[2023] 16 S.C.R. 1026 : 2023 INSC 1074

UNION OF INDIA & ORS.
v.
AIR COMMODORE NK SHARMA (17038) ADM/LGL

(Civil Appeal No. 14524 of 2015)

DECEMBER 14, 2023

[ABHAY S. OKA AND SANJAY KAROL*, JJ.]

Issue for consideration:

Whether the Armed Forces Tribunal could have issued a direction to the Government to frame a policy for filling up the post of Judge Advocate General (Air) and; whether the Tribunal could have directed that the Respondent would continue functioning in such capacity despite non-acceptance of the Promotion Board's recommendation till such time that the policy is framed by the Government and be given an opportunity for consideration by the promotion board constituted under such new policy.

Armed Forces Tribunal Act, 2007 – Jurisdiction of Tribunal – Impugned order passed by the Armed Forces Tribunal directing formation of policy and for the Respondent to continue in service till such time of formation of the policy and being considered thereunder – Legality:

Held: A Tribunal functioning within the strict boundaries of the governing legislation, would not have the power to direct the formation of a policy – A Tribunal subject to the High Court's jurisdiction under Article 226, cannot be permitted by law, to direct the framing of policy by the Government – Making policy is not in the domain of the Judiciary – The Tribunal is also a quasi-judicial body, functioning within the parameters set out in the governing legislation – Although, it cannot be questioned that disputes in respect of promotions and/or filling up of vacancies is within the jurisdiction of the Tribunal, it cannot direct those responsible for making policy, to make a policy in a particular manner – Further, in the Armed Forces, the tenure of service is extended for a period of time upon a person taking office of higher rank – Therefore, upon consideration, had the Respondent been found suitable for promotion to AVM, his superannuation would have moved forward from 57 years at which he was due to superannuate upon not being

* Author

promoted – The age of retirement is known to each officer – A direction to let the Respondent continue in service even past such age appears to be without any basis – The Tribunal did not have any power to extend this, that too for infinity – Therefore, given that the determination of the age of superannuation is within the domain of Executive policy, of which the Tribunal was fully aware, and that, even while seeking to do complete justice, this court ought not to, in ordinary circumstances, look past the commonly accepted age of superannuation, it is clear that the order of the Tribunal is sans basis – Furthermore, on facts, respondent's challenge was barred at first instance, as he participated in the Promotion Board of 2015 and only challenged the non-formation of a policy for filling up the vacancy of AVM JAG (Air), finding himself to be unsuccessful in securing a promotion thereto – Order passed by the Tribunal is quashed and set aside – Service Law. [Paras 20, 22, 17, 23, 24, 26, 28.5, 29]

Service Law – Challenge to the basis of promotion after having participated – Impermissibility:

Held: Challenging the basis of promotion after having participated in the process on consideration of promotion and having been declared unsuccessful thereunder, is not a valid ground to impugn the policy/method – Such challenges cannot be allowed – In the present case, the post of JAG (Air) was upgraded to AVM in the year 2012 – The previous occupant of the position superannuated in 2014 whereafter, the Respondent was once again appointed to such position – The said position having fallen vacant and the Respondent, being only an officiating officer, was only considered with his course mates in the Promotion Board of 2015 – Thus, he was not considered by the Air Force against the AVM JAG vacancy – It is undisputed that the Respondent participated in the Promotion Board of 2015 – It is only when after such consideration alongside other course-mates of the Adm. Branch, when he was not promoted to the rank of AVM JAG (Air) that he initiated the statutory complaint u/s. 27 of the AF Act – Armed Forces Tribunal Act, 2007. [Paras 28.1-28.3, 30]

L. Chandra Kumar v. Union of India & Ors., [1997] 2 SCR 1186: **(1997) 3 SCC 261;** *Rojer Matthew v. South Indian Bank Ltd & Ors.*, [2019] 16 SCR 1: **(2020) 6 SCC 1 – followed.**

Union of India v. K. Pushpavanam, **2023 SCC OnLine SC 987; *Union of India & Ors v. Ilmo Devi & Anr.*, 2021 SCC OnLine SC 899; *Union of India v Parashotam Dass*, 2023 SCC OnLine SC 314;** *Chandra Mohan Verma v. State of Uttar Pradesh*, **[2020] 1 SCR 1158: (2020) 13 SCC 261;** *Union of India v. Uzair Imran*, **2023 SCC OnLine 1308;** *Pradeep Kumar Rai v. Dinesh Kumar Pandey*, **[2015] 6 SCR 825: (2015) 11 SCC 493;** *Ramesh Chandra Shah v. Anil Joshi*, **[2013] 5 SCR 687: (2013) 11 SCC 309;** *Tajvir Singh Sodhi & Ors. v. State of Jammu Kashmir & Ors.*, **2023 SCC OnLine SC 344 – relied on.**

Ex-Rect-/Rfn Nahar Singh v. UOI, Decision of Delhi High Court **in WP(C) 12853/2005 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.14524 of 2015.

