Union Of India

v.

Sanjay Jethi

(Supreme Court Of India)

HON'BLE DR. JUSTICE B.S. CHAUHAN HON'BLE MR. JUSTICE DIPAK MISRA

Civil Appeal No. 8914 Of 2012 (From The Judgment And Order Dated 12-10-2012 Of The Armed Forces Tribunal, Regional Bench, Mumbai In Transfer Application No. 38 Of 2011) | 18-10-2013

Dipak Misra, J.

1. The legal propriety of the judgment and order dated 12-12-2012 in TA No. 38 of 2011 passed by the Armed Forces Tribunal. Regional Bench at Mumbai (for short "the Tribunal") setting aside the decision rendered by the additional court of inquiry and consequential action taken or orders passed pursuant to the said order and directing to convene a fresh court of inquiry (CoI) with a different Presiding Officer and other independent members, if decision is taken to proceed against the first respondent, is called in question in the present appeal.

2. The factual score as depicted is that on 5-8-2009, a complaint was made by one of the officers alleging irregularity in the hiring of Civil Hired Transport (CHT), which were used for the purpose or supply of ordnance stores to units spread over the country, including remotest field and high altitude area by Respondent 1 who holds the rank of Colonel in the Army. On the basis of a complaint, the General Officer Commanding-in-Chief, Pune initiated an action against Respondent 1 by making his attachment with Headquarters Sub-Area on 6-8-2009 and also convened a Board of Officers on 21-7-2009 for ascertaining the truthfulness of the allegations. On 22-7-2009 the said Board seized the entire records and submitted a report. On the premises of that report, a CoI was convened against Respondent 1 to investigate into the alleged irregularities,

3. CoI conducted an inquiry and on 8-3-2010 recommended for taking appropriate disciplinary action against the first respondent and some other

officers. On the basis of the said recommendation on 23-2-2010 the first respondent was attached to the Head Quarters, Mumbai Sub-Area till finalisation of the disciplinary proceedings. At that juncture, Respondent 1 filed Original Application No. 283 of 2010 before the Principal Bench of the Tribunal at New Delhi challenging CoI proceedings contending, inter alia, that he had been deprived of the right of cross-examination as stipulated under Rule 180 of the Army Rules, 1954 (for short "the Rules"); and that there had been non-supply of documents which were annexed after conclusion of the proceedings before CoI. As the factual matrix would unveil, on 17-6-2010 the hearing of charges commenced and the Commanding Officer, Mumbai Sub-Area, under Rule 22 directed for recording of summary of evidence under Rule 23.

4. The original application filed before the Tribunal was disposed of on 8-10-2010 (Col. Sanjay Jethi v. Union of India, Original Application No.283 of 2010, order dated 8-10-2010 (Tri)). While dealing with the grievance pertaining to violation of Rule 180, especially the deprivation of the right to cross-examine, the Tribunal referred to the decision in Lt. Col. Prithi Pal Singh Bedi v. Union of India ((1982) 3 SCC 140 : 1982 SCC (Cri) 642 : AIR 1982 SC 1413), certain passages from Administrative Law by De Smith (Ed.: Constitutional and Administrative Law, S.A. De Smith) and applicability of the principles of natural justice and came to hold that as the first respondent had remained present throughout the course of CoI and had been given opportunity to cross-examine the witnesses and, therefore, the grievance that he was not afforded full opportunity to cross-examine did not merit consideration, In fact the Tribunal opined that in-depth cross-examination was allowed to Respondent 1 and the Presiding Officer asking for written questions to be submitted, could be treated as fair and reasonable exercise of discretion and hence, there was no illegality or irregularity in the conduct or CoI.

5. A contention was advanced that after conclusion of the proceedings by CoI when the report was submitted, certain documents which were not made available to the said respondent were annexed to justify his culpability, The Tribunal found force in the said submission and opined that it was the duty of CoI to find out the truth by holding suitable investigation about the documents that were annexed afterwards, This opinion was formed on scrutiny of the language employed in Rule 180 and placing reliance on the dictum in Uma Nath Pandey v. State of U.P. ((2009) 12 SCC 40 : (2010) 1 SCC (Cri) 501 : AIR 2009

SC 2375). This led to the ultimate conclusion that such enclosing of the documents along with the report by CoI amounted to violation of Rule 180 inasmuch as the said report was treated as the sole basis for initiating the disciplinary proceedings against Respondent 1. It was also held that it would be difficult for the authority concerned to proceed for hearing on the point of charge to take into account those documents which were subsequently annexed, and in all fairness, an additional CoI should be convened affording full opportunity to the parties, by examining or cross-examining any of the witnesses pertaining to those annexures.

6. Being of this view the Tribunal directed the authority to convene an additional CoI limiting to the documents which were subsequently annexed to the report of CoI and granting liberty to the delinquent officer to cross-examine any of the witnesses, if produced, pertaining to those documents.

7. In pursuance to the aforesaid order, the additional CoI reassembled and Respondent 1 was shown all the documents and he perused the same, as the proceedings would reveal, availing considerable length of time. At that stage, i.e made a request for grant of permission to cross-examine the Technical Members but the same was denied on the ground that as per Rule 180 he could only cross-examine the witnesses and not the Members. However, certain other witnesses were examined and cross-examined in CoI and, eventually, a report was sent by the Presiding Officer.

8. Being grieved by the said order Respondent 1 preferred an original application under Section 14 of the Armed Forces Tribunal Act, 1007 for quashing of the additional CoI as there had been an infraction of Rule 180 and for issuance of appropriate direction for holding a fresh additional CoI with new Members who are independent and unbiased and the said original application was transferred to the Regional Bench at Mumbai where it was registered as TA No. 38 of 2011. For claiming such relief heavy reliance was placed on the order passed on earlier occasion in Col. Sanjay Jethi v. Union of India (Original Application No.283 of 2010, order dated 8-10-2010 (Tri)). It was contended before the Tribunal that Brig. N.S. Ahamed, who was the earlier Presiding Officer of CoI, had continued as the Presiding Officer of the additional CoI despite objections raised by the applicant therein and in spite of the request to constitute a fresh CoI without him.

