A LT. COL. VIJAYNATH JHA

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 2020 of 2013)

B MAY 18, 2018

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Armed Forces Tribunal Act, 2007 :

s. 3(o) – Commissioned Officer (appellant) in Indian Army – Inducted in an organization (DGQA) functioning under Ministry of Defence – Refusal of permanent secondment to the appellant in DGQA – Refusal order challenged before Armed Forces Tribunal – Dismissed as not maintainable – On appeal, held: Enumerations under s. 3(o) indicate that they all relate to matters relating to conditions of service pertaining to the conditions of service of persons subject to Army Act, Navy Act and Air Force Act – Impugned order before the Tribunal was by a different organization – Therefore, cannot be held to be service matter within the meaning of s. 3(o) – ss. 27 and 33 of Army Act are also not applicable in the present case – Army Act, 1950 – ss. 27 and 33 – Navy Act, 1957 – Air Force Act, 1950.

Dismissing the appeal, the Court

HELD: 1. The Armed Forces Tribunal Act, 2007 has been enacted to provide for the adjudication or trial by Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950. [Para 12] [566-A-B]

2. The definition of service matters is an inclusive definition. A look into the enumerations as contained in Section 3(o) of 2007 Act indicates that they all relate to matters relating to the conditions of the service of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950. Last enumeration, i.e., (iv) of s. 3(o) is "any other matter whatsoever", at first blush; it appears that the said enumeration is very wide

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which may cover all other residual categories. But, the phrase "any other matter whatsoever" is to take colour from the other three enumerations and the main provision of Section 3(o). The pre-condition of a matter to be a service mater has to be *relating to the conditions of their service*. Thus, for a matter to be treated as a service matter, it must relate to the conditions of their service. [Para 14][567-C-E]

3. From the facts, it is clear that the appellant was given a tenure of two years in Directorate General of Quality Assurance (DGQA) in accordance with the guidelines issued by the Ministry of Defence, Department of Defence Production. After completion of tenure of two years, the appellant returned back to the Army. On 06.06.2007, the appellant's claim for permanent secondment in the DGQA was considered by the Quality Assurance Selection Board (QASB), wherein he was not found fit for the permanent secondment by the QASB, with regard to which a complaint was filed, which was rejected by the Ministry. DGQA is an Organisation functioning under the Ministry of Defence, Department of Defence Production and the question of permanent secondment of an Army Officer was considered by the Selection Board of DGQA. The decision not to grant permanent secondment to the appellant in DGQA does not in any manner affect the service conditions of the appellant as Commissioned Officer. [Para 15][567-F-H; 568-A]

4. In the present case, the action, which was impugned before the Armed Forces Tribunal was the refusal of permanent secondment of the appellant in DGQA by QASB. For permanent secondment of a Commission Officer, there were orders issued by the Ministry of Defence, which regulated the permanent secondment, i.e. Government Order dated 28.10.1978, as amended from time to time and the Government of India O.M. dated 22.12.1993. Non-selection of the appellant which was impugned in the application was by a different organisation, i.e., by QASB of DGQA. Therefore, action impugned before the Tribunal cannot be held to be service matter within the meaning of Section 3(o) of the Armed Forces Tribunal Act, 2007. [Paras 22, 23][573-C-E]

A **5. In the present case, Section 27 has no application. Section 27 of the Army Act, 1950 provides a remedy to aggrieved officers to submit a complaint to the Central Government, if he has been wronged by a commanding officer or any superior officer. Present is not a case where any action of commanding officer or any superior officer of appellant was complained or questioned. [Para 25][574-B]**

B **6. Section 33 of the Army Act, provides for "saving of rights and privileges under other laws". The said provision indicates that the provision saves the rights and privileges conferred on persons subject to Army Act, *by any other law for the time being in force.*" Section 33 has no application in facts of the present case. Present is not a case where the appellant is claiming any privilege conferred on persons subject to Army Act or by any other law in force. [Paras 26, 27][574-C, F]**

C *Union of India and Others v. Colonel G.S. Grewal* **(2014) 7 SCC 303 ;** *Mohammed Ansari v. Union of India and Others* **(2017) 3 SCC 740 : [2017] 1 SCR 422 – referred to.**

D **Case law reference**

(2014) 7 SCC 303	**referred to**	**Para 8**
[2017] 1 SCR 422	**referred to**	**Para 8**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2020 of 2013.

F From the Judgment and Order dated 23.08.2012/11.09.2012 by the Armed Forces Tribunal, Regional Bench Lucknow at Lucknow in OA No. 104 of 2011/M.A. No. 72/2012.

Lt. Col. Vijaynath Jha (Appellant-in-person).

G Sandeep Sethi, ASG, Ms. Alka Agrawal, M. K. Maroria, Prakash Gautam, Advs for the Respondents.

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The Judgment of the Court was delivered by

ASHOK BHUSHAN, J. 1. We have heard the appellant appearing in-person and Shri Sandeep Sethi, learned Additional Solicitor General for India.

2. This appeal has been filed by the appellant questioning the judgment and order dated 23.08.2012 passed by the Armed Forces Tribunal, Regional Bench, Lucknow by which O.A.No.104 of 2011 filed by the appellant has been rejected as not maintainable and returned to the appellant with liberty to file the same before the concerned authority.

