# COURT NO. 2, ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

**Judgment**

1.
**OA 32/2019 with MA 645/2019**
**Col Anil Kumar Gupta** .....**Applicant**
**Versus**
**Union of India & Ors.** ..... **Respondents**

**For Applicant** : Mr. IS Singh, Advocate
**For Respondents** : Mr. TN Khehar, Advocate

**CORAM:**
**HON'BLE MS. JUSTICE SUNITA GUPTA, MEMBER (J)**
**HON'BLE AIR MARSHAL B. B. P. SINHA, MEMBER (A)**

**O R D E R**
**30.09.2019**

Vide separate order, OA has been rejected.

2. Learned counsel for the applicant made oral prayer for grant of leave to appeal which is opposed by the learned counsel for the respondents.

3. Learned counsel for the applicant has not been able to point out any question of law of public important involved in the case which warrants grant of appeal. As such, oral prayer of the applicant is declined.

**(JUSTICE SUNITA GUPTA)**
**MEMBER (J)**

**(AIR MARSHAL B. B. P. SINHA)**
**MEMBER (A)**

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**PRINCIPAL BENCH, NEW DELHI**

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**OA 32/2019 with MA 645/2019**
**Col Anil Kumar Gupta** **.....Applicant**
**Versus**
**Union of India & Ors.** **.....Respondents**

**For Applicant** : Mr. I.S. Singh, Advocate
**For Respondents** : Mr. Tarunvir Singh Khehar with
Mr. Prabhdeep Singh Bindra, Advocates

**CORAM:**
**HON'BLE MS. JUSTICE SUNITA GUPTA, MEMBER (J)**
**HON'BLE AIR MARSHAL B B P SINHA, MEMBER (A)**

**O R D E R**

Feeling aggrieved by the Order dated 22nd November 2018, passed by Respondent No. 4, whereby the applicant has been ordered to be tried by a General Court Martial on a Charge-sheet dated 19th November 2018 containing three charges, the present OA has been filed by the applicant claiming the following reliefs:-

a) *Call for the Complete Original record leading to the Impugned order dated 22.11.2018 and after perusal thereof set aside the Impugned order dated 22.11.2018, the same being illegal and arbitrary;*

b) *Set-aside the Charge-sheet dated 19.11.2018 as the charges contained therein are not only vague and suffer from the vires of multiplicity but are also based on illegal pre-trial proceedings;*

c) *Call for the Complete Court of Inquiry, Hearing-of-Charge and the Summary of Evidence proceedings and after perusal thereof set aside the same being illegal due to non-compliance of Army rule 180 and Army Rule 22;*

d) *Set aside the order by which the Applicant has been attached with 505 Army Base Workshop, Delhi Cantt.*

*New Delhi and revert the Applicant to his place of permanent posting so as to assume his normal military duties;*

e) *After setting-aside all the disciplinary proceedings and the Charge-sheet dated 19.11.2018, direct the Respondents to relieve the Applicant from the consequences of disciplinary proceedings taken against him so far, and place him in the same position he was before the commencement of the Court of Inquiry and the subsequent disciplinary proceedings under-taken against him; and*

f) *Pass any other order or directions as deemed appropriate by this Hon'ble Tribunal in the facts and circumstances of the case.*

2. We have heard Mr. I.S. Singh, Advocate for the applicant and Mr. Tarunvir Singh Khehar, Advocate for the respondents at great length and have carefully perused the record.

3. Learned counsel for the applicant strenuously contended that the order passed by Respondent No. 4, whereby the applicant had been ordered to be tried by a General Court Martial on a Charge-sheet dated 19th November 2018 containing three charges which have already become barred by limitation as prescribed under Section 122 of Army Act, 1950 is illegal. The charges are based on a complaint dated 13th August 2015 made by one Col Ramneesh Pal Singh wherein all the facts averred in the aforesaid three charges were clearly brought out, following which a Court of Inquiry was held. In the Court of Inquiry, the complainant made a detailed statement dated 20th October 2015 elaborating the facts. The three charges are alleged to have been committed

between the period 3rd July 2015 and 8th August 2015 which reflected that he had the knowledge of the alleged offence on the very dates on which the same were allegedly committed by the applicant. Therefore, commencing from 8th August 2015, the three years period of limitation prescribed under Army Act Section 122, expired on 7th August 2018.

4. Counsel further submitted that it was mentioned in the three charges that the offences described in each of the three charges 'came to the knowledge of authority competent to initiate action on 11th November 2016', thereby indicating that the three years period of limitation prescribed under Section 122 of the Army Act shall be computed from the date of knowledge of the authority competent to initiate action and not from the date of commission of the offence or the date of knowledge of the person aggrieved by the offence. It is submitted that Clause 1(b) or 1(c) of Section 122 of Army Act will come into play only if commission of the offence 'was not known to the person aggrieved by the offence or to the authority competent to initiate action'. In other words, if commission of the offence was already known to the person aggrieved on the date of commission itself, then clause 1(a) of the Army Act 122 will apply and not Clause 1(b) or 1(c) thereof.

5. Even assuming that the offence came to the knowledge of the person aggrieved by the offence or the authority competent

to initiate action on the later date, even then the earlier of the two dates, i.e. the knowledge of the aggrieved person or the knowledge of the competent authority, shall be the date from which the period of limitation shall commence as per Clause 1(b) of Section 122 of the Army Act. Accordingly, even if the period of limitation is computed as per Clause 1(b) of Section 122 the Army Act, even then the period of limitation shall be computed at least from 13th August 2015 when the complainant had preferred the complaint dated 13th August 2015. Subsequently, a Summary of Evidence (SoE) was recorded against the Applicant, where the Complainant again made an elaborate statement thereby reiterating the facts stated in his statement made before the Court of Inquiry. Thus it is crystal clear that 'the person aggrieved by the offence', i.e. the complainant had the knowledge of the alleged offences as early as 13th August 2015, if not earlier. Therefore, computing the three years of limitation as prescribed under Section 122 of the Army Act from 13th August 2015, all the three charges for which the Applicant has been ordered to be tried by GCM, became time barred on 12th August 2018, if not on 7th August 2018. It needs no emphasis that charges having become time barred under Army Act Section 122, which places an absolute bar on trial by Court Martial, the impugned order dated 22nd November 2018 passed by Respondent No. 4 is absolutely illegal and court martial has no jurisdiction to try the applicant under the Army Act.

