FORM NO – 21

(See Rule 102 (1)

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO: OA 29 OF 2014

THIS 19TH DAY OF SEPTEMBER, 2014

CORAM: Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)

Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

IC-46298N Lieutenant Colonel Mukul Dev
Son of Late S.Dayal,
Presently posted at HQ DG, NCC,
West Block IV, R.K.Puram, New Delhi

……Applicant

-Vs-

1. Union of India, Service through the Secretary,
Ministry of Defence, South Block,
New Delhi-110 011

2. The Chief of Army Staff,
Army Headquarters, Integrated HQ of M/o Defence (Army)
Defence Headquarters, PO: New Delhi – 110 011

3. Adjutant General, Integrated HQ of MOD (Army)
Defence Headquarters, PO New Delhi- 110 011

4. IC 45419 Brig VC Chitravanshi,
Jt. JAG, JAG's Deptt.
Integrated HQ of MOD (Army)
DHQ PO New Delhi-110 011

5. IC-45765 Col (TS) Jatinder Singh,
AJAG, JAG's Deptt.
Integrated HQ of MoD (Army),
DHQ PO New Delhi-110 011

……..Respondents

For the petitioner: Mr. Rajiv Mangalik, Advocate

For the respondents: Mr. Mintu Kumar Goswami, Advocate

O R D E R

Per Hon'ble Lt. Gen. K.P.D.Samanta, Member (A)

In this original application filed u/s 14 of the AFT Act 2007, the applicant is a serving Lt Col in the JAG Branch of Indian Army. He has essentially challenged the legality and validity of the summary trial proceeding held against him u/s 84 of the Army Act while he was serving as a Major in his parent Corps i.e. Regiment of Artillery in 2001 before he was transferred to the JAG Branch.

2. Without burdening this order with unnecessary factual details, suffices to state as background that the applicant was commissioned in the Regiment of Artillery, Indian Army on 20 Aug 1988 as 2/Lt. In course of service, he got promotions and at the relevant point of time in the year 2001, he was holding the rank of Major in 80 Field Regiment under GOC, HQ 54 Infantry Division, Secunderabad, Andhra Pradesh. He was, however, attached with 2/8 Gorkha Rifles (GR) located at Thiruvanantapuram, Kerala under the command control of the said GOC, 54 Infantry Division.

3. A summary trial proceeding was initiated against the applicant in the year 2001 mainly on two articles of charge framed u/s 63 of the Army Act after holding appropriate court of inquiry and summary of evidence. The alleged act of misconduct was stated to have been committed in the year 1999. As required under Army Rules 26, the applicant was asked by a letter dt. 11.4.2001 (annexure-2) to give his consent to dispense with attendance of prosecution witnesses during the summary trial which was scheduled to be conducted on 17 April 2001 at Secunderabad. The applicant, however, by a written communication on the same date i.e. 11.4.2001, gave his unwillingness to dispense with the attendance of PWs vide annexure-A3. The applicant was asked to attend the summary trial proceeding on 17 Apr 2001 at Secunderabad and accordingly, he reached there on scheduled date and time. According to the applicant, no prosecution witness was present at the trial. During the summary trial presided over by

the GOC, HQ 54 Infantry Division, the applicant was asked about his case when he stated that he acted on the verbal orders of his commanding officer, Col. BS Rehal (CO 80 Field Regiment) which was also his stand at the time of recording of Summary of Evidence (SoE). According to the applicant, said Col. BS Rehal and another key witness Maj GS Sandhu, who deposed during SoE, were not present at the trial though they were the main PWs. However, Nb Sub C Govinda Swamy of 80 Field Regiment, who was the only defence witness, was called at the trial and he was present. It is the specific case of the applicant that Col Rehal was on that date posted as Branch Recruiting Officer (BRO), Alwar (Rajasthan) while Maj Sandhu was serving in HQ 162 Infantry Brigade, J & K and both these key prosecution witnesses were absent during trial. The applicant has further stated that after hearing him, the officer holding the trial dismissed both the charges and acquitted him. Thus, the matter ended there.

4. In the meantime, as it appears, because of pendency of this summary trial, the applicant was not being transferred from his present attachment with 2/8 GR for which he filed a writ petition before the Hon'ble Madras High Court being WP 2116/2001. However, after the summary trial was concluded and both the charges, according to him, were dismissed on 17 Apr 2001, the applicant was transferred back to his parent unit 80 Field Regiment on the very next day i.e. on 18 Apr 2001 since no punishment was inflicted on him in the said summary trial and no Part II order was also published. Thus, according to the applicant, he had no grievance and accordingly, the writ petition pending before Hon'ble Madras High Court also became infructuous. On that ground he did not pursue the said case any further and had no knowledge about its outcome. The fact, however, remains that the said writ petition was dismissed on 18 Apr 2001 in presence of ld. Advocates for both parties when it was brought to the notice of the Hon'ble High Court that the summary trial stood concluded by inflicting punishment of 'reprimand' on the applicant. Hon'be High Court, however, granted liberty to the applicant to challenge the same if any adverse orders are passed in future. As averred by the applicant, since he did not know about this order because of lack of communication between him and his counsel, he did not take any further action on

the understanding that there was no punishment inflicted on him and he was exonerated completely of the charges and got his relief. He has asserted that the fact of the punishment of 'reprimand' that was reportedly imposed on him in the said summary trial was not within his knowledge at all. He further adds that had he had the slightest knowledge that such a punishment was inflicted upon him, the least of all he would have filed a statutory complaint before the competent authorities immediately.

5. Subsequently, by passage of time, the applicant got himself transferred to JAG Branch based on Inter Departmental Transfer policy and is presently working there as Lt. Col. He was due for his promotion to the next rank of Colonel as a 1989 batch candidate since many of his juniors were already promoted to that rank in 2008 while the applicant is still in the lower rank of Lt. Col. For getting justice in the matter of promotion, the applicant started filing multiple applications before the Tribunal. According to the applicant, he being a transferee to JAG Branch from Artillery, the directly appointed JAG officers nursed animus against him and were all out to harm his career in one way or the other. He has brought some allegations against respondents 4 and 5 in this regard. Even after getting certain relief from this Tribunal the applicant was not promoted to the rank of Colonel on special review selection. Therefore, he made efforts to know the reason from various sources for his non-selection and ultimately came to know in April 2013 that there existed an entry of 'reprimand' in his service dossier which was awarded against him in the said summary trial held on 17 Apr 2001 while he was a Major in his former regiment i.e. Artillery.

