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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 15th March, 2011
Judgment Delivered on: 26th April, 2011

+ W.P.(C) 13360/2009

COLONEL A.D.NARGOLKAR Petitioner
Through: Mr.Vinay Kr. Garg, Advocate with
Mr.Fazal Ahmad and Ms.Namrata
Singh, Advocates.
versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.A.S.Chandhiok, ASG and
Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber and Mr. Anuj
Aggarwal, Advocates for UOI with
Major Rahul Soni

W.P.(C) 13367/2009

COLONEL A.D.NARGOLKAR Petitioner
Through: Mr.Vinay Kr. Garg, Advocate with
Mr.Fazal Ahmad and Ms.Namrata
Singh, Advocates.
versus

UNION OF INDIA AND ORS Respondents
Through: Mr.A.S.Chandhiok, ASG and
Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 273/2010

JC-23692P KISALAR NABAB SINGH Petitioner
Through: Mr.D.S.Kauntae, Advocate.
versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with

Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 654/2010

LT. COL. HARPREET SINGH Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber and Mr. Anuj
Aggarwal, Advocates for UOI with
Major Rahul Soni.

W.P.(C) 1918/2010

OM PRAKASH Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Gaurav M.Liberhan, Advocate,
Mr.Atul Batra, Advocate and
Ms.Swapnil Jain, Advocate for UOI.

W.P.(C) 2667/2010

COL. SANJAY KUMAR Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 3086/2010

S.YADAV Petitioner
Through: Mr.V.S.Tomar, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Sachin Datta, Advocate with
Mr.Abhimanyu Kumar, Advocate
for UOI.

W.P.(C) 3405/2010

USHA ATRI Petitioner
Through: Mr.K.K.Rohatgi, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Raman Oberoi, Advocate for
UOI.

W.P.(C) 3439/2010

NARVIR SINGH Petitioner
Through: Col.S.R.Kalkal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 3441/2010

MAHA RAM Petitioner
Through: Col.S.R.Kalkal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 3578/2010

V.S.SUKHDIAL, YSM Petitioner
Through: Mr.Dil Jit Singh, Advocate.

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Anjana Gosain, Advocate for
UOI.

W.P.(C) 3828/2010

NARESH KUMAR Petitioner
Through: Col.S.R.Kalkal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 3836/2010

INDRA SINGH SOLANKI Petitioner
Through: Mr.S.M.Dalal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 3841/2010

RAM SWARUP Petitioner
Through: Mr.S.M.Dalal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 4417/2010

G.S. BENIWAL Petitioner
Through: Mr.Mathew D., Mr.Mohinder Singh
& Mr.D.S.Chaudhary, Advocates.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 4524/2010

KIRAN PAL SINGH Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate
with Mr.Ankur Chhibber,
Advocate for UOI with Major
Rahul Soni.

W.P.(C) 4652/2010

B.D. KHENTE Petitioner
Through: Mr.D.S.Kauntae, Advocate.

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Barkha Babbar, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 4669/2010

EX. SIGMN GANGA RAMA SHARMA Petitioner
Through: Mr.S.M.Dalal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Jyoti Singh, Senior Advocate
with Mr.Jayendra, Advocate for UOI.

W.P.(C) 4699/2010

RAMESHWAR PRASAD SHARMA Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Ruchir Mishra & Mr.Mukesh
Tiwari, Advocates for UOI.

W.P.(C) 4887/2010

SURJIT KAUR Petitioner
Through: Mr.D.S.Kauntae, Advocate.

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Barkha Babbar, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 4926/2010

INDER SINGH Petitioner
Through: Mr.S.M.Dalal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 5090/2010

HARVINDER SINGH KOHLI Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Barkha Babbar, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 5156/2010

VIJAY BAHADUR SINGH Petitioner
Through: Mr.S.M.Dalal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Ravinder Agarwal, CGSC with
Major Rahul Soni.

W.P.(C) 5189/2010

PRABHU DAYAL SHARMA Petitioner
Through: None.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 5206/2010

RAI SINGH Petitioner
Through: None.
versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.D.S.Mahendru, CGSC with
Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 5764/2010

LT. COL. RAJEEV BHATT Petitioner
Through: Mr.Fazal Ahmad with Mr.Namrata
Singh, Advocates.
versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 5794/2010

HAV REIJI KUMAR Petitioner
Through: None.
versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Neeraj Chaudhari, CGSC
with Mr.Mohit Auluck and Mr.Khalid
Arshad, Advocates with Major Rahul
Soni.

W.P.(C) 6061/2010

PSK CHOUDHARY Petitioner
Through: Mr.S.M.Dalal & Mr.P.D.P.Deo,
Advocates.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Atul Nanda, Sr.Advocate with
Mr.Ankur Chhibber, Advocate for
UOI with Major Rahul Soni.

W.P.(C) 6066/2010

BHAGWAN SINGH Petitioner
Through: Mr.M.G.Kapoor, Advocate

versus

UNION OF INDIA AND ANR. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 6183/2010

R.P. SINGH Petitioner
Through: Mr.Dil Jit Singh, Advocate.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.B.V.Niren, CGSC with
Mr.Abhishek Goyal, Advocate for
UOI.

W.P.(C) 7018/2010

GUNNER STOREHAND BANARASI LAL Petitioner
Through: Mr.Dipak Bhattacharya and
Mr.Mithilesh Kumar, Advocate.

versus

UNION OF INDIA AND ANR. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with

Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 7039/2010

MILKHI RAM Petitioner
Through: Mr.Dipak Bhattacharya and
Mr.Mithilesh Kumar, Advocate.

versus

UNION OF INDIA AND ANR. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 7040/2010

SEWA RAM NAGIAL Petitioner
Through: Mr.Dipak Bhattacharya and
Mr.Mithilesh Kumar, Advocate.

versus

UNION OF INDIA AND ANR. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 7041/2010

SAT PAL Petitioner
Through: Mr.Dipak Bhattacharya and
Mr.Mithilesh Kumar, Advocate.

versus

UNION OF INDIA AND ANR. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 7042/2010

HARI SINGH Petitioner

Through: Mr.Dipak Bhattacharya and
Mr.Mithilesh Kumar, Advocate.

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.M.P.Singh, Advocate with Major
Rahul Soni.

W.P.(C) 8298/2010

BHAGWAN SINGH Petitioner
Through: Ms.Kusum Sharma, Advocate.

versus

UNION OF INDIA AND ANR. Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.M.P.Singh, Advocate and
Major Rahul Soni.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. For every real or imaginary problem, a law is enacted with the belief, that by this step the problem will be solved. But we find, for reasons which are fairly unexplainable, that problematic issues relating to the problem arise. The problem of delay in adjudication of disputes between members of an Armed Force and the Force in Civil Courts led to the establishment of the Armed Forces Tribunal with the pious hope that an exclusive Tribunal to decide disputes relating to

Armed Forces would facilitate a speedy adjudication of disputes, but the establishment of the Tribunal has raised jurisdictional issues pertaining to the power of a High Court under Article 226 and Article 227 of the Constitution of India.

2. Much has been said about the delay in obtaining justice in Courts and one probable reason for the delay, apart from many others, is the multiple tiered adjudicatory forums available to the litigating parties. A simple revenue matter, pertaining to an entry in the record of rights, commences with a claim before the tehsildar whose decision is amenable to a challenge by way of an appeal either before the Revenue Assistant or an Additional Collector and a further forum of a Revision before the Financial Commissioner. Exhausting the channel of forums available before the Revenue Authorities, an aggrieved party can approach the High Court under its Writ or Supervisory Jurisdiction under Article 226 or Article 227 of the Constitution of India, which writ is heard by a learned Single Judge of the High Court. Further forum of a Writ Appeal or a Letters Patent Appeal is available before a Division Bench and at the top of the pyramid would be a Petition for Special Leave to Appeal before the Supreme Court. The eviction of an unauthorized occupant from a public premises commences with a proceedings before the Estate Officer whose decision can be challenged by way of an Appeal before the District Judge and further remedies, one before a Single Judge and one before a Division Bench thereafter are available in the High Court before the destination is reached by way of a Petition for Special Leave to Appeal before the Supreme Court. An issue of levy and assessment of house tax commences with an adjudication before the Assessor and Collector against whose

decision an Appeal would lie to either the District Judge or a Committee of Assessors and thereafter the water flows before a Single Judge and thereafter a Division Bench of the High Court before terminating by way of a Petition for Special Leave to Appeal before the Supreme Court. A licensing issue commences with a decision of the Licensing Inspector against which a departmental remedy by way of a representation to the Commissioner would lie before the water flows through a Single Judge and thereafter a Division Bench of the High Court before terminating by way of a Petition for Special Leave to Appeal before the Supreme Court. A simple recovery suit before a Judge, Junior Division, would result in an Appeal before a Judge Senior Division i.e. a Regular First Appeal with further remedy before the High Court by way of a Regular Second Appeal and the ultimate destination would be a Petition for Special Leave to Appeal before the Supreme Court. An ejectment petition before a Rent Controller leads to a First Appeal before the Rent Control Tribunal and if the remedy of Second Appeal against order is not provided by the statute a challenge would lie under the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India and mercifully no challenge would lie before a Division Bench and the journey would end a step earlier before the Supreme Court by way of a Special Leave to Appeal.

3. The multi tiered adjudicatory forums, having a pyramidal structure, are bound to result in congestion as we move upwards and the movement of the traffic (litigation) is bound to be slow; and if not result in making an exit from the reality of life, the slow pace certainly diminishes the value of a claim. Some believe that the existing adjudicatory

mechanism, which functions in a multi-tiered pyramidically structured structure, has virtually reduced the whole system into a *reductio ad absurdum*.

