A F R

(SEE RULE 102(1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH

O. A. NO. 30/2013

THIS 21ST DAY OF AUGUST, 2015

CORAM
HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S) Commander Harneet Singh P No. 04448-H, son of Lt Col (Retd.) Santokh Singh, aged about 39 years, presently serving as Commander Operations at INS Utkorsh, Port Blair, Andaman & Nicobar Islands -734 103.

-versus-

RESPONDENT(S)

1. The Union of India, service through the Secretary, Ministry of Defence, Government of India, South Block, New Delhi, Pin -110 011.

2. The Chief of the Naval Staff, Naval Headquarters, South Block, New Delhi -110 011.

3. The Flag Officer, Commanding-in-Chief, Headquarters Western Naval Command, Mumbai -400 003.

4. The Convening Authority, Headquarters Western Naval Command, Mumbai- 400 003.

5. Members of the Court Martial in respect of the Applicant through the President of the Court Martial, Commodore G. S. Randhawa (01690-R), Indian Navy, Director, MWC(MB), C/o FMO, Mumbai -400 001.

6. The Trial Judge Advocate of the Court Martial, namely Lt Cdr Kusum Yadav JAG Department, Headquarters Western Naval Command, Mumbai – 400 003.

For the petitioner(s) : Mr. S. K. Choudhury, Advocate

For the respondent(s) : Mr. D. K. Mukherjee, Advocate

O R D E R

PER HON'BLE JUSTICE DEVI PRASAD SINGH, (MEMBER JUDICIAL)

1. An application under Section 14 read with 15 of the Armed Forces Tribunal Act, 2007 (in short 'Act') has been preferred by the applicant, a member of the Indian Navy being aggrieved with the decision of Court Martial punishing him with Severe Reprimand and the rejection of his application for judicial review by the Chief of the Naval Staff. Factual matrix on record do not indicate that everything is all right while dealing with a person serving in elite Naval Force of India.

2. A preliminary objection has been raised by the ld. counsel for the respondents Mr. D. K. Mukherjee that against the punishment of Severe Reprimand an application under Section 14 of the Act is not maintainable. However question raised by the ld. counsel seems to be no more res integra. Division Bench of Allahabad High Court at Lucknow (one of us Justice Devi Prasad Singh was Member) vide judgment and order dated 20.02.2014 passed in Writ Petition

No.8051/89 – Major Kunwar Ambreshwar Singh v. Union of India - held that punishment of Severe Reprimand may be impugned before the Tribunal being service matter. Relevant portion of the judgment is reproduced as under :-

> "26. The punishment of 'severe reprimand' affect the service career of the army personnel. Even under dictionary meaning, the punishment of 'severe reprimand' shall be service matter and be amenable before Armed Forces Tribunal constituted under the Act.
>
> 27. In view of the above, keeping in view statutory mandate as well as the provisions contained in Section 84 of the Army Act, 1950, the punishment of 'severe reprimand' shall be deemed to be a punishment and fall under the category of 'service matter' as defined by Section 3 of the Act and can be impugned before the Armed Forces Tribunal in pursuance to the provisions contained in the Act."

The judgment attains finality being not over-ruled by higher forum and also circulated to all the Tribunals.

Facts

3. The applicant joined the Indian Navy as a Cadet in the Naval Academy on 05.07.1991. After completion of graduation, B.Sc. (Special), he was commissioned as an Officer of the rank of Ag Sub Lieutenant on 01.07.1995 and later on promoted to the rank of Lieutenant on 01.04.1998. He also qualified the 'Observer Course' and was deployed as Flight Navigator. Later on also qualified the Joint Air Warfare Course from the College of Air Warfare and passed the Guided Missile Introductory Course. He then did M. Sc. Degree in Surface Warfare Management, Armament and Radar Systems from Cochin University of Science and Technology and also qualified as Gunnery Specialist with outstanding grading. He mastered Russian

language proficiency from School of Foreign Language, Govt. of India.

He had been awarded while serving in INS Hansa by the Commanding Officer for his dedication, commitment and professional competence of Very High Order on 15.08.2004 and with effect from 16.12.2004 he was promoted to the rank of Lieutenant Commander.

4. According to applicant's counsel the applicant had passed the Command Examination and was in the top of merit list of qualifying officers and given the Command of Warship INS Agray on 14.12.2007. The applicant's future prospect suffered with an eclipse after joining as Commander of INS Agray. According to the applicant, INS Agray was destroyed in an underwater explosion in the night of 05/06 February, 2004. The entire stern part of the ship was damaged and sunk on the high seas around 100 nautical miles of Mumbai. A portion of the ship was also lost. The ship was re-built by Naval Dockyard Mumbai and practically all aspects of the ship were reconstructed. Reconstruction of the ship was virtually a mixture of two different designs.

5. According to the applicant, when he took command of the INS Agray the ship was in the terminal stage of almost four year long MR-MLU. Being become operational after almost four years certain technical things were changed for better performance and it became more hydro dynamic with the removal of sonar dome. On 12.11.2008 INS Agray under the command of the applicant proceeded to Goa for deployment. At Goa a plan with navigational chart 2078 was prepared

by the Navigating Officer with due advice of the Executive Officer. Four sorties were undertaken under the command of the applicant during stay at Goa. The ship was almost sailing everyday and ultimately on first available opportunity on 01.12.2008 post sailing diving was carried out for underwater checks which was found to be normal.

6. On 05.12.2008 the ship set sail from Goa for Mumbai and arrived there on 06.12.2008. For domestic commitment the applicant proceeded on leave on 08.12.2008 and came back on 15.12.2008. After coming back from leave he discovered minor chipping on the propeller blades which he reported to the higher authorities. A Board of Inquiry (BOI) was convened to investigate the damage of two propellers blades under Cdr Anil Kumar Kaul along with two junior members.

7. According to applicant's counsel as well as keeping in view the pleading on record, during BOI the applicant was not allowed to participate in violation of Regulation 205 of Regulations (Part II) for the Navy. It is further submitted that Prakash Singh, the Diver who had undertaken diving at Goa on 01.12.2008 for underwater check up was not summoned before the BOI. However, Cdr Anil Kumar Kaul had spoken to Prakash Singh on telephone and without recording his statement and examination, the BOI attributed the damage to the applicant. Feeling aggrieved with the opinion of the BOI and the manner in which Cdr A. K. Kaul proceeded, the applicant submitted a representation dated 21.04.2009 followed by another representation

dated 19.05.2009. However, the BOI concluded its proceedings on 14.02.2009.

8. In the mean time, in pursuance of the decision of Naval HQ dated 27.03.2009 the applicant was promoted to the rank of Commander and was awarded Commander Stripes by Commodore K. S. Aiyappa, Naval Officer-in-Charge of Maharashtra. A customary stripe-wetting party on INS Agray was held where different officers of the Navy were invited. Promotion Genform dated 01.04.2009 was issued in pursuance of IHQ (MoD) Navy letter dated 27.03.2009. Thus the applicant was substantially promoted to the rank of Commander and served on board Agray and signed all documents and correspondences and started discharging his duties. All on a sudden by a letter dated 09.04.2009 HQ Western Naval Command circulated a order that the applicant's promotion was held in abeyance which was implemented on 10.04.2009 by Flag Officer Maharashtra and Gujarat Area. On 13.04.2009 the applicant was informed telephonically by Cdr K. S. Aiyappa that the applicant's promotion was void and again liable to be reverted to Lt Cdr rank. On 20.04.2009 he was directed to hand over the charge to the designated Commanding Officer. However, on 20.04.2009 the applicant's promotion to the substantive rank of Commander (supra) was published in the gazette vide notification dated 21.04.2009 along with pay and allowance of the Commander from 01.04.2009 and as a follow up action the applicant was attached to Naval Officer-in-Charge (Maharashtra) on 15.05.2009.

9. The applicant objected to the BOI proceedings handed over to him on 04.06.2009. Being aggrieved, he submitted a representation dated 11.06.2009 to the Chief of the Naval Staff through proper channel followed by another representation dated 12.07.2009 which was rejected. Hence, the applicant represented his cause to the Commanding Officer on 20.07.2009. The applicant was again transferred on 16.06.2009 to INS Angre and thereafter on 16.07.2009 one Commanding Officer, Cdr Rajiv Tandon was appointed to investigate the matter. However, Commanding Officer, INS Agray made a request to appoint an investigating officer in place of Cdr Rajiv Tandon. In consequence thereof Cdr Ashis Vatsa was appointed as Investigating Officer (IO) who was later on replaced by Cdr Vinil Venogupal as IO to record the SOE. Being aggrieved in the manner the applicant was dealt with, he preferred a writ petition (No.1573 of 2009) in the Bombay High Court which was transferred to the AFT Principal Bench, Delhi. The Principal Bench finally decided the writ petition by an order date 10.03.2011 with the following observation, operative portion of which is reproduced as under :-

"5. We have bestowed our best consideration to this submission. It is true that the Command-in-Chief of the Western Naval Command should not have treated the petitioner so shabbily as the reversion cannot be done by the Flag Officer and can be done only by a Competent Authority, that was, of course, not proper and we do not encourage such kind of treatment to the Officers but by that there is no question of granting compensation to the tune of Rs.10 lakhs.

However, we observe that the petitioner has been treated unfairly by the person, who was not competent to do so. With this observation, the petition stands disposed of. No order as to costs.

A.K. Mathur
(Chairperson)

S.S.Dhillon
(Member)

New Delhi
March 10, 2011."

10. During pendency of the matter before the Bombay High Court later on in AFT Principal Bench, Delhi a charges dated 22.09.2009 comprising three charge-sheets were served upon the applicant. However, later on another charge-sheet dated 21.12.2009 was served containing six charges. Six charges as per amended charge-sheet are reproduced as under :-

CHARGE SHEET AS AMENDED IN TERMS IN TERMS OF REGULATION 157(1) REGULATIONS FOR THE NAVY PART II (STATUTORY)

The accused Lieutenant Commander Harneet Singh (04448-H), Indian Navy, then belonging to Indian Naval Ship Agray and presently attached to Indian Naval Ship Angre under the provisions of NO 01/99, being a person subject to Naval Law, is charged for that he:-

1. Did between 0845 hrs and 1230 hrs on 27t Nov 08, negligently perform the duties of Commanding Officer, Indian Naval Ship Agray where in he did not comply with Regulations 1344 of Regulations for the Navy Part I read together with BR 45(1), Navigational Volume 1 Chapter 13 in that he failed to ensure effective compliance of laid down Navigational procedures including the safety norms whilst entering and leaving Mormugao harbour and thereby committed an offence punishable under Section 41 (c) of the Navy Act 1957.

2. Did between 0950 hrs and 2230 hrs on 28 Nov 08, negligently perform the duties of Commanding Officer, Indian

Navy Ship Agray where in he did not comply with Regulations 1344 of Regulations for the Navy Part I read together with BR 45(1), Navigational Volume 1 Chapter 13 in that he failed to ensure effective compliance of laid down Navigational procedures including the safety norms whilst entering and leaving Mormugao harbour and thereby committed an offence punishable under Section 41 (c) of the Navy Act 1957.

3. Did between 1126 hrs and 1500 hrs on 30 Nov 08, negligently perform the duties of Commanding Officer, Indian Naval ship Agray where in he did not comply with Regulations 1344 of Regulations for the Navy Part I read together with BR 45(1), Navigational Volume 1 Chapter 13 in that he failed to ensure effective compliance of laid down Navigational procedures including the safety norms whilst entering and leaving Mormugao harbour and thereby committed an offence punishable under Section 41(c) of the Navy Act 1957.

4. Did between 0722 hrs and 1500 hrs on 30 Nov 08, negligently perform the duties of Commanding Officer, Indian Naval Ship Agray where in he did not comply with Regulations 1344 of Regulations for the Navy Part I read together with BR 45(1), Navigational Volume 1 Chapter 13 in that he failed to ensure effective compliance of laid down Navigational procedures including the safety norms whilst entering and leaving Moumugao harbour and thereby committed an offence punishable under Section 41(c) of the Navy Act 1957.

5. Did at about 1130 hrs on 05 Dec 08 negligently perform the duties of Commanding Office, Indian Naval Ship Agray where in he did not comply with Regulations 1344 of Regulations for the Navy Part I read together with BR 45 (1), Navigational Volume 1 Chapter 13 in that he failed to ensure effective compliance of laid down Navigational procedures including the safety norms whilst leaving Mormugao harbour and thereby committed an offence punishable under Section 41(c) of the Navy Act 1957.

Sd/-
(Sanjeev Bhasin)
Vice Admiral
Flag Officer Commanding-in-Chief
Western Naval Command

Place : Mumbai
Date 30 Nov 09”

11. On 11.12.2009 the applicant was nominated by FOMAG to proceed for Porbandar on temporary duty with direction to embark the ship INS Ajay at Porbandar on 15.12.2009. On 18.12.2009 a notice for trial was served upon the applicant which was scheduled to commence from 23.12.2009. Court Martial delivered its final verdict with the finding of guilty in respect all the six charges on 11.02.2010 with severe reprimand. Application filed by the applicant for judicial review of the order of Court Martial under Section 160 of the Navy Act was rejected by the Chief of the Naval Staff by the impugned order dated 12.03.2012

Facts not disputed

12. Sorties and work done at Goa has not been disputed in Para.13 of the affidavit-in-opposition. However, it has been stated that no details are available regarding operation/navigation movement of fishing from GSL jetty on account of absence of record. However, in Para.17 it has been admitted that underwater inspection of the INS Agray was done at Goa on 01.12.2008 as a part of post sailing routines. For convenience, Para.17 of the A/O is reproduced as under:-

"17. With reference to the statements made in Paragraph 4.11 of the said application I say that it is checked from Record of Underwater Inspection Book that diving was undertaken by CDU(Goa) on 01 Dec 08 as part of post sailing routines and was reported sat."

13. There is nothing on record which may indicate that the applicant was permitted to participate in the BOI conducted under the

Presidentship of Cdr A. K. Kaul. However, it has been stated that during BOI the applicant was permitted to sit throughout the enquiry but facts has not been recorded due to oversight on the part of the BOI members.

14. It shall not be disputed that two other members of the Board were junior to its President but it has been denied that they were over-shadowed and eclipsed by the Board's President. It has been further submitted that since officers have not been impleaded as respondents in personal capacity, allegation of malafide against them cannot be considered. It is stated that the Board examined 41 witnesses and 14 exhibited documents while recording its findings.

15. However, importance of opinion of the BOI in view of Regulation 207 for the Navy (Part II Statutory) is not admissible in evidence in any enquiry or trial against any person. It is also stated that Court Martial is independent of BOI for, independent investigation under Sec.149 of the Regulations (supra). With regard to co-accused Lt S. Rawling, Gunnery Officer of the ship it is stated that he was not absolved from the charges attributed to him rather disciplinary action was taken against him and he was awarded with 'Letter of Displeasure'. It is not disputed that corrective action against the promotion order was taken by the ship staff of INS Agray. From the counter affidavit, amendment of charges is not disputed but on what ground it was done is not borne out from the record. More so even, when a defence has been set up by the respondents that BOI is only a fact finding body to inform the superior authorities to proceed

further. It has been denied that any manipulation or malafide intention exists behind the action taken against the applicant. It has not been disputed that charges were amended but a defence has been set up that it was done in pursuance of power conferred by Regulation 157 . It is further submitted that as per Regulation 169 (Navy Part II) convening authority is to transmit a list of officers who are eligible to sit as member in the Court Martial proceedings including the names of officers whose attendance is not attainable on the ground of sickness. After receipt of report from the convening authority the President had summoned the qualified officers to sit as member of the Court Martial. It is further stated that only six witnesses were not relevant for adjudication of the present controversy. It has been ascertained by the respondents that appointment of Court Navigator is not illegal since it was in conformity with the Navy Act, 1957. Important facts borne out from the counter affidavit is that the respondents declined to have any knowledge with regard to existence of fishing nets in Goa which could have caused chipping propellers blades. On the other hand, the applicant while filing rejoinder invited our attention to certain incidents happened on INS Godavari and INS Taragiri where incident of chipping of propeller blades happened, in consequence thereof HQWNC issued instructions with regard to avoidance of fishing activities.