From the Judgment and Order dated 30.11.2015 of the Armed Forces Tribunal, Principal Bench, New Delhi O.A. No.537 of 2015]

Ms. Sonia Mathur, Sr. Adv., Rajan Kumar Chourasia, Divik Mathur, Arvind Kumar Sharma, Praneet Pranav, Rajeev Ranjan, Ms. Sweksha, Dr. N Visakamurthy, Advs. for the Appellants.

V. S. Tomar, Rabin Majumder, Advs. for the Respondent.

The Judgment of the Court was delivered by

SANJAY KAROL J.

1. This Civil Appeal, under Section 31(1)[1] of the Armed Forces Tribunal Act, 2007[2] at the instance of the Union of India, is directed against the judgment and order dated 30th November 2015, passed by the Armed Forces Tribunal, Principal Bench, New Delhi in Original Application No. 537 of 2014.

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1 31. Leave to appeal.—(1) An appeal to the Supreme Court shall lie with the leave of the Tribunal;and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.

2 Referred to as "the Act"

For ease, the Union of India is hereafter referred to as the Appellants and Air Commodore NK Sharma, is referred to as the Respondent.

BRIEF FACTS

2. A brief conspectus of facts, as relevant for adjudication of this appeal is-

2.1 The Respondent was commissioned in the Administrative Branch of the Indian Air Force on 29th December, 1982.

2.2 In 1989, he voluntarily underwent training for the Air Force Judge Advocate course in accordance with Air Force Instruction 74/71[3] issued by the Government of India titled as 'Employment of Air Force Officers on Legal Duties-Terms and Conditions' which he completed in 1990.

2.3 1991 onwards, the Respondent has served in the JAG department. Having served on various posts in this department, he was appointed as the Judge Advocate General (Air)[4] by the Chief of Air Staff on 1stAugust, 2010while serving asa Group Captain.

2.4 On 1st June, 2011 he was promoted to the rank of Air Commodore. Further he was granted the acting rank to fill up the possession of JAG (Air). He continued to serve in this position till 15 April 2013. In the meanwhile, on 4th May, 2012 the post of JAG (Air) was upgraded to the rank of Air Vice Marshal.[5]

2.5 On 15 April 2013 another officer of the upgraded rank was appointed to serve as JAG (Air) and upon his superannuation, the Appellant was re-appointed to the said position on 1 October 2014.

THE GENESIS OF THE DISPUTE

3. The grievance of the Respondent is that upon superannuation of the previous JAG (Air), despite meeting the criteria for promotion to AVM, no promotion board was formed to consider the Respondent

3 Hereafter referred to as 'AFI 71/74'
4 Abbreviated as JAG (Air)
5 For brevity, 'AVM'

for the aforesaid vacancy and instead, it was eventually decided that he would be considered for promotion in his parent branch along with his course mates in Promotion Board 1/2015.

4. As such,he was considered in the said Promotion Board along with 9 other persons. Other persons, apart from him were found eligible to fill up the position of JAG (Air) since no other persons, apart from the Appellant were found to have the requisite legal training in accordance with the AFI 71/74. Hence, he was recommended for the position of AVM, which however, was not accepted by the Ministry of Defence[6].

5. It is on such non-acceptance of the recommendation of the Promotion Board that, the dispute before us, began.

STATUTORY APPEAL

6. Section 27[7] of the Air Force Act, 1950[8] provides for a mechanism for redressal of grievances held by officers against their commanding officer or any other superior. Aggrieved by the action of the MoD, the Respondent took recourse to such remedy[9].

6.1 The MoD by order dated 29th September, 2015, considered the Respondent's complaint. The grievance was noted as being the denial of promotion to the rank of AVM despite a clear legal vacancy being available.