9. It was highlighted that the Brigadier concerned should have been made available for cross-examination as he was the author of the document i.e. Ext. XLI which was referred to in the order dated 8-10-2010 in Col. Sanjay v. Union of India (Original Application No.283 of 2010, order dated 8-10-2010 (Tri)). It was brought to the notice of the Tribunal that in the additional CoI Lt. Col. Sandeep Sinha and Maj. Sanjeev Narula were also retained as Technical Members despite the factum that those two officers were responsible for preparing Appendices 'N' to 'AB' to Ext. XLIX and on that ground he had been deprived of the opportunity of cross-examining them. It was further put forth that the document vide Ext. XXXV, was not shown or allowed for his perusal although the said document was a complete report making serious allegations of misappropriation and fraud against the applicant therein. In essence, the grievance that was agitated before the Tribunal was that certain documents were not supplied and the authors or document had become the Members of the additional CoI. It was also submitted that as the additional CoI had already submitted the report and the next phase 01" the proceedings i.e. summary of evidence was about to be over the same also deserved to be quashed.

10. The said submissions were resisted by the respondents therein contending that Ext. XLI contains the observations of the court on the two letters referred to it i.e. COD, Mumbai Letter No. 2754/Gen/Cont dated 4-8-2008 and DGOS IHQ of MoD (Army) Letter No. PC-2/13357/RI00159/Fin/OS-4(e) dated 6-8-2009 and these two letters were earlier perused by Respondent I. Emphasis was laid on the fact that there is no provision for cross-examination of the Presiding Officer of CoI on the basis of his observations made in CoI. As regards the cross-examination of the Technical Members, it was opposed on the ground that the Technical Members had only collated the data which was taken into consideration for formation of an opinion by CoI and the same was done to comply with the order passed on the earlier occasion. It was put forth that Technical Members had only signed the day's proceedings and had no role to play in the final opinion expressed by CoI. That apart, it was stressed that the Technical Members had been produced as witnesses in summary of evidence and every opportunity had been granted to the applicant therein to cross-examine them and, therefore, no prejudice has been caused to him due to their non-production in CoI for cross-examination.

11. It was also contended that request of the applicant therein to cross-examine the authors of the documents XLI and XLIX was beyond the scope of the rule and was also not in accord with the earlier judgment passed on 8-10-2010 (Col. Sanjay Jethi v. Union of India, Original Application No.283 of 2010, order dated 8-10-2010 (Tri)). It was put forth that Technical Members were allowed only to assist the Presiding Officer in the proceedings and not allowed to form any opinion and finding. Their inclusion in the additional CoI would not vitiate the enquiry as it does not violate the spirit of Rule 180.

12. The Tribunal first dealt with the contention relating to inclusion of Technical Members in the additional CoI. In that context, it observed that the Technical Members were undoubtedly involved and connected with the matter being investigated and since they had submitted their report, it was obvious that those Members would certainly support their own report/documents and it would not be possible for them to arrive at a different finding than what they had already found as their personal credibility would be at stake. Taking note of this fact situation and also the factum that the respondent herein had raised his objection at the initial stage pertaining to inclusion of these officers in the additional CoI, the Tribunal opined that the apprehension expressed by him was well-founded.

13. After so holding the Tribunal proceeded to deal with the mandate of Rule 180 and relying on the decision rendered in Lt. Col. Prithi Pal Singh Bedi (Lt. Col. Prithi Pal Singh Bedi v. Union of India, (1982) 3 SCC 140 : 1982 SCC (Cri) 642) and certain other decisions of the High Courts came to hold as follows:

"... that the respondents did not produce the maker or those documents XLIX and XLI for cross-examination by the applicant, although he specifically prayed for it which was also directed in the judgment passed in Col. Sanjay Jethi v. Union of India (Col. Sanjay Jethi v. Union of India, Original Application No.283 of 2010, order dated 8-10-2010 (Tri)). The applicant objected from the very beginning not to include Brig. N.S. Ahamed and two Technical Members in the additional CoI so that a fair trial can be held and they could be cross-examined by him. But the respondents turned a deaf ear to such request of the applicant and in fact that has been done at their own risks. The categorical direction in the earlier OA No. 283 of 2010 dated 8-10-2010 passed by the

Principal Bench of AFT is that in the additional CoI the petitioner is to be afforded with full opportunities to examine and cross-examine the witnesses pertaining to those documents. The respondents, could have convened the additional CoI with different members when there are various other officers available for holding the additional inquiry, but they preferred not to do so and in turn creators of some vital documents were inducted as members allowing themselves to decide upon the documents created by them and they being the members of the inquiry were not produced for cross-examination by the applicant. Such action on the part of the respondents is contrary to fair play in action."

14. The Tribunal observed that as the applicant therein was not allowed to cross-examine the makers or documents XLI X and XLI, the respondents therein not only violated the provisions of Rule 180 but also did not comply with the directions contained in the earlier judgment passed in Col. Sanjay Jethi v. Union of India (Original Application No.283 of 2010, order dated 8-10-2010 (Tri)). The Tribunal proceeded to state that the contention advanced by the respondents therein that on reading of Rule 180 it cannot he discerned that the Presiding Officer and Technical Member of CoI were required to be produced as witnesses was devoid of merit. After so stating the Tribunal held that the respondents therein should not have included Brig. N.S. Ahamad as Presiding Officer and Lt. Col. Sandeep Sinha and Maj. Sanjeev Narula as Technical Members in the said additional CoI, for whatever might be the role of the Technical Members, nonetheless they were Members of the additional CoI and must have applied their mind while preparing the inquiry report.

15. Being of this opinion, the Tribunal concluded that the decision rendered by additional CoI was in violation of the provisions contained in Rule 180 and, accordingly, set aside the same and also all consequential actions taken on the basis of the said additional CoI. It granted liberty to the respondents therein to convene a fresh additional CoI with a different Presiding Officer and other independent members.

16. The centripodal issues that emerge for consideration are whether the Tribunal was justified in holding that the constitution of CoI which consisted of two Technical Members and the Presiding Officer was vitiated as there was

possibility of their having an interest in the proceedings as a consequence of which being biased or there could he a perception or likelihood of bias in the decision-making process which would raise a doubt pertaining to the decision by a prudent or rational person; whether the Presiding Officer and the Technical Members should have been made available for cross-examination in a CoI to meet the necessary command of Rule 180 and further regard being had to the earlier order passed in Col. Sanjay Jethi v. Union of India (Original Application No.283 of 2010, order dated 8-10-2010 (Tri)); and whether there has been real violation of the principles of natural justice which ultimately vitiates the proceedings of the additional CoI.

17. To appreciate the said aspects we shall first proceed to examine the schematic contents of the Rules in issue and how they have been understood and interpreted by this Court. Chapter VI of the Rules provides for CoI. Rule 177 deals with the constitution of CoI and its role, namely, to collect evidence and if so required to report with regard to any matter which may be referred to them. Rule 179 provides the procedure by which a CoI shall be guided.

