

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION No. 782 of 2020**Friday, this 12th day of November, 2021**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)MR-06090H Colonel Soumen Kar (Retd), S/o Late Sri Subhash
Chandra Kar, R/o 3 Sardar Sankar Road, Kolkatta-700026.

..... Applicant

Ld. Counsel for the : **Shri KK Misra**, Advocate.
Applicant

Versus

1. Union of India, through its Secretary, Ministry of
Defence, New Delhi.
2. Chief of the Army Staff, Army Head Quarters, New Delhi.
3. G OC-in-C, HQs Central Command, Lucknow.
4. Commandant, AMC Centre and College, Lucknow, PIN-
226002.

.....Respondents

Ld. Counsel for the **Dr. Shailendra Sharma Atal**, Advocate
Respondents. Central Govt. Standing Counsel

ORDER

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

(i) to quash HQs, AMC Centre and College, Lucknow letter No 1723/Gen/LC dt 17 Oct 2020, (Annexure A-3 to OA) and direct respondent No 3 & 4 not to invoke provisions of AA sec 123 on the applicant any further.

(ii) Since the prescribed period for taking disciplinary actions stands expired, direct the aforementioned respondents to close the said proceedings against the applicant.

(iii) Any other relief which Hon'ble Court may think just and proper may be granted in favour of the applicant.

(iv) Cost of the case may be allowed.

2. In the year 2015 medicines/medical equipments worth Rs 3.25 crores were demanded by Base Hospital (BH), Lucknow Cantt from Armed Forces Medical Stores Department (AFMSD), Lucknow through two indents on 03rd and 05th Jun 2015. The items were received on 03.12.2015 and 29.12.2015 and were shown as expended/consumed on 31.12.2015 and 31.01.2016 respectively. The aforementioned items were related to heart and vascular surgeries which are not performed in hospitals of Central Command/Eastern Command. The whole episode came to light when a pseudonymous letter was received on 14.06.2016 at office of Commandant Base Hospital, Lucknow, allegedly written by Sri Sai Agencies stating exact issue

voucher numbers and thereby implicating misappropriation. On the basis of the pseudonymous complaint, a One Man Inquiry was ordered on 14.06.2016 which found certain irregularities and medical equipment/medicine items worth crores of rupees were found concealed in oxygen cylinder storage room. Later, these items were shown as disposed off. A Court of Inquiry was ordered by Uttar Bharat Area, Bareilly on 26.06.2017 to investigate the alleged fraud which came into light after receipt of pseudonymous complaint and findings of One Man Inquiry report. The applicant served in AFMSFD during the period September 2012 to September 2016 during which the fraud was committed and since he superannuated on 31.08.2017, Section 123 of Army Act, 1950 was invoked and applicant was called to participate in Court of Inquiry. During the course of investigation, summary of evidence was recorded and tentative charge sheet was served to applicant on 12.07.2019, on being found blameworthy in five charges, under Sections 66 and 52 (f) of Army Act, 1950. While the disciplinary proceedings were under progress, some delay took place due to Covid-19 Pandemic. The applicant had participated in Court of Inquiry Proceedings up to 29.10.2019. Subsequently vide letter dated 02.12.2020 applicant was summoned again for recording of Additional Summary of Evidence but he, rather than reporting to AMC Centre & College, has filed this O.A. on 18.12.2020, on the ground that since applicant had retired on 31.08.2017 and

three years after his retirement had elapsed in August 2020, therefore, respondents have no ground to proceed against him on completion of three years of not being subject to the Army Act.

3. Submission of learned counsel for the applicant is that applicant had retired on 31.08.2017 and he ceased to be subject to Army Act w.e.f. 01.09.2017. His further submission is that applicant took active participation in Court of Inquiry from 19.07.2019 to 29.10.2019 and after the Court of Inquiry was over, he was permitted to leave the station. Applicant's learned counsel further submitted that the period of three years prescribed by Section 123 of Army Act, 1950 expired on 01.09.2020 and since proceedings of Court Martial did not commence during the period of three years, the applicant cannot be treated subject to Army Act after 01.09.2020.

4. On the other hand learned counsel for the respondents submitted that after Court of Inquiry, on 24.05.2019 HQ Central Command had directed disciplinary action against 13 delinquents and recording of summary of evidence is complete in respect of all charged personnel except applicant who is trying to escape on invocation of Section 123 of Army Act, 1950. His further submission is that consequent to invoking Army Act Section 123, the applicant could have been taken into custody and tried and punished for such offence as if he

continued to be so subject, however, the applicant was never taken into custody by the respondents in spite of serious charges against him and he was allowed to proceed to Kolkata which is his home town, after initial recording of summary of evidence at his own request, on humanitarian grounds. His further submission is that applicant has made several attempts to derail the recording of Additional Summary of Evidence by incorrect interpretation of Army Act Section 123. The applicant was informed in time for appearing again for recording of Additional Summary of Evidence but he, however escaped by refusing to record his statement and did not attempt to come to Lucknow, with the intent of delaying further investigation. His further submission is that since delay has occurred on account of Covid pandemic, this period should be excluded from the period of investigation. He further submitted that one of the co-accused i.e. Brig SK Gupta in the said case had filed writ petition (C) No. 11049 of 2020 in the Hon'ble Delhi High Court against AFT, Principal Bench, New Delhi order dated 16.12.2020 for exempting him to appear for recording of Summary of Evidence at Lucknow on some miscellaneous grounds like Covid Pandemic etc, but the Hon'ble High Court of Delhi has directed applicant to appear at Lucknow before the Court of Inquiry else consequences shall follow. He pleaded for dismissal of O.A.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. It is undisputed fact of the parties that applicant had served in AFMSD, Lucknow during the period September 2012 to September 2016 and he was posted there as Deputy Commandant (Dy Comdt), when a massive medical equipment/medicine scam was reported to have taken place. Applicant superannuated on 31.08.2017 and he ceased to be subject to Army Act w.e.f. 01.09.2017. On the basis of a pseudonymous complaint received on 14.06.2016 at Commandant Office of Base Hospital, Lucknow, a Court of Inquiry was ordered by UB Area Bareilly. A total of 13 persons were charged under Section 66 and 52 (f) of Army Act, 1950 and final statements were recorded for 12 persons except the applicant. Letters were issued to applicant for recording Additional Summary of Evidence but he did not turn up and has filed this O.A. on the ground that invocation of Section 123 of Army Act, 1950 is not applicable to him w.e.f. 01.09.2020 as three years had lapsed on 01.09.2020 after his retirement.