4. In spite of all these criticisms, it is also true to say that the system of administration of justice has withstood the test of time notwithstanding its inability to readjust itself to the changing time.

5. The concept of 'Rule of Law' is the outcome of the legal and political experience of people. The Rule of Law embodies the hard fought gains in the Common Law Traditions of England. It was the culmination of a long and bitter struggle of the common lawyers against Royal Tyranny. As far back as in the 13th Century, Bracton maintained that even Kings were subject to law. He exhorted: *'The King shall not be subject to man, but to God and the Law since law makes the King'*. James-I, who believed in the divine right of Kings, dictate that the King's will was supreme. He told the Judges not to interfere with his prerogative Courts, such as the Star Chamber. Chief Justice, Sir Edward Coke, repudiated the King's claim and declared that Judges would follow the Common Law and the King was under the Law. Indeed, the Judges won the struggle against the Royal claim to rule by prerogative.

6. The Parliament, with the aid of common lawyers, won the glorious bloodless revolution against the Kings. But, in the place of the King's supremacy, the supremacy of the Parliament came to be established. The supremacy of law, which Bracton and Coke had fought for and won, came to mean the supremacy of Parliament and its penchant for *'elective dictatorship'*. Men realized that it would be a grave

mistake to equate legitimacy with the sovereign will or majority rule alone to the exclusion of other constitutional values.

7. As Parliament legislated to control the rights of the citizens, the concern of the Rule of Law was to limit and discipline this sovereign power to legislate.

8. Three essential components of the concept of Rule of Law emerged. The first was that the law is supreme over the acts of both, the government and the citizens. The second was an independent judiciary to adjudicate claims between the government and the citizens and the third was the exercise of public power must find its ultimate source in some legal rule and the relationship between the State and the citizen must be regulated only by law.

9. Highlighting the second component of the concept of the Rule of Law, suffice would it be to state that laws, which ought to be equal, general and known, need to be administered by independent Judges and the three organs of the State i.e. the Legislature, the Executive and the Judiciary shall be separate.

10. The Indian Constitution rests on federalism, democracy, constitutionalism, respect for minority rights, fundamental rights of the individual and the Rule of Law. These defining principles function in symbiosis and no single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of the other.

11. The problem of judicial delays resulting from a pyramidal structure of adjudicatory forums has its roots in the concept of the Rule of Law having a feature of independent Judges, free from the control of the Executive, to decide disputes between the State and its citizens. The problem is

the result of two conflicting values which society cherishes and has nurtured over the years. The first conflicting value is to secure, in the shortest possible time, the right conferred by law upon the citizen of the State and the second conflicting value is a say, in the adjudicatory process, by an independent Judge.

12. Whereas the State beckons us, in the instant writ petitions, to sacrifice the value of an independent Judge having a say in the adjudicatory process to resolve a conflict between a member of an Armed Force, subject to the Army Act, the Navy Act and the Air Force Act, and the Force and leave it to the Tribunal constituted under the Armed Forces Tribunal Act 2007 to do the needful; the result being a speedy adjudication of claims, stated to be necessary to maintain discipline in Armed Forces. The protagonists i.e. the writ petitioners state that it would be too heavy a price to pay i.e. speedy justice, if they have to sacrifice an independent Judge having a say in the adjudicatory process.

13. The cardinal question which arises for consideration in the above caption writ petitions, upon the answer whereof would depend whether the issues of merit raised in the writ petitions can be adjudicated on, is whether a writ of error/certiorari or any other writ of the like nature would lie under Article 226 of the Constitution of India against a decision of the Tribunal constituted under the Armed Forces Tribunal Act 2007 and additionally whether a High Court can exercise the power of superintendence over said Tribunal, a power of the High Court under Article 227 of the Constitution of India.

14. The legislative competence in both, i.e. the Parliament and the State Legislatures, to effect changes in the Original

Jurisdiction of the Supreme Court and the High Court can be traced not only to Article 323-A and 323-B of the Constitution of India inserted in the Constitution by the Constitution 42nd Amendment Act 1976, but even under entries 77, 78, 79 and 95 of List-I, pertaining to Parliament; and entry 65 of List-II, pertaining to the State Legislature; and entry 46 of List-III available to both. Thus, none has argued with respect to the lack of legislative competence in the Parliament to enact '*The Armed Forces Tribunal Act 2007*' and we note that no section thereof is under challenge with respect to the constitutionality thereof. Pertaining to a Tribunal pertaining to an Armed Force, it may be highlighted that neither Article 323A nor Article 323B specifically refers to an Armed Force Tribunal, but entry 2 under List-I read with entry 97 of said list would be the safe source of the legislative power to create an Armed Force Tribunal.

15. Not that discipline is irrelevant in a civil society and that its relevance is only to an Armed Force, but surely everybody would agree that whereas some form of indiscipline may be accepted in the din of democracy, there is just no scope to brook even the slightest indiscipline in an Armed Force; for the reason it is recognized that in times of peace an Armed Force constitutes a grave threat to democracy. In the Indian context, by virtue of Article 33 of the Constitution of India, rights conferred by Part-III of the Constitution of India i.e. the precious fundamental rights available to persons and citizens of India can be curtailed in their application to the members of the Armed Forces and laws were enacted in India which gave the right to the Armed Forces to subject its members to punishment extending up to even the sentence of death at

trials presided over by fellow members of the Armed Force, way back in the year 1982, in the decision reported as AIR 1982 SC 1414 *Lt.Col.Prithi Pal Singh Bedi vs. UOI & Ors.*, noting that military trials are subject to varying degrees of '*command influence*' and there was absence of even one appeal with an Appellate Forum (having power to review evidence, legal formulations, conclusions and adequacy or otherwise of punishment), and opining the same to be not in sync with democratic principles; further noting the changes adopted in foreign jurisdictions, the Supreme Court expressed a pious hope that the legislature should earnestly consider creating an Appellate Forum, which should be free from the command influence, for members of Armed Forces; lest these brave sons and daughters of India feel being orphaned in a democratic society. The Supreme Court expressed itself, in para 45 of the decision, by highlighting that whereas a hierarchy of Courts with appellate powers has been found to be counter-productive, and suggested at least a single judicial review forum *which must truly be a judicial review forum* for the members of the Armed Forces to question the verdicts against them at a Court Martial. This was the clarion call which went unheeded and unnoticed till, in the year 1999, the Law Commission, in its 169th Report, titled as '*Amendment of Army, Navy and Air Force Acts – April 1999*' opining that the requirement of justice and discipline for members of the Armed Forces had to march hand in hand and recommended setting up of an Adjudicatory Forum, to act as an Appellate Forum, against decisions of Military Courts and Military Tribunals. In para 1.1 and 1.2 of its report, the Law Commission highlighted that the existing mechanism of High

Courts entertaining petitions under Article 226 of the Constitution of India against verdicts by Court Martials was unhealthy inasmuch as each High Court was adopting its own approach in the matter and thus there was a desirability of having a single Appellate Tribunal. In para 5.1.1 of its report, the Tribunal recommended that the Appellate Tribunal should not be a totally Civilian Appellate Tribunal as has been provided in the United Kingdom, opining that in the Indian context this may not be conducive to the discipline of the Armed Force. The Law Commission suggested a hybrid Tribunal, headed by a Civilian Judge whose other members could be drawn from retired members of the Armed Forces. In para 5.1.4 of the Report, the Commission recommended a direct Statutory Appeal to the Supreme Court against the decisions of the Tribunal and expressed a hope that if a legislation was enacted in harmony with its recommendations the Commission would expect that no High Court would entertain a writ petition under Article 226 of the Constitution of India against the orders of the Appellate Tribunal. In para 6.1 of its Report the Law Commission noted that each year thousands of writ petitions were filed by members of Armed Forces in several High Courts in India concerning their service matters and due to docket explosions in Courts these matters remain pending for years together resulting in a sense of dissatisfaction creeping into the members of the Armed Forces; it was opined by the Law Commission that this creeping dissatisfaction was against the interest of discipline in an Armed Force. Thus, the Law Commission recommended that the Statutory Appellate Tribunal to be created should be all embracing i.e. should act as the Appellate Forum for merit

review of Court Martials as also as the Forum where service disputes such as seniority, promotions and other conditions of service could be adjudicated upon. In para 6.2.4 of the report, the Law Commission opined that if an adequate remedy of appeal, on a question of law against the decision of the proposed Tribunal would be made available before the Supreme Court, in view of an adequate remedy of appeal, the High Courts would not exercise jurisdiction under Article 226 of the Constitution of India.

16. The setting up of Armed Forces Tribunal was then taken up by the 13th Lok Sabha Standing Committee on Defence, resulting in the committee recommending a Special Court of Appeal, headed by a retired Judge of the Supreme Court, independent of service headquarters, to be constituted for the redressal of grievances of service personnel, but restricted the same against decisions of Military Courts. The Parliament took up the matter further and we saw the birth of '*The Armed Forces Tribunal Act 2007*' when having been passed by both the Houses of Parliament, The Armed Forces Tribunal Bill received the assent of the President of India on the 20th day of December 2007 and came on the Statute Book as THE ARMED FORCES TRIBUNAL ACT 2007 (ACT NO.55 OF 2007).

17. It was but necessary that in the Statement of Objects and Reasons, the necessity of the legislation was traced to the observations of the Supreme Court in Prithi Pal Singh Bedi's case (supra).

