

RESERVED
COURT NO. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. O.A. 317 of 2015

Monday, this the 23rd day of July, 2018

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

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

Ataullah Khan (JC-180194N Ex Sub/NT) son of Shri Sanaullah Khan, resident of House No. C-69, Abrar Nagar Colony, Picnic Spot Road, Kalyanpur, Lucknow

... Appellant

Counsel for the Appellant: **Shri Yashpal Singh, Advocate**

Vs.

1. Union of India through Secretary, Ministry of Defence, Central Secretariat, New Delhi – 110001.
2. Director General of Medical Services (Army) Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army), 'L' Block, New Delhi.
3. Officer-in-Charge, Army Medical Corps Records, Lucknow.
4. Principal Controller of Defence Accounts (Pension) Allahabad.

..... Respondents

Counsel for the respondents:

Shri Asheesh Agnihotri

Central Government Standing Counsel

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

1. The applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 praying for the following reliefs:

- “(a) *Issuing/passing of an order setting aside the order dated 26.08.2015 passed by the Officer-in-Charge, Army Medical Corps Record, Lucknow whereby claim of granting the same rank, status and pay and allowances to the applicant which is granted to the female nurses in the Military Nursing Services has been rejected.*
- (b) *Issue an order or direction declaring the Army Instruction No. 39/66 as ultra vires insofar as the same provides for mustering of soldiers/Nursing Assistants as Nursing Technician in the rank of Naib Subedar (Group) after passing of the diploma course in General Nursing.*
- (c) *Issue an order directing the respondents to grant the same rank, status and pay and allowances to the applicant which is granted to the Female Nurses inducted as Commissioned Officer in the Military Nursing Service, with effect from the date of mustering and pay all consequential service benefits including arrears of difference in salary with interest.*
- (d) *Issue an order directing the respondents to fix pension of the applicant at par with the Female Nurses inducted as Commissioned Officer in the Military Nursing Service, with effect from the date of retirement i.e. 01.08.2000 and pay arrears of difference in pension with interest.*
- (e) *Issuing/passing of any other order or direction as this Hon'ble Tribunal may deem fit under the circumstances of the case.*
- (f) *Allowing this Original Application with costs.”*

2. Applicant has prayed for declaring Army Instruction 39/66 as ultra vires insofar as it provides for mustering of soldiers/Nursing Assistants as Nursing Technician in the rank of Naib Subedar (Group-B) after passing diploma course in General Nursing and consequently grant rank, status and pay and allowances to the

applicant at par with the Female Nurses inducted as Commissioned Officer in the Military Nursing Service and thereafter to fix his pension with effect from the date of retirement. The relevant material facts are discussed hereinafter.

3. The applicant was enrolled as a Sepoy in the Army Medical Corps of the Indian Army on 17.06.1970 as a Nursing Assistant. He was selected to undergo three years' course of Diploma in General Nursing in the year 1985 on successful completion of the course, he was awarded diploma in General Nursing Certificate by the Armed Forces Medical Services Examination Board in August 1988 and was promoted as Naib Subedar (Nursing Technician) in Group-B. Subsequently, the applicant was promoted to the rank of Subedar (Nursing Technician) and on completion of his terms of engagement, he superannuated on 01.08.2000.

4. The applicant approached the High Court of Judicature at Allahabad by preferring Writ Petition No.2113 (SS) of 2000 seeking parity with the Female Nurses working in the Military Nursing Service. Upon establishment of the Armed Forces Tribunal, said Writ Petition was transferred to this Tribunal and re-numbered as T.A. No. 30 of 2010. On 27.08.2015 in said T.A it was submitted by learned counsel for the applicant that the representation submitted by the applicant has been rejected, as such, the T.A. is rendered infructuous. Thus, the T.A. was dismissed with liberty to the applicant to file a fresh petition, if so desired. Accordingly, the present O.A. has been preferred by the applicant.

5. On 15th September, 1943, an Ordinance was promulgated to constitute a force to be called the Indian Military Nursing Service as part of the Armed Forces of the Union by (The Indian) Military Nursing Service Ordinance, 1943 (No. 30 of 1943). The Ordinance provided that members of the Military Nursing Service shall be liable for service only with forces and persons subject to the Army Act, 1950. Sections 5 and 6 of the Ordinance provided as under:

“5. **Members to be of commissioned rank** – All members of the (Indian Military Service) shall be of commissioned rank and shall be appointed as officers of the (Indian Military Nursing Service) by the Central Government by notification in the Official Gazette.

6. **Eligibility for appointment.** –(1) (Any Citizen of India) if a woman and above the age of twenty-one, shall be eligible for appointment as an officer in the Indian Military Nursing Services) and, if she satisfies the prescribed conditions, may be appointed thereto in the manner laid in Section 5;

(2) Every person so appointed shall be subject to this Ordinance and to the rules and regulations made thereunder.