6.2 The conclusions arrived at by the competent authority of the MoD in respect of the Respondent's complaint can be summarised as under: –

6.2.1 At the outset, it was noted that the Indian Air Force does not have a separate legal branch. The terms and conditions of officers on legal duty are governed by the AFI 71/74, (as 'amplified' by Air Force Order 08/2005[10]) which provides that such officers will be selected from

6 For brevity, 'MoD'

7 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 Governmentin such manner as may from time to time be specified by the proper authority

8 AF Act, for short.

9 The Respondents complaint dated 20 April 2015 underSection 27 of the AF Act is not on record.

10 Referred to as AFO 08/2005

among those holding permanent commission in any branch of the Air Force[11] other than Technical Branch, and while performing such duties, they shall draw pay, allowances appropriate to their rank and branch.

6.2.2 The Government has not issued any policy regarding a separate promotion board for legal vacancies. No policy has been put forth by the Respondents herein which allows him to be promoted against the legal vacancy, without being cleared for promotion to the rank of AVM in the parent branch.

6.2.3 Officers filling up legal vacancies, are eligible for the grant of higher ranks against vacancies in authorised legal appointments, however, the grant of substantive ranks is governed by the parent branches.

6.2.4 Five vacancies were available with the parent branch of the Respondent including the vacancy for JAG (Air). The Respondent was the only officer qualified for such post. However, he was placed 9th amongst 10 considered for the promotion to AVM as per 'AR merit'. The grant of higher marks by the Promotion Board "just to include him in the top 5" is contrary to the provisions of AFO 08/2005. Such marks awarded were "disproportionate to his demonstrated performance as revealed from the ARs and the officers placed above him on the basis of AR marks were given lesser board marks though these officers had varied exposure to the duties of the Adm Branch…"

6.2.5 As per the promotion policy, for the promotion to the current position of the Respondent as also AVM, the ARs of the last 10 years are to be taken in into consideration. But he was placed 9th.

6.2.6 Throughout his career, all promotions given to the Respondent have been with his course mates in the

11 Additional qualifications being that, they ought to have minimum 3 years of commissioned service and, that they ought not to be below the rank of Flight Lieutenant.

parent branch. The Respondent was not promoted to his current position as Air Commodore even when his predecessor at the same position, retired. He was only given the promotion more than a year later, along with his peers of the parent branch.

6.3 Taking such a view of the matter, the Respondent's complaint was rejected as "devoid of merit"

PROCEEDINGS BEFORE THE ARMED FORCES TRIBUNAL

7. In the original application filed before the Armed Forces Tribunal, the Respondent urged, mainly, the following grounds-

7.1 The Respondent (Appellant herein) has knowingly and deliberately not convened the promotion board in 2014 to facilitate the promotion of the Applicant (Respondent herein) in the legal branch.

7.2 The non-approval of recommendations of the Promotion Board of 2015 against the vacancy of AVM, JAG (Air) was illegal,arbitrary, and discriminatory particularly when the Respondent herein fulfilled all the conditions required for such promotion to AVM since May, 2012. This action of non-filling of the position of AVM despite the availability of an eligible and qualified candidate violates the fundamental rights of the Respondent.

7.3 It has been acknowledged by the Appellant herein that only a Judge Advocate qualified officer could be appointed against the position of AVM earmarked for JAG (Air), then when the Respondents herein was the sole qualified candidate, he could not be denied the said promotion.

8. In its counter affidavit, the Appellant herein submitted, chiefly, as under: –

8.1 In the names forwarded by the promotion board, the Respondent herein featured as 1 of the 5 persons recommended to be appointed as AVM. However, it was found that board had awarded the Respondent herein, disproportionate and excessive marks in comparison to other officers in the 'zone of consideration'. This was done only with the aim to appoint

him as JAG (Air). It is on this ground that, the Government did not find the recommendation to be appropriate.

8.2 There is no provision, in either AFI 74/71 or AFO 08/05 or in the Promotion Policy dated 20thFebruary 2008 under which a separate promotion board for filling up legal vacancy, is provided for. The Respondents would be considered qualified for AVM, JAG only if he is cleared for promotion in his parent branch.

8.3 There exists no provision for grant of substantive rank to an officer discharging legal duty against vacancy in the legal department. Substantive ranks can only be granted to such an officer if he is cleared for such promotion in the parent branch. The rules for grant of substantive rank are the rules governing such grant, in the parent branch and not in the legal branch.

