

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO.289/2020

PETITIONER : Col. Ivan Singh s/o Late Shri Kanwar
Shamsher Singh aged about 56 years
r/o Plot No.20, Manav Seva Nagar
Seminary Hills Nagpur through Arnold
Singh s/o Col. Ivan Singh Aged about
25 years r/o Plot No.20 Manav Seva
Nagar, Seminary Hills, Nagpur-440006.

...VERSUS....

RESPONDENTS : 1. Union of India
Through Secretary Ministry of Defence,
Government of India South Block,
Parliament Street, New Delhi – 110011.

2. The Chief of Army Staff
Integrated HQ of Ministry of Defence
(Army) South Block, Parliament Street,
DHQ Post Office, New Delhi – 110011.

3. Director General of Territorial Army,
'Territorial Army Directorate' Integrated
HQ of MOD (Army) 'L' Block, Church
road New Delhi – 110001.

4. General Officer Commanding in Chief
(GOC-in-C), Head Quarters Eastern
Command Fort Williams Kolkatta.

5. General Officer Commanding in Chief
(GOC-in-C), Head Quarters Southern
Command Pune.

6. 116 Infantry Battalion (Territorial Army) (H & H) Assam, Thakurbari Military Station (near Tezpur).

Mr. S.P. Dharmadhikari, Senior Advocate with Mr. A.M. Sudame, Advocate for
petitioner
Mr. Ulhas M. Aurangabadkar, ASGI for respondents

WITH

WRIT PETITION NO.2113/2020

PETITIONER : Col. Ivan Singh s/o Late Shri Kanwar Shamsheer Singh aged about 56 years
Mobile no.6909294677 email id - ivan@warriorminerals.com through
Arnold Singh s/o Col. Ivan Singh,
aged about 25 years r/o Plot no.20,
Manav Seva Nagar, Seminary Hills,
Nagpur-440006.

...VERSUS....

- RESPONDENTS :**
1. Union of India,
through Secretary, Ministry of Defence,
Govt. of India, South Block,
Parliament Street, New DHQ Post office,
New Delhi – 110011.
 2. The Chief of Army Staff
Integrated HQ of MoD (Army),
South Block, Parliament Street,
DHQ Post Office, New Delhi – 110011.
 3. Additional Directorate General
Discipline and Vigilance,
Adjutants General's Branch,
Integrated HQ of MoD (Army),
Sena Bhawan P.O. New Delhi – 110011.

Mr. S.P. Dharmadhikari, Senior Advocate with Mr. A.M. Sudame, Advocate for
petitioner
Mr. Ulhas M. Aurangabadkar, ASGI for respondents

WITH

WRIT PETITION NO.1796/2020

PETITIONER : Col. Ivan Singh s/o late Shri Kanwar
Shamsher Singh, aged 55 years
r/o Plot No.20, Manav Seva Nagar,
Seminary Hills, Nagpur-440006,
Mobile no.6909294677
email id – ivan@warriorminerals.com

...VERSUS....

RESPONDENTS : 1. Union of India,
through Secretary, Ministry of Defence,
Govt. of India, South Block,
Parliament Street, New DHQ
Post office, New Delhi – 110011.

2. The Chief of Army Staff
Integrated HQ of MoD (Army),
South Block, Parliament Street,
DHQ Post Office, New Delhi – 110011.

3. Director General of Territorial Army,
'Territorial Army Directorate' Integrated
HQ of MoD (Army) 'E' Block, Church
road, New Delhi – 110001.

4. Commander, Territorial Army Group
Headquarters, Ghorpuri, Pune – 411001.

5. Maj Gen D.A. Chaturvedi,
PVSM, AVSM, SM (Retired),
Building No.4 U, Flat No.1101,
AWHO, PHASE IV, Greater Noida,
District – Gautam Buddha Nagar,
Uttar Pradesh. Pin Code – 201310.
6. Brig Sajneev Tiwari,
Commander, Territorial Army Group
Headquarters, Ghorpuri,
Pune – Pin Code – 411001.
7. Col. Udai Bhaskarao Barawkar,
Commanding Officer, 56, NCC
Battalion, Kolhapur – 416001.

Mr. S.P. Dharmadhikari, Senior Advocate with Mr. A.M. Sudame, Advocate for
petitioner
Mr. Ulhas M. Aurangabadkar, ASGI for respondent nos.1 to 4

**CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE, JJ.**

Judgment reserved on : 28/01/2021
Judgment pronounced on : 07/05/2021

J U D G M E N T : (PER : AVINASH G. GHAROTE, J.)

1. Rule. Rule made returnable forthwith.
2. In Criminal Writ Petition No.289/2020 the following
relief is sought :-

“i. Direct the Respondents to release the petitioner from Thakurbari Military Station where he is in detention since 01.07.2020 pursuant to the Communication dated 30.06.2020.”

3. In Writ Petition No.2113/2020, the following reliefs are sought :-

“(a) Issue writ of Mandamus or any other writ, order or directions to the respondents to call for record of proceeding pertaining to the impugned order, dated 30.06.2020 issued by respondent no.3 vide their letter No.C/06270/SC/943/20 (15)/AG/DV-2;

(b) Issue writ of Mandamus or any other writ, order or directions to the respondents to quash and set aside the impugned order, dated 30.06.2020 issued by respondent no.3 which is at Annexure 32;

(c) Declare that the petitioner has retired on superannuation on 30.6.2020 and consequently direct the respondents to relieve him from the post, in the interest of justice.”

4. Writ Petition No.1796/2020, the following reliefs are sought :-

“(a) Issue writ of Mandamus or any other writ, order or directions to the respondents to call for record of inquiry proceedings pursuant to Convening

order No.139102/C/118/A/TA, dated 01.02.2019 (Ann 14) and show cause notice, letter No.46347/TA-42060/LC/TA-4 dated 16.04.2020 (Ann 23) peruse the same; and

(b) Hold and declare that the entire action on the basis of complaint of respondent no.7, starting with convening order, dated 01.02.2019 to Court of inquiry proceeding and show cause notice, dated 16/04/2020 is malafide exercise of power so as to defame and injure the petitioner as such it is null and void in the eyes of law. Consequently no action can be taken based upon the report of Col. Udai Barawkar-complainant.

(c) Issue notice to Attorney General of India as quashment of Central Act is prayed for ;

(d) Quash and set aside Section 19 of the Army Act, 1950 and Rule 14 (2) of the Army, Rules, 1954; being ultra vires to Section 71 of Army Act, 1950 and Article 14 and 21 of the constitution of India;

(e) Quash and set aside the inquiry, convened vide convening order dated 01.02.2019 issued by TA Group Headquarter, Southern Command Pune, which is at Annexure 14 and show cause notice, dated 16.04.2020 issued by respondent no.3 – Director General Territorial Army on behalf of Chief of Army Staff which is at Annexure 23.”

In all the above petitions, interim reliefs, have also been sought. In Writ Petition No.1796/2020 though a challenge, is raised to the validity of Section 19 of the Army Act, 1950 and Rule 14 (2) of the Army Rules, 1954, being ultra vires to Section 71 of Army Act, 1950 and Article 14 and 21 of the Constitution of India, the same is given up on instructions by the learned Senior Counsel for the petitioner.

5. The petitioner was employed with the respondents and as on the date of cropping up of the dispute, was holding the rank of Colonel and was stationed at Dibrugarh.

