

Court No.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

Dy No. 1639 of 2018 with M.A. No. 1276 of 2018
Inre O.A. No. Nil of 2018

Wednesday, this the 4th day of July, 2018

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

Rajbir Singh Tomar (JC No. 340334-W Sub/Clk SD)
 Son of Shri Badri Singh Tomar
 R/o P-33, KLP Colony,
 In front of Idgaha Bus Stand, Agra Cantt, Agra
 { Presently posted at Garrison Engineer (east), Agra }

.....Applicant

Ld. Counsel for : **Shri Yash Pal Singh, Advocate**
 the Applicant

Versus

Union of India & Others

.....Respondents

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

ORDER (Oral)

1. 1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs :-

“(I) To issue/pass an order setting aside the Part II Order No.0/0097/2018 dated 05.04.2018 holding the applicant absent without leave w.e.f. 01.01.2018, and any other consequential order passed or proceedings held in furtherance thereof, after summoning the relevant original records.

“(II) To issue/pass an order or directions t the respondents to treat him on the strength of Garrison Engineer (East), Agra till his relieving by the competent authority, and pay him salary and other service benefits.

(III) *To issue/pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*

(IV) *Cost of the appeal be awarded to the applicant."*

2. An interim prayer has also been made that during pendency of the present O.A., the respondents may be restrained to relieve the applicant from the office of Garrison Engineer (East), Agra. Apart from it, a separate application for interim relief (M.A.No. 1276/18) has also been moved, wherein the applicant has made the following prayer in the interim reliefs :

"For the facts, reasons and circumstances stated in the accompanying affidavit it is most respectfully prayed that this Hon'ble Tribunal may kindly be pleased to direct the respondents not to take any coercive/disciplinary action against the applicant in pursuance of the Part II Order No. 0/0097/2018 dated 05.04.2018 holding the applicant absent without leave w.e.f. 01.01.2018; and treat him on the strength of Garrison Engineer (East), Agra and pay him salary and other service benefits regularly and every month as an ad-interim measure during pendency of the present case; and may further be pleased to pass such other order or issue such direction as may be deemed expedient under the circumstances of the case and in the interest of justice."

3. In brief, the facts, are that the applicant was enrolled as Sepoy in the trade of Clerk on 09.01.2000. He was lastly posted at 234 Armoured engineer Regiment, Patiala, from where he was posted to the Garrison Engineer (East), Agra, the present place of posting and since 16.09.2014 he is performing his duty. On 04.08.2017, a general order of posting was issued by the Records and the applicant has been directed to be posted out from Garrison Engineer (East), Agra to 174 Engineer Regiment (TA), situated in Rajouri in the State of Jammu & Kashmir.

4. Virtually, the prayer of the applicant is the stay of his transfer order and to restrain the respondents from directing the applicant to join at Rajouri in the State of Jammu & Kashmir and he be permitted to continue his duty at Agra, where he is presently posted.

5. At the outset, on behalf of the respondents, a preliminary objection has been raised on the point of maintainability of the present O.A. It is submitted that by virtue of Section 3 (o) of the Armed Forces Tribunal Act, 2007, the transfer and posting orders can not be treated as service matters. Section 3(o) of the Armed Forces Tribunal Act, 2007 reads as under :

3 (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;

(Underlined by me)

6. Learned counsel for the applicant has argued that it would be covered under 3 (o)(iv) i.e. any other matters, whatsoever, but we are not the least impressed with the submission of the learned counsel for the applicant, because the words “any other matters, whatsoever” may include any other matters, which are not covered by clauses (i), (ii) and (iii) of Section 3(o) of the Act. But by virtue of the excluding clauses, the transfer and posting matters, including the change of place of unit and posting whether individually or as a part of unit formation, have been specifically excluded from the purview of service matters. Law is settled that what cannot be permitted directly cannot be permitted indirectly. The ultimate purpose of this O.A. is to get his posting to Rajouri within the State of Jammu & Kashmir cancelled and to issue direction for continuing in the office of the Garrison Engineer (East), Agra.

7. This O.A. was filed on 31.05.2018 and a writ petition was also filed with the same prayer before the Hon'ble High Court of Judicature at Lucknow Bench, Lucknow. On 12.06.2018. Hon'ble High court has dismissed the same as not pressed. Following order was passed by Hon'ble High Court:

“Sri S.B. Singh, learned Assistant Solicitor General of India appearing for the opposite party nos. 1 to 5 raised a preliminary objection that the writ petition is not maintainable before this Court for the reliefs claimed in the writ petition as this Court has no supervisory jurisdiction over Armed Forces Tribunal as per Article 227 (4) of the Constitution of India and judgment and order passed by the Hon'ble Supreme Court in Civil appeal No. 7400 of 2013 (Union of India and others versus Major General Shri Kant Sharma and another).

Accordingly, learned counsel for the petitioner submits that the writ petition may be dismissed as not pressed with liberty to approach to the Armed Forces Tribunal for his grievance.

Thus, the writ petition is dismissed as not pressed with the aforesaid liberty.”

Pronouncement of Hon'ble Apex Court in the case of **Union of India & Others vs. Major General Shri Kant Sharma & Another** (2015) 6 Supreme Court Cases 773 has been mentioned in the order. In that case, in appeal before the Hon'ble Apex Court, the question was raised whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the 'Act'), against an order of Armed Forces Tribunal (hereinafter referred to as the 'Tribunal') with the leave of the Tribunal under Section 31 of the Act or leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution of India, will bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters related to Armed Forces and the said controversy was concluded in Paragraphs 44 and 45, as under :

“44. The High Court (Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India.

45. For the reasons aforesaid, we set aside the impugned judgments passed by the Delhi High Court and upheld the judgments and orders passed by the Andhra Pradesh High Court and Allahabad High Court. Aggrieved persons are given liberty to avail the remedy under Section 30 with leave to appeal under Section 31 of the Act, and if so necessary may file petition for condonation of delay to avail remedy before this Court.”

8. Thus, in that case, it was decided that appeals against the orders of the Armed Forces Tribunal are not maintainable before the Hon’ble High Court. The point involved in the instant case is regarding the maintainability of the instant O.A., which is specifically barred by the provisions of Section 3(o) of the Act, quoted above. The writ petition filed in the Hon’ble High Court was dismissed as not pressed only, so Hon’ble High Court has not expressed any opinion on the point of maintainability of the present O.A. The said provision was not brought to the notice of the Hon’ble High court by any of the parties and the petition was dismissed as not pressed.

9. Section 14 of the Armed Forces Tribunal Act, 2007 deals with the jurisdiction, powers and authority in service matters. 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.”

10. Thus, the aforesaid provision makes it clear that only the disputes of service matters relating to a person governed under Army Act, Navy Act or Air Force Act, can be entertained by the Armed Forces Tribunal, but by virtue of Section 3(o) of the Act, the orders of transfer and posting have been specifically excluded from the domain of service matters. Thus, the transfer and posting matters, not being service matters, under the provisions of Armed Forces Tribunal Act, such disputes can not be entertained by this Tribunal.

11. In view of the specific provisions of the Armed Forces Tribunal Act, quoted above, this O.A., whereby interference of this Tribunal has been prayed to stay the posting order, is not maintainable and accordingly, it is **dismissed** as not maintainable.

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

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

Dated: 04th July, 2018
PKG