6. According to the applicant, since it was a surprise to him as he was under the impression that he was fully exonerated in the said summary trial as told by his GOC at that point of time, and since no Part II order was ever published notifying such punishment to be recorded in his dossier, he filed a further application before this Tribunal being OA 34 of 2013 making mainly two grievances, viz. (1) the summary trial was invalid as no prosecution witness was examined which was mandatory in view of his written unwillingness to dispense with presence of PWs; and (2) the recording of the punishment entry

'reprimand' in his dossier without publishing any Part II order and without the authority from the Central Govt. as relevant at that point of time, was illegal and irregular. It was further alleged by the applicant that in the summary trial no prosecution witness was present and therefore, Form No. 1 was used by the presiding officer while conducting the trial though Form No. 2 ought to have been used as per rules since vital prosecution witnesses, who were examined during summary of evidence, did not attend the summary trial on 17 Apr 2001 where the applicant pleaded 'not guilty'. The trial document viz. Form No. 2 is a subsequent development which might have been manufactured at later stage as an after-thought and therefore illegal and cannot be relied upon. However, his prayer was only for quashing of the punishment entry and for reconsideration of his case for promotion after removal of the ibid punishment entry.

7. This Tribunal noticed that no statutory complaint was ever made by the applicant in respect of these grievances possibly because the applicant did not know about existence of any such punishment or its entry into his service dossier. Accordingly, the Tribunal vide its order dt. 15 May 2013 in OA 34 of 2013 directed the Central Govt. in the MOD- respondents to treat the said OA as a statutory complaint and decide the same in accordance with law.

8. In pursuance thereof, the respondents considered the grievances of the applicant as raised therein and disposed it by passing a detailed order dt. 10 Jan 2014 (Annexure A-1 to this OA). In the said order, the respondents i.e. MOD came to the following conclusions:-

> "9. And Now therefore, having considered the issues raised in the OA Number 34/2013 (treated as statutory complainant as per Honourable AFT (RB), Kolkata order dated 12 Sep 2013 (15 May 2013) along with available documents on record, **the Central Government finds that a valid summary Trial of the complainant was held on 17 April 2001** and accordingly **correct entries have been made in his service record**. Accordingly, the contentions raised by the complainant are devoid of merit and substance. Therefore, in deference to Honourable AFT (RB) Kolkata orders dated 15 May 2013, 12 Sept 2013, 27 Sept 2013, 25 Oct 2013 and 2nd Dec 2013 the OA 34/2013 submitted by IC 46298N Lieutenant Colonel Mukul Dev, which has been treated as Statutory complaint, is rejected."

9. Being dissatisfied, the applicant filed two separate original applications before this Tribunal. At this stage it may be noted the summary trials with lower punishments like 'reprimand' was not considered to be under the jurisdiction of the AFT as per interpretation of Section 3 (o) of the AFT Act 2007. Later such interpretations were given a wider vision by certain High Court decision. These aspects are discussed in detail in our Order dated 06.05.2014 in this OA while considering the issue of jurisdiction. The said separate OAs thus filed by the applicant in this AFT are as under:-

a) OA 4 of 2014 in which he called in question the authority and procedure followed in making the punishment entry of 'reprimand' that was allegedly awarded to him in the summary trial held on 17 Apr 2001 into his service record.

b) OA 29 of 2014 i.e. the instant application, in which he has essentially challenged the legality and validity of the conduct of the summary trial itself held on 17 Apr 2001.

10. OA 4 of 2014 was already decided and disposed of by this Tribunal by order dt 27th August 2014 by issuing of certain directions. OA 29 of 2014 is now being considered by us in this order.

11. On the above setting of facts, the applicant has prayed for the following main reliefs in this OA:-

i) To declare the action of the respondents as unjust, arbitrary and illegal; and

ii) To quash and set aside the impugned summary Trial proceedings and consequently award of the punishment of 'Reprimand' by GOC, 54 Infantry Division on 17 April 2001; and

iii) To direct the respondents to reconsider the petitioner for promotion to the rank of colonel through No. 3 Selection Board as a Special Review (Fresh) candidate after removal of the entry of the punishment of 'Reprimand' from all the service documents/CR dossier of the applicant and restoring the seniority of the applicant of his own batch of 1989; and

iv) To direct the official respondents to punish the Respondent No. 4 for his inaction to render impartial advice in terms of their own policy; and

v) To award exemplary costs in favour of the applicant

vi) To pass such other and further orders which their lordships may deem fit and proper in the existing facts and circumstances of the case.

12. The respondents have opposed the application on all material points raising various objections. However, they have taken the following main preliminary objections with regard to admissibility of the application:-

a) The territorial jurisdiction of this Bench of the Tribunal to entertain the application inasmuch as the applicant is now posted at Delhi, is presently residing at Delhi and the alleged incident of summary trial was held at Secunderabad (AP). Therefore, in terms of rule 6(2) of the AFT (Procedure) Rules, the applicant cannot file this application before this Bench based on the ground of his last posting being in Kolkata.

b) In terms of Sec 3(o) (iii) of AFT Act, 2007, any grievance with regard to a summary trial cannot be entertained by the Tribunal save and except where punishment of dismissal has been awarded. Since in the instant case, the punishment is only 'reprimand', and not 'dismissal', therefore, the applicant cannot invoke the jurisdiction of the Tribunal to challenge the ibid summary trial.

c) The application is barred by limitation because the summary trial proceeding which is under challenge was held in Apr 2001 and, therefore, it is obviously barred by limitation in terms of Sec. 22 of AFT Act, 2007.

d) Lastly, the instant application is barred by the principle of res judicata since the applicant is trying to re-agitate the same issue against the same respondents, which was already agitated in earlier application viz. OA 4/2014 in which the order dt 10 Jan 2014 passed by the Central Govt. rejecting the statutory complaint of the applicant was also challenged and

has already decided by the Tribunal by order dt. 27th Aug 2014. The said matter having reached finality in this Tribunal, no further proceeding on the same issue is admissible.

13. On the merit of the case, it is submitted by the respondents that the summary trial of the applicant was held on April 17 2001 at HQ 54 Infantry Division while he was serving with 80 Field Regiment and attached to 2/8 GR. The applicant was arraigned on two articles of charge under Army Act 63 for "AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE". The imputations of the two charges are as follows:-

1st charge

"In that he,

at Madukkarai, on or about 20 May 99 while performing the duties of Battery commander, Headquarter Battery 80 Field regiment, improperly and without authority handed over a blank Central Sales Tax Form 'D' dated 20 May 99, after affixing the stamps of said Headquarter Battery and the battery Commander, Headquarter Batter 80 Field Regiment, to Shri J Balajee Srinivas, the proprietor of M/s Hi-Tech Solar Appliances, Coimbatore.