18. As per the Preamble, the Act aims to provide, for the adjudication or trial, by Armed Forces Tribunal, of disputes and complaints with respect to commission, appointment, enrollment and conditions of service in respect of persons

subject to the Army, Navy and Air Force Act and additionally to provide for appeals arising out of orders, findings or sentences of Court Martial held under the said three acts. In other words, the Tribunal exercises an Appellate Jurisdiction with respect to orders, findings or sentences of Court Martials and exercises Original Jurisdiction with respect to service disputes.

19. As per Section 5 of the Act, the Tribunal is to consist of a Chairperson and such number of Judicial and Administrative Members as the Central Government may decide with the power and jurisdiction of the Tribunal to be exercised by Benches thereof. Vide sub-section 2 of Section 5, a Bench has to consist of 1 Judicial Member and 1 Administrative Member. As per Section 6, the qualification for being appointed as the Chairperson of the Tribunal is a person being a retired Judge of the Supreme Court or a retired Chief Justice of a High Court. The qualification for a Judicial Member is a person who is or has been a Judge of a High Court. To be qualified for appointment as an Administrative Member, a person must have held the rank of Major General or above for at least 3 years in the Army or equivalent rank in the Navy or the Air Force or is a Judge Advocate General for at least 1 year. Appointment of Chairperson and Members, as per Section 7 of the Act, is by the President of India; with consultation with the Chief Justice of India. As per sub-section 2 of Section 9 of the Act, the President has the power to remove the Chairperson or a Member upon ground of proof of misbehaviour or incapacity after an inquiry is made by a sitting Judge of the Supreme Court. The staff of the Tribunal is determined by the Central Government as per Section 13 of the Act.

20. Vide Section 14 of the Act, the Tribunal is vested with the

jurisdiction relating to service matters pertaining to Members of the Armed Forces and vide Section 15 of the Act, the Tribunal is empowered to entertain appeals against Court Martials. Section 14 and 15 need to be noted and hence we reproduce the same as under:-

“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 *ex parte*;
 - (h) setting aside any order of dismissal of any application for default or any order passed by it *ex parte*; and
 - (i) any other matter which may be prescribed by the Central Government.
- (5) The Tribunal shall decide both questions of law and facts that may be raised before it.

15. 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 therefore 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.”

(7) 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 of the Indian Penal Code (45 of 1860) and Chapter XXVI of the Code of Criminal Procedure, 1973. (2 of 1974)

21. Vide Section 19 of the Act, the Tribunal is clothed with the power to punish for contempt but only if the contempt arises out of using insulting or threatening language or by causing any interruption or disturbance in the proceedings of the Tribunal. Relevant would it be to note that the *sui generis* power of contempt vested in superior Courts i.e. the High Court and the Supreme Court to enforce their orders is not

vested in the Armed Forces Tribunal.

22. Vide Section 23 of the Act, the Tribunal is not bound by the procedure prescribed by the Code of Civil Procedure 1908 and is free to be guided by its own procedures. Chapter-V, having 2 sections i.e. Section 30 and Section 31, deals with Appeals to the Supreme Court and being relevant for our discussion are noted hereunder:-

“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."

23. Section 33 of the Act provides for exclusion of jurisdiction of civil courts and reads as under:-

"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."

24. A perusal of the statutory provisions of the Armed Forces Tribunal Act 2007 would reveal that relating to the jurisdiction of the Tribunal, vide Section 14, an original jurisdiction is created with respect to service matters between the members

of an Armed Force and the Force and vide Section 15 the Tribunal has been vested with an appellate jurisdiction over decisions, findings and sentence passed by a Court Martial. It is also important to note that Sub-Section 1 of Section 14 preserves the jurisdiction of the Supreme Court and of the High Court and needless to state the jurisdiction of High Court preserved is under Article 226 and Article 227 of the Constitution of India. Vide Section 19, a limited power to punish for contempt is vested in the Tribunal and one find that the same is limited to using insulting or threatening language or by causing interruption or disturbance in the proceedings of the Tribunal. The contempt jurisdiction does not relate to willful disobedience to a judgment, direction or order passed by the Tribunal.

25. The right to file an appeal before the Supreme Court created vide Section 30 of the Act is subject to Section 31 of the Act and this means that the right to appeal to the Supreme Court is not a matter of right but is a matter of discretion to be exercised by the Tribunal upon an application to be filed seeking leave of the Tribunal to file an appeal to the Supreme Court. Further, the discretion of the Tribunal to grant leave is not with respect to every point of law which may have arisen for consideration before the Tribunal, but is limited to a point of law of general public importance. Of course, under Section 31 a power has been vested in the Supreme Court to grant leave to appeal if the Supreme Court would be satisfied that the point raised before it is one which ought to be considered by the Supreme Court. In other words the right to appeal conferred by the Act is a very narrow right and is not akin to a statutory right of appeal, as a matter of right, understood in

law.

26. It needs to be highlighted that the power to appoint the Chairperson and members of the Tribunal is vested in the executive.

27. It is time now to note the contentions urged by rival parties.

28. Sh.Vinay Garg learned counsel who argued, with his usual adroitness, the lead matter on behalf of the writ petitioners urged that with the decision of the Supreme Court reported as 1997 (3) SCC 261 L.Chandra Kumar Vs. UOI the debate with respect to alternative forums of judicial review and the power of the High Court under Article 226 and Article 227 of the Constitution of India has been set to rest. The law being that the power of judicial review vested in constitutional courts is not only an integral part but is a basic feature of the Constitution of India and cannot be curtailed by legislation. Learned counsel was at pains to take us through the growth of law on the subject and showed us the drifting currents in the stream of jurisprudence pertaining to judicial review. With respect to clause 4 of Article 227 of the Constitution of India, which apparently seeks to take away the jurisdiction of High Court under Article 227 of the Constitution of India pertaining to Tribunals constituted for Armed Forces, learned counsel drew our attention to the Constitution Assembly Debates and highlighted the distinction between the judicial power of superintendence and the administrative power of superintendence and urged that only administrative superintendence over Tribunals relating to Armed Forces was taken away from the High Courts and the power of judicial superintendence was retained. Learned counsel urged that

Section 14 of the Act recognized the original power of the Tribunal to adjudicate service disputes relating to members of an Armed Force and the Force and thus urged that qua decisions of the Tribunal pertaining to service matters the power of the High Court under Article 226 and Article 227 of the Constitution of India remained intact. Qua Section 15 of the Act learned counsel submitted that the same recognized the appellate power of the Tribunal with respect to decisions and sentences by a Court Martial and submitted that qua said decision of the Tribunal the power of judicial review under Article 226 and 227 of the Constitution of India was retained but counsel conceded that exercise thereof would be on very narrow grounds, on the well-recognized principle evolved by Courts that in relation to dispute on facts, to be gathered or inferred from the evidence led, the judicial review would be limited to determine whether it is a case of no evidence and no further; and on other issues relating to jurisdiction, the judicial review would be limited to identification of proceedings suffering from a jurisdiction error or an error of law apparent on the face of the record. Counsel highlighted that findings in sentence at a Court Martial are incapable of execution unless confirmed by an Executive Authority and thus urged that these proceedings are akin to a domestic proceedings in civil service. Other learned counsel for the petitioners adopted aforementioned line of argument.

29. Per contra, Sh.Atul Nanda learned senior counsel, who argued with equal aplomb for the respondents urged that as against civil jurisprudence, military jurisprudence had grown differently and historically Courts in common law and non common law jurisdictions had not issued prerogative writs to

military courts or tribunals. Conceding that power of judicial review under Article 226 of the Constitution was recognized to be a part of the basic structure of the Constitution, counsel urged that the legislative intent to create an Armed Force Tribunal which resulted in the legislative mandate under the Armed Forces Tribunal Act 2007 is to exclude the jurisdiction of the High Court under the Article 226 and Article 227 of the Constitution of India and for which submission learned senior counsel urged that vis-à-vis civil service, requirement of highest standard of discipline in an armed service was essential to a democratic society requiring speedy adjudication of disputes relating to members of an Armed Force and therefrom learned senior counsel urged that keeping in view said distinction between a civil service and a military service, on the principle of comity, speedy justice and the requirement of reducing multiplicity of litigation, it has to be held that a High Court either does not have or if having, would refrain from exercising its power under Article 226 of the Constitution of India. With respect to the power of superintendence under Article 227 of the Constitution of India, with reference to clause 4 thereof, learned senior counsel urged that the complete power of superintendence created under Article 227 was non-applicable to Tribunals or Courts constituted by a law relating to the Armed Forces and thus counsel urged that even judicial superintendence was taken away with respect to the Armed Forces Tribunal. Learned counsel urged that the power under Article 226 of the Constitution of India to correct decisions passed by authorities and persons subordinate to the High Court did not extend to issue directions to exercise discretion in a particular manner, which power was a part of

the jurisdiction under Article 227 of the Constitution, and thus learned senior counsel urged that de hors Article 227 of the Constitution of India, the High Court would be powerless to issue any direction to the Tribunal to exercise its jurisdiction in a particular manner.

30. The contention of Sh.Atul Nanda that the power of High Courts to issue writs under Article 226 of the Constitution of India must be tested on the touchstone of the well-settled principle of military jurisprudence that members of Armed Forces are a separate class; so treated in jurisdictions all over the world, and the consistent view taken by Courts in England, America and Canada is that issues of Military Law have to be treated as outside the scope and realm of ordinary civil jurisprudence requires us to briefly reflect upon the various decisions cited at the bar by Sh.Atul Nanda learned Senior Counsel. We shall link to this discussion the submission that the historical background under which the Armed Forces Tribunal was created reflects the legislative intent to take away the jurisdiction of High Court under Article 226 and Article 227 of the Constitution.

