

RESERVED**A.F.R**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
COURT NO. 2

O.A. No. 175 of 2014**Thursday, this the 21st day of July, 2016**

"Hon'ble Mr. Justice D.P.Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"

Lt Col Harshwardhan Singh, (IC 56796N), aged about 40 years, son of Sri Chandra Bhan Singh, resident of B-2/152 Sector F Jankipuram, Lucknow.....**Applicant**

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi
2. Chief of Army Staff, Integrated Headquarters of Ministry of Defence, south Block, New Delhi.
3. GOC-in-C, Central Command, Lucknow
4. Lieutenant General Arvind Singh Rawat, Comdt, College of Material Management, Jabalpur (MP)
5. Lieutenant General Dalip Bharadwaj PVSM VSM (Retd), Flat No 902, A Wing Sun Shree Emerald, NIBM Road Kondhwa Pune-411048.....**Respondents**

Ld. Counsel appeared for the Applicant

**- Shri R.K.Verma
Shri V.R.Singh
Advocates**

Ld. Counsel appeared for the Respondents

**- Shri R.K.S.Chauhan
C.G.S.C**

Assisted by Col N.K.Ohri, Col MS(Legal) and Lt Col Subodh Verma, OIC Legal Cell.

Order**(Per Justice Devi Prasad Singh, Judicial Member)**

1. Applicant, who was then serving Army as Lt Colonel has preferred the instant O.A. before this Tribunal under section 14 of the Armed Forces Tribunal Act (In short the 'Act'), being aggrieved by the entry reflecting on his career awarded by the Initiating officer, and the follow-up action.

2. We have heard learned counsel for the Applicant and also learned counsel for the respondents assisted by OIC Legal Cell at prolix length. We have also been taken through the materials on records.

3. CAREER PROFILE OF THE APPLICANT

Lt Col Harshwardhan Singh was commissioned in Indian Army in Army Ordnance Corps in December 1996 and was on Infantry attachment with 9 SIKHLI. He took part in Counter Insurgency Operation Chakravyuh from December 1996 to November 1999. In a joint operation, the applicant and his team killed five militants and recovered huge quantity of arms and ammunition after 13 days battle in Poonch Sector. He received appreciation letter from Brigade Commander for the same. In the year 2002-2003 he took part in Operation Parakram and his Annual Confidential

Reports for both the years were outstanding. In 2007-2008 the officer took part in Exercise Shatrunash and Kamyab and for his contribution he was recommended for Chief of the Army Staff Commendation Card. In the year 2010 while working as Additional Director Ordnance Service, he took part in Command Operation Logistics discussion in 33 Corps and he was once again recommended for Chief of the Army Staff Commendation Card and was given outstanding report in his Annual Confidential Reports. In 2013, while working at Military Intelligence Directorate in Army Headquarters he was awarded Vice Chief of the Army Staff Commendation Card. The applicant is an Ammunition Qualified Officer with 'A' grading and has done Advance Material Management Course and Senior Management Ordnance Course with first division. The applicant has been assessed as outstanding in his ACRs before and after the incident.

FACTS

4. The controversy involved in the instant O.A revolves round the ACRs for two consecutive years i.e. for the period commencing from 7th Dec 2004 to 31st May 2005 and also for the period commencing from 1st June 2005 to 31st May 2006. At the relevant time, respondent no. 4, the Initiating officer, held the office

of Commanding officer of 23, Infantry Division, Ordnance Unit, Ranchi.

It is pleaded by the Applicant that since he had been allotted a new residence to which he had shifted, according to the norms and practices in vogue in the Army, the Applicant had invited all the officers of the Unit including respondent no. 4 with their families for dinner. After the dinner was over, the respondent no.4 called the Applicant and his wife to his office on the pretext of so-called urgent discussion. Being a junior officer, the Applicant could not resist the call to attend the office of respondent no. 4 during working hours.

(a) However, in the counter affidavit, the respondent no. 4 has taken the stand that the Applicant had invited him and his wife for dinner at his home. He has very ingeniously concealed the fact that the dinner was hosted by the Applicant for the entire Unit and not alone for the respondent no. 4 and his wife. This fact has not been denied by the Union of India or by respondents 4 and 5. The respondent no. 4 has, in his counter affidavit, averred that on the next date, he thanked the Applicant and invited him and his wife to his office to enlighten them on certain shortcomings.

(b) To begin with, the Applicant remonstrated with the Commanding officer that Ladies should not be

called in the office but the respondent no. 4 is alleged to have insisted that he wanted to have discussion over some urgent matter vis-a-vis his wife. On the insistence of Commanding officer, the Applicant visited the office of Commanding Officer with his wife during office hours. Upon arrival in his office, the Commanding Officer gave a prolonged discourse telling that the Applicant was not doing well in service and that it was not the way to get the higher rank in the army and that the wife of the officer should interact with the Initiating officer. Thereafter, the Commanding Officer unabashedly made remarks tinged with derogatory and immoral innuendos attended with the proposal to help him get promotion and good posting. He also made certain unbecoming remarks in the presence of his wife, which were not only derogatory but obscene and offensive which militated against the military norms. It is claimed that the Applicant aggrieved by the conduct of the Commanding officer, reported the matter to the then Colonel Anuj Mathur, Col (GS) 23, Infantry Division, who assured to arrange audience with General Officer Commanding. Thereafter, the Applicant called on Major General Dilip Bhardwaj, respondent no. 5, with his wife and his wife also called on Mrs Renu Bhardwaj (wife of GOC) in the

presence of Mrs Anuj Mathur (Wife of Col, GS HQ23 Infantry Division). During his meeting with GOC, the Applicant expressed that he would file statutory complaint against the Respondent no. 4, but he was dissuaded from doing so on the assurance that he would deal with the matter and sort out the dispute by taking appropriate action.

