

**IN THE HIGH COURT OF DELHI AT NEW DELHI****Judgment delivered on: March 18, 2024**

+ W.P.(C) 9203/2021

MAJ GENERAL S S KHARA

..... Petitioner

Through: Mr. Angad Alhuwalia,
Mr. Kushal Chaudhary and
Mr. Sanket Baghel, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC
with Mr. Kushagra Kumar, Adv. for
UOI**CORAM:****HON'BLE MR. JUSTICE V. KAMESWAR RAO****HON'BLE MR. JUSTICE SAURABH BANERJEE****J U D G M E N T****V. KAMESWAR RAO, J**

1. On February 27, 2024, this Court had raised an issue of maintainability of the petition. The petitioner has filed the present petition with the following prayers:-

“A. Issue an appropriate writ, order or direction under Article 226 of the Constitution of India directing the Respondents to quash and set aside the promotion policy dated 23.12.2017, to the extent that it excludes the Intelligence Corps of the Indian Army from being considered for promotion to the rank of Lt. General from the Non General Cadre Staff Stream vacancies.



B. Issue an appropriate writ, order or direction under Article 226 of the Constitution of India directing the Respondents to include the Intelligence Corps to be considered for promotion in the NGCSS vacancies and create a vacancy at the rank of Lt. General for the officers to be promoted from the Intelligence Corps; and
C. Direct the Respondents to release a special vacancy for the Intelligence Corps to compensate for the long injustice meted out to the said Corps.

D. Direct the Respondents to consider the Petitioner for promotion to the rank of Lt. General against the special vacancy with restoration of 1985 seniority in the Non General Cadre Staff Stream;

E. Direct the Respondents to ensure an officer of the rank of Lt. General from the Intelligence Corps to be designated as Head of Arm of the Intelligence Corps and a separate officer from the same Corps to be the DGMI, in National Interest,

F. Pass any other order or direction that this Hon'ble Court may deem fit in the interest of equity, justice and good conscience."

2. The submissions of Mr. Angad Alhuwalia, learned counsel for the petitioner are primarily the following:-

2.1 He submitted that all the aforesaid prayers go beyond the simpliciter striking down of the impugned policy dated December 23, 2017. Rather, the Petitioner has sought striking down of impugned policy dated December 23, 2017 only to the extent that it excludes Maj Generals of MI Corps from promotion to rank of Lt. Gens. in Non-General Cadre Staff Stream vacancies ("NGCSS"). The petitioner has also sought various positive directions to protect the promotional interests



of the senior officers of the Intelligence Corps, who have been neglected from promotion. The instant case also involves a policy issue as to whether Director General of Military Intelligence (“DGMI”), who is currently a Lt. Gen from General Cadre (“GC”), should be a Lt. Gen from within the Corps as he would be more suited to discharge the functions of DGMI.

2.2 He submitted that the Supreme Court has held that the Armed Forces Tribunal (‘AFT’, for short) being a quasi-judicial body with a governing legislation cannot direct formulation of a policy in a particular manner. Thus, the AFT would not be in a position to grant the reliefs as prayed for in the instant petition. In this regard, Mr. Alhuwalia had placed reliance on the following judgments of the Supreme Court:-

- i. ***Union of India v. NK Sharma, 2023 SCC OnLine SC 1673;***
- ii. ***L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.***

2.3 He further submitted that ***L. Chandra Kumar (supra)*** was decided in the context of Section 14 of the Administrative Tribunals Act, 1985 (‘Act of 1985’, for short). The said Section of the Act of 1985 is different from Section 14(1) of the Armed Forces Tribunal Act, 2007 (‘Act of 2007’, for short). Section 14(1) of the Act of 1985 states that the Tribunal therein shall enjoy all the jurisdiction, powers and authority exercisable immediately before that day by all courts *except the Supreme*



Court. Per contra, Section 14(1) of the Act of 2007 states that the AFT shall exercise 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 Article 226 and 227 of the Constitution*. Since the Tribunal under the Act of 1985, has been endowed with powers of the High Court, it can examine the *vires* of a legislation/rule/policy. *Per contra*, since the AFT has not been adorned with such powers, it cannot examine the *vires* of any provision of the law or policy. As such, he submitted that ***L. Chandra Kumar (supra)*** has no applicability in the present case and the AFT cannot decide the issues raised before this Court. In this regard, he has placed reliance on the following judgments:

- i. ***Sham Dass v. Union of India, 2019 SCC OnLine AFT 9929;***
- ii. ***Ramesh Chandra Singh v. Union of India, 2018 SCC OnLine AFT 11297.***

2.4 He further submitted that in the case of ***H.M. Singh v. Union of India, (2014) 3 SCC 670***, the petitioner therein, a Major General in DRDO had approached the High Court of Madras when he was not considered for the rank of Lt. General. The Supreme Court ruled in his favour. Similarly, in ***Union of India v. Narinderjit Singh Sidi, (2010) 10 SCC 416***, the respondent therein, a Brigadier, approached the Punjab and Haryana High Court challenging his non-consideration for the post of Maj Gen in Aviation Corps on the ground that there was



no post authorised for Maj. Gen. in Aviation Corps, and if he wanted to be considered for promotion then he would have had to revert to Regiment of Artillery. The Supreme Court in this case also ruled in favour of the respondent therein. In similar facts, when this Court was approached for relief instead of AFT, the Supreme Court had still granted the relief.

