IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

O.A NO. 351 OF 2010

EX JWO RD SHARMA ...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MR. S.S TIWARI FOR THE APPELLANT
MR. AJAI BHALLA FOR THE RESPONDENTS

CORAM :

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. Z.U SHAH, MEMBER

J U D G M E N T
08.03.2011

1. Challenge in this O.A is against the order of the Air Officer Commanding-in-Chief dated 17.12.2009, whereby the finding and sentence of the General Court Martial was upheld. Simultaneously, prayers were also made to direct the respondents to release his pay and allowances from the date of his arrest till the date of retirement; to treat him as retired with effect from 2.2.1992 after the expiry of the extended

service on the basis of 26 years of service; and to make him entitled for all consequential benefits.

2. To invoke the jurisdiction of this Tribunal, the appellant has resorted to the provisions contained in Rule 6(2) of the Armed Forces Tribunal (Procedure) Rules 2008 (the Procedure Rules, in short) showing his "ordinary place of residence" as "House No. 209, Chatterpur, New Delhi-110 074". However, all along the O.A has been resisted by the respondents on the ground that the appellant has concealed the true fact that he is a resident of "Gurgaon, Haryana", which would fall within the territorial jurisdiction of Armed Forces Tribunal, Haryana/Lucknow.

3. In order to ascertain whether this Tribunal has the territorial jurisdiction to adjudicate this case, it would be appropriate to extract Rule 6 of the Procedure Rules. It reads:

> **6. Place of filing application**.—(1) An application shall ordinarily be filed by the applicant with the Registrar of the Bench within whose jurisdiction—
>
> (i) the applicant is posted for the time being, or was last posted or attached; or
>
> (ii) where the cause of action, wholly or in part, has arisen:

> Provided that with the leave of the Chairperson the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 14 or section 15 of the Act, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter.
>
> (2) Notwithstanding anything contained in sub-rule (1), a person who has ceased to be in service by reason of his retirement, dismissal, discharge, cashiering, release, removal, resignation or termination of service may, at his option, file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application."

A reading of the above would make it clear that the jurisdiction of this Tribunal can be resorted to on the basis of (i) present, past posting or attachment; (ii) where cause of action, wholly or in part, has taken place; or (iii) on the basis of his ordinary place of posting when he had settled after ceasing from service. In support of his contention, the appellant has relied upon the decision of the apex Court in **Commissioner of Customs, Mumbai** v. **J.D Orgochem Ltd** (2008(16) SCC 576), wherein the expression "ordinarily" has been defined to mean as under:

> "13. The expression 'ordinarily' may mean 'normally'. It has been held by this Court in *Kailash Chandra* v. *Union of*

> *India* (AIR 1961 SC 1346) and *Krishan Gopal* v. *Prakashchandra* (1974(1) SCC 128) that the said expression must be understood in the context in which it has been used and, thus, 'ordinarily' may not mean 'solely' or 'in the name', and thus, if under no circumstance an appeal would lie to the Principal District Judge, the Court would not be subordinate to it. When in a common parlance the expression 'ordinarily' is used, there may be an option. There may be cases where an exception can be made out. It is never used in reference to a case where there is no exception. It never means 'primarily'.

The expression "ordinarily" has been interpreted with reference to Section 14(1) of the Customs Act, which pertained to the goods ordinarily sold. In the Procedure Rules, the expression "ordinarily" was inserted for the purpose of proving "ordinary place of residence". In order to prove the expression "ordinary place of residence", it would be appropriate to refer to the definition in the context of territorial jurisdiction of the Bench. To understand the statutory intent for which the expression "ordinary place of residence" is used, it would be relevant to refer to certain notifications which have been issued by the Central Government defining the territorial jurisdiction of the Benches of the Armed Forces Tribunal at Chennai, Jaipur, Lucknow, Chandigarh, Calcutta and Kochi. They are: S.R.O Nos. 14(E) dated 21.10.2009, 15(E) dated

28.10.2009, 16(E) dated 5.11.2009, 17(E) dated 10.11.2009, 18(E) dated 18.11.2009 and 19(E) dated 2.12.2009 respectively. Therefore, the territorial jurisdiction of this Bench would depend upon Rule 6 ibid, which provides that the appellant may resort to the forum on the basis of his past and present place of posting and ordinary place of residence. The word "reside" came up for consideration of the apex Court in **Jagir Kaur** v. **Jaswant Singh** (AIR 1963 SC 1521), in the context of the jurisdiction of the Magistrate under Section 488 of the Code of Criminal Procedure 1898 for entertaining the petition of a wife for maintenance. While considering the meaning of the word "reside" in Oxford Dictionary, the apex Court observed thus:

> "Thus said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings, including domicile in the strictest and the most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to, a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense."