6. Reliance is placed on :-

1. ***Foreshore Cooperative Housing Society Ltd. Vs. Praveen D.Desai. (2015) 6 SCC 412.***
2. ***Lt. col. H.S. Dhingra Vs. Union of India & Anr. ILR (1998) 2 Del 33***
3. ***Vinod Kumar Vs. Union of India & Ors. AFT Judgement dated 31.03.2017 in T.A. No. 947/2010***
4. ***Rajvir Singh Vs. Secretary, Ministry of Defence (2012 3 SCC 167***
5. ***Union of India Vs. V.N. Singh (2010) 5 SCC 579***
6. ***Oriental Bank of Commerce Vs. Delhi Develoment Authority & ors. Criminal Revision Appeal No. 259 & 260 of 1981, Delhi High Court Judgement dated 16.07.1982***

7. It was further submitted that besides the lack of jurisdiction of the GCM on account of charges having become time barred, the trial by Court Martial is also without jurisdiction for non-compliance of mandatory provisions of Army Rule 180. It is on record of Court of Inquiry proceedings that the Court of Inquiry was reassembled on the orders of the Convening Authority to record additional evidence. During recording of additional evidence, certain documentary evidence was taken on record at the applicant's back without showing the same to him. Further, after recording additional evidence, the Court of Inquiry proceedings were abruptly closed without affording the applicant an opportunity to make a statement in defence of his character and military reputation. It was submitted that anything less than full compliance of Army Rule-180 will necessarily vitiates all subsequent proceedings

undertaken on the basis of Court of Inquiry proceedings where Army Rule-180 was not fully complied with.

8. Moreover, the trial by GCM also lacks jurisdiction on account of non-compliance of another mandatory provision of Army Rule-22. In the instant case, the Commanding Officer was legally obliged to call & hear the witnesses in accordance with Army Rule-22 before he ordered the Summary of Evidence to be recorded. However, the Commanding Officer dispensed with the calling & hearing of witnesses on the false premise that provisions of Army Rule 180 were fully complied with during Court of Inquiry proceedings. It was averred that it is also the settled principle of law that provisions of Army Rule 22 are mandatory in nature which hits at the very root of the subsequent disciplinary/Court Martial proceedings, hence, non-compliance thereof will necessarily render the aforesaid proceedings as null and void being without jurisdiction.

9. It was further submitted that the entire case has been built up by the complainant Col Ramneesh Pal Singh on the basis of pure conjectures and suspicion and with a view to get rid of his wife by obtaining divorce from her on the ground of said extra-marital relationship which is established by the fact that he has already filed a petition for divorce in Tis Hazari Court.

10. Lastly, it was submitted that the offence described in the first charge contained in the impugned charge-sheet

essentially amounts to adultery having already been de-criminalized by the Hon'ble Supreme Court in ***Joseph Shine Vs. Union of India*** (2018) 2 SCC 189. The respondents have circumvented the law and thereby framed the charge under Army Act Section 45 instead of Army Act Section 69 read with Section 497 IPC which has been declared ultra-vires the Constitution of India. Moreover, the first charge is absolutely vague and uncertain which alleges "inappropriate relationship" which does not give enough information to the applicant as to what he is required to defend.

11. Under the circumstances, it is submitted that the Charge-sheet, Court of Inquiry, framing of Charge and Summary of Evidence proceedings be set aside.

12. Countering the submissions of the learned counsel for the applicant, learned counsel for the respondents submitted that the present OA filed by the applicant under Section 14 of Armed Forces Tribunal Act 2007 (AFT Act 2007) is not maintainable. The said Section requires that there has to be **"an order"** by which the applicant is aggrieved. Moreover, the said order should be pertaining to a **"service matter"**. Section 3(o) defines the ambit and scope of an application which could be termed as a **"service dispute".** The OA does not suggest that it relates to a **"service dispute"** and therefore, the application under Section 14 of AFT Act 2007 is not maintainable. The remedy available to the applicant was

to file appeal under Section 15 of the Armed Forces Tribunal Act as this Section provides that the Tribunal shall exercise all powers, jurisdiction and authority in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or **"incidental thereto".**

13. It is submitted that only after passing of the final order by the GCM, if the applicant is aggrieved then he can challenge the same under Section 15 of the AFT Act but filing of the OA at this juncture is pre mature. Reliance is placed on orders passed in :-

1. *OA 1369/2016 Col Manish Kumar Chakraborty Vs. UOI & Ors. decided on 10.11.2016*
2. *OA 176/2015 Hav Sham Das D Vs. UOI & Ors. decided on 07.04.2014*
3. *OA 326/2019 Maj Gen. Debasish Roy Vs. UOI & Ors. decided on 08.05.2019*
4. *OA (Appeal No. 997 of 2015) Maj. Asha Roshni vs. UOI & Ors. decided on 13.02.2017*

14. Learned counsel further referred to the order dated 09.01.2019 where while declining stay of the Court martial proceedings it was observed as under:-

> *"8. We are not inclined to stay the Court Martial proceedings on account of the fact that no doubt Section 122 of the Army Act prohibits taking of cognizance beyond a period of limitation prescribed therein but in the first instance though we are examining this order, the applicant is not precluded from raising such an objection before the court Martial itself. In addition to this, holding of a General Court Martial proceedings is an elaborate exercise. There is*

*movement of various officers from different units who may constitute the court and therefore, staying of the Court Martial itself at this belated stage would only cause irreparable loss to the respondents."*

15. Reference is also made to the following observations made by Hon'ble High Court in its order dated 27.08.2019 in WP(C) 9258/2019 which was filed by the applicant challenging the order dated 19.08.2019 passed by this Tribunal whereby this Tribunal had declined to defer the recording of evidence before Court martial:-

*"The Court is not prima facie satisfied about the maintainability of such an application before the AFT."*

16. It is further submitted that proceeding under Section 15 of the Act is also subject to other provisions of the Act. Section 21 of the AFT Act 2007 categorically creates an embargo upon admitting such an application without availing alternate remedy available under law. Reliance has been placed on an order passed by the Principal Bench of this Tribunal in ***Major General Basavaraj G. Gillganchi Vs. UOI,*** OA No. 125/2016 dated 13th December 2018 where it was held that it is mandatory to exhaust all remedies before approaching the Tribunal.