3. Brief facts of the case necessary to be noted for deciding the issues raised in the appeal are:

The appellant was commissioned in the Indian Army on 11.03.1989 in the Engineering Discipline. The appellant was subsequently selected and inducted in the Directorate General of Quality Assurance (DGQA) from 31.05.2004. On completion of two years the appellant was transferred to the Directorate of Indigenization under DGEME. Quality Assurance Selection Board (QASB) was held at DGQA organisation for selection of the officers of the rank of Lt. Col. and Major for permanent secondment. The appellant was not found fit for permanent secondment by the QASB. The appellant filed a statutory complaint seeking permanent secondment in the DGQA. The complaint was submitted at the time when the appellant was working in the Army. The complaint was forwarded to the Ministry of Defence. Since, the complaint pertained to DGQA organisation, the Government of India, Ministry of Defence, Department of Defence Production by order dated 17.12.2007 rejected the statutory complaint of the appellant. O.A. No.104 of 2011 was filed by the appellant before the Armed Forces Tribunal, Regional Bench, Lucknow praying for quashing the order dated 17.12.2007 and issuing a direction to the respondent to grant permanent secondment to the DGQA organisation with all consequential benefits retrospectively.

4. A counter-affidavit was filed in O.A. by the respondent. When the O.A. was taken for hearing by the Armed Forces Tribunal on 23.08.2012 a preliminary objection was raised by the respondent that the relief claimed by the applicant in the O.A. is not maintainable in the Armed Forces Tribunal. The Armed Forces Tribunal heard the parties on the above preliminary objection and vide order dated 23.08.2012 held that O.A. is not maintainable. It is useful to extract paragraph 16 of the judgment which is to the following effect:

A *"16. The applicant's main grievance is that he was not considered for permanent seconded, DGQA organisation and we find no breach in the Army Act and the Army Rules and it is a separate organisation with the guideline for induction, appointment and promotion and Service HQ has no role in*
B *grant of second tenure of (sic) permanent secondment of any officer under the Army Act. The terms and condition of the service officers in DGQA is not creation of the Army Act or the Army Rules and the Armed Forces Tribunal is not the right forum for adjudication of DGQA matters. Hence the Original Application is not maintainable and is returned to the applicant*
C *with the liberty to file the same before the concerned authority."*

5. A miscellaneous application was filed by the applicant before the Tribunal seeking leave to appeal to this Court which application was rejected on 11.09.2012. This appeal has been filed challenging the order dated 23.08.2012 and order dated 11.09.2012.

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6. A counter-affidavit has been filed in this appeal by the respondent reiterating their objection that the relief which was claimed by the appellant in O.A. was not maintainable before the Armed Forces Tribunal.

E 7. The appellant appearing in-person submits that in DGQA Officers are drawn from Armed Forces on tenure posting and thereafter their cases are considered for permanent secondment as per the Office Memorandum dated 28.10.1978 and Office Memorandum dated 22.12.1993. The DGQA is an organisation within the control of Ministry of Defence and is composed of persons subject to Army Act, 1950
F including civilian persons thus the Armed Forces Tribunal will have the jurisdiction to decide the matter relating to DGQA. Relying on Section 3(o)(iv) of the Armed Forces Tribunal Act, 2007, the appellant submits that his case is squarely covered by the said provision. The appellant who is subject to Army Act, 1950 being a commissioned officer of Indian
G Army can very well approach the Armed Forces Tribunal. Reliance on judgment of Chandigarh Bench of Armed Forces Tribunal in the case of ***Brig.A.K. Bhutani vs. Union of India*** decided on 19.04.2011 has been placed. The appellant has also relied on the provisions of Sections 27 and 33 of the Army Act, 1950 to support his submission.

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8. Shri Sandeep Sethi, learned Additional Solicitor General submits that the claim raised by the appellant before the Armed Forces Tribunal is not covered by the definition of the service matter as defined in Section 3(o) of the Armed Forces Tribunal Act, 2007. He submits that denial of permanent secondment was made by DGQA Selection Board. No order was passed against the appellant under the Army Act or the Army Rules against which the appellant could have made a complaint before the Armed Forces Tribunal. Learned counsel for the respondent has placed reliance on the judgment of this Court in ***Union of India and others vs. Colonel G.S. Grewal, 2014 (7) SCC 303*** and on another judgment of this Court in ***Mohammed Ansari vs. Union of India and others, 2017 (3) SCC 740.*** He submits that service matters with regard to which Armed Forces Tribunal has jurisdiction are service matters of Army personnel which have been dealt under the Army Act, Army Rules and Regulations framed therein. The action which was impugned before the Tribunal by the appellant was not any action of the Army which could have been complained before the Armed Forces Tribunal. He has further submitted that Armed Forces Tribunal has rightly rejected the O.A. of the appellant as not maintainable.

9. We have considered the submissions of the parties and perused the records.

10. The only question which needs to be answered is as to whether the Original Application filed by the appellant was maintainable before the Armed Forces Tribunal?

11. The main relief, which was asked by the appellant before the Armed Forces Tribunal was to quash and set aside the order dated 17.12.2007 by which the complaint of the appellant was rejected by Central Government. The appellant had prayed for a direction to the respondents to grant permanent secondment in the DGQA Organization with all the consequential benefits retrospectively. The Armed Forces Tribunal (AFT) has rejected the application of the appellant holding that it has no jurisdiction to entertain the application. The Tribunal in Para 16 of the judgment has held that there is no breach of Army Act and the Army Rules and the Service HQ had no role in grant of second tenure of permanent secondment of any Army Officer in the DGQA Organisation. Further, the terms and conditions of the Service Officers in DGQA is not creation of the Army Act or the Army Rules.