31. Learned senior counsel rightly pointed out, a submission which was not controverted by learned counsel for the petitioners, that in time of peace, a standing army was considered being a threat to the Rule of Law and this threat to a democratic nation by an undisciplined army was one of the foundation of military law i.e. Code of Discipline and secondly that issues of military discipline were different than those of disciplining the civil servant and indeed the exigencies of a military service were qualitatively and quantitatively different than those of a civil service.

32. But, what was submitted by learned counsel for the petitioners was that the aforesaid foundation merely gave birth to the extent of judicial review power which a constitutional Court would exercise with respect to affairs of the military and affairs of civil services.

33. In the treatise '*Introduction to the Study of the Law of the Constitution*' 6th Edition, A.V.Dicey set out the historical element why it was considered necessary to have a separate set of Codes of Discipline as the foundation for military law. The learned author opined as under:-

“As to the Standing Army - A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary government; and in truth the existence of permanent paid forces has often in most countries and at times in England-notably under the Commonwealth been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free government. The belief indeed of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen, therefore, at the end of the seventeenth and the beginning of the eighteenth century, found themselves placed in this dilemma. With a standing army the country could not, they feared, escape from despotism; without a standing army the country could not, they were sure, avert invasion; the maintenance of national liberty appeared to involve the sacrifice of national

independence. Yet English statesmanship found almost by accident a practical escape from this theoretical dilemma, and the Mutiny Act, though an enactment passed in a hurry to meet an immediate peril, contains the solution of an apparently insolvable problem.

The position of the army in fact was determined by an adherence on the part of the authors of the first Mutiny Act to the fundamental principle of English law, that a soldier may, like a clergyman, incur special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship.

The object and principles of the first Mutiny Act of 1689 are exactly the same as the object and principles of the Army Act, 1881, under which the English army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or, to use a more accurate expression, with the supremacy of the law of the land.”_

34. Similar ethos is to be found in the treatise ‘*The Federalist and Other Constitutional Papers*’ by Hamilton, Jay, Madison.

35. Since at the heart of the matter at hand is the issue whether this Court can exercise jurisdiction under Article 226 and/or Article 227 of the Constitution of India with respect to decisions pronounced by the Armed Forces Tribunal constituted under the Armed Forces Tribunal Act 2007, we need to embark upon the journey to peep into the past precedents and see how this jurisprudential concept: of the different requirements of military discipline vis-à-vis civil

discipline affected the remedies which could be availed of by members of Armed Forces before civil courts.

36. We deal with the various opinions and decisions cited by Sh.Atul Nanda, learned senior counsel.

37. At the forefront, learned senior counsel had referred to and had read out extracts from '*Halsbury's Laws of England*' 4th Edition, Vol.41.

38. We may only point out that the discussion on the subject in '*Halsbury's Laws of England*' is very wide and exhaustive, but with reference to para 118 of the Commentary, it stands out that as per the treatise, the bar is not absolute. Pertaining to what could be called a writ of error or a writ of certiorari with which we are familiar with in India, it has been opined that the order of certiorari, to quote: '*will not, therefore, be directed to an ecclesiastical Court or to a Court which is not one of civil jurisdiction, for example a court-martial, unless it is shown that civil rights have been affected.*' (Underlined emphasized)

39. Learned senior counsel had relied upon observations in the decisions reported as 1 Brown 427 (1787) *Evelyn Sutton Vs. George Johnston*. 4 F&F 800 *Dawkins Vs. Lord Rokevy*. 1869 LR QV 888 *Dawkins Vs. Paulet*. 1898 (1) QB 888 *Marks Vs. Frogley*. 1917 (2) KB 504 *King Vs. Army Council Ex-Parte Ravenscroft*. 1949 (1) All. ER 242 *R. Vs. Secretary of State Ex-Parte Martyn* and 1949 (1) All. ER 373 *R. Vs. O.C.Depot Ex-Parte Elliot*; all of which pertain to opinions rendered by the Judges in England. Two American decisions by judges in America, reported as 68 US 243 (1863) *Ex-Parte Valladingham*

and 346 US 137 (1952-1953) Burns Vs. Wilson were also cited. One decision of the Supreme Court of Canada reported as 1956 SC Canada 154 Queen Vs. J.R.C.White was also cited.

40. Dealing with the two decisions of the U.S.Courts which were cited, it may be noted that in Ex-parte Vallandigham, the prisoner Vallandigham, a resident of the State of Ohio, and a citizen of the United States, was arrested at his residence and taken to Cincinnati on 5.5.1863 and imprisoned. On the following day, he was arraigned before a Military Commission on the charge of having expressed sympathies for those in Arms against the Government of the United States, and for having uttered, in a speech at a public meeting, disloyal sentiments and opinions with the purported object and purpose of weakening the power of the Government in its effort for the suppression of an unlawful rebellion.

41. The case before the Supreme Court of the United States arose on a petition for a certiorari. The Court was concerned with the 3rd Article of the U.S.Constitution which is the source of the foundation of the judicial power of the Supreme Court of the United States and the inferior Courts as the Congress may, from time to time, ordain and establish. Noting that appellate jurisdiction was vested in the U.S.Supreme Court as also the inferior Courts, it was observed that there was no analogy between the power given by the Constitution and Law of the United States to the Supreme Court and other inferior Courts of the United States, and to the Judges of them, to issue such process and the prerogative power available with the Courts in England. The Court refused to review or revise the proceedings of the Military Commission.

42. It is apparent that the decision was rendered at a very nascent stage of the growth of Jurisprudence in the United States of America. The decision relates to the year 1863. The observations in the said decision, do bring out a view which was sought to be propounded by Sh.Atul Nanda, learned senior counsel, but we must hasten to add that a meaningful perusal of the decision would reveal that issues of fact, relatable to jurisdiction and on merits of the decision of the Military Commission, were sought to be raised in an action akin to a merit review and the Court declined to exercise such wide jurisdiction.

43. But, later decisions of the Courts in the United States throw more light as to how the Jurisprudence grew in the United States and since one such later decision was relied upon by Sh.Atul Nanda i.e. the one in Burns's case (supra), we note the same. The United States Court of Appeals for the District of Columbia Circuit relied upon the earlier decision reported as 137 U.S. SCR 147 Re Grimley where it was observed that the law which governs a civil court in the exercise of its jurisdiction over military *habeas corpus* applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law. But, relevant would it be to highlight that in the majority opinion, penned by Chief Justice Vinson, in which opinion Justice Reed, Justice Burton and Justice Clark joined, at page No.142 of the opinion, a caveat is to be found, wherein it was observed:-

“We have held before that this does not displace the civil courts jurisdiction over an application for

habeas corpus from the military prisoner. Gusik Vs. Schilder 340 U.S. 128 (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. Whelchel Vs. Mc-Donald 340 U.S. 122 (1950)." (Underlined emphasized).

44. On facts, petitioners therein tried separately by Air Force Court Martial on the Island of Guam were found guilty of murder and rape and were sentenced to death. The petitioners had exhausted all remedies available to them under the Articles of War for review of their convictions by the Military Tribunals. They then filed petitions for writs of *habeas corpus* in the United States District Court for the District of Columbia alleging that they had been denied due process of law. They charged of being subjected to illegal detention; under coercion confessions being extorted and counsel of their choice denied to them; they alleged that the military authorities had suppressed evidence favourable to them and had procured perjured testimony against them and lastly urged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair-play. The District Court dismissed the applications without hearing evidence, and without further review, after satisfying itself that the Court Martial, which tried petitioners had jurisdiction over their person. The Court of Appeals affirmed the District Courts Judgment, but after expanding the scope of review by giving petitioners' allegation full consideration on their merits, reviewing in detail the mass of evidence to be found in the transcripts of the trial and other proceedings before the Military Court. It was in this backdrop of the past

litigation, observations made in the judgment cited have to be understood and needless to state the caveat lodged and as extracted by us in the preceding para has to be kept in mind, with further amplification that in the next but one page i.e. page No.144, Vinson CJ categorically held:-

“These records make it plain that the military courts have heard petitioners out on every significant allegations which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process – to re-examine and re-weigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the Military has given fair consideration to each one of these claims. *Whelchel Vs. Mc-Donald (supra)*. We think they have.” (Underlined emphasized).

45. The action in *Evelyn Sutton's* case (supra), *Dawkins Vs. Lord Rokeby's* case (supra), *Dawkins Vs. Paulet's* case (supra) and *Marks's* (case) supra pertained to actions brought before a civil Court for damages. The action in *Evelyn Sutton's* case (supra) was by a Captain in the Navy who accused his Commander-in-Chief of acting in malice, under colour and pretence, of falsely, maliciously and wrongfully alleging offences committed by the plaintiff, after at the trial by a Court Martial, the plaintiff was honorarily acquitted. The action in *Dawkins Vs. Lord Rokeby's* case (supra) was against the Commander of the Army, on the allegation that on account of a malicious action initiated against the plaintiff he was falsely imprisoned and removed from service. Damages were sought. The action in *Dawkins Vs. Paulet's* case (supra) was also for damages on account of stated libel. The defendant had addressed a communication to the Adjutant-General of the

Army reflecting on the character and capacity of the plaintiff; a Captain in the Coldstream Guards with a request that the conduct be investigated by a Court of Inquiry in which the plaintiff lost his commission and was compelled to leave the regiment. The action in Marks's case (supra) was on the tort of assault and false imprisonment by the plaintiff, an Army Man and subjected to Military Law, at the hands of his superior officers.

