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Court : Allahabad

Decided On : Feb-25-2010

Judge : V.K. Shukla, J.

Appellant : Devi Saran Mishra

Respondent : The Union of India (Uoi) and ors.

Advocate for Pet/Ap. : Sri. Sunit Kumar

Judgement :

V.K. Shukla, J.

1. In the present writ petition, subject matter of challenge is the order passed in summary court martial proceeding, wherein sentence has been awarded to the petitioner to serve rigorous imprisonment for six months and to be dismissed from service. Against the said order in question, petitioner preferred appeal, which has been dismissed on 18.05.1989 by mentioning that the same lacks substance. At the said juncture present writ petition has been filed before this Court on 07.03.1990.

2. On 07.12.2003 in the absence of learned Counsel for the petitioner, present writ petition was dismissed, and thereafter an application was moved for recall the said order. Said application has been allowed on 09.12.2009, and thereafter, present writ petition has been taken up.

3. On the matter being taken up today, Sri Sunit Kumar, learned Counsel for the petitioner, contended with vehemence that this Court should take note of the change in the legal provision as has been introduced under Section 34 of the Armed Forces Tribunal Act, 2007, and the present writ petition should be transferred to the Armed Forces Tribunal at Lucknow, which has been duly notified for adjudication of all service matters as per provisions as contained under the Armed Forces Tribunal Act, 2007.

4. Sri R.B. Singhal, Senior Advocate, Additional Solicitor General of India, assisted by Sri S.K. Rai, Advocate, on the other hand, contended that the request of the petitioner cannot be accepted as a matter of course, and in the present case stand of the Union of India qua this aspect of the matter is not that of an adversary litigant, rather as a friend of the Court legal position is sought to be clarified that in exercise of authority under Section 34 of the Armed Forces Tribunal Act, 2007, writ petition cannot, ipso facto, be transferred to the Tribunal, keeping in view the provisions as contained under Section 14 of the Armed Forces Tribunal Act, 2007, which clearly excludes the jurisdiction of supreme court and High Court exercising jurisdiction under Article 226 and 227 of the Constitution of India in relation to all service matters, and as such request made by the petitioner cannot be accepted automatically as a matter of right.

5. In order to appreciate the respective arguments advanced, the constitutional provisions as well as the provisions of Central Administrative Tribunal Act, 1985 and Armed Forces Tribunal Act, 2007 are being looked into.

6. Part XIV-A of the Constitution was inserted through Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from 01.03.1977. Said amendment proposed two provisions of Articles 323-A and 323-B, which are extracted below:

323-A. Administrative tribunals.- (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the

Government of India or of any Corporation owned or controlled by the Government.

(2) A law made under Clause (1) may-

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States:

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in Clause (1);

(e) provide for the transfer to each such administrative tribunal of any cases pending before any Court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under Clause (3) of Article 371D;

(g) contain such supplemental, incidental and consequential provisions (including provision as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

323-B. Tribunals for other matters.-

(1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in Clause (2) with respect to which such Legislature has power to make laws.

(2) The matters referred to in Clause (1) are the following, namely:

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in Article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329A;

(g) production, procurement, supply and distribution or foodstuffs (including edible oil seeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;

(h) offences against laws with respect to any of the matters specified in Sub-clauses (a) to

(g) and fees in respect of any of those matters;

(i) any matter incidental to any of the matters specified in Sub-clauses (a) to (h).

(3) A law made under Clause (1) may-

(a) provide for the establishment of a hierarchy of tribunals;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals; @page-SC1131

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all Courts except the jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals;

(e) provide for the transfer to each such tribunal of any cases pending before any Court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunals if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

7. Explanation. - In this article, 'appropriate Legislature'', in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.'

8. In pursuance of the power conferred upon it by Clause (1) of Article 323-A of the Constitution, Parliament enacted Central Administrative Tribunal Act, 1985, and the statement of object and reasons of the said Act indicated that it was in express terms of Article 323A of the Constitution and was being enacted because large number of cases relating to service matters were pending before the Courts; it was expected that setting of such Administrative Tribunal to deal with such service matters would go a long way in not only reducing the burden of various courts and

thereby providing more time to deal with other cases expeditiously and would provide to the persons covered by Central Administrative Tribunal speedy relief in respect of their grievances.