18. Rule 180 on which the present controversy revolves deals with the procedure when character of person subject to the Act is involved. It is as follows:

"180. Procedure when character of a person subject to the Act is involved.—Save in the case of a prisoner or war who is still absent, whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded 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 his character or military reputation and producing any witnesses in defence or his character or military reputation. The Presiding Officer of the court 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 Rule."

19. Rule 182 stipulates that the proceeding of courts of inquiry or any confession statement or answer to a question made or given at a CoI shall not be

admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial or such person for wilfully giving false evidence before that court. The proviso to the rule states nothing in the said Rules shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witnesses. Rule 184 which has been substituted by S.R.O. 44, dated 24-1-1985 deals with right of certain persons [0 copies of statements and documents.

20. Rule 180 had come up for consideration in Lt. Col. Prithi Pal Singh Bedi (Lt. Col. Prithi Pal Singh Bedi v. Union of India, (1982) 3 SCC 140 : 1982 SCC (Cri) 642). In the said case a contention was advanced that it was obligatory upon [he authorities concerned to appoint a CoI whenever it affects the character or military reputation of a persons subject to the Act and in such an enquiry full opportunity must be afforded to such person of being present throughout the enquiry and of making any statement or giving any evidence he may wish to make or give and or cross-examining any witness whose evidence in his opinion affects the character or military reputation and producing any witness in defence of his character or military reputation. It was further urged before the Court that on a correct interpretation or Rule 180, it would appear whenever the character of a person subject to the Act is involved in any inquiry, a CoI must be set up, Repelling the said submission the learned Judges opined thus: (SCC p. 176, para 40)

"40 .... Rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the courts of inquiry. Rule 180 cannot be construed to mean that whenever or wherever in any inquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up of a court of inquiry is a sine qua non. Rule 180 merely makes it obligator; that whenever a court or inquiry is set up and in the course of inquiry by the court of inquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate ill the proceedings of court of inquiry. Court of inquiry by its very nature is likely to examine certain issues generally concerning a situation or persons." (emphasis supplied)

21. Thereafter, the Court dealt with the proceedings where the participation of a person is obligatory and where it is not required. The said delineation is as

follows: (Lt. Cot. Prithi Pal Singh Bedi case (Lt. Col. Prithi Pal Singh Bedi v. Union of India, (1982) 3 SCC 140 : 1982 SCC (Cri) 642), SCC pp. 176-77, para 40)

"40 .... Where collective fine is desired to be imposed, a court of inquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an inquiry 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 Oil the specious plea that no specific inquiry 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 inquiry 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 inquiry or an inquiry 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 inquiry by the court of inquiry is a sine qua non."

(emphasis supplied)

22. In Major General Inder Jit Kumar v. Union of India ((1997) 9 SCC 1 : 1997 SCC (L&S) 1177) a two-Judge Bench observed that CoI is set up under Rule 177 to collect evidence and to report, if so required, with regard to any matter which may be referred to it. CoI is in the nature of a fact-finding inquiry committee. The learned Judges proceeded to state that: (SCC p. 5, para 7)

''7. ... Army Rule 180 provides, inter alia, that whenever any inquiry affects the character or military reputation of a person subject to the Army Act, full opportunity must be afforded to such a person of being present throughout the inquiry and or 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 his character or military reputation and producing any witnesses in defence of his character or military reputation [and the] Presiding Officer of the court of inquiry is required to take such steps as may be necessary to ensure that any such person so affected receives notice of and fully understands his rights under this rule."

23. In Major General Inder Jit Kumar case ((1997) 9 SCC 1 : 1997 SCC (L&S) 1177) the appellant therein was present before CoI and witnesses were examined by CoI in his presence and were offered to him for cross-examination, but he declined to cross-examine them. In fact, he had moved an application for adjournment for preparing his defence. He had also applied for the evidence adduced before CoI should be reduced to writing. CoI noticed that sufficient time had been granted to him for preparation of his defence after receipt of CoI proceedings by him and, accordingly, refused the application for adjournment. Be it noted, a contention was advanced that a copy of the report of CoI should be provided to him. Dealing with the said aspect, this Court ruled thus: (Major General Inder Jit Kumar case (Major General Inder Jit Kumar v. Union of India ((1997) 9 SCC 1 : 1997 SCC (L&S) 1177), SCC p. 6, para 8)

"8 .... There is no provision for supplying the accused with a copy of the report of the court of inquiry. The procedure relating to a court of inquiry and the framing of charges was examined by this Court in Major G.S. Sodhi v. Union of India ((1991) 2 SCC 382 : 1991 SCC (Cri) 357). This Court said that the court of inquiry and participation in the court of inquiry is at a stage prior to the trial by court martial. It is the order of the court martial which results in deprivation of liberty and not any order directing that a charge be heard or that a summary of evidence be recorded or that a court martial be convened. Principles of natural justice are not attracted to such a preliminary inquiry. Army Rule 180, however, which is set out earlier gives adequate protection to the person affected even at the stage of the court or inquiry. In the present case, the appellant was given that protection. He was present at the court of inquiry and evidence was recorded in his presence. He was given an opportunity to cross-examine witnesses, make a statement or examine defence witnesses."

(emphasis supplied)

24. In Union of India v. Major A. Hussain ((1998) 1 SCC 537 : 1998 SCC (Cri) 437) Union of India and its functionaries had challenged the decision of the High Court which had quashed the court-martial proceedings including the confirmation of the sentence on the ground that the delinquent officers had

denied reasonable opportunity to defend himself as he was not communicated the conclusion reached. In the said case the High Court opined that during the proceeding under Section 22 of the Act the copies submitted in earlier CoI were not supplied; that he was not given assistance of a defending officer of his choice; that he was not provided a loan which was already sanctioned to engage a new counsel; and that the documents for which he had made a request to the convening authority long before assembly of the court martial were not provided. This Court referred to Rules 180 and 184 of the Army Rules and various other provisions and in that context came to hold that the respondent had been unable to show if there was any non-compliance with the provisions of Rules 22, 23 and 24 and Army Order No. 70/84.

25. The Court referred to the decisions in Lt. Col. Prithi Pal Singh Bedi (Lt. Col. Prithi Pal Singh Bedi v. Union of India, (1982) 3 SCC 140 : 1982 SCC (Cri) 642) and Major G.S. Sodhi ((1991) 2 SCC 382 : 1991 SCC (Cri) 357) and observed that: (Major A. Hussain case (1998) 1 SCC 537 : 1998 SCC (Cri) 437, SCC p. 547, para 18)

"18 .... In G.S. Sodhi case (Major G.S. Sodhi v. Union of India, (1991) 2 SCC 382 : 1991 SCC (Cri) 357) this Court with reference to Rules 22 to 25 said that procedural defects, unless those were vital and substantial, would not affect the trial. The Court, in the case before it, said that the accused had duly participated in the proceedings regarding recording of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the accused."

