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(2012) 02 AHC CK 0169

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 69145 of 2011 and Civil Miscellaneous Writ Petition No. 75332 of 2011

Surendra Bahadur Singh — APPELLANT

Vs

Armed Forces Tribunal, Regional Bench, Lucknow and Others
Subhash Chandra Pathak Vs Armed Forces Tribunal and Others — RESPONDENT

Date of Decision : 10-02-2012

Acts Referred:

Armed Forces Tribunals Act, 2007 — Section 3(o), 5, 6, 7, 8, 9(2), 14, 14(2), 14(4), 14(5), 14(6), 14(7), 15, 15(3), 15(4), 15(5), 15(6), 15(7), 16, 17, 18, 19, 26, 28, 30, 30(1), 30(2), 30(3), 31, 31(1), 31(2), 33, 34, 34(1), 35
Arms Act, 1959 — Section 3(b), 18, 26
Central Excises And Salt Act, 1944 — Section 35L(b)
Constitution Of India, 1950 — Article 19, 32, 136, 136(2), 226, 227, 227(4), 323A, 323B, 323A(2)(d), 323(3)(d), 323A(3)(2)(d)
Contempt Of Courts Act, 1971 — Section 14, 15, 17, 18, 20
Entitlement Rules For Casualty Pensionary Awards, 1982 — Rule 11(a), 12
Evidence Act, 1872 — Section 123, 124
Navy Act, 1957 — Section 15(1)
Indian Penal Code, 1860 — Section 175, 178, 189, 180, 193, 195, 196, 228
Persons With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 — Section 47
Pension Regulations For The Army, 1961 — Regulation 173
Administrative Tribunals Act, 1985 — Section 2(a), 2(b), 3(a), 3(b), 6, 14
Air Force Act, 1950 — Section 18
Advocates Act, 1961 — Section 38

Citation : (2012) 3 ADJ 655

Hon'ble Judges : Sunil Ambwani, J;Manoj Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. We have heard Col. (Retd.) R.A. Pandey, learned counsel for the petitioner in Writ Petition No. 69145 of 2011, Surendra Bahadur Singh v. Armed Forced Tribunal, Regional Bench, Lucknow & Ors.; Shri S.A. Siddiqui, learned counsel for the petitioners in Writ Petition No.75332 of 2011, Subhash Chandra Pathak v.

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Armed Forces Tribunal & Ors. and Writ Petition No.75334 of 2011, K.K. Dubey v. Armed Forces Tribunal & Ors. Shri R.B. Singhal, Asstt. Solicitor General of India assisted by Shri S.K. Rai, Shri Ashok Singh and Shri Santosh Kumar Misra appear for the respondents.

2. Shri Surendra Bahadur Singh, the petitioner in Writ Petition No.69145 of 2011 was enrolled in the Regiment of Artillery of the army on 4.3.2002. After his basic training at the Artillery Centre, Hyderabad, he was attested as a Gunner/ General Duties (Gnr/GD). The petitioner proceeded for casual leave from 8.11.2004 to 22.11.2004 to celebrate Deepawali at home. Unfortunately he suffered a cracker blast injury on 12.11.2004, which resulted into his prolonged hospitalisation; 100% loss of vision in both eyes and amputation of two fingers of left hand. On his return the petitioner was invalidated out of service w.e.f. 1.4.2007. A statutory petition u/s 26 of the Arms Act addressed to the Chief of Army Staff-cum-Appeal to the Appellate Committee on his first appeals submitted on 1.10.2007 was rejected vide ADG PS, Adjutant General''s Branch letter dated 5.5.2008, on the ground that injury was not attributable to military service as the petitioner was not on duty at the time of sustaining the injury in terms of Rule 12 of the Entitlement Rules to Casualty Pensionary Awards to Armed Forces Personnel, 1982. The petitioner was not held entitled to disability pension as per Regulation 173 of Pension Regulations for Army Part-I, 1961. A second appeal dated 30.7.2008 to the Chairman, Defence Minister''s Appellate Committee on Pension (DMACP) was filed and was pending, when the petitioner filed Writ Petition No.22751 of 2009 seeking reinstatement. The second appeal was rejected by the DMACP on 1.10.2009 during the pendency of the writ petition.

3. The writ petition was transferred u/s 34 of the Armed Forces Tribunal Act, 2007 (in short AFT Act, 2007) and was renumbered as Transfer Application No.1467 of 2010. The Armed Forces Tribunal (AFT) partly allowed the transfer application on 07.09.2011 with directions to pay disability pension to the applicant at the rate of 100%, for life w.e.f. 1.4.2007 and with interest of 6% and another consequential benefits. The AFT granted the relief on the ground that since the exception provision of Rule 11 (a) of the Leave Regulations are not attracted, he was on duty during the casual leave. The Indian Army being a multireligious organisation and celebrates Deewali with lightening and fire works at its unit and sub-unit, there was a connection between the activity, which the petitioner indulged in during casual leave and military service. The Tribunal followed Union of India v. Khushbagh Singh, Ex-Nayab Subedar, 2011 (1) ESC (P & H) (FB), in which it was held that an activity of an independent business or avocation or calling that would be inconsistent to Military Service and an accident occurring during such activity, cannot be attributable to military service. Any accident, however, remotely connected and not inconsistent with military service, such as when the person is returning from hospital, or doing normal duty of military personnel, would still be taken as a disability attributable to military service.

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4. The Tribunal, however, did not agree that the armed forces could not have dispensed with the services of the petitioner. Section 47 of the Persons with Disabilities Equal Opportunities, Protection of Rights and Full Participation Act, 1995, is not applicable as the Government of India has issued a Notification dated 28.3.2002 excluding combatant personnel of the armed forces from the provisions of the Act. The judgment in Mohd. Yasin Ansari by Single Judge of the High Court quashing the notification, was set aside by the Full Bench of the same Court by its judgment dated 21.9.2006.