12. The provisions of the Armed Forces Tribunal Act, 2007 have to be looked into to find out as to whether the Tribunal has committed any error in refusing to entertain the application of the appellant. The Armed Forces Tribunal Act, 2007 has been enacted to provide for the adjudication or trial by Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950. Section 2 deals with the applicability of the Act, which is to the following Act:-

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

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

13. Section 3 is a definition section. Section 3(o) defines "service matters", which is to the following effect:-

"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;"

14. The provision excludes certain matters. The present case is not covered by excluded categories, hence that part of the provision is not relevant for the present case. The definition of service matters is an inclusive definition. A look into the enumerations as contained in Section 3(o) indicates that they all relate to matters relating to the conditions of the service of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950. Last enumeration, i.e., (iv) is "any other matter whatsoever", at first blush; it appears that the said enumeration is very wide which may cover all other residual categories. But, the phrase "any other matter whatsoever" is to take colour from the other three enumerations and the main provision of Section 3(o). The pre-condition of a matter to be a service mater has to be *relating to the conditions of their service*. Thus, for a matter to be treated as a service matter, it must relate to the conditions of their service.

15. From the facts as noted above, it is clear that the appellant was given a tenure of two years in DGQA in accordance with the guidelines issued by the Ministry of Defence, Department of Defence Production, as noticed above. After completion of tenure of two years, the appellant returned back to the Army. On 06.06.2007, the appellant's claim for permanent secondment in the DGQA was considered by the QASB, wherein he was not found fit for the permanent secondment by the QASB, with regard to which a complaint was filed, which was rejected by the Ministry. DGQA is an Organisation functioning under the Ministry of Defence, Department of Defence Production and the question of permanent secondment of an Army Officer was considered by the Selection Board of DGQA. The decision not to grant permanent secondment to the appellant in DGQA does not in any manner affect the

A service conditions of the appellant as Commissioned Officer. The Tribunal has placed reliance on a judgment of the Principal Bench of the Armed Forces Tribunal in T.A. No. 125 of 2010, *Maj. General S.B. Akali Etc. Etc. Vs. Union of India & Ors.* In the above case, the question of selection of the applicant in Defence Research and Development Organisation was under consideration. The objection was raised that the AFT has no jurisdiction to entertain the claim. The Principal Bench of the Armed Forces Tribunal, speaking through Justice A.K. Mathur, Chairperson (as he then was), in Paragraphs 12, 13, 14 and 15 has held:-

> *"12. We have bestowed our best of consideration and we are of the opinion that as per Section 2 read with Section 3(o) of the Armed Forces Tribunal Act, 2007, this Tribunal has limited jurisdiction to deal with the service conditions of the Army Act and Rules, but, the present case, which relates to non-selection of the petitioner by the DRDO for the rank of Lt. General and it is not supersession under the Army Act or Rules, it is under the DRDO Rules of the Office Memorandum dated 23rd November, 1989. As such, this Tribunal cannot sit over the selection by DRDO to decide the issue whether petitioner has been correctly superseded or not, since the service conditions of the seconded officers under the DRDO is regulated by Office Memorandum dated 23rd November, 1979 and it is not under the Army Act and Rules. Therefore, this Tribunal will have no jurisdiction to decide this case of supersession of petitioner for promotion to the rank of Lt. General.*
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> *13. In this view of the matter, we uphold the preliminary objection of the learned Counsel for the respondent and direct the Principal Registrar to remit this case back to Hon'ble Delhi High Court to decide the matter in accordance with law.*
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> *14. On the same lines is the case of Brig PJS Rangar & Brig Anand Solanki (TA No. 221 of 2010). In this case the incumbents were permanently seconded to Director General of Quality Assurance. It is also governed by OM dated 28th October, 1978, as amended from time to time. In this case also the petitioners prayer is to quash the OM dated 18th February, 2008, letter dated 15th May, 2008 and empanelment*

order dated 16th June, 2008 and direct the respondents to give effect to the empanelment order dated 31st January, 2008 and promote them to the rank of Major General in accordance with their seniority in the panel.

15. The service conditions are governed by the OM dated 28th October, 1978 and the non-selection of the petitioners are by Director General Quality Assurance of Ministry of Defence. There is no breach of any service conditions under the Army Act and Rules. The non-selection of the petitioner is on account of the service conditions as mentioned in OM dated 28th October, 1978, as amended from time to time. Therefore, the objection raised by the learned Counsel for the respondent, in this case is also upheld and consequently it is held that this Tribunal has no jurisdiction to interfere in this matter and direct the Principal Registrar to remit this case back to Hon'ble Delhi High Court to decide the matter in accordance with law."