26. Thereafter, the learned Judges adverted to the role of CoI and opined thus: (Major A. Hussain case", SCC p. 548, para 19)

"19 .... Proceedings before a court of inquiry are not adversarial proceedings and is also not a part of pre-trial investigation. In Major General Inder Jit Kumar v. Union of India ((1997) 9 SCC 1 : 1997 SCC (L&S) 1177) this Court has held that the court of inquiry is in the nature of a fact-finding enquiry committee. The appellant in that case had contended that a copy of the report of the court of inquiry was not given to him and that had vitiated the entire court martial. He had relied upon Rule 184 in this connection. With reference to Rule 184, the Court said that there was no provision for supplying the accused with a

copy of the report of the court of inquiry. This Court considered the judgment in Major G.S. Sodhi case (Major G.S. Sodhi v. Union of India (1991) 2 SCC 382 : 1991 SCC (Cri) 357) and observed that supply of a copy of the report of enquiry to the accused was not necessary because proceedings of the court of inquiry were in the nature or preliminary enquiry and further that rules of natural justice were not applicable during the proceedings of the court of inquiry though adequate protection was given by Rule 180. This Court also said that under Rule 177, a court of inquiry can be set up to collect evidence and to report, if so required, with regard to any matter which may be referred to it. Rule 177, therefore, docs not mandate that a court of inquiry must invariably be set up in each and every case prior to recording of summary of evidence or convening of a court martial."

(emphasis supplied)

27. The aforesaid authorities, as far as Rule 180 is concerned, are to the effect that when a CoI is set up under Rule 177 and during the course of enquiry character or military reputation of a person is likely to be affected, he should be granted full opportunity to participate in the proceedings: that CoI in its very nature is likely to examine certain issues generally concerning a situation or persons: that his participation could not be avoided on a mercurial plea that no specific enquiry was directed against the person whose character or military reputation is involved; that the person concerned shall be afforded full opportunity so that nothing is done at his back and without opportunity of participation; that it is the command of the said provision to ensure such participation; that it is not a condition precedent to always hold that a CoI for proceeding a trial by court martial where the character or military reputation of the officer concerned is likely to be affected: that CoI is in the nature of a fact-finding enquiry committee; that the participation in a CoI is at a stage prior to the trial by court martial: that the said rule gives adequate protection to the person affected at the stage of CoI and there is no provision for supplying the accused with a copy of the report or CoI; and that the proceedings before a CoI are not adversarial proceedings.

28. Keeping in view the aforesaid principles which have been laid down by this Court, we are required to scrutinise whether the Tribunal has appositely applied the principles in quashing the additional CoI including its composition. To appreciate the said position we think it necessary to refer to the earlier order passed by the Tribunal. In the earlier decision, the Tribunal took note of the fact that CoI while submitting the report had annexed certain documents and the said documents were produced in a tabular chart which is as follows:

"Exhibit No.Letter No. and DateRemarks

1.XLIX including all appendicesStill not shown/given to applicant

2.LXIXCMM Jabalpur Letter No.126/CL/HQ dated 5-11-2009

3.L.Still not shown/given to applicant

4.LXVIII-Do-

5.XXXV-Do-

6.XLI-Do-

7.LV-Do-

8.ZXVI(a) FOD Lr. No.50060/Tfc/X dated 30-11-2009

(b) 22 ABOD Lr. No.C/1224/499/ Tfc dated 1-12-2009

(c) FOD Lr. No.G3334/PC/Tfc dated 30-11-2009"

29. Thereafter, the Tribunal appreciating the submissions held thus:

"As has clearly been stated in Army Rule 180, a fair opportunity is to be afforded to an individual whose character and military reputation is involved. In this case, the documents were not given to the applicant warranting judicial review by this Tribunal. We find that the mandatory procedure under AR 180 was not followed by the respondents with regard to those documents which were subsequently annexed to the report. Therefore, that portion or the report which deals with the conduct and reputation or the applicant without giving him an opportunity of being heard in the inquiry, should be taken to be vitiated for violation of AR 180. It is true that the report of CoI has no legal force proprio vigore. But, however, it is seen in this case that the findings rendered by CoI have been taken as the sole basis for initiating disciplinary proceedings against the applicant. In these circumstances, the applicant is entitled to put forward his grievance that CoI has given findings regarding his conduct without giving him an opportunity to put forward his defence as regards those annexures; the applicant was obviously not afforded opportunity to see the documents which were annexed to the report of CoI. It would be difficult for the authority concerned to proceed [or hearing on the point of' charge to take into account those documents which were subsequently annexed. In all fairness, an additional CoI is to be convened affording full opportunity to the parties, by examining or cross-examining any of the witnesses pertaining to those annexures. The additional CoI would remain confined to the annexures referred to above."

(emphasis supplied)

30. After so holding, the Tribunal directed the authority concerned to pass orders convening an additional CoI limiting to the documents which were subsequently annexed to the report of CoI and the applicant was granted liberty to cross-examine any of the witnesses, if produced, pertaining to those documents.

31. We may note here with profit that the aforesaid order was not assailed by the Union of India and its functionaries.

32. We have referred to the earlier order in extensor despite the same having gone unchallenged, for it is submitted by Mr. Kuhad, learned Additional Solicitor General, that the said order has to be understood in the backdrop of the fact situation. There can be no trace of doubt that the Tribunal had passed directions to the limited extent, but it had specified the documents and directed for full grant of opportunity to the delinquent officer.

33. At this juncture, we may refer to the analysis made by the Tribunal in the impugned judgment while setting aside the additional CoI. On a scrutiny of the impugned judgment of the Tribunal, four reasons, namely:

33.1. that though the Tribunal vide its earlier judgment dated 8-10-2010 (Col. Sanjay Jethi v. Union of India, Original Application no.283 of 2010, order dated 8-10-2010 (Tri)) had directed the witnesses concerned with the annexures which were brought on record before CoI were to be made available for cross-examination, the said witnesses like the makers or the documents XLI and XLIX were not made subject to cross-examination by the delinquent officer;

33.2. that though the inclusion of the Presiding Officer in CoI had been objected to on earlier occasion, he was allowed to continue and was not changed;

33.3. that in spite of the Technical Members having prepared and arranged the documents which would mean that they had expressed an opinion at an earlier stage, yet they were retained as Members of CoI as a consequence of which the principles of natural justice were violated, for one cannot be the judge in his own cause; and

33.4. that the doctrine of bias comes into playas the Presiding Officer as well as the Technical Members would have a tendency to support their own reports/documents and it is against the spirit of Rule 180.