5. The episodal facts further are that the respondent no. 4 was, thereafter, called at the Headquarter, 23 Infantry Division and on his return from there, he again called up the Applicant and menaced him with dire consequences for approaching the GOC against him. the Applicant then communicated the threat extended by the respondent no. 4 to the GOC, who again assured him to do the needful. It is stated that except bald assurances, no tangible action was taken against the respondent no. 4. It is further stated that on account of oral complaint made by the Applicant, the respondent no. 4 was offended, which resulted in certain adverse comments in the ACR and resultant downgrading. It was done with the avowed object of spoiling the future prospects relating to career of the Applicant in the Army. It is also stated that the Applicant also remonstrated that the Respondent no. 4 who was prejudiced, should not be permitted to write

down his ACR for the period in question, but all his efforts fell flat and it did not cut any ice with the superior officers. It is further stated that in view of oral complaint of the applicant, the respondent no. 5 called the Applicant and Respondent no. 4 in his office and delivered oral warning to the respondent no. 4 to be careful/cautious in future sans any action with regard to such serious misconduct on his part. It is also stated that the Applicant got married in Nov 1999 after three years of service and possessed unblemished service record studded with outstanding performance. It is also stated that his entire career was not interspersed with any dispute vis a vis any of his superiors except the present one.

6. Respondent no. 4 also filed a counter affidavit in which he has partially admitted the allegations to the extent that he had called the applicant and his wife in his office during working hours. Para 2 of the affidavit filed by respondent no. 4 being relevant is excerpted below.

"Next day, I thank the applicant for the dinner and told him that since he and his wife were insisting to be educated on the shortcomings, if any, we would like to speak to both of them. He promptly said that his wife is in Unit Lines and for a welfare meet and they can come immediately after that. It is submitted that Division Ordinance Unit is a small unit and the distance

between Welfare Meet venue and my office was not more than 70 yards. The minor unintentional shortcomings were apprised over a cup of coffee to the applicant and his wife in most pleasant manner. Later the Respondent no 5 enquired from me about the above incident and the correct facts were conveyed to him."

7. The aforesaid averments contained in the counter affidavit of the respondent no. 4, it would crystallize, constitutes partial admission that the Applicant and his wife were called in his office. No justification has been offered why a lady, who was a house-wife, was called in the office during working hours by the respondents and what was the urgency for calling a lady to his office. Merely saying that some minor unintentional shortcomings were apprised over a cup of tea does not seem to be a plausible justification unless reasons were brought on record supported by ACR, pen profile etc or notices, if any, which are conspicuous by absence in this case.

8. It is also worthy of notice that the respondent no. 5 also filed a counter affidavit in the present O.A. in which he admitted the fact that the Applicant and his wife had approached him and briefed him with regard to unfortunate incident that had happened in the office of respondent no. 4 in the Ist Week of April 2005. Paras 1, 2 and 3 being relevant are excerpted below.

"1. That I was GOC of 23 Infantry Division from 2004-2006. In first week of April 2005 Major (now Lt Colonel) Harsh Wardhan Singh, applicant, who was posted in 23 Infantry Division Ordnance Unit reported to me the matter (as mentioned in OA 175/2014) the respondent no. 4 i.e (Colonel (Lt General) A.S.Rawat (Retired) called applicant and his wife to his office and gave an indecent proposal that the lady wife can assure higher rank in army and if the applicant wife interacts with the IO i.e Respondent no. 4, then applicant would be graded outstanding in ACR and good postings can be ensured for the applicant.

2. On hearing such report, I had a talk in detail with the applicant, I boosted the morale of the applicant being young in service and assured him that I would call and confront Respondent no. 4 and there was no requirement of getting worried or written complaint since such matter could be handled by me being GOC Division. Accordingly after 2-3 days of his report in April 2005, I had summoned Respondent no. 4 to enquire about the matter and advised respondent no. 4 to refrain from such conduct.

3. That after I had called and confronted Respondent no. 4 i.e Colonel (Now Lt General) A.S Rawat (Retd) the applicant Major (Now Lt Colonel) Harshwardhan Singh again complained to me that Colonel (Now Lt General) A.S.Rawat had threatened him that he would be spoiling his ACR/career since applicant reported the matter to me, I again assured the applicant that he should not worry and be strong in life, I would deal with the problem."

9. From a punctillious reading of the contents of the affidavit of respondent no. 4, it would crystallize that there appears to be no room for doubt that the Applicant had made an oral complaint to General Officer Commanding, 23 Infantry Division, being

aggrieved with the conduct of respondent no. 4 but it is surprising that no action was taken by respondent no. 5 except some verbal dressing down to the respondent no. 4. In our view, a duty was cast on him to ensure that the discipline of Army under his command is maintained at all cost, which we are sorry to say, he failed to do so.

A.C.R- ARMY ORDER

10. Army Order 45 of 2001, which is a complete code in itself, deals with ACR and related actions. Para 3 of the Appendix "G" of the Army Order envisages that in case the officer is concerned with a case or a witness who may have deposed against the reporting officer, then the date on which cognizance was taken, will decide whether the Reporting officer can be debarred or not. Paras 3,4 and 5 of Appendix "G" of the Army order aforesaid being relevant are reproduced below.

"3. When a reporting officer is involved in a disciplinary case the criteria for initiation or endorsement of reports by him will be as under:-

- (a) Are the officers to be reported upon directly concerned with the case? If NOT, reporting officer may not be debarred.
- (b) In case the officers are concerned with the case (eg essential witness) who may have deposed against the reporting officer) then the date on which cognizance was taken, will

decide whether the reporting officer can be debarred or not. The position is further clarified as under:-

- (i) In case the date on which cognizance was taken is before the due date for the CR (s) , reporting officer be debarred.
- (ii) In case the date on which cognizance was taken is on or after the due date of initiation of CR, endorsement by the RO in respect of those CRs which are not initiated and processed to the next level may be debarred. The CRs which are already initiated will be commented upon for any subjectivity by the higher reporting officers..