16. The above judgment has been referred to and relied by the Tribunal.

17. In the case of *Union of India & Ors. Vs. Colonel G.S. Grewal, (2014) 7 SCC 303,* the same question relating lack of jurisdiction of AFT came for consideration. The facts have been noticed in Paragraph 3 of the judgment, which are quoted as below:-

"3. The respondent joined the Indian Army as a Major. Indubitably, in that capacity he was subject to the discipline of the Army Act, 1950. It is a normal practice that the personnel belonging to the Armed Forces, namely, Army, Air Force or Naval Force, are seconded to the other offices under the Ministry of Defence, which include Department of Defence Production, Department of Defence Research and Development and Department of Ex-Servicemen Welfare. We are concerned here with the Department of Defence Production, which has Director General of Quality Assurances ("DGQA", for short) as well as Defence Public Sector Undertaking (DPSU). The respondent was seconded to DGQA on 6-11-2004 in the rank of Major. At that time, it was temporary secondment."

A 18. A policy decision was taken, which adversely affected the respondent's claim for further promotion in DGQA. He challenged the policy decision and consequently the order. Before the Tribunal, the judgment of Principal Bench in *Maj. General S.B. Akali Etc. Etc. (supra)* was relied on, which was brushed aside by the Tribunal. The Tribunal decided to entertain the application, however, observed that the B same will not be treated as a precedent. The Union of India, aggrieved by the said order of the Tribunal has approached the Supreme Court. This Court considered the matter in the aforesaid light and set aside the order of the AFT and remitted the matter. This Court held that it was required to be examined as to whether the relief claimed was entirely C within the domain of the DGQA or for that matter, the Ministry of Defence or it can still be treated as Service Matter Under Section 3(o). Following was held in Para 26:-

"26. No doubt, it is open to Mr Bhati to refer to the statutory provisions in the AFT Act or even the Army Act in support of D *his submission. But many other documents of which the learned counsel is relying upon were not part of the record before the Tribunal. Secondly, as already pointed out above, no such aspects are considered either by the Chandigarh Bench in the impugned judgment or by the Principal Bench in Major General S.B. Akali case1. We may point out that merely* E *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* F *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. In Major General S.B. Akali case1, the Principal Bench primarily went by this consideration. The subject-matter was promotion to the rank of Lieutenant General and this promotion was governed by the Rules* G *contained in the Policy of DRDO and not under the Army Act. Therefore, in the instant case, it is required to be examined as to whether the relief claimed is entirely within the domain of DGQA or for that matter, the Ministry of Defence or it can still be treated as "service matter" under Section 3(o) of the* H *AFT Act and two aspects are intertwined and inextricably*

mixed with each other. Such an exercise is to be taken on the basis of documents produced by both the sides. That has not been done. For this reason, we deem it proper to remit the case back to the Tribunal to decide the question of jurisdiction keeping in view these parameters."

19. Although in the above case, this court did not decide finally as to whether the claim of respondent G.S. Grewal in the said case could be entertained by AFT or not. The Court remitted the matter to consider as to whether the claim is entirely within the domain of the DGQA. Thus, the jurisdiction of AFT in a case where a person claims permanent secondment in DGQA, the nature of relief and the action challenged have to be looked into for answering the question. A subsequent judgment of this Court in the case of ***Mohammed Ansari Vs. Union of India & Ors., (2017) 3 SCC 740,*** is also relevant in this context. In this case, the appellant was appointed as an Assistant Executive Engineer in Border Roads Engineering Service (BRES). The appellant was not granted non-functional financial upgradation for officers of Organised Group A. He made representation to the concerned authorities, which was turned down. Thereafter, he filed Original Application No. 102 of 2012 before the Central Administrative Tribunal. The Tribunal decided the issue of jurisdiction in favour of the appellant, which was opposed. The Tribunal held that it has jurisdiction to entertain the claim of the appellant. Aggrieved by the said order of the Tribunal, Union of India filed a Writ Petition for quashment of the order of the Tribunal. The High Court framed the question as to whether a member of the GREF can be regarded as member of Armed Forces. The High Court after referring to Armed Forces Tribunal Act, 2007 and Central Civil Services (Control, Classification and Appeal) Rules, 1965 held that the Central Administrative Tribunal had no jurisdiction and only remedy was to file an application under Article 226. The appellant challenging the order of the High Court came up before this Court. In the above context, this Court also examined the question as to whether after coming into the force of the Armed Forces Tribunal Act, 2007, it shall be the Armed Forces Tribunal which shall deal with the controversy or the High Court has jurisdiction Under Article 226 of the Constitution of India. The judgment of this Court in *Union of India & Ors. Vs. Colonel G.S. Grewal, (supra)* was extensively quoted by this Court and after quoting Paragraph 26 of the judgment, following was stated in Para 29:-

A *"29. Thus, the Court in G.S. Grewal case clearly held that merely because the respondent is subjected to the 1950 Act would not by itself be sufficient to conclude that the Tribunal had jurisdiction to deal with any case brought before it by such a person. It would depend upon the subject-matter which*
B *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 matter" as contained in Section 3(o) of the 2007 Act.*