33.5. In essence, what has really weighed with the Tribunal while passing the impugned order is that such Members constituted CoI who were biased or

reasoned to be biased and such bias is discernible. To appreciate the said facer of reasoning it is necessary to understand when the doctrine of bias really comes into play, for bias is an insegregable facet of the concept of natural justice as a genus.

34. The fundamental principles or natural justice are ingrained in the decision-making process to prevent miscarriage of justice. It is applicable to administrative enquiries and administrative proceedings as has been held in A.K. Kraipak v. Union of India ((1969) 2 SCC 262). It is also fundamental facet of principle of natural justice that in the case of quasi-judicial proceeding the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties and the said principle has been laid down in Gullapalli Nageswaro Rao v. A.P SRTC (AIR 1959 SC 308), Gullapalli Nageswararao v. State of A.P (AIR 1959 SC 1376) and G. Sarana v. University of Lucknow ((1976) 3 SCC 585 : 1976 SCC (L&S) 474)".

35. In Manak Lal v. Prem Chand Singhvi (AIR 1957 SC 425) the Court has stated thus: (AIR p. 420, para 4)

"4 ... It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is or the essence of judicial decisions and judicial administration that Judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment: the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

36. In C. Sarana ((1976) 3 SCC 585 : 1976 SCC (L&S) 474) the learned Judges referred to the Principles or Administrative Law by J.A.G. Griffith and H. Street (4th Edn.), and observed that the position with regard to bias has been aptly and succinctly stated thus: (SCC pp. 590-91, para 12)

"12 .... 'The prohibition or bias strikes against factors which may improperly influence a Judge in deciding in favour of one party. The first of the three disabling types of bias is bias on the subject-matter. Only rarely will this bias invalidate proceedings. 'A mere general interest in the general object to be pursued would not disqualify." said Field. J., holding that a Magistrate who subscribed to the Royal Society for the Prevention of Cruelty to Animals was not thereby disabled from trying a charge brought by that body of cruelty to a horse. There must be some direct connection with the litigation. If there is such prejudice on the subject-matter that the court has reached fixed and unalterable conclusions not founded on reason or understanding, so that there is not a fair hearing, that is bias of which the courts will take account, as where a justice announced his intention of convicting anyone coming before him on a charge of supplying liquor after the permitted hours...

Secondly, a pecuniary interest, however, slight will disqualify, even though it is not proved that the decision is in any way affected.

The third type of bias is personal bias. A Judge may be a relative, friend or business associate of a party, or he may be personally hostile as a result of events happening either before or during the course of a trial. The courts have not been consistent in laying clown when bias of this type will invalidate a hearing. The House of Lords in Frome United Breweries Co. Ltd. v. Bath (1926 AC 586 : 1926 Al ER Rep 576 (HL) approved an earlier test of whether "there is a real likelihood 01" bias." The House of Lords has since approved a dictum of Lord Hewart that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" although it did not mention another test suggested by him ill the same judgment: Nothing is to be done which creates even a suspicion that there has been an improper interference with the course or justice.'"

Eventually ill the said decision in G. Surana (G. Surana v. University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474) it has been ruled that what has to be seen in a case where there is an allegation of bias in respect of a member of an administrative board or body is whether there is a reasonable ground CoI believing that he was likely to have been biased. In other words,

whether there is substantial possibility of bias animating the mind of the member against the aggrieved party.

37. At this juncture, we may refer with profit to Halsburv's Laws of England, 4th Edn., Vol. 2, para 551, where it has been observed:

"551. Want of impartiality or bias; fraud.- ... The test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias (R. v. Moore, ex p Brooks, (1969) 2 OR 677 : (1969) 6 DLR (3d) 465 (Can)"."

38. In Transport Deptt. v. Munuswamy Mudaliar (1988 Supp SCC 651), while dealing with the concept of bias as a part of natural justice, the Court observed that: (SCC p. 654, para 12)

"'12 .... A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension or that predisposition. The reasonable apprehension must be based on cogent materials."

Needless to say, personal bias is one of the limbs of bias, namely, pecuniary bias, personal bias and official bias.

39. In Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant ((2001) 1 SCC 182 : 2001 SCC (L&S) 189) the Court referred to a passage from the view expressed by Mathew, .J. in S. Parthasarathi v. State A.P. ((1974) 3 SCC 459 : 1973 SCC (L&S) 580); (Girja Shankar Pant case ((2001) 1 SCC 182 : 2001 SCC (L&S) 189), SCC pp. 198-99, para 28)

"28 .... '16. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right-

minded persons would think that there is real likelihood of bias on the part or an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis or the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in Metropolitan Properties Co, (F.G.C) Ltd. v. Lannon ((1969) 1 QB 577 : (1968) 3 WLR 694 : (1968) 3 All ER 304 (CA)) (WLR at p. 707].' (SCC p. 465, para 16)"

40. Thereafter, the two-Judge Bench in Girja Shankar Pant case ((2001) 1 SCC 182 : 2001 SCC (L&S) 189) referred to the decision in Franklin v. Minister of Town and Country Planning (1948) AC 87 : (1947) 2 All ER 289 (HL) and the sounding of a different note and the dilution of the principle by English Courts in R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2) ((2000) 1 AC 119 : (1999) 2 WLR 272 : (1999) 1 All ER 577 (HL)) and the view expressed by Lord Hutton in the said case and thereafter proceeded to analyse the doctrine propounded in Locabail (UK) Ltd. v. Bayfield Properties Ltd, (2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA) where the Court or Appeal had upon detailed analysis of the decision in R. v. Gough (1993 AC 646 : (1993) 2 WLR 883 : (1993) 2 All E 724 (HL)) together with Dimes case (Dimes v. Grand Junction Canal Proprietors, (1852) 3 HL Cas 759), Pinochet case ((2000) 1 AC 119 : (1999) 2 WLR 272 : (1999) 1 All ER 577 (HL) as also Ebner. In re ((1999) 161 ALR 557 (Aust) and the decision of the Constitutional Court of South Africa in President of the Republic of South Africa v. South African Rugby Football Union (1999 ZACC 9 : 91999) 4 SA 147) opined that it would be rather dangerous and futile to attempt to define or list the factors which mayor may not give rise to a real danger of bias. The learned Judges took note of the fact that the Court of Appeal continued to give effect that everything will depend upon facts which may include the nature of the issue to be decided.