6. The sequence of events as narrated by the petitioner, in a compilation placed on record on 15/12/2020, which as to the factual position, is not disputed by the respondents, though the allegations and imputations based thereupon are denied, for the sake of ready reference, is reproduced as under :-

Sr. No.	Date	Events
01	08/10/2017 to 13/10/2017	Territorial Army Group Headquarters Southern Command issued a convening order thereby constituting a board for conducting recruitment rally for recruiting Jawans (Soldiers) in Territorial Army in 118 Infantry Battalion (Territorial Army) Grenadiers Nagpur.
02	29/11/2017	The petitioner lodged a complaint against the illegalities and irregularities committed by Col. Barawkar and his companions (Gdr. Amol Patil) during the recruitment rally as well as regarding misappropriation of temple funds, misuse of manpower etc.
03	19/01/2018	A Staff Court of Inquiry was convened on the basis of the complaints made by the petitioner against Colonel Barawkar. The petitioner was prosecution witness No.1.
04	23/04/2018	The Staff Court of Inquiry ordered against Colonel Barawkar was cancelled without assigning any reasons.
05	01/02/2019	A Departmental Court of Inquiry was convened against the petitioner, to investigate issues pertaining to misuse of authority, facilities and manpower from 20/07/2014 to 13/06/2018. The copy of the complaint against the petitioner has not been provided to the petitioner till date.
06	25/02/2019 25/03/2019 25/03/2029 12/02/2020	The petitioner submitted various objections in writing to the conduct of enquiry against him highlighting the fact that the petitioner is being made a scapegoat in an illegal Departmental Court of Inquiry for the sole reason that he raised objections and complained against the corrupt practices of the higher officers. However, petitioner fully cooperated in said Departmental Court of Inquiry.

07	25/02/2019 to 07/03/2019	Departmental Court of Inquiry against the petitioner was conducted at 116 Infantry Battalion (TA) Para, Deolali. However, no action thereafter was taken against the petitioner for almost 13 months.
08	16/04/2020	A show-cause-notice was issued under Section 19 read with Army Rule 14 of the Army Rules, 1954 to the petitioner as to why his services should not be terminated. The show-cause-notice was issued to the petitioner without deciding his various representations dated 25/02/2019 (Annexure 16), 25/03/2019 (Annexure17), 25/03/2019 (Annexure-18), 14/02/2020 (Annexure 19), 12/02/2020 (Annexure20), 19/04/2020 (Annexure- 21) & 23/04/2019 (Annexure – 22).
09	18/04/2020	The petitioner submitted his representation to show-cause-notice and stated that complete set of Court of Inquiry, copy of complaint on basis of which the enquiry was held, copy of findings recommendations, directions and opinion of the Court of Inquiry were not supplied along with the show-cause-notice dated 16/04/2020.
10		The petitioner assailed the show-cause-notice dated 16/04/2020 before this Court vide Writ Petition No.1796/2020 (LD-VC-CW No.17/2020).
11	30/04/2020	This Court issued notice in the matter and directed respondent nos.1 to 4 not to pass any adverse order against the petitioner in pursuance of the show-cause-notice dated 16/04/2020.
12	28/05/2020	The respondents filed an application seeking appropriate directions.
13	30/05/2020	The petitioner filed his reply to the application filed by the respondents.
14	03/06/2020	The petitioner reported for duty at Headquarter 2, Mountain Division, Dibrugarh, Assam. The petitioner was sent for mandatory 21 days quarantine in view of COVID-19 guidelines of Army.

15	05/06/2020	This Court clarified that the respondents are at liberty to proceed with the enquiry according to law against the petitioner.
16	06/06/2020	The respondents called upon the petitioner to submit his reply to the show-cause-notice dated 16/04/2020 but did not conduct any further proceedings contemplated under Rule 14 of the Army Rules.
17	09/06/2020	As the petitioner was quarantined in Military Cantonment till 24/06/2020, the petitioner addressed a handwritten letter to the respondents reiterating that in order to submit his reply he needs copies of documents which have not been supplied despite Court's order dated 30/04/2020.
18	30/06/2020	The petitioner retired from service on attaining the age of superannuation. All formalities in so far as handing over of charge were completed by 12:00. It is pertinent to note that there was no disciplinary enquiry/proceedings pending against the petitioner on the date of his superannuation.
19	30/06/2020	At around 20:06 PM a communication was received by the 166 Infantry Battalion (TA) (H&H) Assam, instructing invocation of Section 123 of the Army Act against the petitioner.
20	01/07/2020	The respondents invoked Section 123 of the Army Act and took petitioner in military custody. The petitioner was detained at Military Station Thakurbari, near Tezpur Assam.
21	01/07/2020	The petitioner made a representation seeking release from military custody. The petitioner pointed out that no fresh enquiry on same charges can be initiated.
22	04/07/2020	The petitioner made another representation informing the respondents that invoking Section 123 against the petitioner is illegal and therefore he ought to be released.

		Mr. Arnold Singh son of the petitioner filed a petition seeking a writ of Habeas Corpus for release of the petitioner from illegal detention vide Criminal Writ Petition No.289/2020 (LD-VC-Criminal Writ Petition No.690/2020).
23	10/07/2020	This Court issued notices in the Criminal Writ Petition No.289/2020 and the same was made returnable on 24/07/2020.
		The petitioner filed Writ Petition No.2113/2020 (LD-VC-CW No.570/2020) challenging the action of the respondents in invoking Section 123 of the Army Act against the petitioner.
24	20/07/2020	This Court issued notices in the matter and directed that the petition will be heard along with Writ Petition No.1796/2020.
25	24/07/2020	This Court by an interim order directed the respondents to release the petitioner from military custody upon furnishing an undertaking to the respondents as well as to this Court that the petitioner would make himself available for trial.
26	23/09/2020	The respondents addressed three communications to the petitioner, informing the petitioner that the subject matter of the tentative charges at this stage would be on the basis of action of misconduct which have been averred in the show-cause-notice served upon the petitioner earlier.
		Thus for the first time the charges on basis of which Section 123 of the Army Act have been invoked, has been communicated to the petitioner on 23/09/2020.

7. The crux of the argument, advanced by learned Senior Counsel Mr. S.P. Dharmadhikari is as under :-

(A) No estoppel operates against the fundamental rights. No one can barter away his fundamental rights. Under the circumstances undertaking given to this Court on 24/7/2020 as well as to the respondents would not non-suit the petitioner, if the petitioner makes out a case of detention without authority of law.

(B) Article 33 of the Constitution of India empowers the Parliament to modify the rights conferred by Part III of the Constitution in its application to the Armed Forces. In exercise of this power the Parliament has enacted Section 21 of the Army Act which permits the Central Government to make rules by notification restricting the rights available to a citizen to such extent and in such manner as given therein. Conjoint reading of Article 33 of the Constitution and Section 21 of the Army Act, according to him, would reveal that the rights conferred by Article 19 can be curtailed in its application to the army personnel by the Central Government, however, the guarantee provided by Article 14 and 21 is still available to the persons subject to the Army Act. As such the Army Officers also enjoy protection against arbitrary action of the Army.

(C) Detention pursuant to order made under Section 123 of the Army Act is without authority of law, because

having taken recourse to Section 19 of the Army Act read with Rule 14 (2) of the Army Rules as per Army Headquarters Letter dated 30/09/2003, it was not permissible for the respondents to go back, to taking up disciplinary proceedings against the petitioner as a Statutory opinion was recorded that the Court-Martial in the circumstances was neither practicable nor expedient. There is a presumption that judicial and official acts have been regularly performed. Such opinion having been recorded after the procedure delineated in Rule 14 (2) of the Army Rules, 1954, there could be no reversal of the process to embark upon Court-Martial as per Army Headquarters letter dated 11/05/1993.