5. The petitioner did not apply for leave of the Tribunal u/s 31 (1) to appeal to the Supreme Court u/s 30 of the AFT Act, 2007 and has filed this writ petition under Art.226 of the Constitution of India to quash that part of the order dated 7.9.2011 passed by the Armed Forces Tribunal, Regional Bench, Lucknow by which the Tribunal has declined to consider the quashing of the impugned notification dated 28.3.2002, stating that in view of the Full Bench judgment, it would not be in order for the Tribunal to interfere. He has challenged the same notification dated 28.3.2002 excluding all combatant personnel of the armed forces from Section 47 of the Persons with Disabilities, Equal Opportunities, Protection of Rights and Full Participation Act, 1995. The petitioner has also prayed for writ of mandamus commanding the respondents to reinstate the petitioner into service with all consequential benefits and to pay his salary after merging the disability pension and to grant him promotions at par with other persons of his batch and to grant full service pension as well as the disability pension after supervision.

6. Shri Subhash Chandra Pathak, the petitioner in Writ Petition No.75332 of 2011 was enrolled in the Indian Army on 15.3.1982. On 10.4.2004 he was admitted in 7 Air Force Hospital, Kanpur sufferring from jaundice. He was referred for psychiatric management in view of history of regular alcohol for more than 15 years. It is alleged that he was moderate drinker and that several times he had quit drinking. He used to develop withdrawal symptoms in the form of restlessness and reduced sleep. A release medical board was conducted on 5.1.2008 at Kanpur. On the basis of medical opinion he was placed in medical category S2 and he was declared to be affected by two different disabilities namely Alcoholic Dependence Syndrome; and Alcoholic Liver disease and Portal Hypertension. The release medical board assessed the disability on account of Alcoholic Dependence Syndrome at nil, and Alcoholic Lever diseases and Portal Hypertension at 11-14%. Neither of the two disabilities were found to be attributable to or aggravated by military service. The claim of disability pension was rejected by the PCDA. The first appeal was rejected by the Appellate Committee on 14.7.2008 and the second appeal was dismissed on 11.1.2011. He filed Original Application No.88 of 2011 in Armed Forces Tribunal, Regional Bench, Lucknow with prayers for directions to grant disability pension. It was submitted by learned counsel appearing for the petitioner in the Tribunal that the disabilities were as a result of consumption of liquor in moderate limits, which was supplied to him by military authorities and as such the disability would be

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treated as attributable to military service. The Tribunal held that military authorities did not force the applicant to take liquor. He has consumed the liquor at his own will. The findings of the Medical Board is an opinion of experts. Nothing was demonstrated to indicate that the assessment was incorrect. The disability pension could be granted in case the disability is either attributable or aggravated by military service and is assessed at 20% or more. The disability in the case of the petitioner was found to be less than 20%. Relying upon Union of India (UOI) and Others Vs. Dhir Singh China, Colonel (Retd.), ; Union of India v. Sunder Singh Rathor, 2008 Mil.L.J. (SC) 122 and Secretary, Ministry of Defence v. Damodaran AV, 2009 Mil.L.J. (SC) 107 the Tribunal found that the opinion of the Medical Board is of great weight and is ordinarily to be accepted. The Tribunal also found that in the second appeal it was observed that the petitioner was posted in peace area, and that the drinking habit of the applicant cannot be related to military service. The O.A. was consequently dismissed. The petitioner did not apply for leave to appeal to the Supreme Court u/s 31 (1) of the AFT Act, 2007.

7. Shri K.K. Dubey, the petitioner in Writ Petition No.75334 of 2011, was enrolled in Air Force on 31.8.1979 and was discharged on the recommendation of the Invaliding Medical Board on 14.8.1983 as he was sufferring from the disability ''generalized epilipsy''. The disability pension claim was rejected vide information given to him under the Right to Information Act, 2005 on 9.2.2011 by Air Headquarter, and his disability pension claim was rejected by PCDA (P), Allahabad vide letter dated 19.10.1983. By the same letter the petitioner was informed that the medical documents are preserved only for a period of 15 years, after the date of discharge, and were destroyed by the Board of Officers thereafter. The Tribunal found that the Original Application No.Nil (34) of 2011 was filed 28 years after discharge of the applicant. No doubt the claim of disability pension is recurring cause of action but the principles are not applicable to the present case because the delay has changed the position of the respondents. The records in the meanwhile have been destroyed and as such the respondents will be prejudiced in their defence. The relief could not be granted to the applicant on the basis of papers submitted with O.A. In any case in the appendix of the letter dated 28.5.1983 the name of the applicant find place at Sl.No.3 and the percentage of disability on account of ''generalized epilipsy'' was shown as 15-19% for 2 years. Under the Pension Regulations the disability pension could be granted to a person, whose disability is attributable to or aggravated by military service and is assessed at 20% or above. There was nothing to demonstrate that the petitioner was medically examined after a period of 2 years to determine whether the disability was continuing. A request was made by the counsel in the AFT that the applicant is suffering great financial distress, and that some amount should be paid to him from the Armed Forces Benevolent Fund. Learned Senior Standing Counsel made a statement in the Tribunal that if such an application is filed, he has no doubt that it will be considered sympathetically in accordance with law. The O.A. was thus dismissed

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with such observations. The petitioner did not apply for leave to appeal to the Supreme Court u/s 31 (1) of the AFT Act, 2007.

8. Shri R.B. Singhal, learned counsel appearing for the Union of India, representing all the respondents has raised preliminary objections to the maintainability of the writ petition against the order of the Armed Forces Tribunal (AFT). He submits that in the matters in which Armed Forces Tribunal has jurisdiction, powers and authority u/s 14 of AFT Act, 2007 with exceptions u/s 3 (o); and in the matters, where the Armed Forces Tribunal has jurisdiction, powers and authority u/s 15 of the Act as well as the orders passed u/s 19 in the matter of power to punish for contempt, the AFT Act, 2007 provides for a right to appeal u/s 30 to the Supreme Court. The appeal u/s 30 (1) lies to the Supreme Court against the final decision or order of the Tribunal, other than an order passed u/s 19 (power to punish for contempt), with a rider that the appeal in the first proviso should be preferred within a period of 90 days from the date of decision or order and further that there shall be no appeal against an interlocutory order of the Tribunal. Sub-section (2) of Section 30 provides that an appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in exercise of his jurisdiction to punish for contempt. Section 31 (1) provides for leave to be granted, for appeal to the Supreme Court and application in that regard can be made under sub-section (2) within 30 days to the Tribunal and sub-section (3) provides that appeal shall be treated as pending until any application to leave to appeal is disposed of and if leave to appeal is granted until the appeal is disposed of.

