

A.F.R.
Court No.1

Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 89 of 2016

Monday this the 6th day of February 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)

Hon'ble Air Marshal Anil Chopra, Member (A)

Mohd Irfan S/o Mohd Kamal, Education – B.A. (Economics, Urdu),
M.A. (Urdu), Occupation – unemployed; Religion – Islam;
Presently R/o H.No. 592 Gha/108, Rejeev Nagar, Ghosiyana,
Kharika, District - Lucknow

..... Petitioner

By Legal Practitioner - Mohd Shahan, Advocate

Versus

1. Union of India through Ministry of Defense, Government of India,
New Delhi.

2. Additional Directorate General of Recruiting, Adjutant General's
Branch, Integrated Headquarter of MoD (Army), West Block-III, RK Puram,
Pin – 900108 C/o 56 APO.

3. Headquarters Recruitment Office Lucknow, HQ Rtg Zone, 236
Mahatma Gandhi Road, Lucknow Cantt. – 226002.

4. Tasawur Rehman presently residing at Institute of National Integration,
Pune and permanently R/o H. No. 3/11/644, Lane No. 26, New Byji Pora,
Indira Nagar, Aurangabad, Maharashtra – 431001.

..... Respondents

By Legal Practitioner - Shri D.K. Pandey,
Learned Counsel for the Central Govt.

ORDER

“Hon’ble Mr. Justice D.P. Singh, Member (J)”

1. Initially, the petitioner had filed Writ Petition No. 6135 (S/S) of 2013 before the Hon’ble High Court of Judicature at Allahabad, sitting at Lucknow Bench, Lucknow, which has been transferred to this Tribunal in pursuance to power contained in Section 34 of Armed Forces Tribunal Act, 2007 by order dated 05.08.2016 for adjudication of controversy in question and now registered as T.A. No. 89 of 2016. The petitioner has claimed the reliefs as under:-

“(a) Issue a writ, order or direction in the nature of certiorari to quash the entire selection and the merit list of religious teacher (Maulvi) in the Army as Junior Commissioned Officer for RRT 71 Course.

(aa) To issue a writ, order or direction in the nature of certiorari to quash the appointment order of O.P. No. 4 after summoning the same from the opp. Parties.

(b) Issue a writ, order or direction in the nature of mandamus to O.P. No. 1 to 3 to take necessary steps to prepare the merit list of religious teacher (Maulvi) in the Army as Junior Commissioned Officer for RRT 71 Course according to norms as stated in the notification for recruitment of religious teacher in the Army as Junior Commissioned Officer for RRT 71 course and accordingly as per the said merit-list, pass necessary orders for petitioner’s said selection to be commissioned as Religious Teacher (Maulvi) in the rank of Naib Subedar.

(c) Issue any other order or direction which this Hon’ble Court may deem fit and necessary in the circumstances of this case.”

2. Being non selected for the post of Maulvi by the Recruitment Agency Respondent No 2/3, the petitioner preferred Writ Petition No. 6135 of 2013 in High Court of Judicature at Lucknow Bench, Lucknow which has been transferred to this Tribunal vide order dated 05.08.2016 under the power conferred by Section 34 of the AFT Act 2007 for adjudication of controversy in question and has been registered as T.A. No. 89 of 2016.

3. We have heard Mohd Shahan, learned counsel for the petitioner and Shri D.K. Pandey, learned counsel for the respondents, assisted by Major Soma John, Departmental Representative and perused the record.

4. The factual matrix of the case is that the petitioner's father is a tailor, stitches clothes for army men and his uncle runs a shop of medals, ribbons etc. being sold to Indian Army Officers in Lucknow. The petitioner has passed NCC 'B' examination certificate and also NCC 'C' examination certificate under the authority of Ministry of Defence, Govt. of India. Copy of NCC 'B' and 'C' certificates are attached with the petition as Annexure No. 1 and 2. The petitioner is a graduate and has been appeared repeatedly for recruitment in the Indian Army as Religious Teacher (Maulvi) as a Junior Commissioned Officer. He also completed his Post Graduation i.e. M.A. in Urdu. In pursuance to Notification issued by Respondent No. 2 and 3 for recruitment as Junior Commissioned Officer for RRT 71 Course, the petitioner sent duly filled form to O.P. No. 3 in Lucknow. On 24.02.2013, the petitioner appeared in two written examination paper I and II in Lucknow. The petitioner has also cleared the requisite medical examination. He appeared for interview on 27.04.2013 held in Roorkee and after declaration of result, he came to know that only O.P. No. 4 has been selected for the post of Religious Teacher (Maulvi) as Junior Commissioned Officer for RRT 71 Course. Subsequently, he is attending training at Institute of National Integration, Pune. However, since the petitioner was not called to attend the training being unsuccessful candidate, he moved an application under RTI Act 2005, in response to which, he was informed vide letter dated 13.06.2013 (Annexure No. 7) that only one candidate has qualified the test i.e. O.P. No. 4.