9. Pursuant to the provisions of Central Administrative Tribunal Act, 1985, Central Administrative Tribunal was established with its five Benches on 01.11.1985. Before the Central Administrative Tribunal pursuant to the Central Administrative Tribunal Act had been established and started functioning various writ petitions had been filed in various High Courts as well as Hon'ble Apex Court, questioning the constitutional validity of Article 323A of the Constitution as well as the provisions of the Central Administrative Tribunal Act, 1985, and therein major complaint was in respect of exclusion of jurisdiction of Apex Court under Article 32 and that of the High Courts under Articles 226 and 227 of the constitution. Hon'ble Apex Court on 31.10.1985 in the case of S.P. Sampath Kumar v. Union of India : 1985 (4) SCC 458 directed to carry out certain measures with a view to ensure the functioning of the Central Administrative Tribunal along with constitutionally sound principles. Thereafter Central Administrative Tribunal Act, 1985 was amended by Act No. 19 of 1986.

10. When Sampath Kumar was finally heard, said amendments had already been added/incorporated, and final judgment was given by Five Judge, Constitution Bench, same is reported in Sampath Kumar v. Union of India : 1987 (1) SCC 124, wherein view was taken, that though judicial review is basic feature of the Constitution, the vesting of poser of judicial review in alternative institutional mechanism, after taking it away from the High Courts, would not do violence to the basis structure so long it was insured that it was real effective mechanism and was effective substitute of High Court. It was observed that at its inception , it did not measure to the standard of effective substitute, and several amendments were suggested. Suggested amendments were given the force of law, by Amending Act 51 of 1987. After said judgment had been delivered, and amendments had been incorporated, Division Bench of Hon'ble apex Court in : 1995 (1) SCC 400, concluded that judgment rendered in the case of Sampath Kumar (supra) requires recommendation. Before Hon'ble Apex Court after reference had been made in respect of the provisions of Central Administrative Tribunal Act in the case of L.

Chandra Kumar v. Union of India 1977 UPLBEC 712, following questions were framed:

(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by Sub-clause (d) of Clause (2) of Article 323A or by Sub-clause (d) of Clause (3) of Article 323B of the Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136. in respect of disputes and complaints referred to in Clause (1) of Article 323A or with regard to all or any of the matters specified in Clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2)Whether the Tribunals, constituted either under Article 323A or under Article 323B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

11. Said issues were exhaustively taken up and considered, and they have been answered in paragraphs 77, 79, 80,81, 82, 92, 93, 94, 97, 98, 100 and 101, which are being extracted below:

77. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The Doctrine of basic structure was evolved in, Kasavananda Bharati's case, : 1973 (4) SCC 225 : AIR 1973 SC 1461. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat and Govern, JJ., Hegde and Mukherjee, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential feature

comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In Indira Gandhi's case, : 1975 Supp. SCC 1 : AIR 1975 SC 2299, Chandrachud J, held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country. (supra at Pp. 751-752). This approach was specifically adopted by Bhagwati, J. in Minerva Mill's case (of : 1980 (3) SCC 625) : (at p. 1820 of AIR 1980 SC 178), and is not regarded as the definitive test in this field of Constitutional Law.

78. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior Courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect (Gajendragadhkar, C.J. in, Special Reference case, : AIR 1965 SC 745, Beg J. and Khanna, J. in Kesavananda Bharati's case, : AIR 1973 SC 1461 Chandrachud, C.J. and Bhagwati, J. in Minerva Mills, : AIR 1980 SC 1789 Chandrachud, C.J. in Fertiliser Kamgar AIR 1981 SC 344, K.N. Singh, J. in Delhi Judicial Service Association 1991 AIR SCW 241 etc.) the rest have made general observations highlighting the significance of this feature.

79. The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. (#) These attempts were directed at

ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior Courts. The inclusion of such daborate provisions appear to have been occasioned by the belief that, armed by such provisions, the superior Courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate Courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

80. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

81. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Courts, there is no constitutional prohibition against their performing a supplemental as opposed to a substitutional-role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses Clause (3) of Article 32 of the Constitution which reads as under:

32. Remedies for enforcement of rights conferred by this part -

(1) ... ...

(2)... ... ...