9. Shri Singhal submits that the AFT Act, 2007 was passed by the Rajya Sabha and Lok Sabha on 3.12.2007 and 6.12.2007 respectively. It received the assent of the President on 20.12.2007. The Act has been enacted as it was found that existent system of administration of justice in the Army and Air Force, providing for submission of statutory complaint against the grievances relating to service matters and pre and post confirmation petitions to various authorities against the findings and sentences of Court Martials and complaint with a right of audience before Judge Advocate General in the navy, in regard to finding and sentence of Court Martial before the same is put up to the Chief of Naval Staff, resulted into large number of cases, pending in the Courts for a long time. The Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, , held that the absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment in the laws relating to the Armed Forces was a distressing and glaring lacuna and urged the Government to take steps to provide for atleast one judicial remedy in service matters. In view of the need for such an adjudicatory forum AFT Act, 2007 was enacted for adjudication of complaints and disputes regarding service matters and appeals arising out of the verdicts of the courts-martial of the members of the three services to provide for quicker and less expensive justice to the members of the said Armed Forces of the Union. The object and reasons also state in para 4 that the establishment of an independent Armed Forces Tribunal

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will fortify the trust and confidence amongst members of the three services in the system of dispensation of justice in relation to their service matters. The bill as such provide for judicial appeal on points of law and facts against the verdicts of courts-martial ousting jurisdiction of all courts except the Supreme Court, whereby resources of the Armed Forces in terms of manpower, material and time will be conserved besides resulting in expeditious disposal of the cases and reduction in the number of cases pending before various courts.

10. Shri Singhal submits that AFT Act, 2007 was enacted by the Parliament and came into force on 20th December, 2007, more than a decade after the judgment in L. Chandra Kumar Vs. Union of India and others, , was decided by 7 judges of the Supreme Court. The AFT Act, 2007, has many distinguishing features as compared to Administrative Tribunals Act, 1985. The AFT Act, 2007 purposely and consciously provide for an appeal against the final orders of the AFT to the Supreme Court subject to the leave granted by the Tribunal. A writ petition under Art.226 of the Constitution of India against the judgment of the Tribunal is therefore not maintainable. Shri Singhal refer to composition of the AFT u/s 6 of the Act providing under sub-section (1) of appointment of a retired judge of the Supreme Court or retired Chief Justice of High Court as Chairperson and appointment of Judicial Member under sub-section (2), unless he is or has been judge of the High Court. The qualification for appointment as Chairman, Vice Chairman and other members u/s 6 of the Administrative Tribunal Act, 1985 provides for a Chairman to be qualified for appointment unless he is or has been a judge of the High Court and Vice Chairman, if he is qualified for appointment of Chairman or if he has held the office of the Vice Chairman for two years. The Administrative Member under sub-section 2 (a) is required to hold for at least 2 years the post of a Secretary of Government of India or any other post under the Central or State Government and carrying the scale of pay which is not less than that of a Secretary to the Government of India for atleast two years or held a post of Additional Secretary to the Government of India etc. A Judicial Member under sub-section 2 (b) unless he is or qualified to be a judge of the High Court or he has for atleast two years held the post of Secretary to the Government of India in the Department of Legal Affairs or the Legislative Department including Principal Secretary, Law Commission of India or Addl. Secretary to the Government of India in the Department of Legal Affairs and Legislative Department for 5 years. There is marked difference between the qualifications of the persons to be appointed as Chairman and other members in both the Acts.

11. Shri Singhal submits that AFT Act, 2007 provided for right to appeal u/s 30, whereas no such right has been given in the Administrative Tribunals Act, 1985. Section 14 of the AFT Act, 2007 providing for jurisdiction powers and authority is also differently worded than Section 14 of the Administrative Tribunals Act, 1985. He submits that the words, "(except the Supreme Court or High Court exercising jurisdiction under Art.226 and 227 of the Constitution in Section 14 of the Armed Forces Tribunal Act, 2007)", are by way of excluding the jurisdiction of the Supreme Court and High Court in such service matters in which the AFT has not

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been provided with the jurisdiction, powers and authority to adjudicate the matters, such as the matters excepted u/s 3 (o) of the Act including Summary Court Martial with less than 3 months punishment and matters in which AFT denies leave to appeal u/s 31 (1) of the AFT Act, 2007.

12. Shri Singhal has also pointed out to the exceptions under Art.19, 136 (2) and Art.227 (4) to the matters relating to army and the superintendence over the Armed Forces Tribunal. He submits that the judgment in L. Chandra Kumar v. Union of India (Supra) is clearly distinguishable, when it is applied to the matters arising out of orders passed by AFT Act, 2007.

13. Per contra, Col. (Retd.) R.A. Pandey submits and is supported by Shri Sahid Ali Siddiqui in the connected matters that the right to judicial review is basic feature of the Constitution of India. The AFT is not a Court. It is a Tribunal, the orders of which are subject to judicial review under Art.226/227 and Section 32 of the Constitution. The Supreme Court had in L. Chandra Kumar''s case held that Clause 3 (2) (d) of Art.323-Ato the extent that it excluded the jurisdiction of the High Court and the Supreme Court as unconstitutional. Section 28 of the Act ''exclusion of jurisdiction'' clauses and all other legislations enacted under Art.323-A would to the same extent be unconstitutional. The Supreme Court also declared Clause 2 (d) of Art.323-A as unconstitutional and held that the jurisdiction of the High Court and Supreme Court under Art.226/227 and Art.32 respectively cannot be ousted. The other Courts and Tribunals may perform supplemental role in discharging the powers conferred by Art.226/227 and Art.32 of the Constitution of India. The Supreme Court, however, held that it will not be open to the litigant to directly approach the High Court, even in cases, where the questions of vires of statutory legislations, except where the legislation, which creates the particular Tribunal is challenged by overlooking the jurisdiction of the concerned Tribunal.