2.5 He also submitted that the AFT would not have the power to grant the prayers as sought for in this petition. If the instant case was to be remanded to the AFT, it would only have the power to strike down the offending portions of the impugned policy, but would not be empowered to direct the respondents to include Major Generals of MI Corps within the scope of consideration for promotion to the rank of Lt. Gen in the NGCSS vacancies. The AFT can also not direct that the Head of Arm of MI, i.e., DGMI should be a Lt. General from within the Corps instead of a Lt. General from GC. Resultantly, such extraordinary reliefs and positive directions can only be granted by this Court under Article 226 of the Constitution of India.

2.6 He submitted that the present petition was filed before this Court on August 27, 2021. The respondents have also filed their counter-affidavit on February 08, 2022. The rejoinder in the matter has also been filed on March 21, 2022. The pleadings in the matter are completed and the same is ripe for final hearing. Thus, this Court has already spent a lot of judicial time in the adjudication of the present *lis*. If the matter, at the stage



of final hearing is remanded to the AFT, the process of consideration will have to begin *de novo*, causing great prejudice and irreparable harm to the petitioner. Thus, the instant petition is maintainable before this Court and the judgment of ***L. Chandra Kumar (supra)*** shall not apply to the instant case.

3. On the other hand, Mr. Ripu Dawan Bhardwaj, learned CGSC appearing for the respondents submitted that the present petition is not maintainable in view of the fact that the prayers made in the present petition are with regard to grant of promotion to the petitioner and also challenging the *vires* of the impugned policy which excludes the Maj. Generals of MI Corps from being promoted as Lt. General in NGCSS. He submitted that as per the Act of 2007, the AFT is competent to hear the challenge to the *vires* of sub-ordinate legislations, rules, regulations, notifications and circulars, etc. as and when challenged by the affected parties. Therefore, the present matter shall fall within the jurisdiction of the AFT in view of Section 3(o) read with Section 14 of the Act of 2007. In support of this submission, he has relied upon the judgment of the Full Bench of this Court in the case of ***Squadron Leader Neelam Chahar v. Union of India & Ors.***, and connected matter in ***W.P.(C) 9139/2019***, decided on May 26, 2023.

ANALYSIS

4. Having heard the learned counsel for the parties, the short issue which arises for consideration is, whether the present petition for the prayers made in the petition shall lie before the AFT which is the



Tribunal of original jurisdiction or the same shall be maintainable before this Court.

5. Mr. Alhuwalia has primarily relied upon the judgment of the Supreme Court in the case of *NK Sharma (supra)*, more specifically on paragraphs 47, 48, 49, 53 and 55, to contend that AFT cannot give a direction for formulation of a policy to include a Major General working in Intelligence Corps for being considered for promotion as Lt. General in NGCSS. The relevant paragraphs of the aforesaid judgment have been reproduced as under:-

“47. 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.

48. 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?

49. 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.

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53. 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*¹⁵ as reiterated by a Bench of 5 judges in *Rojer Matthew v. South Indian Bank Ltd.*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.

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.”

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55. 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.”

6. In support of his submission, he has relied upon prayer (E) of the writ petition which is reproduced in paragraph 1 above, to contend that the prayer as made is for a direction to the respondents to ensure that an officer of the rank of Lt. General from Intelligence Corps be designated as Head of Arm of Intelligence Corps and a separate officer from the same Corps be DGMI in national interest. This according to him, a particular direction is sought for the respondents to frame a policy in the manner suggested in prayer (E).



7. Having said that as far as prayers (A), (B), (C), (D), and (F) are concerned, neither can there be any contest nor it has been contested by Mr. Alhuwalia that the same shall lie before the AFT. This, we say so, as prayers are in effect challenging the promotion policy dated December 23, 2017 to the effect that it excludes the Intelligence Corps of the Indian Army from being considered for the promotion to the rank of Lt. General from the NGCSS vacancies.

