

A.F.R.
RESERVED
Court No. 1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Transferred Application No. 18 of 2017

Friday this the 14th day of December, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

639653 G Shesh Kant,
Elect/Fit. 4-BRD Air Force Kanpur
Son of Sri Ram Krishna
C/o Commanding Officer,
4-BRD Air Force Station Chakeri Kanpur
now discharged from service
R/o House No. 141 Twaripur Bagiya,
Kailash Nagar,
Post - Jajmau, Kanpur

..... Petitioner

Ld. Counsel for the Petitioner : **Shri O.P. Kushwaha**, Advocate

Versus

1. Union of India through Secretary Ministry Defence,
Government of India, New Delhi.
2. The Air Officer Commanding In Chief,
Head Quarter Maintenance Command,
Indian Air Force, Vayu Sena Nagar,
Nagpur – 440007.
3. The Air Officer,
Commanding Air Force Station Chakeri,
Kanpur Nagar.
4. The A.O.I.C., Air Force Record Office,
New Delhi – 110010.

..... Respondents

Ld. Counsel for the Respondents : **Shri R.C. Shukla**,
Central Govt Counsel.

ORDER

“Per Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”

1. Initially Writ Petition No. 55978 of 2000 was filed before the Hon’ble High Court of Judicature at Allahabad, which was dismissed for non prosecution on 28.03.2011 and thereafter it was restored to its original number and transferred to this Tribunal vide order dated 18.01.2017 and registered as T.A.No.18 of 2017 in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007.

2. By means of this T.A., the petitioner has made the following prayer:-

- “(A) Issue a writ, order or direction in the nature of a writ of certiorari quashing the discharge order dated 28.7.2000 and 11.8.2000 discharging the petitioner from service with effect from 1.9.2000.*
- (B) Issue a writ order or directions in the nature of writ of mandamus commanding the respondents to pay the salary and other allowances admissible under the Rules from the date of discharge to the date of reinstatement, reinstating the petitioner in service with full and all benefits attached to the post.*
- (C) Issue a writ order or direction in the nature of writ of mandamus commanding the respondents to grant promotion to the petitioner since the date on which the juniors of the petitioner has been promoted on the post of J.W.O. and to pay the salary and allowances against promoted post.*
- (D) Award cost of the petition to the petitioner.*
- (E) Issue any other writ order or direction which this Hon’ble Court may deem fit and proper in the circumstances of the case.”*

3. The admitted facts of this case are that initially the petitioner got himself enrolled in the Indian Air Force on 20th August 1998

showing his name as Santosh Kumar Saini and in the documents filed at that time he had shown his date of birth as 01st November 1960. At the time of his enrolment, he had mentioned his permanent address as Vill Bibipur, Ghatampur (Tehsil) Distt. Kanpur Dehat. During his initial training, medical investigations revealed that he was suffering from Leprosy Tuberculoid, hence he was discharged from service under Rule 15(2)(c) of the Air Force Rules, 1969.

4. Subsequently, the petitioner appeared in the Matriculation examination (High School Examination of U.P. Board) as private candidate showing his name as Shesh Kant and changed his date of birth from 01st November 1960 to 01st August 1963. On the basis of this Matriculation certificate, again he got himself enrolled on 23rd April 1981. At the time of his second enrolment, he did not disclose the fact of his earlier service in the Indian Air Force and gave his permanent address as Gopalpur (Vill), Tehsil Ghatampur.

5. In July 1997, an anonymous complaint regarding the petitioner's second enrolment was received. The matter was investigated by the IAF police of 4 P & S Unit, AF. Basing on the report of the said Air Force Police, a show cause notice dated 08th September 1997 was issued to the petitioner. In reply to the said show cause notice, the petitioner denied his earlier enrolment in the Indian Air Force. Therefore, the handwriting samples and finger prints of the petitioner and Santosh Kumar Saini, which was available on the personal record, were sent for verification to the Forensic Science Lab and Finger Print Bureau, Lucknow. Both the agencies confirmed that Santosh Kumar Saini and the petitioner were one and the same person. Therefore, another show cause notice dated 15th January 2000 enclosing the report of these two agencies were given to the petitioner. In reply to the said show cause notice, the petitioner admitted the facts and claimed that his case be considered leniently. Hence, the competent authority, instead of

dismissing the petitioner from service, whereby he would have forfeited his pension and gratuity, discharged him from service with all terminal benefits under Rule 15(2) (g)(ii) of the A.F. Rules, 1969 as his services were no longer required-unsuitable for further retention.