2nd charge

"In that he,

At Madukkarai on or about 14 Jun 99 improperly and without authority issued a certificate to Shri Balajee Srinivas, the proprietor of M/s Hi-Tech Solar Appliances, Coimbatore stating therein –

We have carried out thorough testing of Power Haven GPS (Inverters) manufactured by M/s Hi-tech solar appliances of Coimbatore and the following has been confirmed by the quality Assurance Dept pertaining to the test carried out :-

i) Output – Max (As specified by the manufacturer)
ii) Durability and sustainability of Load – Max
iii) Rating – As per specifications
iv) Grading awarded based on the performance of the machine-'A'
v) After sales service – Adequate

Well knowing the said statements to be false"

14. The applicant pleaded 'not guilty' in respect of both the charges, but the then GOC, 54 Infantry Division holding the trial, after hearing the witnesses, and after giving him opportunity to cross examine,

found him 'not guilty' of the first charge and 'guilty' of the second charge and awarded punishment of 'reprimand'. According to the respondents, the contention of the applicant that he was acquitted on both the charges and no punishment was imposed is totally incorrect.

15. It is the case of the respondents that the summary trial was held in accordance with rules and procedures. It is also submitted that Form 2 was used and it is borne out from para 3 of the Form No. 2 that witnesses gave their evidence, and the accused was permitted to cross-examine them. It is, however, submitted that since the records of the summary trial are very old, those have been destroyed in accordance with para 592 of Regulations for the Army, 1987 (revised edition). It is further submitted that the applicant was well aware of this punishment because on 18 Apr 2001, i.e. on the next very day once the punishment was awarded, information was laid before the Hon'ble Madras High Court where the writ petition filed by the applicant was pending. The ld. Adv. of the applicant was very much present in court; and therefore, it does not lie in the mouth of the applicant to contend that he was not aware of any such punishment as he was not in contact with his lawyer. Such a plea is an after-thought and cannot be relied upon. It is emphatically submitted by the respondents that Form No. 2 was used by the officer conducting the trial and not Form No. 1 as alleged by the applicant. It is denied that the trial documents reflecting the award of 'reprimand' were manufactured at a later stage. It is further stated that the allegation made by the applicant is very serious which may invite a proceeding under Army Act sec. 56 against him for casting serious aspersion on the character of the officer conducting the trial. It is submitted that there is documentary evidence on record to show that the summary trial was indeed conducted in Form No. 2 and all established procedures were followed. Therefore, the summary trial was valid and in order. The applicant cannot challenge the said trial after a lapse of all these years when most of the documents relating to this trial were destroyed in the normal course of official business in accordance with rules. They have, therefore, prayed for dismissal of the OA.

16. We have heard Mr. Rajiv Mangalik, ld. Adv. appearing for the applicant and Mr. Mintu Kumar Goswami, ld. Adv. appearing on behalf of the respondents. On conclusion of hearing, Mr. Goswami has submitted a written note of arguments. The other relevant documents have also been produced by the respondents.

17. At the outset, we may deal with the preliminary objections raised on behalf of the respondents with regard to jurisdiction and limitation.

18. It may be stated that at the time of admission of this application, the same very points were argued in detail by the then ld. Counsel for the respondents. This Tribunal vide order dt 6.5.2014 while admitting the application for adjudication, dealt with all these issues in great detail. We need not repeat the same in this order and we reiterate our observations and directions as recorded in our said order to answer the objections so raised by Mr. Goswami.

19. Now, we come to the other important objection as raised by Mr. Goswami on behalf of the respondents i.e. with regard to res judicata.

20. By referring to Sec 11 of the Civil Procedure Code, Mr. Goswami has submitted that in the earlier proceeding i.e. OA 4 of 2014 between the same parties, the averments made in paras 4.8 to 4.10 are identical as have been made in this OA in para 4.8 to 4.10. Similarly, the grounds taken in OA 4 of 2014 to set aside the summary trial at “F, G, H, I, J and L” are also identical with grounds taken in this application at ground Nos. B, C, D.E, F and H. It is submitted that grounds taken in both the OAs for setting aside the summary trial proceeding in question are same. It is further pointed out that reliefs claimed in this OA at para 8 (iii), (iv), (v) and (vi) are also identical with those claimed in the earlier OA at para 8 (iv),(v), (vi) and (vii) except that instead of respondent No. 4, it is mentioned as respondent No. 6 but the person is the same. Since OA 4 of 14 has already been adjudicated and decided by this Tribunal vide order dt. 27 Aug 2014, the applicant is precluded from raising the same issue and pleading as also claiming same reliefs in the present proceeding as the same is hit by the bar of res judicata.

21. It is argued by the ld. Counsel for the respondents that the summary trial was also questioned by the applicant in OA 34/2013 which was subsequently treated as a statutory complaint as per order of this Tribunal. In obedience to that direction, the Central Govt. has considered the matter and passed an order dt. 10 Jan 2014 dealing with the validity of the summary trial as also the punishment entry made in the service record of the applicant. In the earlier OA 4/2014, this Tribunal dealt with this order of Central Govt. and quashed the said order only to the extent where the MoD has held that the said punishment entry as valid. The ld. Counsel contends that this would mean that the Tribunal has set aside sub-para (d) and (e) of para 8 of the order dt. 10 Jan 2014 dealing with entry of punishment of reprimand in the dossier of the applicant and the rest part of the order i.e. sub-paras (a),(b),(c) and (f) of para 8 of the ibid order where it was held that the summary trial conducted on 17 Apr 2001 was valid, was refused to be quashed. Under such circumstances, as per provision of Explanation (V) of Sec. 11 of CP Code, the prayer made in this application relating to that part is barred by the principles of constructive res judicata. He has also contended that in the earlier proceeding the applicant only prayed for setting aside of the punishment entry of reprimand as was inflicted on him in the summary trial dt 17 Apr 2001 by way of challenging the rejection order dt 10 Jan 2014 and therefore, it has to be held that he was satisfied with the other part of the order where the summary trial in question was held to be valid. Thus, the challenge to summary trial proceeding that was raised in the statutory complaint stood merged with the order dt 10.1.14 rejecting such challenge and holding that the said trial was valid. He could have prayed for quashing of the entire summary trial in the earlier proceeding, as has now been prayed for in this proceeding. But by choosing not do so, he has abandoned his right to challenge the same and hence he is now debarred from questioning that part of the order in this subsequent proceeding in view of clear bar in Explanation (IV) of Sec. 11 of CP Code. In support of his contentions, ld. Counsel has relied on the following decisions of the Hon'ble Supreme Court:-

i) Swami Atmananda & Ors –vs- Sri Ramakrishna Tapovanam & Ors, (2005) 10 SCC 51
ii) Ishwar Dutt –vs- Land Acquisition Collector & Anr, (2005) 7 SCC 190

iii) Ramchandra Dagdu Sonavane (dead) by LRs & Ors –vs- Vithu Hira Mahar (dead) by LRs & Ors, (2009) 10 SCC 273

iv) Union of India & Ors –vs-Major S.P.Sharma & Ors, (2014) 6 SCC 351

22. On this preliminary objection with regard to res judicata as raised by the respondents, Mr. Mangalik, has submitted that in the earlier proceeding the substantial issue raised was the authority and procedure that was followed by the respondents in recording the punishment entry of 'reprimand' in the service record of the applicant. The challenge to the summary trial itself was not the direct and substantial issue in the earlier proceeding. Therefore, there cannot be any res judicata as contended by the ld. Counsel for the applicant. He has in support of his contention placed reliance on a decision of the Hon'ble Andhra Pradesh High Court in **Mangu Ramdas –vs- Madurai Venkataratnam & Ors**, reported in AIR 1973 AP 256. He has, however, submitted that he will confine his argument only with regard to para 8(ii) only which is his main prayer in this OA and would not insist on other prayers which were there in the earlier OA.