6. Vide Army Instructions 39 of 1966 (Annexure-7 to the O.A.) a new category of 'Nursing Technician' Group-B (now Group-Y) was introduced and authorized in the Army Medical Corps (AMC). Appendix 'A' of said Army Instructions contained the qualification for the new category. It was provided that Nursing Technicians will be employed in the vacancies of Military Nursing Services (MNS) Officers till such time as the War Establishments/Peace Establishments are amended to authorize this category on their Establishments. Appendix 'A' for convenience sake is reproduced as under:

“APPENDIX ‘A’ TO ARMY INSTRUCTIONS 39 OF 1966

NURSING TECHNICIAN	GROUP ‘B’
Arm/Service : AMC	Mustered from : Recruit or serving Soldiers of other categories

SELECTION

1. The minimum qualification of the candidates must be-
 - (a) Matriculation or equivalent qualification;
 - (b) Nursing Diploma recognized by the Nursing Council of India.

DISPOSAL AFTER SELECTION

2. On being selected, the recruit or soldier will be mustered as Nursing Technician Group ‘B’, in the rank of Naib Subedar.”

7. Army Instruction 39 of 1966 (surpa) pertaining to mustering to Nursing Technician Trade was subsequently amended by Corrigendum No. 05 of 2010 which provided as under:

“On being selected, the soldier will be mustered as Nursing Technician, Group ‘Y’ in the rank of Naib Subedar in his own turn subject to availability of vacancy. The notional seniority in the rank of Naib Subedar will be considered from the date of passing General Nursing Diploma Course or occurrence of vacancies against which the individual is promoted, whichever is late.”

A comprehensive analysis of both the cadres may be culled as under:

	Nursing Technician	Military Nursing Service
--	---------------------------	---------------------------------

Statute	Army Instruction 39/66 & Corrigendum MNS No. 05 of 2010	MNS Ordinance 1943 & MNS Rules 1994
Status	Naib Subedar (Nursing Technician) Group 'B' (Now Group 'Y')	Appointed as officers of the Military Nursing Services
Eligibility	Only male recruit or serving soldiers of other categories above 17 years of age	Only unmarried female are eligible.
Selection	Mustered from recruit or serving soldiers of the categories	Direct recruitment on all India basis.
Training	Professional Nursing training, weapons training and Combat training	Professional Nursing training.
Rank	Junior Commissioned Officer	Commissioned rank.

8. It was submitted by learned counsel for the applicant that for remustering in the rank of Naib Subedar, male nurses are not required to undergo any Cadre Course. Similarly, female nurses (MNS) are not required to face Service Selection Board for grant of Commission. Though female nurses are given Commissioned rank but they are not a par with the officers of the Army selected through the Service Selection Board. It was vehemently argued that the qualification/eligibility criteria, mode of selection and duties assigned of Nursing Technicians and female nurses of Military Nursing Services are the same, but a discriminatory classification has been made relating to the pay scale. Such classification is irrational and unreasonable. Discrimination on the basis of 'sex' in matters relating to pay and rank of the applicant vis-à-vis the female nurses is hit by Articles 14, 15 and 16 of the Constitution of India. Learned counsel further submitted that provisions contained in Army Instruction 39 of 1966 giving rank of Naib Subedar (JCO) to the Nursing Technicians is unreasonable, arbitrary and discriminatory having no nexus with the object sought to be achieved and is violative of Articles 14, 15 and 16 of the Constitution.

9. Further submission of learned counsel for the applicant is that in a plethora of cases Hon'ble Supreme Court has held that Article 14 of the Constitution forbids class legislation. The classification must be founded on an intelligible differentia which distinguishes persons that are grouped together from those who are left out of the group and such a differentia must have a rational nexus to the object sought to be

achieved. Concept of equality before the law contemplates minimizing inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst group of people. Discrimination on the ground of religion, race, caste, sex and place of birth is violative of Article 15 of the Constitution of India. Article 16 of the Constitution of India enshrines that in the matter of public employment the citizens shall have equal opportunity.

10. Learned counsel in support of his above submissions has placed his reliance on the following decisions:-

- (i) ***Randhir Singh vs. Union of India & ors***, (1982) 1 SCC 618.
- (ii) ***Swapan Kumar Chaudhary & ors vs. Tapas Chakravorty & ors***
(1995) 4 SCC 478)
- (iii) ***Supreme Court Employees' Welfare Association vs. Union of India and anr***, AIR 1990 SC 334,
- (iv) ***Nehru Yuva Kendra Sangathan vs. Rajesh Mohan Shukla & ors***,
decided on 12.07.2007 in Appeal (Civil) No. 7356 of 2000, and
- (v) ***Brig Balbir Singh vs. Union of India*** (T.A. No. 2 of 2013, decided by
Regional Bench, Kolkata on 13.08.2015).

11. In rebuttal, learned counsel for the respondents submitted that MNS Officers are appointed as Officers by the Central Government as per the provisions of Military Nursing Service Ordinance, 1943. Provisions of Army Act, 1950 are made applicable to them with certain modifications whereas the Nursing Technicians Category are initially enrolled as per the provisions of the Army Act, 1950 and later on trained to become Nursing Technician. It is submitted that both the categories are not comparable and possession of similar qualification does not entitle a person for the same terms and conditions of service. Learned counsel fervently submitted that MNS is an 'All Woman Service' and is an auxiliary force since members of MNS are appointed as Officers. The eligibility criteria and service conditions of these two cadres are totally different and are being governed by different Government policies, there is per se, no discrimination in the rank, status, pay and allowances.