Board of Inquiry

16. During BOI, 40 witnesses were produced who have discharged duty on the ship during the period in question. Reading of the

statement of witnesses shows that on 29/30.11.2008 deflection of shaft dynamometer was noticed and diving was done at Goa Harbour and nothing unusual was found.

17. From the BOI it is further evident that certain witness were recalled again for cross-examination i.e. S. K. Gupta, S. Kumar, Joudhalekar, Sandip Yadav, P. Kumar, O. P. Singh, Lt Cdr K. Bhagabat, A. K. Singh, Lt S. R. Singh, Mohan Ram, A. K. Jaiswal, A. K. Singh and Lt S. R. Singh. The Board had cross-examined the witnesses. During course of examination privacy seems to be traveled beyond the cannon of justice by <u>disclosing the statement made by one witness to other witnesses and seeking reply thereon.</u>

18. For appreciation of disclosure of statement made by one witness to others seems to be not correct and just and suffers from substantial irregularity which may be inferred from the question and answer of certain witnesses which is reproduced as under :-

1. Witness No.24 – R. K. Jaiswal

Q 293 : Some body was sitting with you in the MCR has observe that the dynamometer has gone on 10 reading for few seconds as a Chief of Watch did you not observe anything ?

Ans. : No sir. I didn't observe anything.

2. Witness No.37 – Lt S. R. Singh

Q 810 : The LO has reported that his call was made in the evening of 29 Nov how could you hear it in the morning when he reported this in the evening.

Ans. : I know that I heard it in the morning only while leaving harbour.

3. Witness No.38 – Lt Cdr Harneet Singh (Applicant)

Q 932 : Witness advised that NO has stated that no sounding has taken in any line ?

Ans. : Nothing to my knowledge I was told by Lt S R Singh that sounding has been taken in vicinity of GSL Jetty.

Q 994 : Would it surprise you to know that no person on the ship has heard the eco sounder report that you have mentioned above on the 29 Nov ?

Ans. : It would really surprise me.

Q 1008 : The officiating engineering officer doesn't recall anything or any conversation with you when you visited to MCR on 29 Nov 08. What do you have to say about it ?

Ans. : Since the event is of two months old no possible explanation can be given.

Q 1059 : The sailor has stated that neither you asked him his well being on 15 Dec or any time earlier in your cabin and were specifically told by you to check propellers. There being no other communication from his side on meeting you on 15 Dec what you have to say about ?

Ans. : As I have mentioned earlier with the exact dialogue is not remembered but something to the effect of the previous two questions did take place. I didn't give him specific command regarding checking.

Q 1072 : Lt S R Singh has stated that the requirement of diving on 15 Dec was made by you to him and that is why he has appointed for the un-authorised diving what do you have to say about?

Ans. : No reply.

Q 1095 : NO has stated that no look out was present on the bridge top on sailing on 29 Nov 08. Being on the bridge top yourself how can you observe the look out to be present when he is not been catered by the GO or NO.

Ans. : The lookout as mentioned above is followed for all sailing however during specific sailing on 29 Nov there may have been shortage of man power observed by the officiating EXO wherein look out may not have been catered for.

With regard to damage caused to the propeller, during course of enquiry the applicant has stated as under :-

" Q1079 : In your opinion what could have caused the damage as observed by you considering the material and heavy make of the propeller ?

Ans. : It is my simple request to the board that the professional propeller repairing agency may kindly be approached for accessing the reason for the damages for both the propellers. As far as my opinion is concern the damage to both propellers has been on the

leading edges of both propeller blades has reported by ASD (MB) signal DTG 052102/Jan. The damage appears to be midway of the leading edges which could have occurred due to entries of floating debris/fishing net into the propeller stream. The crown of the both propeller blade have been found to be OK, which indicate that the damage is very localized and in my opinion alone could have been caused due to floating debris/floatsam. It may also be brought to light that during diving as well as post dry docking, section of nets were removed from both the propellers.

19. From the report of BOI it is also evident that the applicant was never asked or given liberty to cross-examine the witnesses though one or two persons like P. Kumar raised serious allegation against the applicant. The applicant was also not informed by the Board members that he has right to cross-examine the witnesses and put up questions.

20. During the proceedings of BOI statement of the applicant was also recorded who denied the allegation but fairly and boldly keeping in view the high tradition of Navy owed up the responsibility of every commission or omission during sailing for the period in question.

21. Record does not reveal that the applicant was informed to participate in the enquiry proceedings. He was also not told to remain present. In the absence of any note recorded in the proceedings of the BOI inference may be drawn that the applicant was not permitted to participate in the enquiry proceedings before the Board though his own conduct and reputation as well as overall reputation of the Navy was in question.

22. While filing the counter affidavit it has been stated by the respondents that BOI inadvertently not recorded the applicant's presence which seems to be an eye wash. In case the applicant would have been permitted to participate in the enquiry proceedings then he

would have naturally cross-examined some witnesses in pursuance of power conferred by Navy Regulation 205 (Part II). Needless to say, that even in Regulation 207 the statement given before the BOI may be used for the purpose of cross-examining any witness during Court Martial proceedings. For convenience, Regulation 205, 206, 207 and 208 are reproduced as under :-

"**205. Procedure When Character or Conduct of a Person in Government Service Involved.** (1) Save in the case of a prisoner of war who is still absent, wherever any inquiry affects the character or reputation of a person in Government service or may result in the imputation of liability or responsibility for any loss or damage or is made for the contravention of any regulations or general or local orders, full opportunity shall be accorded to such person of being present throughout the inquiry and of making any statement and of giving any evidence he may wish to make or give and of cross-examining any witness whose evidence in his opinion affects him and producing any witness in his defence.

(2) The President of the Board shall take such steps as may be necessary to ensure that any such person so affected and not previously notified, receives notice of and fully understands his rights under this regulation.

206. Evidence When to be Taken on Oath or Affirmation.

(1) Evidence shall be recorded on oath or affirmation when a Board is assembled –

(a) on a prisoner of war, or

(b) in any other case when so directed by the convening authority.

(2) In such cases the Board shall administer an oath or affirmation to witness in the following form:-

"I……do swear in the name of God/solemnly affirm tht the evidence which shall give before this board shall be the truth, the whole truth and nothing but the truth."

207. Proceedings of Board Not Admissible in Evidence. The proceedings of a board or any confession or answer to a question made or given before a board shall not be admissible in evidence against a person subject to Naval law relating to the Government of the regular Army or Air Force nor shall any evidence respecting the proceedings of the board be given against any such person except upon the trial of such person for willfully giving false evidence before the board, provided that nothing in this regulation shall prevent the

proceedings from being used for the purpose of cross-examining any witness.

208. Minutes of Proceedings. (1) Subject to the provisions of these regulations, the proceedings of every board shall be recorded and prepared in accordance with any directions contained in the Navy orders in force for the time being and any instructions given by the convening authority.

(2) The minutes of such proceedings shall contain a verbatim report of all the evidence given and all questions and answers shall be numbered in one series throughout the minutes.

(3) In making up the record of the minutes the sheets shall be securely fastened and numbered consecutively.

(4) A list of the witnesses giving the serial number of questions put to each and a list of the exhibits shall be attached to the proceedings.

(5) All documentary exhibits shall be placed in the order in which such documents are produced at the inquiry and shall be numbered consecutively and attached to the proceedings, the minutes of which shall be forwarded together with all enclosures to the convening authority in the prescribed form.

(6) The written order convening the Board shall be returned to the convening officer with the minutes of the proceedings and shall form a part of the record.

(7) The convening authority shall, having regard to the fact that copies may have to be supplied to persons concerned in the result of the inquiry, should the proceedings be followed by a court-martial arising out of the same subject matter, give directions as to the number of copies of the proceedings which are required and it shall be the duty of the president of the board to see that enough copies of all exhibits are made, one copy to go with such set of papers.

(8) The minutes shall be signed by all the members of the Board and if a difference of opinion among the members arises then the board is required to make a report or give its findings the grounds of such difference shall be stated fully.

(9)On receipt of the minutes of the proceedings including the report from the Board, the convening authority shall: -

(a) take such actions as is within its jurisdiction and as it may deem fit to take; and

(b) submit the same together with its comments thereon to the higher authority-

(i) if required to do so under the orders issued from time to time by the Chief of the Naval Staff; or

(ii) if the convening authority deems it necessary so to do.

Provided that nothing in this regulation shall be construed as debarring the convening authority from taking appropriate action with his jurisdiction."

23. It appears that the procedure prescribed by the Regulation has not been followed. Hon'ble Supreme Court in a case (Three Bench Judgment) reported in 1982 Vol.3 SCC 140 – Lt Col Prithi Pal Singh Bedi v. Union of India & Ors. held that during Court of Inquiry the charged officer should be permitted to participate. Section 180 of the Army Regulation which has been considered by the Hon'ble Supreme Court in the case of Prithi Pal Singh Bedi (supra) is parimetaria to provisions contained in Regulation 205 of the Navy Regulation (supra). Relevant portion of the judgment (supra) is reproduced as under :-

"Rule 180 merely makes it obligatory that whenever a court of enquiry is set up and in the course of enquiry by the court of enquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of court of enquiry. Court of enquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a court of enquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an enquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific enquiry was directed against the person whose character or military reputation is involved. To ensure that such a person whose character or military reputation is likely to be affected by the proceedings of the court of enquiry should be afforded full opportunity so that nothing is done at his back and

without opportunity of participation, Rule 180 merely makes an enabling provision to ensure such participation. But it cannot be used to say that whenever in any other enquiry or an enquiry before a commanding officer under Rule 22 or a convening officer under Rule 37 of the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior enquiry by the court of enquiry is a sine qua non."

The Principal Bench while deciding the issue in O. A. No.93/2012 by an order dated 01.05.2013 relied upon Rule 180 of the Army Rules which is parimateria provision and in the case of Lt Col Prithi Pal Singh v. Union of India (1982 3 SCC 140) it was held as under :-

"Suffice it to say that petitioner was not permitted to participate when examination-in-chief was recorded of the witnesses from 15 to 48, that means participation has been denied to him when there was no reason why he should not be permitted to participate and give fair opportunity to the petitioner. Therefore, we are of the opinion, so far as the conduct of this Court of Inquiry cannot be sustained because of the breach of principle of natural justice under rule 180 of the Army Rules."

24. Accordingly the BOI proceedings seems to be hasty and suffers from vice of arbtrariness. Needless to say that the BOI is the foundation to proceed under Court Martial proceeding.

Diving at Goa

25. Entire controversy rests on the outcome of diving by Navy personnel after arrival of INS Agray at Goa and Mumbai. In total sailing of the INS Agray under water diving were done three times. At Goa, it was done on 01.12.2008 when ERA on duty directed the Diver to check the propeller at Goa Dockyard. Diving was carried out by Prakash Singh, Leading Seaman(135712-N) from INS Bitra who was a part of CDU(Goa) Diving Team. He carried out the diving checks of

shaft, propeller and rudders. On completion of the diving he reported that everything was clear and the same was reported to the applicant. Thereafter the ship had cold way move from 14.30 hrs to 14.58 hrs within the Goa Shipyard Limited (GSLQUAY) on the same day.

Diving at Mumbai

26. The ship INS Agray reached Mumbai on 05.12.2008 and was placed in AMP from 08.12.2008 to 15.12.2008. The applicant went on leave from 08.12.2008. The ship assumed Sea Hawk State II. Bottom searches as planned by GSO were undertaken on 8th, 9th and 11th December, 2008 by the ship Diver Pradip Kumar accompanied by a Diver from INS Gomati. Sea Hawk State II was reverted to State III on 13.12.2008. No damage was spotted by the Divers while carrying out bottom searches under Sea Hawk state II.

27. On 15.12.2008 Lt S. R. Singh, Navigating Officer requested N. S. Bedi, Squadron Diving Co-ordinator to check again since INS Agray was scheduled for another sailing on the same day. Diving was conducted by the same Diver Pradip Kumar (supra) accompanied by a diver from local Flotilla at 12.45 h to 13.40 h. During this diving, diver Pradip Kumar reported that all blades of port propeller and three blades of starboard propeller has sustained damages warranting detail examination. Ship sailing was cancelled and detail examination was done by a team of CCDT (MB) using videograph. Report was submitted to the ship on 16.12.2008 along with the photograph of the propeller. A part of fishing nets were found on the propeller on 15.12.2008 which prima facie indicates the ship has gone through

some fishing nets. While submitting report to Vice Admiral Sanjiv Bhasin, the aforesaid factual decision had been discussed with recommendation to initiate Court Martial proceedings against the applicant.

28. Cdr Ramesh Kumar observed that Murmugao is an area of dense fishing traffic and no report of damage of this magnitude caused by fishing nets as earlier been reported by Mariners, hence damage to the propeller is caused due to Floating Objects/Buoys/Underwater Obstruction. Ship's propeller may have touched the bottom as it has traversed through water with depth less than limiting danger line (LDL) of the ship on four separate occasions. He noted that fluctuation of dynamo reading was not briefed to the divers. Commander of the INS Agray i.e. the applicant negligently hazarded the ship between 27.11.2008 to 15.12.2008 by traversing the ship through shallow water in depth lesser than LDL. He failed to ensure effective compliance of laid down navigational procedure. It has been alleged by Cdr Ramesh Kumar that the applicant has failed to plan the ship's movement factoring for the LDL and failed to ensure effective SSD organization as well as complete planning of the pilotage and underwater inspection and also not adhered to Article 0702.

29. From the perusal of recommendatory report of Cdr Ramesh Kumar it appears that prima facie recommendation of Court Martial is based on movement of ship and under LDL with consequential damage caused. However, since the parts of the fishing nets were

found on the propeller by the divers on 15.12.2008, then why the damage may not be attributed to movement of ship in fishing area or coming in touch with the underground fishing nets ? In any case recovery of fishing nets by the divers on 15.12.2008 is an important piece of evidence which seems to has not been reasonably taken into account and explained by the respondents or Court Martial. Before recommending for Court Martial proceedings and during the course of Court Martial, attention has not been invited to any material on record which may indicate as to why divers could not detect the damage caused to the propeller in first and second underwater checks (supra) and why no explanation has been sought from the divers for their lapses, if any, during first and second diving checking (supra)? Why span diver at Goa was not called for cross-examination or explanation by respondents with regard to report submitted by him that everything was all right ? Pradeep Kumar and another diver of INS Gomati who made underwater inspection on 8th, 9th and 11th Dec.,2008 have cleared the ship under Sea Hawk state II then how in the second diving operation on 15.12.2008 and for what reasons they found that the propeller have been damaged ? Whether between 11th to 15th December, 2008 damage could have been caused to propeller for some extraneous reasons? Question also cropped up and should have been investigated after serving notice on Pradeep Kumar and another diver of INS Gomati to find out any fault on their part in the diving operation done by them on 8th to 11th December, 2008. Whether in view of damage caused to propeller, the ship could have traveled from

Goa to Mumbai ? Without looking into these material facts and questioning the divers with regard to their lapses, if any, the Court Martial proceedings as has been recommended by Cdr Ramesh Kumar in his letter dated 24.09.2009 seems to be not justified. While sanctioning for Court Martial proceedings Vice Admiral Sanjeev Bhasin has also not looked into these material facts. It seems to be a major lapse on the part of respondent.