17. Even otherwise, it is submitted that during the pendency of this present OA, the applicant has availed the remedies available to him as he himself has placed on record the orders dated 18.01.2019 and 28.01.2019 passed by the General Court Martial rejecting the applicant's **"Plea in bar"** and

**"Special plea to jurisdiction".** However, for reasons best known to the applicant, though he has filed a Miscellaneous Application under Rule 25 of the Armed Forces Tribunal (Procedure) Rules 2008 seeking stay of the proceedings but he has not sought modification of the original application nor challenged the orders passed by the GCM.

18. As regards Army Rule 180 is concerned, it was submitted that the provisions of Army Rule 180 has been duly complied with. The applicant has not placed on record any documents to establish non-compliance of this Rule. There is no violation of Army Rule 22. The Commanding Officer dispensed with the calling and hearing of witnesses since the provision of Army Rule 180 had been duly invoked and complied with during the proceedings of Court of Inquiry. The applicant did not prefer to make an additional statement on his own volition. Reference is made to the Court of Inquiry proceedings for submitting that the applicant is well-versed with the provisions of Section 180 of Army Act. Reference was made to page 177 of the Court of Inquiry, wherein while signing the certificate under Section 180, the applicant gave his dissent but while signing certificate at page 178, no dissent was given. As such, nothing prevented the applicant from giving his own statement and it is not even his case that he offered to make his statement but was disallowed by the competent authority to do so.

19. As regards the plea of the applicant that no cognizance could have been taken since the same is now barred by limitation, it is submitted that the said provision of Section 122(1)(a) of the Army Act 1950 can be applied if there is knowledge of both the offences and the identity of offender. If either the offence or identity of offender is not known as on the date of offence, the provision will not be applicable. The complaint of the complainant only revealed the identity of the applicant but lacked in material aspects with respect to exact nature and details of the offence and the manner of commission of the offence. Therefore, the period of limitation would not begin to run from the date of offence i.e. 13th August 2015.

20. Further **'information'** cannot be equated with **'actionable knowledge'.** In order to check the authenticity and veracity of the complaint, the competent authority had to initiate a Court of Inquiry to acquire "actionable knowledge" with reasonable certainty about the offences committed by the applicant. Moreover, identity of the offender and nature of offence committed should have come to the knowledge of the authority competent to initiate action. The complainant Col RP Singh in his complaint dated 13th August 2015 himself had requested for investigation in the matter which clearly indicates that the exact nature of offence was not known to the person aggrieved/complainant. Moreover, the complaint dated 13th August 2015 was addressed to Brig. Ajay Vig. Cdr.

79 Mtn Bde. amongst others including COAS and Raksha Mantri. It was also stated that the applicant was then posted in HQ, Directorate General, National Cadet Corps. The complaint was not addressed to GOC, Delhi Area which clearly suggest that the authority competent to take cognizance and initiate action in respect of the applicant was not aware of the complaint on 13th August 2015. Nature of offence came to the knowledge of GOC, Delhi Area on the date of finalization of proceedings of Court of Inquiry i.e. 11th November 2016 and therefore, it cannot be said that initiation of proceedings against the applicant is barred by limitation. Reliance is placed on :

1. Union of India Vs. V.N. Singh (2010) 5 Section 579
2. J.S. Shekhon Vs. Union of India (2010) 11 Section 586
3. Col. Rajvir Singh Vs. Secretary, Ministry of Defence & Ors. (2012) 3 SCC 167.
4. Ex Sub Gaikwad MB Vs. Union of India (OA 479/2013 decided on 08.01.2019.)

21. It is further submitted that striking off Section 497 IPC in Joseph Shine's judgment (supra) will not have any effect as the charges have been framed against the applicant for offence under Section 45 of Army Act 1950.

22. Rebutting the submissions of learned counsel for the respondents, learned counsel for the applicant submits that OA is maintainable under Section 14 of the Act as sub-section

(1) and (2) of this Section provides that any person aggrieved by an order pertaining to any 'service matter' can make an application to the Tribunal. It is submitted that service matter is defined in Section 3(o) of the Act. It means "all matters relating to the conditions of service" and then includes (i), (ii) and (iii) and goes on to include in (iv) "any other matter, whatsoever". Moreover, the applicant had no other alternative remedy available to him under law. Section 15 of the Act is not applicable at this stage as he is not challenging any order passed by GCM at this stage. Further, he could not have filed statutory complaint in view of letter dated 21st December 2019, whereby it has been ruled that complaints under Section 26 and 27 of the Army Act are not entertainable pertaining to the court martial and disciplinary matters after cognizance of offence has been taken and disciplinary proceedings commenced.

23. It is submitted that the remedies provided under Section 164, Section 179 and Army Rule 33 are not available to the applicant at this juncture. The other submissions made by learned counsel for the respondents were also refuted and the submissions made at the initial juncture were reiterated.

24. We have given our considerable thoughts to the respective submissions of learned counsels for the parties and have perused the record.

25. First of all we shall consider the submission of learned counsel for the respondents that the OA under Section 14 of the Armed Forces Tribunal Act 2007 is not maintainable as it is not covered under Section 3(o) of the Act being not a service matter and the appropriate remedy was to file OA under Section 15 of the AFT Act, after final order is passed and present OA is premature, whereas according to the applicant, the instant matter is covered by "any other matter" as provided under 3(o)(iv). We have gone through various orders relied upon by the learned counsel for the respondents in this regard.