4. When a reporting officer is involved in a disciplinary case and the criteria specified above is met, the concerned unit or formation should forward a statement of case to seek approval of the MS to debar the reporting officers. The case must contain following details:-

- (a) Brief details of the disciplinary case.
- (b) Involvement of the ratee(s) and the reporting officer.
- (c) Specific dates pertaining to Court of Inquiry or Summary of Evidence with date on which cognizance was taken (including invoking of AR 180)
- (d) Specific recommendations of the senior reporting officers in the channel of reporting.
- (e) Can the report be initiated or endorsed by any one else e.g initiation by RO when IO is involved.

5. In such cases, approval of the MS is to be taken prior to initiation of the report so as to avoid any technical infirmities.”

Keeping command and Control system prevailing in pyramidal structure in the Army

11. Once a subordinate submits a complaint to the superior officer, empowered to take action, then oral communication would suffice and the superior officer having jurisdiction, has to proceed in accordance with Rules. Here in the instant case, it would appear that the Applicant expressed to submit complaint in writing at the very inception but he was dissuaded. In the circumstances, it leads us to only inference that the respondent no 5 did not want any incident of indiscipline to be brought on record under his jurisdiction. He did not realise that his faux pas in not taking notice was fraught with negative consequences to the budding career of a young officer. The stand taken in the counter affidavit filed by respondent no. 1 substantially is that it was for the respondent no. 5 to take action and the Government or for matter of that, Army is not the concerned authority. In our considered view, such stand or argument is misconceived and does not commend to us for acceptance. In the instant case, the responsibility lay on General Officer Commanding 23, Infantry Division to check discipline

and to take immediate action after receipt of complaint, oral or in writing. Of course, he was under a duty to have told the Applicant to submit complaint in writing instead of preventing him to do so. From a bare perusal of the counter affidavit filed by him in the Tribunal, it leaves no manner of doubt that command failure has occurred on the part of the respondent no. 5 in maintaining discipline under his command and control.

12. Reverting to the facts of the case, it would appear that the controversy arose when Applicant was not empanelled for the post from Lt Col to Colonel in the month of Dec 2013 on account of impugned ACR initiated by respondent no. 4. When the Applicant came to know, he lodged a non statutory complaint in Jan 2014. There is specific pleading with regard to incident of April 2005. By the impugned order, the grievance was redressed to the extent that entry as contained in column (d) of hidden portion was expunged. The submission of learned counsel for the Applicant is that whole entry should have been expunged on account of action pertaining to award of entry on account of it suffering from malafide. It is also argued that non statutory complaint submitted in Jan 2014 was decided after inordinate delay in violation of

Policy dated 1st July 2015. According to Para 5 of the policy dated 1st July 2015, the complaint should be submitted within six weeks and be decided expeditiously. It is further submitted that section 56 of the Army Act postulates that in the event of false accusation against any person or subject, a person may be convicted by Court Martial proceedings with imprisonment of five years. For ready reference, section 56 of the Army Act is reproduced below:-

"56. False accusations.- Any person subject to this Act who commits any of the following offences, that is to say.-

- (a) Makes a false accusation against any person subject to this Act, knowing or having reason to believe such accusation to be false; or*
- (b) In making a complaint under section 26 or section 27 makes any statement affecting the character of any person subject to this Act, knowing or having reason to believe such statement to be false or knowingly and willfully suppresses any material facts,*
Shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this act mentioned."

13. Regard being had to the facts and circumstances of the case and also to the provisions cited above, we are of the view that the impugned order suffers from two-fold infirmities; firstly that no finding has been

recorded with regard to allegations of malafide and incident of April 2005 whereby the Applicant's wife was mentally tortured by unparliamentarily/lewd comments and discussions having sexual innuendos. The impugned order is also not sustainable merely because one of the reasons assigned was that the complaint was filed at a belated stage. The respondents should not be oblivious of the fact that the Applicant had articulated his grievance orally at the very inception to GOC 23, Infantry Battalion against respondent no. 4, and in response, the GOC, without taking any action, prohibited the Applicant from placing materials in writing. The finding ought to have been given while deciding the non-statutory complaint studied with serious allegations. Secondly, in case allegations were false, the applicant should have been court-martialled under section 56 of the Act.

14. It is submitted that Court of Inquiry was held on anonymous complaint with regard to incident of April 2005 but this being old one; no finding was recorded on merit. It is strange and passes comprehension that in a case where G.O.C, 23 Infantry Division minces no words and admits that the Applicant had verbalised his grievance, still no fact finding enquiry was held and the matter was dumped and relegated to the background.

There is no gain-saying that the respondents 1, 2 and 3 have shifted the burden on respondent no. 5 and shirked the responsibility to proceed in accordance with law. Why only part of ACR was expunged is not understandable when the allegations of mala-fides based on Applicant's complaint seem to be on record. If Initiating officer's assessment of paragraph 24 (d) on the grounds of inconsistency, merits interference and is expunged, then the question that comes up for consideration is whether entire ACR should be expunged and whether case of malafide is made out or not.