(3) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

82. If the power under Article 32 of the Constitution, which has been described as the 'heart' and 'soul' of the Constitution, can be additionally conferred upon 'any other Court,' there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Article 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislature under Entry 65 of List II; Entry 46 of List III can also be availed of both of Parliament and the State Legislatures for this purpose.

83. There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensured since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in, Sampath Kumar's case AIR 1987 SC 386, was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in, Sampath Kumar's case adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

84. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in, Sampath Kumar's case, (AIR 1987 SC 386). In his leading judgment, R. Misra, J. refers to the fact that since independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the commendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in, K.K. Dutta v. Union of India : (1980) 4 SCC 38 : AIR 1980 SC 2056, where this Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of Service Tribunals.

85. The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to a half century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions,

not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as 'the LCI') or similar high level Committees appointed by the Central Government, and are particularly noteworthy.

86. An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the LCI in its 124th Report which was released sometime after the judgment in, Sampath Kumar's case AIR 1987 SC 386. The Report was delivered in 1988, nine years ago, and some changes have occurred since, but the broad perspective which emerges is still, by and large, true:.The High Courts enjoy Civil as well as criminal, ordinary as well as extraordinary and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various status as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary, matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being Courts of record, have the power to punish for its contempt as well as contempt of its subordinate Courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of habeas corpus, mandamus, prohibition, quo warrantor and certiorari. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by Section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of Gift Tax Act, 1958, and Section 18 of Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as, Section 130 of Customs Act, 1962, and Section 35A of Central Excises and Salt Act 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated

by reference to those names, viz., (a) first appeals; (b) appeals under the letters patent; (c) second appeals; (d) revision petitions; (e) criminal appeals; (f) criminal revisions; (g) civil and criminal references; (h) writ petitions; (i) writ appeals; (j) references under direct and indirect tax laws; (k) matters arising under the Sales Tax Act; (1) election petitions under the Representation of the People Act; (m) petitions under the Companies Act, Banking Companies Act and other special Acts and (n) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction. This varies jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts.87. After analysing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunals thereby lending force to the approach adopted in Sampath Kumar's case. The LCI noted the erstwhile international judicial trend which pointed towards generalist Courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as 'catastrophic, crisis ridden, almost unmanageable, imposing .....an immeasurable burden on the system.' the LCI stated that the prevailing view in Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist Courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

88. It is imported to realise that though the theory of alternative institutional mechanisms was propounded in, Sampath Kumar's case AIR 1987 SC 386, in respect of the Administrative Tribunals, the concept itself - that of creating alternative modes of dispute resolution which would relieve High Court of their burden while simultaneously providing specialised justice - is now new. In fact, the issue of having a specialised Tax Court has been discussed for several decades; though the Report of the High Court Arrears Committee (1972) dismissed it as 'ill-conceived,' the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of 'Gram Nyayalayas' (LCI, 114th Report (1986)), Industrial/Labour Tribunals (LCI, 122nd Report (1987)) and Education Tribunals (LCI, 123rd Report (1987)).

89. In R.K. Jain's case 1993 AIR SCW 1899, this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory, Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, 'Alternative Modes and Forums for Dispute Resolution,' deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up 'Gram Nyayalayas,' Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunal set up under Articles 323A and 323B of the Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

Functioning of Tribunals

8.63 Several tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of caliber are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.

8.64 Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

Tribunals-Tests for Including High Courts jurisdiction.

8.65 A Tribunal which substitutes the High court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach. When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision making process especially when the government is a litigant in most of the cases coming before such tribunal. (see S.P. Sampath Kumar v. Union of India reported in : 1987 (1) SCR 435 : AIR 1987 SC 386). The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. It must not be forgotten that what is permissible to be supplant by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the

laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High courts must pass the aforesaid test in order to be constitutionally valid.

8.66 The overall picture regarding the tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted. Not many tribunals satisfying the aforesaid tests can possibly be established.

90. Having expressed itself in this manner, the Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the High Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High Courts.

