

(2013) 03 DEL CK 0125

In the Delhi High Court

Case No : Writ Petition (C) No. 1755 of 2013 and CM No. 3355 of 2013

Maj Saurabh Saharan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-03-2013

Acts Referred:

Armed Forces Tribunals Act, 2007 — Section 14, 15, 15(1), 15(3), 21
Army Act, 1950 — Section 153, 164, 164(2), 192
Constitution of India, 1950 — Article 226

Citation : (2013) 03 DEL CK 0125

Hon'ble Judges : Sudershan Kumar Misra, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Jyoti Singh with Mr. Rajiv Manglik, for the Appellant; Ravinder Aggarwal and Mr. Amit Yadav, for the Respondent

Judgement

S. Ravindra Bhat, J.—Notice.

Mr. Ravinder Aggarwal accepts notice.

With the consent of the counsel for the parties the petition is heard finally for disposal.

The petitioner is aggrieved by an order of the Armed Forces Tribunal (AFT) whereby his application u/s 15(3) of the Armed Forces Tribunal Act, 2007 being OA No. 80/2013 was dismissed.

2. Briefly, the facts are that the petitioner was serving as a Major in the Army and was commissioned in 2000. Whilst he was posted to 61 Cavalry which was primarily associated with Polo, he was in touch with foreign nationals and other sports persons. In respect of certain allegations levelled against him by a foreign national, Ms. Nancey Chapman, a US citizen, court martial proceedings were initiated; it was alleged that the petitioner had indulged in illegalities and violation of Army Rule 180. In the petitioner's case, apparently the recording of evidence was commenced from 2.9.2011 and it culminated in his conviction on

12.2.2013, whereby he was held guilty of four charges. The sentence of the court martial directed that he be cashiered from service, along with rigorous imprisonment for three years. It is a matter of record that the petitioner has been in military custody since 16.4.2012 alleging a series of irregularities and illegalities in the conduct of court martial proceedings. The petitioner approached the AFT by filing OA No. 80/2013. That application was rejected; the Tribunal observed as follows:

Heard learned counsel for the petitioner. The petition at present is pre-mature because the sentence and findings have not been confirmed by the confirming authority u/s. 153 of the Army Act. Therefore, we cannot entertain the appeal at this stage. However, confirming authority is directed to take a decision whether to confirm the sentence and findings or not within four weeks. The learned counsel for petitioner submits that she will not file any pre-confirmation petition. Therefore, there is no impediment for the confirming authority to take a decision within four weeks. The petition is accordingly disposed off.

3. It is urged by learned senior counsel for the petitioner that the jurisdiction u/s 15(3) has not, in any manner, been limited by Section 153 of the Army Act. She contended that the Full Bench of the AFT in its previous order in OA No. 471/2010 had held that u/s 15, the Tribunal's jurisdiction is not in any manner constrained by the provisions of the Army Act (Section 164), and that being an independent adjudicatory mechanism, the Tribunal can go into the questions of legality raised before it regardless of the outcome of statutory applications or petitions.

4. Counsel contended that similarly, whether confirmation of sentence is effected or not would be an irrelevant consideration with regard to the nature of relief sought in the present case. It was submitted that what was questioned before the Tribunal was the legality of the proceedings and not the legality of the sentence. Counsel submitted that what Section 153 mandated was that every sentence handed down by a court martial needs confirmation. It did not in any manner impede the jurisdiction of the Tribunal, which was more or less plenary having regard to the phraseology adopted in Sections 15(1) and 15(3) of the 2007 Act.

5. Learned counsel for the respondents submitted, at the outset, that the Tribunal's power to grant bail found in Section 15(3) cannot be limited by operation of Section 153 of the Army Act. The respondent, however, contested the proposition that the Tribunal can proceed to go into the legality of the court martial proceedings without confirmation as required u/s 153 of the Army Act. It was submitted in this regard that mandate and purpose of Section 153 is to afford the Army authorities the opportunity of going through the entire record and choosing to confirm it. Till the time that such action is taken, the sentence, virtually, is in operation, and an individual can be in military custody by virtue of para 392(I) of the Regulation for the Army Revised (1987) Edition framed u/s 192 of the Army Act.

6. At the outset, it would be necessary to notice the relevant provisions. Section 15 of the Armed Forces Tribunal Act, 2007 reads as follow:

15. Jurisdiction, powers and authority in matters of appeal against court-martial.-

(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 under this Act in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or incidental thereto.

(2) Any person aggrieved by an order, decision, finding or sentence passed by a court martial may prefer an appeal in such form, manner and within such time as may be prescribed.

(3) The Tribunal shall have power to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary:

Provided that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

7. Section 153 of the Army Act states that:

153. Finding and sentence not valid, unless confirmed. No finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided by this Act.

