

Court No.1
Reserved Judgment

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

Thursday the 25th day of October, 2018

TRANSFERRED APPLICATION NO. 33 OF 2017

Jeewan Kumar S/o Narayan Ram,
R/o Bhandari Gaon, Tehsil Kapkot,
Bageshwar.

..... **Petitioner**

Versus

1. Union of India through Secretary, Ministry of Defence,
Govt. of India, New Delhi.
2. Directorate General of Recruiting AG, S Branch,
West Block-III, Integrated HQ of MOD (Army), R.K.Puram,
New Delhi- 110066.
3. HQ Recruiting Zone, Lucknow 236 Mahatma Gandhi Road,
Lucknow Cantt PIN 226002.
4. Army Recruiting Officer Almora,
District Almora (UK), PIN 263601.

..... **Respondents**

Shri Virat Anand Singh, learned counsel for the petitioner.
Shri Ashish Kumar Singh, learned counsel for the respondents.

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TRANSFERRED APPLICATION NO. 34 OF 2017

Suraj S/o Gulsan Kumar,
R/o Jawahar Nagar Haldwani,
Tahsil Haldwani District Nainital

..... **Petitioner**

Versus

1. Union of India through Secretary, Ministry of Defence,
Govt. of India, New Delhi.
2. Directorate General of Recruiting AG, S Branch,
West Block-III, Integrated HQ of MOD (Army), R.K.Puram,
New Delhi- 110066.

3. HQ Recruiting Zone, Lucknow 236 Mahatma Gandhi Road,
Lucknow Cantt PIN 226002.

4. Army Recruiting Officer Almora,
District Almora (UK), PIN 263601.

..... **Respondents**

Shri Virat Anand Singh, learned counsel for the petitioner.
Shri Bhanu Pratap Singh, learned counsel for the respondents.

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

Hon'ble Air Marshal BBP Sinha, Member (A)

ORDER

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

1. Initially Writ Petition (S/S) No. 383 of 2017 was filed by Jeewan Kumar and Writ Petition (S/S) No. 379 of 2017 was filed by Suraj before the Hon'ble High Court of Uttarakhand at Nainital, wherein the prayer of the petitioners was as under :

“ (i) Issue a writ, order or direction in the nature of mandamus directing the respondents to include the name of the petitioner in the Result dated 28th February 2017 published in the Newspaper on 1st March 2017 for the post of Solider (GD) held at Open Rally Banbasa inasmuch as the petitioner is having NCC 'C' Certificate and is exempted from Confirmation Entrance Examination as per Policy of the Central Govt., Ministry of Defence, New Delhi.

(ii) Issue any suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iii) Award the cost of writ petition to the petitioner.”

2. The aforesaid two writ petitions were transferred by a common order dated 17.04.2017 passed in Writ Petition No.379 of 2017 and accordingly they were registered as T.A. Nos. 33 and 34 of 2017. Since similar points in these two T.As. are involved, therefore, they are being disposed of by a common order.

3. Learned counsel for the respondents have argued that the petitioners were not enrolled in the Army. Their prayer is that their name be included in the list of successful candidates in the result declared on 28th February 2017. It is also submitted on behalf of the respondents that until and unless, a person is enrolled in the Army, he is not subject to the Army Act, therefore, these T.As. are not maintainable before this Tribunal.

4. Learned counsel for the petitioners has submitted that a Coordinate Bench of this Tribunal in the case of **Chandan Kumar vs. Union of India & others** (T.A.No. 30 of 2017) decided on 09.08.2017 has considered this point and has held that this Tribunal has jurisdiction to entertain the issue and the T.A. is maintainable in Armed Forces Tribunal. However, after deciding the said point of maintainability, the Court dismissed the T.A. observing in Para 7 as under :

“The argument seems to be misconceived. There is no statutory or fundamental right of a person to get selected in the army unless he or she qualifies the test held for a particular post. Selection is a competitive process where a person has to compete with others against the limited number of seats and if his or her merit falls within the competitive zone of selection, his or her selection/recruitment is made as per his/her merit. The petitioner has not taken any ground with regard to violation of any provision of law in the aforesaid process. Under these facts and circumstances, we do not feel that any fundamental or statutory right of the petitioner has been violated in the matter while declining his recruitment.”

5. Learned counsel for the petitioners has submitted that since the issue of maintainability involved in these T.As. has been decided by a Coordinate Bench, therefore, this Tribunal is bound by the judgment of the Coordinate Bench in view of the settled legal position.