20. This Court further laid down in Paragraphs 33 and 34:-

C *"33. The situation insofar as jurisdiction of the Armed Forces Tribunal (AFT) to hear the appeals arising out of court martial verdicts qua GREF personnel, however, appears to stand on a different footing. It is because the provisions of Chapter VI i.e. offences, Chapter VII i.e. punishment, Chapter X i.e.*
D *"courts martial", etc. apply with full force, subject to minor exceptions and modifications here and there, as applied to GREF. Therefore, the provisions of the 1950 Act dealing with various punishments inflicted by way of courts martial qua GREF personnel as applied can be agitated before AFT and AFT shall have jurisdiction to hear appeals arising out of*
E *courts martial verdicts. There can be no doubt that in respect of said matters AFT shall have jurisdiction. Denial of jurisdiction to the said Tribunal would be contrary to the 1950 Act and the provisions engrafted under the 2007 Act. To elaborate, right to approach AFT by the personnel of GREF*
F *who are tried by a court martial held under the very same Act has to be recognised. At the same time, if the punishment is imposed on GREF personnel by way of departmental proceedings held under the CCS (CCA) Rules, 1965 then obviously the same cannot be agitated before AFT since the penalty in such cases will not be one under the 1950 Act but*
G *will be under the CCS (CCA) Rules, 1965. The distinction, as the law exists in the present, has to be done.*

34. From the aforesaid, the legal position that emerges is that AFT shall have jurisdiction (i) to hear appeals arising out of courts martial verdicts qua GREF personnel. To this extent
H *alone AFT shall have jurisdiction. At the same time, if the*

punishment is imposed on GREF personnel by way of departmental proceedings held under the CCS (CCA) Rules, 1965 the same cannot be agitated before AFT; and (ii) AFT shall have no jurisdiction to hear and decide grievances of GREF personnel relating to their terms and conditions of service or alternatively put "service matters".

21. This Court in the above case has clearly held that AFT can exercise jurisdiction if the action, which is complained flow from the Army Act, 1950, the example of court martial verdict was given to which the personnel of GREF were subject. This Court further held that in event, the personnel of GREF had been administratively dealt with in the departmental proceedings held under the CCS(CCA) Rules, the same cannot be agitated before the AFT.

22. Coming back to the facts of the present case, the action, which is impugned before the AFT was the refusal of permanent secondment of the appellant in DGQA by QASB. For permanent secondment of a Commission Officer, there were orders issued by the Ministry of Defence, which regulated the permanent secondment, i.e. Government Order dated 28.10.1978, as amended from time to time and the Government of India O.M. dated 22.12.1993. Non-selection of the appellant which was impugned in the application was by a different organisation, i.e., by QASB of DGQA.

23. We thus are of the view that action impugned before the Tribunal cannot be held to be service matter within the meaning of Section 3(o) of the Armed Forces Tribunal Act, 2007.

24. The appellant, who has appeared in-person has further relied on two provisions namely, Section 27 and Section 33 of the Army Act, 1950, which are extracted as below:-

"27. Remedy of aggrieved officers.— Any officer who deems himself wronged by his commanding officer or any superior officer and who on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government in such manner as may from time to time be specified by the proper authority.

33. Saving of rights and privileges under laws.— The rights and privileges specified in the preceding sections of this Chapter shall be in addition to, and not in derogation of, any

A *other rights and privileges conferred on persons subject to this Act or on members of the regular Army, Navy and Air Force generally by any other law for the time being in force."*

25. Section 27 provides a remedy to aggrieved officers to submit a complaint to the Central Government, if he has been wronged by a B commanding officer or any superior officer. Present is not a case where any action of commanding officer or any superior officer of appellant was complained or questioned. Thus Section 27 has no application.

26. Coming to Section 33 of the Act, which provides for "saving of rights and privileges under other laws". The said provision indicates C that the provision saves the rights and privileges conferred on persons subject to Army Act, by any other law for the time being in force." Few examples of such privileges are as under:-

"(a) All Govt. pensions (including military persons) are immune from attachment in the execution of the decrees of civil courts; s. 11 of pensions Act 1871, proviso (g) to s. 60 of Code of D *Civil Procedure 1908.*

(b) Receipts for pay or allowances of NCOs, or Sepoys when serving in such capacity need not be stamped; Indian Stamp Act, schedule 1.

E *(c) All officers, JCOs, WOs and OR of the regular Army on duty or on the march as well as their authorized followers, families, horses, baggage and transport are exempt from all tolls except certain tolls for the transit of barges etc. along canals; s. 3 of Indian Tolls (Army and Air Force) Act 1901."*

F 27. The above provision has no application in facts of the present case. Present is not a case where the appellant is claiming any privilege conferred on persons subject to Army Act or by any other law in force. Section 33, thus, has no application.

28. In view of the aforesaid discussion, we are of the view that G the Tribunal committed no error in holding that the application filed by the appellant was not maintainable before the AFT. AFT has returned the application of the applicant to take proceeding before competent authorities. In result, the appeal is dismissed.

H Kalpana K. Tripathy Appeal dismissed.

ADARSH COOPERATIVE HOUSING SOCIETY LTD. A

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 129 Of 2018)

FEBRUARY 16, 2018 B

[DIPAK MISRA, CJI AND SANJAY KISHAN KAUL, J.]

