

1  
IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE

BEFORE  
HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

ON THE 25<sup>th</sup> OF JULY, 2022

**WRIT PETITION No. 4923 of 2022**

**Between:-**

COLONEL AKHIL MENDHE S/O LATE SHRI  
ARUN MENDHE, AGED ABOUT 45 YEARS,  
OCCUPATION: SERVICE IC-56405X C/O  
INFANTRY SCHOOL, MHOW (MADHYA  
PRADESH)

.....PETITIONER

*(SHRI DURGESH SHARMA- ADVOCATE)*

**AND**

1. UNION OF INDIA THROUGH PRINCIPAL  
SECRETARY MINISTRY OF DEFENSE, 104, SOUTH  
BLOCK (DELHI)
2. COMMANDANT INF. SCHOOL MHOW THR. LT.  
GEN. SAVNEET SINGH Y.S.M.S.M.V.S.M.  
COMMANDANT \, INFANTRY SCHOOL MHOW  
(MADHYA PRADESH)
3. BRIGADIER ADMINISTRATION INFANTRY  
SCHOOL MHOW THR. BRIG. JOY BISWAS,  
BRIGADIER ADMINISTRATION INFANTRY  
SCHOOL MHOW (MADHYA PRADESH)
4. BRIG. R.S. DADWAL PRESIDING OFFICER  
COURT OF INQUIRY INF SCHOOL MHOW  
(MADHYA PRADESH)

.....RESPONDENTS

*(SHRI HIMANSHU JOSHI- ADVOCATE)*

.....  
*This petition coming on for orders this day, the court passed the  
following:*

**ORDER**

The present petition is filed under Article 226 of the Constitution of India

challenging the Annexure P/7 convening order/Court of inquiry dated 01.02.2022 passed by the respondent nos.2 and 3.

Contention of the learned counsel for the petitioner is that the said order is beyond jurisdiction and contrary to the section 19, 70, 121, 122, 180 of the Arms Act, 1950 as well as all the judgment of the Apex Court in the case of ***Union of India and Ors Vs. Harjeet Singh Sandhu reported in (2001) 5 SCC 593.***

Learned counsel for the petitioner submits that the Court of inquiry is proposed to investigate and conclude the evidence in relation to the allegation which relates to the civil offence in which the petitioner has already been acquitted by the competent authority (criminal court), and therefore, the aforesaid convening order amounts to reopening/re-initiating the proceedings which has already been done in the form of one man inquiry.

The aforesaid order is further contrary to the provisions of section 121 of the Arms Act and the settled proposition that if the officer tried by a criminal Court and acquitted then pronouncement of judicial verdict excluded any independent disciplinary action being taken against the delinquent officer on the same facts.

Learned counsel for the respondents raises preliminary objection regarding a maintainability of the writ petition. He submits that the petitioner has an alternative and efficacious remedy of approaching the Armed Forces Tribunal under the provisions of Armed Forces Tribunal Act, 2007 (hereinafter referred as "Act, 2007"). He also submitted that the petition is premature petition as the petitioner has challenged the convening order which is nothing but a kind of fact finding inquiry. The petitioner has remedy under section 14 of the Act, 2007.

This Court while issuing notices on 02.03.2022 passed the interim order that the final opinion in the matter may not be given. Learned counsel for the respondents submitted that the inquiry pursuant to the impugned communication Annexure P/7 has already been concluded and only final opinion was not given in view of the interim order passed by this Court.

I have heard learned counsel for the parties on the question of maintainability of the petition under Article 226 of the Constitution of India.

Learned counsel for the petitioner vehemently argued that since the impugned order passed by the respondents convening Court of inquiry is beyond jurisdiction and is in violation of section 70, 121, 122 of the Arms Act, 1950, therefore, the petition is maintainable and there is no bar in exercising powers under Article 226 of the Constitution of India. In support of his submissions, he referred the judgment passed by the Apex Court in the case of *M/s Magadh Sugar and Energy Ltd. Vs. State of Bihar and Ors reported in Civil Appeal No.5728/2021*. He referred para no. 20 and 22 of the said judgment. He also relied on the judgment of the Apex Court in the case of *Harbanslal Sahnia and Anor. Vs. Indian Oil Corp. Ltd reported in AIR 2003 SC 2120*. He referred para 7 of the said order. He further cited the judgment of the Apex Court in the case of *M/s Radha Krishan Industries Vs. State of Himachal Pradesh passed in Civil Appeal No.1155/2021*. He referred para 60 to 66. He referred the order dated 21.11.2012 passed in *WA No.6365/2012* by High Court of Karnataka at Bangalore. He placed reliance on certain orders passed by Delhi High Court.

