$~25

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(CRL) 3614/2019 & CRL.M.A. 43679/2019**

MAJ. GEN. S. C. SHARAN ..... Petitioner

Through: Mr T. Parshad, Advocate.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr Amit Mahajan, CGSC with Maj. Mahesh Sharma, and Col. Manoj, AR.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 27.12.2019

1. The petitioner has filed the present petition, *inter alia*, praying as under:-

> "(A) Issue a Writ of Certiorari or any appropriate Writ/Order/Directions, to quash Para 6 of the impugned Invocation Policy dated 23 March, 2007, dealing with the invocation of the provisions of Section 123 of the Army Act, 1950, being arbitrary, unjust and illegal violating the provisions of Articles 14 and 21 of the Constitution of India as also the provisions of Section 123 of the Army Act itself."

2. The petitioner is a serving officer of the Indian Army and he will superannuate from service on 31.12.2019. Complaints against the petitioner were received alleging financial impropriety and inappropriate conduct with girl cadets when he was posted as Additional Director General, National

Cadet Corps Directorate, Gujarat. In view of the said complaints, disciplinary proceedings were initiated against the petitioner. And, a Court of Inquiry was convened to investigate the said complaints.

3. It is stated that the Court of Inquiry has found the petitioner blameworthy for forwarding sexually explicit messages and videos and thereby sexually harassing certain girl cadets.

4. In view of the above, the petitioner apprehends that he would be arrested.

5. The petitioner is aggrieved by Paragraph 6 of the Policy Letter dated 23.03.2007 (which is impugned herein), to the extent that it provides that an officer or JCO would be placed under arrest prior to invoking Section 123 of the Army Act, 1950 (hereafter the 'Army Act'), unless otherwise directed by the Competent Authority. It is the petitioner's case that such a policy, which provides for blanket provision for arresting all officers unless directed otherwise, is contrary to Articles 14 and 21 of the Constitution of India. It is earnestly contended on behalf of the petitioner that before any order of arrest is passed, the competent authority is required to apply its mind and consider whether such an order is warranted in the given facts of the case.

6. Paragraph 6 of the Policy Letter dated 23.03.2007, which is impugned herein, is set out below:-

> "**Arrest**
>
> 6. Unless otherwise directed by the competent authority at para 4 above, an officer or JCO or OR will be placed under arrest prior to invoking Army Act Sect 123 in his respect on the orders of his commanding officer and would remain under arrest until finalisation of the case

against him. The type of arrest (open or close) will be at the discretion of his commanding officer who will decide whether, having regard to all the circumstances open or close arrest will best meet the requirement of the case. He can also exercise his discretion to change the form of arrest from time to time, if circumstances so warrant. Unless superior authority orders otherwise, the decision of commanding officer in this regard shall prevail."

7. Before proceeding further, it is also relevant to refer to Section 123 of the Army Act, which reads 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 of 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. A plain reading of Sub-Section (1) of Section 123 of the Army Act indicates that when an offence is committed under the Army Act by a person who was subject to the said Act at the material time, he '*may*' be taken into and kept in military custody and punished for such offence. Thus, by virtue of Section 123(1) of the Army Act, even though a person has ceased to be subject to the Army Act he would, nonetheless, be within the sweep of the Army Act for being tried for an offence which is alleged to have been committed while he was subject to the said Act.

9. The use of the word 'may' in Section 123 of the Army Act also clearly indicates that it is not necessary that such a person be taken into military custody. Section 123(1) is only an enabling provision and it is obvious that an alleged offender would be taken into custody only if there are sufficient reasons for warranting the same. In this view, if Paragraph 6 of the policy letter dated 23.03.2007 is read to mean that in all cases officers or JCOs, who are alleged to have committed an offence under the Army Act would, unless otherwise directed by the Competent Authority, be placed under arrest; the same would, *prima facie*, fall foul of Articles 14 and 21 of the Constitution of India.

10. At this stage, Mr Mahajan, learned counsel appearing for the

respondent states, on instructions, that Paragraph 6 of the policy letter is not implemented in the manner as read by the petitioner. He states that in all cases, save and except where the exigencies of a given situation require otherwise, orders of arrest are passed after the Competent Authority has applied its mind.

11. In view of the above statement, Paragraph 6 of the impugned policy letter is read down in the aforesaid manner. Although a provision for arrest has been made in the impugned policy letter, the said arrest would not be made unless the Competent Authority so directs. Mr Mahajan states that in the facts of the present case, the petitioner would not be arrested unless an order to the said effect is passed by the Chief of Army Staff. In view of this statement, the petitioner's grievance does not survive.

12. The respondents are bound down to the said statement. No further orders are required to be passed in this petition.

13. The petition is, accordingly, disposed of. The pending application is also disposed of.

VIBHU BAKHRU, J

DECEMBER 27, 2019
MK