41. Eventually, this Court ruled thus: (Girja Shankar Pant case (Kumaon Mandal Vikas Nigam ltd. v. Girja Shankar Pan, (2001) 1 SCC 182 : 2001 SCC (L&S) 189), SCC p. 201, para 35)

"35. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom-in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained; If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court. Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the court of appeal in Locabail case (Locabail (U.K.) ltd. v. Bayfield Properties ltd., 2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA)."

(emphasis supplied)

42. In G.N. Novak v. Goa University ((2002) 2 SCC 712 : 2002 SCC (L&S) 350) it has been laid down that: (SCC p. 723, para 34)

"34. It is not every kind or bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest-whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension or the principles or natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred."

43. In Delhi Financial Corpn. V. Rajiv Anand ((2004) 11 SCC 625) while dealing with the concept of the doctrine that "no man can be a judge in his own

cause", the Court opined that the said principle can be applied only in two cases where the person concerned has a personal interest or has himself already done some act or taken a decision in the matter concerned. The Court further observed that an officer of a statutory corporation has been appointed as an authority, does not by itself bring the said doctrine into operation. The learned Judges further proceeded to state that in individual cases bias may he shown against a particular person but in the absence of any proof of personal bias or connection merely because officers of a particular corporation are named as the authority does not mean that those officers would be biased. Unless the officer concerned is personally interested, a question of bias or conflict between his interest and his duty would not arise.

44. In Chandra Kumar Chopra v. Union of India ((2012) 6 SCC 369 : (2012) 2 SCC (L&S) 152) it has been held that: (SCC p. 379, para 25)

"25. ... mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record would show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum."

45. The plea of bias it is to be scrutinised on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum.

46. In State of Gujarat v. R.A. Mehta ((2013) 3 SCC 1 : (2013) 2 SCC (Cri) 46 : (2013) 1 SCC (L&S) 490), a two-Judge Bench dealing with "bias" has observed thus: (SCC p. 37, para 58)

"58 .... Bias is one of the limbs of natural justice. The doctrine or bias emerges from the legal maxim uemo debet esse judex in propria causa. It applies only when the interest attributed to an individual is such so as to tempt him to make a decision in favour of, or to further his own cause. There may not be a case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided or dealt with impartially but where the circumstances are such so as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias."

47. In the said R.A. Mehta case ((2013) 3 SCC 1 : (2013) 2 SCC (cri) 46 : (2013) 1 SCC (L&S) 490), it has been further observed that: (SCC p. 37, para 59)

"59. In the event that actual proof of prejudice is available, the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary precondition, for what is relevant, is actually the reasonableness of the apprehension in this regard in the mind of such party. In case such apprehension exists the trial/judgment/order, etc. would stand vitiated for want of impartiality and such judgment/order becomes a nullity. The trial becomes coram non judice,"

48. At this juncture, we think it apt to refer to the pronouncements in Ranjit Thakur v. Union of India ((1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113) and Major G.S. Sodhi v. Union of India ((1991) 1 AXX 281 : 1991 SCC (Cri) 357). In Ranjit Thakur case ((1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113) the Court was dealing with justifiability of an order of dismissal passed by the summary court martial of which one of the Members was Respondent 4 therein. The said respondent had sentenced the appellant to suffer sentence of 28 days' rigorous imprisonment for violating the norms for representation to higher authorities and the representation that was sent to the higher authorities pertained to the ill-treatment at the hands of Respondent 4. Keeping the said factual backdrop in view the Court referred to the procedural safeguards provided under Section 130 of the Act and opined that the proceedings of summary court martial was infirm in law. Thereafter, the learned

Judges proceeded to deal with the second limb of arguments also. It related to bias on the parlor Respondent 4 therein. In that context, the Court observed as follows: (Ranjit Thakur case ((1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113), SCC p. 618, para 16)

“16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want or impartiality is a nullity and the trial coram non judice." (SCC p. 618, para 16)

49. The Court in Ranjit Thakur case ((1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113) referred to the decisions in Allinson v. General Council of Medical Education and Registration ((1894) 1 QB 750 (CA)), Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon ((1969) 1 QB 577 : (1968) 3 WLR 694 : (1968) 3 All ER 304 (CA)), Public Utilities Commission of the District of Columbia v. Pollak (96 L Ed 1068 : 343 US 451 (1952)) and R. v. Liverpool City Justices, ex P Topping ((1983) 1 WLR 119 : (1983) 1 All ER 490 (DC)) and, eventually, concluded that the inescapable conclusion was that the participation of Respondent 4 had rendered the court martial proceedings coram non judice.

50. In Major G.S. Sodhi (1991) 2 SCC 382 : 1991 SCC (Cri) 357) the Court did not accept the alleged plea of bias or mala fide as Lt. Col. S.K. Maini, who had ordered summary of evidence against the petitioner therein, was inimical towards him because of certain prior incidents. It was also alleged that he had not acceded to certain requests made by the petitioner during the inquiry. The Court did not accept the same on the ground that the respondent Lt. Col. S.K, Maini was only concerned with the preliminary inquiry and it was for the court martial to try the case and give its verdict and mere allegation of bias and mala fide against him did not affect the court-martial proceedings. That apart, the Court observed that the allegations against the said Maini had not been really substantiated and even they are perceived from the point of view of the petitioner therein, it could not be held that it was not reasonable on his part to apprehend that the said officer would act ill a biased and partisan manner,

Emphasis was laid on the fact that he was only responsible for holding a preliminary enquiry.

51. The principle that can he culled out from the number of authorities fundamentally is that the question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy or interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being coram non judice. One has to keep oneself alive to the relevant aspects while accepting the pica of bias. It is to he kept in mind that what is relevant is actually the reasonableness of the apprehension in this regard in the mind or such a party or an impression would go that the decision is dented and, affected by bias, To adjudge the attractability of pica of bias a tribunal or a court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition.

52. Keeping in view the principles laid down in the aforesaid precedents and how this Court has understood and dealt with the plea of bias, the case at hand is to be appreciated in its factual backdrop whether there has been "really likelihood of bias".

53. In a CoI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on CoI. The rule provides for procedural safeguards regard being bad to the fact that a person whose character and military reputation is likely to he affected is ill a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action. Thus understood, the language employed in Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty or the authorities to ensure, that there is proper notice to the person concerned

and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back, It is one thing to say that CoI may not always be essential or sine qua non for initiation of a court martial but another spectrum is that once the authority has exercised the power to hold such an inquiry and CoI has recommended for disciplinary action, then the recommendation or CoI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the rule, for the language employed in the said rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of the factual matrix of each case.

