Air Cmde Mrigendra Singh Vs Union of India and Others

Court: Gauhati High Court

Date of Decision: Sept. 17, 2013

Acts Referred: Armed Forces Tribunal Act, 2007 â€" Section 14, 14(4)(f), 15, 21, 22(2), 30, 31(2), 32
Evidence Act, 1862 â€" Section 3, 82, 83, 83(c), 86, 145
Air Force Act, 1950 â€" Section 108, 156(2), 189, 189(2)(d), 190
Code Of Criminal Procedure, 1973 â€" Section 164, 197, 482
Air Force Rules, 1969 â€" Rule 156(2), 156(7)
Air Force Act, 1950 â€" Rule 24, 24(1), 24(3), 25, 26, 37, 43
Armed Forces Tribunal (Procedure) Rule, 2008 â€" Rule 18
Army Rules, 1950 â€" Rule 156(2), 180
Constitution Of India, 1950 â€" Article 21, 33, 226, 227
Defence Service Regulations (Air Force), 1987 â€" Regulation 790

Citation: (2014) 2 GLT 318

Hon'ble Judges: P.K. Saikia, J; I.A. Ansari, J

Bench: Division Bench

Advocate: A. Choudhury and Mr. B. Choudhury, for the Appellant; R. Subramaniam, Asstt. SGI and Mr. R. Sharma, ASG, for the Respondent

Final Decision: Allowed

Judgement

I.A. Ansari, J.
Standing before us, as the petitioner in this writ petition, made under Article 226 and 227 of the Constitution of India, is a

decorated officer of the Indian Air Force, a recipient of Visistha Sewa Medal, presently holding the rank of Air Commodore after having served

the Indian Air Force since 1983 as a fighter pilot of the highest caliber with an impeccable and unblemished service record. The petitioner has

come to this Court, having been unsuccessful in invoking the jurisdiction of the Armed Forces Tribunal (hereinafter referred to as "the AFT"), the

petitioner"s grievance being that he is a victim of harassment, humiliation and persecution in a systematic, concerted and vindictive manner by the

respondents, because the petitioner had raised his voice against mal-administration and corruption leading to low quality of construction of Airbase

for operation of well known Sukhoi-SU-30 MKI Aircrafts. The case of the petitioner, leading to filing of the present writ petition, may, in brief, be

set out as under:

(i) The petitioner is a Commissioned officer in the Indian Air Force (in short, TAF"), the petitioner having joined the IAF as Pilot Officer in the year

1983. During his service tenure, the petitioner not only earned appreciation, but has also been awarded "Visistha Sewa Medal" and Chief of Air

Staff and AOC-in-C Commendation cards.

(ii) In the year 2010, the petitioner was posted to 14 Wing as Air Officer Commanding, at Air Force Station, Chabua, Assam, and he was

entrusted with the task of making the station re-activated for induction of Sukhoi SU 30 MK-I aircrafts. At the time of petitioner"s joining the Air

Force Station, Chabua, major works of construction, under Para 35 of the Defence Works Procedure, were in progress and the petitioner found

that the quality of work, performed by the contractor company, namely, M/S. Surface Tech Construction Company, was not satisfactory. The

predecessor-in-office of the petitioner, dissatisfied with the poor quality of work done by the said construction company, had already made

complaints to the higher authorities and the petitioner also made several complaints to the respondent No. 5 regarding the poor quality of work, but

the petitioner"s complaints failed to yield any positive response from the respondent No. 5. Thereafter, the petitioner wrote letters addressed to

respondent No. 3 requesting him for a high level inquiry into the said matter.

(iii) The respondent No. 7 was posted as Assistant Provost Marshal (hereinafter referred to as "APM"). The APM, who heads the Provost &

Security Unit, has the power and duty of ensuring maintenance of discipline amongst Air Force personnel, preventing and detecting crimes among

service personnel, liaisoning with civil police, other civil and military authorities and also civilian organizations. Provost & Security units are the field

level functionaries of the vigilance organization of Air Force and, as such, enjoy wide powers.

(iv) Consequent upon a complaint made by the Deputy Commissioner, Dibrugarh, in March, 2011, to the petitioner as regards unauthorised use of

red light beacon by the respondent No 7 in the civil area, the petitioner had a discussion with respondent No. 7. This discussion resulted into

heated arguments and the respondent No 7 even threatened the petitioner by saying, ""You don"t know the powers of APM, I can ruin your

career"".

(v) Thereafter, the petitioner wrote, at least, four letters to respondent No. 5 about the insubordinate and improper conduct of respondent No. 7,

but no action was taken against respondent No. 7. The petitioner, then, vide letter, dated 22.06.2011, brought the matter to the notice of the then

AOC-in-C, Eastern Air Command, and, in consequence thereof, respondent No 7 was posted out to a nearby station. The posting out of the

respondent No 7 was neither liked by him nor by the staff of the 19 Provost & Security Unit and the respondent No 5 even expressed his

annoyance on posting out of respondent No. 7 by telling the petitioner, ""M. Singh, you will have to pay heavily for getting the APM removed"".

Thus, the steps, so taken by the petitioner against respondent No. 7, sowed seeds of animosity of the APM Branch (including respondent No. 7

and 8) towards the petitioner.

(vi) The incident, above mentioned, according to the petitioner, is relevant, because the APM staff, including respondent No. 8, had, thereafter,

started victimizing and persecuting the petitioner by concocting evidence and by pressurizing and threatening people to give false evidence against

the petitioner.

(vii) During the period mentioned above, the petitioner was busy in making the station fully operational, because of the rising security threats from a

banned terrorist organization, namely, ULFA. The Air Force Station, Chabua, was visited by many superior officers of the petitioner and a high

level inspection team even appreciated the station and assessed the station as "Average Plus" in operations, maintenance as well as administration.

(viii) Apart from the sub-standard quality of work, done at the said airbase, even the repair works carried out, latter on, by a private contractor,

namely, M/S. Surface Tech Construction Company, on the airfield, was not up to the mark.

(ix) On, thus, finding that even the later repairing works, carried out by the private contractor, M/s. Surface Tech Construction Company, on the

airfield, was not up to the mark, the petitioner communicated this aspect of the matter, too, to the respondent Nos. 4 and 5 and sent to them, along

with his communication, some photographs to prove that the execution of the contract work was not of the required level.

(x) No fruitful result was, however, achieved; but this resulted in damage to, at least, four engines of the said aircrafts causing loss of hundreds of

Crores of rupees to the public exchequer. The petitioner also requested the authorities concerned to order a high level enquiry into the sub-

standard and slow work carried out at the said Air Force Station.

(xi) In course of time, the contractor aforementioned had to be blacklisted and these duties were performed by the petitioner (according to what

the petitioner contends), with all sincerity and not knowing that there was a nexus between the contractor, in question,

and the Air Force Establishment, at Eastern Command, headed by the respondent No. 4. This apart, only after the damage had been caused to the

four engines of the said aircrafts that a team to assess the situation visited the Air Force Station, Chabua, and due to poor work by the said

contractor, the SU 30 Squadron had to be moved out for undertaking the repair work.

(xii) Left with no alternative, the petitioner banned the entry of the contractor concerned to the Air Force Station, Chabua. The actions and steps,

so taken by the petitioner, not only antagonized the Contractor, but also the higher authorities in the Air Force establishment, who had nexus with

the Contractor.

(xiii) Describing as to how the petitioner was systematically harassed, humiliated, victimized, pressurized and persecuted, the petitioner submits that

an anonymous letter, containing allegation against the petitioner to the effect that the petitioner had been sexually exploiting his junior officers''

wives, was allegedly received, on 07.03.2012, by the Headquarter, Eastern Command, without, however, naming any lady in the letter.

(xiv) Closely following the purported anonymous letter, received by Eastern Air Command, on 07.03.2012, about 90 anonymous letters were

allegedly received, on 04.07.2012, at the Eastern Air Command, which were addressed to various officers making allegations of corruption against

respondent Nos. 4 and 5. The respondents contend that the Headquarter, Eastern Command, forwarded the letters to Air Force Headquarter for

consideration and appropriate action and, in the meanwhile, a preliminary investigation, conducted in this regard, revealed, according to the

respondents, that these letters were authored and posted by the petitioner, at Guwahati, on 30.06.2012, when he was going to attend his farewell

dinner at Shillong, but he did not attend the dinner claiming that his wife had, suddenly, fallen ill.

(xv) The petitioner was, then, transferred, on 10.07.2012, from 14 Wing Air Force Station and left the Station for Jaipur accordingly. Soon,

thereafter, on 16.07.2013, a Court of Inquiry, at Jorhat, was convened by respondent No. 4. The ''terms of reference'' of the Court of Inquiry,

which had been ordered into the two sets of anonymous letters, one received against the petitioner and the other received against respondent Nos.

4 and 5, would be taken note of shortly.

(xvi) Suffice it, at this stage, to point out that respondent No. 8 requested the local police to furnish to the respondent No. 8 the call records of

mobile No. 9707791027, belonging to one Ms. ''X'' (name not disclosed for reasons of propriety), from the local police on 07.03.2012 itself, i.e.,

the date on which the purported anonymous letter containing allegation of the petitioner having been sexually exploiting his junior officers'' wives

was claimed to have been received at Headquarter, Eastern Command. Interestingly enough, respondent No. 8 had received the anonymous letter

from the Headquarter, Eastern Command, for the purpose of making discreet enquiry only on 09.03.2012, but he had had already requested for

the call records of telephone No. 9707791027, belonging to Ms. ''X'', from the local police, on 7.03.2012 itself, though the anonymous letter did

not contain name of any lady or any mobile number. The said telephone number belongs to one Ms. ''X'', wife of Wing Commander, J. Singh, with

whom the petitioner was sought to be involved in the Court of Inquiry.

(xvii) The petitioner alleges that respondent No. 8 had, in a preplanned manner, conspired to malign the image and reputation of the petitioner by

concocting a story of improper relationship between the petitioner and the said Ms. ''X'', because the said Ms. ''X'' used to frequently visit the

house of the petitioner to meet the wife of the petitioner inasmuch as the petitioner''s wife was the President, while Ms. ''X'' was the Secretary of

Air Force Wives Welfare Association. The details of the call records were sought for by respondent No. 8 purportedly in exercise of his powers

u/s 108 of the Air Force Act, 1950, though he does not, according to the petitioner, have such an authority. The obtaining of the call records of an

individual by respondent No. 8 amounts to, according to the petitioner, not only a blatant invasion and breach of privacy of a civilian lady, but also

violation of her fundamental rights and is contrary to Section 108 of the Air Force Act and, thus, according to the petitioner, the law of the land

was put at the back burner to, somehow, implicate the petitioner.

(xviii) The materials, placed before this Court, also reveal, submits the petitioner, that Ms. ''X'' has filed a suit, in Allahabad, against the

respondents, for maligning her reputation by eliciting false imputations in the Court of Inquiry. The said Ms. ''X'' has also lodged a complaint with

the National Commission for Women against the respondents for publicly maligning her character and reputation without even making an enquiry.

Further-more, Ms. ''X'' has also filed complaint against the respondents in the Court of Magistrate, Allahabad. Thus, the respondents started

investigation on the purported anonymous complaint, received against the petitioner, on 07.03.2012, by the Headquarters, Eastern Air Command,

and, later on, through a Court of Inquiry.

(xix) According to the petitioner, the Court of Inquiry is mala fide, biased, discriminatory and in violation of the procedure, which has been laid

down by the Ministry of Defence, in its Memorandum, dated 22.11.1992, which requires (points out the petitioner), that whenever the Head of

Department/Chief Executive, on a prima facie examination of an anonymous complaint, takes a decision to pursue further action as to the

verification of facts, mentioned in an anonymous complaint, a copy of the complaint is required to be, first, made available to the officer concerned

for his comments before taking any action. However, no such step was taken by the respondents and, in fact, the copy of the anonymous letter

was supplied to the petitioner only on issuance of charge sheet, dated 26.10.2012, along with copies of the findings of the Courts of Inquiry. This

apart, the Court of Inquiry, according to the petitioner, is also in violation of Rule 156(2) of the Air Force Rules, 1969.

(xx) Explaining how the petitioner has been harassed by the violation of the instructions, contained in the Memorandum, dated 22.11.1992, issued

by the Ministry of Defence, and how the Court of Inquiry suffers from mala fide, bias and discrimination, the petitioner submits that the Court of

Inquiry commenced, w.e.f. 19.07.2012, having the "terms of reference", dated 16.07.2012. In the case at hand, the "terms of reference", as

points out the petitioner, refers to anonymous letters, one containing allegation against the petitioner to the effect that the petitioner had been

maintaining improper relation with the wives of his colleagues and the other containing allegations of corruption against respondents No. 4 and 5.

(xxi) However, while in the case of purported anonymous letter, allegedly received, on 07.03.2012, containing allegations of the petitioner"s

improper relationship with the wives of his colleagues, the Court of Inquiry was required to investigate into the veracity of the allegation made in the

anonymous letter, allegedly received on 07.03.2012, the set of 90 anonymous letters, which contained allegations of corruption against respondent

Nos. 4 and 5, were not required to be investigated by the Court of Inquiry for the purpose of determining as to whether the allegations, made

therein, were true or not; rather, the Court of Inquiry was required to determine as to who the author of the said anonymous letter, making

allegation of corruption against respondent Nos. 4 and 5, was.

(xxii) Thus, points out the petitioner, the respondents adopted double and inconsistent standards, while dealing with the two alleged anonymous

complaints inasmuch as they took the view that the allegations of corruption, made against respondent Nos. 4 and 5, were not required to be

investigated into and what shall be enquired into was the authorship of the said anonymous letters. Thus, without holding any enquiry into the

allegations of corruption, made against respondent Nos. 4 and 5, it was decided that the allegations of corruption, made against the individual

concerned, were untrue and unfounded.

(xxiii) The "terms of reference" were, thus, according to the petitioner, palpably mala fide, biased and discriminatory inasmuch as the "terms of

reference" did not require the Court of Inquiry to determine if there was any truth in the allegations of corruption, which had been made against

respondent Nos. 4 and 5 by the said 90 anonymous letters. Thus, respondent No 4, who was the convening authority of the Court of Inquiry,

became the Judge in his own case, which is against the principle, ""Nemo judex in causa sua"". The Court of Inquiry, under respondent No. 6 as the

presiding officer, accordingly, commenced its proceedings on 19.07.2012.

(xxiv) The Court of Inquiry examined respondent No 7 as witness No 1, who deposed that, while working as APM, 19 P&S (U), he was

informed by his staff that the petitioner had been seen with Mrs. S. Singh during late hours of night in May, 2011. Though the statements, so given

by respondent No. 7, in the Court of Inquiry, were palpably hearsay, his statements were accepted and despite the fact that his statements malign

the reputation of the petitioner, the petitioner was not allowed to participate in the Court of Inquiry, which was in violation of the provisions of Rule

156(2) of the Air Force Rules, 1969, and also Regulation 790 of the Defence Service Regulations (Air Force) apart from being in violation of the

Memorandum, dated 22.11.1992, issued by the Ministry of Defence, Govt. of India.

(xxv) Though respondent No 6, acting as Presiding Officer of the Court of Inquiry, was required to invoke the provisions of Para 790 and Rule

156(2) of the Air Force Rules and give full and effective opportunity to the petitioner to defend himself, the petitioner was not accorded any such

opportunity and, the respondent No. 6, as the Presiding Officer, continued to record, on the subsequent days, the statements of witness Nos. 2 to

6, who were ready to depose against the petitioner as hearsay witnesses.

(xxvi) After examining six witnesses, the provisions of Regulation 790 were invoked and the petitioner was accorded an opportunity to cross-

examine such witnesses, but the statements of these witnesses were already on record, their statements having been recorded in absence of the

petitioner, and, as such, they were bound to support their own respective statements.

(xxvii) Even from the cross examination of respondent No. 8, as witness No. 6, it transpired that the statement of the witness was false and despite

the fact that the answers to the petitioner"s questions were refused, though they were very relevant in the matter, no objection, in this regard, was

entertained by the Presiding Officer even after the request of the petitioner. Conducting of the Court of Enquiry was, thus, unfair, unreasonable and

in violation of the mandatory requirements of law.

(xxviii) The respondent No. 8, as witness No. 6, further produced the written statement of two other witnesses, who were never brought before

the Court of Inquiry; but their statements, recorded by the Air Force Police, were only taken on record and no opportunity was, thus, accorded to

the petitioner to cross-examine these witnesses, whose statements were to be considered by the Court of Inquiry.

(xxvix) Respondent No. 8, as witness No. 6, further produced the call records of Ms. "X" and that of the petitioner and these call records were

accepted by the Court of Inquiry even without the same having been authenticated by the service provider nor any service provider was examined,

as a witness, by the Court of Inquiry.

(xxx) The husband of Ms. "X" was examined as witness No. 17; but he did not make any complaint to the effect that his wife had any improper

relation with the petitioner. Moreover, when asked specifically by the petitioner, the reply of the witness No. 17 clearly revealed that he was never

informed by the Court of Inquiry as regards the alleged relationship of his wife with the petitioner.

