High Courts where a judgment rendered by a single judge may be subject to challenge before a Division Bench. This appeal to the Division Bench does not lie in all cases and must be provided for either under the Letters Patent or any other special enactment. Even where such appeal lies the appeal is heard by two or more judges of the High Court. We cannot envisage a situation where an appeal against the order of a sitting judge of the High Court is heard by a Tribunal comprising of one retired

judge and one retired Armed Forces official. Therefore, we reject the contention that an intra court appeal from the judgment of a single judge of the High Court to a Division Bench pending in the High Court is required to be transferred under Section 34 of the Act.

18. As far as the merits of the case are concerned, the undisputed fact is that the appellant could not clear the aptitude test. It has been urged that even if he could not clear the aptitude test, he should have been considered for appointment in some other post before being discharged from service. It is also urged that in the order of discharge it is not indicated that the case of the appellant was considered for such alternative service.

19. In our view, it is not necessary to indicate in the order of discharge whether such consideration took place or not. From the records of the case, we find that before discharge, the name of the appellant was considered for two categories but unfortunately the appellant could not meet the height criteria for appointment to either of the posts. Thus, this clearly shows that his case was considered as per the extant policy but he was not fit for appointment. In this view of the matter, we find no merit in the appeal, and hence it is dismissed. Pending application(s) if any, stand(s) disposed of.

Judgment Referred.

[1]*SLP.No. 445 of 2005*
[2]*(2012)1 ESC 0386 (All)*
[3]*(2015) 6 SCC 0773*
[4]*(1997) 3 SCC 0261*
[5]*Union of India vs. T.R. Varma AIR 1957 SC 0882*
6(2019) 15 SCALE 0615