46. Various observations in the decisions aforementioned which were relied upon which state that civil courts jurisdiction cannot be invoked to redress grievances arising between persons subject to military law and that the legislature excluded by interference of the civil courts must be read to confine all matter of complaint to the military authorities, have to be understood with reference to the nature of the actions brought before the common Courts in England. Suffice would it be to state that merely because an indictment by a superior officer failed to hold good at a trial before a military court or the nature of arrest was found to be wanting or force was used while arresting a person subject to military discipline, civil actions were held not maintainable. It may be noted that in each case active malice was not established at the trial before the military court, and it was held that it would be impermissible to have a trial before a common court on the issue of active malice. We may simply highlight further that these decisions have no concern and do not relate to the power of superintendence exercised by superior courts in England to issue various writs.

47. The decision in Ex-Parte Ravenscroft's case (supra) is an authority on the point that: (i) a civil court will not intervene in matters relating to military law prescribing rules for the guidance of officers when equally appropriate remedy was open to the officer concerned under the Army Act; (ii) the civil court will not entertain an action relatable to a discretionary power of the Army Council to assemble a Court of Inquiry; for the obvious reason no order can be issued to an authority to exercise a discretionary discretion in a particular way; and (iii) the remedy by mandamus would not be issued in circumstances which can make the mandamus in-effective at the hand of the authority to whom the mandamus is issued. But relevant would it be to note that Chief Justice Viscount, at page 511 of the opinion, clearly stated:-

"I do not, however, wish to be taken as deciding that in no circumstances could this Court issue a writ of mandamus to the Army Council even on proof of a breach of duty which the applicant has a right to enforce. Upon so important and far reaching a proposition of law I desire to reserve my opinion."

48. In the concurring opinion, Ridley J. also observed:-

"If there be a particular duty imposed by statute which must be obeyed implicitly and which allows no scope for discretion, matters assume a different aspect."

49. The aforesaid observations have to be read in the context of the view taken in the said decision when the Court refused to exercise its power of superintendence and refused to issue a writ of mandamus to the Army Council commanding them to cause a Court of Inquiry to re-assemble to hear the charge, but said that in an appropriate case, judicial review was permissible by a civil court.

50. The decision in R. Vs. Secretary of State Ex-Parte Martyn is a short and a cryptic decision, without much discussion, but relevant would it be to note that even in said decision it was observed: “..... But it is not a matter for this Court, which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected.” The aforesaid observations make it clear that the Court did not lay down that proceedings or decisions before military courts or matters of military law were completely immune to a judicial review before a civil court.

51. In the decision of R. Vs. O.C.Depot Ex.Parte Elliot (supra), a deserter arrested abroad and subjected to a Court Martial was the subject matter of a writ of habeas corpus alleging that he was not a person subject to military law and thus his custody was wrongful. The issue in question had been gone into by the Divisional Court and on merit the detention was held to be lawful. The matter was thereafter considered by the King’s Bench Division. The Division Bench found on merits that the person concerned was a deserter and on merit found that though released for two months, had received orders of recall which were disobeyed. Thus, observations in the said decision which were relied upon by learned counsel are of hardly any use for the reason the decision shows that the King’s Bench Division went into the merits and decided against the prisoner who claimed of not being subject to the military court by finding as a matter of fact and reasoning that he was a deserter.

52. The decision of the Supreme Court of Canada in J.R.C.White's case (supra) was on an action by J.R.C.White, a former member of the Royal Canadian Mounted Police, questioning his conviction by a Superintendent of the Force for the misdemeanour of condoning the consumption of intoxicating liquor by a female juvenile, and of associating with a female of questionable character and registering at a hotel under an assumed name. The Court of Appeal for British Columbia reversed an order by the Court of First Instance refusing certiorari. The Supreme Court of Canada allowed the appeal and set aside the judgment of the Court of Appeal and restored the order of the Court of First Instance. It may be noted that J.R.C.White was dismissed from the force and had questioned the verdict on 15 counts all of which related to what we may call a merit review.

53. No doubt, the Canadian Supreme Court observed that the Parliament had specified the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them; and it needs no amplification to demonstrate the object of that investment; and that such a court is prima facie to be looked upon as being the exclusive means by which that particular purpose is to be attained, but hastened to add:-

“Unless, therefore, the powers given are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior court in exercise of its long established supervisory jurisdiction over inferior tribunals.”

54. It is also important to note that the Canadian Supreme Court found that the Court of First Instance had found that the

materials furnished by affidavits showed that it could not be inferred that the proceedings infringed were not supported by evidence or were outside the authority of the statute or the underlying principles of judicial process to be deemed annexed to the legislation concerned. It is apparent that even the Canadian Supreme Court was conscious of judicial review to be exercised on the known principles of writ of error or a writ of certiorari, highlighted by the fact that the Canadian Supreme Court found that it was not shown that the proceedings infringed were not supported by any evidence nor was it shown that any underlying principle of judicial process which was a part of the legislation concerned was infringed.

55. It would thus be incorrect to urge that world over, the ordinary civil courts were historically not exercising any kind of supervisory control over military courts and tribunals.

56. It may be true that in Col.Prithipal Singh Bedi's case (supra), way back in the year 1982, the Supreme Court expressed an opinion that a single judicial review forum was desirable not only qua decisions and sentences at a Court Martial but even to adjudicate service disputes between members of an Armed Force and the Force, but it has to be kept in mind, as would be noticed hereinafter, that the law relating to judicial review by superior courts being a basic feature of the Constitution had yet to be developed. But that apart, it needs to be highlighted that in para 45 of its decision, while expressing the desirability to constitute a single judicial review forum for members of the Armed Forces, the Supreme Court hedged the words: '*which must truly be a judicial review forum*'.

57. We shall be dealing with what has been interpreted to be a truly judicial review forum in the context of denuding High Court jurisdiction under Article 226 of the Constitution of India with reference to the decision of the Supreme Court reported as UOI Vs. R.Gandhi 2010 (5) SCALE 514 and would humbly request the read of our opinion to be patient with us. We assure that we shall so revert.

58. We have noted hereinabove, in para 15, the legislative intent which could be traced to the 169th report of the Law Commission titled: '*Amendment of Army, Navy and Air Force Acts – April 1999*' and would simply highlight that the Law Commission, vide para 5.1.1 of its report, recommended that the proposed tribunal should not be a totally Civil Appellate Tribunal (as has been provided in the United Kingdom) opining that, in the Indian context this may not be conducive to the discipline of the Armed Force and the Law Commission suggested a hybrid Tribunal consisting of Civilian Judges and other members drawn from the retired Armed Force Personnel. Indeed, as noted by us in para 19 above, the Armed Force Tribunal which has been constituted under the Act is a hybrid Tribunal consisting of civilian Judges and retired Members drawn from the Armed Forces. We highlight that the appointment of Members of the Tribunal is by the Executive albeit with consultation with the Chief Justice of India. The legal consequence of this would be discussed by us a little later when we analyze the decision of the Supreme Court in UOI Vs. R.Gandhi (supra).

59. The discussion during the Constituent Assembly Debates on 16.10.1949 pertaining to draft Article 112 of the draft

constitution which ultimately resulted in Article 136 of the Constitution of India as we find and Article 203 of the draft constitution which finds itself as Article 227 of the Constitution of India is of importance on the subject and thus we spend a little time on the subject.

60. Sh.T.T.Krishnamachari moved an amendment No364 and suggested Article 112 as proposed to be re-drafted and clause 4 to be inserted after clause 3 to Article 203 of the draft of the proposed constitution as under:-

“112. (1) The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.

(2) Nothing in clause (1) of this article shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.”

X X X

“(4) Nothing in this Article shall be deemed to extend the powers of superintendence of a High Court over any Court or Tribunal constituted by or under any law relating to the Armed Forces.”

61. Prof.Shibban Lal Saxena immediately rose to his feet stating that he wish to bring a charge of breach of faith against Dr.Ambedkar in this matter. He stated that sometime ago he had tabled an amendment to Article 112 in which he had specifically desired that provision should be made that persons sentence to death by Court Martial should be able to appeal to the Supreme Court and Dr.Ambedkar had assured that such persons are covered by Article 112 and the Supreme Court could take notice of such persons under its said powers. He

raised an issue of probably the discussion in the House being reported in the press and the Defence Department trying to strengthen itself and Mr.T.T.Krishnamachari extending a helping hand to the Defence Department. Stating that this was not fair as he had withdrawn his amendment on the assurance that the law protected members of an Armed Force against wrong decisions at a Court Martial. He highlighted that after the Second World War, in Britain a Commission was appointed to study the administration of Military Court Martials and recommended procedures to be made more civilized and that in the name of discipline people should not be butchered. He concluded his protest by stating that not only considered the provision unfair but against the promise given to the House by Dr.Ambedkar.