6. Learned counsel for the petitioner has argued that he is admitting the facts situation and he has conceded that it is a case of fraudulent enrolment. But his submission is that the matter could not have been investigated by the Air Force Police and for this purpose, a Court of Inquiry ought to have been conducted. He has further argued that in view of provisions of Section 43 of the Air Force Act, 1950, the petitioner could not have been discharged from service administratively by issuing a show cause notice, but the only procedure was that in view of the provisions of Section 43 of the Air Force Act, 1950, the action could have been taken only after his trial by the Court Martial.

7. In reply to the said submission, learned counsel for the respondents has argued that the facts admitted need not to be proved. He has also argued that in this case admittedly the petitioner's enrolment was fraudulent and, therefore, he is not entitled to any relief. However, at the time of hearing, learned counsel for the respondents could not give reply regarding the arguments of the learned counsel for the petitioner regarding the application of Section 43 of the Air Force Act, 1950.

8. Thus, in the instant case, in reply to the second show cause notice, has admitted his fraudulent enrolment, because in view of the reports of the Forensic Science Lab and finger Print Bureau, Lucknow, there was no escape for him, but to admit his guilt. Therefore, the petitioner has been held guilty only on the basis of the reports of the abovenoted two agencies, to which the matter was referred by the competent authority. Hence the argument that the

matter ought to have been investigated by a Court of Inquiry loses all its significance.

9. Now the only point which remains to be considered is whether the provisions of Section 43 of the Indian Air Force Act, 1950 are attracted in this case or not?

Section 43 of the Air Force Act, 1950 reads as under:

“43. Fraudulent enrolment.—Any person subject to this Act who commits any of the following offences, that is to say,—

(a) without having obtained a regular discharge from the Air Force or otherwise fulfilled the conditions enabling him to enrol or enter, enrolls himself in, or enters the said force or any part of the military or the naval forces of India; or

(b) is concerned in the enrolment in any part of the Forces, of any person when he knows or has reason to believe such person to be so circumstanced that by enrolling he commits an offence against this Act,

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.”

10. The entire argument of the learned counsel for the petitioner is based on this section. A bare perusal of this section shows that it has its application to the person who commits such an act during the period when he was subject to this Act. The opening line of this section makes it clear. Sub-clause (a) of Section 43 also substantiates the same interpretation of the opening line of the section. Sub-section (a) shows that it will apply only to such person who is subject to Indian Air Force and who got himself enrolled in the Army or in the Navy without obtaining a regular discharge from Air Force and clause (b) says when being subject to Air Force Act, he is concerned in the enrolment in any part of the Forces, of any person when he knows or has reason to believe such person to be so circumstanced that by enrolling such person, he commits an offence against this Act. Thus, this section does not apply to the person, whose initial enrolment in

the Indian Air Force is itself fraudulent. Because in that case the fraud was committed while he was not subject to Air Force Act.

11. The submission of the learned counsel for the petitioner contrary to it has absolutely no substance. Thus, the purpose of Section 43 of the Air Force Act, 1950 is that if a person, who is subject to the Air Force Act, 1950 got himself enrolled in any other Armed Forces without obtaining his discharge from Air Force or is concerned in the enrolment of any person with the knowledge that the enrolment of such other person would be an offence, only then Section 43 of the Act would be applicable. But in the instant case, the petitioner's enrolment in the Air Force itself was fraudulent.

12. Keeping in view the facts of the instant case, whatever fraud was committed by the petitioner, it was committed by him before his enrolment. He got his Matriculation certificate in the different name showing his different date of birth and different address. At the time when this act was done by the petitioner, he was not subject to the Air Force Act and on the basis of this certificate, he manipulated to get his enrolment in the Indian Air Force and in concealing the fact of his earlier enrolment. Therefore, whatever fraud was committed by the petitioner, was committed prior to his enrolment and not while he was subject to the Indian Air Force. Therefore, Section 43 of the Air Force Act, 1950 has absolutely no application.