(xxxi) The other incident of having posted 90 anonymous letters, addressed to various Air Force authorities, in EAC, was investigated and the

Court of Inquiry directly held the petitioner responsible for posting of the said 90 anonymous letters on the basis of the statement of one witness,

who was a taxi driver, and who had stated that he had been taken to SP"s office and he had made a statement in front of two senior Air Force

Officers. The said taxi driver had been called by Traffic In-charge, Sadar Police Station, Shillong, as well as SP (Crimes), for recording his

statements and, thereafter, he was made to give his statement before the Court of Inquiry.

(xxxii) The petitioner was never provided with the copies of the said 90 anonymous letters. In fact, all the 90 anonymous letters were not even

produced before the Court of Inquiry. More-over, none of the individuals/addressees, who had received such letters, was ever called and

examined to substantiate the fact of their having received such letters.

(xxiii) Further-more, none of the post office staff was examined by the Court of Inquiry to verify the receipt of such a huge number of similar kind

of envelops, in bulk, in a single clearance, meant for the same destination. This gives, according to the petitioner, a clear indication that the story,

concocted by the respondents, was preplanned aiming to harm the petitioner by misusing their powers.

(xxxvi) During the progress of the Court of Inquiry, the petitioner submitted many letters regarding improper manner in which the Court of Inquiry

had been proceeding, the manner in which the statements of witnesses had been recorded and the manner in which their cross-examination was

conducted. However, the respondents/authorities concerned did not pay any heed to the letters, so submitted by the petitioner, though the Court of

Inquiry traveled beyond the "terms of reference" and investigated many other aspects, which did not form part of the "terms of reference" for

which the Court of Inquiry had been convened.

(xxxv) The Court of Inquiry held the petitioner blameworthy in respect of both the sets of anonymous letters.

(xxxvi) During the currency of the Court of Inquiry, which we have referred to above, the petitioner was also sent, as a witness, to record his

statement in another Court of Inquiry, held at 16 Wing Hashimara, regarding incident of suicide of one Corporal Ram Swaroop Bishnoi. It is the

petitioner''s contention that in the latter Court of Inquiry, the petitioner was called initially as a witness, but subsequently, the petitioner was sought

to be blamed for allegedly directing a falsified entry to be made in the Counseling Register even though the petitioner, as Air Officer Commanding,

14 Wing, Air Force Station, Chabua, had no connection with the Counseling process. This has been done, contends the petitioner, in order to

ensure that even if the petitioner is able to withstand one Court of Inquiry, he can be crucified in another, and, in fact, the Court of Inquiry, at

Hashimara, by its findings, dated 06.09.2012, blamed the petitioner for giving an unlawful command.

(xxxvii) In respect of the Court of Inquiry, held at 16 Wing, Hashimara, the allegation is that there is a false back-dated entry made in the

Counseling Register of the Security Section to show that Corporal Ram Swaroop Bishnoi (since deceased) was duly counseled on 17.04.2002

and this false entry was made in the Counseling Register on the order of the petitioner.

(xxxviii) The petitioner claims that even the Court of Inquiry, at Hashimara, smacks of mala fide, because of the manner in which the proceedings

of this Court of Inquiry has also been conducted with predetermined mind to implicate the petitioner. In this regard, the petitioner has also pointed

out that the Court of Inquiry, at 16 Wing Hashimara, has been constituted by officers, who were directly under the chain of command and control

of respondent Nos. 4 and 5, and the common charge-sheet, dated 20.06.2012, aforementioned, is an outcome of the two mala fide Court of

Inquiry and this is ex facie illegal warranting interference of this Court.

(xxxix) So far as the Court of Inquiry, at 16 Wing Hashimara, is concerned, it needs to be pointed out that the Air Force Order, on Counseling,

clearly lays down the responsibilities in the Counseling chain and AOC of a base, such as, the petitioner, is no way connected with this chain and,

therefore, the petitioner was not concerned and had no rational cause to direct any entry to be made in the Counseling Register. This apart, it is

noteworthy that even the then Security Officer, Wg Cdr D.N. Tiwari (witness No. 19), who is alleged to have been directed by the petitioner to

have forged an entry, clearly denied having got any such orders from the petitioner.

(xxxx) The only witness, based on whose statement, the petitioner has been roped in, is one Junior Warrant Officer T.B. Sarkar (Witness No. 4),

who has stated that on 18.06.2012, while leaving the petitioner''s (Witness No. 22) office, he heard the petitioner instructing Wg Cdr D.N. Tiwari

(Witness No. 19) to make an entry in the said register.

(xxxxi) With regard to the above, what can not be ignored is that the said witness No. 4 has also stated before the Court of Inquiry, at 16 Wing

Air Force, Hashimara, that Wg Cdr V.K. Thakur, Stn Adjd (Witness No. 18) and Wg Cdr A. Saxena (Witness No. 21) were also present in the

petitioner''s office at that point of time. However, the said Wg Cdr Thakur has clearly denied that any such instruction was given by the petitioner

to Wg Cdr Tiwari in his presence and Wg Cdr Saxena, too, has denied that in his presence, any instruction, in respect of the Counseling register,

was given by the petitioner to Wg Cdr Tiwari.

(xxxxii) However, without assigning any cogent, plausible and convincing reason, the Court of Inquiry has held the petitioner blameworthy despite

clear statements having been made, at the Court of Inquiry, as indicated hereinbefore, by the person to whom the petitioner had allegedly given

orders and also by persons in whose presence, the order was said to have been given.

(xxxxiii) On the basis of the findings of the said two Courts of Inquiry, the petitioner was issued, on 26.10.2012, a charge-sheet containing 12

charges. The said 12 charges also include the charges, which were beyond the scope of ''terms of reference''. The petitioner, who had not been

earlier supplied with any of the copies of the said 90 anonymous letters, was given, on 26.10.2012, the charge-sheet along with the findings of the

Court of Inquiry, copy of two letters, out of the 90 alleged anonymous letters, even without their envelops having the name of any addressee or any

post office stamp.

2. In order to, however, enter into the soul of the subject-matter of controversy, in the present case, let us pause and look into the case of the

respondents. The respondents'' case is, in brief, thus:

(i) An anonymous letter, alleging sexual exploitation of women, against the petitioner was received, on 07.03.2012, by Headquarters, Eastern Air

Command, and it was decided by the respondent No. 4, who is the competent authority, to enquire into the matter.

(ii) On 07.03.2012 itself, oral instructions were sent to respondent No. 8 from the Headquarters, Eastern Air Command, to carry out a preliminary

investigation and, that is why, respondent No. 8 wrote the said letter to the police, on 07.03.2012 itself, prior to his receipt of the written

instructions, on 09.03.2012, issued, in this regard, to him by the Headquarters, Eastern Air Command. This apart, since respondent No. 8 and

respondent No. 7 had prior knowledge, at Air Force Station, Chabua, of the petitioner''s involvement with the said lady, the call records of the

specific phone number, belonging to the lady, in question, were asked for by respondent No. 8.

(iii) Pursuant thereto, respondent No. 8 forwarded his report to the Headquarters, Eastern Air Command, on 30.03.2012. The report, so

submitted, indicated that the petitioner was involved in exceptional interaction, from his official mobile phone, with Ms. ''X'', on latter''s mobile

phone and that the petitioner had also procured some SIM cards from his subordinate employees to maintain contact with the said lady.

(iv) As the said issue was sensitive, the report was forwarded to the Air Headquarters for consideration and when the petitioner came to know

about this development, the petitioner was, on the request of the petitioner, invited by respondent No. 4, on 24.05.2012, which was more than

21/2 months after the receipt of the anonymous complaint and apprised him of the investigation carried out against him.

(v) On the direction of the competent authority, the petitioner was posted to Advance Headquarter, Western Air Command (Jaipur) w.e.f.

10.07.2012. In accordance with existing practice, petitioner, being Air Officer Commanding of an Air Force Station, was invited to Headquarters,

Eastern Air Command, Shillong, on 29.06.2012, for a farewell dinner. The petitioner traveled by air from Dibrugarh to Guwahati taking his wife

with him. He also started from Guwahati Airport for Shillong in a taxi. However, in the evening, he gave a call expressing his inability to attend the

dinner due to ill-health of his wife. The petitioner returned to Dibrugarh on 30.06.2012.

(vi) The entire matter was deliberated upon and Air Headquarters advised the Eastern Air Commander to order Court of Inquiry to investigate the

contents of the anonymous letter, dated 07.03.2012, and also to identify the author of anonymous letters written against AOC-in-C, EAC, as well

as intent and motive behind writing such a letter. The Court of Inquiry accordingly assembled, on 19.07.2012, and continued its proceeding till

29.08.2012. A total of 50 witnesses were examined by Court of Inquiry. The proceedings have been conducted meticulously in accordance with

Air Force laws.

(vii) On the conclusion of the enquiry, the Court of Inquiry blamed 5 Air Force personnel for various acts of omissions and commissions. They

were provided due opportunity in terms of Para-790 of the Air Force Regulations, 1969, to present their case before the Court of Inquiry. The

Court of Inquiry also found the petitioner blameworthy on 12 counts.

(viii) The Court of Inquiry, according to the respondents, conducted the proceeding strictly in compliance of the various provisions contained in Air

Force Act and the Rules framed thereunder and, thus, the proceedings, in question, its finding as well as all subsequent actions cannot be set aside

and quashed, though the petitioner has so sought for.

(ix) Neither the Office Memorandum, dated 22.11.1992, nor Rule 156 2(2) has any application to the present proceeding conducted by the Court

of Inquiry. The proceedings, at hand, contend the respondents, were required to be conducted under Para by 790 (C) Air Force Regulations,

1969.

(x) Regarding the poor quality of work at Air Force Station, Chabua, the respondents claim that the petitioner himself was in-charge at the final

stage of the said project and he raised complaints about the poor quality of work at the said Air base only after he came to know that a preliminary

investigation had been ordered against him so as to ascertain his improper relationship with the wives of subordinate officers and, thus, the plea of

poor quality of work, carried out at the said Air base, had been raised by the petitioner only to deflect the attention of authority concerned from the

inquiry, which had been initiated against him.

(xi) Moreover, a set of 90 anonymous letters, addressed to various officers, were received, on 04.07.2012, at Headquarters, Eastern Air

Command, containing allegations of corruption against respondent Nos. 4 and 5. The Headquarters, Eastern Air Command, forwarded the letters

to the Air Headquarters for consideration and appropriate action. The preliminary investigation, according to the respondents, indicated that those

letters were also posted by the petitioner, at Guwahati, on 03.06.2012, when he was to attend his farewell dinner, at Shillong, but which he did not

attend claiming that his wife had, suddenly, fallen ill. As regards the Court of Inquiry at 16 Wing, Hashimara, the respondents insisted that it was on

the basis of the materials available before the Court of Inquiry that the findings against the petitioner has been rendered.

3. Countering the case, as set up by the respondents, the petitioner submits that the relevant provision, which govern the present proceeding, are

not contained in Para 790 of the Air Force Regulations, 1969, but Rule 156(2) of the Rules inasmuch as his identity was already known to one and

all from the time the purported anonymous letter was allegedly received, on 07.03.2012, by the authorities concerned.

4. The petitioner had put to challenge, by way of an Original Application, made under Sections 14 and 15 of the Armed Forces Tribunal Act,

2007, in the Regional Bench, Guwahati, the legality, validity and sustainability of the Court of Inquiry, the charge-sheet, which had been issued to

the petitioner, and the disciplinary proceeding, which had been initiated against him. The learned AFT passed an order, on 20.11.2012, refusing to

interfere and examine the merit of the matter on the ground that the proceedings of the Court Martial had already commenced and no interference,

at such a stage, was called for. The ground, so assumed to exist, was, according to the petitioner, wholly non-existent and suffered from non-

application of mind inasmuch as the trial by a Court Martial could have commenced only on convening of the Court Martial and the convening of

the Court Martial could have been done only when the Summary of Evidence was concluded; whereas the stage, when the petitioner had

approached the learned AFT, the proceedings were still at the stage of recording of the Summary of Evidence and, hence, the question of trial by

the Court Martial having commenced had not arisen.

5. Impugning the order, dated 20.11.2012, the petitioner had, initially, come to this Court with the present writ petition, made under Article 226

and 227 of the Constitution of India, and while issuing notice of motion, on 27.11.2012, this Court stayed the ongoing proceedings of the

Summary of Evidence.

6. Upon institution of the present writ proceeding, as the respondents raised a preliminary objection with regard to the jurisdiction of the High

Court in entertaining a writ petition against an order of the learned AFT, this Court, on hearing the learned counsel for the parties concerned,

passed an order, on 22.02.2013, and concluded that under Article 226, there was no legal impediment in entertaining the present writ petition.

Following the conclusion, so reached, this Court issued Rule on 22.02.2013. Since this Court''s order, dated 22.02.2013, has never been

challenged by the respondents, the order has attained finality.

7. After this Court had already held, on 22.02.2013, the present writ petition to be maintainable and Rule had been issued, the respondents herein,

without informing anyone, made, before the learned AFT, a Miscellaneous Application, on 11.03.2013, which gave rise to Misc. Case No. 04/13,

though it was within the knowledge of the respondents that this writ petition would come up, for hearing, on 23.02.2013.

8. Be that as it may, by their Miscellaneous Application, the respondents had contended that the learned AFT had inadvertently erred in

mentioning, or, because of typographical mistake, mentioned, that General Court Martial (in short, ''GCM'') had been convened and that these

observations, made by the learned AFT, were required to be ''rectified'' by making appropriate order by deleting the word ''GCM'' and inserting,

in the place thereof, the expression, ''''further disciplinary proceeding''''.

9. Having received the Misc. Application No. 4/13 aforementioned, the learned AFT, without giving any notice to the writ petitioner, passed an

order, on 13.03.2013, making the corrections as had been sought for by the respondents.

10. Following the order, dated 13.03.2013, passed by the learned AFT, this writ petition has been amended impugning herein and putting to

challenge the subsequent order, dated 13.03.2013, passed, in Miscellaneous Application No. 04/13, by the learned AFT.

11. Situated thus, it is quite clear that the present writ petition, as it stands today, has put to challenge not only the order, dated 20.11.2012,

whereby the learned AFT had refused to decide the Original Application No. 32/12 on merit, but also the order, dated 13.03.2013, passed by the

learned AFT, whereby the learned AFT has claimed to have rectified the order, which it had passed, on 20.11.2012.

12. To put what have been mentioned above a little differently and to be more precise, the petitioner has put to challenge the order, dated

13.03.2013, too, passed by the learned AFT, whereby the learned AFT had, according to its observations, made in its order, dated 13.03.2013,

''inadvertently'' mentioned in its earlier order, dated 20.11.2012, that the proceedings of the General Court Martial had commenced; whereas what

had commenced was a disciplinary proceeding. Is this conclusion, which the learned AFT has expressed in its order, dated 13.03.2013, correct?

This is one of the questions for determination in the present writ petition.

13. We may pause here to point out that the order of correction/rectification, passed by the learned AFT, stands challenged by the petitioner as

illegal on the ground, inter alia, that no leave was obtained from this Court, while this writ petition was pending for hearing, no notice had been

served on the petitioner before the said correction was made, the petitioner was not heard on the respondents'' application for correction of the

learned AFT''s earlier order, dated 20.11.2012, and, further, that the order, dated 13.03.2013, which had been claimed by the learned AFT to be

an order of correction, was based on erroneously assumed facts and contrary to the records.

14. We have heard Mr. A. Choudhury, learned counsel, appearing for the petitioner, and Mr. R. Balasubramaniam, learned Assistant Solicitor

General, appearing on behalf of the respondents.

15. Before dealing with the various contentions, which have been raised by the learned counsel, and determining the merit of such contentions, we

may point out that the respondents have tacitly admitted that the order, dated 20-11-2012, is not in conformity with law inasmuch as it had been

submitted, on behalf of the respondents, at the time of hearing of the preliminary objection, to the effect that this Court may set aside the impugned

order if this Court finds that the impugned order, dated 20-11-2012, passed by the learned AFT, was not a valid order, because of the fact that

the GCM had not commenced at the time, when the order, dated 20.11.2012, had been passed by the learned AFT on wrong assumption that the

GCM had been convened and remand the matter to the learned AFT for adjudication afresh.

16. This Court, however, as observed, in its order, dated 22-02-2013, had declined to interfere with the order, dated 20-11-2012, passed by the

learned AFT, on the ground that it must, first, consider whether this Court has jurisdiction or not to entertain the writ petition and if this Court finds

that it has the jurisdiction, then, this Court would determine if the impugned order, dated 20-11-2012, needs, or does not need, interference by this

Court in exercise of its powers under Article 226 or Article 227. The relevant observations, appearing in this regard, in the order, dated 22-02-

2013, being relevant are reproduced below:

26. Responding to the above submissions, made on behalf of the petitioner, Mr. Sharma, learned ASG, has pointed out that as far as the impugned

order, dated 20.11.2012, is concerned, the same is a final order, which has been arrived at after discussing the case of the petitioner, and, hence,

the petitioner does not have any right to approach this Court either under Article 226 or under Article 227, when a statutory right of appeal has

been provided against the impugned order. At the same time and in the same breath, the learned ASG, as already indicated above, has submitted

that if this Court finds that the impugned order, dated 20.11.2012, passed by the learned AFT, is not in accordance with law, because of the fact

that the GCM had not commenced, when the impugned final order was passed by the learned AFT, this Court may set aside the impugned order

and remand the matter to the learned AFT for adjudication afresh.