23. We have given our thoughtful consideration to the contentions so advanced by the parties on this issue of res judicata. We have also gone through the decisions cited by both parties on this legal issue. We may first consider the law as laid down by the Hon'ble Apex Court on the question of res judicata by considering various decisions cited before us.

24. In **Swami Atmananda & Ors –vs- Sri Ramakrishna Tapovanam & Ors (supra)** the Hon'ble Supreme Court explaining the principles of res judicata has held as under :-

> "26. The object and purport of principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment.
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> 27. The principle of res judicata envisages that a judgment of court of concurrent jurisdiction directly upon the point would create a bar as regard a plea between the same

parties upon some other matter directly in question in another court and that the judgment of the court of exclusive jurisdiction direct in point.

28. The doctrine of res judicata is conceived not only in larger public interest which requires that all litigation must, sooner than later, come to an end but is also founded on equity, justice and good conscience.

29. In **Sulochana Amma vs. Narayanan Nair** [(1994) 2 SCC 14], it was held:

> "5. Section 11 of CPC embodies the rule of conclusiveness as evidence or bars as a plea as issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a court competent to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit would operate as res judicata. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies, been decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the tribunals other than the civil courts."
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> 30. The Appellants did not object to the raising of the said plea by Tapovanam in the suit. As the said plea had adequately been raised in the plaint, in relation whereto the Appellants herein had adequate opportunity to traverse and furthermore both the parties having brought on records all the relevant documents the Appellants herein cannot be said to have been prejudiced in any manner by reason of non-framing of the issue as regard res judicata. "
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38. This Court recently in **Bhanu Kumar Jain vs. Archana Kumar and Another**, [AIR 2005 SC 626], while drawing a distinction between the principles of 'res judicata' and 'issue estoppel' noticed the principle of cause of action estoppel in the following terms :

> "29. There is a distinction between 'issue estoppel' and 'res judicata' [See Thoday vs. Thoday 1964 (1) All. ER 341]
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> 30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the later proceeding. The doctrine of res-judicata creates a different kind of estoppel viz estoppel by accord.
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> 32. The said dicta was followed in Barber vs. Staffordshire Country Council, (1996) 2 All ER 748. A cause of action estoppel arises where in two different proceedings

identical issues are raised, in which event; the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation London Borough Council, (1996) 1 All ER 973]."

In **Ishwar Dutt –vs- Land Acquisition Collector & Anr, (supra)**

"18. ……..The principle of res judicata is species of the principle of estoppel. When a proceeding based on a particular cause of action has attained finality, the principle of res judicata shall fully apply.

19. Reference in this regard may be made to Wade and Forsyth on Administrative Law, 9th Ed., pg. 243, wherein it is stated:

> "One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as `**cause of action estoppel'** and `**issue estoppel**.'"

20. In Hope Plantations Ltd. V. Taluk Land Board, Peermade & Anr [1999] 5 SCC 590, this Court observed:

> "Law on res judicata and estoppels is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum…"

21. In `The Doctrine of Res Judicata' 2nd Edition by George Spencer Bower and Turner, it is stated:

> "A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it...."

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25. In Gulabchand Chhotalal Parikh v. State of Gujarat, AIR (1965) SC 1153 the Constitution Bench held that the principle of res judicata is also applicable to subsequent suits where the same issues between the same parties had been decided in an earlier proceeding under Article 226 of the Constitution.

26. It is trite that the principle of res judicata is also applicable to the writ proceedings. [See Himachal Pradesh Road Transport Corporation v. Balwant Singh, [1993] Supp 1 SCC 552].

In **Ramchandra Dagdu Sonavane (supra)** the principle of res judicata was further explained as under:-

"42. Res-judicata and Code of Civil Procedure: - It is well known that the doctrine of res-judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res-judicata or the principle of the res-judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res-judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also Principles not only of direct res-judicata but of constructive res-judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res-judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties.

43. The Principle of res- judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the Principle of res- judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is 27 deemed to have been constructively in issue and, therefore, is taken as decided [See Workmen v.Cohin Port Trust, AIR 1978 SC 1283].

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45. When the material issue has been tried and determined between the same parties in a proper suit by a competent court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them as laid down in Krishna Behari Roy vs. Bunwari Lal Roy reported in [1875 ILR (IC-144)], which is followed by this Court in the 28 SCC 190], wherein the doctrine of `cause of action estoppel' and `issue estoppel' has been discussed. It is laid down by this Court, that if there is an issue between the parties that is decided, the same would operate as a res-judicata between the same parties in the subsequent proceedings. This court in the case of Isher Singh vs. Sarwan Singh, [AIR 1965 SC 948] has observed:

"11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate court, and (e) that on the proper construction of the pleadings it would have been necessary to

> decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11 of the Civil Procedure Code is satisfied."
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> 54. In Syed Mohd's case, this court has stated that before a plea of res- judicata can be given effect the four conditions requires to be proved. **They are, that the litigating parties must be the same; that the subject matter of the suit also must be identical; that the matter must be finally decided between the parties; and that the suit must be decided by a court of competent jurisdiction**. This court while analyzing those conditions as matter of fact found that the parties had not even filed the pleading of the suits instituted by them. In that factual scenario, this court has to observe that the pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment.
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> 55. It is true that if an earlier judgment has to operate as res-judicata in the subsequent proceedings, then all the necessary facts including pleadings of the earlier litigation must be placed on record in the subsequent proceedings……"

In a recent decision in **Union of India –vs- Major SP Sharma & Ors,** (2014) 6 SCC 351 the Hon'ble Apex Court has dealt with the issue once again. It will be appropriate to reproduce the following observations:-

> "74. The very genesis of an identical challenge relating to the same proceedings of termination on the pretext of a 5% cut in terminal benefits was impermissible apart from the attraction of the principle of merger. This aspect of finality, therefore, cannot be disturbed through a collateral challenge.
>
> 75. In Naresh Shridhar Mirajkar vs. State of Maharashtra & Anr. AIR 1967 SC 1, this Court by a majority decision laid down the law that when a Judge deals with the matter brought before him for his adjudication, he first decides the questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes up the matter before the appellate court.
>
> 76. A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning".
>
> ** ** ** **

78. In the case of Babu Singh Bains etc. versus Union of India and others etc., AIR 1997 SC 116, this Court reiterated the settled principal of law that once an order passed on merit by this Court exercising the power under Article 136 of the Constitution has become final no writ petition under Article 32 of the Constitution on the self-same issue is maintainable. The principle of constructive res judicata stands fast in his way in his way to raise the same contention once over.