7. We have perused Section 123 of Army Act, 1950, extract of which for convenience sake is reproduced as under:-

"123. Liability of offender who ceases to be subject to Act.

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

(2) No such person shall be tried for an offence, unless his trial commences within a period of three years after he had ceased to be subject to this Act; and in computing such period, the time during which such person has avoided arrest by absconding or concealing himself or where the institution of the proceeding in respect of the offence has been stayed by an injunction or order, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded:] Provided that nothing contained in this sub- section shall apply to the trial of any such person for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court- martial.

(3) When a person subject to this Act is sentenced by a court-martial to transportation or imprisonment, this Act shall apply to him during the term of his sentence, though he is cashiered or dismissed from the regular Army, or has otherwise ceased to be subject to this Act, and he may be kept, removed, imprisoned and punished as if he continued to be subject to this Act.

(4) When a person subject to this Act is sentenced by a court-martial to death, this Act shall apply to him till the sentence is carried out."

8. From the aforesaid, it is clear that trial should commence within three years of invocation of Section 123 of Army Act, 1950. Nevertheless it is also a fact that the entire country was in the grip of the Covid Pandemic for many months commencing March 2020, and normal work of all institutions in the country had been severely disrupted.

9. Additionally, the Hon'ble Apex Court in suo motu writ petition (civil) No. 3 of 2020 has taken cognizance for extension

of limitations that due to Covid Pandemic, period of 15.03.2020 to 14.03.2021 shall be excluded from the proceedings. Thus, it is quite clear that due to Covid Pandemic there have been huge delays in every aspect in our work life. We have seen that during the peak covid pandemic period, even prisoners were ordered to be set free, keeping in view of precarious situation all over the world.

10. We have also noted that there has been serious irregularity in purchase and accounting of indented items which are used only in cardio-vascular surgeries (not performed at Base Hospital, Lucknow). These surgeries are performed only in specialized centers viz. Army Hospital (Research and Referral), New Delhi, Command Hospital (Southern Command), Pune, Command Hospital (Air Force), Bangalore and INHS Ashwini (Mumbai). It is also noted with great concern that the quantity demanded by Base Hospital, Lucknow Cantt would have lasted 5-10 years in the above super specialty surgery centers for benefit of needy patients.

11. It is seen from the above that a huge fraud worth crores of rupees was committed, with the active connivance of staff at AFMSD, Base Hospital, Lucknow and the vendor involved in procurement, supply and disposal of unauthorized items of cardiac and vascular surgery. Applicant was performing the duties of Dy Comdt of AFMSD for a period of four years i.e. from September 2012 to September 2016. The fraudulent

procurement of stores by AFMSD, Lucknow took place under his supervision as the Dy Comdt of AFMSD, Lucknow with Brig SK Gupta (Retd), Brig Anurag Khanna, VSM, and eleven other Officers/JCOs/ORs and statements of all involved persons have been recorded except that of the applicant. It is also intriguing to note that items worth crores of rupees were supplied by AFMSD to Base Hospital, Lucknow and charged off/disposed off from ledger showing that they were used in different operation rooms, but the fact is that Base Hospital, Lucknow has no surgical facilities for cardiac/vascular surgeries.

12. We also observe that Brig SK Gupta (Retd) had filed O.A. No. 1135 of 2019 in AFT, Principal Bench, New Delhi against his physical appearance in the said Court of Inquiry which was not allowed vide order dated 16.12.2020. Order dated 16.12.2020 was challenged in the Hon'ble High Court of Delhi by filing Writ Petition (Civil) No. 11094/2020 which was heard and disposed off on 23.12.2020 issuing following directions to applicant:-

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"9. Else, we do not find any reason to interfere with the order dated 16th December, 2020 of the AFT, or to grant the stay of the letter dated 19th December, 2020 calling the petitioner to Lucknow, since the same is also within the domain of the AFT. Rather, the maintainability of the writ petition with respect to a proceeding pending before the AFT and against the orders in the nature of interim order of the AFT, itself is doubtful but we have still chosen to assuage the fears of the petitioner, which in the present times are realistic.

10. Needless to state that if the petitioner fails to appear, consequences shall follow.

13. From the aforesaid it is clear that co-accused (applicant's accomplice) of the said fraud was not given any relief either from AFT, Principal Bench, New Delhi or from the Hon'ble Delhi High Court.

14. We have given our anxious considerations to the applicability of Section 123 of the Army Act and we find that the provisions of this Section can be invoked keeping in view applicant's dereliction in recording of Additional Summary of Evidence and also the special circumstances arising due to the Covid Pandemic as well as order of the Hon'ble Apex Court.

15. In view of the above, O.A. having no force is hereby **dismissed.**

16. No order as to costs.

17. Pending miscellaneous applications, if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: 12.11.2021
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