On the basis of the aforesaid judgments, he submitted that since the order passed by the respondents is beyond jurisdiction and there is patent violation of

the provisions of the Arms Act, therefore, this Court can exercise its writ jurisdiction as the challenge is on the ground for want of authority and jurisdiction which is pure question of law.

Learned counsel for the respondent in support of his submissions that the present petition is not maintainable because of the availability of the alternative and efficacious remedy for approaching the Armed Forces Tribunal Act, 2007, places reliance on the judgment passed by the Apex Court in the case of *Major General Inder Jit Kumar Vs. Union of India and Ors reported in (1997) 9 SCC 1*. He referred para no.7 of the said judgment. He further referred the order passed by the Apex Court in the case of *Union of India and Ors VS. Lt. Colonel Dharamvir Singh passed in Civil Appeal No.1714/2019* and order passed by the Delhi High Court in the case of *Col. Anshuman Vs. Union of India reported in 2021 SCC Online Del 2987*.

I have considered the aforesaid contentions and deal with the contentions of learned counsel for the respondents regarding maintainability of the petition on the ground of availability of alternative and efficacious remedy to the petitioner. It is apposite to refer the provisions of section 3 (o) and section 14 of the Act, 2007.

"3(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) order 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;"

"14. Jurisdiction, powers and authority in service matters."(1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to all service matters.

(2) Subject to the other provisions of this Act, a person aggrieved by an order pertaining to any

service matter may make an application to the Tribunal in such form and accompanied by such documents or other evidence and on payment of such fee as may be prescribed.

(3) On receipt of an application relating to service matters, the Tribunal shall, if satisfied after due inquiry, as it may deem necessary, that it is fit for adjudication by it, admit such application; but where the Tribunal is not so satisfied, it may dismiss the application after recording its reasons in writing.

(4) For the purpose of adjudicating an application, the Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) reviewing its decisions;
- (g) dismissing an application for default or deciding it ex parte;
- (h) setting aside any order of dismissal of any application for default or any order passed by it ex parte; and
- (i) any other matter which may be prescribed by the Central Government.

(5) The Tribunal shall decide both questions of law and facts that may be raised before it."

Section 14 of the Armed Forces Tribunal Act, 2007 (Act) vests in the AFT, all the jurisdiction, powers and authority exercisable immediately prior to setting up thereof, by all courts in relation to all service matters. Though sub-Section (2) thereof provides that "Subject to other provisions of this Act, a person aggrieved by an order pertaining to a service matter may make an application..." but sub-Section (3) thereof provides that "On receipt of an application relating to service matters...". 'Service matters', in Section 3(o) of the Act are defined as all matters relating to conditions of service including the matters expressly specified in Section 3(o)(i), (ii) and (iii) of the Act; Section 3(o)(iv) of the Act vests jurisdiction in the AFT in respect of "any other matter, whatsoever" in relation to the persons subject to Army Act, 1950. It is thus clear that the jurisdiction of the AFT extends over all service matters except those excluded expressly by Section 3(o) of the Act.

Merely because the jurisdiction of this Court under Article 226 of the Constitution of India has been expressly saved by Section 14(1) of the Act, would not entitle this Court to keep on entertaining petitions under Article 226 of the Constitution of India in service matters notwithstanding the creation of a specialist Tribunal by the Act. Though at one time in *Union of India Vs. Major General Shri Kant Sharma (2015) 6 SCC 773*, a view was taken that Article 226 of the Constitution of India cannot be invoked but the same has been diluted to a little extent vide *Rojer Mathew Vs. South Indian Bank Limited (2020) 6 SCC 1*; however *Rojer Mathew supra* also does not open the gates of the High Court under Article 226 of the Constitution of India for all matters falling within the jurisdiction of AFT, as is the contention of the counsel for the petitioner.

The judgments pressed into service by the learned counsel for the

petitioner lays down that there is no absolute bar to exercise the jurisdiction under Article 226 of the Constitution of India, in a case where the order is passed without jurisdiction and question of law is involved. There is no dispute to the aforesaid proposition of law.

The Apex Court in the case of **Lt. colonel Dharamvir Singh** (supra) held that the assumption of jurisdiction of the High Court in writ petition under Article 226 of the Constitution of India in such cases is misconceived. The court further expressed the view that having regard to the definition of expression "Service Matters" in section 3 (o) of the Armed Forces Tribunal Act, 2007 and the jurisdiction of the Arms Forces Tribunal Act, under section 14, a writ petition ought not to have been entertained by the High Court.

In the present case, in pursuant to the impugned communication of convening order, the inquiry has already been held and only final opinion has not been given because of the interim order, I am of the view that the present petition is not maintainable as the jurisdiction lies with the Armed Forces Tribunal under section 14(1) of the Act, 2007.

In view of the aforesaid, the present petition stands dismissed as not maintainable.

**(VIJAY KUMAR SHUKLA)**  
**JUDGE**

Sourabh