** ** **

80. In M. Nagabhushana vs. State of Karnataka & Ors., AIR 2011 SC 1113, this Court held that doctrine of res-judicata was not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. The main object of the doctrine is to promote a fair administration of justice and to prevent abuse of process of the court on the issues which have become final between the parties. The doctrine was based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet bis vexari si constat curiae quod sit pro una et eadem causa' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.

81. Thus, the principle of finality of litigation is based on a sound firm principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end to litigation. The doctrine of res- judicata has been evolved to prevent such an anarchy.

82. In a country governed by the rule of law, finality of judgment is absolutely imperative and great sanctity is attached to the finality of the judgment and it is not permissible for the parties to reopen the concluded judgments of the court as it would not only tantamount to merely an abuse of the process of the court but would have far reaching adverse affect on the administration of justice. It would also nullify the doctrine of stare decisis a well established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so. The judgments of the court and particularly the Apex Court of a country cannot and should not be unsettled lightly.

83. Precedent keeps the law predictable and the law declared by this Court, being the law of the land, is binding on all courts/tribunals and authorities in India in view of Article 141 of the Constitution. The judicial system "only works if someone is allowed to have the last word" and the last word so spoken is accepted and religiously followed. The doctrine of stare decisis promotes a certainty and consistency in judicial decisions and this helps in the development of the law. Besides providing guidelines for individuals as to what would be the consequences if he chooses the legal action, the doctrine promotes confidence of the people in the system of the judicial administration. Even otherwise it is an imperative necessity to avoid uncertainty, confusion. Judicial propriety and decorum demand that the law laid down by the highest Court of the land must be given effect to.

85. In Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay, AIR 1974 SC 2009, this Court held as under:

> "At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of the rule of law. Certainty in law would be considerably eroded and suffer a serious setback if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify' the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article 141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law. "

Thus, in view of above, it can be held that doctrine of finality has to be applied in a strict legal sense.

86. While dealing with the issue this court in Ambika Prasad Mishra v. State of U.P. & Anr., AIR 1980 SC 1762, held as under:

> "6. It is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority 'merely because it was badly argued, inadequately considered and fallaciously reasoned'".

In **Mangu Ramdas –vs- Madurai Venkataratnam & Ors** the Hon'ble Andhra Pradesh High Court has also dealt with the issue as under :-

> "45. Secondly it is well known that an unnecessary or irrelevant issue the decision of which either way will not affect the decision of the main proceedings cannot be said to have been directly and substantially in issue. A matter merely because it is alleged on one side and denied on the other does not necessarily become a matter directly and substantially in issue. Such a matter may be collectively or incidentally or even unnecessarily in issue for the purpose of deciding the real matter which is directly in issue in the main proceedings. It is evident that a matter although directly in issue in the previous proceedings will not necessarily operate as res judicata in the subsequent proceeding unless it was also substantially in issue in such former proceeding. The word 'substantial' means "of importance and value" and a matter is substantially in issue if it is of importance and value for the decision of the main proceeding. For example an unnecessary or irrelevant issue the decision of which either way will not affect the decision of the main proceeding cannot be of any importance or value for the decision of the proceeding and is therefore not substantially in issue. With this background in mind we do not find any difficulty in holding that the matter in controversy between the two respondents falling under Section 11 was not a matter of importance or value for the adjudication of the main proceeding under Section 15. Any adjudication therefore of such an unimportant or valueless matter cannot be said to be substantially in issue in the former proceedings and any determination of such an irrelevant issue cannot operate as res judicata in a subsequent proceeding under Section 56 of the Act."

25. In the backdrop of above legal position with respect to the bar of res judicata and principles analogous thereto, we may now examine the case in hand.

26. Admittedly, both in the earlier proceeding i.e. OA 4/2014 and in the present proceeding, the rejection order dt 10 Jan 2014 of the statutory complaint filed in the form of a petition before this Tribunal in OA 34/2013 has been challenged. It would appear from the ibid order dt. 10 Jan 14, that it has decided two issues – viz. validity of the entry of 'reprimand' in the service dossier of the applicant and the other being the validity of the summary trial held against the applicant on 17 Apr 2011 while he was posted as a Major in 80 Field Regiment under GOC 54 Infantry Division. Admittedly a summary trial was held against him under section 84 of Army Act for committing offence punishable u/s 63 of Army Act. In the said summary trial, as it appears, the applicant was punished by way of 'reprimand' though the applicant disputes this punishment.

26. Subsequently long after this incident, when the applicant was denied promotion to the rank of Colonel, he on inquiry came to know about this punishment entry in his service record and thought that this might be the cause of his supersession in promotion. He, therefore, challenged this entry in OA 34/2013 as also the summary trial proceeding. However, this Tribunal directed the authorities to treat the said OA as a statutory complaint of the applicant and decide the same. Accordingly, the impugned order dt. 10 Jan 2014 was issued by the MoD rejecting the statutory complaint. By this order, two issues were decided by the MoD as already indicated above.

27 There is no dispute that the applicant has filed two applications and in both the application this order dt. 10 Jan 2014 has been challenged but for different relief. In OA 4/2014 his prayer was for declaring the entry in his service record as illegal as it was not done in accordance with established procedure and with direction of competent authority. That OA was already decided by this Tribunal vide order dt. 27 Aug 2014.

28. According to the ld. Adv. for the respondents, this order of the Tribunal operates as res judicata to decide the present OA as it also decides the other issue considered in the order impugned. He has taken the grounds of principle of merger and principles of res jujdicata. His further contention is that when the applicant could have very well challenged the other issue i.e. summary trial itself, in the earlier proceeding and he having not done so, is now estopped from doing so. Thus law of estoppel has also pressed into service. That apart, his other contention is about constructive res judicata as according to him, when the order dt. 10 Jan 2014 was under challenge in the earlier proceeding, and this Tribunal quashed the said order only to the extent of punishment entry, it means that other parts of the ibid order remains valid and hence the said part cannot be challenged separately which will invite the bar of constructive res judicata.