(i) Rule 22 and 23 of the Army Rules aim at conducting fact finding enquiry and the Authority takes a view of the matter for the first time and decides to take recourse to one of the three ways to dealing with the matter. It is only when it decides to conduct Court-Martial, then trial of the offence begins. Section 123 of the Army Act can be invoked only when a decision is taken to conduct Court-Martial against an officer and not before. It is unequivocal stand of the respondents and correctly so that since the procedure of Rule 22 and Rule 23 of Army Rules 1954 is not

completed no decision to Court-Martial the petitioner has been taken. If that be so, Section 123 of Army Act, 1950 could not be invoked at a time at which it was invoked.

(ii) The allegations contained in show-cause-notice dated 16/04/2020 do not constitute any offence. The term 'Offence' has been defined in Section 3 (xvii) which reads "Offence" means any act or omission punishable under this Act and includes a civil offence as hereinbefore defined. Section 3 (ii) defines "civil offence" to mean an offence which is triable by a Criminal Court, which means a Court of ordinary criminal justice in any part of India, as per the definition in Section 3 (viii). Chapter VI of the Army Act which includes Section 34 to Section 70 categorizes several acts as offences including mutiny, desertion, absence without leave etc. The legislature in its wisdom has specifically provided the acts which amount to an offence in relation to the Army. The petitioner has not been charged with any of the offences.

(iii) The order under Section 123 of the Army Act, having been passed, in utter violation of order of this Hon'ble court dated 30/04/2020 in Writ Petition No.1796/2020, which is still in force and which engrafts an injunction prohibiting the respondents

from making any order adverse to the petitioner, the order under Section 123 of the Army Act, which took the petitioner in custody, could therefore not be passed by the respondents, and therefore was not sustainable.

(iv) The petitioner was taken into military custody by the respondents on 01/07/2020 and was kept as such till 24/07/2020 i.e. for a period of 24 days without having been informed about the charges/grounds for his detention. Section 50 of the Army Act provides for punishment of imprisonment for a term which may extend to two years for irregularity in connection with arrest or confinement. Where any person subject to the Army Act fails without reasonable cause to deliver at the time of committal or as soon as may be or in any case within a period of 48 hours, a written account of offence with which the committed person is charged, he is liable to be prosecuted under Section 50. The petitioner was kept in military custody for a period of 24 days without informing him about the charges leveled against him.

Mr. S.P. Dharmadhikari, learned Senior Counsel for the petitioner thus contends that for the aforesaid reasons, the impugned order dated 30/06/2020 (Criminal Writ Petition

No.2113/2020) is liable to be quashed and set aside, and the petition of the petitioner seeking writ of Habeas Corpus (Criminal Writ Petition No.289/2020) is required to be allowed. He also contends that for deliberate and wilful disobedience of the order dated 30/04/2020, charge under Section 12 of the Contempt of Courts Act read with Article 215 of the Constitution of India is required to be framed against the respondents.

8. In support of his above submissions, learned Senior Counsel relies upon the following judgments :-

(1) Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180.

(2) Madhu Limaye and others Vs. State of Bihar, AIR 1969 SC 1014.

(3) Nand Lal Bajaj Vs. State of Punjab and another, (1981) 4 SCC 327.

(4) Arnab Manoranjan Goswami Vs. The State of Maharashtra and others, AIR 2021 SC 1 .

(5) Balkrishna Ram Vs. Union of India and another, AIR 2020 SC 341.

(6) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, (1998) 8 SCC 1.

(7) M. P. State Agro Industries Development Corpn. Ltd. and another Vs. Jahan Khan, (2007) 10 SCC 88.

(8) Kunhayammed and others Vs. State of Kerala and another, (2000) 6 SCC 359.

(9) National Buildings Construction Corporation Vs. S. Raghunathan and others, (1998) 7 SCC 66.

(10) Om Prakash Chautala Vs. Kanwar Bhan and others, 2014 (5) Mh.L.J. 498.

(11) The State of Punjab Vs. Sodhi Sukhdev Singh, AIR 1961 SC 493.

(12) The State of U. P Vs. Raj Narain and others, (1975) 4 SCC 428.

(13) Amar Chand Butail Vs. Union of India and others, AIR 1964 SCC 1658.

9. Mr. Ulhas Aurangabadkar, learned Assistant Solicitor General of India (ASGI) submits as under :-

As a preliminary objection, he contends that in view of Sections 14, 15 and 33 of the Armed Forces Tribunal Act, 2007 (for short “the AFT Act 2007” hereinafter) as the matter relates to the services of the petitioner, the present petition would not be maintainable and the petitioner has to approach the Armed Forces

Tribunal for ventilating his grievances. Without prejudice to this preliminary objection, the learned ASGI contends as under :-

(i) The petitioner herein, when performing duties, while serving as an officer in 118 Territorial Army, committed certain culpable acts of commission and omission, which were established during investigation by duly constituted Court of Inquiry held under Rule 177 of the Army Rules.

(ii) The Court of Inquiry arrived at the findings that number of acts of commission/omission on the part of the petitioner have been established. The said enquiry proceedings were duly approved by Chief of Army Staff who initially directed that Administrative action be initiated against the petitioner for his dismissal from service.

(iii) However, considering the nature of the matter and peculiar facts and circumstances of the case, including the reply to the show-cause-notice issued to him as also the fact that this Court vide its order dated 30/04/2020 in LD-VC-WP No.17 of 2020 had passed an interim direction that no adverse order against the petitioner in pursuance to the show-cause-notice dated 16/04/2020

shall be passed, the Competent Authority refrained from passing any order in respect of the petitioner.

(iv) Further it was also considered that the petitioner was retiring from service on 30/06/2020. The provisions of Section 123 of the Army Act were invoked against the petitioner so that appropriate disciplinary action could be initiated against him wherein he would get adequate opportunity to put up his defence and a wholesome view of the matter could be taken based on all the relevant evidence that would be brought on record.

(v) Before initiating any disciplinary action against the petitioner, an application was filed by the respondents before this Court duly informing about the initiation of disciplinary action.

(vi) The provisions of Section 123 of the Army Act were invoked and the petitioner was attached to 140 Armoured Brigade for initiation of disciplinary action as per the decision by the Competent Authority i.e. the Chief of the Army Staff.

(vii) In the given peculiar circumstances of the case, decision taken by the Competent Authority to change the administrative action for termination of service into disciplinary

action is legally permissible and the same does not violate any of the rights of the petitioner.

(viii) The above fact was duly considered by this Court during the hearing of LD-VC-WP No.17 of 2020 on 05th June, 2020, wherein it passed the following order :-

“4. On going through the order dated 30th April, 2020, we find that the order does not direct stalling of the inquiry being conducted against the petitioner and all that it does is of restraining the respondent nos.1 to 4 only from passing any adverse order against the petitioner in pursuance of the show cause notice dated 16 April, 2020. So, we would make it clear that the respondent nos.1 to 4 would be at liberty to proceed with the inquiry according to law against the petitioner and in this inquiry, the petitioner would have to take part keeping his right reserved to challenge the inquiry on all grounds subsequently. If the petitioner does not take part in this inquiry, necessary order, including order of dismissal of the petition would be passed by this Court upon production of sufficient material regarding non-participation before this Court on the on next date.”

(ix) Despite the aforesaid order, the petitioner herein has willfully avoided taking part in the enquiry, has been impeding the administration of justice by filing various petitions,

representations and sending legal notices to obstruct and delay the investigation against him. The petitioner is in abuse of the process of law wherein he has not acted upon the undertaking submitted in this Court to cooperate with the authorities by non-reporting to 140 Armoured Brigade.