15. The respondent Nos. 1 to 3 has stated that no adverse remark is reflected in the pen-picture and in the box, '8' was awarded to the applicant on merit. He also stated that inspite of involvement of wife, the Applicant kept mum for so many years without voicing any grievance against the respondents 4 and 5. It is also stated that even if entries are expunged, no benefit would accrue to the Applicant and there is no bias or malafide since pen-picture well appreciates the Applicant relevant service tenure. It is also submitted that there cannot be judicial review of the ACR granted by the competent authority. It is also submitted that the respondent no 5 was the responsible officer to hold

inquiry in lieu of oral complaint submitted by the applicant with regard to incident that had happened in the office of respondent no. 4 but he did not take any action. It is also submitted that the grouse advanced by the Applicant does not make out a case for interference or for judicial review.

INTERIM ORDER

16. During the course of hearing, keeping in view the admitted facts on record, the Tribunal had passed an interim order dated 24 Sept 2015 whereby respondents 1 to 3 were directed to hold an inquiry with regard to incident that had happened in the office of respondent no. 4 wherein the respondent no.4 had used derogatory language in the presence of the wife of the Applicant. Being aggrieved by the order, the respondents 1 to 3 preferred a writ Petition in the Lucknow Bench of Allahabad High Court which was heard by learned Single Judge after taking into reckoning the Apex Court decision reported in **(2015) 6 SCC 733, Union of India & Ors v Major General Shri Kant Sharma & Anr** allowed the writ petition and quashed the interim order on the ground that the Tribunal lacked jurisdiction to pass such orders suo motu in the absence of any application or prayer made

therein. The relevant portion of the Judgment of the High Court being relevant is reproduced below.

"This court has gone through the judgment of the Supreme Court reported in (2015) 6 SCC 773, Union of India & Ors. Vs Major General Shri Kant Sharma & Anr, and does not find anything therein so as to bar the instant writ petition against an interlocutory order of the Tribunal. The question considered therein was as regards maintainability of the writ petition under Article 226 of the Constitution against the final order of the Tribunal in view of the statutory remedy of appeal as provided before the Supreme Court under Section 30 of the Act, 2007.

This writ petition raises certain issues relating to the jurisdiction of the Tribunal and the exercise of such jurisdiction as vested in it by the Act, 2007. The Tribunal has been constituted under the Act, 2007. It can only exercise the jurisdiction vested upon it under the said Act. Section 14 of the Act 2007 very categorically mentions the jurisdiction vested upon it in addition, of course, to its jurisdiction under section 15 which is not attracted herein. It states that save as otherwise expressly provided therein the Tribunal is vested with all the jurisdiction, powers and authority exercisable immediately before the appointed day by all courts, except the Supreme Court or a high Court exercising jurisdiction under Article 226 and 227 of the Constitution of India in relation to all service matters. Thus, the Tribunal does not exercise the jurisdiction exercisably by the Supreme Court or the High Court under Article 226 or 227 of the Constitution of India in relation to such service matters. The subject matter of the original application before the Tribunal was the validity of two ACRs relating to 2005-06 awarded to the applicant.

In this context certain allegations of malafide were made against the respondent No. 4 therein i.e. Sri Rawat. The Tribunal had jurisdiction to consider the validity of the action impugned before it and in that context to also consider the allegations of mala fide, but in the absence of any prayer either, final or interim, for getting an inquiry held in respect to the allegations/complaints against the respondent No. 4 therein the Tribunal should not have issued such a direction, specially at the interim stage, as the applicant himself has stated in the original application that he does not require any interim relief. The directions issued by means of the impugned order dated 24.9.2015 are beyond the scope of the original application and the relief claimed therein. The question as to whether even if such a relief was claimed, the same could be considered and granted by the Tribunal, is left open for consideration in some other case. While the court understands the anxiety and feelings of the Tribunal as expressed in the impugned order, it is unable to sustain the directions given by it, except to the extent that it could have summoned the decision taken on the complaint made by the applicant before it.

In these circumstances the interim order dated 24.9.2015 insofar as it directs the inquiry by a committee to be constituted by the Chief of the Army Staff in respect to the complaint of the applicant before it and further directs the Chief of the Army Staff to submit his report as regards the action taken with regard to other complaints as informed through the Right to Information Act, cannot be sustained, the same is accordingly quashed.

It is, however, provided that the respondents before the Tribunal shall place before the Tribunal the

action/decision taken on the complaint of the applicant against the respondent No. 4 and such decision as may have been taken pertaining to other complaints against him as may be demanded by the Tribunal which may be relevant for adjudication of the case.

This order does not absolve the petitioners herein/opposite parties before the Tribunal from taking such action as they are under an obligation under the Army Act or any other provision of law, to take in respect of such complaints/allegations. In fact, they are bound to discharge their statutory obligations in this regard.

It shall be open for the Tribunal to decide the matter finally, uninfluenced by any observation made hereinabove."

17. Keeping in view the finding recorded by the High Court, the questions that surface for consideration are (1) whether the Tribunal has jurisdiction to direct holding of enquiry or proceed with the discovery of the factual matrix on record on its own for the cause of justice and (2) whether while passing the final order, Tribunal may direct to proceed in accordance with law against the respondent no. 4 in case some offence is made out?

JURISDICTION OF TRIBUNAL

18. Armed Forces Tribunal has been constituted under the Act of Parliament. It is Act No 55 of 2007, which came into force on 15th June 2008. The tribunal has

been constituted in pursuance of directives of the Apex Court to provide one more additional forum apart from the Court Martial to mitigate the grievances (**Vide Prithi Pal Singh vs Union of India AIR 1982 SC 1413**). The purpose was to avoid multiplicity of litigation and prolonged litigative period occurring in High Court under Article 226 of the Constitution of India. While redressing the grievance of Armed forces personnel, the Estimate Committee of Parliament in its 19th Report presented to the Lok Sabha on 20th August 1992 recommended for constitution of Tribunal. Section 3 (0) defines the jurisdiction of the Tribunal with regard to different facets of service matter. For ready reference, section 3 (O) of the Armed Forces Tribunal Act 2007 (In short the "Tribunal Act" is reproduced below:-

"(o) "service matters", in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air force Act, 1950 (45 of 1950), mean all matters relating to the conditions of their service and shall include-

- (i) Remuneration (including allowances), pension and other retirement benefits;
- (ii) Tenure, including commission, appointment, enrolment, probation, confirmation, seniority, training, promotion, reversion, premature

retirement, superannuation, termination of service and penal deductions;

- (iii) Summary disposal and trials where the punishment of dismissal is awarded
- (iv) Any other matter, whatsoever.”