Further, the apex Court in **Jeewanti Pandey** v. **Kishan Chandra Pandey** (1981(4) SCC 517, had considered the same question viz. "ordinary place of residence". In the said decision, the apex Court used the expression "resides" appearing in Section 19(11) of the Hindu Marriage Act, 1955, which is akin to the present Act, so far as determination of "ordinary place of residence" is concerned. The Supreme Court held thus:

> "13. It is plain in the context of clause (ii) of Section 19 of the Act, that the word 'resides' must mean the actual place of residence and not a legal or constructive residence; it certainly does not connote the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant, at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora, had jurisdiction or not. That being so, the High Court was clearly in error in upholding the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under Section 12 of the Act."

4. In this case, the appellant has produced Ration Card No. 563 issued by the Government of Haryana to prove his "place of residence", which was admittedly got issued during the pendency of this proceeding,

precisely, after the filing of the present O.A. Counsel for the appellant has pointed out that the new card was issued after surrendering his earlier ration card from where he last resided. It became necessary because of his change of residence to Delhi from Haryana. In support of his argument, counsel for the appellant has also produced a copy of the First Information Report registered against the ration dealer and the election identity card issued by the Election Commission of India, wherein the date of issuance is shown as "3.1.2011". As stated earlier, all these documents were obtained during the pendency of the present O.A only for the purpose of usurping the territorial jurisdiction of this Tribunal. Furthermore, counsel for the appellant has submitted that the appellant shifted his residence to Delhi much earlier and was residing in Delhi. It appears to have obtained the ration card and the election identity card before the acknowledgment of the surrender of the earlier card issued by the State Government, Haryana. As against this, it is submitted that the appellant changes his residence to suit his convenience for the purpose of litigation. Further, in the counter affidavit filed in Crl. M.C No. 53 of 2010 before the Allahabad High Court, the appellant had shown his place of residence as "587, New Railway

Road, Dayanand Colony, Gurgaon (Haryana) and presently residing at House No. 209 Chattarpur, New Delhi - 110 074. Merely by mentioning "presently residing" would not make him come within the definition of "ordinary place of residence".

5. As regards the disposal of the statutory complaint/representation by Chief of Naval Staff is concerned, it would not give any cause of action as regards the appeal under Section 15 of the Act is concerned. This position is settled by a Full Bench of this Tribunal by judgment dated 19.10.2010 in **Parmeshwar Ram** v. **Union of India and others** (O.A No. 471 of 2010), wherein it was held that the appeal against the court martial proceedings are not dependent on the final disposal of the statutory complaint/representation made to the Chief of Naval Staff or to the Central Government. The court martial proceedings are subject to appeal irrespective of the fact whether statutory representation/complaint is pending. In this regard, it would be appropriate to quote the relevant provisions contained in Section 15 of the Armed Forces Tribunal Act 2007, which reads:

> 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 whatever; or

(b) the finding involves wrong decision n 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) ……

(7) ……..”

From the above, it is clear that this Tribunal has jurisdiction to entertain an appeal against the court martial proceedings and not against the statutory complaint/representation. Under such circumstances, resort to the jurisdiction of this Tribunal against the decision by the competent authority on the statutory representation cannot be the basis for appeal.

6. It has next been contended by the learned counsel that for providing substantial justice to the aggrieved party, merely on technical ground the appellant cannot be denied his right when part of the cause of action arose here at Delhi on account of rejection of statutory complaint. As has already been mentioned, the appeal against the court martial proceedings is not dependent upon the decision in statutory representation. They are altogether a separate proceeding and cannot be assailed in an appeal under Section 15 of the Armed Forces Tribunal

Act 2007. We are not oblivious of the fact that a decision rendered without jurisdiction would be *coram non juris.* In **Harshad Chiman Lal's case** (supra), it was held by the apex Court thus:

> "6. …… It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, …. strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

7. In view of the aforesaid discussion, we are of the opinion that this Tribunal has no territorial jurisdiction to entertain this appeal. Further, it suffers from delay and laches. In the result, the appeal is dismissed.

(Z.U SHAH)
MEMBER

(S.S KULSHRESTHA)
MEMBER