26. In ***Col. Manish Kumar Chakraborty*** *(supra)* also OA was filed under Section 14 of the Armed Forces Tribunal Act for quashing the attachment order, tentative charge sheet and subsequent disciplinary proceedings. The OA was dismissed at the stage of admission itself observing that when disciplinary proceedings are initiated against the applicant serving him a tentative charge-sheet, it was not a fit case calling for the intervention of the Tribunal.

27. The order was challenged by filing SLP 3144 of 2017 before Hon'ble Supreme Court however Hon'ble Supreme Court did not interfere with the order passed by the Tribunal.

28. In ***Maj. Debasish Roy*** (supra) also the challenge was to the disciplinary action initiated against the applicant on various counts. There also an objection was taken by the respondents regarding the maintainability of the OA and the

respondents had relied upon the order dated 7th April 2015 passed by the Tribunal in ***Hav. Sham Das D*** (supra) and particular reference was made to para 24 and 25 of the said order which reads as under:-

> *"24. Applying the principle to sub-section (1) of Section 15 of the Act, the contention that the expression 'any order' must mean 'all orders' or 'every order' does not appear to be sound. It is pertinent to mention that certain final orders such as the one under Section 151 of the Army Act, 1950, may also be passed by a Court martial.*
>
> *25. Having thus considered all the relevant aspects of the matter, including the legislative history, object, basic scheme and the provisions of the Act and the nature of Court Martial Proceedings we are not inclined to accept the argument that any order passed by the Court Martial would be appealable under sub-section (1) of Section 15 of the Act. The provision is applicable to a final order only as any contrary interpretation would not only frustrate the purpose of the Act but also make the entire system of administration of justice in the Armed Forces unworkable."*

It was observed that since the GCM was pending, the OA was not legally tenable and uncalled for.

29. ***Maj. Asha Roshni*** (supra) was also a case where the applicant had challenged the attachment order and sought quashing of the disciplinary action against her. Similar pleas, as in the instant case, were taken before the Tribunal and it will be relevant to reproduce para 10 to 12 as under:-

> "10. There is vast difference between a Court and a Tribunal. Whereas it could be stated all Courts are

Tribunal it is not so vice versa. A Tribunal constituted under a Statute has to discharge its functions in accordance with the parameters laid there under. In procedural matters, no doubt, it can exercise inherent powers to have some flexibility, but in respect of matters falling under its jurisdiction its adjudication and findings to be rendered, it has to go by the provisions of the Statute, under which it is established. Armed Forces Tribunal has been established to provide for adjudication or trial of disputes and complaints over service matters of Armed service personnel, both serving and retired, including their dependents, heirs and successors, and for appeals arising out of orders, findings or sentence of Court martial held under the three separate Acts governing such Armed Forces personnel. Section 14 of the Act deals with jurisdiction, powers and authority in service matters and Section 15 of the Act, matters of appeal against Court martial, by the Armed Forces Tribunal. These sections, both of them beginning with the words 'Save as otherwise expressly provided in this Act', demonstrate that the Tribunal has to exercise its jurisdiction, powers and authority over 'service matters' and 'Court martial' abiding and respecting the inbuilt safeguards and checks incorporated under various provisions of the Act, which, no doubt, are intended to insulate and maintain discipline of the military force. So far as 'service matters' it is stated that the tribunal has the jurisdiction, powers and authority of the Courts, which exercised such authority immediately before the Act came into force, except that of the Supreme Court or High Court exercising jurisdiction under Articles 226 and 227 of the Constitution. The decisions relied by the learned counsel for applicant viz. **State of Haryana v. Bhajan Lal 1992 (Supp) 1 SCC 335, Zandu Pharmaceuticals v. Mohd Sharaful Haque (2005) 1 SCC 122, IOC v. NEPC India Ltd. & Others (2006) 6 SCC 736 and Inder Mohan Goswami v. State of Uttaranchal (2007) 12 SCC 1,** dilating upon the quashing of criminal proceedings in exercise of powers under Section 482 of Code of Criminal Procedure or Article 226 of Constitution of India have no bearing in examining the jurisdiction, powers and authority exercisable by the

Armed Forfces Tribunal. Similar is the situation in **C. Ratnaswamy v. K.C. Palaniswamy and others (2013) 6 SCC 740** over the quashment of proceedings, civil or criminal, when warranted to prevent abuse of process of court in exercise of the powers under Articles 136 and 142 by the Apex Court or Article 226 by the High Court. The Tribunal does not have jurisdiction as of a High Court exercising its authority under Article 226 is explicitly made clear under Section 14 of the Act. Section 482 of the Cr. P.C. does not confer inherent powers to a High Court thereunder, but only recognizes and amplifies inherent powers enjoyed by that Constitutional Court to exercise its authority to quash a criminal proceedings wherever it is found necessary to advance the ends of justice. It is futile to contend that Armed Forces Tribunal can exercise its jurisdiction to quash any disciplinary proceedings against an Armed Forces service personnel following the principles laid down by the Apex court in the aforesaid decisions, which essentially dilated upon the powers of the High Court under Section 482 Cr. P.C. and Article 226 of the Constitution of India to quash criminal proceedings and that of Apex Court under Articles 136 and 142 over any proceedings abusing the process of court.

11. Now we have to examine what should be the interpretation to be placed on 'any other matter, whatsoever' in Section 3(o) of the Armed Forces Tribunal Act, which deals with 'service matters'. 'Service matters' is defined under Section 3(o) of the Act thus:

"3. Definitions.—In this Act, unless the context otherwise requires,--

xx xx

(o) "service matters", in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), mean all matters relating to the conditions of their service and shall include—

(i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure, including commission, appointment, enrolment, probation, confirmation, seniority, training, promotion, reversion, premature retirement, superannuation, termination of service and penal deductions;

(iii) summary disposal and trials where the punishment of dismissal is awarded;

(iv) any other matter, whatsoever, but shall not include matters relating to—

(i) orders issued under section 18 of the Army Act, 1950 (46 of 1950), sub-section (1) of section 15 of the Navy Act, 1957 (62 of 1957) and section 18 of the Air Force Act, 1950 (45 of 1950); and

(ii) transfers and postings including the change of place or unit on posting whether individually or as a part of unit, formation or ship in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950).