13. Learned counsel for the petitioner in his supplementary rejoinder affidavit has placed reliance on the pronouncement of a judgment passed by the Coordinate Bench of this Regional Bench in the case of **Anurag Singh vs Union of India & others** (T.A.No. 1402 of 2010 decided on 01.12.2017, wherein a contrary view has been taken with regard to Section 43 of the Air Force Act, 1950. Since the Hon'ble Apex Court in the case of **Ex Sig Man Kanhaiya Kumar vs. Union of India & Ors** (Civil appeal No.1804 of 2018) decided on 09th January 2018 of fraudulent enrolment has taken a different view,

therefore, the view of the Hon'ble Apex Court is binding and has to be followed. It is pertinent to mention here that the case of Anurag Kumar (supra) was decided by a Coordinate Bench, when the aforesaid judgment of Hon'ble Apex Court was not delivered.

14. The issue involved in this case is squarely covered by a recent pronouncement of the Hon'ble Supreme Court in the case of **Ex Sig Man Kanhaiya Kumar** (supra). Paras 3 and 4 of the said judgment show the facts of that case, which reads as under:

“3. The facts giving rise to this appeal are that the appellant was enrolled in the Army as Sepoy/Washerman on 19.01.2009. About 6 years of service a show cause notice was issued on 08.10.2014 alleging offence of fraudulent enrolment i.e. enrolment in the Army based on a fake relationship certificate. On 13.03.2015, the respondent authorities dismissed the appellant from service under Section 20(3) of the Army Act. The appellant submitted representation before the respondents which was not considered in time due to which he filed O.A. No. 773/2015 before the AFT and the same was disposed of with a direction to decide the representation of the appellant. On 09.08.2016 the respondents rejected the representation of the appellant. The appellant preferred the original Application under Section 14 of the Armed Forces Tribunal Act, 2007 challenging the order dated 09.08.2016.

4. It may be noted that without admitting the formal original application, the AFT had directed the respondent to produce the relevant documents. In compliance with the said direction, the Relationship Certificate dated 09.08.2004 was produced vide reply dated 05.11.2014 submitted by the appellant to the show cause notice issued by the establishment. In the reply so submitted the appellant had specifically admitted the fact that his father was not an Ex-serviceman and, in fact, he had produced and relied on a fake Relationship Certificate. The records pertaining to Army No. 14224588 made available by the respondents clearly showed that number is in respect of Onkar Mal Gujar.”

In this factual background, Hon'ble Apex Court held as under :

“14. In the aforesaid scenario, the argument of the appellant that there should have been an inquiry into the matter as per the provisions of the Army Act, 1950 is totally untenable. Even otherwise, when the appellant himself has admitted that Relationship Certificate produced by him is fake, the procedure as laid down in Section 20 of the Army Act, 1950 would be an empty formality.

15. In Union of India v. Major General Madal Lal Yadav (Retd), this Court opined that a person having done wrong cannot take advantage in his own wrong and plead bar of any law to frustrate the lawful trial by a competent court and, in the process, the Court

invoked the Latin dictum “Nullus Commodum Capere Protest De Injuria Sua Propria”.

15. In the facts of the instant case, virtually the respondents have taken a very lenient view as he was only discharged from service and they released his pensionary benefits, while in the case before the Hon’ble Supreme Court, the petitioner was dismissed from service and his dismissal order was not interfered with by the Hon’ble Supreme Court because admittedly his enrolment itself was fraudulent. Therefore, the aforesaid pronouncement of the Hon’ble Supreme Court applies in full force to the facts of the instant case. Hon’ble Apex Court has approved the administrative dismissal order under Section 20(3) of the Army Act, 1950. Here it is pertinent to mention that Section 43 of the Air Force Act, 1950 and Section 43 of the Army Act, 1950 are absolutely identical.

16. Thus, in view of the pronouncement of the Hon’ble Apex Court, quoted above, it is clear that where admittedly the initial enrolment is fraudulent, then the relationship of master and servant from the very inception becomes illegal and, therefore, the applicant cannot claim any benefit of any procedural defects provided in the Air Force or the Army Act. In this case, the respondents have taken an exceptionally lenient view with regard to applicant by holding him entitled to pensionary benefits, because when the relationship of master and servant was illegal from the very inception, then such a lenient view ought not to have been taken.

17. This T.A. has absolutely no force, deserves to be dismissed and is hereby **dismissed**.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated : December ,2018
PKG