54. Coming to the case at hand, we are obliged to state that initially CoI was constituted by three Members by order dated 22-7-2009 and it was asked to investigate certain issues. The relevant part of the said order reads thus:

"(a) Pers involved incorrupt practice of submitting inflated claims to PCDA in connivance with Tpt Firms with spl. ref. to Kaushik Tpt (P) Ltd.

(b) Hiring vehicles of lower tonnage and submitting bills for hiring of higher tonnages.

(c) The misappropriation in dispatch of stores to Ord Depot."

The composition of the Board of Officers was as under:

(a) Presiding Officer - Brig. N.S. Ahamed, CSO, HQ MG & G Area.

(b) Members - 1. Col. R.V. Desai, Jt. Dir. DSC Mumbai Sub-Area.

2. Lt. Col. Sandeep Sinha, OC 53 Coy ASC (Sup)."

55. Thereafter, an amendment was brought regarding the composition of CoI vide order dated 28-7-2009. It reads as follows:

'The following amendments will be made in our above convening order at Para 2:

For Presiding Officer - Brig. N.S. Ahamed, CSO. HQ MG & G Area

Members – 1. Col. R. V. Desai, Jt. Dir. DSC Mumbai Sub-Area

2. Lt. Col. Sandeep Sinha, OC 53 Coy ACS (Supply)

Read Presiding Officer - Brig. N.S. Ahamed. CSO. HQ MG & G Area

Members 1. Col. R.V. Desai, Jt. Dir. DSC Mumbai Sub-Area

2. Col. R.G. Laxrnan, SO (ECHS) HQ Mumbai Sub-Area

Technical Members 1. Lt. Col. Sandeep Sinha, OC 53 Coy ASC (Supply)

2. Maj. Sanjeev Narula. Stn Wksp EME, Mumbai"

56. It is submitted by Mr. Kuhad, learned ASG, appearing for the appellants, that the Technical Members had only compiled and collared the documents and for such an act they cannot be disqualified to function as Members. It is also urged by him that the said Members only signed the day-to-day proceedings but were not signatories to the final report that was submitted through the officer

who convened CoI. In this context we may refer to what has been recorded on 11-2-2011 by the additional CoI:

"In deference to the directions given by Hon'ble Armed Forces Tribunal Principal Bench, New Delhi dated 8-10-2010, the following exhibits, namely, Ext. XLIX, Ext. LXIX. Ext. L. Ext. LXVIII, Ext. XXXV Ext. XLI, Ext. LV, Ext. LXVI are available for perusal. It is clarified that Ext. XLIX named as technical report containing Appendices A to M, the documents produced at the initial court of inquiry and which have already been perused by all the witnesses under AR 180 and for easy reference these documents have been compiled in one place marked as Appendices A to M of Ext. XLIX. The balance of Ext. XLIX, the technical report forming part of Appendices N to AB and extract to Appx N is the collation of information in various formats as per beadings given in these Appendices from the information available in Appendices A to M of Ext. XLIX.

The court has requested the convening authority HQ MG & G Area to intimate details of documents, copies of court of inquiry and exhibits handed over to the witnesses if any during the interim period i.e. 6-12-2009 to 7-2-2011, vide Presiding Officer HQ MG & G Area (Sigs) Letter No. PC-0604/CHT/CODI Addl C of I dated 9-2-2011 and the letter is read over. The copy of the letter is attached as Ext. 1."

57. It is not in dispute that Respondent 1 perused all the documents and objected to the presence of the Technical Members, namely, Lt. Col. Sandeep Sinha and Maj. Sanjeev Narula in the additional CoI proceedings. On 17-2-2011 the additional CoI clarified that Ext. XLIX comprised of appendices as brought about by the court at Para 5 of the additional CoI proceedings dated 11-2-2011. At that juncture, the said respondent gave a list of his witnesses. On 24-2-2011 Respondent 1 made a prayer to cross-examine the Members of CoI but the said prayer was declined. It is contended by Mr. Kuhad that neither the examination nor the cross-examination of the Presiding Officer and the Members of CoI can be spell out from the language of Rule 180 as they are not witnesses. We find force in the said submission of the learned Senior Counsel and hold that neither the Presiding Officer nor the Technical Members of CoI could be made available for cross-examination before CoI.

58. The core of controversy, as we notice, is the inclusion of the Technical Members and the Presiding Officer in CoI. As has been stated earlier, the respondent raised the plea of bias against the Technical Members and had objected to the inclusion of Brig. N.S. Ahamed as Presiding Officer. To appreciate the fulcrum of the controversy, we are required to see the role played by the Technical Members at an earlier stage, for it was repeatedly stated before us that they had only compiled the documents. A mere compilation or pagination or for that matter an arrangement of documents may not be an act to compel someone from recusing from a case. He may not be disqualified to be a part of a CoI. But on a perusal of Ext. XLIX we find that it is a "Technical Report" prepared by the two Technical Members. At the beginning it has been stated "Technical Report: Staff C of I". Thereafter it has been mentioned therein that documents in custody of the court were perused for arriving at the technical inputs. The Members have listed the important documents, stated about the methodology they were going to adopt and have given the input which have been brought on record as Appendices 'N' to 'Z'. After giving the inputs the Members have given their observations stating that during the course of scrutiny of documents they have observed many financial irregularities.

59. The observations are from Paras 5(a) to (m). Para 6 deals with inferences and describes the part, namely, "Anomaly along with inference". The same includes—

(a) variation between tonnage mentioned in gate register and bills.

(b) variation of CHT tonnage between traffic branch office copy of consignment note (bilti) and bills with financial loss,

(c) transhipment details as per or/ice copy of convoy note in Traffic Branch and receipted copies of convoy note and input, from consignee un its,

(d) Same CHT billed fur different tonnages with financial loss.

(e) same CHT being hired within close period,

(f) variation in billed tonnage of CHTs vis-à-vis actual tonnage as per list given by Kaushik Transport with tender documents with financial loss.

(g) CHT billed but date record at variance in gale register with respect to reporting and utilisation of vehicle note,

(h) dispatch to same places in consecutive days amounting: to splitting: of transaction,

(i) variation between actual utilisation and the CFA sanction, and

(k) preliminary inquiry at COD Malad."