6. Before proceeding further, we would like to reproduce certain provisions of the Armed Forces Tribunal Act, 2007. Section 2 of the Act deals with the applicability of the Act, which reads as under :

“2. Applicability of the Act: (1) *The provisions of this Act shall apply to all persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and Air Force Act, 1950 (45 of 1950).*

(2) *This Act shall also apply to retired personnel subject to the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957) or the Air Force Act (45 of 1959), including their dependants, heirs and successors, in so far as it relates to their service matters.”*

Section 3(O) of the Act defines service matter, which reads as under:

(o) “service matters, in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), mean all matters relating to the conditions of their service and shall include—

(i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure, including commission, appointment, enrolment, probation, confirmation, seniority, training, promotion, reversion, premature retirement, superannuation, termination of service and penal deductions;

(iii) summary disposal and trials where the punishment of dismissal is awarded;

(iv) any other matter, whatsoever, but shall not include matters relating to—

(i) orders issued under section 18 of the Army Act, 1950 (46 of 1950), sub-section (1) of section 15 of the Navy Act, 1957 (62 of 1957) and section 18 of the Air Force Act, 1950 (45 of 1950); and

(ii) transfers and postings including the change of place or unit on posting whether individually or as a part of unit, formation or ship in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950).

(iii) leave of any kind;

(iv) Summary Court Martial except where the punishment is of dismissal or imprisonment for more than three months;

Section 14, under which the Original applications are filed before this Tribunal, is also relevant to some extent in this matter. Relevant part of Section 14 reads as under :

“14. Jurisdiction, powers and authority in service matters. –

(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 immediately

before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under article 226 and 227 of the Constitution) in relation to all service matters.

(2) Subject to the other provisions of this Act, a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in such form and accompanied by such documents or other evidence and on payment of such fee as may be prescribed.”

7. Thus, a joint reading of the aforesaid provisions of the Armed Forces Tribunal Act shows that only the service matters of the persons subject to Army, Navy or Air Force Act are maintainable before this Tribunal. This point has been considered by the Division Bench of the Hon’ble High Court of Judicature at Allahabad in the case of **Union of India vs. Kapil Kumar** (Special Appeal No.833 of 2015) decided on 24.11.2015 presided over by Hon’ble Dr. D.Y.Chandrachud, Chief Justice (as his Lordship then was). Hon’ble Division Bench, after considering all the relevant provisions of the Armed forces Tribunal Act, 2007, has decided as under :

*“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. The judgment of the learned Single Judge in *Devi Saran Mishra vs. Union of India*⁴ involved a situation where a direction was issued to the effect that all matters pending before this Court which were the subject matter of the Armed Forces Tribunal in terms of Section 34 of the Armed Forces Tribunal Act, 2007 were directed to be transferred to the Tribunal at Lucknow. Evidently, this decision of the learned Single Judge covers those cases which are within the ambit of the jurisdiction of the Tribunal having due regard to the provisions of Sections 14 and 15 of the Act. We, therefore, find merit in the appeal filed by the Union of India, challenging the decision of the learned Single Judge. In the present case, we find that the learned Single Judge has simply ordered that the proceedings be transferred under Section 34 without considering as to whether the matter was within the jurisdiction of the Tribunal under Section 14. The relief which the respondent seeks is to provide him entry into the service of the Army. There is not even an averment to the effect that the respondent was enrolled as a member of the Armed Force. On the contrary, the respondent has*

sought to question the decision by which he was declared unfit for enrollment on the ground that he did not meet the required medical standard. Such a dispute which arose prior to the enrollment of the respondent into the Armed Forces would not fall within the definition of the expression "service matters" under Section 3(o) because ex facie, the respondent is not a person who is subject to the Army Act 1950."

(underlined by us)

8. Since the point whether the pre-enrolment cases should be transferred to this Tribunal has been considered by a Division Bench of the Hon'ble High Court of Judicature at Allahabad and it has been decided that since the petitioner was not enrolled, therefore, he was not subject to the Army Act and hence this writ petition ought not to have been transferred by the learned Single Judge.

9. We have carefully examined the judgment, referred above, and rendered by the Coordinate Bench of this Tribunal. The judgment passed by the Division Bench of Hon'ble High Court of Judicature at Allahabad was not brought to the notice of this Tribunal in O.A.No.30 of 2017, therefore, the view expressed therein was *per incuriam*, hence it loses its binding effect. Therefore, in our considered view, the judgment of the Division Bench considering the issue involved here, is correct binding and has to be followed.

10. In view of the discussions, made hereinabove, T.A. Nos. 33 of 2017 and 34 of 2017 are not maintainable before this Tribunal. Accordingly, we direct the Registry to send back the records of these cases to the Hon'ble High Court of Uttarakhand at Nainital.

Copy of this order be also placed on the records of connected T.A.No. 34 of 2017.

(Air Marshal B.B.P. Sinha)
Member (A)

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

Dated: October ,2018.
PKG