Propeller :

Admiralty Manual of Seamanship (BR 67) deals with different types of propellers. Conventional propellers are of two types i.e. Fixed-pitch (FP) and Controllable-pitch (CP). The other type of propellers are Vertical Axis or Cycloidal propeller, the Bow Thruster and the Active Rudder. Conventional propellers rotate in the vertical or nearly vertical plane and the shiphandler describes the direction of rotation as right-handed or left-handed. A right-handed propeller turns in a clockwise direction when viewed from aft and a left-handed propeller turns counter-clockwise. Port propeller is right-handed and rotates clockwise and the starboard propeller is left-handed and rotates counter-clockwise. By applying shaft brake the propeller may be stopped. Active rudder propeller is used for accurate maneuvering when vessel is stopped or nearly stopped and also for propelling the vessel at a very slow speed. According to book (supra) advance propeller system itself bents upward in case a hot pitch touches it.

Pradeep Kumar who appears as PW 17 is the main diver who

inspected the propeller with regard to damage. He had made the following statement (relevant portion) :-

"On 15 Dec 08 we had to sail and my Commanding Officer reported on board he called me in his cabin personally and asked me to carry out the post sailing checks. As the post sailing checks were not carried earlier, so I went to INS Bedi to manage the team. We first dived in INS Bedi and one ship which was along side INS Bedi in MN Inner Break water. Thereafter with same divers and me reported to my ship. I took the clearance from OOD. He briefed me and thereafter the diving Supervisor Lt Cdr SR Singh briefed me before I went into water. First I dived on the PORT side and then I went to propeller, I found damages which were very minor so I came out and told the surface team to make the picture of propeller and then I dived again on the propeller when I came back I explained that all the damages on PORT side. Thereafter I dived on STBD side and when I came to propeller, I found some damages in shaft propeller and rudder after checking all these I reported to the surface team and explained all the damages. The damage was very minor and it took me around one hour."

With regard to diving done on 8th, 9th & 11th December he stated that he had checked the propeller shaft and rudder but he could not find any damage (Q. No.1398). He also stated that he did not find any rope or net entangled with rope guard on either shaft or propeller (Q No.1399). No satisfactory reply seems to be on record from Pradeep Kumar who is the key witness as to why he could not find out the damage caused to the propeller during Sea Hawk state II on 8th, 9th & 10th December. How he could have failed to find out damage at Sea Hawk state II, more so when he stated that he has done diving at Kochi, Mumbai and Visakhapatnam ports though in Examination-in-Chief he stated that no fishing net was found but during cross-examination he admitted that fishing net weighing 250-300 grams were recovered on 15.12.08 (Q No.1405). Contradictory statement made by him as Examination-in-Chief and during cross-examination

by the Defence makes the statement untrustworthy. In a letter dated 24.09.2009 addressed to Vice-Admiral for grant of sanction of Court Martial with regard to damage caused to the propeller he stated the factual position as under:-

> "32. On arrival at Mumbai, the ship was placed in AMP from 08 Dec 08 to 15 Dec 08. The accused thereafter proceeded on leave on 08 Dec 08. The ship assumed Sea Hawk state II. Bottom searches as planned by the GSO where undertaken on 08 Dec 08, 09 Dec 08 and 11 Dec 08 by the ship's diver, Pradeep Kumar L/S UW II (SD), 155758-Y along with a diver from INS Gomati. It is pertinent to note that no post sailing under water checks were undertaken nor any signal raised for the same. Sea Hawk state was reversed to state III on 13 Dec 08. The accused reported onboard on 15 Dec 08 ex-leave as the ship was scheduled to sail for ODA patrol the same day. The Navigating Officer Lt SR Singh (05387-T) telephonically requested the Squadron Diving Coordinator, INS Bedi for Post sailing checks. Pradeep Kumar L/S UW II (SD), 155758-Y was personally called to the accused cabin and instructed by the accused to carry out diving. The diving was conducted by the same diver Pradeep Kumar L/S UW II (SD), 155758-Y along with divers from local flotilla from 1245h to 1340h. It was reported by the ship's diver that all blades of port propeller and three blades of starboard propeller had sustained damages warranting detailed examination. The ship's sailing was cancelled. A team from CCDT(MB) was thereafter called for detailed examination using videography. The report was submitted by the ship vide letter No.121/21 dated 16 Dec 08. Photographs of the propeller."

The applicant, Harneet Singh had submitted a report on 16.12.2008 pointing out details of damages caused to the propeller after taking into account the diver's report. According to him, the starboard propeller was having chipping of blade material of length 21cm and depth 04 mm halfway from crown to hub observed on one blade along the leading edge. A singular dent of length 01-02 mm and depth 02-05 mm observed on two blades. The fourth blade was found undamaged. The port propeller was found chipping of material of length 03 cm and depth 04 mm halfway from crown to hub observed

on one blade along the leading edge. Singular dents of length 01-02 mm and depth 02-05 mm observed on remaining three blades.

It should be noted that DW 1 Prakash Singh on 01.12.2008 carried out diving work and made a statement that he had checked all the four starboard propeller both by feeling and visually found it to be fit. However, the Prosecutor while summing up his case with regard to damage to propeller held as under :-

"The following facts are relevant with regards to the type and extent of damage to the propellers :-

(a) The underwater Videography undertaken by CCDT (MB) on 16 Dec 08 was forwarded by CCDT (MB) to INS Agray as per para 2 of exhibit D-6(CCDT (MB) Signal DTG 161913) and as corroborated by DW-06 (Cdr Rajinder Singh Dahiya (02781-W), Officer-in-Charge, CCDT (MB). However, the same has remained untraceable and not held onboard.

(b) In absence of the underwater Vidography, the next best available evidence is exhibit P-15 (Photographs of the ship's damaged propellers). The contents of the exhibit have been verified by PW-9 (Lt Cdr Vijay Krishna, 42404-Y) who has taken the photographs himself from a digital camera. The photographs clearly indicate the following:-

(i) The propeller blade are petal shaped and hence the crown per se is not clearly discernible.

(ii) The damages were in built up shape indicating interference of foreign objects and not a result of corrosion or pitting.

(iii) The damage is limited to the propellers edges and there is no damage to any other underwater fitting or the keel.

(iv) All blades of the Port propeller and three blades of the Starboard propeller had sustained damages indicating that the obstruction was by an object analogous to both propellers.

(v) All the damages are along the outer edges away from the hub and in proximity to that portion of the blade which normally would enter the water first indicating the introduction of interference from the bottom when the propellers were in rotation.

(vi) Except one blade on the starboard propeller continuously chipped off to about 20 cms and one blade on the port propeller chipped 3-5 cms damage, the remaining damages are very minor.

The photographs of the damaged propellers are available and indicate the best available reference. Hence all diagrammatic representations and deposition from witnesses with regard to the damages have no relevance due to the following :-

(a) Exhibit D-8, Appendix P and Q of INS Agray letter 121/21 dated 16 Dec 08 (Diagrammatic representation of damage to propellers) as the same is a diagrammatic representation. DW-5 who stated that the diagram could be relied upon was not involved in making the diagram.

(b) Rough diagrammatic representation of damage to propellers as drawn by memory by PW-09 during cross examination is a diagrammatic representation from memory and the witness stated that the damage is half way between the hub and the crown which is incorrect as it is clearly brought out from the Photographs.

(c) Exhibit D-4 (CCDT (MB) Signal DTG 161913/ Dec indicating no damages to the outer edge of the propellers as it is clearly apparent from the photographs that all the damages are to the outer edges of the propellers and not on the surface. If it meant the crown of the propeller, the same is not easily discernable as brought out earlier due to the shape of the propeller. In addition DW-6 Commander Rajender Singh Dahiya, 02781-W who deposed as the defence witness has not seen the video nor did he inspect the propellers but as the Officer-in-Charge of CCDT(MB) was briefed by his unit prior releasing the signal.

(d) Deposition of DW-7 (Cdr Rajneesh Sharma) indicating proximity of damages closer to the hub as it is again a deposition from memory which is incorrect as is clearly indicated in the diagram."

One of the strange facts borne out from pleadings on record and the material placed thereon is that while making statement before the Tribunal, Lt Commander Navin Pandita, present CO of INS Agray stated that whenever a ship arrive to its destination like in the present Bombay Dockyard, keeping in view the security it is placed under different Sea Hawk stages. He submits that whenever a ship is placed in the Sea Haw stage, in the present case Sea Hawk stage II, the propellers and other machineries are checked by divers as done in the present case. However, he submits that repair of damaged propeller is

done at Dry Dockyard Agency by technicians. However, in the present case attention of Tribunal has not been invited to the report of technical experts of Dry Dockyard who repaired the damaged propellers and sent it back to the ship in correct stage with regard to its use in the ship for further sailing. It is not understandable as to why the respondents Navy during course of Court Martial proceedings or during Board of Inquiry proceedings had not brought on record technical expert's report who repaired the damaged propeller at Dry Dockyard Agency. The technical expert or who even repaired the ship's propellers was also not produced as witness. This is a serious infirmity and fatal to the entire proceedings. Why report of Dry Dockyard Agency was not taken into account while making prayer for Court Martial is not understandable.

Material on record prima facie indicates that all the blades of port propeller and three blades of starboard propeller sustained damages warranting detailed examination. Extent of damage has not been stated specifically. Damage of all blades of port propeller as noted by Cdr Ramesh Kumar seems to be extensive damage of all the blades, seems exaggeration of facts. Three blades of starboard propeller also sustained damages. The tenor of letter dated 24.09.2009 addressed to Vice Admiral Sanjeev Bhasin to grant sanction for Court Martial reveals extensive damage to the propellers. It is not a case of minor chipping or minor damage in propeller. In case the letter dated 24.09.2009 addressed to the Vice Admiral seeking permission to initiate Court Martial proceeding against the applicant is looked into,

otherwise also in case of extensive damage caused to three blades of starboard propeller prima facie it reflects serious damage. In case there was minor chipping then such fact should have been brought to the notice of the Vice Admiral since the foundation of Court Martial proceeding is damage caused to the propeller. It raises reasonable doubt on fairness. In Para.33 Cdr Ramesh Kumar while putting the factual matrix on record stated that all blades of port propeller were damaged along with three blades of starboard propeller but in conclusion in Para.33 he diluted the damage caused to the propeller in its totality which is not understandable and is contradictory.

Part II of the Court Martial proceeding contains a conclusive statement with regard to circumstances under which damage caused to the propellers by floating navigational hazards. It has been observed that floating navigational hazards are known to exist in Andaman & Nicobar Islands. Heavy logs of wood are also found drifting in these islands. In Singapore there have been a large number of instances of propeller damage to their crafts presumably due to sunken logs. It has been further observed that damage to centre and starboard propellers may be attributed to the ship hitting by floating/sub-merged object like a log. While recording the finding attributing the damage caused to the propeller on account of touching the under water hard objects, different instances or situation which may cause damage to the propeller should also have been considered.

Court Martial Proceedings

30. First meeting of the Court Martial appears to begin from 23.12.2009 and seems to be continued till 11.02.2010. In the trial of the applicant under the Presidentship of Cdr G. S. Randhawa and Commander Vinil Venugopal was named as Prosecutor. At initial stage on behalf of the prosecution a list of 19 witnesses was provided. On the other hand, a list of 7 defence witnesses were given which contains the names of Prakash Singh, Leading Seaman, Devender Singh, POCD, Lt Col Mrinal Bhatnagar, Cdr Asim Mittal, Lt Cdr Puneet Sehegal, Cdr R. S. Dhawan and Cdr Rajmal Sharma.

31. A preliminary objection was also raised by the applicant through his next friend with regard to maintainability of Court Martial in pursuance of provisions contained in Sec.102 of the Navy Act. Since Ld. Counsel raised the plea and also argued with regard to maintainability of Court Martial that should have been considered on the basis of material on record. It shall be appropriate to consider some of the preliminary objection raised during Court Martial proceedings and finding recorded thereon as under:-

(i) Objection was raised that Prosecutor V. Venugopal and G. S. Randhawa, President of the Court Martial Proceedings belong to same establishment i.e. MWC (MB) on account of their intimacy or relationship of the establishment there is likelihood of bias. It was further objected that Prosecutor was reporting directly to the President who was Director of Maritime Warfare Centre i.e. MWC and used to brief him from the progress of investigation and development relating

to cases in hand. Since the applicant has charged navigational negligence under Section 55(2) and 41C of the Navy Act, the President should recuse himself.

: Allegation that the President and the Prosecutor belong to the same establishment of the Unit was not denied by the Prosecutor and the President. Senior-most Member of the Court rejected the objection expressing his full faith and trust on the Prosecutor and the President and also declined to question the appointment made by the Convening Authority.

(ii) Relying upon Section 103 of the Navy Act objection was raised by defending officer that President is to be appointed by Convening Authority and it is for the President and his prerogative to summon all officers except who exempted under Section 20 of the Navy Act. It was pointed out that Convening Authority himself appointed six members by pick and choose method which should not have been done. Reliance was also placed on Sec.97(90) Sub-Sec.20 read with Regulation 174. It was argued by the defending officer that these provisions were incorporated to avoid command influence and is beyond the scope of deeming provisions contained in Regulation 174 of Navy Regulation Pt. II, more so when it is subordinate legislation to Navy Act.

: President has over-ruled the objection and directed to proceed further without assigning any reasoned and speaking order, relying upon the opinion of TJA.

(iii) Another objection was raised by the defending officer on behalf of the applicant that under Section 103 of the Navy Act, charge-sheet and summary of evidence should have been handed over to the applicant with prior notice of minimum 96 hours before the Court Martial. Attention was invited to Regulation 167 of Navy Regulation Pt. II. The charge-sheet was handed over on 21.12.2009 at 9 O'clock and Court Martial proceeded on 23.12.2009 before 96 hours.

: Relying upon Regulation 169 as argued by TJA, President has over-ruled the objection without speaking and reasoned order, relying upon the opinion of TJA.

(iv) Objection was raised to the effect that the applicant was working as a Commander of INS Agray. During the course of proceedings of Board of Inquiry he was not permitted to participate in it in pursuance of Regulation 205 of the Navy Regulation Pt. II. Since the opinion expressed by the Board of Inquiry is the basis, forwarding the letter dated 24.09.2009 recommending for Court Martial proceedings suffers from substantial illegality.

: Objection was over-ruled by the President on the ground that Court Martial proceedings is an independent body and has no relation with the Board of Inquiry(BOI).

(v) In pursuance of order issued by HQWNC vide order dated 08.05.2009 BOI report was forwarded to NOIC (Maharashtra). It was on the report of BOI in which the Convening Authority has expressed opinion with regard to charges through his order in terms of

Regulation 148 and 149 of Navy Regulation Pt.II. Initially in terms of order dated 15.05.2009 the applicant was attached to NOIC (Maharashtra) from 15.05.2009 to 16.06.2009 where the investigation was carried out by Investigating Officer appointed by NOIC (Maharashtra). Later on in pursuance of letter dated 15.06.2009 issued by HQWNC the applicant was attached to INS Agray. According to the applicant a request was made for his attachment to INS Agray.