On a bare perusal of the same one can easily say that the Technical Members have expressed their opinion after analysis of the documents. They have, in detail, scrutinised the documents, drawn their inferences and made their observations. This document has been marked as Ext. XLIX. By no stretch of imagination can it be said that it is an arrangement of documents or pagination of documents. True it is, they are not the authors of the original documents but their analysis and inference have been used against the respondent in the earlier CoI and in the additional CoI. It cannot be brushed aside by saying that Technical Members did not sign the final report. Once they have given an opinion, the possibility to support the same cannot be totally discarded. That is where the real likelihood of bias comes into play.

60. As has been stated in number or authorities which we have reproduced hereinbefore if one has something substantial, relevant or material to do with the case he is disqualified. In the case at hand, we find that the Technical Members had compiled the documents, adopted the methodology, made observations, drawn inferences and expressed the view and, above all, they had prepared the report which has been brought on record as a document. To say

that they had not played any role would tantamount to blinking at reality. In our considered view, their inclusion as the Technical Members is not legally permissible. It is so as the said respondent is bound to be prejudiced. In this context, we may reproduce a passage from State v, N.S. Gnaneswaran ((2013) 3 SCC 594 : (2013) 3 SCC (Cri) 235 : (2013) 1 SCC (L&S) 688) (SCC pp. 600-01, para 12)

"12. The issue also requires to be examined on the touchstone of doctrine of prejudice. Thus, unless in a given situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/enquiry/result. In judging a question of prejudice, the court must act with a broad vision and Look to the substance and not to technicalities. (Vide Jankinath Saramgi v. State of Orissa ((1969) 3 SCC 392), State of U.P. v. Shatrughun Lal ((1998) 6 SCC 651 : 1998 SCC (L&S) 1635),. State of A.P. v. Thakkidiram Reddy ((1995) 6 SCC 554 : 1998 SCC (Cri) 1488) and Debotosh Pal Choudhury v. Punjab National Bank ((2002) 8 SCC 68 : 2003 SCC (L&S) 1).

(emphasis supplied)

61. Even applying the rigorous substantive test, we find that a case of prejudice comes into full play in the case at hand.

62. Presently we shall advert to the inclusion or Brig. N.S. Ahamed. In the earlier order dated 8-10-2010 (Col. Sanjay Jethi v. Union of India, Original Application No.283 of 2010, order dated 8-10-2010 (Tri)) the Tribunal had referred to Ext. XLI to be made available to the respondent. The learned Senior Counsel for the appellants has tiled Ext. XLI before us. The same has been prepared by the Presiding Officer. It reads as follows:

"On sample perusal of File No. 2751/Gen/18/Cont of Central Ordnance Depot, Mumbai, it is observed by the Court that recommended distribution of stores has been forwarded to DGOS by Central Ordnance Depot Mumbai. The approval is accorded by DGOS which mayor may not be the same as recommended by Central Ordnance Depot, Mumbai. A photocopy of Central Ordnance Depot Letter No. 2754/Gen/Cont. dated 4-8-2008 found from DGOS

and approval Letter of the same IHQ, MOD, MGO Letter No. PC 2 to 13357/RI 001519/Fin/OS-46 dated 6-8-2009, this approval is only for issue or items and not dispatch is enclosed as Ext. XLI."

To the said observation/report two letters have been annexed, one written by Rishab Paliwal. Capt., Control Officer, for Commandant, and another by P. Krishna Kumar, SCSO, Jt. Dir. OS-4E, for Dir. Gen. Ord Services. On a scrutiny of the same it cannot be said that it pertained to the proceedings before Cot In fact, on earlier occasion the Tribunal had taken exception to the fact that the said documents were not given to the first respondent. No doubt, thereafter he had been allowed to peruse the same but he is entitled to explain the same, more so, when a view has been expressed in the document.

63. Mr. Kuhad would contend that the summary of evidence had commenced and a number of witnesses, including the Technical Members, have been examined and they have also been cross-examined by the first respondent. Be it noted, this Court, while issuing notice and directing stay of the proceedings of the order passed by the Tribunal had permitted the appellants to proceed and further proceedings were made subject to the result of the final decision of the appeal. We are compelled to repeat here that once a CoI bas been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views in writing behind the back of the person and assume the role of the recommending authority which is statutory in nature to take disciplinary action, The law does not countenance the same. In the present case it is irrefragably clear that the recommendation of CoI was the sole basis on which the disciplinary action has been initiated. Nothing else had come on record as observed by the Tribunal on earlier occasion as well as by the impugned order and the said finding is unassailable. That being the position, we find in fitness of things, the Presiding Officer should have recused himself to preside over CoI. However, we must make it clear that on earlier occasion the Tribunal had not quashed the entire proceedings and the same was not challenged by either of the parties. Therefore, the additional CoI which has been directed by the Tribunal by the impugned judgment, shall only function as an additional CoI and deal with the documents which were produced earlier before the Tribunal in a tabular chart to which we have referred to hereinbefore.

64. At this juncture, we think it is necessary to observe that Respondent 1 at one point of time had filed a long list of witnesses. It is to be borne in mind that on the earlier occasion the Tribunal permitted for examination or cross-examination of witnesses who had something to do with the documents. The additional CoI shall keep that in view so that there is no procrastination of the proceedings at the behest of the delinquent officer, for natural justice has also its own limitations. It can be allowed to become an unruly horse.

65. Before parting with the case, we think and we are constrained to think that we should say something about the order of the Tribunal, Section 14 of the Armed Forces Tribunal Act, 2007 occurs in Chapter III of the said Act and deals with jurisdiction, powers and authority of the Tribunal in service matters, Under sub-section (5) of Section 14 the Tribunal is required to decide both questions of law and facts that may be raised before it. The respondent had approached the Tribunal under Section 14 of the said Act. In the Statement of Objects and Reasons it has been spelt out for constituting an Armed Forces Tribunal for adjudication of complaints and disputes regarding service matters and appeals arising out of the verdicts of the court martial to provide for quicker and less expensive justice to the Members of the said armed forces of the Union. The Preamble of the Act provides for adjudication or trial by the Tribunal of justice and compliance in respect of many a matter. As we find the Tribunal has been conferred powers to deal with the cases in promptitude, Promptitude does not ostracise or drives away the apposite exposition of facts and necessary ratiocination. A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in support of the view expressed having due regard to the rational methodology, in our considered opinion, are imperative. We have said so as we find that the Tribunal by the impugned order has not adverted to the necessitous facts. We say so despite sustaining the verdict.

66. Ex consequenti, the appeal, being sans merit stands dismissed leaving the parties to bear their own costs.