8. The order dated 19.10.2010 of the AFT in Ex.-Hav. Parmeshwar Ram vs. Union of India & Ors. in OA No. 471 of 2010 had noticed that by virtue of Section 39 of the 2007 Act, primacy was accorded to its provisions by a non-obstante clause. Applying that logic and having regard to the decisions of the Supreme Court dealing with the interpretations of statute, especially in cases where two special statutes operated in somewhat similar fields, the AFT was of the opinion that Section 164 -which was in question in that case and which provides for statutory remedy by way of an appeal to the Central Government, will not preclude the Tribunal from the exercise of judicial power u/s 15, even pending the consideration of the statutory recourse u/s 164 by the litigant. The relevant observations of the Tribunal in that regard are as follows:

38. There is no conflict between the two sections, Section 15 of the Act of 2007 and Section 164(2) of the Army Act. Both can survive if our perception is clear that Section 15 is the judicial power and Section 164 is an administrative power. Section 15 gives a judicial review of the administrative action. However, once a judicial power is already exercised and orders are passed by the authorities, then administrative remedy provided u/s. 164(2) automatically stand ousts. In this connection, one of the points which has been raised by the Jaipur bench is with reference of section 21 of the Act of 2007 i.e. exhaustion of the alternative

remedy under the Act. Section 21 uses the word "ordinarily", an application shall not be admitted unless it is satisfied that applicant had availed the remedy available to him under the Act i.e. Army Act, Navy Act or Air Force Act as the case may be. The expression ordinarily does not mean to prohibit the jurisdiction of the judicial remedy under the Tribunal. This is a rule of prudence that the party should first exhaust as far as possible administrative remedy but that does not touch the jurisdiction of the Tribunal to adjudicate the matter judicially. The judicial determination of administrative action always take precedence over the administrative action. This is cardinal principle of judicial system. Therefore, section 21 will not abrogate the power of the Tribunal to entertain appeal against the order of Court Martial. Even pendency of petition u/s. 164(2) of the Army Act will not prevent Tribunal to entertain appeal u/s. 15 of the Act of 2007 against order of Court Martial order.

39. Therefore, we hold that view taken by the AFT (Jaipur Bench) does not lay down a correct law and we hereby over rule the same. The three questions which have been referred to the Tribunal are answered as under:

(1) Section 15 will over ride section 164 of the Army Act and the Tribunal has full jurisdiction to entertain the appeal notwithstanding any petition filed by aggrieved party u/s. 164 of the Army Act, 1950. (2) The power u/s. 15 of the Tribunal is not dependent on the statutory representation u/s. 164(2) of the Army Act, 1950. It is independent adjudicatory power and appeal against the order passed by the Court Martial or any connected therewith will be maintainable.

(3) The pendency of the petition u/s 164 will not bar to exercise of power u/s. 15 of the Act. Once the judicial determination has taken place then it will be binding on the parties and thereafter no further interference by the Section 164 of the Army Act is permissible.

9. The terminology used in Section 15(1) makes it clear that the Tribunal shall exercise all jurisdiction, powers and authorities in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or incidental thereto. In other words regardless of whether u/s 153 of the Army Act has confirmation been done or not, the legality of the proceeding leading up to the imposition of a sentence, is open to question before the Tribunal; and latter would be within its rights to examine and pronounce upon it. Likewise, the power conferred u/s 15(3) is not constrained by any consideration of pendency of statutory remedies or procedures like Section 153 and 164 of the Army Act. In this view of the matter, this Court has no doubt that the Tribunal possesses the jurisdiction to decide upon the legality of the proceedings and procedure adopted by the court martial, irrespective of whether or not confirmation had taken place. Likewise, it should have, in the opinion of this Court, at least in this case, examined the merits of the application for bail, having regard to the fact that the Petitioner had remained in custody for about 340 days.

10. While on the subject the court is mindful of the circumstance that the petitioner in this case is aggrieved of procedural violations, which ordinarily would have been open to examination in proceedings under Article 226 of the Constitution of India.

11. The formation of AFT by virtue of the 2007 Act was for the creation of an efficacious, inexpensive and speedy dispute resolution mechanism. It was not the intention that some of the remedies such as questioning the legality of a Court proceeding during its pendency by seeking a writ or direction in the nature of certiorari, would get lost by the enactment of the said Act.

12. This conclusion is fortified by the expressed terminology used in Section 14 which has conferred upon the Tribunal, on and from the appointed date, all jurisdictional powers and authorities exercisable immediately before that date, by all courts.

13. It is, therefore, held that any order, decision, finding or sentence passed by a court martial or any other matter connected therewith or incidental thereto would be within the Tribunal's authority and jurisdiction. The Tribunal would be competent to pronounce upon the proceedings and procedure adopted by the court martial, pending confirmation of sentence.

14. Furthermore, there is no dispute about the fact that the petitioner has been in military custody for nearly a year. The Court has carefully considered the nature of allegations leveled against him and the punishment imposed. Para 392(I) of the Regulation of the Army, no doubt, empowers the army authorities to detain those convicted of offences by court martial or held guilty. Nevertheless, the confirmation proceedings u/s 153 have to be expeditious, keeping in mind the length of custody already undergone by the person convicted.

15. In these circumstances, the petitioner is directed to be released on bail, subject to his furnishing a surety in the sum of Rs. 50,000/-. The matter is remitted for consideration of prayer/relief Clause A by the Armed Forces Tribunal. The petitioner's bail granted by this order shall remain in force till the disposal of the said application by the Tribunal.

16. The bail bond shall be furnished to the satisfaction of the Registrar (Appellate) of this Court. For this purpose, the surety shall appear before the Registrar (Appellate) on 21.3.2013.

17. The writ petition is allowed in the above terms. Order dasti under signatures of Courtmaster.