: Objection rejected by the President without reasoned order, relying upon the opinion of TJA.

(vi) Under Regulation 149 it is the prerogative of the Commanding Officer to investigate the allegation but in the present case neither CEO of INS Agray nor any Officer appointed by him has investigated the case and drawn summary of evidence. Investigating Officer Cdr. V. Venugopal was appointed as Inquiry Officer vide order dated 04.08.2009 by the Convening Authority in contravention of Regulation 149 of Navy Regulation Pt.II. It is the Convening Authority to consider the report of investigation carried out by the enquiry officer for the purpose whether the Court Martial is to be ordered or not. In the present case Cdr. V. Venugopal was appointed as the Investigating Officer of the case, hence suffers from bias violating Regulation 149.

: Objection was over-ruled by the President without speaking and reasoned order, relying upon the opinion of TJA.

(vii) The applicant was reverted from the post in spite of the fact that his regular promotion to the post of Commander was duly

notified on 21.04.2009 and in a traditional ceremony he was conferred with the Badge of Commander. After reversion to the post of Lt Cdr he represented his cause to the Ministry of Defence. The matter was pending when the Court Martial proceeding was initiated. Hence objection was raised that Court Martial proceeding should not be continued or initiated till the controversy with regard to applicant's reversal is adjudicated by the MoD.

: Objection was over-ruled by the President without assigning any reason, relying upon the opinion of TJA.

(viii) It was brought to the notice of the Court that the applicant was promoted to the rank of Commander with effect from 01.04.2009 in pursuance of gazette notification No.RS/3160/CDR/O&R/2/9 dated 21.09.2009. The applicant was addressed as Cdr Harneet Singh by a superior with effect from 01.09.2009 including SO (Q & R II) dated 21.04.2009 and Director of Personnel (O&R). It was the convening authority who demoted the applicant by an order vide HQWCN PHM SO9P0/044/09 dated 09.04.2009. Hence trial by Court Martial held to be without jurisdiction treating the applicant as Lt Cdr and also amounts to double jeopardy.

: Objection rejected by the President, relying upon the opinion of TJA.

(ix) Objection was raised during the Court Martial proceeding whereby promotion Genform No.0900002/F dated 01.04.2009 was produced and asserted that the applicant was promoted from the rank of Lt Cdr to the rank of Cdr in pursuance of letter vide IHQ MOD (N)

letter RS/1425/CDR/OA&R-ii/09 dated 27.03.2009. Genform containing the promotional order was certified by S. N. Kadam, MCPO, SO to INS Agray. Gazette Notification dated 21.04.2009 of Navy Branch indicates that the President has been pleased to promote the applicant from the date shown in the list at Sl. No.3 with effect from 01.04.2009. Gazette Notification shown to the Court has added document by CDA Navy. The applicant also informed that he is in receipt of pay and allowances of the Commander since last 10 months.

: Objection rejected by the President on the ground that controversy with regard to officers rank is pending for adjudication, relying upon the opinion of TJA.

Rejection of preliminary objection by the President suffers from vice of arbitrariness :

33. Duties of President and Trial Judge Advocate (TJA) has been given in the Regulation of Navy Part II Statutory. Duties of the President has been provided under Regulation 174 and 175 of the Regulation which, for convenience, are reproduced as under :-

"**DUTIES OF THE PRESIDENT**

174. Summoning of Members. (1) The President shall by Signal summon the officers junior to himself present at the place where the court martial shall be held to sit thereon which signal shall be deemed to be a compliance with sub-section (19) of section 97.

(2) When issuing the signal, provision shall be made for the attendance of spare members who would be eligible to sit if any objection to a member of the court is allowed.

175. Responsibilities for Conduct of Court. The President shall be responsible together with the trial judge advocate for ensuring that the trial is conducted in accordance with the provisions of the Act and these regulations and that the customary ceremonial set forth in Appendix III is observed."

A plain reading of the aforesaid provisions shows that the President shall be responsible together with TJA for ensuring that trial is conducted in accordance with the provisions of the Act in terms of guidelines contained in Appendix III.

34. Regulation 169, 170 & 171 deal with the duties of TJA which, for convenience, are reproduced as under :-

"**DUTIES OF TRIAL JUDGE ADVOCATE**

169. Notice of Trial to the Accused. (1) The trial judge advocate shall :-

(a) give timely notice to the accused of the time and date of the trial;

(b) cause the accused to be furnished with copies of the charge sheet, the circumstantial letter, the summary of evidence and the list of exhibits proposed to be exhibited at the trial by the prosecution;

(c) inform the accused that any witness whom he may desire to call and whose attendance can reasonably be procured shall be summoned on his behalf;

(d) inform the accused that he may, if he so desires and if he makes an application in writing, give evidence on his own behalf.

(2) The notice to the accused shall be in the prescribed form.

170. Notice to Prosecutor. The trial judge advocate shall inform the prosecutor of the time and date of the court martial issuing him with a notice in the prescribed form and request the prosecutor to forward to him certified copies of the documents mentioned in section 119.

171. Attendance of Witnesses. The trial judge advocate shall take necessary steps to procure the attendance of witnesses whom the prosecutor or the accused may desire to call and whose attendance can reasonably be procured, serving them with summons in the prescribed form."

35. Para. 15 of Appendix III is relevant to decide the right of President and Trial Judge Advocate during course of Court Martial proceeding. For convenience, para.15 is reproduced as under :-

"15. (a) The trial shall then proceed in accordance with the normal procedure, the prosecution and the defence presenting their cases respectively through the witnesses called by them.

(b) Whenever in the course of a trial it appears desirable to the trial judge advocate that arguments and evidence as to the admissibility of evidence or arguments in support of an application for separate trials or on any other points of law should not be heard in the presence of the court, he may advise the president of the court accordingly and the president shall thereupon make an order for the court to retire or direct the trial judge advocate to hear the arguments in some other convenient place in accordance with section 114(2) of the Navy Act.

(c) Since, it may not normally be possible to find another suitable place with necessary furniture, fittings and facilities for the trial judge advocate, the accused, the defending officer or counsel, the prosecutor and his assistant, the stenographer, witnesses and audience, it may be desirable and convenient for the court to retire to an appropriate room to be kept ready for the purpose. The trial judge advocate should settle this before hand with the president of the court-martial.

(d) Whenever the court has to retire and under these circumstances all present in the court room shall stand in their places as the members of the court file out of the court room for going to the retiring room.

(e) After the necessary arguments have been heard and the point at issue decided, the trial judge advocate shall inform the court through the officer of the court. Members of the court shall then come in and resume there seats. All present in the court shall stand in their seats only after all members of the court have resumed their seats and have taken off their caps.

(f) The trial shall then proceed in the normal manner.

(g) After the summing up by the defence, the prosecution and the trial judge advocate, the court shall be cleared to consider the finding. The trial judge advocate, the officer under instruction and the stenographer shall also withdraw from the court."

36. A combined reading of the Regulation (supra) and guidelines as contained in Appendix III shows that the duties of TJA is advisory in

nature and during course of trial he may make his submission with regard to any point raised or issue involved apart from discharging other statutory duty. It is for the President and the Court to take decision rejecting or accepting the advice of the TJA except the legal advice discussed hereinafter.

37. Section 111 of the Navy Act provides that whenever before entering on his defence the accused raised a plea of no case to answer then in such a situation after hearing the accused and the prosecutor and the advice of the Trial Judge Advocate, in case the Court accepts the plea then the accused shall be acquitted on the charge and if the Court over-rules the plea, the accused shall be called upon to enter on his defence, in consequence thereof the Trial Judge Advocate shall inform the accused to give evidence. It appears that the plea of no case may be raised at the beginning in the form of preliminary objection as well as after conclusion of prosecution evidence. Question of law shall be decided by the Trial Judge Advocate in pursuance of power conferred by Section 111 of the Navy Act. But whenever the question comes with the plea of no case the opinion of the Trial Judge Advocate on the question of law shall be considered by the trial Court with consequential order passed during the proceedings of the Court. For convenience, Sec.111 of the Navy Act is reproduced as under :-

“111. Plea of no case and defence of accused.-- (1) When the examination of the witnesses for the prosecution is concluded, the accused shall be called on for his defence.

(2) Before entering on his defence, the accused may raise a plea of no case to answer.

(3) If such a plea is raised, the court will decide the plea after hearing the accused and the prosecutor and the advice of the trial judge advocate.

(4) If the court accepts the plea, the accused shall be acquitted on the charge or charges in respect whereof the plea has been accepted.

(5) If the court overrules the plea, the accused shall be called upon to enter on his defence.

(6) The trial judge advocate shall then inform the accused that he may give evidence as a witness on his own behalf should he desire to do so and should he make a request in writing to do so, but that he will thereby render himself liable to cross-examination.

(7) If the accused does not apply to give evidence, he may make a statement as to the facts of the case, and if he has no defence witnesses to examine as to facts, the prosecutor may sum up his case and the accused shall be entitled to reply.

(8) If the accused or any one of the several accused applies to give evidence and there are no other witnesses in the case for the defence, other than witnesses as to character, then the evidence of such accused shall be recorded and if the accused so desires the witnesses as to character shall be examined and the prosecutor shall then sum up his case and the accused may reply.

(9) If the accused or any one of the accused adduces any oral evidence as to facts other than his own evidence, if any, the accused may then sum up his case on the conclusion of that evidence and the prosecutor shall be entitled to reply."

In the present case the Trial Judge Advocate has given his opinion with regard to preliminary objection raised by the applicant but while accepting or rejecting the preliminary objection the President has passed a mechanical order without applying his mind. The orders are cryptic without any reason (supra). This seems to be contrary to provisions contained in Section 115 read with Section 124 of the Navy Act. The Court should apply its mind while rejecting or passing an order but with reason. Otherwise decision shall be hit by Article 14 of the Constitution.

38. A Full Bench of Hon'ble Allahabad High Court in Writ Petition (Misc. Bench) No.9470 in the case of Smt. Chawali v. State of U. P.

in its judgment and order dated 16.01.2015 had considered the earlier judgment of the Court with regard to necessity of reasoned order. While speaking in the Full Bench (supra) one of us (Hon'ble Justice Devi Prasad Singh) held as under :-

"85. A Full Bench of this Court while considering the importance of reason in a case reported in 2013 (11)ADJ 22 Ms. Ranjana Agnihotri and others [P.I.L.] versus Union of India Through Secy. Ministry of Home Affairs & others had considered various pronouncements of Hon'ble Supreme Court and held that the reason is the part and parcel of Article 14 of the Constitution of India. Relevant portion from the judgement of Ms. Ranjana Agnihotri (supra) is reproduced as under :-

"190. Learned author (De Smith's Judicial Review, 6th Edition) has rightly held that failure to give adequate reasons may indicate that a decision is irrational. Learned author observed as under:

> "The beneficial effects of a duty to give reasons are many. To have to provide an explanation of the basis for their decision is a salutary discipline for those who have to decide anything, that adversely affects others. The administration in that it encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making. The giving of reasons increases public confidence in the decision-making process. The giving of reasons can also render it easier to determine if a decision is irrational or erroneous."

191. Sir W.W.R. Wade in his famous treatise "Administrative Law" (10th Edition) observed :

> "The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."

192. Learned author(supra) referred a case reported in Breen versus Amalgamated Engineering Union (1971)2 QB 175 where Lord Denning MR has relied upon the earlier judgment of House of Lords, Padfield versus Minister of Agriculture, Fisheries and Food and held as under :

> "The importance of the House of Lords' decision was underlined by Lord Denning MR. The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

193. In The United States, the Courts from time to time insisted upon recording of reasons in the decision taken by administrative authority. In Phleps Dodge Corporation versus National Labour Relations Board (1940)85 Law Ed 1271 at p. 1284, it has been held that the authority should give clear indication that it has exercised the discretion with which it has been empowered because administrative process will best be vindicated by clarity in its exercise.

194. In Securities and Exchange Commission versus Chenery Corporation (1942)Law Ed 626 at p. 636, it has been held that orderly functioning of the process of the administrative agency be clearly disclosed and adequately sustained.

195. The Federal Administrative Procedure Act, 1946 prescribes the basic procedural principles which are to govern formal administrative procedures and contained an express provision (Section 8(b)) to the effect that all decisions shall indicate a

statement of findings and conclusions as well as reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record.

196. The Supreme Court in a case reported in **AIR 1976 SC 1785 Seimens Engineering and Manufacturing Company of India Limited versus Union of India and another**, held as under :

> “”6.....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the ad judicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.”

197 In one another case reported in **(2004)5 SCC 568 State of Orissa versus Dhaniram Lunar**, their Lordships of Supreme Court held as under :

> “8..... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made.....”.

198. In **Mc Dermott International Inco. Versus Buru Standard Co. Limited and others (2006) SLT 345**, their Lordships observed as under :

> "...Reason' is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration In Re, "proper, adequate reasons". Such reasons shall not only be intelligible
> but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons....."

199. A Division Bench of this Court in a case reported in **2007 LCD 1266 Vijai Shanker Tripathi versus Hon'ble High Court of Judicature at Allahabad** has considered the concept of exercise of discretionary power by the State or its authorities including the High Court held that every administrative order passed by authorities must fulfil the requirement of Art. 14 of the constitution.

200. Supreme Court in a case reported in **JT 2010(9) SC 590 M/s. Kranti Associates Private Limited and another versus Sh. Masood Ahmed Khan and others** held that a cryptic order shall deem to suffer from vice of arbitrariness. An order passed by quasi judicial authority or even administrative authority must speak on its face.

In a case reported in **2010(4) SCC 785 CCT versus Shukla and Brothers**, their Lordships held that the reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. To quote relevant portion from the judgment (supra), to quote :

> "Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principle are not only applicable to administrative

> or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements."

201. The aforesaid view with regard to reasoned order by authorities which include judicial and quasi judicial authorities has been consistently reiterated by the Supreme Court in earlier judgments. Their Lordships of Hon'ble Supreme Court held that the authorities have to record reasons, otherwise it may become a tool for harassment vide **K.R. Deb versus The Collector of Central Excise, Shillong, AIR 1971 SC 1447; State of Assam and another versus J.N. Roy Biswas, AIR 1975 SC 2277; State of Punjab versus Kashmir Singh, 1997 SCC (L&S) 88; Union of India and others versus P. Thayagarajan, AIR 1999 SC 449; and Union of India versus K.D. Pandey and another, (2002)10 SCC 471.**

In a recent judgment reported in **AIR 2013 SCW 2752 Union of India versus Ibrahimuddin(para 33)**, their Lordships of Hon'ble Supreme Court reiterated that every order passed by the administrative authority, judicial or quasi judicial must be a reasoned order.

86. In a case reported in **2010(9) SCC 496 Kranti Associates Private Limited and another versus Masood Ahmed Khan and others**, Hon'ble Supreme Court held as under :

> "15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the "inscrutable face of a sphinx".