Constitution of India – Art.32 – Petitioner sought directions for prohibiting the respondents Nos. 4 to 7 from releasing/screening/ publishing feature film with direct or indirect references to the petitioner society's land/building/membership – Petitioner alleged that film has projected the society in an unacceptable manner and that is likely to have some impact on the litigations which are pending apart from affecting the reputation of the members of the society – Held: A film with regard to a particular situation does not affect the trial or the exercise of 'error jurisdiction' by the appellate court – The Courts of law decide the lis on the basis of the materials brought on record and not on the basis of imagination as is projected in language of the theatre or a script on the celluloid – The doctrine of sub-judice may not be elevated to such an extent that some kind of reference or allusion to a member of a society would warrant the negation of the right to freedom of speech and expression which is an extremely cherished right enshrined under the Constitution – The right to freedom of speech and expression is not absolute but any restriction imposed thereon has to be extremely narrow and within reasonable parameters – In instant case, the grant of certificate by the Central Board of Film Certification (CBFC), after consulting with the authorities of the Army, should dispel any apprehension of the members or the society – Cinematograph Act, 1952. C D E F

Dismissing the writ petition, the Court

HELD : 1. A film with regard to a particular situation does not affect the trial or the exercise of 'error jurisdiction' by the appellate court. The courts of law decide the *lis* on the basis of the materials brought on record and not on the basis of imagination as is projected in the language of the theatre or a script on the celluloid. [Para 8] [580-F-G] G H

2. In human history, there have been many authors who expressed their thoughts in their own words, phrases, expressions and also created whimsical characters which no ordinary man would conceive of. Further, a thought provoking film should never mean that it has to be didactic or in any way puritanical, rather it can be expressive and provoking the conscious or the sub- conscious thoughts of the viewer and if there has to be any limitation on it, such a limitation has to be as per the prescribed law. [Para 10] [581-D-E]

3. The doctrine of sub-judice may not be elevated to such an extent that some kind of reference or allusion to a member of a society would warrant the negation of the right to freedom of speech and expression which is an extremely cherished right enshrined under the Constitution. The moment the right to freedom of speech and expression is atrophied, not only the right but also the person having the right gets into a semi coma. However, the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within reasonable parameters. In the case at hand, the grant of certificate by the CBFC, after consulting with the authorities of the Army, should dispel any apprehension of the members or the society. [Para 17] [583-C-E]

Viacom 18 Media Private Limited & Ors. v. Union of India & Ors. **2018 (1) SCALE 382 – relied on.**

R. K. Anand v. Registrar, Delhi High Court **(2009) 8 SCC 106 : [2009] 11 SCR 1026**; *State of Maharashtra v. Rajendra Jawanmal Gandhi* **(1997) 8 SCC 386 : [1997] 4 Suppl. SCR 68**; *Mushtaq Moosa Tarain v. Government of India* **(2005) SCC Online Bom. 385**; *Nachiketa Walhekar v. Central Board of Film Certification & Anr.* **(2018) 1 SCC 778**; *Devidas Ramachandra Tuljapurkar v. State of Maharashtra & Ors.* **(2015) 6 SCC 1 : [2015] 7 SCR 853 – referred to.**

Kingsley International Pictures Corporation v. Regents of the University of the State of New York **360 U.S. 684, 688-89 (1959) – referred to.**

Case Law Reference

[2009] 11 SCR 1026	**referred to**	**Para 4**
[1997] 4 Suppl. SCR 68	**referred to**	**Para 5**
2018 (1) SCALE 382	**relied on**	**Para 8**
(2018) 1 SCC 778	**referred to**	**Para 9**
[2015] 7 SCR 853	**referred to**	**Para 13**

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 129 of 2018.

Under Article 32 of the Constitution of India.

Sanjay R. Hegde, Sr. Adv., Ravindra Keshavrao Adsure, Ms. Himanshi Gupta, Sagar N. Pahune Patil, Pranjal Kishore, Advs. for the Petitioner.

DIPAK MISRA, CJI 1. The petitioner, a registered society, has preferred this petition under Article 32 of the Constitution of India seeking appropriate directions for prohibiting the respondent Nos. 4 to 7 from releasing/screening/publishing feature film, namely, 'Aiyaary' with direct or indirect references to the petitioner society's land/building/membership, for such an action is bound to affect the Right to Life under Articles 14 and 21 of the Constitution. It is also prayed that the said respondents should be commanded to delete all those parts in the ensuing feature film which has direct or indirect references to the society in question.

2. It is contended by Mr. Sanjay R. Hegde, learned senior counsel for the petitioner, that the film, which is going to be released, has projected the society in an unacceptable manner and that is likely to have some impact on the litigations which are pending apart from affecting the reputation of the members of the society. A newspaper article has been brought on record to highlight how the script has been written and how the dialogues have the innuendos to reflect on the image of the society as well as its members. Learned senior counsel has highlighted that the members of the society have built a reputation which is very dear to their life and if the film is allowed to be released, the same shall destroy the established reputation and the posterity will remember the image projected in the film but not the real image which the members have. According to Mr. Hegde, the "reel reflection" will garner the mindset of the people rather than the "real life lived".

A 3. It is not in dispute that the film 'Aiyaary' has already been given the requisite certificate by the Central Board of Film Certification (for short 'CBFC') under the Cinematograph Act, 1952 (for brevity, 'the Act') and the said Board has also taken the suggestions from the competent authorities of the Army as a measure of caution. There can be no shadow of doubt that the Censor Board can grant a certificate and in the said decision making process, it can also consult the persons who can assist it to arrive at the condign conclusion. We do not intend to name the number of authorities which have been referred to in the pleadings.

C 4. Learned counsel had laid emphasis on ***R.K. Anand v. Registrar, Delhi High Court***[1] and the paragraph that has been commended to us is extracted below:-

> "The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial impossible but means that regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny."