5. On query made through RTI Act 2005, petitioner was informed that recruitment is carried out in accordance with notification issued for each religious teacher's course. A copy of which has been filed as Annexure No. 8 to Writ Petition.

6. It has been submitted by learned counsel for the petitioner that merit list was wrongly prepared and the marks of paper II examination were not added while preparing final list of selected candidates. It has been further submitted by learned counsel for the petitioner that Respondent No. 4 has been appointed as religious teacher in the rank of Naib Subedar against norms provided in the notification (supra) which is in contravention of Articles 14 and 21 of the Constitution of India.

7. In response to argument advanced by learned counsel for the petitioner, a preliminary objection has been raised by learned counsel for the respondents that present T.A. is not maintainable in Armed Forces Tribunal, Regional Bench, Lucknow, hence it be returned back to the High Court for adjudication of dispute in question on merit. Our attention has been invited by learned counsel for the respondents regarding the non maintainability of the Writ Petition at High Court, Lucknow Bench, Lucknow, which has been returned by the High Court vide order dated 05.08.2016. High Court has not gone through the AFT Act, 2007, by which Tribunal has been conferred jurisdiction to adjudicate the controversy at AFT, hence it shall be appropriate that question of jurisdiction / maintainability be decided first.

8. A perusal of copy of the notification filed with the present TA shows that it has been issued by the Indian Army. It appears that recruitment is done by Additional Directorate General of Recruiting, Adjutant General's Branch,

Integrated Headquarters of MoD (Army), New Delhi (O.P. No. 2). The power for recruitment at pre recruitment stage is exercised by recruitment board of the Indian Army. After recruitment, incumbent is sent for training and thereafter the candidate is attested as a member of the Indian Army. Till the incumbent is attested after completion of training, he/she shall not be regular member of the Indian Army. However, until he is attested the services of such person may be terminated by Army in view of decision by Hon'ble High Court, Allahabad in the case of **Union of India vs. Kapil Kumar** in Special Appeal No. 833 of 2015.

9. Now coming to second limb of the dispute of maintainability as to whether controversy in question is within the preview of Armed Forces Tribunal? Section 2 of the Armed Forces Tribunal Act, 2007 provides that it shall be applied to all personnel subject to Army Act, Navy Act and Air Force Act. The Army comes in the picture after a person is selected and chosen for training and further processing. Section 2 of the Army Act 1950 defines the person subject to the Act. For convenience sake, Section 2 of the Army Act 1950 is reproduces as under:-

“Section 2

2. *Persons subject to this Act. – (1) The following persons shall be subject to this Act wherever they may be, namely :-*

- (a) officers, junior commissioned officers and warrant officers of the regular Army;*
- (b) persons enrolled under this Act;*
- (c) persons belonging to the Indian Reserve Forces;*
- (d) persons belonging to the Indian Supplementary Reserve Forces when called out for service or when carrying out the annual test;*
- (e) officers of the Territorial Army, when doing duty as such officers, and enrolled persons of the said Army when called out or embodied or attached to any regular forces, subject to such adaptations and modifications as may be made in the application of this Act to such*

persons under sub-section (1) of section 9 of the Territorial Army Act, 1948 (56 of 1948);

(f) persons holding commissions in the Army in India Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces;

(g) officers appointed to the Indian Regular Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces;

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(i) Persons not otherwise subject to military law who, on active service, in camp, on the march or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the regular Army.

(2) Every person subject to this Act under clauses (a) to ¹[(g)] or sub-section (1) shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service.”

10. Clause B of Section 2 (supra) provides that only those persons shall be subject to Army Act who are enrolled under the Act. Clause (i) of sub Section 3 defines the active service which is as under:-

“(i) “active service”, as applied to a person subject to this Act, means the time during which such person -

(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to or forms part of a force which is in military occupation of a foreign country;”

11. In the present case, admittedly, petitioner was not enrolled at the time when he preferred the Writ Petition in the High Court. Since the petitioner was not enrolled in the Army, he shall not be covered by the Army Act for adjudication of any controversy and benefits of the Armed Forces Tribunal Act,

2007 cannot be given to a person who is not subject to Army Act, Navy Act and Air Force Act. Section 4 of the Army Act, 1950 also provides that it shall be applied to certain forces of the Central Govt. Non selectee, who failed in examination by Recruitment Board, has no right to claim statutory benefits conferred by Army Act 1950. The procedure before enrolling officer under the Army Act is given in Section 13 and mode of enrolment and validity has been provided in Sections 14 and 15. After enrolment a person is attested in the Army under Section 16 of the Army Act. Mode of the attestation has been provided under Section 17. For convenience sake Sections 14, 15, 16 and 17 of Army Act, 1950 are reproduced as under:-