14. Learned counsel for the petitioner has relied upon a judgment of the High Court of Delhi in Colonel A.D. Nargolkar v. Union of India & Ors., W.P. (C) No.13360 of 2009 and other connected petitions decided by the Division Bench on 26.4.2011 holding the question of maintainability of the writ petition against the orders of AFT in favour of the petitioners. The Delhi High court relying heavily on L. Chandra Kumar''s case held that AFT being manned by personnel appointed by the executive, albeit in consultation with the Chief Justice of India, cannot be said to be truly a judicial review forum, as a substitute to the High Courts, which are constitutional Courts and the power of judicial review being a basic feature of the Constitution under Art.226 and 227 of the Constitution of India is unaffected by the Constitution of AFT. Art.227 (4) of the Constitution of India takes away only the administrative supervisory jurisdiction of the High Court over the AFT and does not impact the judicial supervisory jurisdiction over the AFT. The decision of AFT would be amenable to judicial review by High Court under Art.226 as also Art.227 of the Constitution of India. The Delhi High Court relied upon the Division Bench judgment of Kerala High Court in Joby Varghese Vs.

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Armed Forces Tribunal, .

15. The Kerala High Court had in Joby Varghese''s case once again relying heavily on L. Chandra Kumar''s case, held in para 3 of the judgment that Section 14 of AFT Act, 2007 confers original jurisdiction on Tribunal on all service matters pertaining to service personnel. Section 15 confers jurisdiction on the Tribunal to hear appeals against the orders of the court martial. Section 34 of the Act provides for transfer of cases pending in the High Court over which the Tribunal is now conferred with the jurisdiction under the Act. Similarly Section 35 provides for filing appeal to the Tribunal against the orders passed by any Court other than High Court or any other authority in any suit or proceedings over which the Tribunal is vested with the jurisdiction under the Act. The transfer of cases pending before the High Court u/s 34 does not mean that the case so transferred carry with it the jurisdiction of the High Court under Art.226 or 227 of the Constitution. In other words, the process of transfer of cases pending before the High Court does not involve conferment on High Court jurisdiction over the Tribunal. These cases are decided by the Tribunal by virtue of jurisdiction conferred on it by the Act. The purpose of jurisdiction is to get the same decided by the Tribunal, which has jurisdiction. The Tribunal has no jurisdiction to entertain challenge against the constitutional validity of the provisions of the Act under which it is created, which is in exclusive domain of the Supreme Court and High Court. The operation of these provisions do not involve vesting of jurisdiction of the High court under Art.226 or 227, which remains unaffected by the Constitution and conferment of jurisdiction on the Tribunal on service matters by the Act.

16. On the right of appeal u/s 30 and 31 the Kerala High Court held that the right to appeal is available against the orders of the Tribunal only in the matters pertaining to jurisdiction of the Tribunal to punish for contempt. Under Second Proviso to Section 30 (1) there is an express bar against the filing of appeal to the Supreme Court against the interim orders of the Tribunal. So far as other matters are concerned, the appeal lies to Supreme Court only if either the Tribunal certifies that the point of law involve is one of general importance or if the Supreme Court is of the opinion that the point arising from the order of the Tribunal is one which ought to be considered by that Court. If the certificate is denied, the aggrieved person can approach the Supreme Court with a petition for leave to appeal u/s 31 (2) of the Act. Nothing prohibits an aggrieved person to challenge the order of the Tribunal before the High Court by filing a writ petition under Art.226, if the grievance is such that the High Court should exercise jurisdiction and grant relief to the party. The right to appeal after obtaining leave to file the appeal from the Supreme Court, cannot be treated as a statutory right to appeal [Mammooty v. Food Inspector, 1986 KLT 113 (FB)]. The availability of right to appeal granted by the Supreme Court will not bar the jurisdiction of the High Court under Art.226 of the Constitution. The orders of the Tribunal, therefore, can be corrected in exercise of powers under Art.226 of the Constitution.

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17. In para 5 of the judgment the Kerala High Court observed that so far as the interim orders of the Tribunal are concerned, in view of Second Proviso to Section 30 (1) of the Act the only remedy available to aggrieved persons is to approach the High Court under Art.226 of the Constitution of India. In the concluding para 6 and 7 the Kerala High Court observed again relying upon L. Chandra Kumar''s case that the jurisdiction of the High Court under Art.227 is part of basic structure of the Constitution. Sub- Article (4) of Article 227 only covers the administrative matters and not judicial matters and thus the High Court will not have any supervisory jurisdiction in administrative matters over the Tribunal. The High court will, however, have powers under Art.227 in respect of orders issued by the Tribunal, and on the failure of the Tribunal to exercise their jurisdiction. Where the applications are rejected on the ground of delay, or for want of jurisdiction and they may be ever so many other situations, where the Tribunal may decline to exercise jurisdiction, the High Court in all such cases, may correct the orders under Art.227. The Kerala High Court observed that the jurisdiction of the High Court will under the Act be confined in following events:-

1. To entertain Writ Petitions under Art.226 of the Constitution of India pertaining to challenge against constitutional validity of any of the provisions of the Act under which the Tribunal is constituted; 2. To entertain Writ Petitions under Art.226 of the Constitution on matters pertaining to Armed Forces outside the jurisdiction of the Tribunal, particularly of the cases covered by the second part of S.3 (o) of the Act; 3. To entertain Writ Petitions under Art.226 against final orders of the Tribunal where the Tribunal has not granted certificate for fitness for appeal under S.31 of the Act. However, no writ will lie to the High Court in Contempt matters over which statutory appeal is provided to the Supreme Court; 4. To entertain Writ Petitions under Art.226 against all interim orders passed by the Tribunal; 5. To entertain Writ Petition under Art.227 seeking directions to the Tribunal to exercise their jurisdiction or to refrain from exercising jurisdiction wherever the Tribunal has failed to exercise their jurisdiction or exercises jurisdiction not conferred on it.

18. The Kerala High Court cautioned that the High Court may not entertain writ petitions filed against each and every order of the Tribunal. It is neither desirable nor possible to visualize all the orders of the Tribunal should be interfered with in writ proceedings. There are enough judgments of the Supreme Court and the High Courts on the guidelines to be followed in exercise of writ jurisdiction by the High Court under Art.226 and 227 of the Constitution of India. It was observed in the end in para 7:-

Therefore, in our view, any person aggrieved by order of the Tribunal except where the point of law arising from such order is of general public importance, should challenge the said order in the High Court, if tenable under Art.226 or 227 of the Constitution of India. However, if an application for certificate of fitness for appeal to the Supreme Court against the orders of the Tribunal is filed by either party before them, necessarily the remedy against rejection of the same by the

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Tribunal is only to file petition for leave to file appeal before the Supreme Court under S.31 (2) of the Act.