But shall not include matters relating to—

- (i) orders issued under section 18 of the Army Act, 1950 (46 of 1950), sub-section (1) of section 15 of the Navy Act, 1957 (62 of 1957) and section 18 of the Air Force Act, 1950 (45 of 1950); and
- (ii) Transfers and postings including the change of place or unit on posting whether individually or as a part of unit, formation or ship in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950).
- (iii) Leave of any kind;
- (iv) Summary Court Martial except where the punishment is of dismissal or imprisonment for more than three months;
- (v) Summary disposals and trials means summary disposals and trials held under the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950);
- (vi) Tribunal means the Armed Forces Tribunal established under section 4.

19. Clause (iv) of section 3 (o) is material for jurisdiction purposes of the Tribunal. A Division Bench

of High Court at Lucknow had considered the expression "for any other purposes" as provided in Section 3 (o) (iv) i.e any other matter whatsoever in **writ Petition No. 8051 of 1989, Major Kunwar Ambreshwar Singh vs Union of India and others decided on 20th Feb 2014**. At that time, the Division Bench was presided over by one of us (Hon Devi Prasad Singh J). We have been informed that the judgment of the High Court (supra) has been affirmed by Hon'ble Supreme Court. In that case, the Division Bench had considered the relevant provisions of the Act including Sections 33, and 34 and observed as under:

'9. Parliament enacted the Act keeping in view large number of cases relating to service matters of the Members of Armed Forces pending in the Courts for long time. Hon'ble Supreme Court also expressed its opinion for constitution of Armed Forces Tribunals which was considered by the Parliament and consequently, the Act has been enacted. Statement of objects --and reasons of the Act is reproduced as under :

"The existing system of administration of justice in the Army and Air Force provides for submission of statutory complaints against grievances relating to service matters and pre and post confirmation petitions to various authorities against the findings and sentences of court-martial. In Navy, an aggrieved person has a right to

submit a complaint relating to service matters and has a right of audience before the Judge Advocate General in the Navy in regard to the finding and sentence of a court-martial before the same are finally put up to the Chief of the Naval Staff.

2. Having regard to the fact that a large number of cases relating to service matters of the members of the abovementioned three armed forces of Union have been pending in the courts for a long time, the question of constituting an independent adjudicatory forum for the Defence Personnel has been engaging the attention of the Central Government for quite some time. In 1982, the Supreme Court in Prithi Pal Singh Bedi v. Union of India and Ors. AIR 1982 SC 1413 held that the absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment in the laws relating to the armed forces was a distressing and glaring lacuna and urged the Government to take steps to provide for at least one judicial review in service matters. The Estimates Committee of the Parliament in their 19th Report presented to the Lok Sabha on 20th August, 1992 had desired that the Government should constitute an independent statutory Board or Tribunal for service personnel.

3. In view of the above, it is proposed to enact a new legislation by constituting an Armed Forces Tribunal for adjudication of complaints and disputes regarding service

matters and appeals arising out of the verdicts of the courts-martial of the members of the three services (Army, Navy and Air Force) to provide for quicker and less expensive justice to the members of the said Armed Forces of the Union.

4. Establishment of an independent Armed Forces Tribunal will fortify the trust and confidence amongst members of the three services in the system of dispensation of justice in relation to their service matters.

5. The Bill seeks to provide for a judicial appeal on points of law and facts against the verdicts of courts-martial which is a crying need of the day and lack of it has often been adversely commented upon by the Supreme Court. The Tribunal will oust the jurisdiction of all courts except the Supreme Court whereby resources of the Armed Forces in terms of manpower, material and time will be conserved besides resulting in expeditious disposal of the cases and reduction in the number of cases pending before various courts. Ultimately, it will result in speedy and less expensive dispensation of justice to the Members of the abovementioned three Armed Forces of the Union.

6. The Notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives."

10. From the objects and reasons, it is borne out on the face of record that the intention of the Legislature is to provide an alternative forum which may decide all

service matters of Army personnel efficaciously so that their service career may not be affected adversely. Sub Section (n) and (o) of Section 3 of the Act defines service and service matters. For convenience, they are reproduced as under:

(n) "service" means the service within or outside India;

(o) "service matters", in relation to the persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950, mean all matters relating to the conditions of their service and shall include--

(i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure, including commission, appointment, enrolment, probation, confirmation, seniority, training, promotion, reversion, premature retirement, superannuation, termination of service and penal deductions;

(iii) summary disposal and trials where the punishment of dismissal is awarded;

(iv) any other matter, whatsoever, but shall not include matters relating to--

(i) orders issued under section 18 of the Army Act, 1950(46 of 1950), sub-section (1) of section 15 of the Navy Act, 1957(62 of 1957) and section 18 of the Air Force Act, 1950(45 of 1950); and

(ii) transfers and postings including the change of place or unit on posting whether individually or as a part of unit, formation or ship in relation to the persons subject to

the Army Act, 1950(46 of 1950), the Navy Act, 1957(62 of 1957) and the Air Force Act, 1950 (45 of 1950);

*(iii) leave of any kind;
(iv)summary court martial except where the punishment is of dismissal or imprisonment for more than three months;"*

11. It has been settled by a Division Bench of this Court, judgment of which was delivered by one of us (Hon'ble Devi Prasad Singh, J) in a case reported in 2010 ADJ 504 Vishwanath Chaturvedi versus Union of India and others that the object and reasons of a statute may be taken into account during the course of statutory interpretation in the event of doubt or to gather the intention of Legislature.