12. Further submission of learned counsel for the respondents is that the Study Group Committee on Grievances headed by Maj Gen MKV Panicker constituted by the Army Headquarters expressed views that there appeared necessity of induction of more male nursing staff in patient care of Armed Forces to reduce the burden of Nursing officers and subsequently allow for reduction in their strength. The Panicker Committee further recommended that the best department where MNS Officers can be posted are those where the patient require acute care such as Intensive Care Unit (ICU), Burn Centres and Labour Rooms. In the large hospitals they can also be

posted to Special Department/Family Ward or Operation Theatre depending upon the requirement.

13. It is argued that if a probationer nurse, who does not pass 1st, 2nd and 3rd year examination in three attempts is liable to be terminated, but in the case of Nursing Technician, Group 'Y' in case he fails to succeed in the examination, he would be liable to be reverted back to this original category without any loss of service. Probationer nurses have to execute a bond with the Armed Forces Medical Services for continuance in training, but such a bond is not required in the case of male Nursing Technicians.

14. Contrary to the case law cited by learned counsel for the applicant, learned counsel for the respondents has placed reliance on a decision of Hon'ble Delhi Court in Civil Writ Petition 763 of 2001, **Sub NK A.K. Saxena vs. UOI & ors**, decided on 22.02.2001.

15. In the case of **Sub NK A.K. Saxena** (supra), Hon'ble Delhi High Court had the occasion to consider and decide the same issue as involved in the present petition, viz. **"whether the Nursing Technician, Group 'Y' is entitled to the same rank, status and pay and allowances which is granted to the Female Nurses inducted as Commissioned Officer in the Military Nursing Service."** It was observed by Hon'ble Single Judge as under:

"I have perused the contents of the writ petition. It is an admitted position that the petitioner was initially appointed as Sepoy into the Core of Army Medical in the year 1979 and was serving as nursing assistant. Although he was selected to undertake the course of three years diploma in general nursing and had completed the course, the same is a course which is also to be undertaken by the nursing cadets, who are called probationer nurses as is established from the contents of the AMC Instructions No. 6. The nursing Assistants like the petitioner, who have minimum five years of service left for retirement, could be promoted to the rank of Naib Subedar before retirement after such nursing assistant is detailed for the course and he completes the said course successfully.

Because the petitioner had undertaken the same course with the probationer female nurses, the same will not and cannot entitle him to be appointed in the same category as that of the female nurses, who after completion of the aforesaid course would become members of the Indian Military Nursing Service. The Ordinance, called the Indian Military Nursing Ordinance, 1943 is also placed before me. Para-6 thereof provides that one of the eligibilities for appointment is that it is available only to a woman, who is aged 21 years. Such a woman, who is aged 21 years, and is found eligible for appointment is to be appointed as an officer in the Indian Military Nursing Service. It is thus apparent that the cadre of Military Nursing Service and the cadre of Nursing Technician are two different cadres and, therefore, they cannot be equated for any purpose. Procedure for recruitment and conditions of service for the two cadres are also distinct and separate."

16. Subject to above observations, the learned Single Judge in aforesaid case dismissed the petition. The operative portion of the order is reproduced as under:-

“In that view of the matter, there is no discrimination since the persons are not similarly situated and have different avenues of promotion. There is no merit in the petition and the petition stands dismissed.”

17. The decision in Civil Writ Petition 763 of 2011 (supra) was challenged by the petitioner before Hon’ble the Supreme Court in SLP (Civil) No. 7304 of 2002 which was dismissed by Hon’ble Supreme Court vide order dated 15.04.2002.

18. We have gone through the case law cited by both the parties. No doubt, in the cases cited by learned counsel for the applicant, the question decided related was on the doctrine of “equal pay for equal work”, but said decisions related to other departments/organizations/posts in the Army, whereas the decision of Hon’ble Delhi High Court in the case of *Subedar NK A.K. Saxena* (supra) specifically considered the question of treating the Nursing Technicians in the rank of Naib Subedar at par with the female nurses and granting them all benefits and service privileges as given to female nurses in the Military Nursing Service in respect of their rank, status, pay and allowances, i.e. the exact question involved in the present O.A. As observed above, the decision of the Delhi High Court has been upheld by Hon’ble Supreme Court and the Special Leave Petition preferred against said decision by the petitioner in said case has been dismissed. In this view of the matter, since the question involved in the present O.A. has attained finality by decision of Hon’ble Supreme Court, negating the relief sought in the present O.A., no relief as prayed for in the instant O.A. can be granted to the applicant.

19. In view of observations made above, the O.A. deserves to be dismissed; as such is **dismissed**.

No order as to costs.

(Air Marshal BBP Sinha)

Member (A)

Dated: July , 2018

anb

(Justice SVS Rathore)

Member (J)