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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 21661/2005**

CAPT. KASHYAP KUMAR

..... Petitioner

Through: Mr. Alok Krishna Agarwal, Advocate
with Mr. Mayank Bughani, Advocate

versus

UOI & ORS.

..... Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Ruchir Mishra, Ms. Shreya Sinha,
Mr. Sarfaraz Ahmad, Ms. Aastha Jain and
Mr. Mukesh Kumar Tiwari, Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

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22.02.2016

1. The limited issue arising for consideration is whether the present petition filed in the year 2005, would be maintainable in the High Court in view of the enactment of the Armed Forces Tribunal Act, 2007.
2. It is pertinent to note that the petitioner had filed the present petition in the year 2005 when the Armed Forces Tribunal Act, 2007 had not been enacted. The relief prayed for is for quashing the dismissal order dated 26.10.2005. Apart from the petitioner herein, there were two other co-

delinquents, namely, Commander Vijendra Rana and Commander Vinod Kumar Jha, who were also dismissed from service and had filed similar petitions in this Court. Commander Vijendra Rana had filed W.P.(C) 12037/2006 and Commander Vinod Kumar Jha had filed W.P.(C) 4749/2006.

3. On the last date of hearing, Mr. Sanjay Jain, learned ASG had informed the Court that vide orders dated 09.11.2009 and 15.09.2009 passed in W.P.(C) 12037/2006 and 4749/2006 respectively, the said cases were transferred by the Division Bench to the Armed Forces Tribunal in terms of Section 34 of the Armed Forces Tribunal Act, 2007. He had submitted that the present petition should also be transferred to the Armed Forces Tribunal for a decision on merits.

4. The aforesaid submission was however, disputed by Mr. Agarwal, learned counsel for the petitioner, who had stated that the impugned order dated 26.10.2005, dismissing the petitioner from service without pension, had been passed under Section 15(1) of the Navy Act, 1957 (hereinafter referred to as '**the Act**') and ought to be treated as a Presidential Order and therefore the present petition has to be retained by this Court for a decision on merits.

5. Having regard to the language used in the order dated 26.10.2005 and the assertions made by counsel for the petitioner that reliance placed by the respondents on Section 15(2) of the Act is misplaced and the impugned order had in fact been passed under Section 15(1) of the Act, it was deemed appropriate to direct the respondents to furnish copies of similar orders passed in other cases under Section 15(2) of the Act, for purposes of comparison.

6. Pursuant to the aforesaid order, Mr. Jain, learned ASG hands over a copy of an order dated 30.12.1998 passed under Section 15(1) of the Act in the case of Admiral Vishnu Bhagwat, a perusal whereof reveals that the format of the said order is entirely different from that used in the case of the petitioner herein, as also in the cases of Commander Vijendra Rana and Commander Vinod Kumar Jha, the co-delinquents. A glance at the order dated 30.12.1998 shows that the same has been issued by the President of India by exercising the powers vested in him under Section 15(1) of the Act, which prescribes that “every officer and sailor shall hold the office during the pleasure of the President.”

7. Mr. Aggarwal, learned counsel for the petitioner urges that the Court must compare the order dated 30.12.1998 with the one passed in the petitioner’s case, which would reveal that the latter order ends by using the words, “By Order and in the name of the President”, which indicates that the same has been issued by the President by exercising the Doctrine of Pleasure under Section 15(1) of the Act.

8. Learned ASG rebuts the said argument and states that the concluding part of the impugned order, may have mentioned the words, “By Order and in the name of the President” which fact is being unnecessarily stressed by the other side to urge that the impugned order has been issued under Section 15(1) of the Act. But fact of the matter is that the said order has been signed by the Under Secretary to the Government of India which clearly demonstrates that the same has been issued under Section 15(2) of the Act, by invoking Article 77(1) of the Constitution of India, which deals with the conduct of business of the Government of India and specifies that all

executive action of the Government of India shall be expressed to be taken in the name of the President.

9. We are not inclined to accept the submission made by counsel for the petitioner that the impugned order has to be treated as an order issued by invocation of the Doctrine of the President's pleasure under Section 15(1) of the Act for the reason that in the body of the order dated 26.10.2005 passed in the petitioner's case, all the three paras specifically state that the Central Government is not satisfied that it is practicable to give the petitioner an opportunity to show cause; that the Central Government has arrived at the conclusion that his continuation is not in the interests of the State and lastly, that the Central Government in exercise of its powers under Section 15 of the Act read with relevant Regulation has ordered his dismissal from service. As against the format of the aforesaid order, the sample order dated 30.12.1998 produced by the other side reveals that it has been issued under Section 15(1) of the Act and it states in so many words that the President, in exercise of powers conferred under Section 15(1) of the Act, has withdrawn his pleasure for continuation of the addressee in the Naval Service. This is in complete contradistinction to the language used in the impugned order passed in the case of the petitioner and a clear pointer in the direction unlike the petitioner's case, the provisions of Section 15(1) of the Act have been invoked in the order dated 30.12.1998.

10. Moreover, it has been brought to our notice by the learned ASG that the aforesaid aspect had come up for consideration before a Co-ordinate Bench in **W.P.(C) 5535/2013** in the case entitled Commander K.K. Saji vs. UOI and Ors., wherein the petitioner therein had raised a similar ground as taken by the counsel for the petitioner herein to the effect that the entire

Section 15 of the Act pertains to the tenure of service of officers and sailors being under the doctrine of the President's Pleasure and in such circumstances, the High Court would have the jurisdiction to entertain and decide the said petition on merits. After considering the statutory scheme and taking note of the arguments advanced by counsel for the petitioner in the captioned case, the Division Bench had observed in its order dated 03.09.2013, that the legislature has drawn a distinction between orders passed under sub-section (1) on the one hand and sub-section (2) of Section 15 on the other hand and the said distinction cannot be effaced by invoking the provisions of Section 3(8)(b)(i) of the General Clauses Act. With those observations, the captioned petition was rejected as not maintainable with liberty granted to the petitioner therein to seek his remedies in accordance with law.

11. Mr. Aggarwal, learned counsel for the petitioner clarifies that he is not invoking the provisions of Section 3(8)(b)(i) of the General Clauses Act to urge that the High Court would be vested with jurisdiction to entertain the present petition. Instead, he argues the expression used in Section 15 of the Act itself indicates that every officer and sailor shall hold the office during the pleasure of the President and therefore, the impugned order ought to be treated as one issued under the Doctrine of the President's pleasure.

12. We are unable to persuade ourselves to concur with the submissions made by counsel for the petitioner that the impugned order ought to be treated as one passed under Section 15(1) of the Act. Quite clearly, the tone and tenor of the impugned order passed against the petitioner under Section 15(2) is at complete variance with the one passed under Section 15(1), which would be apparent on a comparison of the order dated 30.12.1998 passed in

the case of Admiral Vishnu Bhagwat vis-a-vis the order dated 26.10.2005 passed in the case of the petitioner herein and the other co-delinquents. We are, therefore, of the opinion that the issue raised in the present petition ought to be adjudicated under the Armed Forces Tribunal Act, 2007.

13. For the aforesaid reasons, it is deemed appropriate to direct the Registry to transmit the file of this case to the Armed Forces Tribunal for adjudication. The parties shall appear before the Registrar, Armed Forces Tribunal on 21.03.2016, for an actual date to be fixed for arguments.

14. The petition is disposed of.

HIMA KOHLI, J

SUNIL GAUR, J

FEBRUARY 22, 2016

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