(x) That disciplinary proceedings against the petitioner are being initiated under the framework provided under the Army Act and Army Rules and as a corollary, entitlement of the petitioner to various documents and with regard to putting up his defence would also be governed by the statutory provisions thereunder.

(xi) The relevant provisions which govern the rights of an accused regarding entitlement to documents and preparation of his defence are prescribed under Rule 180 and 184 of the Army Rules during the Court of Inquiry stage, which have already been duly complied.

(xii) Thereafter, upon initiation of disciplinary action, as is the present stage, provisions of Rule 22 and 23 of the Army Rules would be applicable wherein an accused person gets all due opportunities to participate in the proceedings, cross-examine

witnesses, produce own witnesses and evidence and make any statement or produce relevant documents in his defence.

(xiii) Thereafter, in case any decision is taken to try him by GCM (General Court-Martial), then the rights in his defence as specified in Rule 33 and 34 of the Army Rules will be available to him.

(xiv) Further every stage of the GCM is also governed by due procedure specified in the Army Rules, which fully caters for the accused to put up his defence at each stage.

(xv) That at present stage, the Commanding Officer will take an independent decision based on the proceedings being conducted under Rule 22 of the Army Rules whether to proceed ahead with the disciplinary process or otherwise. Thereafter, in case Summary of Evidence is recorded in terms of Rule 23 of the Army Rules, then again authorities will examine the Summary of Evidence to decide whether to proceed further or not for convening of the Court-Martial. As of now, only the Court of Inquiry, which is the fact finding body, has taken place wherein competent authorities have come to a *prima facie* decision to proceed with disciplinary action against the petitioner. At the present stage, no rights of the

petitioner are affected and in the course of the disciplinary proceedings, all due procedure prescribed by the Army Act and Army Rules shall be duly followed, enabling the petitioner to exercise his rights therein. After the conclusion of the Court of Inquiry, under Rule 177 of the Army Rules, the petitioner was entitled to get the statement of witnesses and exhibits under Rule 184 of the Army Rules, which have already been provided to him.

(xvi) That the invocation of Section 123 of the Army Act is merely an enabling provision to ensure progress of the disciplinary cases in situation where a person who has ceased to be subject to the Act. He relies on the following decisions :-

(1) Lt. Gen. Avadhesh Prakash (rettd.) Vs. Union of India & others, Original Application No.66 of 2010, decided on 22nd February, 2010 (Armed Forces Tribunal, Principal Bench, New Delhi).

(2) Avadhesh Prakash Vs. Union of India & Ors., Petition(s) for Special Leave to Appeal (Civil) No(s).7846/2010.

(3) Ex-Capt. Ashwani Kumar Katoch Vs. Union of India and others, 1995 Supp (4) SCC 715.

10. The foremost issue to be considered is the preliminary objection as has been raised by Mr. Ulhas Aurangabadkar, learned ASGI to the effect, that in view of the express provisions of the AFT Act, 2007, the questions raised in these petitions, cannot be entertained by this Court, as they relate to the service matter of the petitioner. He invites our attention, to Sections 2 (o), 14, 15 and 33 of the AFT Act, 2007, to contend that a bar of jurisdiction has been created due to which, it would not be permissible for this Court to entertain and decide these petitions. Learned ASGI for this purposes places reliance upon *Union of India and others Vs. Major General Shri Kant Sharma and another, (2015) 6 SCC 773; Union of India and Ors. Vs. P. S. Gill, Criminal Appeal No.404 of 2013, decided on 27.11.2019 (Supreme Court of India).*

10.1. Mr. S.P. Dharmadhikari, learned Senior Counsel, opposes the preliminary objection. He invites our attention to the language of Section 14 (1) of the AFT Act, 2007, to contend, that the jurisdiction, power and authority of the Tribunal under the AFT Act, 2007 cannot curtail the power of this Court to entertain and try the present petitions. He lays stress on the expression “except the

Supreme Court or High Court exercising jurisdiction under Articles 226 and 227 of the Constitution”, as occurring in Section 14 (1) of the AFT Act, 2007 to contend, that the jurisdiction of this Court is not ousted. Further relying upon *Olga Tellis* (supra), he submits that even otherwise, any action on part of the respondents to deprive the petitioner of his liberty, can always be looked into by this Court in its power under Article 226 of the Constitution. He further relies upon *Balkrishna Ram Vs. Union of India and another, (2020) 2 SCC 442*.

10.2. In so far as the preliminary objection is concerned, we are with the learned Senior Counsel for the petitioner. This is so for the reason that none of the prayers as made in these petitions, as reproduced above are for a relief, which could be related to what has been stated in Section 3(o) (i) to (iv) of the AFT Act, 2007, in respect of service matters, in view of which Section 14 of the AFT Act, 2007 is clearly not attracted. So also, as of date, there has been no Court-Martial against the petitioner, in which, he could be said to have been awarded any punishment, in light of which, Section 15 of the AFT Act, 2007 is also not attracted.

10.3. In ***Major General Shri Kant Sharma*** (supra), the Armed Forces Tribunal, was approached by the officers for adjudication or trial of disputes and complaints with respect to conditions of service, which having ruled against them, the High Court was approached under Article 226 of the Constitution, it is in which context, the Hon'ble Apex Court held that since remedy of appeal directly to the Supreme Court was provided under Section 30 of the AFT Act, 2007, the petitions before the High Court by invoking Article 226 of the Constitution were not maintainable.

10.4. In ***P. S. Gill*** (supra), the Hon'ble Apex Court held that Section 14 of the AFT Act, 2007, should receive a wide construction and an interpretation, which confers jurisdiction, should be preferred over an interpretation which takes away jurisdiction, relying upon ***Mantri Technozone Vs. Forward Foundation, (2019) SCC OnLine SC 322***. There cannot be any dispute with the above proposition, however, on facts of the present case, as pointed above, none of the reliefs claimed in the present petitions, can be said to fall within Section 3 (o) of the AFT Act, 2007, for which reason, the reliance upon ***P. S. Gill*** (supra) is misplaced.

10.5. In fact, in ***Balkrishna Ram*** (supra), the Hon'ble Apex Court while dilating upon the scope and ambit of the jurisdiction of the Armed Forces Tribunal under Section 14 (1) of the AFT Act, 2007 and that of the High Court under Article 226 of the Constitution after considering ***Major General Shri Kant Sharma*** (supra), and placing reliance on the decision of the Constitution Bench in ***L. Chandra Kumar Vs. Union of India and others, (1997) 3 SCC 261***, held as under :-

“9. We are not at all in agreement with this submission. Section 14(1) of the Act quoted hereinabove clearly provides that AFT will exercise powers of all courts except the Supreme Court or the High Court exercising jurisdiction under Articles 226 and 227 of the Constitution of India. Section 34 is very carefully worded. It states that “every suit”, or “other proceedings” pending before any court including a High Court immediately before the establishment of the Tribunal shall stand transferred on that day to the Tribunal. The legislature has clearly not vested AFT with the power and jurisdiction of the High Court to be exercised under Article 226 of the Constitution. We are not going into the question as to whether the Tribunal is amenable to the supervisory jurisdiction of a High Court under Article 227 of the Constitution but there can be no manner of doubt that the High Court can

exercise its writ jurisdiction even in respect of orders passed by AFT. True it is, that since an appeal lies to the Supreme Court against an order of AFT, the High Court may not exercise their extraordinary writ jurisdiction because there is an efficacious alternative remedy available but that does not mean that the jurisdiction of the High Court is taken away. In a given circumstance, the High Court may and can exercise its extraordinary writ jurisdiction even against the orders of the High Court.”