12. A plain reading of the aforesaid provision reveals that service matters includes remuneration, post-retirement benefits, appointment, enrolment, probation, confirmation, seniority, training, promotion, reversion, termination of service etc. Clause (iv) of Sub Section (o) further expands the definition of service matters and provides "any other matter, whatsoever. Clause (iv) is exhaustive in nature and covers all service matters with exception to the items contained in Sub Clause (i), (ii)(iii) and (iv). Thus, Legislature to their wisdom has included all matters which correlate to service matters or incident of service of the army personnel except the exception provided in the Act itself.

13. Section 14 of the Act further provides that the tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by all courts in relation to all service matters. For convenience, Section 14 of the Act is reproduced as under:

"14. Jurisdiction, powers and authority in service matters - (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to all service matters.

(2) Subject to the other provisions of this Act, a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in such form and accompanied by such documents or other evidence and on payment of such fee as may be prescribed.

(3) On receipt of an application relating to service matters, the Tribunal shall, if satisfied after due inquiry, as it may deem necessary, that it is fit for adjudication by it, admit such application; but where the Tribunal is not so satisfied, it may dismiss the application after recording its reasons in writing.

(4) *For the purpose of adjudicating an application, the Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, (5 of 1908) while trying a suit in respect of the following matters, namely:*

(a) *summoning and enforcing the attendance of any person and examining him on oath;*

(b) *requiring the discovery and production of documents;*

(c) *receiving evidence on affidavits;*

(d) *subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, (1 of 1872).*

requisitioning any public record or document or copy of such record or document from any office;

(e) *issuing commissions for the examination of witnesses or documents;*

(f) *reviewing its decisions;*

(g) *dismissing an application for default or deciding it ex parte;*

(h) *setting aside any order of dismissal of any application for default or any order passed by it ex parte; and*

(i) *any other matter which may be prescribed by the Central Government.*

(5) *The Tribunal shall decide both questions of law and facts that may be raised before it."*

14. *According to Maxwell, the golden rule of interpretation is to adhere to the ordinary meaning of the words used unless*

it is in direct conflict with the intention of the Act. In this connection, the author in his book 'Interpretation of Statutes' (12th Edition) observes thus:

"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express."

The authorities-on the question of interpretation of the constitutional provisions may roughly be divided into four categories which may not exactly be absolutely separate or independent so as to be confined in a watertight compartment but in some cases may overlap, yet they generally lay down the law on the subject categorised by us:

Categories

(A) Where the language of a statute is plain, explicit and unambiguous, no external aid is permissible.

(B) Where the language is vague and ambiguous or does not clearly spell out the object and the spirit of the Act, external aids in the nature of parliamentary debates, reports of Drafting or Select Committees may be permissible to determine and locate the real intention of the legislature.

(C) Where certain words are omitted from the statute, the court cannot supply the omission or add words to the statute on a

supposed view regarding the intention of the legislature.

(D)Any speech made by a Minister or a Member in the Parliament is not admissible or permissible to construe a statutory or a constitutional provision."

*Relevant portion from to Maxwell on the Interpretation of Statutes (12th edition page 36) is reproduced as under:-
"A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated."*

23. In view of the above, while interpreting the provisions contained in Section 3 (o) of the Act, the provisions contained in Clause (iv) containing the words, "any other matter, whatsoever," cannot be excluded. In case these words are not taken into account, it shall make clause (iv) redundant which is not permissible under interpretative jurisprudence".

20. From a plain reading of the aforesaid finding recorded by the High Court, it would transpire that all matters which co-related to service matters or incidental to the service of the Army Personnel subject to exceptions provided (supra) would fall within the

domain of Armed Forces Tribunal. Keeping in view the aforesaid interpretation, since the defence set up by the Applicant in its statutory complaint is based on malice animus, the conduct of initiating officer coupled with undignified behaviour with the Applicant and his wife in the office during working hours, the Tribunal was well within the power to seek report after due investigation from chief of Army Staff, being basis of entire controversy.

21. The attention of learned Single Judge, (we are constrained to observe), was not drawn to the aforesaid judgment of the Division Bench of the Allahabad High Court of Lucknow Bench dated 20th Feb 2014 by the learned counsel for the Union of India, which had preferred the writ Petition in the High Court resulting in concealment of material facts, which amounts to commission of fraud by the respondents 1 to 3. While approaching the High Court, why the respondents 1 to 3 has not invited attention to the judgment dated 20th Feb 2014 (supra) is not understandable. It appears that the JAG Branch has colluded with the respondent no. 4 or committed serious negligence while presenting the matter before the High Court by not inviting attention to the order dated 20th Feb 2014 passed by the Division Bench of

the same High Court at Lucknow, a higher forum and binding on the learned Single Judge (supra).

22. Apart from the above, Section 14 confers jurisdiction on the Armed Forces personnel to prefer petition in the Tribunal. Section 14 (4) (a) of the Act empowers the Tribunal to summon and enforce the attendance of any person and examine him on oath where sub section (b) empowers the Tribunal to proceed with discovery of facts wherefrom required and direct for production of documents. The Legislatures in its wisdom used the word "and" in disjunction, meaning thereby apart from proceeding with discovery, the Tribunal may direct for production of documents. Sub section (c) of section 14 (4) provides for receiving evidence on affidavits. Sub section (e) provides for issuing commissions for the examination of witnesses or documents. Sub section (i) provides for any other matter which may be prescribed by the Central Government. The Tribunal has a right to review its decision, dismiss an Application for default or decide the case ex-parte. Under sub section (4) of section 14, Civil Procedure Code has been made applicable for the aforesaid matter.