8.4 Merely because vacancy is available and the Respondent herein considers himself qualified to be appointed at such vacancy, it would not imply that such an appointment would be automatically made. Upon consideration, the Respondent herein failed to secure the promotion and therefore such promotion has not been granted. The recommendation of the promotion board is only recommendatory in nature and holds no significance unless approved by the competent and duly empowered authority.

IMPUGNED JUDGMENT

9. The AFT held that given the position of JAG (Air) had been upgraded in light of the recommendations made by a High-Power Committee constituted in compliance with the directions given by the Delhi High Court in **Ex-Rect-/Rfn Nahar Singh v. UOI**[12], the consideration of the case of the Respondent herein, "under a policy where he could be promoted against a legal vacancy by competing with his batch mates working in the administrative branch was an exercise in futility."

9.1 It then endorsed the submission of the learned counsel for the Respondent herein that "a policy ought to have been formulated by the Respondent No.1 for filling up the post immediately after the upgradation of the post of JAG (Air) to the rank of

12 WP(C) 12853/2005

AVM… And a separate promotion board ought to have been proposed thereunder to give effect to provisions of para 3 of AFI 71/74(supra)"

9.2 The learned Tribunal concluded as under: –

"13. Having considered all these factual and legal aspects of the matter, we are of the considered opinion that non-framing of the policy for filling up the post of JAG (Air) in the rank of AVM by constituting a Special Promotion Board has adversely affected the petitioner›s right to be considered for the promotion in a just, fair and reasonable manner. As we have concluded that the petitioner›s claim for onward promotion to the post in the rank of AVM has not been duly considered against the vacancy, which became available with effect from 01.10.2014 when he still had 14 months of service remaining the decision of the Supreme Court in *Maj Gen SM Singh VSM* v. *Union of India* (2014) 3 SCC 670, is attracted to the facts of this case. Accordingly, on one hand the impugned action of the respondent no. 1 deserves to be quashed as violative the fundamental rights vested in the petitioner under Articles 14 & 16 of the Constitution of India and on the other, he is entitled to remain in service till a due consideration for promotion is afforded.

14. For all these reasons, the OA is allowed in part and the impugned decision of the respondent No. 1 not approving the recommendation of the Promotion Board qua the petitioner is set aside with the direction to reconsider the same after formulating the policy for filling up the AVM rank post in the JAG (Air) Department by convening a separate Promotion Board.

15. In the peculiar facts and circumstances of the case, it is further directed that the petitioner shall continue to function as JAG (Air) till the process of formulating a policy for filling up the post of JAG (Air) in the rank of AVM and affording an opportunity to the petitioner for being considered by the Promotion Board to be constituted under the policy is completed. We hope and trust that the respondent No. 1 shall complete the process as far as practicable within a period of 3 months from today."

ARGUMENTS ADVANCED

10. By way of the Civil Appeal, the Appellants contend that the Tribunal was not justified in directing that the Respondent be allowed to function as JAG (Air) till such time that the formulation of a policy for filling up the possession of AVM takes place, and he's given an opportunity to be considered under such policy. Such a direction, it is submitted, is against public policy as it would allow the Respondent to continue in service beyond the age of superannuation, 57 years. He was due to retire from service on 30 November 2015.

10.1 Further, it was contended that the Tribunal could not direct that a person should be considered for promotion in particular manner or in terms of a new policy, framed upon such direction.

10.2 It was submitted that the Tribunal failed to consider the fact that the Respondents had duly been considered for promotion to the rank of AVM along with his colleagues of the administrative branch and was "not found fit to be promoted."

11. The Respondent, vide his counter affidavit dated 21stMarch 2016 has submitted the following: –

11.1 It is submitted that the Indian Air Force failed to formulate any policy to fill up the updated vacancy of AVM JAG (Air). It demonstrates utter disregard on part of the Appellants for the orders of the Delhi High Court.

11.2 It is further submitted that, the order of the AFT, contrary to the submission of the Appellants, is not opposed to public policy. If a fundamental right of the Respondent is violated or contravened, the learned Tribunal has the power to intervene and pass suitable orders.

11.3 It is contended that the direction in favour of the Respondent enabling him to continue past the age of superannuation, was called for since the Appellants inaction continued since 2012. The direction to formulate a policy for filling up the above said post and subsequently considering the Respondent in accordance therewith was also necessitated thereby.