In respect of **Major General Shri Kant Sharma** (supra), it was held as under :-

“15. Ms Dwivedi, placed reliance on the observations made in Shri Kant Sharma that, “jurisdiction of the Tribunal constituted under the Armed Forces Tribunal Act is in substitution of the jurisdiction of the civil court and the High Court so far as it relates to suit relating to conditions of service of the persons”, subject to the provisions of the Act. It is clear that the intention of the Court was not to hold that the Tribunal is a substitute of the High Court insofar as its writ jurisdiction is concerned because that is specifically excluded under Section 14(1) of the Act. We cannot read this one sentence out of context. It is true that proceedings on the original side even in exercise of writ jurisdiction are to be transferred to the Tribunal for decision by AFT because the original jurisdiction now vests

with AFT. This however, does not mean that AFT can exercise all the powers of the High Court.”

It is thus apparent, that the jurisdiction, power and authority of the High Court, is not in any way curtailed by the provisions of Section 14 (1) of the AFT Act, 2007, rather on the contrary, is saved as is held above, and is also apparent from the use of the expression “(except the Supreme Court or a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution)”, as occurring in Section 14 (1) of the AFT Act, 2007.

10.6. That apart, the position in the present matters, is quite different, in as much as, as stated above, the challenges raised in the present petitions, do not fall within the meaning of the expression “service matters” as defined in Section 3 (o) of the AFT Act, 2007. The preliminary objection, therefore, to the maintainability of the petitions before this Court, is therefore rejected.

ALTERNATE REMEDY

11. The respondents have also raised a plea of an alternate remedy, in view of provisions of Section 27 of the Army Act of

making a complaint/representation to the Central Government in the manner as specified in this regard.

11.1. In *Whirlpool Corporation* (supra) relied upon by Mr. S.P. Dharmadhikari, learned Senior Counsel for the petitioner, while considering the existence of an alternative remedy, it was held that the power to issue prerogative writs under Article 226 of the Constitution was plenary in nature and was not limited by any other provision of the Constitution and could be exercised apart from for issuing of the writs and also for enforcement of any of the fundamental rights, contained in Part III of the Constitution, also for “any other purpose” and the rule of availability of an efficacious and effective alternate remedy would not operate as a bar, where the writ petition has been filed for the enforcement of any of the fundamental rights, or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of the Act is challenged. Similar is the statement of law as made in para 12 of *M.P. State Agro Industries Development Corpn. Ltd.* (supra).

11.2. The contention of availability of an alternate remedy may not detain us long, in view of the nature of reliefs as are sought in the writ petitions, which are beyond the purview of Section 27 of the Army Act, and the fact that none of the reliefs as claimed in the present petitions, can form the subject matter of any representation/complaint under Section 27 of the Army Act. The plea of availability of alternate remedy, is therefore rejected.

ABSENCE OF AUTHORITY

12. The contention by Mr. S.P. Dharmadhikari, learned Senior Counsel, for the petitioner that under the communication dated 23/3/2007, the Competent Authority to decide as to whether or not provisions of Section 123 of the Army Act should be invoked, in respect of the petitioner, who was holding the rank of Colonel was the GOC-in-C Command Concerned, as against which, the communication dated 30/6/2020 indicated that the same had been invoked by the COAS, and therefore, the invocation, was by an Officer below the rank as specified in para 4 (b) (i) of the communication dated 23/3/2007, and for this reason, was legally incompetent and infirm, cannot be accepted, for the reason, that the

communication dated 30/6/2020 invoking Section 123 of the Army Act, against the petitioner, makes a mention of the Competent Authority having perused the case of the petitioner, had directed that Section 123 be invoked. The Competent Authority, in terms of para 4 (b) (i) of the instructions dated 23/3/2007, was the GOC-in-C Command Concerned, which has to be related to the Competent Authority, as indicated in the letter dated 30/6/2020. Even otherwise, para 5 of the instructions dated 23/3/2007, indicates, that after action under Section 123 of the Army Act, is directed by the Competent Authority, as mentioned in para 4 (b) (i) of the instructions dated 23/3/2007, the orders invoking Section 123 of the Army Act will be issued by the Commanding Officer of the Unit where the accused last served or the Unit where he may be attached consequent to the decision of the Competent Authority to invoke the said section for its trial or by a Superior Officer. It is not a case as if the General Officer Commanding-in-Chief did not have any authority in law to invoke Section 123 of the Army Act, as such authority is there, however, as discussed hereinafter, it was invoked under a misconception that in the given fact situation, it could be done.

13. Section 123 of the Army Act, being material is reproduced below :-

“123. Liability of offender who ceases to be subject to Act .- (1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) -----.

(3) -----.

(4) -----.”

Section 123 (1) of the Army Act is permissible to be invoked where (a) an offence under the Act had been committed by any person while subject to the Act and (b) he has ceased to be so subject, in which case such person, is liable to be taken into and kept in military custody and tried and punished for such offence as if he continued to be so subject. The offences punishable under the Army Act are listed in Chapter-VI Sections 34 to 70 thereof. The communication dated 30/6/2020, invoking Section 123 of the Army Act against the petitioner, does not specify, as to which of the offences, as listed in Chapter-VI of the Army Act, are alleged to have been committed by the petitioner, while subject to the Army Act, for

which he was required to be tried and punished. Even if, there is an absence of the mention of the offence, which the petitioner is alleged to have been committed, for which the provisions of Section 123 of the Army Act were invoked in the communication dated 30/6/2020, even in the reply, submissions filed by the respondents on record from time to time, there is no whisper about which offence has been committed by the petitioner, out of those listed in Chapter -VI of the Army Act. It is trite to say that when Section 123 (1) of the Army Act being a penal provision, requiring a person to be taken into and kept in military custody, thereby depriving such person of his liberty, more so, when in the instant case, the petitioner had already superannuated by the noon of 30/6/2020, was invoked, it was thus necessary for the communications, invoking Section 123 of the Army Act, to make a mention of the specific offence, which was alleged to be committed by the petitioner, while subject to the Army Act. The absence of any such mention in the communications dated 30/6/2020, is telling. The petitioner or for that matter, any officer, subject to the provisions of the Army Act is entitled, to be made aware, as to which offence, is being alleged against him, when the provisions of

Section 123 of the Army Act are invoked against him, as the invocation, leads to curtailment of his freedom, guaranteed under the Constitution. Thus, an officer, cannot be left in the dark, as to the nature of the offence alleged against him, for which his liberty is being sought to be curtailed by taking him into military custody, and it is necessary for the notice invoking Section 123 of the Army Act to mention which of the offence as contained in Chapter-VI of the Army Act is being alleged against him.

13.1. The communication dated 23/3/2007, in this regard, issued by the office of the Additional Directorate General, Discipline and Vigilance, Adjutant General's Branch, Integrated HQ of MOD (Army) New Delhi, addressed to the Headquarters and all Commands of the Army indicates, the circumstances under which Section 123 of the Army Act, can be invoked. It says that Section 123 of the Army Act is an extraordinary provision to cater for exceptional circumstances, keeping the need of discipline in mind and that the spirit of the enabling provision should be maintained by invoking it judicially after having examined each case from all possible angles and in any case Section 123 of the Army Act cannot

be invoked, if formal cognizance has not been taken. It also states that Section 123 of the Army Act may be invoked in respect of service persons alleged to have committed serious offences, which warrant a sentence of dismissal or above. Again, the invocation of Section 123 of the Army Act is related to the commission of an offence, which would necessarily indicate the disclosure of the nature of the offence, which is absent in the communication dated 30/6/2020 in the present matter.