62. After Sh.R.K.Shidhava, Sh.B.Das and Pandit Thakur Das Bhargava made interjections, Dr.B.R.Ambedkar responded in the following words:-

“Mr.President Sir, in view of the observations made by my hounorable Friend, Prof.Shibban Lal Saksena, it has become incumbent upon me to say something in relation to the proposed article moved by my honourable Friend, Mr.T.T.Krishnamachari. It is quite true that on the occasion when we considered article 112 and the amendment moved by my honourable Friend, Prof. Shibban Lal Saksena. I did say that under article 112 there would be jurisdiction in the Supreme Court to entertain an appeal against any order made by a Court-Martial. Theoretically that proposition is still correct and there is no doubt about it in my mind. But what I forgot to say is this: That according to the rulings of our High Courts as well as the rulings of the British courts including those of the Privy Council, it has been a well recognized principle that civil courts, although they have jurisdiction under the statute will

not exercise that jurisdiction in order to disturb any finding or any decision given or order made by the Court-martial. I do not wish to go into the reason why the civil courts of superior authority, which notwithstanding the fact that they have this jurisdiction have said that they will not exercise that jurisdiction; but the fact is there and I should have thought that if our courts in India follow the same decision which has been given by British courts – the House of Lords, the King’s Bench Division as well as the Privy Council and if I may say so also the decision given by our Federal Court in two or three cases which were adjudicated upon by them – there would be no necessity for clause (2); but unfortunately the Defence Ministry feels that such an important matter ought not to be left in a condition of doubt and that there should be a statutory provision declaring that none of the superior civil courts whether it is a High Court or the Supreme Court shall exercise such jurisdiction as against a court or tribunal constituted under any law relating to the Armed Forces.

This question is not merely a theoretical question but is a question of great practical moment because it involves the discipline of the Armed Forces. If there is anything with regard to the armed forces, it is the necessity of maintaining discipline. The Defence Ministry feel that if a member of the armed forces can look up either to the Supreme Court or to the High Court for redress against any decision which has been taken by a court or tribunal constituted for the purpose of maintaining discipline in the armed forces, discipline would vanish. I must say that this is an argument against which there is no reply. That is why clause (2) has been added in article 112 by this particular amendment and a similar provision is made in the provisions relating to the powers of superintendence of the High Courts. That is my justification why it is now proposed to put in clause (2) of Article 112.

I should, however, like to say this that clause (2) does not altogether take away the powers of the Supreme Court or the High Court. The law does not leave a member of the armed forces entirely to the mercy of the tribunal constituted under the particular law. For, notwithstanding clause (2) of article 112, it would still be open to the Supreme Court or to the High Court to exercise jurisdiction, if the court martial has exceeded the jurisdiction which has been given to it or the power conferred upon it by the law relating to armed forces. It will be open to the Supreme Court as well as to the High Court to examine the question whether the exercise of jurisdiction is within the ambit of the law which creates and constitutes this court or tribunal. Secondly, if the court-martial were to give a finding without any tribunal. Secondly, if the court martial were to give a finding without any evidence, then, again, it will be open to the Supreme Court as well as the High Court to entertain an appeal in order to find out whether there is evidence. Of course, it would not be open to the High Court or the Supreme Court to consider whether there has been enough evidence. That is a matter which is outside the jurisdiction of either of these Courts. Whether there is evidence or not, that is a matter which they could entertain. Similarly, if I may say so, it would be open for a member of the armed forces to appeal to the courts for the purpose of issuing prerogative writs in order to examine whether the proceedings of the court martial against him are carried on under any particular law made by Parliament or whether they were arbitrary in character. Therefore, in my opinion, this article, having regard to the difficulties raised by the Defence Ministry, is a necessary article. It really does not do anything more but give a statutory recognition to a rule that is already prevalent and which is recognized by all superior courts." (*emphasis supplied*)

63. The aforementioned illuminating debate at the Constitution Assembly as afore extracted, should in our opinion, settle the controversy sought to be raised by Sh.Atul Nanda learned senior counsel. Two issues would probably be settled. First

that the drafters of the Constitution clearly understood that historically, jurisprudence in civilized democracies recognized power of judicial review over decisions and sentences of Court Martials and notwithstanding insertion of Clause 4 in Article 227 of the Constitution of India, the Constituent Assembly recognized the power of judicial superintendence over Court Martials and this position, as would be noted by us hereinunder, came to be recognized by the Supreme Court, even without a reference to the aforementioned debate.

64. Indeed, in the decision reported as AIR 1990 SC 1984 S.N.Mukherjee Vs. UOI, in para 41 the Supreme Court observed as under:-

“41. Before referring to the relevant provisions of the Act and the Rules it may be mentioned that the Constitution contains certain special provisions in regard to members of the Armed Forces. Article 33 empowers Parliament to make law determining the extent to which any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline amongst them. By clause (2) of Article 136 the appellate jurisdiction of this Court under Article 136 of the Constitution has been excluded in relation to any judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces. Similarly clause (4) of Article 227 denies to the High Courts the power of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces. This Court under Article 32 and the High Courts under Article 226 have, however, the power of judicial review in respect of proceedings of courts-martial and the proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings

suffer from a jurisdictional error or any error of law apparent on the face of the record.”

65. A Division Bench of this Court, in the decision reported as 58 (1995) DLT 339 Ex.Maj.R.S.Budhwar Vs. UOI & Ors., surveying as many as 42 decisions on the subject and noting the decision in S.N.Mukherjee's case (supra) held in para 28 of the report as under:-

“28. The jurisdiction of this Court under Article 226 is, therefore, defined and is limited to the extent of finding it whether there is an error of jurisdiction and it is a case of total lack of evidence. This Court, as has been consistently held, does not sit as a Court of Appeal. In case legal evidence was available on which a finding could be given, the sufficiency or otherwise was for the Authority to decide and this Court cannot substitute its opinion for that of Court-Martial.”

66. The Constitutional Bench decision of the Supreme Court reported as 1973 (4) SCC 225 Keshwananda Bharti Vs. State of Kerala & Anr. laid down the principle of the basic structure of the Constitution being inviolable and we may hasten to add that though the Bench did not specifically hold that judicial review is a part of basic structure of the Constitution but expressly held that Rule of Law is essentially a part of the basic structure. Judicial review was however held to be an integral part of the Constitution. We may also note that Justice Y.V.Chandrachud (as His Lordship then was), in the decision reported as 1975 Supp. SCC 1 Indira Nehru Gandhi Vs. Raj Narain & Anr. held in the context of elections to elect representatives to the Lok Sabha, that judicial review cannot be considered to be a part of the basic structure of the Constitution. However, a meaningful reading of the opinion of Y.V.Chandrachud (CJ) in the decision reported as 1980 (3) SCC

625 Minerva Mills Ltd. & Ors. Vs. UOI & Ors. would reveal that His Lordship held judicial review with respect to legislative actions as a part of the basic structure of the Constitution. The separate opinion of P.N.Bhagwati, J. (as His Lordship then was), also upheld judicial review with respect to legislative actions as a part of the basic structure of the Constitution, but His Lordship hedged the opinion with a caveat in the following words:-

“Para 87.....I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. (Underlined emphasized).”

67. In his separate opinion in the decision reported as 1981 (2) SCC 362 Waman Rao & Ors. Vs. UOI, Bhagwati, J. (as His Lordship then was) in para 64 of the opinion reiterated that para 77 and paras 80 to 102 of his opinion in Minerva Mills’ case (supra) be read as part of his opinion and thereby reiterated the view that notwithstanding judicial review being a feature basic to the Constitution, nothing prevented Parliament to enact a law having arrangements for judicial review through alternative institutional mechanisms.

68. The aforesaid line of reasoning adopted by Bhagwati, J. was applied in full vigour in the decision reported as 1987 (1) SCC 124 S.P.Sampath Kumar Vs. UOI & Ors. in para 3 whereof it was observed that although power of judicial review is an

integral part of our Constitutional system and without it there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality and thus judicial review cannot be altogether abrogated by Parliament, it can certainly, without in any way violating the basic structure doctrine, set up alternative institutional mechanisms or arrangements for judicial review. But, to our mind, His Lordship made a very broad and a sweeping statement in said para 3 by observing that this view was the majority view of the Judges who decided Minerva Mills case (supra). The observations in para 3: *It is undoubtedly true that my judgment in Minerva Mills Ltd. case was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogether abrogated by Parliament it can certainly, without in any way violating the basic structure doctrine set up effective alternative institutional mechanisms or arrangements for judicial review.*

69. The majority opinion penned by Ranganatha Misra, J. (as his Lordship then was) held that effective alternative institutional mechanisms or arrangements for judicial review can be made by Parliament and as long as a Tribunal met the mandate of being a real substitute for the High Court, not only in form but even in content.

70. The concurring opinions of the Constitution Bench in S.P.Sampath Kumar's case laid the foundation that the basic

feature of the Constitution of judicial review could be preserved through alternative dispute resolution mechanism as long as the same were a de jure and de facto substitute for High Courts.

71. Two decisions pronounced in the year 1993 incisively reviewed the legal position with reference to judicial review exercised by superior courts in the Indian context i.e. the High Courts exercising power under Article 226 and Article 227 of the Constitution of India. The first was a 3 Judge bench decision of the Supreme Court reported as 1993 (4) SCC 119 R.K.Jain Vs. UOI and the second being a full Bench decision of the Andhra Pradesh High Court reported as 1993 (3) ALT 471 Sakinala Hari Nath Vs. State of A.P. The main opinion in R.K.Jain's case, penned by K.Ramaswamy, J. with which Ahmadi, J. and Punchhi, J. concurred, in paras 66, 67 and 76 observed as under:-

“66. In *S.P.Sampath Kumar Vs. Union of India* this Court held that the primary duty of the judiciary is to interpret the Constitution and the laws and this would predominantly be a matter fit to be decided by the judiciary, as judiciary alone would be possessed of expertise in this field and secondly the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. The Constitution has, therefore, created an independent machinery i.e. judiciary to resolve disputes, which is vested with the power of judicial review to determine the legality of the legislative and executive actions and to ensure compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercising the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of

our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution and to provide alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. It must, therefore, be read as implicit in the constitutional scheme that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it, must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it which must be equally effective and efficacious in exercising the power of judicial review. The tribunal set up under the Administrative Tribunals Act, 1985 was required to interpret and apply Articles 14, 15 and 16 and 311 in quite a large number of cases. Therefore, the personnel manning the administrative tribunal in their determinations not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that an appropriate rule should be made to recruit the members; and consult the Chief Justice of India in recommending appointment of the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by Judge of the Supreme Court to recruit the members for appointment. In *M.B. Majumdar Vs. Union of India* when the members of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this Court held that they are not on a par with the judges but a separate mechanism created for their appointment pursuant to Article 323-A of the Constitution. Therefore, what was meant by this Court in *Sampath Kumar case* ratio is that the tribunals when exercise the power and functions, the

Act created institutional alternative mechanism or authority to adjudicate the service disputes. It must be effective and efficacious to exercise the power of judicial review. This Court did not appear to have meant that the tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution. *J.P.Chopra Vs. Union of India* merely followed the ratio of *Sampath Kumar*.

