

(2021) 05 DEL CK 0208

In the Delhi High Court

Case No : Civil Writ Petition No. 5495 Of 2021, Civil Miscellaneous No. 17036 Of 2021

Col Anshuman

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 27-05-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Army Rules, 1954 — Rule 14

Armed Forces Tribunal Act, 2007 — Section 2(b), 3(o), 3(o)(i), 3(o)(ii), 3(o)(iii), 3(o)(iv), 14, 14(1), 14(2)

Army Act, 1950 — Section 19

Citation : (2021) 05 DEL CK 0208

Hon'ble Judges : Rajiv Sahai Endlaw, J; Amit Bansal, J

Bench : Division Bench

Advocate : Rajiv Manglik, Sayan Ray, Ajay Digpaul, Nidhi Mohan Parashar, Kamal Digpaul, Vikrant Kumar

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J

1. On 25th May, 2021, when this petition came up first before us, the following order was passed:-

3. The petitioner, a Colonel in the respondents Indian Army, has instituted this petition, (i) impugning the continuance of his attachment, initially ordered on 26th November, 2019

purportedly on account of pendency of disciplinary proceedings against him, in spite of the respondents Indian Army themselves on 3rd March, 2020 certifying that no disciplinary

proceedings were in progress against the petitioner; and, (ii) seeking a mandamus to the respondents Indian Army to initiate a formal Court of Inquiry

to investigate the allegations made

by the petitioner in his complaint dated 13th February, 2019, against the respondent No.6 Brig. Sandeep Kumar.

4. Finding the order of attachment to be a part of the disciplinary action, we have at the outset only enquired from the counsel for the petitioner, whether not the jurisdiction to entertain

the present lis would be of Armed Forces Tribunal (AFT) under the Armed Forces Tribunal Act, 2007.

5. The counsel for the petitioner states that attachment is akin to transfers/postings, which under Section 3(o) of the Act are exempted from the jurisdiction of the AFT and thus this Court

has jurisdiction under Article 226 of the Constitution of India.

6. We are unable to agree. Section 3(o) of the Act, when exempts transfers and postings including the change of place or unit on posting, appears to be talking of only transfers/postings in

the routine manner and not an attachment, which is in the wake of disciplinary proceedings.

7. The counsel for the petitioner then contends that a Full Bench of AFT has held that since attachment is akin to postings/transfers, AFT has no jurisdiction.

8. The counsel for the respondents appearing on advance notice states that Supreme Court, in Union of India Vs. Lieutenant Colonel Dharamvir Singh (2019) 15 SCC 793, has held that

disputes as to attachment are within the jurisdiction of AFT.

9. The counsel for the petitioner then contends that since attachment to another unit in the present case is being continued in spite of no disciplinary proceedings pending against the

petitioner, the case would not be covered by the dicta in Lieutenant Colonel Dharamvir Singh supra aforesaid.

10. Both the counsels are requested to e-mail to the Court Master, judgments relied upon by them.

11. The counsel for the respondents states that the petitioner has not revealed that a notice dated 7th April, 2021 has been served on him on 21st May, 2021, to show cause why his services

should not be terminated.

12. A copy of the said Show Cause Notice be also e-mailed to the Court Master.

13. The counsel for the petitioner states that though the Show Cause Notice

bears an earlier date but was served on the petitioner after the advance copy of this petition had been delivered

to the counsel for the respondents and has been antedated to make this petition infructuous.

14. The counsel for the respondents states that since the petitioner was on leave, the notice could not be served earlier.

15. List on 27th May, 2021.â??

2. The counsel for the respondents since then has filed a copy of the judgment of the Supreme Court in Lieutenant Colonel Dharamvir Singh supra, a copy of the order dated 15th March, 2021 of Armed

Forces Tribunal (AFT), Principal Bench, New Delhi in O.A. No. 1626/2020 titled Lt. Col. P. Vasudeva Vs. Union of India, where the AFT entertained the challenge with respect to an attachment order

and a copy of the show cause notice dated 7th April, 2021 issued to the petitioner along with acknowledgment receipt thereof signed by the petitioner on 21st May, 2021.