11.4 It is incorrect to state that the Tribunal has directed that the Respondent must be promoted. Therefore, the direction passed is not against the proposition of law that a person does not have the right to be promoted but has the right to be considered for promotion.

ISSUES FOR CONSIDERATION

12. In this backdrop, the questions that we are required to consider are: –

12.1 Whether the Tribunal could have issued a direction to the Government to frame a policy for filling up the post of JAG (Air)?

12.2 Whether the Tribunal could have directed that the Respondent would continue functioning in such capacity despite non-acceptance of the Promotion Board's recommendation till such time that the policy is framed by the Government and be given an opportunity for consideration by the promotion board constituted under such new policy?

CONSIDERATION AND CONCLUSION

13. The Preamble to the Armed Forces Tribunal Act, 2007 reads-

"An Act 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 and also to provide for appeals arising out of orders, findings or sentences of court martial held under the said Acts and for matters connected therewith or incidental thereto.

(Emphasis Supplied)

14. Chapter III of the Act pertains to the powers and jurisdiction vested in the Tribunal. Section 14 therein, details the jurisdiction, power and authority of the Tribunal in service matters and Section 15 delineates the same in terms of appeal from orders of Court Martial. The present case concerns the service rendered/to be rendered, by the Respondent. The former reads-

"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 articles 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 document or other evidence and on payment of such fee as may be prescribed.

(3) On receipt of an application relating to service matters, the Tribunal shall, if satisfied after due inquiry, as it may deem necessary, that it is fit for adjudication by it, admit such application; but where the Tribunal is not so satisfied, it may dismiss the application after recording its reasons in writing.

(4) For the purpose of adjudicating an application, the Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act,

1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing an application for default or deciding it ex parte;

(h) setting aside any order of dismissal of any application for default or any order passed by itex parte; and

(i) any other matter which may be prescribed by the Central Government.

(5) The Tribunal shall decide both questions of law and facts that may be raised before it"

15. A perusal of this Chapter of the Act clearly shows that the Legislature has laid out in the legislation, in considerable detail, the functioning of the Tribunal. It must be noticed, as per Section 14(4) for the purposes of adjudication of dispute before it, the Tribunal has been vested with the powers of a civil court. Further we notice, that the Section itself expressly states that the Tribunal shall not have the powers exercised by the Supreme Court or that of a High Court under Articles 226 and 227 of the Constitution of India.

16. It is in consideration of this statutory scheme that we must look for an answer to the question as to whether the Tribunal could have directed the formation of a policy, albeit in regard to a matter affecting the service of armed forces personnel, to adjudicate which, it otherwise possesses the jurisdiction?

17. Making policy, as is well recognised, is not in the domain of the Judiciary. The Tribunal is also a quasi-judicial body, functioning within the parameters set out in the governing legislation. Although, it cannot be questioned that disputes in respect of promotions and/or filling up of vacancies is within the jurisdiction of the Tribunal, it cannot direct those responsible for making policy, to make a policy in a particular manner.

18. It has been observed time and again that a court cannot direct for a legislation or a policy to be made. Reference may be made to a recent judgement of this Court in **Union of India v. K. Pushpavanam**[13] where while adjudicating a challenge to an Order passed by a High Court directing the State to decide the status of the Law Commission as a Statutory or Constitutional body and also to consider the introduction of a bill in respect of torts and State liability, observed as under: –

"..As far as the law of torts and liability thereunder of the State is concerned, the law regarding the liability of the State and individuals has been gradually evolved by Courts. Some aspects of it find place in statutes already in force. It is a debatable issue whether the law

13 2023 SCC OnLine SC 987 (2 Judge Bench)

of torts and especially liabilities under the law of torts should be codified by a legislation. A writ court cannot direct the Government to consider introducing a particular bill before the House of Legislature within a time frame. Therefore, the first direction issued under the impugned judgment was unwarranted."

(Emphasis Supplied)

19. We may further refer to **Union of India & Ors v. Ilmo Devi & Anr**[14] wherein the Court, while considering with the case concerning regularisation/absorption of part-time sweepers at a post office in Chandigarh observed:-

"The High Court cannot, in exercise of the power under Article 226, issue a Mandamus to direct the Department to sanction and 17 create the posts. The High Court, in exercise of the powers under Article 226 of the Constitution, also cannot direct the Government and/or the Department to formulate a particular regularization policy. Framing of any scheme is no function of the Court and is the sole prerogative of the Government. Even the creation and/or sanction of the posts is also the sole prerogative of the Government and the High Court, in exercise of the power under Article 226 of the Constitution, cannot issue Mandamus and/or direct to create and sanction the posts."