27. When a query was made by this Court as to how can this Court interfere with the impugned order if it accepts the respondents'' plea that the

impugned order does not fall within the ambit of this Court''s writ jurisdiction under Article 226 or 227, the learned ASG could give no effective

reply. Nonetheless, the learned ASG insists that the impugned order is a final order and there being a statutory appeal provided against such an

order, the High Court''s jurisdiction, under Articles 226 as well as 227, stands ousted. The conflicting submissions, which have been made on

behalf of the respondents, give an impression that the respondents are, perhaps, of the view that the impugned order is based on non-existent fact

and, is, therefore, illegal, but they are also of the view that since the impugned order is a final order, this Court, at least, does not have the

jurisdiction either under Article 226 or under Article 227 to interfere with the final order, because statutory provisions for appeal against a final

order exist in the AFT Act.

(Emphasis is added)

17. Before proceeding further, let us determine the legality of the impugned order, dated 20-11-2012, passed by the learned AFT. For the

purpose of determining if the impugned order, dated 20.11.2012, passed by the learned AFT, is sustainable in law, we reproduce hereinbelow the

relevant observations, appearing in the impugned order, dated 20.11.2012, aforementioned, passed by the learned AFT:

5. We notice that although the Court of Inquiry submitted its report on 29.08.2012 and the second one on 06.09.2012, the appellant did not

challenge the same immediately. In the meantime, the GCM proceeding has been convened and it started functioning against the appellant as

submitted. That apart, the statutory complaint filed by the appellant is also yet to be disposed of by the Ministry of Defence.

6. In the case of Lt. Gen PK Nath Vs. UOI (OA No. 61012010 dated 20.10.2010), the Principal Bench of Armed Forces Tribunal did not

interfere with findings of Court of Inquiry when the next procedure of the GCM already started. Again in the case of Union of India and others Vs.

Major General Madan Lal Yadav (Retd.), the Apex Court held that trial commences the moment the General Court Martial assembles to consider

the charge and examines wherein they would proceed with the trial. Applying this test also, in the instant case, we find that the trial has already

commenced and there has been much progress in the GCM and hence we do not consider to interfere with the Court of Enquiry report on the trial

at this stage.

6. In view of the above discussion, we refrain from giving any opinion on the merit of the case and in turn, dispose the appeal with the directions

that the respondents, more particularly, respondent No. 1, shall dispose of the statutory complaint of the appellant which must have been

forwarded to them by now by the respondent No. 2 as early as possible preferably within a period of six weeks and communicate the result

thereof to the appellant forthwith.

(Emphasis is added)

18. From a bare reading of the impugned order, dated 20.11.2012, what clearly transpires is that the learned AFT had not only taken the view, in

its order, dated 20.11.2012, that the General Court Martial (in short, GCM) had already commenced, but that much progress had already been

made in the proceedings of the GCM and that it (i.e., the learned AFT) shall not interfere with the report of the Court of Inquiry, when the

proceedings of the GCM had already progressed much; whereas the reality was that the subject-matter of the OA rested, on 20.11.2012, at the

stage of recording of Summary of Evidence (popularly called "S of E") and that neither any formal charge-sheet, as contemplated by Air Force

Rules, 1969, has been served on the petitioner nor till date the GCM has been convened.

19. In fact, it is, now, conceded by the respondents that the GCM has not been convened. Consequently, the question of the GCM having made

progress, as had observed by the learned AFT, did not arise.

20. Let us, now, turn to the scheme of the Air Force Rules, 1969, with regard to investigation and trial. In this regard, what needs to be noted is

that it is Chapter V of the Air Force Rules, 1969, which makes provisions for investigation of charges and trial by a Court Martial.

21. While considering Chapter V, what is of great significance to note is that Chapter V relates to investigation of charges and remand for trial. The

word ''charges'', appearing in Chapter V, means tentative charges, which, in turn, means accusations and not ''charges'', which are formally framed

by the Criminal Courts of ordinary jurisdiction. These ''tentative charges'' are, thus, accusations and it is the Commanding Officer, who has to

decide whether or not the accusations, so made, are to be proceeded with or not.

22. What is of utmost importance to note, while considering the provisions contained in Chapter V of the Air Force Rules, 1969, is that Sub-Rule

(1) of Rule 24 empowers, and, at the same time, makes it a duty of the Commanding Officer to hear every ''charge'' against a person subject to the

Air Force Act in the presence of the accused with liberty given to the accused to cross-examine the witnesses produced against him and also to

call such witnesses as he may require and he may make such statement as may be necessary for his defence.

23. If, upon hearing of the ''charges'' under Sub-Rule (1) of Rule 24, the Commanding Officer is of the opinion that the ''evidence'' does not show

that an offence under the Act has been committed, he must dismiss the ''charges''. The Commanding Officer may also dismiss the ''charge'' if he is

satisfied that the ''charge'' ought not to be proceeded with. If, however, the Commanding Officer is of the opinion that the ''charge'' ought to be

proceeded with, he shall, within a reasonable time, (a) dispose of the case summarily or (b) he may refer the case to the superior air force authority

for sanction u/s 83 or (c) adjourn the case for the purpose of having the ''evidence'' reduced to writing.

24. When the Commanding Officer adjourns the case, in terms of Clause (c) of Sub-Rule (3) of Rule 24, for the purpose of having the ''evidence''

reduced to writing, a Summary of Evidence, is recorded in terms of Rule 24. At the stage of Summary of Evidence, as Rule 24 conceives,

''evidence'' given by the witnesses is recorded with liberty given to the accused to cross-examine the witnesses. The accused also has the right to

make a statement in his defence and may even examine witnesses in defence of his case. The ''evidence'', so collected, and the statements, so

recorded, under Rule 24, is called Summary of Evidence. Rule 24 requires that the Commanding Officer shall consider the Summary of Evidence

and remand the accused for trial by a Court Martial or refer the case to the appropriate superior air force authority for sanction u/s 83 or disposal

u/s 86 or, if he thinks it desirable, re-hear the case and dispose it of summarily.

25. When, however, the accused is remanded for trial, he is served with a charge-sheet, which has to be signed by the Commanding Officer in

terms of Rule 37 and it is Rule 43, which empowers the convening authority to convene a Court Martial. Where the Commanding Officer is not the

officer competent to convene a Court Martial, the competent military authority can convene Court Martial if he is satisfied that the ''charges'' to be

tried by the Court Martial are ''offences'' within the meaning of the Army Act and that the ''evidence'' justifies a trial on those ''charges'' and if he is

not so satisfied, he may order release of the accused or may even refer the case to the superior authority.

26. What is, now, imperative to note is that until the time a convening order is made by a competent military authority, the accused is not put to trial

by a Court Martial. More importantly, though Rules 24, 25 and 26 use the expression ''evidence'', the word ''evidence'' is not really ''evidence'' as

is understood u/s 3 of the Evidence Act and the expression ''charge'', which appears in Rule 24, 25 and 26, is not really a formal ''charge'', which a

Criminal Court frames. The expression, ''charge'', as already indicated, means an accusation, which may be under enquiry or investigation. Though

called as Summary of Evidence, none of the materials collected under Rule 24 is ''evidence'' stricto senso and Summary of Evidence stands on the

same footing as do the previous statements of witnesses, who are examined during the course of investigation, and can be used for the purpose of

contradicting a witness or impeaching the credibility of a witness in terms of Section 145 of the Evidence Act.

27. Thus, the scheme of the Air Force Rules, 1969, if carefully read, clearly reflect that when an accusation, made against a person, subject to the

Air Force Act, 1950, is investigated in terms of Rule 24 or 25, the accusation is called ''charge'' and Summary of Evidence is merely a collection of

the statements of the witnesses recorded during investigation with, however, liberty given to the accused to examine the witnesses and, hence,

Summary of Evidence is not, legally speaking, ''evidence'' as conceived u/s 3 of the Evidence Act.

28. In the case of Courts of ordinary criminal jurisdiction, a person may appear or may be brought before the Court on accusations of his having

committed an offence either on completion of investigation or on completion of enquiry. When an accused is brought before a Criminal Court with

an accusation, there is no formal charge. When, however, an accused is brought before a Court Martial, charge(s), on which the accused is to be

tried, are charge(s) already framed by the Commanding Officer.

29. In a Court Martial, unlike an ordinary Criminal Court, it is not the Court, which frames charges. Though in both the cases, i.e., in a trial by a

Court Martial as also in a trial by an ordinary Criminal Court, the accused is asked if he pleads guilty to the charge or not.

30. From the discussions, held above, it becomes clear that recording of the Summary of Evidence is a stage or part of the investigation procedure

and after recording of the Summary of Evidence, a Court Martial may or may not be convened depending upon the contingencies, which have

been indicated in Chapter V.

31. The learned AFT, therefore, ex facie refused to exercise jurisdiction on non-existent ground by erroneously treating the Summary of Evidence

as a collection of ''evidence'' within the meaning of Section 3 of the Evidence Act and assumed that trial by General Court Martial had already

commenced and had made much progress.

32. Considering the fact that the impugned order, dated 20-11-2012, passed by the learned AFT, was demonstratively illegal and not sustainable

in law, because the foundation of this order was on a wrong assumption of facts and position of law, it could not have been logically extended to

mean, nor could have the respondents, legally speaking, contended before the learned AFT, that the word ''GCM'' had been mentioned by the

learned AFT, in its order, dated 20-11-2012, ''inadvertently'' or because of ''typographical'' mistake. This apart, even the learned AFT could not

have legally held, in its subsequent order, dated 13.03.2013, that the words ''trial'' and ''GCM'', appearing in its earlier order, dated 20.11.2012,

should be taken to have meant disciplinary proceeding inasmuch as mentioning of the word ''GCM'' was only a ''typographical'' error or an

''inadvertent'' mistake in its order, dated 20.11.2012. Moreover, without giving any notice to the petitioner, the order, dated 13-03-2013, could

not have been passed by the learned AFT treating the order, dated 20-11-2012, as an order, wherein ''typographical'' mistake or an ''inadvertent''

error had crept in, while using the word ''trial'' and the word ''GCM'', particularly when the learned AFT had made it clear, in its earlier order,

dated 20.11.2012 (as has already been pointed out above), that the GCM had commenced and made much progress.

33. In addition to what have been pointed out above, we may also take note of the fact that it has been pointed out by Mr. A Choudhury, learned

counsel for the petitioner, with great justification, that an Armed Forces Tribunal cannot review, in the light of Rule 18 of the Armed Forces

Tribunal (Procedure) Rule, 2008, its order if an application for review is made after expiry of a period of 30 days from the date of receipt of the

copy of the order sought to be reviewed.

34. Though there can be no doubt that in the light of the provisions of Section 14(4)(f) of the Armed Forces Tribunal Act, 2007, (in short, AFT

Act), the AFT does have the power to review its own order, an AFT cannot review, in the face of Rule 18 of the Armed Forces Tribunal

(Procedure) Rule, 2008, its order if an application for review is made after expiry of a period of 30 days from the date of receipt of the copy of the

order sought to be reviewed.

35. The above inference is reinforced from the fact that wherever the AFT Act wanted to confer discretion, the same has been clearly specified.

For instance, while imposing limitation on the powers of the AFT to admit an application, Section 22(2) very clearly states that "if the Tribunal is

satisfied that the applicant had sufficient cause for not making the application u/s 21 of the AFT Act, the Tribunal shall not admit such an

application." Similarly, Section 32 confers power to condone delay by laying down that the Supreme Court may, upon an application made, at any

time by the appellant, extend the time within which an appeal may be preferred by him to that Court u/s 30 or Sub-Section (2) of Section 31.

36. There is no provision in the AFT Act or the Rules made thereunder making the Limitation Act, 1963, applicable. There can, therefore, be no

manner of doubt that the learned AFT could not have entertained the application seeking rectification/correction, when the said application had

been made beyond the period of 30 days of the receipt of the copy of the order.

37. Though the above position of law was not even disputed on behalf of the respondents, at the time of hearing of this writ petition, Mr.

Choudhury, learned counsel, to buttress his above submission, relies on two decisions of the Supreme Court in L.S. Synthetics Ltd. Vs.

Fairgrowth Financial Services Ltd. and Another, and Fairgrowth Investments Ltd. Vs. The Custodian, The references, made by Mr. Choudhury,

to the cases of L.S. Synthetics Ltd. (supra) and Fairgrowth Investments Ltd. (supra), are, to our mind, not wholly misplaced and we, therefore,

must hold, and do hold, that the Armed Forces Tribunal, under the scheme of Armed Forces Tribunal Act, 2007, read with the Armed Forces

Tribunal (Procedure) Rules, 2008, cannot take resort to Limitation Act, 1963, for the purpose of condoning delay in making an application for

review.

38. In short, an Armed Forces Tribunal does not have, under the scheme of the Armed Forces Tribunal Act 2007 read with Armed Forces

Tribunal (Procedure) Rules, 2008, the power to entertain a review petition or any proceeding in the nature of review on expiry of 30 days from the

date of receipt of the order, which is sought to be reviewed. Considered in this light, there can be no escape from the conclusion that same as the

order, dated 20-11-2012, even the order, dated 13-03-2013, is wholly without jurisdiction, palpably illegal and is in gross violation of the

principles of natural justice, particularly, when we have noted above that the learned AFT, in the present case, incorrectly recorded, in its order,

dated 13.03.2013, to the effect that the word ''trial'' and the word ''GCM'', which appeared in its earlier order, dated 20.11.2012, were not due

to ''inadvertent'' error or ''typographical'' mistake.

39. We would have had, in the light of the discussions held above, set aside the orders, dated 20-11-2012 and 13-03-2013, passed by the

learned AFT, and we would have, perhaps, remanded the matter to the learned AFT, but we restrain from doing so, because of three reasons.

40. The first reason, as has been pointed out by this Court, in its order, dated 22-02-2013, is that when an accusation of discrimination or

victimization is made, the High Court has, indeed, the power under Article 226 to examine such issues.

41. The second reason for our decision not to remand the matter to the learned AFT is that the learned AFT, in the light of the order, dated,

20.11.2012, read with order, dated 13.03.2013, has clearly reflected its mind that in the face of the materials on record, the petitioner does not

have, at this stage, any case calling for interference by the learned AFT or to invoke jurisdiction of the learned AFT.

42. Coupled with the above, the third reason, which restrains us from remanding the matter to the learned AFT, is that the learned counsel for the

parties, appearing before this Court, have addressed this Court on the merit of the writ petition and having heard the writ petition at length, it would

not be advisable for this Court not to determine the correctness of the rival submissions made before us with regard to the sustainability of the

findings of the Court of Inquiry and the initiation of the disciplinary proceeding against the petitioner by issuing a charge-sheet to the petitioner,

particularly, when the learned AFT, in the light of its subsequent order, dated 13-03-2013, is convinced that the original application, which the

petitioner had filed in the learned AFT, was not to be pursued on merit. Indeed, none of the parties to the present writ proceeding has expressed

that if this Court happens to set aside the learned AFT''s order, dated 20.11.2012, read with order, dated 13.03.2013, this Court may not, in

exercise of its jurisdiction under Article 226 or 227, examine the validity of the order convening Court of Inquiry, the proceedings of the Court of

Inquiry and/or the charge-sheet and/or the disciplinary proceeding initiated against the petitioner.

43. Ordinarily, this Court would not have, in exercise of its power under Article 226 and/or Article 227, entered into the merit of the allegations

and counter allegations made by the parties to the present writ proceeding. However, we have, very reluctantly, taken the view that this writ

petition needs to be decided on merit lest this Court''s reluctance to interfere with the impugned proceedings creates a ''distorted picture'' in the

minds of the Air Force personnel, who stand on the same footing as do the Army personnel, that the persons subject to the Air Force Act, 1950,

are not citizens of India. The Parliament may, under Article 33 of the Constitution of India, restrict or abrogate the fundamental rights of the

members of an armed force; but exercise of this power cannot be read to mean that a person subject to the armed forces act is not entitled to the

benefit of liberal spirit our Constitution or liberty oriented approach of our Constitution.

44. It is, therefore, the right time to recall the Supreme Court''s famous and often quoted observations made in Lt.-Col. Prithi Pal Singh Bedi and

Others Vs. Union of India (UOI) and Others, wherein the relevant observations, appearing in Lt. Col. Prithi Pal Singh Bedi (supra), read thus:

8. Personnel of the Armed Forces are entitled as much as any other citizen to the protection of the Constitution of India. The Supreme Court had

observed over thirty years ago and reiterated regularly thereafter (yet regretfully unheeded by the Respondents) that service in the Armed Forces

can no longer be viewed as a support or adjunct of the Rulers. We cannot do better than to reproduce the following extract from the decision in

Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others,

44. Reluctance of the Apex Court more concerned with civil law to interfere with the internal affairs of the Army is likely to create a distorted

picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our

Constitution that a person by enlisting in or entering Armed Forces does not cease to be a citizen so as to wholly deprive him of his rights under the

Constitution. More so when this Court held in Sunil Batra v. Delhi Administration that even prisoners deprived of personal liberty are not wholly

denuded of their fundamental rights. In the larger interest of national security and military discipline Parliament in its wisdom may restrict or

abrogate such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizens not

entitled to the benefits of the liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of

belonging to the civilised community governed by the liberty-oriented constitution. Personal liberty makes for the worth of human being and is a

cherished and prized right. Deprivation thereof must be preceded by an enquiry ensuring fair, just and reasonable procedure and trial by a judge of

unquestioned integrity and wholly unbiased. A marked difference in the procedure for trial of an offence by the criminal court and the court martial

is apt to generate dissatisfaction arising out of this differential treatment. Even though it is pointed out that the procedure of trial by court martial is

almost analogous to the procedure of trial in the ordinary criminal courts, we must recall what Justice William O''Douglas observed: That civil trial

is held in an atmosphere conducive to the protection of individual rights while a military trial is market by the age-old manifest destiny of retributive

justice. Very expression ''court martial'' generally strikes terror in the heart of the person to be tried by it. And somehow or the other the trial is

looked upon with disfavor. In Reid v. Covert, Justice Black observed at page 1174 as under:

Courts martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying

degrees of command influence. In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command.