29. On the contrary, ld. Adv. for the applicant has submitted that in the earlier proceeding the substantial issue was wrong entry and not the summary trial and therefore, the earlier decision cannot operate as res judicata in this proceeding where relief claim is totally different and distinct from the earlier proceedings.

30. It is true that the applicant has chosen to file two separate applications based on the same impugned order dt.10 Jan 2014 but for two different causes of action. As contended by Mr. Goswami, the ld. Adv. for the respondents that the applicant having chosen not to include the prayer made in this application in the earlier OA, has abandoned his right to challenge the summary trial itself which is the subject matter in this OA. Therefore, it is a case of constructive res judicata as enjoined in explanation (IV) of Sec 11 of the CP Code.

31. In **Alka Gupta –vs- Narender Kumar Gupta** Civil Appeal No. 8321 of 2010 decided on 27 September, 2010, the Hon'ble Supreme Court has dealt with the issue of constructive res judicata in great detail. It will be useful to refer to the following observations:

“13. The learned trial bench passed the order on 13.3.2009 on the preliminary issue (Issue No.1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order: "Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable." This was not interfered by the appellate bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant plaintiff an opportunity to meet the case based on such plea.

14. Res judicata means `a thing adjudicated' that is an issue that is finally settled by judicial decision. The Code deals with res judicata in section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

> "11. Res judicata.--No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"
>
> Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:
>
> (i) The matter must be directly and substantially in issue in the former suit and in the later suit.
>
> (ii) The prior suit should be between the same parties or persons claiming under them.
>
> (iii) Parties should have litigated under the same title in the earlier suit.
>
> (iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.
>
> (v) The court trying the former suit must have been competent to try particular issue in question……

To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression `former suit' refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III

states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".

15. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from Greenhalgh v. Mallard [1947 (2) All ER 257] thus:

> "....it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.
>
> (Emphasis supplied)

In **Direct Recruit Class II Engineering Officers' Association –vs- State of Maharashtra & Ors,** [1990 (2) SCC 715], a Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to Forward Construction Co. v. Prabhat Mandal [1986 (1) SCC 100) thus:

> "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata. IV. A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

> 16. Code of Civil Procedure is nothing but an exhaustive compilation- cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption."

32. We may now consider whether the applicant could have agitated the issue that has now been raised in this proceeding (OA 29/2014), in the earlier proceeding (OA 4/2014) as well; if so, certainly the instant proceeding would be hit by the principles of constructive res judicata.

33. As already indicated in the impugned orders dt 10 Jan 2014, two separate issues have been dealt with and decided. The applicant challenged the first issue i.e. with regard to the procedural mode of entry into the service record in the earlier OA (OA 4/2014). In that proceeding he had not challenged the summary trial itself from which the punishment emanated and subsequently entered into his service record. In OA 4/2014 he only challenged the authority under whose direction the said entry was made i.e. DV Directorate. It was his contention that at that point of time, only Central Govt. had the authority to direct such entry to be recorded in service record and not the DV Directorate upon whom such power was conferred subsequently. The said proceeding was decided only on that particular issue.

34. In the present proceeding he has challenged the summary trial itself by contending that it was not conducted in proper manner and following proper legal process as required by the Army Act. Therefore, the entire trial was vitiated and has to be quashed. As a corollary it would mean that the punishment that was inflicted based on such illegal trial would also become non est.

35. Now, in terms of rule 10 of AFT (Procedure) Rules, 2008, an aggrieved person can file a petition only on a single cause of action and cannot seek plural remedy unless they are

consequential to each other. It can be said that the punishment entry is a consequence of the summary trial and therefore there was no bar in filing a single application challenging both, the summary trial and also the mode of recording the punishment entry. In fact, in earlier OA 34/2013 the applicant challenged both but had restricted his prayer to the procedural issue of 'entry' only. The MoD order dt. 10 Jan 2014 (Annexure A-1) rejecting the applicant's statutory complaint (OA 34/2013 being treated as a statutory complaint) has been, however, issued covering both the issues.

36. We notice from our order dt. 27 Aug 2014 disposing of the earlier OA 4/2014 that the respondents therein raised an objection with regard to maintainability of the application on the ground that 'summary trial' proceeding was not a 'service matter' to be adjudicated by this Tribunal in view of section 3(o)(iii) of AFT Act 2007. The Tribunal observed in para 11and 12 as under:-

> "11. So far as other objection regarding definition of 'service matter' is concerned, Mr. Mangalik has pointed out that Hon'ble Allahabad High Court at Lucknow has clearly held that service matter also includes summary trial where even lesser punishment than dismissal has been awarded. However, he has very emphatically submitted that in this proceeding, the applicant is only challenging the illegal entry in his service record and not the summary trial. Therefore, there is no bar in entertaining this application with regard to wrong recording in service dossier which surely is a service matter.
>
> 12. On the question of preliminary objections, we may observe that by our order dt. 5.2.14 both the objections now raised by the respondents have been dealt with in detail. **It was made very clear that this application was being admitted only with regard to the grievance of the applicant for promotion and illegal entries in the service records which are within the purview of this Tribunal to adjudicate**……"

37. Thus, it is evident that there was clear objection from the respondents to entertain any plea or challenge with regard to summary trial on ground of lack of jurisdiction and therefore, the said application was admitted only with regard to that part of the challenge which came within the purview

of service matter i.e. challenge to entry into service record. Moreover, we also observe that on 16 Jan 2014 when the OA-4/ 2014 was filed, The Allahabad High Court Lucknow Circuit Bench judgement interpreting Section 3 (o) of AFT Act 2007 differently expanding the scope of 'service matter' had not even been pronounced; it was pronounced only on 20 Feb 2014. Therefore the applicant at point in time could not have included the prayer to quash the summary trial proceedings; in fact it was not a relief that he prayed for. However, the applicant has filed the current OA (OA 29/2014) on 17 Apr 2014 by which time the aforesaid decision by the Allahabad High Court, Lucknow Circuit Bench had been operative. In that view of the matter, the respondents cannot now raise the question of res judicata or constructive res judicata by taking the spacious ground that the applicant could have made a challenge to the summary trial itself in the earlier proceeding (OA 4/2014) but did not do so thus abandoning his right or that having not granted any relief by this Tribunal with regard to other part of the decisions of the Govt. as contaianed in order dt. 10 Jan 2014 (Annexure A-1) except to the extent of punishment entry; it would mean that the Tribunal has refused such relief and hence the applicant would be debarred from challenging the same.

38. Considering the matter from all angles, we hold that this application cannot be said to be barred by res judicata, constructive res judicata or principles analogous thereto nor does it cover the bar of 'issue estoppels' or 'cause of action estoppel" because the issue raised now was not considered or decided finally by this Tribunal in earlier proceeding.