91. In the years that have passed since the Report of the Malimath committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

92. We may first address the issue of exclusion of the power of judicial review of the High Courts . We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Court and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunals. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

93. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial

superintendence over the decisions of Tribunals under Article 227 of the Constitution. In R.K. Jain's case 1993 AIR SCW 1899, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunals on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the afore-stated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

94. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

95. Before moving on to other aspects, we may summarise our conclusions of the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a

creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Court. We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

96. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceeding, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

97. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times. IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their

specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a judge of the Supreme Court, nominated by the Chief Justice of India. we have reason to believe that the committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.

98. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of

the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

99. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of expert bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommended that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

100. Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the vires of the provision was not in question in, Dr. Mahabal Ram's case : 1994 (2) SCC 401, we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or a bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of

unconstitutionality.

101. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3 (d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the 'exclusion of jurisdiction' clauses in all other legislations enacted under the aegis of Article 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred uipon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislation (except where the legislation which creates the particular Tribunal is challenged)by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

12. Having regard to the fact that a large number of cases relating to service matters of the members of the above mentioned three Armed forces of Union have been pending in the courts for along time, the question of constituting an independent adjudicatory forum for the defence personnel has been engaging the attention of the Central Government for quite some time. In 1982, the Supreme Court in Prithvi Pal Singh Bedi v. Union of India : AIR 1982 SC 1413 held the absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment in the laws relating to the armed forces was a distressing and glaring lacuna and urged the Central

Government to take steps to provide for at least one judicial review in service matters. The Estimates committee of the Parliament in their 19th report presented to the Loksabha on 20th August, 1992 had desired that the Government should constitute an independent statutory Board or Tribunal for service personnel.

13. In view of the above, it was proposed to enact a new legislation by constituting an Armed Forces Tribunal for adjudication of complaint and dispute regarding service matters and appeals arising out of the verdicts of the courts-martial of the members of the three services (Army, Navy and Air Force) to provide for quicker and less expensive justice to the members of the said Armed forces of the Union. Establishment of an independent Armed Forces Tribunal will fortify the trust and confidence amongst the members of the three services in the system of dispensation of justice in relation to their service matters.

14. The Bill was introduced to provide for a judicial appeal on points of law and facts against the verdicts of courts-martial which was crying need of the day and lack of it has often been adversely commented upon by the Supreme Court. The Armed Forces Tribunal Bill received the assent of the President on 22.12.2007 and was known as The Armed Forces Tribunal Act, 2007 (55 of 2007).

15. After the Armed Forces Tribunal Act has been introduced and the Armed Forces Tribunal has been established, the scheme and salient features of the Act are being looked into:

Chapter I of the said Act deals with Preliminaries; Section 1 proceeds to deal with short title and commencement; Section 1(2) provides that it shall come into force on such date as the Central Government may, by notification, appoint. Section 2 deals with applicability of the Act, Sub-section (1) of Section 2 provides that the provisions of this Act would apply to the persons who are subject to the Army Act, 1950, Navy Act, 1957 and the Air Force Act, 1950. It will also apply to the retired Army personnel, including their dependents, heirs and successors in so for as it relates to service matters. Section 3 of the Act deals with definitions; Section 3(b) deals with 'application' and means that an application made under Sub-section (2) of Section 14; Section 3(c) defines the 'appointed day' means the date with effect from which the Tribunal is established by notification under Section 4 of the Act.

Chapter II of the Armed Forces Tribunal Act, 2007 deals with establishment of Tribunal and Benches hereof and clearly provides that Central Government shall, by notification, establish the Armed Forces Tribunal to exercise the jurisdiction, powers and authority on it by or under the Act. Section 5 deals with composition of Tribunal and Benches thereof. Section 6 deals with qualifications for appointment of Chairperson and other members. Section 7 deals with appointment of Chairperson and other members. Section 8 deals with term of the office. Section 9 deals with resignation and removal; Section 10 deals with salaries, allowances and other terms and conditions of service of Chairperson and other members. Section 11 deals with prohibitions as to holding of offices etc. by Chairperson or member on ceasing to be such of Chairperson or member. Section 12 deals with financial and administrative powers of Chairperson and Section 13 deals with staff of the Tribunal.