E 5. A passage has also been referred to from the decision in ***State of Maharashtra v. Rajendra Jawanmal Gandhi***[2] which states thus:-

> "There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice."

6. Our attention has been drawn to a few passages from the judgment of the Bombay High Court in ***Mushtaq Moosa Tarain v. Government of India***[3]. As Mr. Hegde has laid immense stress on the paragraphs from the said judgment, we think it appropriate to reproduce the same:-

> "56. The Censor Board has framed guidelines. These guidelines are framed under section 5b(2) of the cinematography act. One

[1] (2009) 8 SCC 106
[2] (1997) 8 SCC 386
H [3] (2005) SCC Online Bom. 385

of the guiding factors is that visuals or words "involving defamation of an Individual or Body of Individual or contempt of court are not presented. These guidelines ensure that nothing should be permitted which amounts to interfering with the administration of justice. It is not as if the Censor Board has to be satisfied that visuals or scenes have in fact interfered with or obstructed the course of justice or have adverse effect thereon. In other words, it is not as if the matter has to be decided by the Censor Board on the touch stone of Law of Contempt. Similarly, "defamation" as contemplated by the guidelines should not be construed as committing of tort of defamation as understood in law. Broadly, these guidelines are for the purposes of giving effect to the well settled principle that every right has a corresponding duty or obligation.

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64. In the case of Hutchison, Ex parte McMAHON, reported in (1936) ALL ENGLAND LAW REPORTS ANNOTATED (VOL. 2) 1514, the King's Bench has observed thus:-

"Proprietors of cinemas and distributors of films must realise that, if they want to produce these sensational films, they must take care in describing them not to use any language likely to bring about any derangement in the carriage of justice."

65. Grant of injunction or restraint order is not a gagging writ in the facts of this case. The Petitioner has made out a strong prima-facie case inasmuch as fair trial, which is part of Rule of Law and Administration of Justice, is an aspect which must prevail over individual's right of free speech and expression. People's right to know cannot be stretched to such an extent as would make mockery of Rule of Law. Petitioner's right to fair and impartial trial must outweigh all such previleges and expectations. The balance of convenience is definitely in favour of an injunction inasmuch as the restraint against exhibition is for limited duration and the Petitioner's right as above as well as public interest is in favour of such restraint. The Respondents have a commercial and business interest which is secondary. The loss to the Petitioner's dignity and reputation is enormous. It would be irreparable as the viewers may form an opinion about his guilt.

A 66. Before we conclude, we cannot but observe that this trial is one of those important trials even in terms of history and in terms of reconciliation of people. If the people have to have a belief in truth and justice as abiding values having a primacy over force and violence, it is just and necessary that justice must not merely be done but must also appear to have been done. If a society B wants to do justice and thereby have peace and stability, then the stream of justice has got to be maintained clean to the extent possible. It is equally essential that the dignity of any individual, even though he may be an accused, has to be maintained as far as it could be. Looking at it from this point of view as well, we C cannot but hold that the release of the film will have a prejudicial effect on fair administration of justice as well as on the image of the accused. We, therefore, hold that the Petitioner has made out a case for the injunction that he has sought on the ground that the release of the film would constitute contempt of court and his defamation."

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7. Relying on the said judgment, it is contended by Mr. Hegde that as the matter is sub-judice, the release of the movie is likely to affect the stream of justice and order of stay of the release of the movie is called for. With all the humility at his command, Mr. Hegde has relied upon the E decision of the Bombay High Court which we have referred to hereinabove. We do not intend to comment on the said decision of the Bombay High Court because we are not aware whether the *lis* travelled to this Court or not and in any case, the principle stated therein cannot always be a guiding factor. Suffice it to say, the said case has to rest on its own facts.

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8. As it seems to us, a film with regard to a particular situation does not affect the trial or the exercise of 'error jurisdiction' by the appellate court. The courts of law decide the *lis* on the basis of the materials brought on record and not on the basis of imagination as is projected in the language of the theatre or a script on the celluloid. In G this regard, we may reproduce a paragraph from the order passed in ***Viacom 18 Media Private Limited & Ors. v. Union of India & Ors***.[4] which deals with the release of the film, namely, 'Padmaavat'. It reads as follows:-

[4] 2018 (1) SCALE 382

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"It has to be borne in mind, expression of an idea by any one through the medium of cinema which is a public medium has its own status under the Constitution and the Statute. There is a Censor Board under the Act which allows grant of certificate for screening of the movies. As we scan the language of the Act and the guidelines framed thereunder it prohibits use and presentation of visuals or words contemptuous of racial, religious or other groups. Be that as it may. As advised at present once the Certificate has been issued, there is prima facie a presumption that the concerned authority has taken into account all the guidelines including public order."

9. In *Nachiketa Walhekar v. Central Board of Film Certification & Anr.*[5], this Court stated that a film or a drama or a novel or a book is a creation of art and that an artist has his own freedom to express himself in a manner which is not prohibited in law. The Court also stated that prohibitions should not by implication crucify the rights of expressive minds.

10. The Court noted that in human history, there have been many authors who expressed their thoughts in their own words, phrases, expressions and also created whimsical characters which no ordinary man would conceive of. Further, the Court stated that a thought provoking film should never mean that it has to be didactic or in any way puritanical, rather it can be expressive and provoking the conscious or the sub-conscious thoughts of the viewer and if there has to be any limitation on it, such a limitation has to be as per the prescribed law.