13.2. The entire crux of the matter depends upon the answer to the question as to whether once an action under Rule 14 (1) (b) and 14 (2) of the Army Rules, 1954, is taken, would it be permissible for the respondents, to go back to the stage of conducting a Court-Martial enquiry, that too, without withdrawing the action under the above rules and for that purpose to invoke Section 123 of the Army Act. In the instant case, it is not in dispute, that on 1/2/2019, a Departmental Court of Inquiry was convened against the petitioner, which was conducted between 25/2/2019 to 7/3/2019. After 7/3/2019, nothing has been placed on record to show what has happened thereafter till 16/4/2020, when a show-

cause-notice was issued to the petitioner, and the petitioner was informed that the Chief of Army Staff was of the opinion that the further retention of the petitioner in the territorial army was not desirable and in accordance with the directions of the Chief of Army Staff the petitioner was so informed in terms of Rule 14 of the Army Rules and on behalf of the Chief of Army Staff, the petitioner was called upon to submit an explanation and defence as to why his services should not be terminated under the provisions of Rule 14 of the Army Rules 1954 read with Rule 14 (c) of the T.A. (Amendment) Rules 1964. It was also stated that in case no explanation was submitted by the petitioner during the stipulated period, it shall be presumed that the petitioner had no ground to urge in favour of his retention in the service. A copy of the Court of Inquiry was enclosed with the letter dated 16/4/2020. What is material to note is that the copy of the Court of Inquiry as enclosed with the letter dated 16/4/2020, indicates, that the court was assembled on 25/2/2019 and subsequent days, in which witnesses were examined pertaining to the issues and period as relevant vide the convening order and since the character and military reputation of the petitioner was involved the provisions of Rule 180 of the

Army Rules, 1954 were invoked and the proceedings of the Court of Inquiry as enclosed with the letter dated 16/4/2020 contains a certificate regarding compliance of Rule 180 of the Army Rules, which states that an adequate opportunity was provided to the petitioner, to make a statement, to give any evidence, to produce any witness in his defence, to cross-examine/cross-question any witness and to remain present throughout the proceedings of the Court of Inquiry. It is thus evident that the Court of Inquiry was convened and conducted in respect of the charges against the petitioner, on 25/2/2019 and subsequent days, which was pursuant to the order dated 1/2/2019, as amended by the letters dated 1/2/2019 and 28/2/2019.

13.3. Rule 14 of the Army Rules, 1954, being material is reproduced as under :-

“14. Termination of service by the Central Government on account of misconduct .-(1) When it is proposed to terminate the service of an officer under section 19 on account of misconduct, he shall be given an opportunity to show cause in the manner specified in sub-rule (2) against such action-

Provided that this sub-rule shall not apply-

(a) where the service is terminated on the ground of misconduct which has led to his conviction by a Criminal Court; or

(b) where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(2) When after considering the reports on an officer's misconduct, the Central Government, or the Chief of the Army Staff is satisfied that the trial of the officer by a Court-Martial is inexpedient or impracticable, but is of the opinion, that the further retention of the said officer in the service is undesirable, the Chief to the Army Staff shall so inform the officer together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence:

Provided that the Chief of the Army Staff may withhold from disclosure any such report or portion thereof if, in his opinion, its disclosure is not in the interest of the security of the State.

In the event of the explanation of the officer being considered unsatisfactory by the Chief of the Army Staff, or when so directed by the Central Government, the case shall be submitted to the Central Government, with the officer's defence and the recommendation of the Chief of the Army Staff as to the termination of the officer's service in the manner specified in sub-rule (4).

(3) *Where, upon the conviction of an officer by a Criminal Court, the Central Government or the Chief of the Army Staff considers that the conduct of the officer which has led to his conviction renders his further retention in service undesirable a certified copy of the judgment of the Criminal Court convicting him shall be submitted to the Central Government with the recommendation of the Chief to the Army Staff as to the termination of the officer's service in the manner specified in sub-rule (4).*

(4) When submitting a case to the Central Government under the provisions of sub-rule (2) or sub-rule (3), the Chief of the Army Staff shall make his recommendation whether the officer's services should be terminated, and if so, whether the officer should be-

(a) dismissed from the service; or

(b) removed from the service; or

(c) compulsorily retired from the service.

(5) The Central Government after considering the reports and the officer's defence, if any, or the judgment of the Criminal Court, as the case may be, and the recommendation of the Chief of the Army Staff, may-

(a) dismiss or remove the officer with or without pension or gratuity; or

(b) compulsorily retire him from the service with pension and gratuity, if any, admissible to him."

It is thus apparent that Rule 14 (1) of the Army Rules, is invoked, when it is proposed to terminate the service of an officer

on account of misconduct, for which a show-cause-notice is required to be given to such officer. The proviso to Rule 14 (1), however, says that such a show-cause-notice would not be necessary, in case (a) the termination is on the ground of misconduct which has led to his conviction by a Criminal Court or (b) where the Central Government is satisfied for reasons to be recorded that it is not expedient or reasonably practicable to give an opportunity to show-cause. In the instant case, a show-cause-notice was given, which mentioned Rule 14 of the Army Rules, 1954, which could only relate to Rule 14 (2) of the Army Rules, 1954. A perusal of Rule 14 (2) of the Army Rules, 1954, indicates, that the same can be invoked only when the Central Government or the Chief of Army Staff is satisfied that the trial of the officer by a Court-Martial is inexpedient or impracticable, and is also of the opinion that the further retention of the officer is undesirable, in which case the Chief of Army Staff is required to so inform the officer, together with all reports adverse to him and to submit in writing his explanation and defence. It is thus apparent, that when provisions of Rule 14 (2) of the Army Rules, 1954 were invoked in the instant case, in pursuance to which the show-cause-notice dated 16/4/2020 was issued, the opinion of the

Chief of Army Staff, to the effect that the trial of the officer/petitioner by a Court-Martial was inexpedient and impracticable, was already formed, and it is only after this, that the decision to invoke the provisions of Rule 14 (2) of the Army Rules, 1954, was taken. In fact, a plain reading of para 3 of the show-cause-notice dated 16/4/2020 clearly indicates that such an opinion as required by Rule 14 (2) of the Army Rules, 1954 that the trial of the petitioner by a Court-Martial, was inexpedient or impracticable and that the further retention of the said officer in the service was undesirable, was the basis for issuance of the show-cause-notice dated 16/4/2020, which also makes a reference in the preceding paragraphs therein about the proceedings of the Court of Inquiry.