87. In one other case reported in (2014)3 SCC 502 Dipak Babaria versus State of Gujarat, Hon'ble Supreme Court held as under :

> "64. That apart it has to be examined whether the Government had given sufficient reasons for the order it passed, at the time of passing such order. The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent affidavits as laid down by this Court long back in **Commissioner of Police, Bombay v.**

Gordhandas Bhanji reported in AIR 1952 SC 16 in the following words:

"9. Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in
his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting's and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

This proposition has been quoted with approval in paragraph 8 by a Constitution Bench in **Mohinder Singh Gill v. Chief Election Commissioner** reported in 1978 (1) SCC 405 wherein Krishna Iyer, J. has stated as follows:

8**.** The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

88. From the aforesaid proposition of law, there appears to be no room of doubt that even the administrative order requires some precise reason……"

39. In view of the above, President or collectively the Court Martial proceeding seems to have failed to meet out the requirement of law while passing an order with regard to objection raised by the defence counsel. It goes to the very root of the proceeding, hence subsequent proceeding by Court Martial seems to suffer from substantial illegality.

Constitution of Court Martial :

40. In the present case Convening Authority has himself appointed six persons to constitute the Court Martial. Section 97 deals with the constitution of Court Martial. It is constituted in pursuance of power conferred by Section 97 of the Navy Act, 1957 (in short 'Act'). For convenience, Sub-section (6) to (22) of Section 97 of the Act which are relevant are reproduced as under :-

"(6) A court-martial shall consist of not less than five nor more than nine officers.
(7) No officer shall be qualified to sit as a member of a court- martial unless-

(a) he is subject to naval law,

(b) he is an officer of the Indian Navy of the rank of lieutenant or higher rank, and

(c) he is of or over twenty-one years of age.

(8) A prosecutor shall not be qualified to sit on the court- martial for the trial of the person he
prosecutes.
(9) The officer ordering the court-martial, the officer who was the commanding officer of the ship to which the accused belonged at the time of the commission of the alleged offence and the officer investigating the offence shall not be qualified to sit on a court-martial for the trial of such accused.
(10) Subject to the provisions of sub-sections (7) to (9), officers of the Indian Navy shall be eligible to sit as members of a court-martial irrespective of the branch of the naval service to which they belong:

Provided that-

(a) the majority of the members of the court-martial, including the president, shall be officers of the executive branch of the naval service, and

(b) at trials for offences against sections 34,35, 55, 1[55A, 55C] and 56, officers other than officers of the executive branch of the naval service shall not be eligible to sit.

(11) A court-martial shall not be deemed to be duly constituted unless the members thereof are drawn from at least two ships not being tenders, and commanded by officers of the rank of lieutenant or higher rank.
(12) The president of a court-martial shall be named by the authority ordering the same or by any
officer empowered by such authority to name the president.

(13) No court-martial for the trial of a flag officer shall be duly constituted unless the president is a flag officer and the other officers composing the court are of the rank of captain or of higher rank.
(14) No court-martial for the trial of a captain shall be duly constituted unless the president is a captain or of higher rank and the other officers composing the court are commanders or officers of higher rank.
(15) No court-martial for the trial of a commander shall be duly constituted unless the president is a commander or of higher rank and two other members are commanders or officers of higher rank.
(16) No court-martial for the trial of a person below the rank of commander shall be duly constituted unless the president is a substantive or acting commander or of higher rank.
(17) No commander or lieutenant-commander or lieutenant shall be required to sit as a member of a court-martial when four officers of higher rank and junior to the president can be assembled at the place where the court-martial is to be held, but the regularity or validity of any court-martial or of the proceedings thereof shall not be affected by any commander, lieutenant-commander or lieutenant being required to sit or sitting thereon under any circumstances and when any commander, lieutenant commander or lieutenant sits on any court-martial, the members of it shall not exceed five.
(18) Members of the court-martial other than the president shall be appointed, subject to the provisions of the foregoing sub-sections, in the manner provided in sub-section (19).
(19) Subject to the provisions of sub-section (11), the president shall summon all officers except such as are exempted under the provisions of sub-section (20), next in seniority to himself present at the place where the court-martial shall be held, to sit thereon until the number of nine or such other number not less than five as is attainable is complete.
(20) The officer convening the court-martial or the senior naval officer present at the place where the court-martial is to be held, may exempt by writing under his hand conveyed to the president of the court-martial any officer from attending as member on ground of sickness or urgent public duty.
(21) In this section references to specified ranks of officers shall, unless otherwise stated, be deemed to be references to substantive ranks and to include references to equivalent ranks in all branches of the naval service.
(22) When the naval forces are on active service, officers of the Indian Naval Reserve Forces subject to naval law shall be eligible to sit as members of courts-martial on the same basis and under the same conditions as officers of the Indian Navy."

41. Regulation 174 read with Regulation 168 empowers the President to summon the officer junior to himself to sit thereon in

compliance of provision contained in Sub-section (19) of Section 97 of the Act. A combined reading of Sub-section (19) of Sec. 97 read with Regulation (supra) shows that power has been conferred on the President to choose officers who are next in seniority to himself to sit thereon to complete the number of nine but not less than five.

42. .In the present case the convening authority has chosen six persons as Member of the Court Martial which seems to against the spirit of the statutory mandate. Flowing from sub-section (19) of Sec. 97 of the Act read with Regulation (supra) since the President has not himself chosen the members of the Court Martial, the constitution seems to suffer from substantial illegality.

Demotion and Trial :

43. Admittedly, the applicant was promoted to the rank of Commander and notification was issued in the name of the President of India. During course of trial he raised objection that a representation against the order passed by the subordinate authority dt. 09.04.2009 is pending with the Ministry of Defence, hence he may not be tried as Lt Commander. Argument advanced by the ld. counsel for the applicant carries weight. Presidential notification issued for applicant's promotion to the regular post of Commander and follow up action for payment of salary and benefits could not have been turned down by the Navy or its subordinate authority and exept by the Government of India itself under provisions contained in Section 20 and 21 of the General Clauses Act.

44. The moment notification issued the same should be given to effect in accordance with its contents. Section 21 of the General Clauses Act further provides that a notification may be amended, varied or rescinded by the same authority since power to revoke includes power to revoke or modify. Keeping in view the provisions of Section 20 and 21 of the General Clauses Act action taken by the respondents during Court Martial treating the applicant as Lt Commander seems to suffer from substantial illegality for the reason that trial of Lt Commander and Commander varies to some extent. For convenience, Sec. 20 & 21 of the General Clauses Act are reproduced as under :-

"**20. Construction of notifications, etc. issued under enactments. –** Where, by any [Central Act] or Regulation, a power to issue any [notification], order, scheme, rule, form, or bye-law is conferred, then expressions used in the [notification], order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power."

21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws.—Where, by any [Central Act] or Regulation, a power to [issue notifications], orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any [notifications], orders, rules or bye-laws so [issued]."

Hon'ble Supreme Court in a case reported in AIR 1958 SC 232 – P. Balakotaiah v. Union of India held that no exception can be taken to the proposition that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision it can be shown to be within its power

under any other rule, and that the validity of an order should be judged on consideration of its substance and not its form.

45. Hon'ble Supreme Court in a case reported in AIR 1981 SC 1582 held that notification shall be operative in the territory to which it is intended to operate. It has been further settled by the Hon'ble Supreme Court in a case reported in AIR 2003 SC 269 – Subhas Ram Kumar Bind alias Vakil v. State of Maharashtra – that a notification in common English acceptation means and implies a formal announcement of a legally relevant fact and in the event of Statute speaking of a notification being published in the Official Gazette, the same cannot but mean a notification published by the authority of law in the Official Gazette. It is a formal declaration and publication of an order by the Government.

46. In another case reported in AIR 1961 SC 1095 Hazrat Syed Shah Mastarshid Ali Al Quadari v. Commissioner of Wakfs, West Bengal, Hon'ble Supreme Court held that the power and duties are inter connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and vice versa. The delegation of powers takes with it the duties. The proposition hardly needs authority. It means once Presidential notification is issued promoting the applicant on the post of Commander then his trial should have been done treating him as Commander.

47. Sub-section (15) of Section 97 of the Navy Act (supra) provides that no Court Martial for trial of a Commander shall be duly

constituted unless the President is a Commander or of higher rank and two other members are Commanders or Officers of higher rank. Under the provisions contained therein trial of the applicant treating as Lt Commander seems to suffer from substantial illegality.

48. As held, decision taken by the subordinate authority in contravention of notification (supra) is an instance of lack of jurisdiction. Objection raised by the applicant with regard to his right to be addressed as Commander should have been taken at primary stage since the trial held at later stage of notification treating him as Lt Commander should not have been done. It results into failure of justice since the constitution of Court Martial for Commander is different than Lt Commander. Question of jurisdiction should have been decided by the Court Martial/TJA by speaking and reasoned order.

49. Hon'ble Supreme Court in a case reported in AIR 1967 SC 284 – Associated Electrical Industries (India) Private Limited, Calcutta v. Workmen set aside the order on account of infirmity in the proceeding of the Tribunal suffering from jurisdictional error.

50. In another case reported in 1981 Vol. 3 SCC 589 – Pathumma and Ors. v. Kuntalan Kutty and Ors. – Hon'ble Supreme Court upheld the order of the High Court where jurisdiction was assumed against the statutory provision. Their Lordships held as under :-

"4. We have heard learned counsel for the parties on the question of jurisdiction. An unfortunate aspect of this litigation has been that although that question has been agitated already in three courts and has been bone of contention between the parties for more than a decade, the real provision of law which clinches it was never

put forward on behalf of the appellant before us nor was adverted to by the learned District Judge or the High Court. That provision is contained ink sub-section (1) of Section 21 of the Code of Civil Procedure which runs thus:

> No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice."

5. In order that an objection to the place of suing may be entertained by an appellate or revisional court, the fulfilment of the following three conditions is essential:

(1) The objection was taken in the Court of first instance.

(2) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.

(3) There has been a consequent failure of justice.

6. All these three conditions must co-exist. Now in the present case conditions Nos. 1 and 2 are no doubt fully satisfied; but then before the two appellate Courts below could allow the objection to be taken, it was further necessary that a case of failure of justice on account of the place of suing having been wrongly selected was made out. Not only was no attention paid to this aspect of the matter but no material exists on the record from which such failure of justice may be inferred. We called upon learned counsel for the contesting respondents to point out to us even at this stage any reason why we should hold that a failure of justice had occurred by reason of Manjeri having been chosen as the place of suing but he was unable to put forward any. In this view of the matter we must hold that the provisions of subsection above extracted made it imperative for the District Court and the High Court not to entertain the objection whether or not it was otherwise well founded. We, therefore, refrain from going into the question of the correctness of finding arrived at by the High Court that the Manjeri Court had territorial jurisdiction to take cognizance of the application praying for final decree.".

51. Averment contained in para 4.9 & 4.38 of O. A. have not been denied with regard to issuance of notification dt. 21.04.2009 and promotion done with effect from 01.04.2009.

Jurisdiction/order without jurisdiction

52. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised even at a belated stage in execution. The finding of a court or Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. (Vide United Commercial Bank Ltd. Vs. their Workmen AIR 1951 SC 230; Smt. Nai Bahu Vs. Lal Ramnarayan & ors., AIR 1978 SC 22; Natraj Studios Pvt. Ltd. Vs. Navrang Studio & Anr., AIR 1981 SC 537; Sardar Hasan Siddiqui Vs. State Transport Appellate Tribunal, AIR 1986 All. 132; A.R. Antuley Vs. R.S. Nayak, AIR 1988 SC 1531; Union of India Vs. Deoki Nandan Aggarwal, AIR 1992 SC 96; Karnal Improvement Trust Vs. Prakash Wanti & Anr., (1995) 5 SCC 159; U.P. Rajkiya Nirman Nigam Ltd.Vs. Indure Pvt. Ltd., AIR 1996 SC 1373; State of Gujarat Vs. Rajesh Kumar Chimanlal Barot & Anr., AIR 1996 SC 2664; Kesar Singh & ors Vs Sadhu & ors 1996 SC 711 Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar & ors., AIR 1999 SC 2213; and Collector of Central Excise, Kanpur Vs. Flock (India) (P) Ltd., Kanpur, AIR 2000 SC 2484).

53. In Sushil Kumar Mehta Vs. Gobind Ram Bohra (1990) 1 SCC 193, the Supreme Court, after placing reliance on large number of its earlier judgments and of the English Courts, particularly in Premier Automobiles Ltd. Vs. K.S. Wadke, (1976) 5 SCC 496; Kiran Singh Vs.Chaman Paswan, AIR 1954 SC 340; Barraclough Vs. Brown, 1897 Authorised Controller 615; Doe d. Rochaster (P) Vs. Bridges, 109 ER 1001; Ledgard Vs. Bull, (1886) 11 App. Cases 648; Borton Vs. Finchan, (1921) 2 KB 291; and Chandrika Misir Vs. Bhiya Lal, (1973) 2 SCC 474; held, that a decree without jurisdiction is a nullity; when a special statute gave a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the Common Law Court has no jurisdiction; where an Act creates an obligation and enforces the performance in specified manner, "performance cannot been forced in any other manner."

54. Accordingly, the applicant shall be deemed to be holding the post of Commander during the course of trial in view of the Presidential notification. Order passed by the subordinate authority is nullity in law and objection raised by the applicant during Court Martial should have been decided by speaking and reasoned order instead of rejecting the objection by cryptic unreasoned order. The applicant should have deemed to be continued as Commander with all consequential benefits for the purpose of trial in the Court Martial proceeding in terms of Sec.97 of the Navy Act read with rules.

55. During the course of trial by the Court Martial it is for the Trial Judge Advocate (TJA) to read out the charges and question the accused whether he pleads guilty or not guilty. Section 105 of the Navy Act, 1957 under the title Arraignment is reproduced as under :

> .
> "105.Arraignment. (1) When the court is ready to commence the trial. the trial judge advocate shall read out the charges and shall ask the accused whether he pleads guilty or not guilty.
> (2) If the accused pleads guilty, then, before such plea is recorded, the trial judge advocate shall
> ensure that the accused understands the charge to which he has pleaded guilty and the difference of procedure which will result from the plea of guilty.
> (3) If it appears from the accused's replies, or from the summary of evidence prepared in the
> prescribed manner that he should not plead guilty, the trial judge advocate may advise the accused to withdraw his plea.
> (4) If the court accepts the plea of guilty, it shall be recorded as the finding of the court and the court shall proceed to take steps to pass sentence unless there are other charges to be tried in which event the sentence shall be deferred until after the findings on such charges are given."

56. The charges are framed in pursuance to Regulations contained in Regulation 155 of the Regulations for the Navy. Regulation 155 provides that the charge shall contain the list of charges and it provides that each charge shall deal with a distinct offence and in no case an offence shall be described in the alternative in the same charge. It further provides that every charge shall contain the law which creates the offence with the specific name, so much of the definition of the offence must be stated so as to give the accused notice of the matter with which he is charged. The charge shall contain all such particulars such as time and the place of alleged offence and of the persons if any against whom or the thing, if any, in

respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. For convenience, Section 155 of the Regulations for the Navy is reproduced as under :

> **"155. The charge sheet:-** The charge shall contain the list of charges**,** on which it is proposed to try the accused.
>
> (2) Subject to the provisions of the Act, a charge sheet may contain one or more charges.
>
> (3) Every charge sheet shall begin with the name and description of the person charged and state his rank, the number and the ship to which he belongs.
>
> (4) Each charge shall deal with a distinct offence and in no case shall an offence be described in the alternative in the same charge.
>
> (5) If the law which creats the offence gives it any specific name, the offence may be described in the charge by that name only.
>
> (6) If the law which creats an offence does not give it any specific name, so much of the definition of the offence must be stated so as to give the accused notice of the matter with which he is charged.
> (7) The law and the section of the law against which an offence is said to have been committed shall be mentioned in the charge.
> (8) the fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged with is fulfilled in the particular case.
> (9) The charge shall contain such particulars as to time and place of the alleged offence and of the person, if any against whom or the thing, if any, in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.
>
> (10) When the nature of the case is such that the particulars mentioned in the foregoing sub-regulation do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, unless such particulars are stated in the circumstantial letter.