Chapter III of the Armed forces Tribunal Act, 2007 deals with jurisdiction, powers and authority of the Tribunal. Section 14 talks of jurisdiction, powers and authority in service matters. Section 15 deals with jurisdiction, powers and authority in matters of appeal against court-martial. Section 16 deals with re-trial. Section 17 deals with powers of Tribunal on appeal under Section 15. Section 18 deals with cost; Section 19 deals with power to punish for contempt; Section 20 deals with distribution of business among the Benches. For ready reference the provisions of Sections 14, 15, 16, 17, 19 and 20 of the Armed Forces Tribunal Act are being quoted below:

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 documents 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 exparte;

(h) setting aside any order of dismissal of any application for default or any order passed by it exparte; 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. Jurisdiction powers and authority in matters of appeal against court martial :

(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 under this Act in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or incidental thereto.

(2) Any person aggrieved by an order, decision, finding or sentence passed by a court martial may prefer an appeal in such form, manner and within such time as may be prescribed.

(3) The Tribunal shall have power to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary:

Provided that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

(4) The Tribunal shall allow an appeal against conviction by a court martial where-

(a) the finding of the court martial is legally not sustainable due to any reason whatsoever; or

(b) the finding involves wrong decision on a question of law; or

(c) there was a material irregularity in the course of the trial resulting in miscarriage of justice, but, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant:

Provided that no order dismissing the appeal by the Tribunal shall be passed unless such order is made after recording reasons therefor in writing.

(5) The Tribunal may allow an appeal against conviction, and pass appropriate order thereon.

(6) Notwithstanding anything contained in the foregoing provisions of this section, the Tribunal shall have the power to--

(a) substitute for the findings of the court martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court martial and pass a sentence afresh for the offence specified or involved in such findings under the provisions of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950, (45 of 1950) as the case may be; or

(b) if sentence is found to be excessive, illegal or unjust, the Tribunal may--

(i) remit the whole or any part of the sentence, with or without conditions;

(ii) mitigate the punishment awarded;

(iii) commute such punishment to any lesser punishment or punishments mentioned in the Army Act, 1950, (46 of 1950) the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950, (45 of 1950) as the case may be;

(c) enhance the sentence awarded by a court martial:

Provided that no such sentence shall be enhanced unless the appellant has been given an opportunity of being heard;

(d) release the appellant, if sentenced to imprisonment, on parole with or without conditions;

(e) suspend a sentence of imprisonment;

(f) pass any other order as it may think appropriate.

Notwithstanding any other provisions in this Act, for the purposes of this section, the Tribunal shall be deemed to be a criminal court for the purposes of Sections 175, 178, 179, 180, 193, 195, 196 or 228 (45 of 1860) of the Indian Penal Code and Chapter XXVI of the Code of Criminal Procedure, 1973. (2 of 1974)

16. Re-trial : (1) Except as provided by this Act, where the conviction of a person by court martial for an offence has been quashed, he shall not be liable to be tried

again for that offence by a court martial or by any other Court.

(2) The Tribunal shall have the power of quashing a conviction, to make an order authorising the appellant to be retried by court martial, but shall only exercise this power when the appeal against conviction is allowed by reasons only of evidence received or available to be received by the Tribunal under this Act and it appears to the Tribunal that the interests of justice require that an order under this section should be made:

Provided that an appellant shall not be retried under this section for an offence other than--

(a) the offence for which he was convicted by the original court martial and in respect of which his appeal is allowed;

b) any offence for which he could have been convicted at the original court martial on a charge of the first-mentioned offence;

(c) any offence charged in the alternative in respect of which the court martial recorded no finding in consequence of convicting him of the first-mentioned offence.

A person who is to be retried under this section for an offence shall, if the Tribunal or the Supreme Court so directs, whether or not such person is being tried or retried on one or more of the original charges, no fresh investigation or other action shall be taken under the relevant provision of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45of 1950) as the case may be, or rules and regulations made there under, in relation to the said charge or charges on which he is to be retried.

17. Powers of the Tribunal on appeal under Section 15 : The Tribunal, while hearing and diciding an appeal under Section 15, shall have the power--

(a) to order production of documents or exhibits connected with the proceedings before the court martial;

(b) to order the attendance of the witnesses;

(c) to receive evidence;

(d) to obtain reports from Court martial;

(e) order reference of any question for enquiry;

(f) appoint a person with special expert knowledge to act as an assessor; and

(g) to determine any question which is necessary to be determined in order to do justice in the case.