13.4. It is thus, evident, that the invocation of Rule 14 (2) of the Army Rules, 1954, was only upon the satisfaction of the Chief of Army Staff, as regards the requirements of Rule 14 (2) of the Army Rules and not otherwise. What is necessary to be noted, is the difference, of termination in pursuance to a Court of Inquiry and termination by invoking the powers under Rule 14 (2) of the Army Rules, 1954. The nature of a termination by invoking Rule 14 (2) of

the Army Rules, read with Section 19 of the Army Act, is an administrative termination, as against which termination in pursuance to a Court-Martial is a penal termination. The administrative nature of the termination under Section 19 of the Army Act read with Rule 14 (2) of the Army Rules, is clearly indicated from the very fact, that in spite of a Court of Inquiry having been commissioned, an opinion is formed by the Chief of Army Staff, that the trial by Court-Martial is inexpedient or impracticable, thereby doing away with the further process of the Court-Martial, apart from which, this is so indicated by the communication dated 30/9/2003, by Additional Directorate General, Disciplinary and Vigilance, Adjutant General's Branch, Army Headquarters, New Delhi, the relevant portion of which reads as under :-

“7. Invoking of AA Section 19 read with AR 14 (2) involves the following steps :-

(a) Discipline is a command function. Therefore, the competent Disciplinary Authority has to be satisfied on the basis of various reports. Court of Inquiry etc. that trial of an accused by Court-Martial is inexpedient or impracticable on the grounds other than probable failure to establish charges against him and that further retention

of the accused in service is not desirable. The disciplinary authority has to exhaust his powers before recommending administrative termination of service of an Officer under AA Section 19 read with AR 14 (2). The essential feature of such a recommendation is that there is sufficient evidence to prove the charges but still trial by Court-Martial is considered inexpedient or impracticable. The disciplinary authority has to justify his decision to recommend invoking of AA Section 19 read with AR 14 (2).

(b) The disciplinary authority makes his recommendation to the COAS to invoke AA Section 19 read with AR 14 (2).

(c) The COAS considers the recommendations and if satisfied makes his opinion to invoke the said provisions and causes issuance of a SCN to that effect to such an Officer concerned.

(d) The reply of the Officer alongwith recommendations/comments of the Cdrs in Chain of Command are considered and appropriate orders are issued by the COAS or the Central Government as the case may be.

8. In view of the foregoing, it has now been decided that in all such cases where the directions of the COAS to terminate the services of an Officer in terms of AA Section 19 read with AR 14 (2) are to be obtained, the formation concerned would also forward a detailed justification duly recommended by Cdrs in Chain of Command on format appended herewith, which should

include the reasons as to why trial of the Officer by Court-Martial is impractical or inexpedient as detailed in the preceding paragraphs alongwith the case/records and reasons recommending termination of the services of an Officer.

9. *The contents of this letter may please be widely disseminated.”*

13.5. It is thus apparent, that the entire idea of proceeding ahead with the Court-Martial, against the petitioner, came to be dropped, by invoking the provisions of Rule 14 (2) of the Army Rules, 1954, by the respondents, in view of the opinion as formed by the Chief of Army Staff, which was the position as it stood on 16/4/2020. It was thus expected, considering that the respondents were aware that the date of superannuation of the petitioner was 30/6/2020, for the respondents, to act in consonance with Rule 14 (4) of the Army Rules, 1954, i.e. to submit to the Central Government the recommendation of the Chief of Army Staff, as to whether the officer/petitioner should be (a) dismissed from service; or (b) removed from service; or (c) compulsorily retired from service, consequent to which as per sub-rule 5 of Rule 14 of the Army Rules, 1954, the Central Government after considering the

reports and the defence of the officer, and the recommendation of the Chief of Army Staff could either (a) dismiss or remove the officer with or without pension or gratuity or (b) compulsorily retire the officer from service with pension and gratuity, if any, admissible to him.

13.6. In the instant matter, nothing is placed on record by the respondents as to any action, which is required to be taken under Rule 14 (4) and (5) of the Army Rules, 1954, which was necessary, in view of the fact, that the show-cause-notice dated 16/4/2020 invoked Section 19 of the Army Act, in conjunction with Rule 14 (2) of the Army Rules, 1954 categorically indicating that the petitioner was intended to be dismissed or removed from service. In our considered opinion, if this was the intention, to either remove or dismiss the petitioner from the service, as was indicated by invocation of the powers under Section 19 of the Army Act read with Rule 14 (2) of the Army Rules, 1954, it was necessary for the respondents to have acted in consonance with the requirements of Rule 14 (4) and (5) of the Army Rules, 1954, before 30/6/2020, the date on which the petitioner was to superannuate. However, nothing

in this regard appears to have been done, till 30/6/2020, as is apparent, from the absence of any material in this regard being placed on record. So also, nothing has been placed on record, as to why, in spite of the fact, that the action under Rule 14 (2) of the Army Rules, 1954, not having been reversed, how and in what manner, and under what authority or powers, the petitioner, was being sought to be proceeded ahead with the Court of Inquiry/Court-Martial. In our considered opinion, to justify such an action, it was necessary for the respondents, to place on record, something which would have indicated, the withdrawal of the action under Rule 14 (2) of the Army Rules, read with Section 19 of the Army Act, however, there is absolutely nothing. When a specific query was made in this regard, as to whether there were any additional charges levied against the petitioner, the response was that the enquiry as initiated upon the original charges as contained in the show-cause-notice dated 16/4/2020 which was prior to the action under Rule 14 (2) of the Army Rules read with Section 19 of the Army Act, was being continued without there being any, change or addition in the nature of charges. This is clearly inexplicable, for the reason, that once the Chief of Army Staff, in exercise of the

powers as conferred upon him under Rule 14 (2) of the Army Rules, 1954 forms an opinion that any trial by Court-Martial was inexpedient or impracticable, and at the same time is of the opinion that the further retention of the said officer in the service is undesirable, then the course to follow would be as laid down in Rules 14 (4) and 14 (5) of the Army Rules, 1954. No provision, Rule has been pointed by the learned ASGI, Mr. Ulhas Aurangabadkar, to indicate otherwise, or for that matter, that the further course of action, as indicated in Rules 14 (4) and 14 (5) of the Army Rules, 1954, can be abandoned at the drop of a hat and the course reverted back, to a trial by Court-Martial, that too without there being any additional material being considered. This is so, for the apparent reason, that while forming the opinion under Rule 14 (2) of the Army Rules, 1954, the Chief of Army Staff has already considered the basis of the allegations made, charges leveled, material available, and the reports on an officer's misconduct, which would include the report of the Court of Inquiry, and after applying his mind to all this, has come to the conclusion that the trial of the officer by Court-Martial on the basis of the material which is available, is inexpedient or impracticable. Thus, when the

charges/allegations/report remain the same, which were duly considered for forming of the opinion under Rule 14 (2) of the Army Rules, 1954, then unless, it is demonstrated, that something additional has been found, which has a material bearing upon the charges/allegations leveled against the officer or affects the efficacy of the report of the Court of Inquiry, the clock cannot be turned back, to prosecute the officer by a trial by Court-Martial. No such plea has been made in the submissions as placed on record by the respondents, which clearly indicates that the action now of reverting back from the position of Rule 14 (2) of the Army Rules, 1954, as was taken earlier, is clearly unsustainable in law. After all, a decision taken in terms of sub-rule 1 & 2 of Rule 14 of the Army Rules 1954, seeking administrative termination has civil consequences and, therefore, if any other action than prescribed in this rule is proposed to be taken, it would amount to review of the decision, which is not permissible, unless there is conferred in the rules express power of review or there are available on record new circumstances or new grounds which have emerged subsequent to taking of the decision under sub-rule 1 & 2 of Rule 14 of the Army Rules 1954. In the present case, both of these factors are absent.