(11) When the accused is charged with criminal breach of trust or dishonest misappropriation of money or stores, it shall be sufficient to specify the gross sum or the aggregate of all items of stores in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge for one offence, provided that the time included between the first and last of such dates shall not exceed one year.

(12) Where an accused person is believed to have committed an offence of being absent without leave in addition to some other offences, a charge of absence without leave shall also be included in the charge sheet in order that the court may have the power to sentence the accused to mulcts of pay and allowances.

(13) Where it is intended to prove any facts in respect of which any mulcts of pay and allowances may be awarded to make good any proved loss or damage occasioned by the offence charged, the charge shall contain particulars of these facts and the sum of the loss or damage it is intended to charge.

(14) In every charge, words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

(15) A charge sheet shall be in the prescribed form or in a form as near there to as circumstances admit".

57. The charges may be amended by the Convening Authority and thereupon a fresh charge sheet shall be drawn up by the Convening Authority in pursuance of the Regulation 157 of Regulations for the Navy. Under Regulation 156 it has been provided that the Convening Authority shall not convene a court martial unless he is satisfied himself that the charges are correct.

58. In the present case the charges framed against the applicant does not seem to specify the place of incidence. It begins from 27th November and ends on 15th December. It does not pinpoint the place of negligence, more so, when the Diver at Goa has given clean chit and opined that everything was alright during the departure from Goa.

59. Apart from above, Charge No.2 to 6 seems to be the break-up of same charge into several charges may be to ensure a positive outcome on one or other ground. Such action seems to be contrary to Regulation 155 of Regulations for the Navy. It does not also meet out the requirement of sub regulation (9) of Regulation 155 of the Regulations for the Navy.

60. The Charge Sheet is silent with regard to involvement of other persons. Though the Commander/Captain was the overall in-charge of the Ship but the duty assigned to different person under the staffing pattern should have taken into account. In no way it is the sole responsibility of the Captain to do each and every thing. The procedural lapses may be administrative lapse but it may not attributable to negligence on the part of Commander. Ordinarily, it does not seem to make out a case to constitute negligence on the part of Commander. Negligence may be committed by one person or collectively by more than one person. It is the individual or collective act resulting the commission of misconduct or crime. The charge when framed, negligence committed by the charged officer should be dealt with specifically as discussed in the preceding paragraph.

61. While deciding a case, by an order dated 13-7-2015 in OA No.45 of 2013, we have considered the contents of charges required to be framed. The relevant portion is reproduced as under:

> 40. Purpose of charge-sheet is to specify the accusation for which the accused has been charged and required to meet during the course of trial. It is the first notice to an accused of the matter where of he/she is accused and it must convey to him with sufficient clearness and certainty that the prosecution

intends to prove against him and of which he would have to clear mind. Object of the framing of charge is to enable the accused of the case he is required to answer during trial. Charges must be properly framed and evidences tendered must relate to matters stated in the charge. It has been settled by the Hon'ble Supreme Court that charge is not an accusation in abstract but a concrete accusation of an offence alleged to have been committed by the accused. Further the accused is entitled to know with the greatest precision and particularity the acts said to have been committed and section of the penal law infringed; otherwise he must be seriously prejudiced in his defence vide **AIR 1958 SC Page 672- Srikantiah B.N. v. State of Mysore; AIR 1948 Sind 40, 48 : (1948) 49 Cr.L.J. 72 – Waroo v. Emperor & AIR 1963 SC 1120 – Birichh Bhuian v. State of Bihar.**

41. To specify a definite criminal offence is the essence of Criminal Jurisprudence which is in tune with Article 14 of the Constitution of India and part and parcel of Principle of Natural Justice. Offence whatever may be, no trial may proceed without framing of charges. Section 211 of Cr. P. C. deals with the contents of charges. Section 212 of Cr. P. C. provides that the charge shall indicate the particulars, place and person, the time and place of the office and Section 213 of Cr. P. C. provides that when manner of committing offence must be stated. Section 215 of the Cr. P. C. deals with the effect of errors for framing of charges.

42. It is further well settled that even if there are irregularity in framing of charges it may not be fatal unless irregularity and omission has misled and caused prejudice to the accused and occasioned a failure of justice itself not vitiates the trial. Failure to specify the manner and mode of offence makes a charge vague but where particulars are on record there could not have been any prejudice to the accused. Section 221 of the Cr.P.C. like Section 113 of the Army Rules, 1954 takes care of the situation and provides safeguard empowering the Criminal Court or the SCM to convict the accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence along with other offences to which charges are framed. Further merely because of an inapplicable provision has been mentioned in the charge, trial may not be invalidated vide **3950 (3976) (SC) : AIR 2005 SC 3820 : 2005(3) – State (NCT of Delhi) v Navjot Sandhu, 2005Cr.LJ.; (1995) 4 SCC 181- State of J&K v. Sudershan Chakkar; (2001) 4 SCC 38- Omvati v. State (Delhi Admn.); AIR 2011 SC 3114- Rafiq Ahmed @ Rafi v. State of U.P.; AIR 2012 SC 1485- Rattiram v. State of M.P.; AIR 2012 SC 3026- Bhimanna v. State of Karnataka; AIR 2013 SC 840- Darbara Singh v. State of Punjab;**

43. However, in the present case at the face of record charges were not framed and hence the omission appears to be fatal. In a case reported in **1979 Vol.1 SCC Page 87- Bhupesh Deb Gupta v. State of Tripura,** Hon'ble Supreme Court has set aside the conviction since charges were framed entirely indicating different factual aspects which has no co-relation with the offence for which the accused was charged. Hence it was held that it caused prejudice to the accused. Relevant portion of the judgment is reproduced as under :-

> "12. The wording of the charge framed by the Speical Judge is that the money was remitted by Nikhil Chakraborty for showing, in exercise of official function a favour to the said Schindra Dey on the plea of securing service for the said Sachindra Dey. The High Court understood the charge as meaning that the money was sent by Nikhil Chakraborty on behalf of Sachindra Dey as a gratification for securing service for the said Sachindra Dey. It appears from the charge and from the judgment of the courts below that the courts proceeded on the basis that the gratification was received by the accused for showing favour as a public servant. As the basis of the charge is entirely different from what is sought to be made out now i.e. the gratification was paid to the accused for influencing a public servant, it cannot be said that the accused was not prejudiced by the frame of the charge. It would have been open to the prosecution to rely on the presumption if the charge was properly framed and the accused was given an opportunity to meet the charge which the prosecution was trying to make out against the accused. On a careful scrutiny of the facts of the case, we are unable to reject the contentions of the learned counsel for the accused that he was prejudiced by the defect in the charge and that he had no opportunity to meet the case that is put forward against him.".

44. Framing of charges is the part and parcel of Article 14 of the Constitution of India. That is why it has been held by Hon'ble Supreme Court in the case of **Roop Singh Negi** (supra) that the Enquiry Officer is not permitted to travel beyond the charges and any punishment imposed on the basis of the finding which was not the subject-matter of charges is illegal.

Principle of Natural Justice is equally applicable to the Armed Forces personnel. In the case of **Sheel Kr. Roy** (supra) Hon'ble Supreme Court held that it is well settled legal principle accepted throughout the world that a person merely by joining Armed Forces does not cease to be a citizen or be deprived of his human or constitutional right.

45. In the case of **Prithi Pal Singh Bedi** (supra) Hon'ble Supreme Court held that even during course of enquiry under Rule 180 in case character or military reputation of a person is

likely to be affected then such person be given a full opportunity to participate in the proceedings of Court of Inquiry. Nothing should be done behind the back without giving opportunity of participation.

46. In the case of **General Officer Commanding, Rastriya Rifles** (supra) Hon'ble Supreme Court held that Court Martial proceedings are akin to criminal prosecution. However, once the matter stands transferred to the Army for conducting a Court Martial then the Court Martial has to be done in accordance with Army Act, Rules and Regulations framed thereunder".

62. In view of above, it was incumbent on the part of the Convening Authority to specify the accusation for which the accused has been charged, i.e. pointing out the negligence committed by him while sailing the ship from Goa to Mumbai or vice-versa with date, time and place and the neglect or failure on the part of the applicant.

NEGLIGENCE

63. Negligence is the commission or omission of a person authorised to discharge duty in a particular manner. But inadvertently or wilfully he has been failed to do so.

64. 65 Corpus Juris Secondrum-409 as cited in Baburao Viswanath Mathpati v. State of Maharashtra defines negligence as under :

"….the word may import something more than a mere omission, something more than a failure without fault, it may import an omission accompanied by some kind of culpability in the conduct of disregard of duty…."

65. In JW CBCH TURNER, Kenny's outlines of Criminal Law 108n. 1 (16th ed. 1952) deals 'neglect' as under :

> "Neglect" is not the same thing as 'negligence'. In the present connection the word 'neglect' indicates, as a purely objective fact, that a person has not done that which it was his duty to do; it does not indicate the reason for this failure. 'Negligence', on the other hand, is a subjective state of mind, and it indicates a particular reason why the man has failed to do his duty, namely because he has not kept the performance of the duty in his mind as he ought to have done. A man can 'neglect' his duty either intentionally or negligently."

66. PATTERSSON J. King v. Burrell, 12 A & E 468, 468 while defining negligence observed as under :

> "A failure to do what is required; omission, forbearance to do anything that can be done or that requires to be done, the omission to do or perform some work, duty or act; the omission or disregard of some duty, the omission from carelessness to do something that can be done and that ought to be done; negligence. Neglect to do a thing means to omit to do a duty which the party is able to do."

67. Allahabad High Court in a case reported in AIR 1977 All 435 (Azharudin v. Syed Zohid Hussain) while defining 'neglect' used in Cl. (g) of S. 108 of the Transfer of Property Act (4 of 1882) in matters of taxation held that it means non-payment of the tax at the time it is payable and the non payment will be deemed due to neglect in the absence of anything exceptional after reasonable time for payment of the tax expires.

68. In Baburao Vishwanath Mathpati v State (AIR 1996 Bom 227), the Division Bench of Bombay High Court has held that the word 'neglect' appears to have a different connotation than the word 'negligence'. The word 'neglect' means 'gross neglect', willful, intentional, culpable or flagrant disregard of duties.

69. According to Glanville Williams : Criminal Law, 2nd Edn.. 1983, c.4, s.4.1 page 88, negligence is failure to conform to the standard of care to which it is the defendant's duty to conform. It further states that negligence means forbidden conduct where the defendant's liability depends on the fact that he failed to realize what he ought to have realized, and failed to conform his conduct accordingly, or a fortiori, that he did realize it and yet failed to conform his conduct as he should a legal fault which does not involve mental state, is negligence.

70. According to W.PAGE Keeton ET AL., The Law of Torts, S.28 at 16 during the first half of the nineteenth century, negligence began to gain recognition as a separate and independent basis of tort liability. Its rise coincided in a marked degree with the Industrial Revolution, and it very probably was stimulated by the rapid increase in the number of accidents caused by Industrial machinery, and in particular by the invention of railways. It was greatly encouraged by the disintegration of the old forms of action, and the disappearance of the distinction between direct and indirect injuries, found in trespass and case….Intentional injuries, whether direct or indirect, began to be grouped as a distinct field of liability and negligence remained in the main basis for unintended torts. Negligence thus developed into the dominant cause of action for accidental injury in the nation today. It further held as under :

> "Negligence is a matter of risk – that is to say of recognizable danger of injury…….In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is

> unaware of the results which may follow from his act. But it may also arise where the negligent party has considered the possible consequence carefully, and has exercised his own best judgement. The almost universal use of the phrase 'due care' to describe conduct which is not negligent should not obscure the fact that the essence of negligence is not is not necessarily the absence of solicitude for those who may be adversely affected by one's action but is instead behavior which should be recognized as involving unreasonable danger to others."

71. Section 85 of Indian Penal Code defends negligence which means want of attention or look after or lack of proper care in doing something.

72. Glanville Williams in his famous Criminal Law, 2nd Edn., 1983 C 4, S 4.1 page 88 defended 'negligence' as under :

> "Negligence is failure to conform to the standard of care to which it is the defendant's duty to conform. It is failure to behave like a reasonable or prudent man in circumstances where the law requires such behavior. It should not be regarded as a form of *mens rea*, but may be said to be form of legal fault. Negligence means forbidden conduct where the defendant's liability depends on the fact that he failed to realize (foresee/know) what he ought to have realized, and failed to conform his conduct accordingly, or a fortiori, that he did realize it and yet failed to conform his conduct as he should a legal fault which does not involve mental state, is negligence".

73. The Hon'ble Supreme Court in a case reported in 2008 (1) SCC 791 (Naresh Giri v. State of MP) and in 2008 (14) SCC 795 held that negligence is a conduct which fails below the standard established for the protection of others against unreasonable risk of harm.

74. In Machindranath Kernath Kasar v. D.S. Mylarappa 2008 (13) SCC 198 the interpretation of negligence is as under :

> "Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely, that the same evidence would support an action against them, individually…..Accordingly, they will be jointly liable for a tort which they both commit or

for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a)agency, (b)vicarious liability, and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them."

75. It has been held by various judgements that negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do or doing something which a prudent or a reasonable man would not do. Though the charges indicates the alleged offence breach of Navy regulation but they did not point out how and in what manner applicant failed or committed negligence.

OFFENCE

76. The applicant has been charged for offences under Section 41 and Section 55 of the Navy Act, 1957. For convenience, Section 41 and Section 55 of the Navy Act, 1957 are reproduced as under :

"41. Deserting post and neglect of duty. Every person subject to naval law, who,-
a) deserts his post ; or
(b) sleeps upon his watch ; or
(c) fails to perform or negligently performs the duty imposed on him; or
(d) wilfully conceals any words, practice or design tending to the hindrance of the naval service;
shall be punished with imprisonment for a term which may extend to two years or such other punishment as is hereinafter mentioned."

"55. Losing ship or aircraft - (1) Losing ship or aircraft. Every person subject to naval law, who wilfully loses strands or hazards or suffers to be lost, stranded or hazarded any ship of the Indian Navy or in the service of the Government, or loses or suffers to be lost any aircraft of the Indian Navy or in the service of the Government shall be punished with imprisonment for a term which may extend to fourteen years or such other punishment as is hereinafter mentioned.

(2) Every person subject to naval law who negligently or by any default loses, strands or hazards or suffers to be lost, stranded or

> hazarded any ship of the Indian Navy or in the service of the Government, or loses or suffers to be lost any aircraft of the Indian Navy or in the service of the Government shall be punished with imprisonment for a term which may extend to two years or such other punishment as is hereinafter mentioned".

77. Section 41(c) under which the applicant has been charged indicates that it deals with the situation when a person fails to perform or negligently performs the duty imposed on him. Legislature to their wisdom has used the word 'fail' and 'negligent'.