Frequently, the members of the court martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings in

short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of

them undoubtedly have, the members of a court martial, in the nature of things, do not and cannot have the independence of jurors drawn from the

general public or of civilian judges.

(Emphasis is added)

45. In the light of our decision that we must decide the writ petition on merit, we, now, turn to the Office Memorandum, dated 22-11-1992, issued

by the Ministry of Defence, Government of India, which is reproduced under:

a. Many anonymous/pseudonymous complaints are false and malicious and very often, such complaints are not a reliable source of information and

enquiries into such complaints do have an adverse effect on the morale of the services. The Government of India are, therefore, of the view, that

generally, no action is warranted on anonymous/pseudonymous complaints against Government Servants and they are to be filed.

b. While as a policy, anonymous/pseudonymous complaints should be ignored and only be filed [....] wherever the Head of the Department/Chief

Executive, on a prima facie examination of such complaints, takes a decision, to pursue further action in this regard as to the verification of the

facts, a copy of all such complaints, petitions, as far as possible, shall first be made available to the officer concerned for his comments and only

thereafter, further action should be taken.

(Emphasis is supplied)

46. From a bare reading of the office memorandum, dated 22-11-1992, it becomes clear that according to the policy decision and guidelines

issued by the Government of India, no action is, generally, warranted on an anonymous complaint against Government servant or pseudonymous

complaint against Government servants and such a complaint shall, ordinarily, be filed. However, when the Head of the Department/Chief

Executive, on a prima facie examination of such a complaint, decides to pursue the complaint as regards the verification of the acts stated therein, a

copy of such a complaint, as far as possible, shall, first, be made available to the officer concerned for his comments and only thereafter, further

action should be taken.

47. In other words, if the Head of the Department/Chief Executive, on a prima facie examination of an anonymous or pseudonymous complaint,

decides to verify the facts stated therein, he shall, first, make available the complaint, as far as possible, to the officer (against whom the complaint

has been made) for the comments of the officer and it is only after having obtained his comments that further action should be taken.

48. Initially, as reflected by the affidavit-in-opposition, which the respondents have filed, the respondents contended that the Office Memorandum,

dated 22-11-1992, aforementioned was not applicable to the Air Force personnel.

49. However, on a pointed query made by this Court, at the time of hearing of the writ petition, Mr. Balasubramaniam candidly conceded that the

guidelines, issued by Office Memorandum, dated 22-11-1992, are as much binding on the Air Force personnel as on the other employees of the

Central Government.

50. Notwithstanding, therefore, the initial contention of the respondents that the guidelines, issued by the Office Memorandum, dated 22-11-1992,

are not binding on the Air Force personnel, the admitted position, now, is that these guidelines are, indeed, binding.

51. Moreover, what cannot be ignored and must not be ignored is the fact that there is no provision in the Statutes, Rules or Regulations applicable

to the Air Force personnel, which lays down as to how an authority, in the Air Force, shall deal with an anonymous or pseudonymous complaint.

This gap can be filled up, and has, admittedly, been filled up, by issuing executive instructions in the form of Office Memorandum, dated

22.11.1992. We may also point out that the principle that a gap, in the enforcement of law, can be filled up by issuance of executive instructions

has not been disputed by the respondents at the time of hearing.

52. In a situation, such as the present one, it is not only difficult but impossible not to hold, and we, therefore, hold, that the guidelines, issued by

the Office Memorandum, dated 22.11.1992, are, indeed, binding on the Air Force personnel.

53. As a precautionary measure, a reference, with regard to the above, may be made to the case of Accountant General, State of Madhya

Pradesh Vs. S.K. Dubey, reported in (2011) 4 SCC 578, wherein the Supreme Court has held, in clear terms, that in absence of any provisions in

the Statutes/Rules, there is no bar in issuing executive order or administrative instruction by the Government. There can, therefore, be no doubt that

it has been the consistent position of law that executive instructions are in application, when the Statutes/Rules are silent so as to fill up the void.

54. In fact, in Maj. Gen. Surendra Kumar Sahni Vs. Union of India (UOI) and Others, the Delhi High Court has pointed out that it has been the

consistent position of the Union of India that the Office Memorandum, dated 22.11.1992, is binding on Armed Forces. This can be clearly

gathered from the observations, made in Maj. Gen. S.K. Sahni (supra), which read thus:

There is no contest on behalf of the respondents in so far as applicability of the aforesaid instructions in connection with taking of cognizance of

anonymous/pseudonymous complaints to defense personnel is concerned.

55. The Delhi High Court has pointed out, in Maj. Gen. S.K. Sahni (supra), that since there was omission on the part of the respondents to act in

compliance with the guidelines/directions, issued by the Office Memorandum, dated 22.11.1992, this omission has vitiated the order convening

Court of Inquiry.

56. Considering the fact that the convening authority, in the case of Maj. Gen. S.K. Sahni (supra), had passed the order convening Court of

Inquiry without, first, complying with the guidelines/instructions issued by the Office Memorandum, dated 22.11.1992, aforementioned, the High

Court, in Maj. Gen. S.K. Sahni (supra), held that such a convening order, being in violation of the Office Memorandum, dated 22.11.1992, is

liable to be set aside. The relevant observations, appearing in Maj. Gen. S.K. Sahni (supra), in this regard, read as under:

...In terms of an Office memorandum M of D ID. No. C-13029/I/VIG-III/91, dated 22-11-1992 (Annexure-G) made applicable to the defense

personnel as well, whenever the Head of Department/Chief Executive, on a prima facie examination of an anonymous/pseudonymous complaint,

takes a decision, to pursue further action as to the verification of facts, a copy of such complaint, as far as possible, is required to be first made

available to the officer concerned for his comments and only thereafter action, if any, is to be taken. In the present case, no copy of any complaint

was furnished to the petitioner in order to invite his comments, if any, before taking decision for convening the Court of Inquiry. Omission on the

part of the respondents to act in compliance with the said requirement of the office memorandum/(Annexure-G), according to the petitioner

renders the order convening the Court of Inquiry vitiated and bad in law. There is no contest on behalf of the respondents in so far as applicability

of the aforesaid instructions in connection with taking of cognizance of anonymous/pseudonymous complaints to defense personnel is concerned. In

the present case, no copy of complaint(s) pertaining to the alleged charges covered under para 3(b) to (f) is claimed to have had been supplied to

the petitioner inviting his comments before making the order convening the Court of Inquiry to investigate into allegations directed against the

petitioner. The admitted position as reflected from the counter affidavit of the respondents is that a copy of complaint containing allegations

covered under Para 3(b) of the counter affidavit was forwarded to the authority concerned along with convening order of the Court of Inquiry and

the petitioner was to be apprised of the same only at the time when the Court of Inquiry was to assemble. The stand so taken by the respondents is

obviously not in conformity with the instructions contained in the aforesaid office memorandum (Annexure-G). The reason for supplying a copy of

anonymous/pseudonymous complaints and affording an opportunity to the official concerned to offer his comments is to enable the authority

concerned to apply its mind to the whole matter before exercising its discretion relating to convening of the Court of Inquiry to investigate into the

allegations against him. Since the convening authority in the instant case appears to have passed the impugned order convening a Court of Inquiry

without furnishing the copy of the complaint(s) in question and affording the petitioner an opportunity of offering his comments, if any, ignoring the

relevant instructions on the subject, there was improper exercise of power on the part of the convening authority in making the impugned order

convening the Court of Inquiry to investigate into the allegations as detailed in para 3(b) to (f) of the counter affidavit and consequently the same is,

liable to be set aside to that extent.

(Emphasis is added)

57. The observations, made above in Maj. Gen. S.K. Sahni (supra), clearly show that it was not even contended, in Maj. Gen. S.K. Sahni

(supra), that the Office Memorandum, dated 22.11.1992, was not applicable. This apart, the Court held, in Maj. Gen. S.K. Sahni (supra), that

omission, on the part of the respondents to act, in terms of the requirement of the Office Memorandum, dated 22.11.1992, rendered the order

convening Court of Inquiry bad in law.

58. What is also important to note is that in Maj. Gen. S.K. Sahni (supra), the copy of the complaint was made available to the officer concerned

along with the convening order of the Court of Inquiry. In the case at hand, the copy of the complaint was not furnished to the petitioner before or

at the time of convening of the Court of Inquiry. It has been pointed out, in Maj. Gen. S.K. Sahni (supra), and we see no reason to disagree, that

the direction to supply the copy of the anonymous complaint to the person concerned is intended to afford an opportunity to the person concerned

to offer his comments so that the authority concerned may make up its mind before directing any investigation.

59. In the circumstances indicated above, the pertinent question is: Whether the copy of the anonymous complaint, which had allegedly been made

against the present petitioner and is claimed to have been received, on 07.03.2012, by the Headquarter, Eastern Air Command, ought to have

been furnished to the petitioner?

60. In order to reach a correct answer to the question posed above, we reproduce hereinbelow the anonymous letter aforementioned:

Jai Hind

We Indians are very proud and respectful towards our Armed Forces.

But from some time many corruption cases, fake encounters and adultery have surfaced in our Armed Forces.

Through our reliable sources it has been found out that Armed Forces Officers are indulging in adultery within their own area. We have reliable

information and clinching evidence that Shri M Singh Air Commodore who is heading Air Base Chabua in Assam, is deeply involved in sexually

exploiting the wives of his colleagues.

No true Indian will allow this exploitation to happen and continue. It is demanded that a thorough, transparent and urgent inquiry should be carried

out and Shri M Singh should be punished for his dirty work.

We want to tell you that we are contacting National Women Commission, Human Right Commission, many women NGO, Newspapers, TV

Media. If you as a head of Indian Air Force is not able to punish Shri M Singh, then other approach will be tried. We will try to raise this question

even in Parliament in budget session.

If any attempt is made to hide or suppress this than result will be very bad and it will be injustice and insult to women of air base Chabua. This will

defame Indian Air Force, because true story will appear in all possible places and platforms. The corrupt Mr. M Singh should be punished for

sexually exploiting wives of his colleagues. He must be awarded an exemplary sentence for his acts.

Please wake up and act.

True and Patriotic Indians.

61. It has been submitted, with considerable force, by Mr. Choudhury, learned counsel, that the policy decision of the Government of India, as

contained in the office memorandum, dated 22-11-1992, was honoured in breach inasmuch as the copy of the complaint, involving the petitioner,

was not furnished to the petitioner and his response was not sought thereto, though the contents of the said complaint implicated the petitioner and

contained imputations, which impaired and damaged the reputation of the petitioner.

62. As indicated above, a bare perusal of the anonymous letter, in question, identify the petitioner as the person against whom the offending

imputations were made. The petitioner was, therefore, entitled to a copy of the complaint and his response ought to have been sought thereto. This

was, however, not done. Why the copy of the said complaint was not furnished to the petitioner, no reason, far less convincing reason, has been

assigned by the respondents nor is there any plausible explanation discernible from the materials on record.

63. It is also not the contention of the respondents that it was not possible to furnish to the petitioner a copy of the said anonymous

letter/complaint.

64. We have, therefore, no doubt in our mind that the respondents have ignored and flouted, deliberately and consciously, the policy decision and

guidelines of the Ministry of Defence, Govt. of India, contained in their Office Memorandum, dated 22.11.1992. The respondents cannot, and

shall not, in the light of the decision in Prithi Pal Singh Bedi (supra), be allowed to escape from the consequences of their omission to furnish a copy

of the said letter/complaint to the petitioner seeking his response thereto, particularly, when the respondents have played hide and seek with this

Court by initially contending that Air Force personnel are not bound by the Office Memorandum, dated 22.11.1992, and, then, conceding, though

might be reluctantly, that the said Office Memorandum is applicable as much to the Air Force personnel as to any other Central Government

employee.

65. Pausing at this stage, for a moment, let us turn to, and take note of, the ''terms of reference'' for the Court of Inquiry, which reads as under:

TERMS OF REFERENCE

1. To investigate and determine the veracity of the contents of the anonymous letter received at HQ EAC on 07 Mar 12 alleging improper

relationship between an Air Force officer and the wives of his colleagues, mentioned therein (copy annexed).

2. To investigate and determine the extent of relationship, if any, between the said AF Officer and wives of his colleagues.

3. To investigate the circumstances in which a large number of anonymous letters were received at HQ EAC on 04 Jul 12.

4. To investigate the motive and the reasons for writing such a large number of anonymous letters to the officers and warrant officers of HQ EAC.

5. To investigate and determine the identity of individual(s) who had forwarded these anonymous letters to HQ EAC.

6. To investigate any other issue associated with or related to the above matters.

7. To record the evidence on oath/affirmation.

8. To apportion blame, if any.

9. To record deliberations and findings.

10. To make recommendations.

66. On careful examination of the ''terms of reference'', what attracts our attention, most prominently, is that according to the ''terms of reference'',

while the Court of Inquiry was required to investigate and determine the veracity of the allegations embodied in the anonymous letter, received

against the present petitioner including the extent of relationship, if any, between the petitioner and the wives of his colleagues, the ''terms of

reference'' did not warrant or require the Court of Inquiry to investigate and determine the truthfulness or veracity of the contents of the anonymous

letter, which contain allegations of corruption against the respondent Nos. 4 and 5. Far from this, what the ''terms of reference'' required the Court

of Inquiry to do in respect of the complaint, containing allegation of corruption against respondent Nos. 4 and 5, was to identity the person, who

had forwarded the said complaint to the Headquarter, Eastern Air Command.

67. The respondents contend that while the preliminary investigation, as against the petitioner, had been directed by the respondent No. 4 as the

competent authority, the direction to constitute the Court of Inquiry to enquire into the allegation of corruption, made against the respondent Nos. 4

and 5, was directed by the Air Headquarter.

68. While dealing with the above aspect of the case, it needs to be noted that except a bald statement that it was on instructions of Air

Headquarter that the Court of Inquiry into the second anonymous complaint be made, nothing has been placed before this Court to show that any

such direction had, indeed, been issued by the Air Headquarter, particularly, when it is not contended that the Court of Inquiry was directed by the

Air Headquarter without making any order in this regard as a matter of practice. The respondents cannot, therefore, escape or be allowed to

escape by contending that the Court of Inquiry on the second anonymous complaint, which had been received against respondent Nos. 4 and 5,

were ordered to be enquired into by the Air Headquarter.

69. What is, however, of immense importance to note, while considering the above aspect of the case, is that nowhere, it has been contended, on

behalf of the respondents, that the Air Headquarter had asked respondent Nos. 4 and 5 or directed respondent Nos. 4 and 5 to convene a Court

of Inquiry on the second anonymous complaint with a caveat that there was no need to enquire into the truth or veracity of the allegations of

corruption, which had been made against respondent Nos. 4 and 5. In fact, such a direction could not have been issued and has, therefore, not

been contended to have been issued by the Air Headquarter to the respondent No. 4. This apart, the question is not as to who had directed the

constitution of the Court of Inquiry.

70. The real question is as to why two different, contradictory, inconsistent and mutually irreconcilable standards or yardsticks were applied to the

facts of the case at hand. Why the Court of Inquiry was not required to determine the truthfulness or veracity of the allegations of corruption made

against the respondent Nos. 4 and 5. How could the Air Headquarter, without investigation and determination of the correctness of allegation of

corruption made against the respondent Nos. 4 and 5, come to the conclusion that their integrity, notwithstanding the allegations made against

them, were beyond doubt, while respondent No. 4 was allowed to set the "terms of reference", when he was, undoubtedly, an interested party

inasmuch as the second anonymous complaint leveled allegations of corruption against respondent No. 4 too. Mr. Choudhury, learned counsel,

has, therefore, great substance, when he submits that respondent No. 4 has become the Judge of his own cause and ought not to have been

expected by the Air Headquarter or Union of India to be impartial and free from bias and/or prejudice.

71. Coupled with the above, it is noteworthy that though the petitioner, right from the inception, has challenged the "terms of reference" as

discriminatory and biased, the respondents have not been able to state one sentence in justification of not making any investigation to determine if

there was any element of truth in the allegations of corruption made against the respondent Nos. 4 and 5. Exoneration of the respondent Nos. 4

and 5 of the allegations of corruption made against them, in the facts and attending circumstances of the present case, cannot, but be described as

biased, discriminatory and arbitrary.