*“14. **Mode of enrolment.** - If, after complying with the provisions of section 13, the enrolling officer is satisfied that the person desirous of being enrolled fully understands the questions put to him and consents to the conditions of service, and if such officer perceives no impediment, he shall sign and shall also cause such person to sign the enrolment paper, and such person shall thereupon be deemed to be enrolled.*

*15. **Validity of enrolment.** – Every person who has for the space of three months been in receipt of pay as a person enrolled under this Act and been borne on the rolls of any corps or department shall be deemed to have been duly enrolled, and shall not be entitled to claim his discharge on the ground of any irregularity or illegality in his enrolment or on any other ground whatsoever; and if any person, in receipt of such pay and borne on the rolls as aforesaid, claims his discharge before the expiry of three months from his enrolment, no such irregularity or illegality or other ground shall, until he is discharged in pursuance of his claim, affect his position as an enrolled person under this Act or invalidate any proceeding, act or thing taken or done prior to his discharge.*

*16. **Persons to be attested.** – The following persons shall be attested, namely :-*

- (a) all persons enrolled as combatants;*
- (b) all persons selected to hold a non-commissioned or acting non-commissioned rank; and*

(c) *all other persons subject to this Act as may be prescribed by the Central Government.*

17. ***Mode of attestation.*** – (1) *When a person who is to be attested is reported fit for duty, or has completed the prescribed period of probation, an oath or affirmation shall be administered to him in the prescribed form by his commanding officer in front of this corps or such portion thereof or such members of his department as may be present, or by any other prescribed person.*

(2) *The form of oath or affirmation prescribed under this section shall contain a promise that the person to be attested will bear true allegiance to the Constitution of India as by law established, and that he will serve in the regular Army and go wherever he is ordered by land, sea or air, and that he will obey all commands of any officer set over him, even to the peril of his life.*

(3) *The fact of an enrolled person having taken the oath or affirmation directed by this section to be taken shall be entered on his enrolment paper, and authenticated by the signature of the officer administering the oath or affirmation.”*

12. In view of the above, since petitioner has not been enrolled under the Army Act in terms of Section 2 (b), he shall not be subject to Army Act. Under Section 2 of the Armed Forces Tribunal Act 2007, the provisions of AFT Act 2007 shall apply to all persons who are subject to Army Act, Navy Act and Air Force Act. Accordingly, provisions contained in Armed Forces Tribunal Act, 2007 does not seem to be applied to adjudicate the dispute in question. Attention has not been invited to any provisions of the Army Act which may indicate that a person who failed in the recruitment test is subject to Army Act or Rules framed therein.

13. According to Black’s Law Dictionary, the words subject matter, subject of a right, subject of an action, subject to liability, subject to open are defined as under:-

“Subject of an action. The right or property at issue in a lawsuit; the basis of a legal claim. Cf, object of an action under OBJECT (2) [Cases. Action]

Subject of a right. (1876) 1. The owner of a right; the person in whom a legal right is vested. 2. OBJECT OF A RIGHT.

Subject to liability, adj. (Of a person) susceptible to a lawsuit that would result in an adverse judgment, specif, having engaged in conduct that would make the actor liable for another’s injury because the actor’s conduct is the legal cause of the inquiry, the injured party having no disability for bringing the lawsuit. [Cases: Action 14.]

Subject to open. (1906) Denoting the future interest of a class of people when this class is subject to a possible increase or decrease in number.”

14. As per Advanced Law Lexicon Dictionary meaning of:-

“Subject of an action. The subject of an action is what is primarily understood as the subject matter of the action, and, as Mr. POMEROY says, finds its primary and modern application in equitable, rather than legal proceedings. The cause of action is the right claimed or wrong suffered by the plaintiff on the one hand, and the duty of the defendant on the other, and these appear by the facts of each separate case. The right or property at issue in a lawsuit; the basis of a legal claim.”