11. Elaborating the same, we may add that there can be multitudinous modes, manners and methods to express a concept. One may choose the mode of silence to be visually eloquent and another may use the method of semi-melodramatic approach that will have impact. It is the individual thought and approach which cannot be curbed.

12. Mr. Hegde, learned senior counsel, has also suggested that though the freedom of speech and expression should not be curtailed, yet this Court, on certain occasions, has protected the image and reputation of the individuals by giving priority to the image of the person in society.

13. In this regard, he has drawn inspiration from ***Devidas Ramachandra Tuljapurkar v. State of Maharashtra & Ors***.[6]. It is

[5](2018) 1 SCC 778
[6] (2015) 6 SCC 1

A necessary to clarify here that in the said case, the question was with regard to poetic license wherein the Court observed that as far as the words "poetic license" are concerned, it can never remotely mean a license as understood in the language of law as there is no authority which gives a license to a poet; for the words of the poet come from the realm of literature. Further elaborating, the Court stated that the poet B assumes his own freedom which is allowed to him by the fundamental concept of poetry and he is free to depart from the reality; hide ideas beyond myths which can be absolutely unrealistic or put serious ideas in satires, ifferisms, notorious repartees; take aid of analogies, metaphors, similes in his own style, compare life with sandwiches that is consumed C everyday or convey life is like peeling of an onion, or society is like a stew define ideas that can balloon into the sky never to come down and cause violence to logic at his own fancy.

14. In this backdrop, the Court opined that a 'poetic license' can have individual features, deviate from norms, or other collective D characteristics or it may have a linguistic freedom wider than what a syntax sentence would encompass. We may note with profit that the controversy travelled to this Court as the trial court had framed charges under Section 292 IPC against the appellants and the High Court had declined to interfere. This Court observed that the language employed in the poem "I met Gandhi" was *prima facie* obscene because of the E language employed relating to Mahatma Gandhi, the father of the Nation. Though the Court quoted some stanzas of the poem, yet it thought it wise not to reproduce the said stanzas in entirety because of the words used. The Court did not adjudicate upon the entire controversy as the author of the poem had not challenged the order. The concept of obscenity F was judged in the background of "contemporary community standards test" and the Court ruled that when the name of Mahatma Gandhi is alluded or used as a symbol and obscene words are used, the concept of "degree test" in addition to contemporary community standards test is invokable. The Court further elaborated by stating that the "contemporary community standards test" becomes applicable with more vigour, in a G greater degree and in an accentuated manner. The Court was of the view that what can otherwise pass the contemporary community standards test would not be able to do so if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene.

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15. While so stating, the Court concluded by leaving it to the poet to put his defense at the trial explaining the manner and the context in which he has used the words. In this context, the Court further opined that the view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be said to be flawed.

16. In our considered opinion, the reliance placed on the above-mentioned judgment by Mr. Hegde, learned senior counsel, does not render any assistance. The law laid down in the said case rests on the facts depicted therein.

17. At this juncture, we may also state that the doctrine of sub-judice may not be elevated to such an extent that some kind of reference or allusion to a member of a society would warrant the negation of the right to freedom of speech and expression which is an extremely cherished right enshrined under the Constitution. The moment the right to freedom of speech and expression is atrophied, not only the right but also the person having the right gets into a semi coma. We may hasten to add that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within reasonable parameters. In the case at hand, we are obligated to think that the grant of certificate by the CBFC, after consulting with the authorities of the Army, should dispel any apprehension of the members or the society.

18. In this context, we may appositely reflect on an eloquent passage from ***Kingsley International Pictures Corporation v. Regents of the University of the State of New York***[7] wherein Potter Stewart stated:-

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

[7] 360 U.S. 684, 688-89 (1959)

A 19. The nature of the present matter compels us to recapitulate that the human history is replete with struggles to get freedom, be it physical or mental or spiritual. The creativity of a person impels him not to be tied down or chained to the established ideals or get enslaved to the past virtues and choose to walk on the trodden path. He aspires to rejoice with the new ideas and exerts himself to achieve the complete fruition. That is the determination for moving from being to becoming, from existence to belonging and from ordinary assumption to sublime conception. The creative intelligence kicks his thinking process to live without a fixed target but toying with many a target.

C 20. We would be failing in our duty if we do not note the last plank of submission of Mr. Hegde. He would suggest that this Court may direct the producer and director of the film to add a disclaimer so that no member of the society would ultimately be affected by the film. The aforesaid submission on a first blush may seem quite attractive but on a slightly further scrutiny, if we allow ourselves to say so, has to melt into D oblivion. Whether there is the necessity of "disclaimer" or not has to be decided by the Censor Board which is the statutory authority that grants the certificate. In fact, when a disclaimer is sought to be added, the principle of natural justice is also attracted. To elaborate, the producer or director is to be afforded an opportunity of hearing. The Court should not add any disclaimer for the asking. Addition of a disclaimer is a different E concept altogether. It is within the domain of the authority to grant certificate and to ask the director to add a disclaimer in the beginning of the movie to avoid any kind of infraction of guidelines. Though the suggestion is made in right earnest by Mr. Sanjay Hegde, yet we are impelled not to accept the same.

F 21. Consequently, the writ petition, sans merit, stands dismissed.

Ankit Gyan Writ Petition dismissed.