(iii) leave of any kind;

(iv) Summary Court Martial except where the punishment is of dismissal or imprisonment for more than three months".

Any other matter whatsoever in Section 3(o)(iv) of the Act has to be examined and understood not in isolation but in relation to those which are included in service matters and excluded under the general definition. It is totally fallacious to hold that 'any other matter whatsoever' include all service matters of Armed Forces service personnel which are not excluded. 'Any other matter whatsoever' has to be given a narrow and restricted meaning taking note of the service matters specifically included under the definition. Having regard to the scheme of the Act and definition of 'service matters' with the inclusive and exclusive clause thereunder, and also in the backdrop of the nature of jurisdiction, powers and authority of Tribunal conferred under Sections 14 and 15 of the Act, the scope, ambit and meaning 'any other matter

whatsoever' in relation to service matter of Armed service personnel has to be analyzed. By no stretch of imagination it can be said that all service matters of Armed Forces personnel other than those excluded under the Section 3(o) of the Act will fall within the purview of service matters as under 'any other matter whatsoever'. On the contrary, its scope is limited and it has application only where it is shown that the service matter over which the complaint is made by the Armed Forces service personnel is something which has disastrous consequences on such personnel if not prevented and for which he has no efficacious remedy and, further, entertaining and adjudication of any grievance thereof is not barred implicitly or explicitly by application of right of appeal provided against any order, decision, finding or sentence passed by a Court martial or any matter connected therewith or incidental thereto, as under Section 15 of the Act.

12. "Any other matter" covered under clause (iv) of Section 3(o) of the Act has to be examined with reference to the scheme of the Act, and jurisdiction, power and authority conferred over the Tribunal under Section 14 and 15 of that Act, and when it so analyzed, without any hesitation, it has to be held that no challenge against a Court of Inquiry nor its findings, ordinarily, will lie before a Tribunal. A Court of Inquiry is nothing but a fact finding enquiry and how it is to be conducted is governed by the rules laid down in Chapter XII of the Defence Service Regulations. Army Rules and Regulations for the Army also provide additional safeguards insulating the rights of parties who are likely to be proceeded against on the basis of findings formed in a Court of Inquiry. Competent authority as and when situation demand may constitute Court of Inquiry to decide the future course of action to maintain discipline and ethos of the defence forces. A Court of Inquiry as such does not postulate a proceeding against a person, leave alone, any disciplinary action. It is only on the basis of the findings of the Court of Inquiry and more so on acceptance of such findings by the competent authority that the question of disciplinary

> action may arise. So, in the absence of exceptional circumstances disclosing that the Court of Inquiry ordered is vitiated and per se tainted with illegality no challenge thereto can be entertained before a Tribunal or a Court. In matters involving discipline of the Forces and any deviation detected thereto, giving rise to a Court of Inquiry, normally no interference is permissible since whatever be the opinion formed in the enquiry, if at all disciplinary action follows the person proceeded under military law is amply insulated and protected of all his valuable rights. Similar is the case of an order of attachment in contemplation of a disciplinary action. An attachment at the most is only a temporary posting for some definite purpose. Merely attaching an officer for the purpose of disciplinary proceedings is neither a punishment or a stigma, nor it tends to directly or indirectly adversely affect his service in any manner. So much so, ordinarily, no challenge against a Court of Inquiry or its findings or an order of attachment is entertainable before a Court or before the Tribunal as a 'service matter' falling under 'any other matter' under clause (iv) of Section 3(o) of the Act."

30. In the peculiar circumstances of that case, the Tribunal found that an exceptional case was made out showing fragrant violation of principles of natural justice in the Court of Inquiry and the disciplinary proceedings ordered to be initiated against the applicant. Therefore, the OA was partly allowed and the attachment order was set aside.

31. In all these cases, the disciplinary proceedings before Court martial was challenged by filing OA under Section 14 of AFT Act and same was held to be not maintainable and it was held that the remedy lies under Section 15 of the Act against the order passed by the GCM or the confirming authority. In view of the same, we are of the view that since no order was

passed by the GCM when the present OA was filed, therefore, filing of this OA is pre mature.

32. Even if it is taken that the applicant should not be left remedy less and therefore, his OA be entertained, it is to be seen whether it bears any merit or not.

33. As regards the submission of learned counsel for the respondent is that the present OA is not maintainable as before approaching the Tribunal, the applicant has not availed the remedies available to him under Army Act as provided under Section 21 of the AFT Act 2007. As stated above, learned counsel for the applicant has placed reliance on the letter dated 21st December 1990 for submitting that no such complaint is entertainable. For the sake of convenience, this letter is reproduced as under:-

***"STATUTORY COMPLAINTS OFFICERS***

*1. It has come to the notice of this Headquarters that with a view to stall disciplinary proceedings, a number of Army Personnel submit statutory complaints under the provisions of Army Act Sec 26 and 27 at various stages of such discipline proceeding. The matter has been examined carefully at this Headquarters, in consultation with Ministry of Law and it has been ruled that complaints under Section of Sec-26 and 27 of the Army Act are not entertainable pertaining to the court martial and disciplinary matters after cognizance of offence has been taken and disciplinary proceeding commenced. Adequate remedies are already available with regard to such proceedings under Army Act Section 164, Section 179 and Army Rule 33.*

*2. Suitable instruction to the units/formations under your Command may, accordingly, be issued.*

*------Sd-------*

*(D.K. Dasgupta)*
*Maj. Gen.*
*Addl DG D&V*
*for Adjutant Genral*

*List 'D'*
*AO/ 1/ 99"*

34. A bare perusal of this letter goes to show that complaints under Section 26 and 27 of the Army Act are not entertainable pertaining to Court Martial and disciplinary matters after cognizance of offence has been taken and disciplinary proceedings has been commenced.

35. The remedy under Section 164 of the AFT Act was not available to the applicant when the OA was filed as plea of **"bar of jurisdiction"** was taken before court martial during the pendency of present OA.