(Emphasis Supplied)

20. The above being the settled position of law, it only stands to reason that a Tribunal functioning within the strict boundaries of the governing legislation, would not have the power to direct the formation of a policy. After all, a court in Writ jurisdiction is often faced with situations that allegedly fly in the face of fundamental rights, and yet, has not been entrusted with the power to direct such formation of policy.

21. Not only that, it stands clarified by a bench of no less than 7 Judges of this Court in **L. Chandra Kumar v. Union of India & Ors**[15] as reiterated by a Bench of 5 judges in **Rojer Matthew v. South Indian**

14 2021 SCC OnLine SC 899(2 Judge Bench)
15 (1997) 3 SCC 261 (7 Judge Bench)

Bank Ltd & Ors[16] that a Tribunal would be subject to the jurisdiction of the High Court in Article 226, in the following terms as recorded by Gogoi, *CJ,* writing for the majority-

"**215.** It is hence clear post *L. Chandra Kumar* [*L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] that writ jurisdiction under Article 226 does not limit the powers of High Courts expressly or by implication against military or armed forces disputes. The limited ouster made by Article 227(4) only operates qua administrative supervision by the High Court and not judicial review. Article 136(2) prohibits direct appeals before the Supreme Court from an order of Armed Forces Tribunals, but would not prohibit an appeal to the Supreme Court against the judicial review exercised by the High Court under Article 226.

217. The jurisdiction under Article 226, being part of the basic structure, can neither be tampered with nor diluted. Instead, it has to be zealously protected and cannot be circumscribed by the provisions of any enactment, even if it be formulated for expeditious disposal and early finality of disputes. Further, High Courts are conscious enough to understand that such power must be exercised sparingly by them to ensure that they do not become alternate forums of appeal. A five-Judge Bench in *Sangram Singh* v. *Election Tribunal* [*Sangram Singh v. Election Tribunal*, (1955) 2 SCR 1 : AIR 1955 SC 425] whilst reiterating that jurisdiction under Article 226 could not be ousted, laid down certain guidelines for exercise of such power : (AIR pp. 428-29, para 13)

"*13.* The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal.

16 (2020) 6 SCC 1 (5 Judge Bench)

It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is "vis-à-vis" all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Articles 226 and 136. Therefore, the jurisdiction of the High Courts under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105."

This position stood restated, recently, in **Union of India v Parashotam Dass**[17]

"**26.** On the legislature introducing the concept of "Tribunalisation" (one may say that this concept has seen many question marks vis-a-vis different tribunals, though it has also produced some successes), the same was tested in *L. Chandra Kumar*[18] case before a Bench of seven Judges of this Court. Thus, while upholding the principles of "Tribunalisation" under Article 323A or Article 323B, the Bench was unequivocally of the view that decisions of Tribunals would be subject to the jurisdiction of the High Court under Article 226 of the Constitution, and would not be restricted by the 42nd Constitutional Amendment which introduced the aforesaid two Articles. In our view, this should have put the matter to rest, and no Bench of less than seven Judges could have doubted the proposition… Thus, it is, reiterated and clarified that the power of the High Court under Article 226 of the Constitution is not inhibited, and superintendence and control under Article 227 of the Constitution are somewhat distinct from the powers of judicial review under Article 226 of the Constitution.

(Emphasis Supplied)

22. Thus, it only stands to reason then, that, a Tribunal subject to the High Court's jurisdiction under Article 226, cannot be permitted by law, to direct the framing of policy by the Government.

17 2023 SCC OnLine SC 314(3 Judge Bench)

23. In view of the above conclusion, the direction of the Tribunal for the Respondent to continue in service till such time of formation of the policy and the respondent being considered thereunder, is also to be considered. In the Armed Forces, the tenure of service is extended for a period of time upon a person taking office of higher rank. Therefore, upon consideration, had the Respondent been found suitable for promotion to AVM, his superannuation would have moved forward from 57 years at which he was due to superannuate upon not being promoted.