72. We may pause here to point out that the Office Memorandum, dated 22-11-1992 leaves it to the discretion of the Head of the

Department/Chief Executive to decide if an anonymous complaint shall or shall not be pursued and, ordinarily, no anonymous or pseudonymous

letter shall be pursued, the fact of the matter remains that in the case at hand, the authority concerned decided to pursue the complaint. When the

decision was to pursue the complaint, then, there has to be some explanation, convincing and acceptable, as to why no investigation by Court of

Inquiry was directed for the purpose of determining if there was any substance, truth or veracity in the complaint received against the respondent

Nos. 4 and 5.

73. In the backdrop of what have been discussed above, there is considerable force in the contention of the petitioner that the "terms of reference"

are signs of malice and bias and that respondent Nos. 4 and 5, being the highest and second highest authorities in the hierarchy, acted as Judges of

their own cause and even the Air Headquarter allowed them (i.e., respondent Nos. 4 and 5) to decide that the allegations, made against them (i.e.,

respondent Nos. 4 and 5), were false and, thus, inquiry/investigation was allowed to be stage managed and proceed with pre-determined mind and

with the sole object of finishing the service career of the petitioner.

74. When an authority, who is required to act reasonably and impartially, adopts two inconsistent and wholly irreconcilable courses of action, while

dealing with two sets of complaints, such course of action cannot, but be described as ex facie unacceptable and arbitrary.

In such a situation, one cannot help, but regard such unexplained act as an act of arbitrariness and reflective of bias, prejudice and mala fide.

75. While respondent Nos. 4 and 5 have been treated with favour as can be clearly noticed, the complaint against petitioner has been pursued

vigorously without trying to identify as to who the author of the complaint, made against the petitioner, was. The decision in favour of the

respondent Nos. 4 and 5 has already been taken and that is why, it is the identity of the person, who had the audacity to raise his voice against

corruption, which was sought to be suppressed so that none dares to raise his voice against corruption; more so, when there is not one word used

by the Air Headquarter or the Union of India, in the present case, to stand by the respondent Nos. 4 and 5 and submit before this Court, frankly

and boldly, as to why the integrity of respondent Nos. 4 and 5 was considered so much above board that the Air Headquarters was not even

willing to look into the truth or falsity of the allegations of corruption made against the respondent Nos. 4 and 5, while the author of the letter was

to be hunted and punished, no matter whether the allegations made against respondent Nos. 5 and 6 were true or false.

76. Situated thus, one cannot ignore the petitioner''s contention that the origin of the Court of Inquiry lies in mala fide, more particularly, because

the anonymous letters started materializing out of nowhere and in March-April, 2012, discreet enquiries were initiated and, when the petitioner

finally made a complaint, in the month of May, 2012, as regards the sub-standard construction work at Chabua Airbase, the petitioner was posted

to Jaipur in July, 2012, and, within a week, thereafter, a Court of Inquiry was convened by respondent No. 4.

77. Justifying the preliminary investigation, which had been directed against the petitioner, the respondents contend that even before the anonymous

letter was received against the petitioner, on 07-03-2013, by the Headquarter, Eastern Air Command, the APM unit, at the Air Force Station,

Chabua, knew about the unholy relationship existing between the petitioner and Ms. ''X'' and that was why, when instructions were issued orally,

on 07-03-2012, respondent No. 8, immediately, asked for the records of the mobile numbers of the petitioner and Ms. ''X''.

78. To determine the correctness of the above contention of the respondents, when this Court made a pointed query, at the time of hearing of this

writ petition, if the respondents were waiting for the anonymous letter to arrive, on 07-03-2012, at Headquarter, Eastern Air Command, so as to

start the investigation into the alleged unholy relationship, which the petitioner allegedly maintained within the knowledge of the APM Unit, at Air

Force Station, Chabua, with Ms. ''X'', Mr. Subramanium had no reply to offer.

79. In the facts and circumstances, as mentioned hereinabove, one cannot, but hold that the petitioner has considerable force, when he contends

that he was sought to be victimized, because of the reason that respondent Nos. 5 and 8 were annoyed and full of rage against the petitioner,

because the petitioner was instrumental in getting respondent No. 7 transferred out of Air Force Station, Chabua, and respondent No. 4 equally

angry with the petitioner, because the petitioner had the courage to raise his voice against the poor quality of construction and poor quality of

repairing works, which contractors, in question, had carried on.

80. It is noticeably noted that it is not the case of the respondents that the construction work and/or the repairing work, in question, were of the

required standard or quality. Not a word has been said by the respondents, in their affidavit, in justification of the quality of work done by the

contractor and no material has been placed before this Court to show that the quality of works done by the contractors, in question, were up to the

required level. The respondents have tried to duck the question, which was bound to be raised and has been raised, by contending that it was the

petitioner, who was in-charge and responsible for supervision of the said works and that he raised the issue of poor quality of work only when he

came to know about the investigation being carried out against him. This reaction confirms that there is some substance in the petitioner''s

contention that the quality of construction as well as the quality of repairing works, done by the contractors, in question, were poor and not of

required standard or level and he had to, therefore, ban the entry of the contractor into the Airbase leading to blacklisting of the contractor.

81. As regards the Court of Inquiry, which was held at 16 Wing, Hashimara, it needs to be pointed out that in terms of the charge-sheet, dated

20.06.2012, the petitioner is alleged to have given an unlawful command in the sense that he had allegedly directed Wg. Cdr. D.N. Tiwari (witness

No. 19) to make a false entry in the Counseling Register to show that Corporal Ram Swaroop Bishnoi had been counseled on 17.04.2012. In

support of this accusation, respondents rely on the sole statement of Junior Warrant Officer T.B. Sarkar (Witness No. 4).

82. No reason could, however, be assigned, at the time of hearing of this writ petition, by the learned ASG, as to why the Court of Inquiry has not

believed the statements of Wg. Cdr. D.N. Tiwari (Witness No. 19), who has denied to have received any such order from the petitioner, which

the petitioner was alleged to have given. This apart, the learned ASG has also failed to offer any explanation at all as to why the Court of Inquiry

found the statements of Wg Cdr V.K. Thakur, Stn Adjd (Witness No. 18) and Wg Cdr A. Saxena (Witness No. 21) not acceptable, when,

according to the Junior Officer T.B. Sarkar (Witness No. 4), Wg Cdr V.K. Thakur, Stn Adjd (Witness No. 18) and Wg Cdr A. Saxena (Witness

No. 21) were present at the time, when Wg Cdr D.N. Tiwari (Witness No. 19) had been allegedly directed by the petitioner to make a false entry

in the Counseling Register, as indicated hereinbefore, but Wg Cdr D.N. Tiwari (Witness No. 19) has denied to have received any such instruction

or order from the petitioner and Wg Cdr V.K. Thakur, Stn Adjd (Witness No. 18) and Wg Cdr A. Saxena (Witness No. 21) have denied that in

their presence, any direction or order, as alleged to have been given by the petitioner, had actually been given by him.

83. The apparent discomfiture of the respondents in convincingly explaining the reasons leave this Court with no option, but to infer that the

petitioner has substance, when he submits that roping in of the petitioner into the Court of Inquiry, at 16 Wing, Hashimara, smacks of mala fide so

that the petitioner may, if necessary, be roped in if he is able to withstand the Court of Inquiry convened to determine the nature of his relationship

with wives of the officers junior to the petitioner and the authorship of the said set of 90 anonymous complaints. This inference gets reinforced,

when we notice that the Air Force Order, on Counseling, admittedly, lays down the responsibilities in the Counseling chain and the AOC of an

Airbase, as the petitioner was, is, nowhere, connected with this chain of Counseling and it was, therefore, immaterial for the petitioner as to

whether any Counseling had or had not been done or any entry of such Counseling had or had not been made in the Counseling Register.

84. Reverting to the preliminary investigation, it needs to be borne in mind that according to the respondents, on receiving the complaint at Air

Headquarter, Eastern Air Command, on 07.03.2012, respondent No. 4 orally asked respondent No. 8 to make a discreet enquiry, though formal

letter, in this regard, was issued, on 08.03.2012, by Headquarter, Eastern Air Command, and the same was, admittedly, received by the

respondent No. 8 on 09.03.2012.

85. Interestingly enough, though it has been claimed that the oral instructions had been issued, on 07.03.2012 itself, to respondent No. 8 to make

discreet enquiry into the anonymous complaint received against the petitioner, no record of such an oral instruction was produced by the

respondents. This apart and more importantly, a careful reading of the letter, dated 08.03.2012, whereby discreet enquiry was ordered, in writing,

by the Headquarter, Eastern Air Command, it becomes abundantly clear that not even a word has been used by the respondents to indicate in the

letter, dated 08.03.2012, that the said letter was a follow-up action to the oral instructions, which had purportedly been issued, on 07.03.2012, by

the respondent 4 to respondent No. 8.

86. No wonder, therefore, that the letter, dated 08.03.2012, makes no reference to any oral instruction having been issued, on 07.03.2012, to the

respondent No. 8 for making a discreet enquiry. When the letter, dated 08.03.2012, is wholly silent that any instruction had been issued to

respondent No. 8, on 07.03.2012, to conduct a discreet enquiry and when no explanation for this silence has been offered or placed in the

materials on record, the lone conclusion, which one unavoidably reaches, as submitted by the petitioner, is that no such oral instruction had actually

been issued on 07.03.2012 and the story of oral instruction has been concocted to justify the letter, which respondent No. 8 had written, on

07.03.2012, itself, to the Superintendent of Police, Dibrugarh, seeking details of call record of the mobile phones of not only of the petitioner, but

also of Ms. "X".

87. The above inference gets strengthened from the fact that on 12.07.2012, respondent No. 8 wrote a letter to the Superintendent of Police,

Dibrugarh, asking the latter to furnish to the former the call records of certain mobile phones on the ground that a Court of Inquiry was in progress;

whereas the Court of Inquiry was, admittedly, directed on 16.07.2012 and the proceedings of the Court of Inquiry commenced on 17.07.2012.

The letter, dated 12.07.2012, aforementioned, being of great relevance, is reproduced below:

Superintendent of Police Dibrugarh, Assam.

ASSEMBLY OF COURT

OF INQUIRY

Sir,

1. A Court of Inquiry is in progress in the Air Force and there is a requirement to produce certain evidence in front of the above quasi judicial

forum which has been assembled as per the provisions of AIR Force Law. The undersigned being the Provost Marshal as per the Sec. 108 of AF

Act is the authority who requires to produce the same in front of the above COI.

2. It is therefore requested that call details of the following numbers from Jan 11 to Mar 12 may be provided to the undersigned so as to produce

in front of the Court of Inquiry:

(a) 9864230600

(b) 9864297476

(c) 9864765132

(d) 9435002698

(e) 9707791027

3. Your kind co-operation in this regard is highly solicited.

Thanking you.

Yours sincerely

Sd/-

(S Anil Kumar)

Wing Commander

Asstt. Provost Marshal.

88. From a cautious reading of the contents of the above letter, certain indigestible facts emerge on record. With the help of the letter, dated

12.07.2012, respondent No. 8 had asked for records of call details falsely projecting and thereby misleading that Superintendent of Police,

Dibrugarh, that a Court of Inquiry was already in progress; whereas Court of Inquiry was, admittedly, convened by order, dated 16.07.2012, and

the proceedings of the Court of Inquiry commenced on 17.07.2012.

89. Thus, despite the fact that respondent No. 8 has been caught lying, no action has been initiated against him by the respondent No. 4 and/or

respondent No. 5 and not a word of remorse has been expressed by any of the respondents, particularly, respondent No. 8, in this regard.

90. The facts, pointed out above, which, according to us, are indigestible, leave us with no option, but to infer that respondent No. 8

had been informally and discreetly informed that a Court of Inquiry was going to be ordered and, that is why, even before the Court of Inquiry was

called, respondent No. 8 had the audacity to address a letter to the Superintendent of Police, Dibrugarh, asking him to furnish the call details by

falsely projecting that a Court of Inquiry was in progress. No word of defence to this action of the respondent No. 8 could be said by the

respondent No. 8 or by other respondents, when the writ petition was heard. These true and unavoidably noticeable facts give rise to the

inference, which supports the petitioner"s contention, that there was, indeed, a collusion amongst respondent Nos. 4, 5 and 8 as against the

petitioner and, pursuant to this collusive design, actions and steps were taken one after the other against the petitioner. This apart, respondent No.

8, in his letter, dated 12.07.2012, addressed to the Superintendent of Police, Dibrugarh, has claimed to have exercised his power to call for the

records of a civilian lady by resorting to Section 108 of the Air Force Act, 1950.

91. Let us, therefore, pause and look into the provisions of Section 108 of the Air Force Act, 1950, which, we find, reads as under:

108. Provost-marshals. - (1) Provost-marshals may be appointed by the Chief of the Air Staff or by any prescribed officer.

(2) The duties of a provost-marshal to take charge of persons confined for any offence, to preserve good order and discipline, and to prevent

breaches of the same by persons serving in, or attached to, the Air Force.

(3) A provost-marshal may at any time arrest and detain for trial any person subject to this Act who commits, or is charged with, an offence, and

may also carry into effect any punishment to be inflicted in pursuance of the sentence awarded by a court-martial, or by an officer exercising u/s 82

but shall not inflict any punishment on his own authority:

Provided that no officer shall be so arrested or detained otherwise than on the order of another officer.

(4) For the purposes of sub-section (2) and (3), a provost-marshal shall be deemed to include a provost-marshal appointed under the Army Act

or the Navy Act and any person legally exercising authority under him or on his behalf

92. A careful reading of Section 108 makes it clear that this Section (Section 108) embodies the duties of a Provost Marshall, the duties being to

take charge of persons confined for any offence, to preserve good order and discipline and/or to prevent breach of the same by a person serving

in, or attached to, the Air Force. Though a Provost Marshall has the power to arrest and detain, for trial, a person, who commits, or is charged

with, an offence, he does not have the power to ask call details of a civilian. Respondent No. 8 did not, however, mind going beyond his powers,

conferred by Section 108, and yet the remaining respondents remained silent and took no action against respondent No. 8.

93. In fact, in a case of present nature, on having noticed the contents of the letter, dated 12-07-2012, it was the duty of the respondent Nos. 4

and 5 and also the Air Headquarter to initiate appropriate action against respondent No. 8 for going far beyond his powers and for making

palpably a false statement. No such action has been taken against the respondent No. 8 either because he is, as alleged by the petitioner, a part of

the whole collusive design of the respondents to fix the petitioner or, here again, the superior authorities of the Air Force have adopted double

standard by ignoring the conduct, otherwise unbecoming, of an Assistant Provost Marshall. Yet another explanation can be that the superior

authority, in the hierarchy of Air Force, were, as contended on behalf of the petitioner, scared to take against the respondents lest he spills the

beans.

94. Coming to the Court of Inquiry, which was ordered on 16-07-2012, and started its proceeding on 19-07-2013, it needs to be noted that the

Court of Inquiry was convened by respondent No. 4, who appointed his subordinate officers constituting the Court of Inquiry and these sub-

ordinate officers, as rightly pointed out by the petitioner, report to respondent No. 4 as members of the Court of Inquiry, when the allegations, in

the set of 90 anonymous complaints, include the respondent No. 4 himself. Thus, respondent No. 4 not merely became, or was allowed to

become, the Judge of his own cause, but also constituted a Court of Inquiry consisting of officers, who are subordinate to him and are required to

report to him.

95. While dealing with the Court of Inquiry, imperative it is to note, as we have already pointed out above, that the anonymous letter,

which was allegedly received on 07-03-2012, had clearly cast aspersions on the character and service reputation of the petitioner and respondent

No. 7, appearing as witness No. 1 in the Court of Inquiry, stated that he had been informed by his staff that the petitioner had been seen with Ms.

''X'', late at night, during May, 2011. The statement, so made by respondent 7, as witness No. 1, undoubtedly, affected the service reputation of

the petitioner and provisions of Rule 156(2) of the Air Force Rules, 1969, ought to have been followed, but either oblivious of their duty or

deliberately, the Court of Inquiry, knowing fully well that the proceedings of the enquiry were adversely affecting the character and service

reputation of the petitioner, who was an Air Force Officer, continued with the proceedings of the Court of Inquiry, without associating the

petitioner with the enquiry, though he ought to have been so associated, when it was his character and service reputation, which were being

scathed upon.

96. In the light of the contents of the anonymous letter and the "terms of reference", respondent No. 6, acting as the Presiding Officer of the Court

of Inquiry, ought to have taken recourse to the provisions of Rule 156(2) and given full and effective opportunity to the petitioner to defend himself.

However, throwing to the wind, as has been done in this case many a times, respondent No. 6 kept proceeding with the Court of Inquiry by

examining 5 more witnesses, whose statements were against the petitioner.

97. After 6 key witnesses had already been examined, behind the back of the petitioner, at the Court of Inquiry, between 19-07-2012 and 24-07-

2012, provisions of Paragraph 709 of Defence Service Regulations (Air Force) was invoked on 24-07-2012 and the petitioner was accorded an

opportunity to cross-examine the witnesses, who had already been examined behind the back of the petitioner and were, as rightly pointed out on

behalf of the petitioner, bound to support their previous statements recorded in the absence of the petitioner.