36. However, applicant himself has placed on record the orders dated 18.01.2019 and 28.01.2019 whereby GCM has rejected the plea of applicant regarding bar of jurisdiction of GCM on the ground of limitation and also special plea to jurisdiction which was taken during the pendency of present OA. It does not appeal to reason as to why the applicant did not amend the OA & challenged the orders passed by GCM.

37. The applicant cannot be allowed to adopt parallel proceedings by agitating the matter before this Tribunal and before competent authority. At the cost of repetition, it may be mentioned that most of the pleas which have been taken by the applicant in the present OA were also taken before GCM

and vide detailed speaking orders, same were rejected however, for reasons best known to applicant, he has chosen not to challenge those orders in these proceedings. Therefore, some are not required to be adjudicated upon again in these proceedings.

38. Even if it is taken that OA was filed earlier taking all these pleas before raising these pleas before GCM, it is to be seen whether the same bears any merit or not.

39. It is the case of applicant that orders of the competent authority for trial of the applicant by GCM is barred by limitation as provided under Section 122 of the Army Act for reasons mentioned hereinbefore.

40. In order to appreciate this submission, it will be relevant to extract Section 122 of the Army Act which reads as under:-

> *"Section 122. Period of limitation for trial (1) Except as provided by sub- section (2), no trial by court-marital of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence-*
>
> *(a) on the date of the offence; or*
>
> *(b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or*
>
> *(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.*

*(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37.*

*(3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory; or in evading arrest after the commission of the offence, shall be excluded.*

*(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army.*

41. This Section, in substance, prescribes that no trial by Court Martial of any person subject to the provisions of the Act for any offence shall be commenced after the expiration of a period of three years. It further explains as to when period of three years shall commence. It provides that the period of three years shall commence on the date of the offence or where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority whichever is earlier.

42. The purpose of incorporating this Section has been explained by Hon'ble Supreme Court in ***V.N. Singh*** (supra) as under:-

*The purpose of Section 122 is that in a civilised society a person should not live, for the rest of his natural life, under a Sword of Damocles and the prosecution be allowed to rake up*

*any skeleton from any cupboard at any time when the accused may have no further materials, oral or documentary, to prove that the skeleton is not from his cupboard. If the device is left open to the prosecution to convene a Court Martial at its leisure and convenience, Section 122 will lose all significance. Section 122 is a complete Code in itself so far as the period of limitation is concerned for not only it provides in Sub-section (1) the period of limitation for such trials but specifies in Sub-section (2) thereof, the offences in respect of which the limitation clause would not apply. Since the Section is in absolute terms and no provision has been made under the Act for extension of time, it is obvious that any trial commenced after the period of limitation will be patently illegal. The question of limitation to be determined under Section 122 of the Act is not purely a question of law. It is a mixed question of fact."*

43. In view of the foregoing, the question for consideration is whether the period of limitation in respect of all three charges contained in the charge-sheet would start from either of the following:

a) from respective dates of offence as alleged in the Charge-sheet;

b) 13th August 2015, i.e. date of complaint ;

c) when the Court of Inquiry was ordered by GOC, Delhi Area i.e. 18.10.2015; or

d) When authority competent to initiate action on Court of Inquiry gave direction i.e. 11th November 2016.

44. It is the case of the applicant that the period of limitation under Section 122 of the Army Act will commence from the date of the complaint i.e. 13th August 2015 when the complainant made the complaint to Brig. Ajay Vig, Cdr. 79, Mtn Bde, with a copy to COAS i.e. authority competent to initiate action. According to him, the complaint clearly gives the nature of offence committed as well as the identity of the

offender. Therefore, the twin conditions incorporated in Army Act 122 Clause 1(b) were met. However, according to the respondents, the complaint itself lacked complete details and was not supported in material aspects. The complainant himself requested for conducting an enquiry into the matter. Therefore, no action could have been initiated against the accused based on the said complaint. Therefore, according to the respondents, the period of limitation will begin from 11th November 2016 when the authority competent to initiate action gave its direction on Court of Inquiry.

45. In order to appreciate rival submissions of the learned counsel for the parties, it will be advantageous to reproduce the complaint dated 13th August 2015 made by the complainant to Brig Ajay Vig., Cdr. 79, Mtn. Bde.:-

> *"COMPLAINT IN R/O IC 56663 COL ANIL K GUPTA*
>
> *Dear Brigadier*
>
> 1. *I am writing this letter to bring to your notice an act of stealing brother officer's affection by IC 56663, Col Anil K Gupta. The officer is presently posted at HQ DG NCC in New Delhi, tenanting the appt of Dir NCC (PLG) COORD.*
> 2. *The offr has been sending indecent msgs to my wife, which are sexually explicit in nature and there is reasonable cause to believe that they have indulged in illegitimate physical relationship. My wife, Mrs. Sugandhi Aggarwal, has been equally involved and has reciprocated positively to these msgs. The offr vis my house in Delhi on 13th July 2015, after lying to his wife about some official social engagement and was present there from 2030 H, for approx two hours.*

> 3. *With regard to my marriage, I intend initiating divorce proceedings in the civ court, based on charges of infidelity. However, I would request you to initiate suitable inquiry into the incident and take up case for discp action against the offr, as deemed fit. May I also request you to initiate the process for forthwith posting out of Col AK Gupta from Delhi."*
>
> ***(Emphasis added)***

46. There is no doubt that as held in ***V.N. Singh*** (supra) and ***Oriental Bank of Commerce*** (supra), the complainant was the **"person aggrieved"** since he is a natural person and the allegation made by him with respect to the applicant pertained to his own wife. However, a bare perusal of complaint goes to show that although the name of the offender has been mentioned by the complainant, however, it was not mentioned whether indecent messages allegedly sent by the applicant to the wife of the complainant were verbal/written or electronic nor the contents of such messages were revealed in the complaint. Moreover, the complainant himself was not sure about the same as it is mentioned **"there is reasonable cause to believe xxxxx".**

47. Further the complainant himself made a request **"to initiate suitable inquiry into the indecent messages and take up the case for disciplinary action against the Officer".** Thus, the knowledge of the complainant was not of such a nature so as to disclose an offence under the Act. In order to fasten the applicant with any liability, further investigation was required to be conducted as to whether any

offence has *prima facie* been committed or not. That being so, although the identity of the offender was disclosed but the offence alleged against the offender required investigation. That being so, the period of limitation in respect of charges contained in the Charge-sheet would not begin to run from the date of complaint i.e. 13th August 2015 as alleged by the applicant.