19. We may observe before considering the preliminary objections to the maintainability of the writ petition against the order of the AFT, 2007 without applying for leave to appeal u/s 31 (2) of the AFT Act, 2007, that the Parliament had the advantage of the judgment of the Supreme Court in L. Chandra Kumar v. Union of India (Supra) by 7 Hon''ble Judges of the Supreme Court, at the time of enactment of the AFT Act, 2007. By that time for more than 10 years the issues decided in L. Chandra Kumar''s case declaring clause 2 (d) of Art.323-A, and clause 3 (d) of Art.323-B to the extent they excluded the jurisdiction of the High Court and the Supreme Court except under Art.136, to be unconstitutional and reiterating that the jurisdiction conferred upon the High Court under Art.226/227 and upon the Supreme Court under Art.32 is part of the basic structure of our Constitution was operative. The judgment in L. Chandra Kumar still holds the field. The Parliament will be deemed to be conscious of the declaration of law by the Supreme Court at the time of enacting the AFT Act, 2007.

20. The AFT Act, 2007 was enacted to provide for adjudication or trial by Armed Forces Tribunal of disputes and complaints with respect to appointment, enrollment and conditions of service in respect of persons subject to Army Act, 1950, Navy Act, 1957 and the Air Force Act, 1950 and also to provide for appeals arising out of orders, findings or sentences of court martial held under the said Acts and for matters connected therewith or incidental thereto. The introduction of the Act provides for constituting an independent adjudicatory forum for defence personnel both in view of judgment of the Supreme Court in Prithi Pal Singh in 1982 and the 19th report of the Estimate Committee of the Parliament of 1992. In view of these, it was proposed to enact a new legislation by constituting AFT for adjudication of complaint and disputes regarding service matters and appeals arising out of verdicts of the court martial to provide for quicker and less expensive justice to the members of the armed forces of the Union. The statement of object and reasons also outlined and highlighted for providing a quicker and less expensive justice to the members of the armed forces of the Union. Para 5 of the object and reasons provide that the Tribunal will oust the jurisdiction of all the Courts except Supreme Court, whereby resources of the Armed Forces in terms of manpower, material and time will be conserved besides resulting in expeditious disposal of the cases and reduction in the number of cases pending before various courts. Para 5 of the object and reasons is quoted as below:-

5. The Bill seeks to provide for a judicial appeal on points of law and facts against the verdicts of courts-martial which is a crying need of the day and lack of it has often been adversely commented upon by the Supreme Court. The Tribunal will oust the jurisdiction of all courts except the Supreme Court whereby resources of the Armed Forces in terms of manpower, material and time will be conserved besides resulting in expeditious disposal of the cases and reduction in the

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number of cases pending before various courts. Ultimately, it will result in speedy and less expensive dispensation of justice to the Members of the abovementioned three Armed Forces of the Union.

21. The Armed Forces Tribunal in Section 5 of the AFT Act, 2007 provides for composition of Tribunal and Benches thereof. Sub-section (1) provides that the Tribunal shall consist of Chairperson and such number of judicial and administrative members as Central Government may deem fit. The Bench shall consist of under sub-section (2) of one judicial member and one administrative member. Sub-section (3) secures the inclusion of atleast one judicial member and one administrative member in every Bench with the Principal Bench under sub-section (4) to sit at Delhi. The qualifications for appointment of Chairperson and other members includes in sub-section (1), a person to be retired judge of the Supreme Court or retired Chief Justice of the High Court for appointment as Chairperson. Under sub-section (2) a person shall not be qualified for appointment as judicial member unless he is or has been a judge of a High Court. Sub-section (3) provides for the Administrative Member to have held or has been holding u/s 3 (a), the rank of Major General or above for a total period of atleast 3 years in the army or equivalent rank in the navy or air force and in Section 3 (b) to have served for less than one year as Judge Advocate General in army, or the navy or air force is not below the rank of Major General, Commodore and Air Commodore respectively. The appointment u/s 7 of Chairperson and other members of the Tribunal is by the President. The proviso restricts that no appointment shall be made except after consultation with the Chief Justice of India. Sub-section (2) provides that the President may appoint one or more members of the Tribunal to be Vice Chairperson or as the case may be the Vice Chairpersons. The term of office to be 70 years of the Judge of the Supreme Court as Chairperson and Chief Justice of the High Court to be 65 years as Chairperson and 65 years for other persons is provided in Section 8 of the Act itself. The removal u/s 9 (2) can only be made by the President on the ground of proved misbehaviour or incapacity after an enquiry made by sitting Judge of the Supreme Court in which such Chairperson or other member has been informed of the charges against him and given reasons, opportunity of being heard in respect of those charges and in accordance with the Rules regulating procedure for investigation under sub-section (3).

22. Chapter-III of the AFT Act, 2007 provides for jurisdiction, powers and authority of the Tribunal. Section 14 gives all the jurisdiction, powers and authority exercisable immediately before that date by all Courts (except the Supreme Court or a High Court exercising jurisdiction under Art.226 and 227 of the Constitution) in relation to all service matters. The service matters u/s 3 (o) of the Act in relation to persons subject to Army Act, 1950, Navy Act, 1957 and the Air Force Act, 1950 means all matters relating to conditions of their service and shall include:-

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

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(ii) tenure, including commission, appointment, enrollment, 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 u/s 18 of the Army Act, 1950, sub-section (1) of Section 15 of the Navy Act, 1957 and Section of th Air Force Act, 1950; and

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

(iii) leave of any kind;

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

23. For the purposes of exercising its powers u/s 14, sub-section (4) provides that the Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, while trying a suit in respect of the matters, namely summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavits; subject to the provisions of Section 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office; issuing commissions for the examination of witnesses or documents; reviewing its decisions; dismissing an application for default or deciding it exparte; setting aside any order of dismissal of any application for default or any order passed by it exparte; and any other matter, which may be prescribed by the Central Government. Sub-section (5) provides that the Tribunal shall decide both questions of law and facts that may be raised before it.