98. The petitioner has, therefore, great justification in submitting before this Court that when it was known to the Court of Inquiry that it was the

petitioner"s character or service reputation, which had been at stake, he ought to have been associated with the proceedings of the Court of

Inquiry from its commencement, but the same was deliberately not done so that the witnesses could be made or forced to give statements, in the

absence of the petitioner, in the manner as was required to implicate the petitioner and make them thereby bound to stand by their respective

statements, which were to be recorded, and have been recorded, in the absence of the petitioner. Thus, the mandatory procedural requirement,

which the Court of Inquiry ought to have followed, was, grieved the petitioner, blatantly violated with ulterior motive and pre-determined mind

vitiating thereby the entire proceedings of the Court of Inquiry.

99. Before we turn to what Rule 156(2) of the Air Force Rules, 1969, requires, it is of great relevance to note, for the purpose of this case, the

contents of this Rule, i.e., Rule 156(2), which reads as under:

156. (2) Save in the case of a prisoner of war who is still absent, whenever any inquiry affects the character or service 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 statements 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

service reputation, and producing any witnesses in defence of his character or service reputation.

(Emphasis is added)

100. While it is the contention of the petitioner that Rule 156(2) was applicable to the present Court of Inquiry, the respondents contend that it was

Para 790 of Defence Service Regulations (Air Force), which governed, in the present case, the course of proceedings of the Court of Inquiry, and

that the Court of Inquiry has rightly proceeded in accordance with what Para 790 required. This apart, according to the respondents, even Rule

156(2) has been followed inasmuch as the Court of Inquiry, having recorded the statements of 6 (six) witnesses, allowed the petitioner to cross-

examine these witnesses.

101. The respondents have, however, no answer to the question as to why the petitioner was not associated with the Court of Inquiry from its

commencement, when his identity was known and when it was also known that the inquiry had been ordered on allegations, which were to affect

the character or service reputation of an Air Force officer.

102. Close on the heels of Rule 156(2), we, for the sake of convenience, extract hereinbelow Paragraph 790 of the Defence Service Regulations

(Air Force):

790. Action when Character, etc. of persons is affected

(a) As soon as it appears to the court that the character or professional reputation of an officer or airman is affected by the evidence recorded, or

that he is to blame, the affected person is to be so informed by the court. All the evidence recorded up to that stage is to be read over to the

affected person, and the court is to explain to the person, if so required by him, how, in its opinion, it appears that the officer''s or chairman''s

character or professional reputation is adversely affected, or how he appears to be to blame.

(b) From the time an officer or airman is so informed, in accordance with sub-para (a) above he has the right to be present during all the ensuing

proceedings, except when the court is deliberating privately. The fact that an officer or airman to whom this para applies is or is not present will be

recorded in the proceedings.

(c) The affected officer or airman may, if he so desires, cross-examine any witness whose evidence was recorded prior to the action taken under

sub-para (a) above. He may, likewise, cross-examine subsequent witnesses after their statements have been recorded. He may also request the

court to record the evidence of any witness in his defence. The officer or airman may make any statement in his defence.

(d) In case the officer or airman affected cannot, for any reason be present to exercise his privilege under sub-paras (a), (b) and (c) above, the

court is to inform him by letter (or otherwise as may be convenient) of the reasons why, in the opinion of the court, his character or professional

reputation appears to be affected, or he appears to be to blame. The affected person may make a statement in writing in denial, exculpation, or

explanation. This statement is to be attached to the proceedings, and the court is to endeavour, by examining or recalling witnesses, to accord, to

the affected person, such protection as is intended in sub paras (a), (b) and (c) above.

(e) If, after recording all the evidence, and after taking such action under sub-paras (a) to (d) above as may be called for in the circumstances the

court is of the opinion that an officer or airman is to blame, or that his character or professional reputation, is affected, the entire proceedings are to

be shown to the affected person, and he is to be asked whether he desires any further statement to make. Any such statement is to be recorded,

and fresh points are to be fully investigated by the court.

(f) The findings, and recommendations, if called for, of the court may then be made in accordance with the terms of reference.

(g) An officer or airman to whom sub-para (a), (b), (c) or (d) applies does not have the right to demand that the evidence be taken on oath or

affirmation, or, except so far as the assembling authority or the court may permit, to be represented by a solicitor or other agent.

(h) If the assembling authority attributes blame to an officer or, an airman other than the officer or airman held to blame by the court, or attributes

blame in a way substantially different from that of the court, the proceedings will be returned to the presiding officer of the court (without any

endorsement on the proceedings) by the assembling authority together with a statement from the assembling authority as to why that authority

considers that blame should be attributed to such officer or airman or in a way substantially different from that of the court. This statement will form

part of the court of inquiry proceedings. The court of inquiry will be reconvened and the court will show to the affected person the entire

proceedings and statement of the assembling authority. The court will then obtain from the person any statement that he may wish to make and

record the evidence of any witnesses he may wish to call in cross-examination or of any fresh witnesses. When complete, the proceedings will be

forwarded to the assembling authority together with any additional findings and or recommendations that the court may wish to record. The

assembling authority will endorse its remarks on the proceedings only after completion of action under this para.

(j) If blame is attributed by any authority higher than the assembling authority to an officer or airman other than the officer or airman held to blame

by the court or the assembling authority, the proceedings will be returned to the assembling authority together with such authority''s statement for

action as per sub para (h) The concerned higher authority will endorse its remarks on the proceedings, only after the proceedings are received

back from the assembling authority after completion of action. When forwarding the proceedings to higher authority after taking action under this

para, the assembling authority or any other intermediary authority may append remarks on any additional findings recommendations made.

(k) The same court which originally investigated the particular occurrence will, as far as possible, be reconvened for purposes of sub-paras (h) and

(j). A fresh court is to be assembled only in exceptional circumstances.

(Emphasis is added)

103. Mr. A. Choudhury, learned counsel for the petitioner, has pointed out that Rule 156(2) of Air Force Rules, which pertains to Court of Inquiry

and falls under chapter VI, has been framed by the Central Government by virtue of Section 189(2)(d) of Air Force Act, 1950, which permits the

Central Government to make Rules providing for assembly and procedure of courts of inquiry, the recording of summaries of evidence and the

administration of oaths of affirmation by such courts.

104. Referring to Section 190 of the Air Force Act, 1950, which confers powers on the Central Government to make regulations for all or any of

the purpose of the said Act, other than those already specified in Section 189, Mr. Choudhury, learned counsel, points out that Section 190 of the

Air Force Act, 1950, makes it clear that on and from the date of promulgation of the Air Force Rules, 1969, which came into effect on

24.09.1969, (when the Rules aforementioned were published in the official gazette), Para 790 of the Defence Service (Air Force) Regulations

seized to have affect and, therefore, in the face of the specific provisions embodied in Rule 156(2), as regards the manner in which a Court of

Inquiry shall be conducted, Para 790 does not apply.

105. Apart from the fact that the above submissions of Mr. Choudhury could not be countered by the respondents, it is noteworthy that Section

189 does, indeed, empower the Central Government to make rules with regard to, inter alia, assembly and procedure of courts of inquiry. What

Section 190 seeks to convey can be best understood if Section 190 is carefully read. Section 190 is, therefore, reproduced below:

The Central Government may make regulations for all or any of the purposes of this Act other than those specified in section 189.

106. A cursory glance on Section 190 shows that the Central Government may make regulations for any of the purposes of the Air Force Act,

1950, other than, of course, those, which are specified in Section 189.

107. When Section 190 is read in juxtaposition with Section 189, it becomes clear that the Central Government may make regulations only for the

purposes, which are not specified in Section 189. Except those matters, therefore, which Section 189 deals with, no regulation can be framed.

Viewed from this angle, when Section 189 has already empowered the Central Government to make rules providing for, inter alia, assembly and

procedure of Court of Inquiry, no regulations, in exercise of powers u/s 190, could have been framed by the Central Government.

108. Considering, however, the fact that at the time, when appropriate rules, providing for assembly and procedure of courts of inquiry, had not

been framed, the Central Government could have issued executive instructions to fill up the gap in this area. Para 790 of the Defence Service (Air

Force) Regulations has to be, therefore, read as an executive instruction, which filled up the void that existed at the relevant point of time.

However, with the enforcement of Section 156(2), which provides for assembly and procedure of Court of Inquiry, Para 790 of the Defence

Service (Air Force) Regulations cannot be resorted to, particularly, to a case, where the provisions of Rule 156(2) squarely apply.

109. Coupled with the above, there is, as already indicated above, fundamental distinction between Para 790, on the one hand, and Rule 156(2)

on the other. Rule 156(2) makes it clear that except in the case of a prisoner of war, who is still absent, whenever any inquiry affects the character

or service 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 service reputation and producing any witnesses in defence of his character or service reputation.

110. In the face of sub-Rule (2) of Rule 156 of the Air Force Rule, 1969, there can be no escape from the conclusion that when it is known, in a

case, such as the present one, that the Court of Inquiry has been convened to examine the allegations, made against a person, who is subject to the

Air Force Act, 1950, adversely affecting his character or service reputation, the person, against whom the allegations are made, ought to be

accorded "full opportunity" of being present throughout the inquiry.

111. As against the stage, when Rule 156(2) gets attracted, Para 790 comes into play, when it is not known as to whether the Court of Inquiry is

likely to affect the character or professional reputation of a person. In such circumstances, as and when the Court of Inquiry finds that the character

or professional reputation of an officer or airman is affected by the evidence recorded, or that he is to be blamed, the affected person has to be so

informed by the court, all the evidence recorded, up to that stage, has to be read over to the affected person and the Court of Inquiry has to

explain to the person, if so required by him, how, in the opinion of the Court of Inquiry, the officer''s or chairman''s character or service reputation

was being adversely affected or how he appeared to be blameworthy.

112. Thus, while Para 790 comes into play after materials are brought on record adversely affecting the character or professional reputation of a

person subject to the Air Force Act, 1950, Rule 156(2) comes into play, where the Court of Inquiry is aware of the fact, even before the

commencement of the proceedings of the Court of Inquiry, that the materials, to be brought on record, would affect the character or service

reputation of a person subject to the Air Force Act, 1950, and, in such a case, he must be afforded full opportunity of being present throughout the

proceedings of the Court of Inquiry, i.e., from the commencement of the proceedings until the proceedings end.

113. In order to put it a little differently, Para 790 comes into effect when, during the progress of the proceedings of the Court of Inquiry, the

character or service reputation of a person is found to be adversely affected by the materials brought on record. As and when the person''s identity

surfaces, he has to be associated with the inquiry giving him an opportunity to cross-examine all those witnesses, who might have been examined

before the person concerned was associated with the proceedings of the Court of Inquiry; whereas Section 156(2) speaks of a situation, wherein

the Court of Inquiry has the identity of the person, whose character or service reputation was under attack, and, in such a situation, the person

concerned, such as the petitioner, has to be associated with the proceedings of the Court of Inquiry throughout, i.e., from the beginning to the end.

114. In the case at hand, it was already clear from a bare reading of the anonymous letter, received on 07.03.2012, at the Headquarter, Eastern

Air Command, and which gave rise to the Court of Inquiry, that allegations had been made against character or service reputation of the petitioner

and his character or service reputation was substantially the subject of determination by the Court of Inquiry and he ought to have been, therefore,

associated with the proceedings of the Court of Inquiry from its commencement. This was, however, not done.

115. Concedes the respondents, at the time of hearing, that in the factual background of the present case, the Court of Inquiry ought to have

associated the petitioner with the proceedings of the enquiry from the commencement thereof and given him, thus, full opportunity from the very

inception of the proceedings to be present at the enquiry, hear the witnesses" statements and cross-examine them, but the same had not been

done.

116. To wriggle out of the situation, it has been submitted by Mr. Subramaniam, learned ASG, that mere violation of Rule 156(2) would not vitiate

the proceedings of the Court of Inquiry unless prejudice is shown to have been caused to the petitioner, because of his not being associated with

the proceedings of the Court of Inquiry from its very inception.

117. The question, therefore, is as to whether Rule 156(2) is mandatory or not and, if Rule 156(2) is mandatory, whether its violation would vitiate

the entire proceedings of the Court of Inquiry if no prejudice is shown to have been caused?

118. While the petitioner wants this Court to answer the question so posed in the affirmative, the respondents insist that the provisions, embodied

in Rule 156(2), are not mandatory and even if the provisions, contained in Rule 156(2) are taken to be mandatory, violation thereof would not

vitiate the proceedings of the Court of Inquiry unless it is shown that the violation has caused prejudice to the person concerned.

119. While, in support of his contention that Rule 156(2) is mandatory, Mr. Choudhury, learned counsel, has placed reliance on the decisions, in

Lt. General S.K. Dahiya Vs. Union of India (UOI) and Others, and Maj. Gen. Surendra Kumar Sahni Vs. Union of India (UOI) and Others, the

learned ASG refers to Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja, as authority for his proposition that mere violation

of Rule 156(2) would not, in the absence of prejudice, vitiate the proceedings of the Court of Inquiry.

120. While considering the question as to whether Rule 156(2) is or is not mandatory, we notice that in De Smith"s Judicial Review, 6th Edition, at

para 7, the author has observed, "when a mandatory procedure is set out in a statute, it must be followed."

121. It needs to be borne in mind that Rule 156(2) and Rule 180 of the Army Rules, 1969, are pari materia. The Courts have been consistent that

observance of the provisions of Rule 180 is not a matter of formality, but mandatory requirement and that their compliance, in letter and spirit, is

necessary. Conversely, therefore, non-compliance of Rule 180 would prove fatal to subsequent disciplinary proceeding and administrative action.

122. Reference made, on the above aspect of the case, by Mr. A. Choudhury, learned counsel for the petitioner, to the case of Lt. Gen. S.K.

Dahiya (supra), is not misplaced, wherein the Court has held that Rule 180 is mandatory in character.

123. For the conclusion, so reached, Delhi High Court, in Lt. Gen. S.K. Dahiya (supra), has assigned two reasons. Firstly, because the use of the

expression ""full opportunity must be afforded"", appearing in Rule 180, are a clear enough indication that the rule making authority intended the

provision to be mandatory. The second, but equally weighty reason why Rule 180 must be held to be mandatory is that Rule 180 recognizes the

need for the grant of an opportunity to an officer to defend his character and reputation in any inquiry, where the enquiry is likely to affect his

reputation, because reputation and character of an individual are his most valued possessions and fundamental to his existence as a human being.

The relevant observations, appearing in Lt. Gen. S.K. Dahiya (supra), read as under:

21. Applying the dual test of the object underlying the provision and the language employed in the same, we are of the opinion that Rule 180

(supra) is mandatory in character. We say so for two distinct reasons. Firstly, because the use of the words ""full opportunity must be afforded

appearing in Rule 180 are a clear enough indication that the rule making authority intended the provision to be mandatory. As observed in Lachmi

Narain''s case (supra), the use of words like ''must'' instead of ''shall'' is by itself sufficient for the court to declare that the provision is mandatory in

nature making pursuit of any further enquiry unnecessary. What puts the matter beyond the pale of any doubt is the obligation which the rule casts

upon the presiding officer of the Court to take all such steps as may be necessary to ensure that any person whose character or military reputation

is affected by the enquiry receives notice of the enquiry and fully understands his rights under the rule. It leaves no manner of doubt that the

requirement of affording an opportunity of being present in the enquiry and of cross-examining the witnesses or giving evidence in defense is

mandatory, for otherwise neither the language of the rule would have been what it is nor would the rule have taken that extra care to ensure that

those affected by the inquiry not only get a notice, but fully understand their rights under the Rule.

22. The second but an equally weighty reason why the rule must be held to be mandatory is that the same recognizes the need for the grant of an

opportunity to an officer to defend his character and reputation in any inquiry where the same is likely to be affected. Reputation and character of

an individual are his most valued possessions. They are held in greater esteem than great riches for an injury to ones reputation and character

inflicts a greater suffering than is inflicted by loss of property. Reputation of an individual was recognized by the Supreme Court as a part of

fundamental right to life guaranteed under Article 21 of the Constitution in State of Bihar v. Lal Krishna Advani and Ors. The Court was in that

case dealing with the findings recorded by a Commission of Inquiry without notice to the affected person. Even when the recommendations made

by the Commission did not ipso facto result in any punitive action against those affected by the same, their Lordships held that just because no

proceedings had been initiated against the affected party did not mean that the findings could not be questioned on the ground of violation of the

principles of natural justice. The Court not only recognized the significance of reputation of an individual as one of his most valued possessions, but

declared reputation to be a part of the right to life and observed:

Right to reputation is a facet of the right to life of a citizen under Article 21 of the Constitution. In case any authority, in discharge of its duties

fastened upon it under the law, traverses into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his

say in the matter. In such circumstances right of an individual to have the safeguard of the principles of natural justice before being adversely

commented upon by a Commission of Inquiry is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review.

23. To the same effect is the decision of the Supreme Court in Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni

and Kiran Bedi v. Committee of Inquiry which approved the following passage from an American decision in D.F. Marion v. Minnie Davis 55

American LR 171:

The right to enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good

reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and

property.