15. In the case of **Kapil Kumar** (supra), Hon’ble High Court of Allahabad with regard to jurisdiction in identical cases held as under :-

“Now, it is in this background that it would be necessary to analyze the statutory provisions. The jurisdiction of the Armed Forces Tribunal under Section 14 is "in relation to all service matters". The Tribunal has been vested with the jurisdiction, power and authority which, prior to the appointed date, was exercisable by all Courts, save and except for the Supreme Court and High Courts exercising jurisdiction under Articles 226 and 227. Before the Tribunal can exercise its jurisdiction under Section 14, the cause of action must relate to a service matter. The definition of the expression "service matters" in Section 3(o) basically comprehends four ingredients. The first part of the definition makes it clear that it is in relation to persons subject to the Army Act 1950, the Navy Act 1957 or the Air Force Act 1950. The second part defines the expression to mean all matters relating to conditions of their service. The expression "their service" clearly means the conditions of service of persons

subject to the Army Act 1950, the Navy Act 1957 and the Air Force Act 1950. Hence, it is only where a person is subject to one of these three legislations that a matter relating to the conditions of service would fall within the meaning of Section 3(o). The third element of Section 3(o) is the inclusive definition by virtue of which matters falling within the purview of sub-clauses (i), (ii), (iii) and (iv) are brought within the ambit of the definition. The last part of the definition excludes matters of the description therefrom the jurisdiction of the Tribunal. In order to be a service matter, the twin requirements to be fulfilled are that the dispute must arise in relation to persons subject to the Army Act 1950, the Navy Act 1957 or the Air Force Act 1950 and must fulfill the description of relating to the conditions of their service. Moreover, as we have noted, the inclusive part of the definition would bring in matters of the listed category falling in clauses (i) to (iv).

The expression "persons subject to" the Army Act 1950, the Air Force Act 1950 and the Navy Act 1957 are therefore terms which have a well defined connotation and meaning having due regard to the provisions of the three Acts to which we have made a reference above. The Armed Forces Tribunal Act 2007 specifies in Section 2 that its provisions shall apply to all persons who are subject to the Army Act 1950, the Air Force Act 1950 and the Navy Act 1957. Sub-section (2) enlarges the applicability of the Act to cover retired personnel subject to the aforesaid three Acts including their dependents, heirs and successors insofar as they relate to their service matters. When the provisions to which we have made a reference earlier are read together, it is evident that in order for the Tribunal to have jurisdiction under Section 14, the dispute must relate to a service matter as defined in Section 3(o) of the Act. The basic requirement of being a service matter is that it must arise in relation to persons who are subject to the Army Act 1950, the Air Force Act 1950 or the Navy Act 1957.

The fact that both the limbs of Section 3(o) would need to be fulfilled has been emphasized in a decision of the Supreme Court in Union of India vs Colonel G.S. Grewal³. In that case, the Supreme Court held that merely because a person was subject to the Army Act would not vest the Tribunal with jurisdiction unless the subject matter also constituted a service matter within the meaning of Section 3(o). Both requirements must exist. The Supreme Court observed as follows:

"We may point out that merely because the respondent is subject to the Army Act would not by itself be sufficient to conclude that the Tribunal has the

jurisdiction to deal with any case brought before it by such a person. It would depend upon the subject matter which is brought before the Tribunal and the Tribunal is also required to determine as to whether such a subject matter falls within the definition of 'Service Matters', as contained in Section 3(o) of the AFT Act." (emphasis supplied).

The above observations would indicate that before the Tribunal can exercise jurisdiction under Section 14, the person in relation to whom the dispute arises must be subject to one of the three legislations (the Army Act 1950, the Air Force Act 1950 or the Navy Act 1957) and the ingredients of the definition of the expression 'service matter' must also be fulfilled.

16. In view of the above, we are of the opinion that unless a person is enrolled in accordance with the procedure provided under Army Act 1950 and rules framed thereunder, the provisions contained in Armed Forces Tribunal Act, 2007 shall not be attracted in view of Section 2 (supra). Hence, petition filed by such person shall not be maintainable at this Tribunal.

17. With profound respect, we are of the view that Tribunal lacks jurisdiction to adjudicate the controversy in question and the petition is not maintainable at Armed Forces Tribunal, more so when finding has not been recorded by the High Court after taking into account the Army Act, AFT Act and provisions contained therein. Order dated 10.10.2013 passed by the High Court of Judicature at Allahabad, Lucknow Bench, lacks binding effect being per incuriam to statutory provisions (supra) and the Division Bench judgment (supra).

18. Accordingly, having no jurisdiction to adjudicate the controversy, we send the petition back to Senior Registrar, of the High Court, Lucknow Bench, Lucknow, for listing of the matter before appropriate Bench to decide the controversy in question. Of course, in case reasons assigned herein above are over ruled by the High Court, then being higher Forum, the Tribunal may

proceed to decide the controversy otherwise any decision given by the Tribunal with regard to controversy involved shall be exercise of power without jurisdiction and will be nullity in law.

19. Let the record be sent back to Senior Registrar, High Court of Judicature, Lucknow Bench, Lucknow within a week by the Registrar of this Tribunal.

(Air Marshal Anil Chopra)
Member (A)

Dated : February, 2017
Ukt/SB

(Justice D.P. Singh)
Member (J)