
(2018) 11 DEL CK 0076

In the Delhi High Court

Case No : Civil Writ Petition No.10830 Of 2018 & Civil Miscellaneous.APPL
42260 Of 2018

Hav. Sham Dass

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 01-11-2018

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2018) 11 DEL CK 0076

Hon'ble Judges : G.S. Sistani, J;Jyoti Singh, J

Bench : Division Bench

Advocate : Shree Prakash Sinha, Anand Kumar, Rakesh Mishra, Akshit Anand,
Ravi Prakash, Brajesh Kumar, Farman Ali, Varun Pathak

Final Decision : Disposed Off

Judgement

G.S. Sistani, J

1. This is a petition under Article 226 of the Constitution of India filed by the petitioner seeking the following prayers:

â??I. Declare Rule 147A of the Army Rules, 1954 inconsistent with the provisions of Army Act, 1950 and allied rules as well as violative of Article

14 and 21 of the Constitution of India, and/or

II. Pass such other or further order/orders, as this Court may deem fit and proper in the facts and circumstances of this case.â??

2. Mr. Ravi Prakash, learned counsel for the respondent has raised a preliminary objection with regard to the maintainability of the present petition.

Mr. Prakash submits that the Armed Forces Tribunal (AFT) would have the jurisdiction to decide the issue so raised in the present petition.

3. We find force in the submission made by Mr. Ravi Prakash, the learned counsel

for the respondent. In the case of *L.Chandra Kumar v. Union of India and Others*, reported at (1997) 3 SCC 261, in para 99 it was held as under:

¶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.¶

4. Similar view was expressed by the Supreme Court of India in the case of *Bharat Sanchar Nigam Limited v. Telecom Regulatory Authority of India and Others*, reported at (2014) 3 SCC 222. In para 22, it was held as under:

¶122. The larger Bench then dealt with the scope of the power of judicial review vested in the Supreme Court and the High Courts and proceeded to observe: (*L. Chandra Kumar case* [*L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] , SCC pp. 308-309, para 93)

¶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.â??

5. In view thereof, the petition is disposed of with liberty to the petitioner to approach the Armed Forces Tribunal (AFT), if so advised.

6. At this stage, Mr. Sinha submits that the matter be transferred to the AFT. We direct the Registry to transfer this matter to the Armed Forces Tribunal.

7. Parties are directed to appear before the Armed Forces Tribunal on 20.11.2018.

8. The petition stands disposed of in above terms.

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9. The application also stands dismissed in view of the orders passed in the present petition.