18. Cost :While disposing of the application under Section 14 or an appeal under Section 15, the Tribunal shall have power to make such order as to costs as it may deem just.

19. Power to punish for contempt :

(1) Any person who is guilty of contempt of the Tribunal by using any insulting or threatening language, or by causing any interruption or disturbance in the proceedings of such Tribunal shall, on conviction, be liable to suffer imprisonment for a term which may extend to three years.

(2) For the purposes of trying an offence under this section, the provisions of Sections 14, 15, 17, 18 and 20 of the Contempt of courts Act, 1971 (70 of 1971) shall mutatis mutandis apply, as if a reference therein to--

(a) Supreme Court or High Court were a reference to the Tribunal;

(b) Chief Justice were a reference to the Chairperson;

(c) Judge were a reference to the Judicial or Administrative Member of the Tribunal;

(d) Advocate-General were a reference to the prosecutor; and

(e) Court were a reference to the Tribunal.

20. Distribution of business among the Benches : The Chairperson may make provisions as to the distribution of the business of the Tribunal among its Benches.

Chapter IV of the Armed Forces Tribunal Act, 2007 deals with procedure. Section 21; Section 21 specifically provides the application not to be admitted unless other remedies are exhausted. Section 22 deals with limitation for entertaining application. Section 23 deals with Procedure and powers of Tribunal. Section 24 deals with terms of sentence and its effect on appeal. Section 25 deals with conditions as to making of interim order. Section 27 deals with power of Chairperson to transfer cases from one Bench to another. Section 28 provides that the decision should by majority and Section 29 deals with execution of order of the Tribunal. Sections 21 and 22 of the Act being relevant are being quoted below:

21. Application not to be admitted unless other remedies exhausted :

(1) The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of the remedies available to him under the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950) as the case may be, and respective rules and regulations made thereunder.

(2) For the purposes of Sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950, (45 of 1950) and respective rules and regulations--

(a) if a final order has been made by the Central Government or other authority or officer or other person competent to pass such order under the said Acts, rules and regulations, rejecting any petition preferred or representation made by such person;

(b) where no final order has been made by the Central Government or other authority or officer or other person competent to pass such order with regard to the petition preferred or representation made by such person, if a period of six months from the date on which such petition was preferred or representation was made

has expired.

22. Limitation : The Tribunal shall not admit an application--

(a) in a case where a final order such as is mentioned in Clause (a) of Sub-section (2) of Section 21 has been made unless the application is made within six months from the date on which such final order has been made;

(b) in a case where a petition or a representation such as is mentioned in Clause (b) of Sub-section (2) of Section 21 has been made and the period of six months has expired thereafter without such final order having been made;

(c) in a case where the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which jurisdiction, powers and authority of the Tribunal became exercisable under this Act, in respect of the matter to which such order relates and no proceedings for the redressal of such grievance had been commenced before the said date before the High Court.

(2) Notwithstanding anything contained in Sub-section (1), the Tribunal may admit an application after the period of six months referred to in Clause (a) or Clause (b) of Sub-section (1), as the case may be, or prior to the period of three years specified in Clause (c), if the Tribunal is satisfied that the applicant had sufficient cause for not making the application within such period.

Chapter V of the Armed Forces Tribunal Act, 2007 deals with appeal. Section 30 deals with appeal to the Supreme Court; Section 31 deals with leave to appeal and Section 32 deals with condonation. Sections 30, 31 and 32 of the Act being relevant are being quoted below:

30. Appeal to Supreme Court :

(1) Subject to the provisions of Section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under Section 19):

Provided that such appeal is preferred within a period of ninety days of the said decision or order:

Provided further that there shall be no appeal against an interlocutory order of the Tribunal.

(2) An appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in the exercise of its jurisdiction to punish for contempt: .

Provided that an appeal under this Sub-section shall be filed in the Supreme Court within sixty days from the date of the order appealed against.

(3) Pending any appeal under Sub-section (2), the Supreme Court may order that--

(a) the execution of the punishment or the order appealed against be suspended; or

(b) if the appellant is in confinement, he be released on bail:

Provided that where an appellant satisfies the Tribunal that he intends to prefer an appeal, the Tribunal may also exercise any of the powers conferred under Clause (a) or Clause (b), as the case may be.