24. There is in the light of the above, no gainsaying that what the rule making authority intended to do was to ensure that no prejudice is caused to

a person whose character or military reputation was likely to be affected by reason of the denial of an opportunity to him to participate in the

enquiry, cross-examine the witnesses and to adduce evidence in his defense. It would not, therefore, be unreasonable to say that having regard to

the significance attached to the reputation of an individual whether military or otherwise and his character, the right to participate in an enquiry to

clear his name by cross-examining the witnesses or adducing evidence in his defense may be implicit in the nature of the enquiry and its

implications. So long as the Court of Inquiry proceedings can be used for taking administrative action, as has happened in the instant case, it would

be hazardous to recognize the legality of any such inquiry unless there is an inbuilt mechanism ensuring a fair opportunity to the person affected by

the same to participate in the inquiry and to prove his innocence. Such being the position, Rule 180 simply codifies the said requirement in explicit

terms to avoid miscarriage of justice and complications arising out of a denial of opportunity to the affected person. We have, therefore, no

difficulty in holding that Rule 180 of the Army Rules is mandatory in character.

(Emphasis is added)

124. There is uniformity in the judicial opinion that whenever reputation and character of a person, subject to the Army Act, is likely to be affected,

requirements of law, as embodied in Rule 180, must be complied with and, to this extent, provisions of Rule 180 are mandatory. The reference,

made, in this regard, by Mr. Choudhury, learned counsel for the petitioner, to the case of Lt. Gen. S.K. Sahni v. Chief Of Army Staff & Ors.,

decided on 11.01.2007, is not misplaced, wherein a Division Bench of Delhi High Court, while considering the question of the scope and impact of

Rule 180, observed, at paragraph 26 and 29, thus:

26. Holding of a court of enquiry may not be essential and would be at the discretion of the competent authority but once the authority exercises its

powers to hold such an enquiry and where the enquiry affects or is likely to affect the character or military reputation of a person subject to the

Act, then compliance to the requirements of Rule 180 would be mandatory. The language of the Rule is certain and unambiguous, capable of only

one interpretation i.e. that to afford a full opportunity in terms of this provision is the responsibility of the competent authority. This obligation and

burden is incapable of being shifted at the initial stage. Once an opportunity is afforded at the initial stage then it is for the concerned Officer whose

character or military reputation is being affected or is likely to be affected, to exercise the option in regard to what evidence he wishes to give,

which witnesses he wishes to cross-examine and what defense, if any, he wishes to lead.

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29. To the same effect are the decision of the High Court of Jammu & Kashmir in Vinayak Daultatrao Nalawade v. Core Commander, Lt. Gen.

G.O.C.H.Q. 15 Corps. 1987 Labour Industrial Cases 860 and the Single bench decision of the High Court of G.S. Sandhu Vs. Union of India,

There is, in the light of the above authoritative pronouncements, no gainsaying that Rule 180 (supra) is mandatory in character and that violation of

the same would vitiate the Court of Inquiry.

125. From the above observations made by the Supreme Court, in Lt. Gen. S.K. Sahni (supra), what logically follows is that since the character

and reputation of a person are of immense importance to his existence as a human being, Rule 180 aims at protecting this aspect of a person''s life

and, that is why, Rule 180 requires a person, whose character or reputation is under stake, to be associated with the proceedings of the Court of

Inquiry from beginning to the end and, to this extent, Rule 180 is mandatory and violation thereof has to be treated to have caused prejudice to him

unless it can be shown otherwise by those, who violate the procedural safeguards, which Rule 180 of the Army Rules, 1950, or Rule 156(2) of the

Air Force Rules, 1969, as the case may be, provides to a person, whose character or service reputation is under attack.

126. When reputation of a person is so fundamental to his existence that it has been recognized as a basic human right so as to enable him live with

dignity and it has also been recognized, in the light of the decision in State of Bihar Vs. Lal Krishna Advani and Others, as a part of the

fundamental right guaranteed by Article 21 of our Constitution, one cannot ignore the fact that except to the extent and in the manner this right to

reputation has been restricted, abridged or abrogated by the Parliament by making law, in respect of a member of armed forces, even a person,

subject to the Army Act, 1950, and/or the Air Force Act, 1950, cannot be denuded of his right to protect his reputation from being damaged.

See, in this regard, the cases of Smt. Kiran Bedi Vs. Committee of Inquiry and Another, too.

127. In the case of Ranjit Thakur Vs. Union of India (UOI) and Others, while considering the procedural safeguards, prescribed for a person

subject to the Army Act, the Supreme Court, in the context of Court Martial proceeding, observed thus:

11. The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary

jurisdiction of the court-martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards

should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and

correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute. The oft-quoted words of Frankfurter, J. in

Vitarelli v. Seaton are again worth recalling:

...if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that

procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so.

He that takes the procedural sword shall perish with that sword.

12. ""The history of liberty"" said the same learned Judge ""has largely been the history of observance of procedural safeguards"".

(Emphasis added)

128. It has been contended by the learned ASG that a Court of Inquiry is merely a fact finding body and, hence, non-compliance of Rule 156(2)

would not vitiate the proceedings. While considering this aspect of the case, it needs to be noted that a Court of Inquiry is not essential and

depends on the discretion of the competent authority to convene or not to convene. However, once the authority exercises its power to hold such

an enquiry and whenever the enquiry affects the character or service reputation of a person subject to the Air Force Act,

1950, then, compliance with the requirements of the provisions, embodied in Rule 156(2), would be mandatory.

129. While considering the question of compliance with the procedural safeguards, which Rule 156(2) seeks to provide to a person, whose

character or service reputation is under attack, it needs to be pointed out that the procedure, which Rule 156(2) of the Air Force Act, 1969,

prescribes, is same as the procedure laid down by Rule 180 of the Army Rule, 1954. In substance and effect, both these Rules, in order to

safeguard a person''s character or service or military reputation, require the procedure, prescribed therefore, to be scrupulously followed, for, the

reputation of a person is so fundamental to his existence that it becomes a facet of his right to life to live with dignity guaranteed by Article 21 and

cannot be allowed to be violated. In such a case, one, who convenes the Court of Inquiry, has to ensure scrupulous compliance of Rule 156(2) or

Rule 180, as the case may be; or else, the convening order and the resultant inquiry must perish. To put it pithily, in the words of Frankfurter, J, in

Viteralli v. Saton, 359 US 535;

...if dismissal from employment is based on a defined procedure,..... that procedure must be scrupulously observed..... This judicially

evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that

sword. The history of liberty has largely been the history of observance of procedural safeguards

(Emphasis is added)

130. In the context of the procedural safeguards, which have been provided under Rule 156(2), one may also refer to the observations, made by

Douglas, J, in Joint Anti-Fascist Refugee Committee vs. McGrath, 341 US 123 which read as under:

... It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural

safeguards [are the main assurances] that there will be equal justice under law.

131. Because of the fact that Rule 156 (2) is meant to protect the character and service reputation of a person, the principle, enunciated in the case

of Taylor v. Taylor, reported in [1875] 1 Ch D 426, and followed in Nazir Ahmed v. King Emperor, LR 63 IA 372, shall be applied in the sense,

as observed by the Judicial Committee of the Privy Council,

...Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all....

132. The above principle has been reiterated in several decisions of the Supreme Court including State of Uttar Pradesh Vs. Singhara Singh and

Others, wherein the Supreme Court observed thus:

8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to

do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner

than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been

enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The

power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down.

If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the

protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements

or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him.

(Emphasis added)

133. We may also point out that contrary to what the respondents contend, Rule 156(2) is not restricted by Rule 156(7) inasmuch as the

provisions of these two Rules cover two different aspects and different fields and, therefore, apply to two distinctly different spheres. While Rule

156(2) comes into play the moment a Court of Inquiry commences its proceeding, Rule 156(7) comes into operation, when the Court of Inquiry

concludes its proceedings.

134. It is in the above context that a Division Bench of Delhi High Court, while considering the provisions of Rule 180 of the Army Rules,

observed, in Maj. R.K. Sareen Vs. Union of India (UOI) and Others, as under:

22. A bare reading of Rule 180 shows that the sine qua non for application of Rule 180 in respect of a person in an inquiry is that the inquiry must

affect or likely to affect the character or military reputation of that person. The necessary corollary thereof is that Rule 180 should be applied from

the time when the inquiry affects or is likely to affect the character or military reputation of a person. Where an inquiry is directed against a specific

person Rule 180 should be applied in respect of said person from the very inception of the inquiry for in such a case the character or military

reputation of the said person would be affected or likely to be affected from the very inception of the inception of the inquiry. However where an

inquiry is a general inquiry and not directed against any individual but affects or likely to affect character or military reputation of a person Rule 180

should be applied in respect of such person from the time the inquiry affects or is likely to affect his character or military reputation for in such a

case the character or military reputation of the said person would be affected or likely to be affected only during the course of the inquiry and not

from the very inception of the inquiry. Similarly where an inquiry is directed against a person but affects or is likely to affect the character or military

reputation of another person Rule 180 should be applied in respect of such other person from the time the inquiry affects or likely to affect his

character or military reputation.

(Emphasis is added)

135. Though Mr. Subramaniam has placed reliance on Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja, it is a case

pertaining to departmental enquiry, where the charged employee was not furnished with a copy of the inquiry report. It was, in the light of the

decision, in Union of India Vs. Md. Ramzan Khan,

reported in Union of India and others Vs. Mohd. Ramzan Khan, that the Court refused to interfere with the penalty imposed on the petitioner,

because non-supply of the enquiry report to a delinquent employee would not ipso facto render the proceeding null and void unless the delinquent

employee pleads and proves that non-supply of the report has caused prejudice and miscarriage of justice. The decision, in Haryana Financial

Corporation (supra), is not applicable to the facts of the case at hand, where a number of issues are intrinsically interlinked to each other and form

such a chain that the chain cannot be severed and one aspect of the case cannot be considered extricated from, or independent of, the other. More

so, when Rule 156(2), as already discussed above, aims at protecting the reputation of a person and when the reputation of a person is

concomitant to his right to life to live with dignity within the meaning of Article 21.

136. Though the respondents have also relied on the decision in Union of India (UOI) and Others Vs. Ex. Flt. Lt. G.S. Bajwa, it may be noted that

G.S. Bajwa (supra) was a case, wherein General Court Martial had concluded and sentence of dismissal from service had been challenged on the

ground that he was deprived of his fundamental right of not being permitted to be represented by a counsel of his choice at State expense and, in

the light of the provisions of the Air Force Act, 1950, the Supreme Court held, in G.S. Bajwa (supra), that provisions of the Air Force Act, 1950,

cannot be challenged on the ground that it infringes the fundamental right guaranteed under Article 21; more so, when G.S. Bajwa had failed to

establish as to how he was unable to engage the service of a counsel on account of poverty or indigence. The observations of the Supreme Court,

made, in this regard, in G.S. Bajwa (supra), read,

the provisions of the Act and the Rules were scrupulously followed in the conduct of the Court Martial proceedings and the respondent chose to

defend himself without seeking the help of the defending officer or the friend of the accused. It, therefore, does not lie in his mouth to complain that

he was prejudiced in his defence on account of the State not providing him defence counsel at State expense. The finding recorded by the High

Court is, therefore, wholly unsustainable.

(Emphasis is added)

137. In the present case, the petitioner''s grievance is not merely that he has not been supplied the day-to-day proceedings of the Court of Inquiry.

Far from this, the petitioner''s grievance is with regard to not supplying to him, at the time, when he was associated with the enquiry, copies of

those documents, which formed the basis of the enquiry, so that the expression "full opportunity", as envisaged by Rule 156 (2), is not rendered

lifeless and facile.

138. We are, indeed, disturbed to note that two decisions, namely, Union of India and Others Vs. Himmat Singh Chahar, and Kanwar Natwar

Singh Vs. Director of Enforcement and Another, and Major A.R. Malhotra Vs. Union of India, reported in Mil LJ 2005 J&K 184, were included

in the compilation of the respondents, but have not been cited by the respondents at the time of hearing. Nonetheless, it may be noted that the

decision, in Himmat Singh Chahar (supra), does not apply to the facts of the present case.

139. Mr. Choudhury has rightly pointed out that the practice of filing of judgments in compilation, but not citing, has been disapproved by the

Supreme Court, in Natwar Singh (supra), in the following words:

Practice of inclusion of list of judgments in compilations not cited at the Bar

53. Before parting with the judgment, we are constrained to observe with some reluctance about the recent practice and procedure of including list

of authorities in the compilation without the leave of the Court. In many a case, even the Senior Counsel may not be aware of inclusion of such

authorities in the compilation. In our considered opinion, this Court is not required to consider such decisions which are included in the compilation

which were not cited at the Bar. In the present case, number of judgments are included in the compilation which were not cited at the Bar by any

of the counsel. We have not dealt with them as we are not required to do so. At any rate, all those judgments deal with the procedural aspects and

concern the interpretation for various provisions of the Code of Criminal Procedure applicable to a criminal trial and they are totally irrelevant for

the purposes of deciding the issue that had arisen for our consideration in the present case.

140. Be that as it may, Himmat Singh Chahar (supra) considers the jurisdiction of the High Court under Article 226 over the findings of the

General Court Martial. The decision, in Himmat Singh Chahar (supra), goes in favour of the petitioner inasmuch as it has been clearly held by the

Supreme Court, in Himmat Singh Chahar (supra), that if there is an infraction of any mandatory provisions of the Act prescribing the procedure,

which has caused miscarriage of justice, or that the authority, exercising the jurisdiction had not been vested with jurisdiction under the Act, the

High Court is entitled to exercise its power of judicial review.

141. Similarly, Maj. A.R. Malhotra (supra) is one, where identity of the person involved was not known, when the Court of Inquiry commenced;

whereas, in the case at hand, the person involved stood identified and not a word could be submitted, on behalf of the respondents, as to why

even, on knowing that the petitioner was the one against whom allegations of maintaining improper relationship with the wives of his sub-ordinate

officers had been made and the same formed substantially the subject-matter of enquiry, the petitioner was still kept away from being associated

with the proceedings of the enquiry until the time statements of six key witnesses were brought on record. This apart, and as we would show, the

Court of Inquiry has used the statements of some witnesses recorded behind the back of the petitioner and, that too, without giving the petitioner

any opportunity whatsoever of cross-examining the witnesses.

142. We have pointed out above that respondent No. 4, in the present case, has become the Judge of his own cause violating thereby the

fundamental principle of natural justice, which stands incorporated in the maxim ''Nemo Debet Esse Judex in Propria Sua Causa''.

143. The inference, which we have drawn above, that the manner in which ''terms of reference'' have been set is not only discriminatory, but also

biased, prejudiced and mala fide is, primarily, because of the reason that it could not be explained, on behalf of the respondents, particularly,

respondent No. 4, as to why the ''terms of reference'' did not incorporate the requirement of determining the truthfulness and veracity of the

accusations, which had been made, in the set of 90 anonymous letters, against the respondent Nos. 4 and 5.

144. There is yet another aspect of the present case in the context of Rule 156(2) of the Air Force Rules, 1969, which no court can, perhaps,

ignore.

145. Article 21 guarantees to every person, including a person subject to the Air force Act, 1950, that he would not be deprived of his life except

in accordance with the procedure prescribed by law. The law prescribed must, therefore, be, in the light of the decision, in Mrs. Maneka Gandhi

Vs. Union of India (UOI) and Another, just, fair and reasonable. When the right to reputation is a concomitant to the right to life and this right is so

important that it falls, in the light of the decision, in Lal Krishna Advani (supra), within the ambit of Article 21, one cannot but hold that the right to

reputation is another facet of the right to life inasmuch as a person has the basic right to live with dignity and if the right to reputation is not

protected, it would amount to denial of the right to a human being to live with dignity in a humane society.

146. Whenever, therefore, an attack is made on the character or reputation of a person, the law has always protected such an attack except in the

manner in which an attack, on the character or reputation of a person, in the wisdom of the law maker, is made permissible. In this context, when

we carefully analyse Rule 156(2), we have no hesitation in our mind that if a Court of Inquiry is not made to follow the procedure prescribed by

156(2), whenever Rule 156(2) is applicable, the proceedings of the Court of Inquiry have to be treated as unjust, unfair and unreasonable. The

findings, which may emerge from such a strongly manipulated, continuously controlled, well crafted and carefully guided Court of Inquiry, as in the

present case, cannot be allowed to become the basis of prosecution and has to be struck down; or else, the prosecution would amount to

persecution and would cease to become a facet of administration of justice.

147. No wonder, therefore, that Rule 156(2), same as Rule 180, requires that a person, whose character or service reputation is affected by the

Court of Inquiry, must be associated with the proceedings of the Court of Inquiry throughout, i.e., from the commencement of the proceedings until

the end of the proceedings.

148. In short, the violation of the right, which has been conferred on a person by Rule 156(2), same as Rule 180, must be treated to have vitiated

the Court of Inquiry unless it is shown by the authority concerned that notwithstanding the violation of the provisions of Rule 180 or Rule 156(2),

no prejudice has been caused to the person, who has been proceeded against. The violator of the provisions of Rule 156(2) cannot demand that

prejudice be proved by the person, whose rights have been violated. When the basic right of a person is violated or infringed, it is the person,

violating such a vital right, who has the burden to show that notwithstanding such violation, no prejudice has been caused.

149. In the backdrop of the above position of law, when we revert to the case at hand, we notice that the petitioner made repeated requests for

furnishing him, inter alia, copies of the ''terms of reference'' and copies of anonymous letters, which formed the subject-matter of enquiry; but none

of these materials was furnished to him. Amazingly enough, the respondents'' reply has been that there is no provision to furnish the ''terms of

reference'' and/or to supply copies of the anonymous letters, which form the subject-matter of enquiry.