78. The word 'fail' in the Black Law Dictionary has been defined as 'To be deficient or unsuccessful; to fail short, they failed to settled the dispute 2. To become insolvent or bankrupt, two banks failed last week 3. To lapse, the bequest failed as a result of ademption".

79. The word 'negligent' deals with non performance of duty imposed on a person. While leading evidence it shall be necessary for the prosecution to establish from material evidence as to how Commander or Captain has been failed or committed negligence on their part to perform duty. In case there is distribution of work over a ship under the overall distribution of the work under the staffing pattern then it shall be necessary to establish that how and what manner Captain/Commander has failed to perform their duty under his command and control while supervising the ship and has neglected the duty. In case the Commander/Captain do the needful and because of some other's fault or incompetence or for natural cause, damage is

caused then ordinarily he may not be held responsible for the damage. Mere damage does not constitute offence.

80. It may be noted that while appearing in the Court, the present CO of INS Agray stated that he will not move unless the required number of staff are made available in terms of guidelines. How and what manner the authorities directed from sailing of the ship from Mumbai to Goa or Goa to Mumbai without the full complement of officers and three divers under the staffing pattern is not borne out from record. No trustworthy material has been brought on record that the applicant sailed the ship on his own in contravention of rules and guidelines without divers. Heavy burden lies on the prosecution to establish failure and negligence in duty (supra) which may point out the guilt only to the charged officer.

81. Section 55(supra) deals with the situation where the Naval Officer who negligently or by any default loses strands or hazards or suffer to be lost, stranded or hazarded any ship of Indian Navy. The damage caused to a ship on several counts may not make out an incident which may be the outcome of negligent or failure to discharge duty. Their should be valid and factual cause from which a ship may be damaged.

82. Accordingly, in case a Navy Officer charged for damage to ship on account of his default or negligence, then it shall be necessary that while framing charge or leading evidence the prosecution should come out with specific facts and circumstances as to when and what

time and place and manner the ship stranded or hazarded or suffered to be lost.

83. In the present case the charges were framed by the prosecution starting from 27th November and continued upto 15th December. It is not a case of continuity of losing grip of the ship under hazardous conditions. Damage should have been caused at a place. Accordingly, the charges should be framed specifically with regard to commission or omission on the part of applicant pointing out the place of occurrence which seems to have not been done.

84. According to Black's Law Dictionary, the word 'strand' has been defined as under :

> "**strand** = A shore or bank of an ocean, lake, river or stream".
> "**Stranding** = Maritime law. A ship drifting, driving or running aground on a strand. The type of stranding that occurs determines the method of apportioning the liability for any resulting losses.
> "**accidental stranding**. Stranding caused by natural forces, such as wind and waves – Also termed involuntary standing. See general average and particular average under AVERAGE.
> 'Damage to a vessel from involuntary stranding tor wreck and the cost of repairs, are particular average only. Where, however the ship and cargo are exposed to a common peril by the accidental stranding the expenses of unloading and taking care of the cargo, rescuing the vessel, reloading the cargo, and other expenses other than repairs requisite enable the vessel to proceed on the voyage, are brought into general average, provided the vessel and cargo were served by the same series of measures during the continuance of the common peril which created the joint necessity for the expenses."
> "**Voluntary stranding**. Stranding to void a more dangerous fate or for fraudulent purposes"

85. Keeping in view the Dictionary meaning of the word 'strand' or 'stranding' it appears that it may be voluntarily to secure the ship may be to avoid to more dangerous fate of the ship or for fraudulent

purpose. The burden of prove shall lie on the prosecution to establish the 'negligence' on the part of Naval Officer with regard to stranding.

86. In Black's Law Dictionary the word 'hazard' has been defined as under :

> " **Hazard** = Danger or peril; esp. a contributing factor to a peril.
>
> **Extraordinary hazard** = Workers compensation. An unusual occupational danger that is increased by the acts of employees other than the injured worker – Also termed extraordinary danger; extraordinary risk.
>
> **Imminent hazard** – An immediate danger; esp. in environmental law, a situation in which the continued use of a pesticide will probably result in unreasonable adverse effects on the environment or will involve an unreasonable damager to the survival of an endangered species.
>
> **Occupational hazard** – A danger or risk that is peculiar to a particular calling or occupation. Occupational hazards include both accidental injuries and occupational diseases.
>
> **Moral hazard** = A hazard that has to inception in mental attitudes, such as dishonesty, carelessness, and insanity. The risk that an insured will destroy property or allow it to be destroyed (usu by burning) in order to collect the insurance proceeds is a moral hazard. Also, an insured's potential interest, if any, in the burning of the property is sometimes called a moral hazard.
>
> **Physical hazard** – A hazard that has its inception in the material world, such as location, structure, occupancy, exposure, and the like".

87. Keeping in view the variety of ingredients referred in the Dictionary meaning with regard to the strands, hazard etc. the framing of charges should be specific with regard to commission and omission of Naval Officer for which he or she has been charged. Ordinarily

there may not be case where a person may be charged for its strand, hazards, default losses and failure collectively. The charges seems to arraigned in such a manner which can extend to collective failure on different counts (supra) by the applicant without involving others. Hence it appears to be vague.

EVIDENCE ON NAVIGATIONAL MATTER

88. The controversy in question relates to Navigational matter. In Regulation 183 it has been provided that what material should be made available and how such dispute shall be dealt with. Regulation 184 deals with the situation where document is not available. In absence of document, Navigation Director or Officer of alike status should be called to assist the Court by making a statement over the controversy. However, in the present case Court Navigator was appointed.

89. One important thing borne out is that in Navigational matter under Regulation 185A, the reason for finding of guilt or not guilt are to be recorded for the charges under Section 55 and 55A. Regulation 183, 184 , 185, 185A and 186 are reproduced hereunder :-

"183. Documents to be made available in Navigational cases.:- (1) At all trials at which evidence is to be given on the navigation of one of Indian Naval Ships or vessels the prosecutor on opening his case shall lay before the court such of the following documents as exist and apply to the case, namely:-

(a) the ship's log;
(b) the rough and fair engine room registers;
(c) control room log;
(d) the chart or charts and sailing directions by which the ship was navigated;
(e) the last table of compass deviations;
(f) the navigational data book and the gyro-compass log;
(g) the Captain's night order book, and
(h) the Navigating officer's note book and work book.

(2) After the prosecutor has opened his case, the president shall, unless he considers the circumstances so exceptional that such procedure would be a waste of time, order the documents referred to in sub-regulation (1) to be handed to one or more Navigation Direction or other competent officers who shall work up the ship's reckoning throughout the material time; the result, together with such other details as may be required, being delivered to the court in the prescribed form completed in all relevant respects and attested by the signature of the officer or officers so directed, and such officer or officers shall be sworn and be subject to cross-examination by both persecution and defence as to its accuracy.

(3) The president shall endorse such report as approved, if the court concurs, and if not, an expression of its dissent shall be added, signed by the president, showing in what respects and for what reason it dissents.

(4) With the said report such officer or officers shall also deliver to the court a copy or tracing of the chart by which the ship was navigated on which the position of the ship so determined have been laid off, and also the determined position when ashore or in danger, as noted in the log book.

(5) The rule and direction of the current and of the tidal stream and the state of the tide should also, if possible, be ascertained, stated, and verified on oath.

(6) The report in the prescribed form and the prepared chart, as well as an attested copy of the ship's log book and the engine room register or of the control room log, commencing from at least 48 hours before the ship took the ground or was endangered, if so long from a known anchorage, shall accompany the minutes.

(7) At trials at which evidence may be required on the navigation of an aircraft such documents as exist and may be available to serve a similar purpose to those set out in sub-regulation (1) shall be made available by the Commanding Officer of the aircraft and the court may follow, with such variation as may be necessary or desirable, the procedure prescribed in this regulation.

184. **Absence of documents:-** (1) Should the absence of any of the documents mentioned in regulation 183 be likely to render it difficult for the officers mentioned therein to complete their task to the satisfaction of the court, it shall be permissible for

the prosecution to call an expert witness (if possible a qualified Navigation Direction Officer) to assist the court.

(2) Such a witness shall not be called under regulation 183 and shall, with the permission of the court, be present to hear the evidence and shall then lay out the resulting courses on the chart.

(3) Such witness shall be subject to unrestricted cross-examination.

185. Navigation Direction Officers – examination and cross-examination:- (1) The examination and cross-examination of the officer or officers who leave been directed to perform the duty mentioned in regulation 183 shall be limited to ascertaining the accuracy or inaccuracy of the documents laid before the court.

(2) Notwithstanding anything contained in sub-regulation (1), if no other navigational experts are reasonably available and it is desired to have further evidence from such officer or officers, the court may recall such officer or officers and permit him or them to be questioned on other navigational matters by both the prosecution and the defence.

185A. Reason for finding in navigationalcases:- The reasons for finding of 'guilty' or 'not guilty' including cases where the court accepts the 'plea of no case to answer' on charges under section 55 and 55A shall be recorded.

186. Evidence of negligence not alleged in circumstantial letter:- (1) If the court, at any time during the trial, considers that the accused has been negligent in any way not specifically detailed in the circumstantial letter or the charges, the court shall formulate a fresh allegation against the accused, inform the accused about the allegation and invite him to deal with the fresh allegation in his defence, adjourning if necessary to give him time to meet it.

(2) Any witness for whom the accused asks shall, if practicable, be called or recalled and if he is a prosecution witness, he shall be cross examined by the defence and re-examined by the prosecutor and if he is a defence witness, he shall be examined by the defence, cross-examined by the prosecutor and re-examined by the defending officer.

(3) If the charge is found proved, any such additional heading indicating a form of negligence, if finally established to the satisfaction of the court, shall be included in the finding."

90. The material and pleading on records indicate that while recording the finding the Court Martial has failed to record reason under Regulation 85A which is also required under Art.14 of the Constitution (supra). Regulation 186 further empowers the Court to call witnesses and formulate fresh allegation against the accused in the event of doubt or to meet out the requirement. No duty has been assigned to the TJA, but only to the Court to record reason by Section 185A of the Regulation, which has got mandatory force being the provision in tune with Art 14 of the Constitution. Navigational procedure has not been complied with by the Court. The Court should have recorded as to how navigational procedure and safety clauses were applicable but had not been complied with. It has also been failed to express opinion on what basis the Bridgeman of officers and sailors are liable for any fault, while concluding the finding. The Court should have dealt with the different Navigational Officers' Work Book.

The Court had given go by to the procedure contained in Regulation 183, 184, 185, 185A and 186 which is mandatory for the trial of navigational cases. Hence the trial vitiates being suffered from non application of mind to statutory mandate (supra)

Order/finding of Court Martial :

91. Record shows that keeping in view the summing up report by Trial Judge Advocate (TJA), on 11.02.2010, on the question raised by TJA the President declared the applicant guilty of six charges. For convenience, proceeding of 11.02.2010 is reproduced as under :-

"The court reassembled at 1430 hrs on 11 Feb 10.

TJA Nr. President Sir, are your ready with your findings ?

President Yes

TJA What is your findings on Charge No.01 ?

President Guilty

TJA What is your findings on Charge No.02 ?

President Guilty.

TJA What is your findings on Charge No.03 ?

President Guilty

TJA What is your findings on Charge No.04 ?

President Guilty

TJA What is your findings on Charge No.05 ?

President Guilty.

TJA What is your findings on Charge No.06 ?

President Guilty.

TJA Are you ready with your reasons for findings for charge No.1 to 6 ?

President Yes.

The President read out the reasons for charge no.1

The findings were drawn by the TJA and signed by the President and Members of the court and countersigned by Trial Judge Advocate.

The Trial Judge Advocate formally announced the findings on Charge 1 to 6 in the open court.

(Findings and reasons attached)

TJA Mr. Prosecutor, are there any previous trials by court martial of the accused in the list of returns of officers tried by court martial ?

Prosecutor No

CONFIDENTIAL
FINDINGS

LIEUTENANT COMMANDER HARNEET SINGH, (04448-h) INDIAN NAVY, THEN COMMANDING OFFICER OF INDIAN NAVAL SHIP AGRAY AND PRESENTLY ATTACHED TO INDIAN NAVAL SHIP ANGRE IN TERMS OF NO 01/99.

	Guilty	Not guilty
Charge No.1	Guilty	-
Charge No.2	Guilty	-
Charge No.3	Guilty	-
Charge No.4	Guilty	-
Charge No.5	Guilty	-
Charge No.6	Guilty	-

Sd/- (J SURESH) MEMBER
COMMANDER(03775 B)

Sd/- (R K BHARDWAJ) MEMBER
COMMANDER(03581 N)

Sd/- (SINGH PARAMBIR) MEMBER
COMMANDER(03499 A)

Sd/- (MADHUKAR JOSHI) MEMBER
COMMANDER(02053 R)

Sd/- (G S RANDHAWA)
COMMODORE(01690-R)
PRESIDENT OF THE COURT MARTIAL

COUNTERSIGNED
Sd/- (KUSUM YADAV)
LIEUTENANT COMMANDER(06190 W)
TRIAL JUDGE ADVOCATE

NAVAL BARRACKS
MUMBAI
11 FEB 10

CONFIDENTIAL

92. Subject to above finding and declaration by the President, the Court on 11.02.2010 i.e. on the same day with regard to charge No.1 passed the following order :-

"**REASONS FOR THE FINDINGS BY THE COURT**

Charge No.1. The accused had negligently hazarded Indian Naval Ship Agray in that he traversed the said ship in shallow waters in depths lesser than the ships Limiting Danger Line whilist operating from GSL Jetty at Marmagao harbour between 27 Nov 08 to 05 Dec.'08 resulting in damage to both the propellers.

Sd/-G. S. RANDHAWA
COMMODORE(01690-R)
PRESIDENT OF THE COURT MARTIAL

NAVAL BARRACKS
MUMBAI
11 FEB 10"

93. During the course of question by the TJA to the applicant accused a statement was made by him that he has not committed any wrong and has suffered intense humiliation and embarrassment. He continued to suffer disgrace amongst his peers because of wrong information and rumours generated during the said period and if he is punished it will be an additional insult to him. He submits that he is the third generation in the defence forces in line with his grand-father and father and he is proud of his uniform. He submits in case any damage caused to the propellers it was because of fishing nets.

94. With regard to charge No.2,3,4 & 6 framed under section 41(c) of the Navy Act, the Court took a decision to award him punishment with severe reprimand. Decision of the Court dated 11.02.2010 is reproduced as under :-

CONFIDENTIAL
SENTENCE

LIEUTENANT COMMANDER HARNEET SINGH, (04448-H) INDIAN NAVY, THEN COMMANDING OFFICER OF INDIAN NAVAL SHIP AGRAY AND PRESENTLY ATTACHED TO INDIAN NAVAL SHIP ANGRE IN TERMS OF NO 01/99.

The Court having found the accused guilty of charge No.1 under section 55(2) of Navy Act 1957 and charges Nos 2,3,4,5&6 under section 41(c) of the Navy Act 1957 adjudges him the said LT CDR Harneet Singh (04448-H), Indian Navy to tbe severely reprimanded.