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) An application to the Tribunal for leave to appeal to the Supreme Court shall be made within a period of thirty days beginning with the date of the decision of the Tribunal and an application to the Supreme Court for leave shall be made within a period of thirty days beginning with the date on which the application for leave is refused by the Tribunal.

(3) An appeal shall be treated as pending until any application for leave to appeal is disposed of and if leave to appeal is granted, until the appeal is disposed of; and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it might have been made, but it is not made within that time.

32.condonation : The Supreme Court may, upon an application made at any time by the appellant, extend the time within which an appeal may be preferred by him to that Court under Section 30 or Sub-section (2) of Section 31.

Chapter VI of the Armed Forces Tribunal Act, 2007 deals with miscellaneous matters. Section 33 deals with exclusion of jurisdiction of civil courts; Section 34 deals with transfer of pending cases. Section 35 deals with the provisions for filing certain appeal; Section 36 says that the proceedings before the Tribunal are judicial proceedings. Section 37 deals with members and staff of the Tribunal, who are to be treated as public servants; Section 38 provides protection of action taken in good faith. Section 39 provides that the Act in question has overriding effect; Section 40 deals with the power to remove difficulties; Section 41 deals with power of Central Government to make rules and Section 42 specifically vests in the Central Government the power to make rules even retrospectively. Sections 33, 34 and 39 of the Act being relevant are being quoted below:

33. Exclusion of jurisdiction of civil courts : On and from the date from which any jurisdiction, powers and authority becomes exercisable by the Tribunal in relation-to service matters under this Act, no Civil Court shall have, or be entitled to exercise, such jurisdiction, power or authority in relation to those service matters.

34. Transfer of pending cases :

(1) Every suit, or other proceeding pending before any court including a High Court or other authority immediately before the date of establishment of the Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based, is such that it would have been within the jurisdiction of the Tribunal, if it had arisen after such establishment within the jurisdiction of such Tribunal, stand transferred on that date to such Tribunal.

(2) Where any suit, or other proceeding stands transferred from any court including a High Court or other authority to the Tribunal under Sub-section (1),--

(a) the court or other authority shall, as soon as may be, after such transfer, forward the records of such suit, or other proceeding to the Tribunal;

(b) the Tribunal may, on receipt of such records, proceed to deal with such suit, or other proceeding, so far as may be, in the same' manner as in the case of an application made under Sub-section (2) of Section 14, from the stage which was reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit.

39. Act to have overriding effect : The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained, in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

16. A bare perusal of the above quoted provisions would go to show that the Armed Forces Tribunal Act has been enacted with a view to provide speedy justice in the matter of service to the members of the Armed Forces. The Tribunal has been established under the Act to perform special role as large number of cases relating to service matters of the members of three Armed forces of Union of India are pending in the courts for along time, and there had been no forum of review against the said action taken on judicial side, and by means of Armed Forces Tribunal Act, 2007 a forum of judicial review in the service matter has been provided for.

17. The issue involved at the moment is as to whether under Section 34 of the Armed Forces Tribunal Act, 2007, ipso facto the proceedings, which are pending before the High Court even under Article 226/227 of the Constitution would stand transferred specially in the backdrop of the language used in Section 14 of 2007 Act, wherein while defining jurisdiction, powers and authority of Tribunal in service matters, authority vested in the Supreme Court and the High Courts under Articles 32 and 226/227 of the Constitution have been specifically excluded.

18. The provisions as contained under Section 34 of the said Act clearly provides that every suit, or other proceeding pending before any court including a High Court or other authority immediately before the date of establishment of the Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based, is such that it would have been within the jurisdiction of the Tribunal, if it had arisen after such establishment within the jurisdiction of such Tribunal, stand transferred on that date to such Tribunal.

19. 'Other proceedings' has to be seen keeping in mind that different types of litigation come up before High Court in exercise of its wide jurisdiction bearing different names/heads, namely, (i) first appeals (ii) appeals later patent (iii) second appeals (iv) revisions (v) civil and criminal references (vi) writ petitions (vii) special appeals (viii) election petitions (ix) company petitions (x) many others. These variety of litigation has over burdened the courts on account of which, service matters qua army personnel were pending in court for long time, and in order to provide one speedy forum for judicial review, the provisions of Armed Forces Tribunal Act has been introduced, wherein provisions has been made for adjudication of dispute of such service matters by Bench, comprising of one Judicial Member and one Administrative Member, whose qualification has been specifically provided for. The Tribunal has been vested with the authority to decide both questions of law and fact that may be raised before it. The Tribunal has been vested with the authority of Civil Court under Sub-section (4) of Section 14, which is inclusive of the authority of summoning and enforcing the attendance of witnesses, examination on oath, review of decision etc., and it has also been clarified that Tribunal is not bound by the procedure, but shall be guided by principles of natural justice and subject to provisions of Act and the Rules.