3. We have today yet again enquired from the counsel for the petitioner, whether the petitioner, in view of the dicta of the Supreme Court in Lieutenant Colonel Dharamvir Singh supra, is desirous of

approaching AFT rather than pressing this petition.

4. The counsel for the petitioner states that he is pressing this petition. However, before recording his contentions, it is deemed apposite to reproduce herein below the relevant contents of the show

cause notice aforesaid issued to the petitioner, as under :-

â??2. AND WHEREAS, the aforesaid Court of Inquiry, on conclusion, found that you, being an Army Officer, behaved in a manner unbecoming the position and the character expected of

you as an officer and found you blameworthy for the following misconducts :-

(a) For having an extra-marital relationship with Late Mrs Rohna Girish, wife of Lieutenant Colonel Girish Parthan, Sena Medal then Second-in- Command of 12 GUARDS.

(b) On 16 October 2018, you were seen coming out from the rear bathroom door of the second bathroom in the residence of Lieutenant Colonel Girish Parthan, Sena Medal (Second-in-

Command) of 12 GUARDS when he was not present in his house.

(c) You visited the residence of Lieutenant Colonel Girish Parthan, Sena Medal

(Second-in-Command) of 12 GUARDS from the rear bathroom door at 2315 hours on 22 October 2018 and

came out at 0515 hours on 23 October 2018 from the same bathroom door when Lieutenant Colonel Girish Parthan, Sena medal (Second-in-Command) of 12 GUARDS was not present in

his house.

(d) You conducted yourself in a very profane manner with the unit ladies which was beyond acceptable social norms, during social interactions in the Battalion.

(e) You being the Commanding Officer of the sole unit at Pokhran and with the additional responsibility of Station Commander, proclivity in your conduct towards the wife of Lieutenant

Colonel Girish Parthan, Sena Medal (Second-in-Command) of 12 GUARDS, led to creation of an environment where the moral values of Officers as a class were with distrust by the men

under your command.

(f) You on 28 August 2018, visited the house of IC-78324X Captain (now Major) Kamlesh Mani in his absence to see Mrs Priyanka Mani (wife of the officer) accompanied by Late Mrs

Roshana Girish. You entered the bedroom wherein you placed your hand on the thigh of the lady which is not befitting your rank and expected conduct.

(g) You during Holi celebrations on 02 March 2018 under the garb of playing Holi inappropriately held the hand of Mrs. Priyanka Mani and misbehaved with wives of other officers,

which was unbecoming of your rank and position as Commanding Officer of the Battalion.

3. AND WHEREAS, the facts of the case were placed before the Chief of the Army Staff, who is satisfied that your trial by Court Martial is inexpedient and is of the opinion that due to the

aforesaid misconduct on your part, your retention in service is not desirable.

4. NOW THEREFORE, in accordance with the directions of the Chief of the Army Staff, you are hereby informed and on his behalf called upon to submit your defence, if any, in writing as

to why your services should not be terminated under the provisions of Army Act Section 19 read with Army Rule 14.â??

5. The counsel for the petitioner has contended that, (i) the proceedings against the petitioner, were without any of the women involved or their husbands making any complaint against the petitioner; (ii)

all this is happening because the respondent no. 6 Brig. Sandeep Kumar is inimical to the petitioner; (iii) the Court of Inquiry (COI) was ordered against the petitioner on account of e-media complaints;

(iv) no investigation whatsoever has been conducted; (v) the respondent no. 6, occupying the position of Deputy Judge Advocate General (DJAG), is manipulating the proceedings; (vi) in the COI held

also, no evidence whatsoever against the petitioner came on record; (vii) as per para 12 of the letter dated 26th March, 2015 of Military Secretary's Branch, Integrated Headquarter of Ministry of