39. Having settled and thus rejecting the preliminary objections so raised by the respondents, we may now come to the merit of the case.

40. Mr. Mangalik, ld. counsel for the applicant in challenging the summary trial held on 17thApril 2001 at HQ 54 Infantry Division at Secunderabad against him u/s 84 of Army Act, has raised mainly three contentions:-

A) The summary trial was held illegally inasmuch as even though the applicant gave in writing his unwillingness to dispense with presence of PWs, no prosecution witness was present at the trial and thereby he did not get any opportunity to cross examine them. At least two PWs viz. Col. BS Rehal and Maj GS Sandhu, who deposed during SoE, were not present at the trial. It the specific case of the applicant that Col. BS Rehal was on that date posted as BRO, Alwar (Rajasthan) while Maj Sandhu was serving in HQ 162 Infantry Brigade, J & K. However, sole defence witness Nb Sub C Govinda Swamy was present and he has filed an affidavit (annexure to rejoinder) stating that no PW was present on the date of trial.

B) This contention is raised because according to the applicant he was present at the trial and it is in his personal knowledge that no PWs were present. That apart, summary trial was conducted in Form No. 1 and not in Form No. 2 which ought to have been used in view of his unwillingness to dispense with presence of PWs and pleading 'not guilty' to the charges.

C) By referring to annexure-A5 to the OA, which he procured through RTI application, it is stated that even though Form No. 2 has been supplied to him wherein it is stated that witnesses gave evidence and accused was allowed to cross examine, no PWs was present nor was he given any opportunity to cross examine. By referring to annexure-A6, which is the conduct sheet of relevant trial, he has drawn our attention to the column where name of witness is to be written; it is recorded 'documentary'. This means that no witness was present and the trial was done based on documentary evidence only. He has also referred to annexure-A7 which is review report of summary trial in respect of the applicant made by Col A for GOC in

which 'Form-1' is mentioned and not 'Form 2'. Further, in respect of field conduct sheet it was opined that under the column 'Name of witness', particular of the witnesses heard at the trial should have been endorsed instead of endorsing 'documentary'. According to the applicant this supports his plea that Form No. 1 was used and that no witness was present and trial was conducted based on documentary evidence. Thus, the entire trial was illegal.

41. Based on such contentions, Mr. Manglik submitted that the entire summary trial was vitiated and is required to be set aside. He has referred to a decision of the Hon'ble Calcutta High court in **Parajmjit Singh Kohli –vs- UOI & Ors**, MLJ 1997 of CAL 119, a copy has been produced before us. The facts in that case are more or less similar. It has been held as under:-

> "In a summary trial under AA sec 84 where the accused (petitioner) pleaded not guilty to the charge, a non-speaking and unreasoned single line conviction finding the accused guilty of the charge without assigning any reasons in its support and no evidence having led during the trial, there being no evidence in support of the charge, the conviction of the accused based on the evidence recorded during the summary of evidence (that too not by the authority holding summary trial (respondent No. 3) and reliance thereon by the respondent No. 3 without even mentioning such reliance by him while convicting, is unprecedented in the annals of criminal jurisprudence. No trial can be worse than this. It was unfair to the accused and totally contrary to the principles of natural justice. The trial was a sham and wholly farcical."

42. Appearing for the respondents, Mr. Goswami submits that the trial was held in 2001 whereas the present OA has been filed in 2014. In the meantime, all records of the summary trial have been destroyed in accordance with relevant regulations. Therefore, due to non-production of records, no adverse presumption can be raised against the respondents. He has referred to the rejection order dt. 10 Jan 2014 by the MoD and submitted that points raised by the applicant were addressed by the Central Govt. and it has been held that the summary trial was valid. He has further contended that the applicant was aware of the punishment of reprimand in Apr 2001 itself as this information was placed before the Hon'ble Madras High Court in connection with the writ petition filed by the applicant himself. His ld. adv. was very much present on 18 April 2001 when the said writ petition was dismissed. Liberty

was also given to the applicant to challenge any adverse action in future. He never made any such application in terms of the liberty to challenge the punishment or the trial itself as is now being done through this proceeding. He contends that by filing an application belatedly after destruction of the records, the applicant cannot be allowed to take advantage of the situation and cannot be granted any relief based on equity.

43. Mr Mangalik, ld. counsel for the applicant, however rebutted the points raised by Mr Goswami. He submits that issue of belated filing of this OA has already been settled when the preliminary objections were rejected. Further, he submits that the MoD would have discussed and commented on the summary trial proceedings before concluding in their rejection order dated 10 Jan 2014 (Annexure A-1) that the said trial was valid. The relevant trial documents including JAG Review Report etc would definitely have been perused on file before arriving at such a conclusion. It is not possible that the respondent authorities have selectively destroyed only the depositions made by PWs. He has brought out enough facts with supporting documents to prove that the PWs were never examined during the summary trial against all rules and norms.

44. We have carefully taken into account the rival submissions and have perused the records that have been produced before us. We cannot fully agree with the contention of Mr. Goswami that respondents would have destroyed all relevant summary trial documents dating back to 2001, because the court has physically perused the copies of said summary trial documents including the Dy JAG 21 Corps review report in the concerned MoD file where the applicants complaint was analysed before issuing the impugned order of 10 Jan 2014; yes, we did not find any written statements or depositions made by any PW. We however agree with Mr Goswami's contention that the respondent cannot be prejudiced for non-availability of original records which have since been reportedly destroyed as per rules. At the same time it is also to be seen that no wrong is done to the applicant which would adversely affect his career prospects. Therefore we have to go by the available records; same records

based on which the impugned order dated 10 Jan 2014 has been issued by the MoD. Fortunately copies of all relevant documents have been meticulously made available to the Court for our perusal which are part of the concerned MoD file that was submitted to us by the respondents.

45. We have carefully gone through the impugned order dt 10 Jan 2014 at annexure-A1. We find that the points raised by the applicant were meticulously narrated in this order at para 6 and in para 8 thereof (para 7 is not there, may be due inadvertence in numbering paragraphs). It has been clearly stated that" most of the documents relating to the summary trial held on 17 Apr 2001 have been destroyed as per para 592 of RA". It has been stated in para 8 (c) that "summary trial was conducted as per rules on Form 2 where it has been endorsed that prosecution witnesses gave their evidence and accused was permitted to cross examine." There is, however, no finding as to the specific plea of the applicant that no PW was present at the trial and he thus could not get opportunity to cross examine. His specific contention is that the two PWs as named in para 6(d) of the ibid order were not present at the trial on 17 Apr 2001 at Secunderabad, because they were on that day present in their respective place of posting at Alwar (Rajasthan) and J & K. The sole DW was present and he has submitted an affidavit (annexed to the rejoinder) stating that no PW was present at the trial. If documentary evidence in respect of use of Form No. 2 is available and as it appears as annexed to the OA at annexure-A5, then in the review report, 'Form No. 1' would not have been mentioned by the reviewing authority nor would it have been observed that in the conduct sheet, in the column meant for names of witnesses, only the word 'documentary' has been endorsed.