8. Suffice to state, that the petitioner is Major General holding the designation of ADG, Military Intelligence in the Indian Army. The prayers as made, more specifically prayer (B) whereby a direction is sought for the respondents to include the Intelligence Corps to be considered for promotion in NGCSS and create a vacancy at the rank of Lt. General for the officer to be promoted from the Intelligence Corps, can be adjudicated by the AFT. This we say so, for the reason that the original jurisdiction with regard to issues pertaining to the promotion in terms of Section of 3(o) read with Section 14 of the Act of 2007 lies with the AFT. The plea of Mr. Alhuwalia by relying upon the judgment in the case of *NK Sharma (supra)* is, that such a direction and also the direction sought in prayer (E) cannot be granted by the AFT and as such, the only remedy for the petitioner is to file the present petition before this Court under Article 226 of the Constitution. He heavily relied on paragraphs 47, 48, 49, 53 and 55 which we have already reproduced above. The conclusion of the Supreme Court has to be read in the context of directions given by the AFT in paragraph 33 of the impugned judgment before the Supreme Court, which has been reproduced as below:-



“33. 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.”

9. As can be seen from the above, the AFT in paragraph 14 therein has allowed the O.A. filed by the respondents before the Supreme Court and set aside the impugned decision of the respondents therein i.e., the petitioners before the Supreme Court in approving the recommendation of the Promotion Board qua the petitioner, with a further direction to reconsider the same “after formulating the policy” for filling up the AVM rank post in the JAG (Air) Department.

10. It is on this direction of the AFT that the Supreme Court observed that the AFT could not have given a direction for making policy that too in a particular manner. In fact, in paragraphs 49, 50 and 51 of the said judgment, the Supreme Court has said even the High Court, in exercise of powers under Article 226, can neither issue a *mandamus* to direct a department to sanction and create a post nor it can direct the Government/Department to formulate a particular regularization policy. In fact, the Supreme Court was of the view that making policy, as is well recognized, is not in the domain of the Judiciary. The relevant paragraphs, i.e., 49, 50 and 51, are reproduced as under for ready reference:-

“49. 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.



50. 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 judgment 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 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)

51. We may further refer to *Union of India v. Ilmo Devi*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)

11. As such, in paragraph 55, the Supreme Court has concluded as under:-

“55. 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.”

12. Similarly, it is also a settled law that even this Court in exercise of its power under Article 226 of the Constitution of India, 1950 cannot give a direction for framing of recruitment rules that too in a particular manner as being sought by the petitioner. Hence, in view of the judgment of the Supreme Court in the case of **NK Sharma (supra)**, prayer (E) as sought by the petitioner can neither be granted by the AFT nor by this Court. Hence, to that extent prayer (E) is liable to be rejected and it is ordered so.

13. Though a submission has been made by Mr. Alhuwalia that the judgment of the Supreme Court in the case of **L Chandra Kumar (supra)** shall have no applicability and as such, AFT cannot decide the issues raised before this Court, the fact of the matter is, this Court through its Full Bench judgment in the case of **Squadron Leader Neelam Chahar (supra)** has settled the issue to the effect that AFT is competent to hear the challenge to the *vires* of subordinate legislations, rules, regulations, notifications and circulars, etc. as and



when challenged by the affected parties. Hence, this plea of Mr. Alhuwalia is also liable to be rejected. The relevant paragraph of the judgment rendered by the Full Bench in ***Squadron Leader Neelam Chahar (supra)***, is reproduced as under:-

“14. The outcome of the entire discussion is that the Armed Forces Tribunal is competent to hear the challenge to the vires of the subordinate legislations, rules, regulations, notifications and circulars etc., as and when challenged by the affected parties.”

14. Insofar as, reliance placed by Mr. Alhuwalia on the decisions of AFT in ***Sham Dass (supra)*** and ***Ramesh Chandra Singh (supra)***, in support of the submission that the AFT cannot consider the *vires* of a given Act are concerned, in view of the judgment of the Full Bench, have no applicability.

15. As this Court is of the view that the present petition is not maintainable, the following judgments as relied upon by Mr. Alhuwalia, on the merit of the case, have no applicability:-

- i. ***Union of India and Others. v. Atul Shukla and Others, (2014) 10 SCC 432;***
- ii. ***Major General H.M. Singh, VSM v. Union of India and Another, (2014) 3 SCC 670;***
- iii. ***Union of India and Others v. Narinderjit Singh Sidhu, (2010) 3 SCC 416;***
- iv. ***Maj. Gen. P.K. Bharali, VSM v. Union of India & Ors., 2014 SCC OnLine AFT 622.***



16. Having said that, in light of our conclusion in paragraph 7 above, we are of the view, to the extent of prayers (A), (B), (C) and (D), liberty is with the petitioner to approach the AFT. It goes without saying that if the petitioner approaches the AFT, the AFT shall decide the same in accordance with law.

17. In view of the aforesaid, the petition is disposed of. There is no order to costs.

V. KAMESWAR RAO, J

SAURABH BANERJEE, J

MARCH 18, 2024/aky