67. The tribunals set up under Articles 323-A and 323-B of the Constitution or under an Act of legislature are creatures of the Statute and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision.

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76. Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Article 136 to this Court also proves to be costly and probative and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this Court. An appeal to a

Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of injustice of those who can ill afford to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would made an in-depth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income Tax Appellate Tribunal and to make appropriate urgent recommendations to the Government of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory."

72. Suffice would it be to state that the observations of K.Ramaswamy, J. in R.K.Jain's case certainly struck a discordant note with respect to the view taken in S.P.Sampath Kumar's case (supra) and the observations in para 76 highlight judicial adjudication being a special process efficiency of which could be best maintained by advocate Judges as also remedy of appeal by Special Leave to the Supreme Court being cost prohibitive compelling citizens from far-flung areas to approach the Supreme Court and hence the desirability of a remedy before a Bench at the respective High Courts.

73. In Sakinala Hari Nath's case the Full Bench of the Andhra Pradesh High Court declared Article 323A(2)(d) of the Constitution of India as unconstitutional to the extent it empowered Parliament, byelaw, to exclude the jurisdiction of the High Court under Article 226 of the Constitution of India as also declared Section 28 of the Administrative Tribunals Act 1985, to the extent it divested the High Court of its jurisdiction

under Article 226 as unconstitutional. In so declaring as aforesaid the Full Bench of the Andhra Pradesh High Court referred to various decisions which held that Tribunals with trappings of a court are not courts in the strict sense of exercising judicial power and that Constitutional Courts are the only guardians to ensure and safeguard the enduring values which the Constitution seeks to preserve. It was held that Tribunals may have the authority of law to pronounce upon valuable rights and may act in a judicial manner, but they cannot be treated as equivalent to ordinary Courts of Civil judicature.

74. The 7 Judge Constitution Bench decision reported as 1997 (3) SCC 261 L.Chandra Kumar Vs. UOI completed the journey, root whereof could be traced to the Full Bench decision of the Andhra Pradesh High Court in Sakinala Hari Nath's case and the view taken in R.K.Jain's case. 3 broad issues, being: whether the power conferred upon Parliament or the State Legislatures by sub-clause (d) of Clause 2 of Article 323A or by sub-clause (d) of Clause 3 of Article 323B of the Constitution, totally exclude the jurisdiction of all Courts, except that of the Supreme Court under Article 136 run counter to the power of judicial review conferred on the High Courts under Article 226 and 227; whether the Tribunals constituted either under Article 323A or Article 323B of the Constitution possess the competence to test the constitutional validity of a statutory provision/rule; and whether the 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. Considering 26 decisions, most of them penned and authored by Courts in India and a few

abroad, the unanimous verdict was that under the Indian Constitutional Scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review and that notwithstanding judicial power being capable of being vested in a Tribunal, the power of judicial review of the High Court could not be excluded even by a Constitutional amendment. The Supreme Court categorically upheld the underlying theme of the Full Bench decision of the Andhra Pradesh High Court that the power of judicial review is a basic feature of our Constitution and the aspect of the power of judicial review is vested exclusively in the constitutional courts i.e. the High Court and the Supreme Court. In paras 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 77, 78 and 80, the Constitution Bench discussed and analyzed the 5 majority opinions in Keshwananda Bharti's case and as subsequently applied in Indira Nehru Gandhi's case, Minerva Mills' case and R.K.Jain's case to bring home the point that the minority view i.e. P.N.Bhagwati, J.'s view in Minerva Mills' case as reflected by the 5 Judge Constitution Bench opinion in S.P.Sampath Kumar's case was not the correct view and that the correct legal position would be that whereas Tribunals can perform a supplemental as opposed to a substitutional role by empowering Tribunals with judicial power but the power of judicial review, which is a part of the basic structure of the Constitution, cannot be taken away from the High Courts which have the power to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdiction. In para 91 of the decision, the Constitution Bench affirmatively held that the decisions of Tribunals, whether created pursuant to Article 323A or Article

323B of the Constitution would be subject to the High Courts writ jurisdiction under Article 226 and Article 227 of the Constitution.

75. A words needs to be penned by us with reference to para 96 of the decision in L.Chandra Kumar's case, with reference whereto Sh.Atul Nanda learned senior counsel for the respondents urged that if not qua Article 226 of the Constitution of India, qua Article 227 of the Constitution of India, it would be permissible to denude High Court's jurisdiction under said Article. The observations relied upon read: '96. *It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is not authority charge 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*'.

76. Suffice would it be to state that the said observations pertain to administrative supervisory jurisdiction of a High Court over Courts and Tribunals functioning within the territory of the High Court and do not relate to judicial supervisory jurisdiction.

77. In the decision reported as AIR 2007 SC 861 I.R.Coelho Vs. State of Tamilnadu, a 9 Judge Bench of the Supreme Court,

in its unanimous opinion reiterated that the power of judicial review is a basic feature of the Constitution and being a constituent power cannot be abrogated by judicial process or interpretation (refer para 41).

78. The latest pronouncement of the Supreme Court reported as 2010 (5) SCALE 514 UOI Vs. R.Gandhi has very succinctly, in para 12 and 13 brought out the difference in the powers exercised by Courts and Tribunals and briefly stated reiterates the view that the sovereign power of the State to administer justice and in particular the power exercised by superior courts of that of judicial review can never be entrusted to Tribunals.

79. Another illuminating decision tracing the historical source of power of supervisory jurisdiction by superior courts in India is the decision reported as 2003 (6) SCC 675 Suryadev Rai Vs. Ram Chandra Rai & Ors. Dealing with the amendment to Section 115 CPC by Act No.46 of 1999 and its impact on the jurisdiction of the High Court under Article 226 and Article 227 of the Constitution of India, the Supreme Court held that the power of the superior court to issue a writ of error was historically treated as the inherent power of superior courts in common law countries. In para 29 of the decision it was held as under:-

“29. The Constitution Bench in *L.Chandra Kumar v. Union of India* dealt with the nature of power of judicial review conferred by Article 226 of the Constitution and the power of superintendence conferred by Article 227. It was held that the jurisdiction conferred on the Supreme Court under Article 32 of the Constitution and on the High Courts under Articles 226 and 227 of the Constitution is a part of the basic structure of the Constitution, forming its integral

and essential feature, which cannot be tampered with much less taken away even by constitutional amendment, not to speak of a parliamentary legislation.”

80. The decision in Suryadev Ra's case also brings out another interesting facet of the growth of Jurisprudence with respect to the power conferred by Article 226 of the Constitution vis-à-vis the power conferred under Article 227 of the Constitution of India; and notwithstanding the commonly perceived view that Article 226 of the Constitution of India preserves to the High Court the power to issue writs and thus vis-à-vis Tribunals, authorities and persons, with respect to writs of certiorari, the power would be limited, as held by the Supreme Court in the decision reported as AIR 1955 SC 233 Harivishnu Kamath Vs. Ahmad Ishaque, to (a) correct errors of jurisdiction; (b) correct illegality in the exercise of its undoubted jurisdiction by the Tribunal; (c) correct such error which is a manifest error apparent e.g. when it is based on clear ignorance or disregard of the provision of law or is a patent error as against a wrong; (d) act not as in appellate jurisdiction but exercise supervisory jurisdiction, one consequence whereof being the Court will not review findings of facts even if erroneously reached by the Tribunals, power under Article 227 being supervisory power and in that sense has width and vigour unprecedented, the distinction between the two jurisdictions stands almost obliterated. In para 25 it was so observed and with the justification why it has become customary for the lawyers labeling their petitions as one common under Article 226 and Article 227 of the Constitution of India.

81. Whereas it can be safely said that proceedings under Article 226 are in the exercise of the original jurisdiction of the High Court, proceedings under Article 227 of the Constitution are not original but supervisory proceedings.

82. The Jurisprudence on the subject would reveal that the expression '*administration of justice*' is always understood to mean the exercise of judicial power of the State to maintain and uphold rights. Judicial power means the power which every sovereign authority must of necessity have, to decide controversies between its subject, or between itself and its subjects. Though, with the growth of civilization and the problems of modern life, a large number of administrative Tribunals have come into existence and notwithstanding these Tribunals act in a judicial manner, but they are not part of the ordinary Courts of Civil Judicature. These Tribunals may share the exercise of the judicial power of the State, but cannot exercise the power of judicial review. The decision of the Supreme Court reported as 1962 (2) SCR 339 Harinagar Sugar Mills Vs. Shyam Sundar Jhunhunwala brings out the facet of Tribunals exercising judicial power but not being courts and hence capable of being entrusted with the judicial power of the State but not the sovereign power of the State of judicial review, which power is reserved for superior courts. The decision reported as 1992 Supp. (2) SCC 651 Kihoto Hollohan Vs. Zachillhu & Ors., dealing with what is commonly known as the anti-defection law, categorically held that even where a statute gives finality to a decision, the same would not give immunity to the decision from a judicial review.