150. While considering the above contention of the respondents, it needs to be noted that complete and effective meaning would not be possible to

be given to the expression ''full opportunity'', appearing in Rule 156(2), unless the ''terms of reference'', which really determines the scope of

enquiry, are furnished to the person, whose character or service reputation is at stake or unless the materials, which become the basis of enquiry,

are furnished to the person, who is proceeded against. In such a case, it cannot be said that the person, being proceeded against, has been given

full opportunity of defending himself.

151. It is no answer on such a vital issue that no specific provision has been made in the Rules. When the Rule making authority has used the

expression full opportunity, it would, obviously, include that every such material on which an enquiry is based and every such material, which can

make the person concerned know the scope of the enquiry to be made, and every such evidence, which comes on record adversely affecting the

character or service reputation of the person concerned, be furnished to the person concerned in such a manner that he can prepare his defence

and effectively cross-examine the witnesses so that justice is secured.

152. It has been contended by the respondents that the petitioner was allowed to take note of the contents of the materials, which he had sought

for. This answer, given by the respondents, is, to say the least, unfortunate. A person''s reputation is very valuable to him; so valuable that it

becomes fundamental to his existence. Such a basic right, which every human being has, cannot be allowed to be violated merely by saying that

there is no provision for supplying materials, which the petitioner had sought for. It needs to be remembered that a person, whose character or

service reputation is being enquired into by a Court of Inquiry, must be presumed to be innocent and cannot be treated as a condemned person

deprived of his basic rights or else, the expression ''full opportunity'', appearing in Section 156(2), would become meaningless and be rendered

otiose.

153. In the backdrop of the facts, as have already been discussed in the preceding paragraphs of this judgment, it is not difficult to conclude, in the

light of the well-designed, thoughtfully crafted and carefully worded "terms of reference", that the impugned proceedings smack of blatant

discrimination, bias, prejudice and mala fide. This apart, when the manner in which the Court of Inquiry, as we have pointed out, proceeded, leave

no room for doubt that the Court of Inquiry, as contended on behalf of the petitioner, was constituted with a pre-determined mind to nail the

petitioner and it is for this reason that despite knowing that the Court of Inquiry had been ordered chiefly to enquire into the allegations made

against the character or service reputation of the petitioner, the petitioner had been kept away from the proceedings of the Court of Inquiry, six

witnesses were examined in his absence and, then, he was called to cross-examine the witnesses, who were, as rightly contended on behalf of the

petitioner, bound to support their previous statements, which had already been brought on record by the Court of Inquiry.

154. In the absence of any explanation as to why such a course of action, despite the clear provisions of Rule 156(2), had been adopted by the

Court of Inquiry, there can be no escape from the conclusion, and we are bound to conclude, and we do conclude, that the Court of Inquiry has

not been conducted impartially. Far from this, the Court of Inquiry proceeded with a pre-determined mind to bring enough materials against the

petitioner to ensure that the petitioner"s career, as apprehended by the petitioner, is ruined and the allegations of corruption, which had been made

against respondent Nos. 4 and 5, never see the light of the day, are never inquired into and the veracity thereof never determined and/or become

known.

155. Situated thus, when the Court of Inquiry has manifestly acted with bias and adopted steps, which were, undoubtedly, prejudicial to the

petitioner"s character and service reputation, one cannot help but hold that the petitioner had been seriously prejudiced by the manner in which the

Court of Inquiry had been conducted. When the reputation of a person is fundamental to his existence as his basic human right, nobody can be

allowed to trample, with impunity, over such a basic right of a person, who is yet to be condemned, and make thereby suffer the cause of justice. If

this Court does not step forward and stop the actions, which the respondents have been taking in consequence of the proceedings of the Court of

Inquiry, there would be serious miscarriage of justice and the loser would be not only the petitioner, but also the administration of justice.

156. If a Court of Inquiry has to be meaningful, then, the authority concerned must do everything to ensure that the person, proceeded against,

does not suffer from any burden in addition to the burden of preparing his defence, effective cross-examination of the witnesses produced, making

of his own statement and examining witnesses, who may be relevant to his defence.

157. In the case at hand, by means of his letter, dated 14.08.2012, the petitioner had given a list of 42 defence witnesses to respondent No. 6 as

Presiding Officer of the Court of Inquiry, who, in turn, by letter, dated 15.08.2012, required the petitioner to shorten and reduce the number of his

defence witnesses and, in this a situation, the petitioner reduced the number of defence witness to a bare minimum of 13.

158. Coupled with the above, the petitioner also requested respondent No. 6 to examine Ms. "X", as a witness, but this request, too, was turned

down; rather, the petitioner was asked to examine Ms. "X" as a defence witness.

159. When the respondents had obtained the call records of mobile phone of Ms. "X", and brought the same on record so as to implicate the

petitioner, when they had recorded the statements of witnesses imputing improper relationship between the petitioner and Ms. "X" and when the

enquiry conducted was not only to affect adversely the service reputation of the petitioner, but to equally damage the reputation of Ms. "X", we fail

to comprehend as to why respondent No. 6 declined to call Ms. "X" as a witness on behalf of the convening authority. The respondents have not

even realized that the manner in which they have proceeded in the present case, they have already condemned Ms. "X" without hearing as to what

she had to say in her defence inasmuch as she was the best person to clarify as to how she happened to make call, on the mobile number of the

petitioner, or on the mobile numbers of those persons, the use whereof is blamed on the petitioner.

160. Had Ms. "X", on being required to appear, refused to appear, the matter would have, perhaps, been different. Such is, however, not the case

inasmuch as she was not called as a witness to the Court of Inquiry.

161. We fail to understand as to why respondent No. 6 imposed the liability of calling Ms. "X" as a defence witness. There can be no explanation

except that this stand was taken by the respondent No. 6 as the Presiding Officer of the Court of Inquiry in order to ensure that if Ms. "X" appears

in the Court of Inquiry, she will be subjected to cross-examination by the representative of the authority, who had constituted the Court of Inquiry.

162. In order to explain as to why Ms. "X" had not been called as a witness, Mr. Subramaniam, learned ASG, drew, at the time of hearing, our

attention to a letter, whereby it is sought to be shown that the husband of Ms. "X" had requested not to call his wife as a witness in the Court of

Inquiry. In this regard, it is impossible to ignore the fact that the husband of Ms. "X" has clearly stated, in the Court of Inquiry, that he had never

made any complaint against the petitioner.

163. Hence, even if the husband of Ms. "X" had requested not to call his wife as a witness, this could not have been a valid reason for the Court of

Inquiry to restrain from calling Ms. "X" as a witness, when she was the central theme of the entire proceedings of the Court of Inquiry.

164. Moreover, if it was due to the letter of the husband of Ms. "X" that she had not been called as a witness to the Court of Inquiry, why this fact

had not been disclosed to the petitioner, when he had requested Ms. "X" to be called as a witness by the Court of Inquiry. To this uncomfortable

question, too, there is, as usual, no answer from the end of the respondents.

165. In the circumstances of the present case, there can be no doubt that Ms. "X" was the pivot around whom revolved the entire proceedings of

the Court of Inquiry and, therefore, she ought to have been called as a witness by the Court of Inquiry itself so that she could be examined and,

then, if necessary, be cross-examined by the petitioner.

166. The expression, full opportunity, which appears in Rule 156(2), conveys that if no opportunity is afforded or if opportunity provided is not

full, the same would not meet the requirement of Rule 156(2) and, in such a case, Rule 156(2) has to be held as having been violated.

167. We are deeply disturbed by the manner in which the Court of Inquiry chose to proceed and render its finding, when, to our utter surprise, we

notice that the statements of two witnesses, who had never been brought before the Court of Inquiry, have been brought on record and the same

have been used with no opportunity having been provided to the petitioner to cross-examine the witnesses concerned.

168. Similarly, the statements of two other witnesses, who are postal employees, have also been brought on record without calling them before the

Court of Inquiry and without affording any opportunity whatsoever to the petitioner to cross-examine them. These are not mere procedural

irregularities, but denial of fundamental principle of natural justice, which has been held to be, in the light of the discussions held above, as important

as the right to live with dignity.

169. It is the petitioner"s contention that he is being persecuted in a systematic, concerted and vindictive manner for having done his job and duty

as a Air Officer Commanding, particularly, when he requested and, eventually, demanded a high level enquiry into the sub-standard and slow work

of construction by the contractor concerned at one of the most strategically placed, airbase in the country, as the first line of Air defence in the

Eastern Sector, which inducted Sukhoi Su-30MKI Aircrafts. According to the petitioner, the impugned proceedings against the petitioner are the

result of the petitioner"s complaints and his black-listing of the private contractor inasmuch as the contractor has, according to the petitioner, nexus

with the Air Force establishment, Eastern Air Command, headed by respondent No. 4, who convened the Court of Inquiry in concert with other

respondents, who, being either directly, or under the command and influence of, respondent No. 4, had their own axes to grind against the

petitioner.

170. The mala fide origin of the whole Court of Inquiry and the disciplinary proceedings is apparent from a cursory look at the timeline inasmuch as

it was after the petitioner''s complaints that the so-called anonymous letters started materializing out of nowhere and in March-April, 2012, discreet

inquiries were initiated and after the petitioner''s final complaint, in May, 2012, seeking enquiry into substandard construction work at the Airbase,

at Chabua, the petitioner was posted to Jaipur in July and, within a week thereafter, the Court of Inquiry was convened.

171. The charge-sheet, which has been served on the petitioner, is the outcome of the proceedings of the Court of Inquiry and if the proceedings

of the Court of Inquiry are found not sustainable in law for having suffered from manipulation, bias, mala fide and discrimination, the charge-sheet,

which, as indicated hereinabove, being the outcome of the Court of Inquiry, cannot be sustained.

172. We have, now, reached the stage, where we must not ignore the fact that the charge-sheet, which has been served on the petitioner, is logical

extension of the Court of Inquiry or findings of the Court of Inquiry. When we have already recorded, for the reasons, which we have assigned

above, that the findings of the Court of Inquiry, in the light of the ''terms of reference'', was mala fide, it deserves to be noted that mala fide belongs

to the genus of incurable illegalities. When an investigation is actuated by mala fide, such an investigation cannot be allowed to be proceeded

inasmuch as a mala fide, manipulated, controlled and unfair investigation cannot result in justice, but would only be precursor to injustice.

173. The petitioner''s case is not based on procedural irregularities alone or on denial of mandatory procedural safeguards, but the sheet anchor of

the petitioner''s case, as rightly contended by Mr. Choudhury, is based on apparent mala fide on the part of the respondents and manipulation of

the Court of Inquiry, which, rightly contends Mr. Choudhury, are sufficient to vitiate the entire proceedings from the very moment of convening of

the Court of Inquiry until the time the charge-sheet was served on the petitioner and the proceedings thereafter.

174. When the allegation of mala fide becomes apparent and manifest, it becomes an incurable defect and the Court would not, in such a case,

enter into determination of the correctness, truthfulness or otherwise of an accusation made against a person, for, truth, in such a case, would

always remain clouded and when investigation has been unfair, it logically follows that an unfair investigation cannot result into a fair trial. If further

proceedings, in such a blatantly manipulated and outrageously controlled Court of Inquiry are not stopped, justice would be the casualty. Any

reluctance, on the part of this Court, to interfere with the impugned proceedings, would make the cause of justice suffer.

175. It is, in the context of a case of present nature that it has been clearly observed by the Supreme Court, in State of Haryana and others Vs.

Ch. Bhajan Lal and others, that where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously

instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, then, the

whole proceedings are liable to be quashed and no fresh proceedings can be initiated.

176. In the light of the decision, in Bhajanlal (supra), when we come to the case of State of Orissa through Kumar Raghvendra Singh and Others

Vs. Ganesh Chandra Jew, we notice that in Ganesh Chandra Jew (supra), the complaint was, in brief, thus: The complainant is a reputed

pharmacist and a man of means, police personnel entered into his clinic, arrested him alleging that some elephant tusks had been recovered from

his possession and though he was a man of good reputation and standing in the society, he was made to walk on the bazaar roads with handcuffs

and was made to sit under a tree with the intention to give an impression to the general public that he was an illicit trader of elephant tusks. An

advocate requested the officials to allow the complainant to take insulin as the complainant was a diabetic patient, but this request was not heeded

to. On the next day, the complainant was produced in the Court of the SDJM, but before doing so, some elephant tusks were put on the

complainant''s shoulders and photographs were taken. Appellant Nos. 5 and 6 assaulted the complainant severely causing serious injuries and

when the complainant was produced before the SDJM, the complainant was not in a proper state of mind. After having been released on bail, the

complainant got himself medically examined and the complaint was, upon consulting lawyers, lodged.

177. The appellants, in Ganesh Chandra Jew (supra), with the help of an application, made u/s 482 Cr.P.C., questioned, in the High Court, the

legality of the proceedings inasmuch as they were, according to the appellants, protected by Section 197 Cr.P.C. and that in any event, the

complaint was lodged with oblique motive and intention as a retaliatory measure and that there was no material to take cognizance of the case,

particularly, when the seizure and arrest had been done, according to the appellants, pursuant to the discharge of their official duties.

178. Since the High Court took the view that Section 197 was not attracted to the facts of the case and dismissed the application made u/s 482

Cr.P.C., the appellants, aggrieved by the order of the High Court, pointed out, in the Supreme Court, that the alleged occurrence had taken place

on 27.02.1991 and, on the next day, i.e., on 28.02.1991, accused was produced before the Magistrate with prayer for his remand to custody

and, simultaneously, respondent moved a bail application and, while hearing the bail application, the SDJM specifically asked the complainant as to

whether there was any ill-treatment, but the complainant made no complaint of any ill-treatment and, later on, however, the complainant-

respondent got himself medically treated and filed the complaint.

179. Having analysed the facts of the case, the Court, in Ganesh Chandra Jew (supra), observed that when background facts of the case is

considered, the question regarding applicability of Section 197 takes the backseat and that the factual scenario go to show that on having been

produced before the Magistrate and, on being specifically asked if he had been ill-treated, the respondent made no complaint of ill-treatment and

this itself strikes at the credibility of the complaint. Additionally, the Supreme Court pointed out that the doctor examined the complainant, for the

first time, on 12.03.191 and treated the complainant. The Court observed that though Section 482 can be resorted to in very rare cases, the case

at hand was one of such cases, where the principles, indicated by the Supreme Court, in Bhajanlal''s case (supra), that continuance of a proceeding

by way of prosecution would amount to abuse of the process of law if the same is manifestly actuated by mala fide and the proceedings were

accordingly quashed.

180. It is, thus, transparent that mala fide goes to the root of a proceeding or investigation and vitiates thereby the whole of the investigation or

proceeding, because it is as grave as fraud. Similar as fraud goes to the root of an investigation or proceeding and an investigation or proceeding,

which suffers from fraud, cannot be sustained, an investigation or proceeding, which suffers from mala fide, can also not be sustained, for, truth will

not surface from such investigation or proceeding and justice would elude us.

181. The mala fide and bias, which, in the present case, are apparent on the face of the record and which surface from the impugned actions of the

respondents, go to the root of the matter rendering whole of the actions of the respondents completely illegal, void and non est in law. Our findings

that the proceedings are biased and mala fide, which make the whole of the proceedings incurable, force us to hold that such a proceeding must

not be allowed to continue.

182. The facts and circumstances, which we have taken note of including the factum of non-compliance of Rule 156(2) and discrimination, coupled

with the apparent mala fide, bias, both personal and institutional, impel us to hold that the proceedings, which have been impugned in this writ

petition, cannot be sustained and must not be allowed to proceed further.

183. The power and machinery of the Air Force have been clearly abused and misused by the respondents, particularly, by the respondent Nos.

4, 5 and 8. When such are the manipulations, as we have noticed above, conscience of the Court would not permit such manipulated exercise of

power, personal and institutional, to be continued, for, any hesitation, on our part, to interfere, would make one lose faith in the fairness of the

system of administration of justice. The question of truth, surfacing from such a scarred inquiry or investigation, would never arise and justice would

remain a distant dream. Such a dreadful situation, we must not allow to reach and make thereby justice a captive of manipulated, controlled,

mutilated and mala fide process of inquiry and investigation, or else, as we have made it clear earlier, the cause of justice would suffer.

184. In the result and for the foregoing reasons, this writ petition is allowed. The impugned ex-parte order, dated 13.03.2012, passed, in Misc.

Application No. 04/2013 (In OA No. 32/2012), by the learned Armed Forces Tribunal, Regional Bench, Guwahati, is hereby set aside. We

further set aside the order, dated 20.11.2012, passed by the learned Armed Forces Tribunal, Regional Bench, Guwahati, in O.A. No. 32 of 2012,

and, in consequence to the setting aside of the impugned order, dated 20.11.2012, the impugned findings, dated 29.08.2012 and 06.09.2012, of

the Courts of Inquiry, held against the writ petitioner, as well as the charge-sheet, dated 26.10.2012, and all further proceedings consequential

thereto shall stand set aside and quashed.

185. With the above observations and directions, this writ petition stands disposed of. No order as to costs.