Defence (Army) to all the Commands and titled "Attachment of Officers", the attachment cannot be for more than 180 days; (viii) however in violation thereof, the attachment against the petitioner

has been continued for 1½ years; (ix) if the petitioner's complaint against the respondent no. 6 is investigated, the true facts will come before this Court; (x) in spite of the order in Lieutenant Colonel

Dharamvir Singh supra, this Court has jurisdiction because the attachment against the petitioner is continuing without there being any disciplinary proceedings against the petitioner; (xi) the show cause

notice now issued to the petitioner is also an administrative action and not a disciplinary proceeding; and, (xii) the petitioner should be sent back to his unit and cannot be retained at a different place by

way of attachment and has been sitting idle for the last four years.

6. The counsel for the respondents has contended that, (i) the counsel for the petitioner is wrong in stating that there is no evidence whatsoever before the COI; (ii) it is on the basis of the evidence

before the COI that the show cause notice aforesaid has been issued to the petitioner; (iii) as far as the contention of the petitioner, of the respondent no. 6 occupying the position of DJAG manipulating

the affairs and/or proceedings against the petitioner is concerned, as evident from the show cause notice itself, it has been issued under directions of the Chief of the Army Staff and not merely at the

level of DJAG; (iv) the petitioner, instead of responding to the show cause notice, is pursuing this petition; and, (v) the jurisdiction for the grievance of the petitioner with respect to inaction on his

complaint against the respondent no. 6, is also of AFT.

7. The counsel for the petitioner, in rejoinder has contended that the petitioner can approach the AFT only if an order is passed on his complaint against the respondent no. 6 and cannot approach AFT

for inaction on his complaint. It is further argued that it is only this Court which can issue a mandamus directing the respondents to investigate the complaint of the petitioner against the respondent no. 6

and AFT does not have any power to issue any such direction.

8. We have considered the aforesaid contentions and will first deal with the contention of the counsel for the petitioner, of AFT not having jurisdiction to grant the relief of directing the respondents to

take action, if found to be required, on the complaint of the petitioner against the respondent no. 6.

9. Section 14 of the Armed Forces Tribunal Act, 2007 (Act) vests in the AFT, all the jurisdiction, powers and authority exercisable immediately prior to setting up thereof, by all courts in relation to all

service matters. Though sub-Section (2) thereof provides that "Subject to other provisions of this Act, a person aggrieved by an order pertaining to a service matter may make an application" but

sub-Section (3) thereof provides that "On receipt of an application relating to service matters, in Section 3(o) of the Act are defined as all matters relating to conditions of

service including the matters expressly specified in Section 3(o)(i), (ii) and (iii) of the Act; Section 3(o)(iv) of the Act vests jurisdiction in the AFT in respect of any other matter, whatsoever in

relation to the persons subject to Army Act, 1950. It is thus clear that the jurisdiction of the AFT extends over all service matters except those excluded expressly by Section 3(o) of the Act. It is not the

case of the counsel for the petitioner that the matter of inaction on the complaint of the petitioner against the respondent no. 6, falls in the excepted category.

10. The petitioner, instead of preferring this petition, could have very well filed a suit before a Civil Court for a direction to the respondents to take action against the respondent no. 6, on the complaint of

the petitioner. If the Civil Court would have had jurisdiction to entertain the same, per Section 14 of the Act, AFT also would have jurisdiction. Though Section 14(2) of the Act enables a person subject

to the Army Act to approach AFT against an order pertaining to any service matter but sub-Section (3) permits approaching AFT relating to any service matter and which would include approaching the

AFT for a direction to the respondents to do what the respondents, under the law are required to do. Thus, if the petitioner is entitled in law to have his complaint against respondent no.6 investigated, the

jurisdiction with respect thereto vests in AFT.