20. Section 3(o) of the Armed Forces Tribunal Act, 2007 defines 'service matters' in relation to persons subject to Army Act, Navy Act, Air Force Act, and once said subject matter is falling within the jurisdiction of the Tribunal, the writ petition labeled under Articles 226/227 of the Constitution are also to be transferred to the Tribunal or not under the heading of 'other proceedings'. Label does not matter, rather it is the pith and substance which matters and it is the subject matter of challenge, which is important. The cause of action involved in the writ petition

falling within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007, has at the first instance to be adjudicated by the Tribunal, as is fully reflected from the scheme of things provided for, on matter being received after transfer, wherein the Tribunal on receipt of such record, has to deal with the matter in same manner as in the case of application made under Sub-section (2) of Section 14 from the stage which was received before such transfer or from any earlier stage or even denovo as Tribunal may deem fit. Same will ensure that claims are filtered out through the process of adjudication, as provided for.

21. Section 14 of the Armed Forces Tribunal Act, 2007 deals with Jurisdiction, powers and authority of the Tribunal in service matters. It clearly provides that 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. The jurisdiction, power and authority of Tribunal in service matters falling within the jurisdiction of Tribunal is absolute and exclusive. This exclusiveness does not however, apply to jurisdiction of Supreme Court or High Court exercising powers under Article 32 and Article 226/227. This is the effect of Section 14 of the Act, and nothing beyond the same.

22. Exercise of jurisdiction, powers and authority by the Tribunal has been clearly provided under Section 14 of the Act, excepting the authority of Supreme Court and High Court under Article 32 and 226/227 of the Constitution, then in such situation under Section 34 of the said Act, which is inclusive of transfer of proceedings pending before the High Court would same also include the proceeding pending before before the High Court under Article 226/227 wherein subject matter is falling within the jurisdiction of the Tribunal. The authority of transfer under Section 34 is not at all controlled by Section 14, inasmuch as, Section 14 vests authority in Tribunal to exercise jurisdiction, power 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. Tribunal after receiving the file, will not exercise the authority of Supreme Court or High Court under Article 226/227, rather it will

proceed to exercise the authority vested under Section 14 of the Act

23. Once Section 14 in no way encroaches upon the authority or dilutes the authority of Hon'ble Apex Court or High Court under Articles 226/227 of the Constitution and such power is always retained by the courts, as power of judicial review is integral feature of the Constitution constituting specific and basic structure, then the provisions of Section 14 has to be read as it has been mentioned and each and every provision has to be given purposive interpretation.

24. By transferring the petitions under Articles 226/227 of the Constitution, the power of judicial review is not being taken away, rather the matter is transferred to a forum of competent jurisdiction constituted for a purpose having all wide powers and once decision is taken by the said competent authority, then power of judicial review is always there as has been held in the case of L. Chandra Kumar (supra) 1997 (1) UPLBEC. Section 14 of 2007 Act has to be read in the way and manner it has been framed. It merely proceeds to save the 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. In this way and manner the purpose of the Act would also be fulfilled without encroaching upon the authority of the High Court of judicial review, in any manner.

25. Once the question has been answered as above, judicial notice may also be taken of the fact that Hon'ble the Chief Justice of this Court in exercise of administrative authority has already passed order on administrative side to transfer all such matters, which are subject matter of Armed Forces Tribunal. Such fact is referred from the letter circulated by Joint Registrar (L) dated 13.11.2005

26. For reasons mentioned above, it is hereby directed that all the matters pending before this Court, which are subject matter of Armed Forces Tribunal in terms of Section 34 of the Armed forces Tribunal Act, 2007 be transferred to the Armed forces Tribunal at Lucknow, and immediately necessary steps be undertaken in this regard.

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