24. The age of retirement is known to each officer. A direction to let the Respondent continue in service even past such age appears to be without any basis. The Tribunal did not have any power to extend this, that too for infinity. It has been observed in **Chandra Mohan Verma v. State of Uttar Pradesh**[18] that:-

> "**24.** The determination of the age of retirement is a matter of executive policy. The appellant attained the age of superannuation prior to the notification dated 6-2-2015 and was not entitled to the benefit of the enhancement of the age of retirement.
>
> (Emphasis supplied)

25. We also take note of a recent judgment of this Court in **Union of India v. Uzair Imran**[19] where the commonly accepted age of retirement has been recognised and acknowledged. It did not see past the retirement age.

26. Therefore, given that the determination of the age of superannuation is within the domain of Executive policy,of which the Tribunal was fully aware, and that, even while seeking to do complete justice, this court ought not to, in ordinary circumstances, look past the commonly accepted age of superannuation, it is clear that the order of the Tribunal is *sans* basis.

27. On both counts, as demonstrated the judgement and order of the Tribunal, cannot stand.

28. We find a further ground under which the challenge led by the Respondent, ought to have failed at the first instance.

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18 (2020) 13 SCC 261 (3 Judge Bench)
19 2023 SCC OnLine 1308 (2 Judge Bench)

28.1 The post of JAG (Air) was upgraded to AVM in the year 2012. The previous occupant of the position superannuated in 2014 where after, the Respondent was once again appointed to such position.

28.2 The said position having fallen vacant and the Respondent, being only an officiating officer, was only considered with his course mates in the Promotion Board of 2015. In other words, he was not considered by the Air Force against the AVM JAG vacancy.

28.3 It is undisputed that the Respondent participated in the Promotion Board of 2015. It is only when after such consideration alongside other course-mates of the Adm. Branch, when he was not promoted to the rank of AVM JAG (Air)[20] that he initiated the statutory complaint under Section 27 of the AF Act dated 20 April 2015.

28.4 Challenging the basis of promotion after having participated in the process on consideration of promotion and having been declared unsuccessful thereunder, is not a valid ground to impugn the policy/method. Repeatedly, this Court has held that such challenges cannot be allowed. On this, we may refer to certain past instances: –

28.4.1 In Pradeep Kumar Rai v. Dinesh Kumar Pandey[21] it was observed:-

> "17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should

20 Result of the Promotion Board, as noted in the OA was 31 March 2015.
21 (2015) 11 SCC 493(2 Judge Bench)

not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

28.4.2 In **Ramesh Chandra Shah v. Anil Joshi**[22] it was observed:-

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

28.4.3 Recently, in **Tajvir Singh Sodhi & Ors. v. State of Jammu Kashmir & Ors**[23] having considered a number of earlier decisions, it was held by this Court that:-

"69. It is therefore trite that candidates, having taken part in the selection process without any demur or protest, cannot challenge the same after having been declared unsuccessful. The candidates cannot approbate and reprobate at the same time. In other words, simply because the result of the selection process is not palatable to a candidate, he cannot allege that the process of interview was unfair or that there was some lacuna in the process. Therefore, we find that the writ petitioners in these cases, could not have questioned before a Court of law, the rationale behind recasting the selection criteria, as they willingly took part in the selection process even after the criteria had been so recast. Their candidature was not withdrawn in light of the amended criteria. A challenge was thrown against the same only after they had been declared unsuccessful in the selection process, at which stage, the challenge ought not to have been entertained in light of the principle of waiver and acquiescence."

28.5 In view of the above discussion, we are of the view that the Respondent's challenge was barred at first instance, as he participated in the Promotion Board of 2015 and only challenged

22 (2013) 11 SCC 309(2 Judge Bench)
23 2023 SCC OnLine SC 344 (2 Judge Bench)

the non-formation of a policy for filling up the vacancy of AVM JAG (Air), finding himself to be unsuccessful in securing a promotion thereto.

29. As a result of the discussion aforesaid, the questions raised in this appeal are answered accordingly and the same, is allowed. The judgement and order passed by the Armed Forces Tribunal in O.A 537 of 2015, titled as Air Cmde NK Sharma (17083) v. Union of India &Ors, is quashed and set aside.

30. Interlocutory applications, if any, shall stand disposed of. No order as to costs.

Headnotes prepared by: Divya Pandey

Result of the case:
Appeal allowed.