24. Section 15 gives jurisdictions, powers and authority to the Tribunal in the matters of appeal against the court martial. Subsection (1) provides that the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding or sentence passed by a court-martial or any matter connected therewith or incidental thereto. The incidental powers in deciding appeal against the court martial are given under subsection (3) to (7) of Section 15. It can examine under sub-section (4), if the findings are not legally sustainable; involves wrong decision on a question of fact; suffer from material irregularity in the course of trial resulting in miscarriage of justice. The Tribunal under sub-section (6) can substitute for the findings of the court-martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court-martial and pass a sentence afresh for the

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offence. The Tribunal may also interfere on the proportionality of the sentence, if it is found to be excessive, illegal or unjust, by remitting the whole or any part of sentence, mitigating the punishment awarded; commuting the punishment to any lesser punishment or enhance the sentence, provided before enhancing the sentence the appellant shall be given an opportunity of being heard, Tribunal may also release appellant, if sentenced to imprisonment, on parole with or without conditions; suspend a sentence of imprisonment and pass any other order as it may think appropriate. Sub-section (7) gives the powers of criminal court to the Tribunal for the purposes of Sections 175, 178, 189, 180, 193, 195, 196 or 228 of the IPC and Chapter XXVI of the Code of Criminal Procedure, 1973. u/s 16 the Tribunal can direct re-trial of court martial with the conditions given under sub-section (2) to exercise the powers when the appeal against the conviction is allowed by reasons only of evidence received or available to be received by the Tribunal and it appears to the Tribunal that the interest of justice requires that order of re-trial should be made. The re-trial is protected only on the conditions that it may not be ordered for an offence of which he was convicted by the original court-martial or an offence for which he could have been convicted at the original court-martial on a charge of the first-mentioned offence or any offence charged in the alternative in respect of which the court martial recorded no finding in consequence of convicting him of the first-mentioned offence.

25. Section 17 gives powers to the Tribunal to order production of documents or exhibits connected with the proceedings before the court martial, to order attendance of witnesses, to receive evidence, to obtain reports from court martial, to order reference of any question for enquiry, to appoint a person with subject expert knowledge, to act as an assessor and to determine any question, which is necessary to be determined in order to do justice in the case. Section 18 gives powers to the Tribunal to order as to costs while disposing of application u/s 14 or an appeal u/s 15. Section 19 provides for power to punish for contempt of the Tribunal under sub-section (1) by using any insulting or threatening language, or by causing any interruption or disturbance in the proceedings to suffer imprisonment for a term which may extend to three years. For the purposes of trying an offence, sub-section (2) provides that the provisions of Section 14, 15, 17, 18 and 20 of the Contempt of Courts Act, 1971 shall mutatis mutandis apply, as if a reference therein to Supreme Court or High Court were a reference to the Tribunal; Chief Justice were a reference to the Chairperson; Judge were a reference to the Judicial or Administrative Member of the Tribunal; Advocate- General were a reference to the prosecutor; and Court were a reference to the Tribunal.

26. Section 26 authorises the Tribunal to make an interim order on an application or appeal or in proceedings relating thereto, after opportunity of hearing is given to the other parties, provided that the Tribunal may dispense with the requirement of serving copies under Clause (a) and opportunity of hearing in Clause (b) to make interim order as an exceptional measure, if it is necessary for

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the reasons to be recorded in writing, to do so for preventing any loss being caused to the applicant or to the appellant. The application for vacating the interim order are to be disposed of within 14 days, as in the case of interim orders under Art. 226 of the Constitution of India.

27. The appeal and leave to appeal to Supreme Court is provided u/s 30 and 31 as follows:-

30. Appeal to Supreme Court : (1) Subject to the provisions of section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed u/s 19):

Provided that such appeal is preferred within a period of ninety days of the said decision or order:

Provided further that there shall be no appeal against an interlocutory order of the Tribunal.

(2) An appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in the exercise of its jurisdiction to punish for contempt:

Provided that an appeal under this sub-section shall be filed in the Supreme Court within sixty days from the date of the order appealed against.

(3) Pending any appeal under sub-section (2), the Supreme Court may order that-

(a) the execution of the punishment or the order appealed against be suspended; or

(b) if the appellant is in confinement, he be released on bail: Provided that where an appellant satisfies the Tribunal that he intends to prefer an appeal, the Tribunal may also exercise any of the powers conferred under clause (a) or clause (b), as the case may be.

31. Leave to appeal : (1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.

(2) An application to the Tribunal for leave to appeal to the Supreme Court shall be made within a period of thirty days beginning with the date of the decision of the Tribunal and an application to the Supreme Court for leave shall be made within a period of thirty days beginning with the date on which the application for leave is refused by the Tribunal.

(3) An appeal shall be treated as pending until any application for leave to appeal is disposed of and if leave to appeal is granted, until the appeal is disposed of; and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it might have been made, but it is not made

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within that time.

28. Section 33 excludes the jurisdiction of civil courts from the date from which the jurisdiction, power and authority becomes exercisable by the Tribunal in relation to service matters under the Act and Section 34 (1) provides that every suit, or other proceedings pending before any court including a High Court or other authority immediately before the date of establishment of the Tribunal to be transferred on that date to the Tribunal. Sub-section (2) provides for forwarding the records and the Tribunal to deal with such suit or other proceedings in the same manner as in the case of an application under sub-section (2) of Section 14, from the stage which was reached before such transfer or from any earlier stage or denovo as the Tribunal may deem fit. Section 35 provides for appeal from any decree or order or order passed by any court other than High court or any authority within 90 days, from the date of establishment of the Tribunal.

29. The scheme of the AFT Act 2007 demonstrates the distribution of jurisdiction, powers and authority of AFT. The service matters except those, which are not included in the definition of service matters u/s 3 (o), may be entertained and decided by the AFT u/s 14. For the matters, which are not included in service matters, a person may approach the High Court under Art.226 of the Constitution of India subject to the limitation by exercise of jurisdiction by the High Court. In case of court martial in view of the recommendations of the Supreme Court in Prithi Pal Singh Bedi''s case, right of appeal has been provided u/s 15 to the Tribunal. The powers and jurisdiction of the Tribunal in respect of such appeals are the same as possessed by the High Court in respect of appeals against conviction and sentence under the Code of Criminal Procedure. The Tribunal has been given powers to punish for contempt with a punishment, which may extend to 3 years, whereas under the Contempt of Courts Act, 1971 the maximum punishment of imprisonment is only of two months. The orders of the AFT subject to the provisions of Section 31 can file appeal to the Supreme Court against final decision or order of the Tribunal other than order passed u/s 19 (power to punishment for contempt). The first proviso restricts the right to appeal to be exercised within 90 days and second proviso provides that there shall be no appeal against an interlocutory order of the Tribunal. Sub-section (2) of Section 30 gives rights to a person to file an appeal to the Supreme Court from any order or decision of the Tribunal in exercise of jurisdiction to punish for contempt provided the appeal is filed within 60 days. This right was not subject to leave to appeal u/s 31. The appeal to the Supreme Court lies with the leave of the Tribunal and such leave, shall not be granted unless it is certified by the Tribunal that point of law of general public importance is involved in that decision or it appears to the Supreme Court that the point is one which ought to be considered by that Court. The application for leave to appeal under sub-section (2) of Section 31 has to be filed within 30 days and an application to the Supreme Court for leave shall be made within a period of 30 days beginning from the date, when the application for leave is refused by the Tribunal. A conjoint