48. Reliance has been placed by learned counsel for both the parties on V.N. Singh's case, where the facts were that during inspection of unit (4 RPD), certain irregularities were noticed with regard to local purchase of hygiene and chemicals in May 1993. A preliminary investigation was ordered on 05.05.1993 (One Man Inquiry) which submitted its report on 17.05.1993. On 8.1.1994, Technical Court of Inquiry was ordered which submitted its report which led to ordering of Staff Court of Inquiry on 07.05.1994. The Staff Court of Inquiry submitted its report on 31.08.1994 blaming the respondent. GOC-in-C Western Command finalized the Staff Court of Inquiry and directed disciplinary action against the respondent on 03.12.1994. Hon'ble Supreme Court held that the question of limitation to be determined under Section 122 of the Act is not purely a question of law. It is a mixed question of fact and law and further held that the plea that the date of submission of report by the Technical Court of Inquiry should be treated as the date from which the period of limitation shall commence has no substance. It was observed that no definite conclusion

about the correct details and the persons responsible for the irregularities was mentioned in the report of the Technical Court of Inquiry. It was only after detailed investigation by Staff Court of Inquiry that the irregularities committed by the respondents and his role in the purchase of hygiene and chemicals came to light. On the facts and the circumstances of the case, it was held that the period of limitation for the purpose of trial of the respondent commenced on 03.12.1994 when the GOC-in-C Western Command being the competent authority directed disciplinary action against the respondent in terms of Sec 122(1) (b) of the Army Act. It was observed that the limitation cannot commence from the date of receipt of a vague complaint and the said period will commence from the date of direction on the Staff Court of Inquiry when correct details and facts regarding the offence and offender were ascertained and came into knowledge of the authority competent to initiate action.

49. In ***Col Rajvir Singh's*** *case* a pseudonymous complaint dated 27.10.2006 making allegations of gross irregularities committed by the appellant in purchase of stores of COD Cheokki was received. The complaint was seen by the GOC-in-C, Central Command on 15.11. 2006. The complaint was followed by a report by the Central Command Liaison Unit which also highlighted the irregularities committed in procurement of stores at COD, Chheoki. This report was also seen by GOC-in-C Central Command on 06.12.2006. On

9.12.2006, a Court of Inquiry was ordered by GOC-in-C,to investigate the alleged irregularities in purchases of store at COD Cheokki. Court of Inquiry submitted its report on 24.01. 2007 blaming the Appellant. On 07.05.2007, the GOC-in-C Central Command gave his recommendations and forwarded the Court of Inquiry to IHQ of MoD (Army). Pursuant thereto, IHQ of MoD (Army) asked GOC-in-C Central Command to finalize the Court of Inquiry vide letter dated 19.2.2008 in respect of the appellant. On 12.5.2008, GOC-in-C Central Command gave directions on court of Inquiry and directed disciplinary action against the appellant. It was held that the period of limitation had commenced after conclusion of the Staff Court of Inquiry when the same was scrutinized by GOC-in-C Central Command and recommendations for disciplinary action were endorsed and not when the complaint was received or report of Liasion Unit was received.

50. Similarly, in ***J.S. Shekhon (supra),*** certain irregularities were noticed by authorities in purchase of equipment and investigated the contract agreements on 06.12.1994. A vigilance check was performed on 09.12.1994 and comments of petitioner were called for which were submitted on 06.02.1995. The discrepancies detected in Vigilence Report and comments of petitioner led to ordering of Technical Board of Officers, which submitted its report on 09.04.1995. Thereafter, a Court of Inquiry was ordered, which was finalized on 11.10.1996. It was held by Hon'ble Supreme Court that

since the authority competent to initiate action has derived his knowledge about the commission of offence on submission of the report of the Court of Inquiry on 11.10.1996 or at the most on submission of the report by the Technical Board of Officers on 09.04.1995 and the date of convening of the trial by General Court Martial is 09.03.1998, the trial is not barred by limitation as sought to be submitted by the counsel appearing for the appellant and therefore, the submission of the counsel appearing for the appellant fails and is rejected. Thus, the Hon'ble Apex court had concluded that requisite knowledge envisaged by Section 122 of Army Act was acquired by the authority competent to initiate action only after investigation were concluded and not merely based on Vigilance Check Report.

51. In Ex Sub Gaikwad MB it was held as under:-

> *"As per section 122 of Army Act, the starting point of limitation in court martial is the date of knowledge of the authority competent to initiate disciplinary action"*

52. Reverting to the case in hand, the period of limitation cannot be said to have commenced on the basis of a complaint made by the complainant who himself wanted an enquiry to be conducted into the indecent messages making general allegations against the applicant and his own wife therefore, the competent authority, in its wisdom, directed to conduct Court of Inquiry to ascertain the veracity of allegations made

in the complaint. It is the case of the applicant himself that it was only on 20th October 2015 when the complainant made a detailed statement elaborating the facts before the Court of Inquiry.

53. Moreover, the complaint dated 13th August 2015 was addressed to Brig. Ajay Vig, Cdr. 79 Mtn Bde amongst others including COAS and Raksha Mantri. It is the case of respondents that the applicant was then posted in Headquarters Directorate General National Cadet Corps but the complaint was not addressed to GOC, Delhi Area who was the authority competent to take cognizance and initiate action in respect of the applicant. As observed by Hon'ble Supreme Court in J.S. Sekhon Vs. UOI (supra), the date of knowledge of commission of offence of the competent disciplinary authority becomes material as he is the competent authority to convene a General Court Martial. The period of limitation in the instant case would begin to run from the date of direction of GOC, Delhi Area on the Court of Inquiry proceedings. Since the report of Court of Inquiry revealed the nature of offence allegedly committed by the applicant, the same was ordered on 11th November 2016.