46. We further notice from the departmental file in which statutory complaint was dealt with that 'hearing of charge' under rule 22 was done by the CO of 2/8 GR on 13 Dec 2000 and calling and hearing of witnesses were dispensed with since provisions of AR 180 were complied with at the COI. Tentative charge was framed on 14 Jun 2000 and the applicant pleaded 'not guilty'. Summary trial was done by the GOC, 54 Inf Div after a long gap of more than nine months on 17 Apr 2001. During the said Summary

Trial the statement of the applicant/accused was recorded and copy is available that was perused by us. Copy of statement of DW, Nb sub C. Govinda Swamy of 80 Field Reg is also available and was perused by us. We also find that on 9 May 2001 D JAG gave his report on the trial for review, where Form 1 was mentioned. It was also opined by Brig Khanna, the D JAG that, "since the accused did not consent to dispense with the attendance of witnesses at the summary trial, in the remarks column this fact should have been recorded and under the column 'name of witness', the particular of the witnesses heard at the trial should have been endorsed instead of endorsing 'documentary'." It appears, based on this DJAG report, Col-A for GOC issued the review report as enclosed at Annexure-A7 to the OA. Strangely, form 2 is also available with the record where punishment of 'reprimand' is recorded and signed by the GOC, Maj Gen HQ 54 Inf Div. There must be some confusion and mis-documentation because it does not tally with the remarks on the question of 'form' made by the DJAG in his written report. This is also evident from the DV-2 letter dt. 7 Jun 2001 based on which the entry was made available on file. Here also Form 1 is mentioned.

47. We are, however, not much concerned whether Form 1 or Form 2 was used because this is only a technical formality. It, however, gives rise to a very serious doubt as regards actual presence of PWs at the Summary Trial held on 17 April 2001 at Secunderabad. This is the main ground of the applicant who has repeatedly contended that no PW was present thus denying him of the basic opportunity to cross examine them to prove his plea of 'not guilty'. On this point the respondents have based their argument on a sole point that PWs would have been examined the available 'Form 2' suggest that witnesses were present and the accused was allowed to cross examine them. Unfortunately for the respondents their stand is contradicted by their own DJAG' report and the Review Report signed by the Col 'A' on behalf of the GOC of a Corps. Their other stand that most of the documents would have been destroyed also does not hold much water since all relevant documents are available on file, produced before us and perused by the Court. It is to be further noticed that hearing of charge was done by the CO of 2/8 GR at

Trivandrum, whereas trial was done by GOC 54 Infantry Division at Secunderabad; the GOC did not hear the charge at its framing stage; nor was he involved in the COI proceeding nor in the SOE stage. It is clear and evidently established that the GOC, who is the officer holding the Summary Trial, has never heard any of the prosecution witnesses (PWs) before or during the Trial. It is, therefore, all the more necessary that witnesses ought to have been heard at the trial and the accused applicant was to be given opportunity to cross-examine in accordance with the provisions of Army Rule 26(2), quoted below :-

> **"26. Summary disposal f charges against officers, Junior Commissioned Officer or Warrant Officer –** (1) *** *** ***
>
> (2) Where the authority empowered under section 83, 85 or 85, decides to deal summarily with a charge against an officer, junior commissioned officer or warrant officer, he shall unless he dismisses the charge, or unless the accused has consented in writing to dispense with the attendance of the witnesses, hear the evidence in the presence with the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witness and make a statement in his defence."

The ratio and substance of the Hon'ble Calcutta High court judgement in the case of **Paramjit Singh Kohli (Supra)** as relied upon by Mr Mangalik squarely applies in this case. Conducting a Summary Trial in this manner with gross violation of AR 26(2) besides total violation of natural justice ignoring all procedures and rules of the Army itself is ultra virus in law and should have been set aside by the reviewing authorities in 2001 itself after receiving the DJAG's opinion soon after trial. We do not know why it has been allowed to linger on.

48. The MoD, while examining the OA 34/2013 as a statutory complaint, was armed with all the above facts that have now been discussed. We have perused their file in this regard. How is it that the MoD in their order dated 10 Jan 2014 could ignore the obvious and hold that the said summary trial was valid; but at the same time it was also stated that most of the documents were destroyed. However, the said order dt 10 Jan 2014 was passed based on the inputs given in OA 34 of 2013 which was treated as a statutory complaint. We are fully conscious of the fact that there was no prayer by the applicant in OA 34/2013 for quashing the summary trial proceedings of 17 Apr 2001 being considered illegal. It is also

quite clear that the Central Govt. still had to analyse the said summary trial and conclude its validity, perhaps to add strength to the validity of the consequential entry. Possibly, these entire lacunas of the summary trial were not taken into account at the time of consideration of the matter by the Central Govt. and possibly based on Form 2 as annexed at annexure-A5, which the applicant obtained through RTI channel, it was observed that valid summary trial was held and Form No. 2 was used. Under such circumstances, we are of the view that proper consideration and application of mind on the issue of validity of the said summary trial was not done even based on documents that were available in respect of the pleas taken by the applicant that no valid trial was conducted.

49. Ordinarily court or tribunal need not interfere within the domain of executive authorities unless there exists very special circumstances. In our considered view the authorities should get an opportunity to re-examine the matter in the light of the observations made by us above, specially those at Para 44 to 48.

50. In the result, the application is disposed of by issuing the following directions:-

a) The impugned order dt. 10 Jan 2014 (annexure-A1) is hereby set aside so far as it relates to the finding that the summary trial held on 17 Apr 2001 against the applicant was a valid trial.

b) The respondent 1 and 2 are directed to re-examine the grievance of the applicant as ventilated in this OA in the light of observations made by us in the body of this judgement and pass a reasoned order within 60 days from the date of communication of this order.

c) The applicant will be at liberty to agitate the issue as raised now if the decision of the Central Govt. goes against him, at appropriate forum, if so advised.

d) OIC, Legal Cell, HQ, Bengal Area is directed to send a copy of this order directly to respondent Nos. 1 and 2 for necessary action.

e) No costs.

51. The original records be returned to the respondents on proper receipt.

52. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both parties on observance of due formalities.

(LT. GEN. K.P.D.SAMANTA)
Member (Administrative)

(JUSTICE RAGHUNATH RAY)
Member (Judicial)