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reading of Section 30 and 31 will show that whereas appeal lies as a matter of right from any order of the AFT in exercise of its jurisdiction to punish for contempt, the appeal to Supreme Court u/s 30 (1) lies subject to provisions of Section 31, which provides for grant of leave to appeal on an application to be filed within 30 days and if such leave is not granted by the Tribunal, leave given by the Supreme Court within a period of 30 days beginning with the date on which the application for leave is refused by the Tribunal. The orders against which an appeal may lie to the Supreme Court u/s 30, include the orders passed in appeal u/s 15 against the court martial.

30. The exercise of jurisdiction by the AFT and the appellate powers of Supreme Court leave some area of jurisdiction and orders, against which no remedies are provided in AFT and these matters include service matters u/s 3 (o) relating to orders passed u/s 18 of the Army Act, 1950, Section 15 (1) of the Navy Act, 1957, Section 18 of the Air Force Act, 1950 (providing that every person subject to these Acts shall hold office during the pleasure of the President); the orders of transfer and posting including the change of place or unit on posting whether individually or as a part of unit, formation or ship, leave of any kind and Summary Court Martial, where the punishment is of dismissal or imprisonment of less than three months. A person may also be left without remedies under AFT Act of 2007 against the interim orders passed by the Tribunal, where no appeal is provided, and against the orders, where leave to appeal has not been granted by the Tribunal, and a person, who has not approached the Supreme Court on a point, which ought to be considered by that Court (the Supreme Court). The powers of the High Court under Art.226 are thus not excluded totally leaving the persons subject to Army Act, Navy Act and Air Force Act, without any remedies in respect of the excepted service matters u/s 3 (o), interim orders passed by the Tribunal in exercise of its jurisdiction u/s 14 and 15.

31. In L. Chandra Kumar (Supra) 7 Judges'' Bench of the Supreme Court overruled S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, on the grounds that the Tribunal created under Art.323-A and 323-B are competent to hear the matters, wherein vires of statutory provisions are questioned, and are required to perform a supplemental role in discharging the powers conferred by Art.226/227 and 32 of the Constitution. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. It was also held that the Tribunals will consequently also have the power to test vires of subordinate legislations and rules, except the vires of the provisions of the Administrative Tribunals Act under which such Tribunal is established. The Tribunal it was held can perform the supplemental as opposed to a substitutional role. It was further held that while saving the power of judicial review of legislative action vested in the High Court under Art.226/227 of the Constitution, it will ensure that frivolous

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claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of reasoned decision on merits, which will be of use to it in finally deciding the matter. The Tribunal, however, will continue to act as the only court of first instance in respect of the areas of law for which they have been constituted. It will not be open for litigants to directly approach the High Courts where any question of vires of statutory legislations (except, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. The setting up of the Tribunal is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. A judicious mix of judicial members and those with grass-root experience would best serve this purpose. Since the Selection Committee is headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.

32. The Supreme Court further held in L. Chandra Kumar''s case that all decisions of Tribunal whether created pursuant to Art.323A or Art.323B of the Constitution, will be subject to High Courts'' writ jurisdiction under Art.226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. No appeal from the decision of Tribunal will directly lie before the Supreme Court under Art.136 of the Constitution of India, instead aggrieved party will be entitled to move the High Court under Art.226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move the Supreme Court under Art.136 of the Constitution.

33. So far as supervisory jurisdiction under Art.227 is concerned, the Supreme Court held that the constitutional scheme does not require that all adjudicatory bodies, which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. A direction was issued that Union should initiate action to bring all these Tribunals in one single nodal department preferably the legal department and that comments of experts bodies like the Law Commission of India and the Malimath Committee should be taken into consideration and it should be ensured that the independence of members of all such Tribunals is maintained.

34. As discussed above, the 7 Judges'' judgment in L. Chandra Kumar rendered by Hon''ble Supreme Court held the field for almost 10 years, when the AFT Act, 2007 was enacted. There is considerable difference in the constitution of Tribunals under the Administrative Tribunals Act, 1985 and the Armed Forces Tribunal Act, 2007. Unlike the Administrative Tribunals Act, 1985 the qualifications for appointment of Chairperson and other members, in Section 6 of the AFT Act, 2007 provides that person shall not be qualified for appointment as Chairperson unless he is retired judge of the Supreme Court or retired Chief

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Justice of the High Court. Under sub-section (2) a person shall not be qualified for appointment as Judicial Member, unless he is or has been a judge of the High Court. The AFT though created under Art.323-A, consists of Chairman, who has been judge of the Supreme Court or retired Chief Justice, and the Judicial Member of the Tribunal cannot be appointed unless he is or has been judge of the High court. There are no exceptions to the service matters under the Administrative Tribunals Act, 1985 and there is no appeal against any order of holding a person guilty and sentence by way of imprisonment. Further there is no statutory appeal provided under the Administrative Tribunal Act, 1985 against the orders of the Tribunal to the Supreme Court, instead u/s 28 only the jurisdiction of the Supreme Court u/s 136 of the Constitution was saved. We thus find that there is considerable difference between the composition of the Tribunal, its jurisdiction, powers and authority, and the right to appeal against the orders of the Tribunal between Administrative Tribunals constituted under the Administrative Tribunals Act, 1985 and the AFT constituted under the AFT Act, 2007.