23. The unique feature of the Tribunal is that it also exercises appellate jurisdiction with all powers and

authority exercisable under the Act in relation to appeal against any order, decision, finding or sentence passed by the Court Martial or any matter connected therewith or incidental to. The Tribunal has also been conferred power to grant bail to persons in Military custody with or without conviction.

24. From a combined reading of sections 14 and 15 on the face of record, it appears that on one hand, the Tribunal has been conferred the power of a Civil court and on the other hand, the power of a criminal court. With regard to contempt under section 19 of the Act, the Tribunal has been conferred power of High Court and certain provisions of Contempt of Court Act 1971 have been applied mutatis mutandis. The power of Tribunal in Contempt matter is the same as conferred on Supreme Court or High Court exercised under reference to them.

DISCOVERY AND INSPECTION

25. Power to discover relevant fact and inspection under the C.P.C has been conferred by Order XI. The order X provides that at first hearing of the case, the court shall ascertain from each party or its pleader with

regard to factual admission or denial with regard to allegations of facts made in the plaint or written statement. Ascertainment of facts has been left over to the judicious discretion of the Court. Under Order XI, parties may move application for discovery of facts and documents. Under order XI Rule 15 of the C.P.C the Court may allow to lead evidence with regard to discovery on such terms or otherwise as the courts shall think fit.

26. In section 14 of the Act, the Legislature has used the word "discovery" which means to obtain information from opposing party before trial in a law subject. The Opposing party in the present case is Union of Indian and Army as well as private respondents.

27. In the case of **Pandurang Kalu Pati Vs State of Maharashtra reported in AIR 2002 SC 733**, their Lordship of Hon'ble Supreme Court held that discovery of fact cannot be equated with recovery of object, means a fact which has been concealed by an accused, it is discovered under the order of court.

28. In the case reported in **(2005) 11 SCC 600**, Hon'ble Supreme Court held that discovery of fact cannot be equated to object produced or found. The discovery of fact arises by reason of the fact that

information given by the accused exhibited the knowledge or mental consciousness of the informant accused in relation thereto. In the Book **American Civil Procedure and Introduction by Geoffrey C Hazard Junior and Micheli Tarruffo**, discovery as a broad scope and enquiry may be made into any matter not privileged, that is relevant to the subject matter of action. Thus discovery may be on facts incidental to issues in pleading even if facts do not directly prove or disprove the facts in question.

29. **Section 30 of the C.P.C 1908** as amended from time to time, contains courts power to order for discovery which for ready reference is reproduced below

"30. Power to order discovery and the like.- Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party,

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit."

30. In view of the above, subject to condition or limitation provided by the C.P.C, the court may at any time either of its own motion or on the applicant of party, make appropriate order for discovery of facts. The power is statutory, based on discretion of court or tribunal.

31. In the above conspectus, the order passed by learned Single Judge (supra) holding that Tribunal has no power to issue order for report from Chief of the Army with regard to factual matrix on its own, seems to be one militating against section 30 of the C.P.C and hence, per in curium to statutory provisions.

32. Summoning and attendance of a witness contained in Order XVI of the C.P.C, the Tribunal has been conferred power to summon any person except who has been privileged by the Act itself and in case a witness fails to comply with the summon, the Tribunal has a right to issue warrant. Similarly tribunal has a right to summon a witness to appear before it for recording statement and in case he does not appear, the consequence has been given under order XVI of the C.P.C.

33. For ready reference, the order XVI Rule 10,11,12,13,14 and 15 of the C.P.C are reproduced below.

"10. Procedure where witness fails to comply with summons.- (1) *Where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court—*

(a) shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or

(b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any court, touching the service or non-service of the summons.

(2) Where the court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named, therein; and a copy or Such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an Order for the attachment of his property to such amount as it thinks fit, not exceeding the

amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no court of small causes shall make an Order for the attachment of immovable property.

11. If witness appears attachment may be withdrawn.- *Where, at any time after the attachment of his property, such person appears and satisfies the court,—*

(a) that he did not, without lawful excuse fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the court shall direct that the property be released from attachment and shall make such Order as to the costs of the attachment as it thinks fit.

12. Procedure If witness falls to appear.- *(1) The court may, where such person does not appear, or appears but fails so to satisfy the court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may Order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:*

Provided that, if the person whose attendance is required pays into court the costs and fine aforesaid, the court shall Order the property to be released from attachment.

(2) Notwithstanding that the court has not issued a proclamation under sub-rule (2) of rule 10, nor issued a warrant nor ordered attachment under sub-rule(3) of that rule, the court may impose fine under sub-rule (1) of his rule after giving notice to such person to show cause why the fine should not be imposed.

13. Mode of attachment.-*The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment debtor.*

14. Court may at its own accord summon as witnesses strangers to suit.-*Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the court at any time thinks it necessary to examine any person, including a party to the suit, and not called as a witness by a party to the suit, the court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.*

15. Duty of persons summoned to give evidence or produce document.-*Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purposes, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place."*

34. Accordingly, keeping in view the provisions contained in section 14 (4) of the Armed Forces Tribunal Act, whereby C.P.C has been made applicable, the Tribunal has been conferred jurisdiction to summon the witness or any person having bearing on the case in the event of non compliance, issue warrant and may also pass appropriate order necessary for adjudication of controversy to discover truth.