11. Merely because the jurisdiction of this Court under Article 226 of the Constitution of India has been expressly saved by Section 14(1) of the Act, would not entitle this Court to keep on entertaining

petitions under Article 226 of the Constitution of India in service matters notwithstanding the creation of a specialist Tribunal by the Act. Though at one time in Union of India Vs. Major General Shri

Kant Sharma (2015) 6 SCC 773, a view was taken that Article 226 of the Constitution of India cannot be invoked but the same has been diluted to a little extent vide Rojer Mathew Vs. South Indian

Bank Limited (2020) 6 SCC 1; however Rojer Mathew supra also does not open the gates of the High Court under Article 226 of the Constitution of India for all matters falling within the jurisdiction of

AFT, as is the contention of the counsel for the petitioner.

12. We are thus of the opinion that the remedy, if any of the petitioner, for inaction on his complaint against the respondent no. 6, lies before the AFT and no case for this Court to entertain this petition

for the said relief, is made out.

13. As far as the other relief claimed by the petitioner of impugning continuation of his attachment is concerned, the counsel for the petitioner contends that Lieutenant Colonel Dharamvir Singh supra is

not applicable since in Lieutenant Colonel Dharamvir Singh supra, disciplinary proceedings were admittedly pending, in the present case they are not.

14. However the fact of the matter remains that the order is of attachment and which, under Army Instruction 30/1986 can be made in the case of a disciplinary proceeding. In view of the categorical

position in law laid down in Lieutenant Colonel Dharamvir Singh supra, we are of the view that it is not open for this Court to go behind the order of attachment and to see whether the same has been

properly passed.

15. The counsel for the petitioner then contends that the Full Bench of AFT, in order dated 10th May, 2019 in OA No.965/2017 titled Major General M.S. Jaswal Vs. Union of India, after considering

Lieutenant Colonel Dharamvir Singh supra has held that AFT, in the matter of attachment, has no jurisdiction. It is argued that the petitioner thus cannot be relegated to AFT.

16. We have perused the order of AFT in Major General M.S. Jaswal supra and

indeed find AFT to have, after considering Lieutenant Colonel Dharmavir Singh supra held:

“The attachment order issued under Army Instruction 30/1986 and Army Order 7/2000 will fall under the exception provided under Section 3(o)(ii) of the Armed Forces Tribunal

Act, 2007, so as to exclude it as a “service matter”, unless very compelling extraordinary or exceptional case is carved out on facts for indulgence of the Tribunal”.

We are perplexed, that if according to AFT, it does not have jurisdiction to entertain a challenge to an attachment order, how “very compelling extraordinary or exceptional case” would vest

jurisdiction in the AFT to entertain a challenge qua attachment order also. However the need to observe anything else with respect to Major General M.S. Jaswal supra is not felt since the said order is

not under challenge before us. Suffice it is to state that after the said order also, AFT in Lt. Col. P. Vasudeva supra, albeit without referring to Major General M.S. Jaswal supra, entertained a challenge

to the attachment order though did not on merits find in favour of the applicant therein. Moreover in Lieutenant Colonel Dharamvir Singh supra, Supreme Court set aside the interim orders of the High

Court in a writ petition impugning the attachment order and granting stay thereof, reasoning that (i) the High Court erred in entering upon an area which relates to the exercise of the disciplinary

jurisdiction of the Army under the Army Act; (ii) an officer subject to the discipline of the Army Act must abide by the regulations, if the disciplinary jurisdiction is sought to be invoked; (iii) the High

Court could not have taken upon itself the task pre-empting the exercise of that jurisdiction and taking over the essential function of determining whether or not recourse to the disciplinary jurisdiction

was warranted; (iv) having regard to the definition of expression “service matters” in Section 3(o) and the jurisdiction of the AFT under Section 2(b), writ petition ought not to have been entertained

by the High Court; and, (v) such preempted judicial strides are unwarranted.

17. We, even otherwise, after perusing the contents aforesaid of the show cause notice, are of the view that reverting the petitioner to his unit is even otherwise not called for. The reasons given in the

show cause notice are grave and this Court, in exercise of jurisdiction under Article 226 of the Constitution of India, would not grant a relief which may