54. The Charge-sheet containing three charges was signed on 19th November 2018 thereby directing the trial of the applicant by a General Court Martial. Taking the date of 11th November 2016 when the offences described in each of three charges

came to the knowledge of the authority competent to initiate action against the applicant, then the order dated 19th November 2018 by which the applicant was ordered to be tried by General Court Martial was within three years and is not barred by time.

55. Adverting to the submission of learned counsel for the applicant that so far as compliance of Rule 180 is concerned, when the Court of Inquiry was initially commenced, the said Rule was complied with. However, when the Court of Inquiry reassembled on the orders of the Convening Authority to record additional evidence at that time, there was failure on the part of the competent authority to comply with Army Rule 180 as no opportunity was afforded to the applicant to make his statement.

56. We have perused the record submitted by the respondents which reflect that the applicant is well-versed with the provisions of Rule 180 which is reflected from the fact that while signing page 177 of the Court of Inquiry regarding certificate under Section 180, the applicants gave a note of his dissent but while signing certificate at page 178, no dissent was given. When the additional evidence was recorded, the applicant did not prefer to make any additional statement and it is not even his case that he offered to make fresh statement but was disallowed to do so by the competent authority.

Therefore, the applicant has not been able to make out a case that there was any violation of Army Rule 180.

57. As regards the next limb of arguments of learned counsel for the applicant, that the General Court Martial lacked jurisdiction on account of non-compliance of mandatory provisions of Army Rule 22, it will be in fitness of things to reproduce Section 22 of the Army Rules, 1954, so far as it is material for the present purpose.

> **"Section 22 in The Army Rules, 1954**
>
> *(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence: Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of Rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1)."*

58. A perusal of Army Rule 22(i) goes to show that it is obligatory on the part of the Commanding Officer to hear the charges in the presence of accused, grant liberty to accused to cross examine the witnesses, afford opportunity to accused to call witness(s) and to make statement in his defence. However, the Rule itself provides that the Commanding Officer can dispense with calling and hearing of witnesses in case Army Rule 180 has been fully complied with during the Court of Inquiry proceedings. In the instant case also, the Commanding Officer has dispensed with compliance of Army Rule 22 on the ground that provisions of Rule 180 has been complied with.

59. Coming to the last limb of the arguments of learned counsel for the applicant that in view of the judgment passed by Hon'ble Supreme Court in ***Joseph Shine's*** case, the first charge contained in the impugned Charge-sheet essentially amounts to adultery which has been decriminalized by Hon'ble Supreme Court in the aforesaid judicial pronouncement. Therefore, in order to circumvent the law, the respondents have framed the charges under Army Act Section 45 instead of Section 69 read with Section 497 IPC which has been declared unconstitutional. It was submitted that what cannot be done directly cannot be allowed to be done indirectly.

60. A perusal of the Charge-sheet goes to show that applicant has been charge sheeted on following counts:-

***"CHARGE SHEET***

*The accused, IC-56663X Colonel Anil Kumar Gupta, 54, Uttar Pradesh Battalion, National Cadet Corps, Kanpur, attached to 505 Army Base Workshop, an Officer holding a Permanent Commission in the Regular Army, is charged with:-*

***First Charge***
***Army Act***
***Section 45***

***BEING AN OFFICER BEHAVING IN A MANNER UNBECOMING HIS POSITION AND CHARACTER EXPECTED OF HIM***

*in that he,*
*at Delhi, between 03 July 2015 and 08 August 2015, which came to the knowledge of authority competent to initiate action on 11th November 2016 indulged in an inapparopriate relationship with Mrs. Sugandhi Aggarwal, wife of IC 56206K Colonel Ramneesh Pal Singh.*

***Second Charge***
***Army Act***
***Section 45***

***BEING AN OFFICER BEHAVING IN A MANNER UNBECOMING HIS POSITION AND CHARACTER EXPECTED OF HIM***

*in that he,*

*at Delhi, between 06 July 2015, which came to the knowledge of authority competent to initiate action on 11th November 2016 sent a sexually explicit video message from mobile No. 8527701044, used by him to Mobile No. 9891445445 used by Mrs. Sugandhi Aggarwal, wife of IC 56206K Colonel Ramneesh Pal Singh.*

***Third Charge***
***Army Act***
***Section 45***

***BEING AN OFFICER BEHAVING IN A MANNER UNBECOMING HIS POSITION AND CHARACTER EXPECTED OF HIM***

*in that he,*

*at Delhi, between 06/-7 August 2015 night, which came to the knowledge of authority competent to initiate action on 11th November 2016 improperly induolged in sexually explicit chatting on WhatsApp from mobile No 9891445445 used by Mrs. Sugandhi Aggarwal, wife of IC 56206K Colonel Ramneesh Pal Singh."*

61. The charges have been framed under Army Act Section 45 and are covered within the definition of 'Offences' as defined in Section 3(xvii) of the Army Act 1950. Since no charge has been framed under Section 69 or Section 497 IPC, at this stage applicant cannot take any benefit from the judgement passed by Hon'ble Supreme Court in ***Joseph Shine's*** case. In any case, proceedings are still going on before GCM, if on the basis of evidence coming on record, it turns out that offence is basically under Section 69 or Section 497 IPC, it will be open to applicant to raise this issue before GCM. But at this stage, there are no grounds to quash proceedings on this count.

62. No other point was urged by learned counsel for the applicant during the course of arguments and it was specifically stated that he is pressing only relief (a) and not other reliefs as prayed in the OA.

63. In view of the foregoing, we are of the view that OA lacks merit. Same is accordingly dismissed. Pending applications, if any, also stand disposed off.

Pronounced in the open court on this 30 day of September 2019.

**(JUSTICE SUNITA GUPTA)**
**MEMBER (J)**

**(AIR MARSHAL B.B.P. SINHA)**
**MEMBER (A)**

/sm/