35. The aforesaid discussion would show that the powers of the High Court under Art.226 of the Constitution are not totally excluded in respect of all the matters. In the matters, which are accepted u/s 3 (o) from service matters including summary court martial except where punishment is less than three months, the interim orders against which no appeal lies to the Supreme Court in the Second Proviso to Section 30, the High Court can exercise jurisdiction under Art.226 of the Constitution of India. So far as Art.227 is concerned, the supervisory jurisdiction has been excluded by the Constitution itself under Clause (4) of Art.227 of the Constitution of India.

36. u/s 30 of the AFT Act, 2007 right to appeal to the Supreme Court has been given subject to leave of the Tribunal on a point of law of general public importance. There is no such restriction to apply for leave u/s 31 of the AFT Act, 2007 to the Supreme Court against the orders passed by the AFT. Where it appears to the AFT that point is one which has to be considered by that Court, the appeal may be entertained. A person, therefore, is not left without a remedy of judicial review, which is basic feature of the Constitution of India.

37. Art.136 of the Constitution of India does not confer a right to appeal on any party. In Ashok Nagar Welfare Association and Another Vs. R.K. Sharma and Others, ; Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another, and in Esher Singh Vs. State of Andhra Pradesh, the Supreme Court held that Art.136 confers a discretionary power on the Supreme Court to interfere in suitable cases. It does not inhibit any person from invoking jurisdiction of the Supreme Court. In Ramakant Rai Vs. Madan Rai and Others, the Supreme Court following Arunachalam Vs. P.S.R. Sadhanantham and Another, and P.S.R. Sadhanantham Vs. Arunachalam and Another, held that the powers vested in Supreme Court under Art.136 is not to be confused with the ordinary appellate power exercised by appellate courts and appellate tribunals

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under specific statutes. It is a plenary power, "exercisable outside the purview of ordinary law" to meet a person''s demand for justice. Art.136 confers a wide discretionary power on the Supreme Court to interfere in suitable cases. It is a special jurisdiction, which is residuary in nature and is extraordinary in its amplitude, its limits, when it chases injustice. The Supreme Court retains inherent powers and jurisdiction under Art.136 in dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. The power as held by the Supreme Court is required to be exercised only in exceptional circumstances for furthering the ends of justice.

38. The right to appeal u/s 31 (1) of the AFT Act, 2007, when certificate of leave to appeal is denied by the Tribunal, is not restricted to the consideration of a point of law of general public importance. The words "or it appears to the Supreme Court that point is one which ought to be considered by that Court" are wide enough, for the Supreme Court to entertain any appeal on such point, or on any other point. The powers of the Supreme Court, u/s 31 (1) cannot be limited to only to such point, which was raised and on which the Tribunal did not grant certificate, and in that context it cannot be said that a person aggrieved by the judgment of the AFT has been left without a remedy of judicial review.

39. There are several central legislations such as Advocates Act, 1961 (Section 38); Central Excise Act, 1944 [Section 35 L (b)] in which the power of judicial review against the orders of the statutory authorities or the Appellate Tribunals are conferred by providing appeals to the Supreme Court. In all such cases the power of judicial review of the Supreme Court, may not be interpreted, if a right to approach the High Court under Art.226 is not admitted, to exclude right to judicial review, which is the basic feature of the Constitution of India. In the AFT Act, 2007, also we find right to appeal to the Supreme Court under sub-section (2) of Section 30, where the Tribunal has passed any order in exercise of its jurisdiction to punish for contempt. In all such cases, the exclusion of the right to approach the High Court, is not with an object to deny the right of judicial review but exclude one stage of judicial review by first approaching the High Court under Art.226 of the Constitution of India, and thereafter approaching the Supreme Court.

40. We are not persuaded by the decisions of Delhi High Court that all the decisions of the AFT may be reviewed by the High Court under Art.226 of the Constitution of India as the right to judicial review under Art.226 of the Constitution of India is the basic feature of the Constitution. The right to judicial review and not review by the High Court under Art.226 of the Constitution of India, is the basic feature of the Constitution of India. Where such right has been conferred by Parliament, by way of statutory appeal to the Supreme Curt of India, the right of judicial review is not denied.

41. We find ourselves in agreement with the Kerala High Court in Joby Varghese''s case that the jurisdiction of the High Court under Art.226 of the

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Constitution of India, will not be excluded, where the constitutional validity of any of the provisions of the Act under which the Tribunal is constituted is under challenge, to entertain writ petitions on matters pertaining to armed forces outside the jurisdiction of the AFT, particularly of the cases excluded from the definition of service matters u/s 3 (o) of the AFT Act, 2007; to entertain writ petitions in the matters of interim orders passed by the AFT; seeking directions to the Tribunal to exercise its jurisdiction or to refrain from exercising jurisdiction, where the Tribunal has failed to exercise its jurisdiction or exercises jurisdiction not conferred on it. We are, however, not persuaded with the view taken by the Kerala High Court that the High Court will be entitled to entertain writ petitions under Art. 226 against final orders of the AFT, where the Tribunal has not granted certificate of fitness for appeal u/s 31 (1) of the Act and a writ under Art.227 of the Constitution, where the AFT has failed to exercise its jurisdiction.

42. We may, add a note of caution, as flagged by the Supreme Court in Surya Dev Rai Vs. Ram Chander Rai and Others, and 39 as follows:-

38 (5). Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not

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covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where ''a stitch in time would save nine''. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

Conclusion

43. On the aforesaid discussion, we are of the view that the AFT Act, 2007 does not take away or violate the right of judicial review under Art.226/227 and Art.32 of the Constitution of India. The writ petitions under Art.226 of the Constitution of India would be maintainable, where:-

(a) it pertains to challenge against the constitutional validity of any of the provisions of the AFT Act, 2007;

(b) in the matters relating to armed forces excepted from the jurisdiction of the AFT u/s 3 (o) of the AFT Act, 2007;

(c) in the matters of interlocutory orders passed by the AFT; However, no writ

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will lie in the High Court:-

(a) in contempt matters, where statutory appeal is provided to the Supreme Court u/s 30 (2) of AFT Act, 2007;

(b) against final orders of the AFT, in which an appeal lies to Supreme Court u/s 31 (1) of AFT Act, 2007;

(c) under Art.227 of the Constitution of India.

44. In the writ petitions before us, the petitioners have challenged the final orders passed by the AFT, without filing an application for leave to appeal to the Supreme Court u/s 31 (1) of the AFT Act, 2007.

45. All the writ petitions are consequently dismissed.

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