13.7. It is further trite to note that Rule 22 and 23 of the Army Rules, 1954 indicate the conduct of an enquiry, which can be said to be in the nature of a preliminary enquiry, based upon the findings of which, the Commanding Officer, may choose to adopt any of the courses of action as indicated in Clause (a) to (c) of Rule 24, which includes remanding the accused for trial by a Court-Martial. It is thus apparent that the Army Act and the Rules framed thereunder, contemplate a preliminary enquiry, under Rule 22 or Rule 177 of the Army Rules 1954, based upon the findings of which, the decision whether to initiate a Court-Martial, has to be taken. In the instant case, as is evident, a Court of Inquiry duly convened under the letter dated 1/2/2019 had held its sittings from 25/2/2019 to 7/3/2019, in pursuance to which, a report was submitted. This report and other material placed before the Chief of the Army Staff, was considered inexpedient for directing the trial of the officer by Court-Martial, in view of which, in our considered opinion, it would not have been permissible for the invocation of Rule 22 (1) of the Army Rules, 1954, for the reason, that the proviso thereto, requires the Commanding Officer, to consider the report of the Court of Inquiry, which in the present matter, having already

been considered by the Chief of the Army Staff, who upon due consideration, having come to an opinion, that the trial by Court-Martial, was inexpedient and impracticable, based upon the material before him, the Commanding Officer, being an Officer Subordinate to the Chief of the Army Staff, would be bound by the opinion of his ultimate superior. It is in light of the above position that the action of invoking Section 123 of the Army Act, is to be considered as when once a decision to invoke Rule 14 (2) of the Army Rules 1954, was taken considering the factual position and the material available on record, the invocation of Section 123 of the Army Act, clearly appears to be under some misconception that the same could have been done, on account of a purported enquiry under Section 22 of the Army Act, which was never commenced.

13.8. The reliance on *Ex-Capt. Ashwani Kumar Katoch* (supra) by Mr. Ulhas Aurangabadkar, learned ASGI to contend that in case of invocation of Rule 14 (2), it is permissible for the show-cause-notice to be waived off by the Central Government, upon being satisfied that it is inexpedient or impracticable, for reasons to be recorded in writing, is of no assistance to the contention as

advanced by him, for the reason, that in the instant matter, a show-cause-notice under Rule 14 (2), was indeed issued to the petitioner on 16/4/2020.

13.9. Similarly, the judgment of the Armed Forces Tribunal in *Lt. Gen. Avadhesh Prakash (retd.)* (supra) also does not assist the learned ASGI, for the reason, that what was in challenge therein was an order convening of the Court of Inquiry and its proceedings along with findings and opinion, leading to invocation of the provisions of Section 123 of the AFT Act, 2007 against the petitioners in that case, as against which there is no such challenge raised in the present petitions.

13.10. It is not in dispute, that on 30/6/2020, the petitioner retired from service on attaining the age of superannuation. The petitioner avers that all formalities in so far as handing over of charge, were completed by 12:00 noon, which is not disputed by the respondents. It is only on 30/6/2020, that the provisions of Section 123 of the Army Act, were invoked against the petitioner, the e-mail message in respect of which is placed on record at

Annexure-32/pg.30 of compilation, which is addressed to the 116, INF BN (TA) (H & H) Assam, the timing of receipt of which is 20:06:51, by which time the petitioner already stood superannuated. The communication about invocation of Section 123 of the Army Act, was hand delivered to the petitioner on 1/7/2020 at 12.20 hours which is apparent from the endorsement made upon the communication in this regard dated 30/6/2020 (Annexure- 32/pg.28 of the compilation). The communication about invocation of Section 123 of the Army Act, cannot halt the superannuation of the petitioner, which occurred on 30/6/2020. Even otherwise, Section 123 of the Army Act, does not have any effect, upon the superannuation of any person subject to the Army Act. The petitioner, therefore, would be entitled to a declaration that he stood superannuated on 30/6/2020. In view of the averment of the petitioner, that all formalities in so far as handing over of charge, were completed by 12:00 noon, which is not disputed by the respondents, the effect of which is that the petitioner stood relieved from the post, the question of issuing any direction in this regard does not arise at all.

13.11. Writ Petition No.2113/2020, therefore will have to be allowed in terms of prayer clause (b) and part of prayer clause (c) as indicated above and is so allowed.

14. In view of what we have stated above, regarding the action initiated under Section 19 of the Army Act, read with Rule 14 (2) of the Army Rules, 1954, and the consequent action require to be taken in pursuant thereto as contemplated by Rules 14 (4) and (5) of the Army Rules, 1954, we do not think, that the any enquiry, based upon the original charges, as contained in the show-cause-notice dated 16/4/2020 can be permitted to be continued, in absence of any fresh material or any fresh charges, particularly, in view of the admission by the respondent nos.1 to 4, that the subsequent action would be initiated on no new grounds, but only on the grounds as contained in the earlier show-cause-notice dated 16/4/2020, in respect of which already an opinion has been rendered by the Chief of Army Staff, of proceeding under Rule 14 (2) of the Army Rules, 1954, for the purpose of administratively terminating the services of the petitioner. In that light of the matter,

Writ Petition No.1796/2020 is allowed in terms of prayer clause (e) alone, as notices have been issued only to the respondent nos.1 to 4.

15. The question of liberty of a citizen, as guaranteed under Articles 19 and 21 of the Constitution of India has always been very close to the heart of the Apex Court and the High Courts, who have zealously guarded this liberty throughout. No doubt, reasonable fetters can always be placed upon such liberty, but even the reasonableness of such fetters, can always be tested by the Courts. The issue has been considered by the Courts in various judgments, time and again, including those cited by Mr. S. P. Dharmadhikari, learned Senior Counsel for the petitioner. The position in this regard as spelt out is that if the detention is under judicial orders or is traceable to a power conferred under a provision of a statute, the same cannot be termed as illegal, unless, it is demonstrably *per se* illegal or without jurisdiction.

15.1. The plea of deprivation of right to liberty, as raised in the Criminal W.P. No.289/2020, is on account of invocation of Section 123 of the Army Act, which resulted in the detention of the

petitioner at military station Thakurbari near Tezpur Assam on 1/7/2020 till 23/7/2020, on account of his release on 24/7/2020, as directed by this Court by an interim order dated 24/7/2020, upon furnishing an undertaking that he would make himself for available for trial.

15.2. It would be apparent that Section 123 of the Army Act, empowers and authorizes, a person, who is alleged to have committed an offence, while being subject to the Army Act, but has ceased to be subject to the Army Act, to be kept in military custody and tried and punished for such offence, as if he continued to be so subject. Thus, any detention of a person by the respondents, directly relates, to the power as conferred in this regard under Section 123 of the Army Act. In our considered opinion, till such time the detention can be related to any order by an Authority flowing from a statute, the same cannot be illegal. However if the order is found to be without jurisdiction or illegal, then the detention would of course have to be declared as illegal too.

15.3. In the instant matter it is upon invocation of Section 123 of the Army Act, that the petitioner was taken into custody. The custody of the petitioner, is therefore directly traceable to the power under Section 123 of the Army Act and thus cannot be said to be without authority. The purpose of custody of the petitioner, as is now apparent, was for ensuring the presence of the petitioner, in the enquiry, which was proposed to be held. Thus, the custody of the petitioner for the above duration cannot be held to be illegal or for that matter without authority. It is a different case altogether that the invocation has now been found to be not proper upon the interpretation of the factual position upon the touchstone of rule 14 (2) of the Army Rules. This being the case Criminal Writ Petition No.289/2020, therefore fails.

16. Since the petitioner has already been enlarged from custody by an interim order of this Court dated 24/7/2020, and we have allowed Writ Petition No.2113/2020 and Writ Petition No.1796/2020 to the extent as indicated above, there is now no further need for any custody of the petitioner and no further orders need to be passed in that regard, except that the petitioner who is

already released, under this Courts order dated 24/7/2020, now stands a free man.

All applications stand disposed of accordingly.

Rule made absolute in the aforesaid terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

(SUNIL B. SHUKRE, J.)

Wadkar