Sd/-
(J SURESH) MEMBER
COMMANDER

Sd/- (R K BHARDWAJ) MEMBER
COMMANDER

Sd/- (SINGH PARAMBIR) MEMBER
COMMANDER

Sd/- (MADHUKAR JOSHI) MEMBER
COMMANDER

Sd/- (G S RANDHAWA)
COMMODORE
PRESIDENT OF THE COURT MARTIAL

COUNTERSIGNED
Sd/- (KUSUM YADAV)
LIEUTENANT COMMANDER(06190 W)
TRIAL JUDGE ADVOCATE

NAVAL BARRACKS
MUMBAI
11 FEB 10

CONFIDENTIAL

95. The duty of TJA as per provisions under Section 114 of the Act read with Regulation (supra) is reproduced as under :-

"114. Duties of the trial judge advocate.(1) At all trials by courts-martial it is the duty of the trial judge advocate to decide all questions of law arising in the course of the trial, and specially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or 351 the propriety of the questions asked by or on behalf of the parties; and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.
(2) Whenever in the course of a trial it appears desirable to the trial judge advocate that arguments and evidence as to the admissibility of evidence or arguments in support of an application for separate trials or on any other points of law should not be heard in the presence of the court, he may advise the president of the court accordingly and the president shall thereupon make an order for the court to retire or direct the trial judge advocate to hear the arguments in some other convenient place."

A plain reading of the provision(supra) shows that during trial by the Court Martial, the TJA is to decide all the question of law arising during the course of trial and specially all questions as to the relevancy of the facts which proposes to prove admissibility of evidence and propriety of questions etc. and communicate his opinion to President.

96. In no case the TJA is supposed to give finding on merit. It is for the Court to announce the findings in open Court for the charges on which the accused is tried. Sections 115, 116 & 117 are relevant for the purpose to consider the manner in which the court shall decide the controversy.For convenience,these Sections are reproduced as under :-

"115. Duties of the court. It is the duty of the court to decide which view of the facts is true and then arrive at the finding which under such view ought to be arrived at.

Retirement to consider finding.

116. Retirement to consider finding. (1) After the trial judge advocate has finished his summing up, the court will be cleared to consider the finding.

2) The trial judge advocate shall not sit with the court when the court is considering the finding, and no person shall speak to or hold any communication with the court while the court is considering the finding.

Announcement of the finding.

117. Announcement of the finding. (1) When the court has considered the finding, the court A shall be reassembled and the president shall inform the trial judge advocate in open court what is the finding of the court as ascertained in accordance with section

(2) The court shall give its findings on all the charges on which the accused is tried.".

97. A combined reading of these sections (supra) shows that the decision of the Court to appreciate the facts and find out which view of the fact is true and then arrive at the finding which under such view ought to be arrived at. After summing up by the TJA the Court shall retire and consider its findings without assess to TJA. Findings shall be announced after re-assemble by the President with due information to TJA in open Court in accordance with Section 124. The Court shall give its findings on all charges. Section 124 of the Act provides that all decisions by the Court Martial shall be by majority and in view of quality votes the decision shall be in favour of the accused. For convenience, Section 124 is reproduced as under :-

"124. Ascertaining the opinion of the court.(1) Subject to the provisions of sub-sections (2) and (3), every question for determination by a court-martial shall be decided by the vote of the majority: Provided that where there is an equality of votes, the decision most favourable to the accused shall prevail.

(2) The sentence of death shall not be passed on any offender unless four at least of the members present at the court-martial where the number does not exceed five, and in all other cases a majority of not less than two-thirds of the members present, concur in the sentence.

(3) Where in respect of an offence, the only punishment which may be awarded is death, a finding that a charge for such offence is proved shall not be given unless four at least of the members present at the court-martial where the number does not exceed five, and in all other cases a majority of not less than two-thirds of the members present, concur in the finding.".

98. In the present case as evident(supra) after receipt of summing up by TJA the Court passed a cryptic and unreasoned order without recording the findings with due discussion of material on record. It shall not be possible to decide a issue as to which view of fact is true without discussion of evidence led by parties with follow-up conclusion. Arrival to a particular finding in a Court Martial proceeding must be preceded by discussion of fact and statutory provisions. In case the Court by majority did not decide the dispute followed by finding with due discussion of material on record along with statutory provisions, the findings recorded by the Court Martial shall suffer from vice of arbitrariness and shall be hit by Article 14 of the Constitution of India.

99. It is well settled principle of law that decision whether administrative or quasi-judicial or judicial must conform to reasons in a just and fair manner (supra). A cryptic and unreasoned order shall be violative of principle of natural justice and be hit by Article 14 of the Constitution. The accused has right to know on what ground he has been punished or convicted and how the objection raised by him or heard has been dealt with by the Court Martial authority or Tribunal. It is also necessary for the reason that the finding of the Court Martial

is not conclusive but this is subject to judicial review through an appeal under Section 15 of the Armed Forces Tribunal Act. The appellate authority, Court or Tribunal, must know how the subordinate authority of Court or Tribunal or Court Martial had applied mind to the dispute in question. Otherwise it shall not be possible for appellate authority to impart justice.

100. Some of the basic principle of law seems to be flagrantly violated and not complied with are :-

(i) No reasonable time was given to the applicant in pursuance of mandatory provisions of 96 hours (supra), hence all subsequent action seems to suffer from arbitrariness. Principle of natural justice is part and parcel of Article 14 of the Constitution of India and rather it is the pulse beat of the Indian Constitution. Even during course of BOI the applicant was not permitted to participate and kept outside the entire proceeding for the reason best known to the respondents. The report of BOI is not a substantive evidence but it is the foundation to proceed or initiate Court Martial proceeding against the member of Indian Navy. The manner provided in the Act, Rules and Regulations have got statutory forces. The manner prescribed by law must be followed while trying a Navy person by the Court Martial.

(ii) After considering the earlier judgment in a case reported in 2012 Vol. 4 SCC 463- Union of India & Ors. v. Brig P. S. Gill retierated the basic principle of law that while interpreting or considering a statute meaning should be given to each and every

word, comma full stop and section. The relevant portion is quoted as under :-

"28. It follows that the question whether an appeal lies to the Supreme Court and, if so, in what circumstances and against which orders and on what conditions is a matter that would have to be seen in the light of the provisions of each such enactment having regard to the context and the other clauses appearing in the Act. It is one of the settled canons of interpretation of statutes that every clause of a statute should be construed with respect to the context and the other clauses of the Act, so far as possible to make a consistent enactment of the whole statute or series relating to the subject. Reference to the decisions of this Court in M. Pentiah v. Muddala Veeramallapa and Gammon India Ltd. v. Union of India should in this regard suffice.

29. In Gammon India Ltd. this Court observed : (SCC p.602, para 19)

> "19……. Every clause of a statute is to be construed with reference to the context and other provisions of the Act to make a consistent and harmonious meaning of the statute relating to the subject-matter. The interpretation of the words will be by looking at the context, the collocation of the words and object of the words relating to the matter.".

30. We may also gainfully extract the following passage from V. Tulasamma v. Sesha Reddy wherein this Court observed : (SCC p.141, para 69)

> "69…… It is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the context and in the light of other provisions of the statute so as, as far as possible, to make a consistent enactment of the whole statute.".

(iii) It is settled law that in case the authorities want to do certain things, then that should be done in the manner provided by the Act or statutory provisions and not otherwise - vide Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253; Deep Chand Vs. State of Rajasthan, AIR 1961 SC 1527, Patna Improvement Trust Vs. Smt. Lakshmi Devi and others, AIR 1963 SC 1077; State of U.P. Vs. Singhara Singh and other, AIR 1964 SC 358; Barium Chemicals Ltd. Vs. Company Law Board, AIR 1967 SC 295 (Para 34); Chandra Kishore Jha Vs. Mahavir Prasad and others, 1999 (8) SCC 266; Delhi Administratiion Vs. Gurdip Singh Uban and other, 2000 (7) SCC 296; Dhanajay Reddy

Vs. State of Karnataka, AIR 2001 Sc 1512; Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others, 2002 (1) SCC 633; Prabha Shankar Dubey Vs. State of M.P., AIR 2004 SC 486; Ramphan Kundu Vs. Kamal Sharma, AIR 2004 SC 1657; Taylor Vs. Taylo (1876) 1 Ch.D. 426; Nika Ram Vs. State of Himachal Pradesh, AIR 1972 SC 2077; Ramchandra Keshav Adke Vs. Govind Joti Chavare and others, AIR 1975 SC 915; Chettiam Veettil Ammad and another Vs. Taluk Land Board and others, AIR 1979 SC 1573; State of Bihar and others Vs. J.A.C. Saldanna and others, AIR 1980 SC 326; A. K. Roy and another Vs. State of Punjab and others, AIR 1986 SC 2160; State of Mizoram Vs. Biakchhawna, 1995 (1) SCC 156.

(iv) It is further well settled proposition of law that procedural safeguard provided by the Act, Statute or Regulation must be adhered to vide AIR 1987 SC 2386- Ranjeet Thakur v. Union of India ; AIR 1978 SC 597 –Maneka Gandhi v. Union of India; AIR 1953 SC 244 – State of Bombay v. Pandaya.

(v) It is further settled proposition of law that undue haste for non-compliance of statutory rules may create likelihood of malafide. In the present case though the applicant has not impleaded any person as respondent, the manner of proceeding as drawn and continued is not just and disregard to statutory provisions which may be treated as a case where action is suffered from malice in law.

Malice in law means action of the subject must be just and fair. The State is under obligation to act fairly without ill will or malice – in facts or in law. “Legal malice” or “malice in law” means something

done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from all feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended.". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the right of others, which intent is manifested by its injurious acts. (Vide Jaichand Lal Sethia vs. The State opf West Bengal & Ors- AIR 1967 SC 483; A.D.M. Jabalpur Vs. Shib Kant Shukla, AIR 1976 SC1207; State of A.P. Vs. Goverdhanlal Pitt, AIR 2003 SC 1941.

(vi) It has been pleaded by the applicant in his summary of defence that in INBR 451 and 159/90 the damage caused to a ship shall not make out a case of intentional negligence unless it is proved otherwise. Though we have directed the respondents to provide copy of circulars (supra) guidelines but the same has not been provided. The Court Martial also had not considered and record the findings after taking into account the defence summing up. It shall always be necessary in the Court Martial to record the findings on question on fact and law keeping in view the defence as well as prosecution version on its own while giving final verdict but it seems to has not

been done. It is always obligatory that the plea raised by the defence in its summing up must be considered while giving final verdict which has not been done.

Conclusion :

101. Keeping in view the discussion made hereinabove to sum up –

(1) The applicant was not permitted to participate in BOI proceeding in utter disregard of principle of natural justice and regulation

(2) No time was granted to him to the extent of 96 hours in pursuance of Regulation 167. The Regulation is mandatory and its violation amounts to violation of principle of natural justice and affect the right of the accuse to avail reasonable opportunity.

(3) The allegation that the Prosecutor and the President belong to the same establishment/unit which may result likelihood of bias has not been considered in the light of Prithi Pal Singh (supra) and Ranjeet Kumar (supra). Hon'ble Supreme Court held that minimum requirement of natural justice is that Court Martial proceedings must contain impartial persons acting fairly without bias. Likelihood of bias may be tested with reasonableness of the apprehension in that regard in the mind of party.

(4) The objection raised by the applicant should have not been rejected lightly without taking into account the judgment of the Hon'ble Apex Court(Supra). No reasonable finding was

recorded in view of clear chit given by the divers at Goa and later on Sea Hawk State II stage. Why the same diver at Sea Hawk State II after under water checking between 08 to 12 Dec. has recorded the finding that everything was in order and later on changed his views while diving on 15.12.2008 with contrary report is an important question. No action has been taken against the diver Pradeep Kumar or S. P. Singh for their report given on respective dates.

(5) Report of the Dry Dockyard Agency who repaired the propeller has not been brought on record to assess the actual damage caused to the propeller. Photograph does not seem to be genuine evidence when the propeller was repaired by the competent technicians and later on used in the ship in question. Report of the technician who repaired the propeller is an important piece of evidence which has not been taken into record. The charges framed against the applicant seems to be vague and covered the period from 27/11 to 15/12. Accordingly, charge-sheet seems to suffer from vagueness and is not in true spirit of Regulation 155(supra).

(6) Charge Nos. 2 to 6 seem to correlate to each other and it is not understandable why the charge have been broken up though it has been stated that being Captain of the ship he was responsible to navigate the ship in accordance with the order/guidelines passed from time to time which as alleged to be not complied with and how and in what manner the applicant

may be held guilty of negligence in the light of interpretative law has not been dealt with (supra).

(7) There is variation with regard to damage caused to the propeller. A close scrutiny of letter sent by the convening authority to Vice Admiral of Navy seeking approval for Court Martial and subsequent evidence led by the parties shows the degree of damage differently. Once the repair done by the Dry Dockyard Agency of the same propeller was available then Vice Admiral should have been informed according to the report of the technicians with regard damage cause but the same has not been done. Commander Ramesh Kumar seems to forward the letter in a hasty manner.

(8) Keeping in view the Presidential notification dt. 21.04.2009 with regard to applicant's promotion to the post of Commander and also keeping with the fact that he was being paid salary of the Commander and holding the said post from 01.04.2009, it was not justified on the part of the Court Martial to treat the applicant as Lt Commander and prosecute him.

(9) Subordinate authority has not been empowered to demote the applicant in view of the Presidential notification. Accordingly, order oral or written passed by them in contravention of notification or the decision taken by the Government of India suffers from jurisdictional error and is nullity in law.

(10) It is humiliating to note that in a customary stripe vetting on INS Agray the promotion Genform dated 01.04.2009 was

issued by the INS Agray after having duly promoted to the substantive rank of Commander. The related pleading in Par.4.9 and para 4.38 has not been categorically denied. Para 4.38 contains categorical pleading that in view of the notification dated 21.04.2009 and Genform of 01.04.2009 the applicant permitted for withdrawing the full pay and allowances of Commander rank. Accordingly the trial of Commander should have been done in accordance with the provisions contained in sub-section (15) of section 97 of the Navy Act and not otherwise. This goes to very root of the issue.

(11) The Court Martial with a majority or unanimously have not discussed the findings keeping in view the letter and spirit of section 115, 116 and 117 read with Sec.124 (supra) assigning reason. The order is cryptic and unreasoned merely relying upon the prosecution sum up by the TJA. Accordingly, verdict in the present case by the Court Martial suffers from vice of arbitrariness and not sustainable in view of settled proposition of law(supra).

(12) As held, the procedure contained in the Regulation (supra) with regard to navigational trial seems to has not been followed by passing a reasoned order while recording finding by the Court Martial which hits the root of the charges. Hence the entire proceeding by the Court Martial suffers from substantial illegality and vitiates.

102. While parting with the case we would like to observe that the JAG Branch of all the three wings of the Armed Forces seems to be not equipped with broader knowledge of constitution and law as it stands. It further appears that they are not well versed with interpretative jurisprudence as well as administrative law. Hence it shall be appropriate that JAG Branch of all the three wings of the Armed Forces must be trained with aid of eminent lawyers and judges to cope with the litigation in Tribunal or Court.

O R D E R

103. In view of the above, O. A. deserves to be allowed. Accordingly, O. A. is allowed . The impugned order dated 11.02.2010 as well as appellate order dated 12.03.2012 as is annexed with O. A. are set aside with all consequential benefits. No order as to costs.

103. Let a copy of the order be sent to the Chief of the Naval Staff to take appropriate steps with regard to training to educate the JAG Branch relating to the different facet on developing law. Opinion as contained in para 99 shall also be forwarded to the Chief of the Air Force and Army within one week.

104. Original records submitted by the respondents be returned to them under proper receipt.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE DEVI PRASAD SINGH)
Member (Judicial)

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