83. We had promised to discuss the decision of the Supreme Court in UOI Vs. R.Gandhi (supra).

84. The Constitution Bench of the Supreme Court was considering issues relating to 'The National Company Law Tribunal' and 'The National Company Law Appellate Tribunal'. In view of the decision in L.Chandra Kumar's case (supra), and recognizing that judicial review by Constitutional Courts was recognized as a basic feature of the Constitution, in para 12 onwards the Court discussed the difference between Courts and Tribunals followed by a discussion in para 17 onwards on the separation of executive and judicial powers of the State. Discussing in para 24 onwards, the question: *Whether the Government can transfer the judicial functions traditionally performed by Courts to Tribunals?* In para 32 it was noted that notwithstanding the Constitution contemplating judicial power being exercised both by Courts and Tribunals held that this must accept the powers and jurisdictions vested in superior courts by the Constitution.

85. Discussing the argument in favour of Tribunals the Supreme Court noted that since Court functions under archaic and elaborate procedural laws and highly technical evidence law and with a view to ensure fair play as also avoidance of judicial error, procedural laws provide for appeals, revision and reviews resulting in frivolous and vexatious preliminary objections, pushing into background the main issues resulting in the inevitable delays which lead to frustration and dissatisfaction and hence a user friendly Tribunal was welcomed, but noted that the dependence of Tribunals on the sponsoring or the parent department for infrastructural

facilities and or personnel undermines the independence of the Tribunals and this drawback substantially takes away the glitter from the positive features of tribunalization. It was noted that the Leggatt Committee chaired by Sir Andrew Leggatt had submitted a report to the Lord High Chancellor of Great Britain in March 2001 recommending that if Tribunals had to be a true successor of ordinary civil courts and not become '*Bureaucratic Boards*' it would be best served if there administrative support is provided by the '*Lord Chancellor's Department*'. This would be, in our opinion the signature tune of the ethos expressed by the Supreme Court in para 45 of the decision in *Lt.Col.Prithipal Singh Bedi's* case (supra) when the Supreme Court observed that the Tribunal it was suggesting should '*Truly be a Judicial Review Forum*'.

86. Even prior to the Constitution of India being promulgated, superior courts constituted by the Letters Patent Charter in India and other dominions of the Crown used to issue prerogative writs to courts and tribunals subordinate to the Chartered High Courts save and except where appellate or revisional remedies were created by statute. The writ of error, as called today by the name of certiorari used to be issued to courts and tribunals and the origin of the said power to issue prerogative writs could be traced to the theory that the king being the paramount judicial authority and the judges being only the king's deputies, any exercise of unauthorized jurisdiction by the Judges was considered as an usurpation of the royal prerogative. The August royal personage could not of course tolerate transgression of jurisdictional limits to the incumbents of the office of Judgeship and had therefore to exercise his controlling power over them to keep them within

the bounds of their authority. As it developed, the writ of certiorari was the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdiction to certify or send proceedings before them into the King's Bench Division, whether for the purposes of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below.

87. Recognizing efficacious alternative remedies available and on the principle of comity, prerogative writs were not issued where the error was capable of being rectified at an appellate or a revisional jurisdiction.

88. We have noted hereinabove that a limited contempt jurisdiction has been vested in the Tribunal which does not empower the Tribunal to enforce its decisions under contempt jurisdiction. We note that there is no Section in the Act empowering the Tribunal to execute its orders, though we find that under Rule 25 of the Armed Forces Tribunal (Procedure) Rules 2008 it is stipulated that nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. It would be debatable whether Rule 25 recognizes the sui generis power of contempt of the Tribunal. If not, it would be an anomaly to hold that the Armed Forces Tribunal is not a Tribunal subordinate to the High Court for the reason if held otherwise, a High Court would have no power under its

contempt jurisdiction to enforce an order passed by the Armed Forces Tribunal, and if the Tribunal would have no power to enforce its order, it would be a strange situation where a party would be left without a remedy. But we refrain from expanding on this aspect of the matter for the reason learned counsel for the parties had not addressed any submissions on this point and thus we simply note a point which does arise for consideration as it is relevant to the issue at hand and leave it at that.

89. To summarize, the position would be that the Armed Forces Tribunal, being manned by personnel appointed by the Executive, albeit in consultation with the Chief Justice of India cannot be said to be truly a judicial review forum as a substitute to High Courts which are constitutional courts and the power of judicial review, being a basic feature of the Constitution, under Article 226 and Article 227 of the Constitution of India is unaffected by the Constitution of the Armed Forces Tribunal. Further, Article 227(4) of the Constitution of India takes away only the administrative supervisory jurisdiction of High Court over the Armed Forces Tribunal and does not impact the judicial supervisory jurisdiction over the Armed Forces Tribunal. Thus, decisions by the Armed Forces Tribunal would be amenable to judicial review by High Court under Article 226 as also Article 227 of the Constitution of India.

90. We may note that the view which we have taken finds a precedent in a Division Bench decision of the Kerala High Court reported as 2010 (4) KLT 611 *Joby Varghese Vs. Armed Forces Tribunal*.

91. The preliminary question pertaining to the maintainability of the writ petitions is accordingly answered in favour of the petitioners and it is held that the above captioned writ petitions against the decisions/orders passed by the Armed Forces Tribunal are maintainable.

92. W.P.(C) No.3441/2010 Ex.Hav.Maharam Vs.UOI & Ors., W.P.(C) No.2667/2010 Col.Sanjay Kumar Vs. UOI & Ors., W.P.(C) No.5794/2010 Hav.Reiji Kumar Vs. UOI & Ors., W.P.(C) No.654/2010 Lt.Col.Harpreet Singh Vs. UOI & Ors., W.P.(C) No.273/2010 Risaldar Nabab Singh Vs. UOI & Ors., W.P.(C) No.5189/2010 Naik Prabhu Dayal Sharma Vs. UOI & Ors., W.P.(C) No.4926/2010 Ex.Sep.Inder Singh Vs. UOI & Ors., W.P.(C) No.4699/2010 Rameswar Prashad Sharma Vs. UOI & Ors., W.P.(C) No.4887/2010 Smt.Surjeet Kaur Vs. UOI & Ors., W.P.(C) No.4669/2010 Ex.Sigmn Ganga Ram Sharma Vs. UOI & Ors., W.P.(C) No.4524/2010 Sub.Maj.Kiran Pal Singh Vs. UOI & Ors., W.P.(C) No.4417/2010 Lt.Cdr.G.S.Beniwal Vs. UOI & Ors., W.P.(C) No.3841/2010 Ex.Sep.Ram Swarup Vs. UOI & Ors., W.P.(C) No.3836/2010 Indra Singh Solanki Vs. UOI & Ors. and W.P.(C) No.5206/2010 Ex.Sep.Rai Singh Vs. UOI & Ors. are directed to be listed for preliminary hearing on 29.4.2011.

93. W.P.(C) No.6066/2010 Ex.Maj.Bhagwan Singh Vs.UOI & Ors., W.P.(C) No.6183/2010 Ex.Brig.R.P.Singh Vs. UOI & Ors., W.P.(C) No.7018/2010 G.D.Banarasi Lal Vs. UOI & Ors., W.P.(C) No.7040/2010 Ex.Capt.Sewa Ram Nigial Vs. UOI & Anr. and W.P.(C) No.6061/2010 Ex.Maj.Gen.P.S.K.Chaudhary Vs. UOI & Ors. shall be listed for preliminary hearing on 4.7.2011.

94. W.P.(C) No.4652/2010 GNR.B.N.Khente Vs. UOI & Ors., W.P.(C) No.5090/2010 Ex.Col.Harvinder Singh Kohli Vs. UOI &

Ors., W.P.(C) No.5156/2010 Naib Sub.Vijay Bahadur Singh Vs. UOI & Ors., W.P.(C) No.3828/2010 Ex.Gnr.Naresh Kumar Vs. UOI & Ors. and W.P.(C) No.3578/2010 Brig.V.S.Sukhdial Vs. UOI & Ors. shall be listed for preliminary hearing on 5.7.2011.

95. W.P.(C) No.5764/2010 Lt.Col.Rajeev Bhatt Vs. Chief of Army Staff & Ors., W.P.(C) No.1918/2010 Om Prakash Vs. UOI & Ors., W.P.(C) No.3439/2010 Lt.Cdr.Narvir Singh Vs. Union of India & Ors., W.P.(C) No.3086/2010 Wing.Cdr.S.Yadav Vs. Union of India & Ors. and W.P.(C) No.3405/2010 SqnLdr.Dr.Usha Atri Vs. Union of India & Ors. shall be listed for preliminary hearing on 6.7.2011.

96. W.P.(C) No.7039/2010 Gunner Milkhi Ram Vs. Union of India & Ors., W.P.(C) No.7041/2010 Gunner Sat Pal Vs. Union of India & Ors., W.P.(C) No.7042/2010 Gunner Hari Singh Vs. Union of India & Ors. and W.P.(C) No.8298/2010 Ex.Sep.Bhagwan Singh Vs. Union of India & Anr. shall be listed for preliminary hearing on 7.7.2011.

97. W.P.(C) No.13360/2009 Col.A.D.Nargolkar Vs. Union of India & Ors. and W.P.(C) No.13367/2009 Col.A.D.Nargolkar Vs. Union of India & Ors. shall be listed for preliminary hearing on 8.7.2011.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

APRIL 26, 2011
dk/mm