35. Apart from the above, while interpreting the Act in the case of **Shri Kant Sharma (supra)**, their Lordship of Supreme Court held that the Tribunal possessed jurisdiction of civil court and High Court in so far as it relates to suit relating to condition of service of a person subject to different Acts of Armed Forces. For the sake of ready reference, Para 14 of the judgment of Shri Kant Sharma (supra) is reproduced below.

"14. Therefore, it is clear from the scheme of the Act that jurisdiction of the Tribunal constituted under the Armed forces Tribunal Act is in substitution of the jurisdiction of Civil Court and the High Court so far as it relates to suit relating to condition of service of the persons subject to Army Act 1`950, the Navy Act, 1957 and the Air Force Act, 1950, which are special laws enacted by the Parliament by virtue of exclusive legislative power vested under Article 246 of the constitution of India read with Entries 1 and 2 of List I of the Seventh Schedule."

36. In the case of Shrikant Sharma (supra), Hon'ble Supreme Court noted that under Article 227 of the Constitution, High Court has not been conferred power of superintendence over any court or Tribunal constituted by or under any law relating to Armed Forces.

227. Power of superintendence over all courts by the High Court.—(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

37. Similarly, no appeal lies under Article 136 of the Constitution of India before Hon'ble Supreme Court against the order passed by the Tribunal except in accordance with the provisions contained in section 31 of the Armed Forces Tribunal Act for which the condition precedent is to obtain leave to appeal from the Tribunal itself. For the sake of ready reference,

paragraphs 19 and 20 of the Judgment of Shri Kant Sharma (supra) are reproduced below.

"19. In this context, it is also necessary to notice [Article 136](#) of the Constitution which provides special leave to appeal to Supreme Court:

"136. Special leave to appeal by the Supreme Court.-(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

In view of clause (2) of [Article 136](#) which expressly excludes the judgments or orders passed by any Court or Tribunal constituted by or under any law relating to Armed Forces, the aggrieved persons cannot seek leave under [Article 136](#) of Constitution of India; to appeal from such judgment or order. But right to appeal is available under [Section 30](#) with leave to appeal under [Section 31](#) of the Armed Forces Tribunal Act, 2007.

20. We may also refer to [Article 227\(4\)](#) of the Constitution, which reads as under:

"[Article 227\(4\)](#) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

Thus, we find that there is a constitutional bar not only under [Article 136\(2\)](#) but also under [Article 227\(4\)](#) of the Constitution of India with regard to entertaining any determination or order passed by any court or Tribunal under law relating to Armed Forces."

38. Again in the case of Union of India Vs Shrikant Sharma, (supra) their Lordships of Hon'ble Supreme Court while exercising power under Article 142 and while interpreting the provisions contained in the Act held that no writ petition should be entertained by the High Court against the final order of the Tribunal by-

passing the statutory remedy of appeal provided under section 31 of the Act. Hon'ble Supreme Court has summed up its decision in Para 34 of the judgment aforesaid and for ready reference, Para 34 is reproduced below.

"34. The aforesaid decisions rendered by this Court can be summarised as follows:

The power of judicial review vested in the High Court under [Article 226](#) is one of the basic essential features of the Constitution and any legislation including [Armed Forces Act, 2007](#) cannot override or curtail jurisdiction of the High Court under [Article 226](#) of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii)The jurisdiction of the High Court under [Article 226](#) and this Court under [Article 32](#) though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii)When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv)The High Court will not entertain a petition under [Article 226](#) of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressals of grievance. (Refer: Nivedita Sharma).

[Article 141](#) of the Constitution of India reads as follows: "[Article 141](#).Law declared by Supreme Court to be binding on all courts.- The law declared by the Supreme Court shall be binding on all courts within the territory of India."

39. Their Lordships however, held that the situation would be anomalous in case the petition is entertained by the High Court in regard to final order passed by

the Tribunal. The relevant observations on this count are contained in Para 37 which being relevant is reproduced below.

"37. Likelihood of anomalous situation If the High Court entertains a petition under [Article 226](#) of the Constitution of India against order passed by Armed Forces Tribunal under [Section 14](#) or [Section 15](#) of the Act bypassing the machinery of statute i.e. [Sections 30](#) and [31](#) of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.

[Section 30](#) provides for an appeal to this Court subject to leave granted under [Section 31](#) of the Act. By clause (2) of [Article 136](#) of the Constitution of India, the appellate jurisdiction of this Court under [Article 136](#) has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or Tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves before the High Court under [Article 226](#) and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under [Article 136](#) of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of [Article 136](#), this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under [Article 226](#) of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under [Section 30](#) with leave to appeal under [Section 31](#) of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under [Article 226](#) of the Constitution under [Section 30](#) read with [Section 31](#) of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under [Article 141](#) of the Constitution of India, allowing the aggrieved person to avail the remedy under [Section 30](#) read with [Section 31](#) Armed Forces Act."

40. In view of the above, the learned Judge of the High Court made the observation as stated supra, without taking note of the statutory provisions contained in section 31 of the Act read with the Civil

Procedure Code (supra) which has been made applicable. Hence, the order seems to be “per incurium” to the statutory provisions under the Act of Parliament. An order or decision passed in ignorance of statutory provisions or decision of a higher forum on judicial side in the hierarchy of system like Supreme Court or larger Bench of the High Court shall not have binding effect and the Court may proceed in accordance with statutory mandate and law settled by the higher forum.

41. *The concept of “per incuriam” are those decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned i.e. previous decisions of the Court i.e. itself or by a Court of co-ordinate or higher jurisdiction or in ignorance of a term of a statute or by a rule having the force of law. “Incuria”, literally means “carelessness”. In practice, per incuriam is taken to mean per ignoratum. (Vide: **Mamleshwar Prasad v. Kanahaiya Lal**, AIR 1975 SC 907: (1975) 2 SCC 232: (1975) 3 SCR 834; **A.R. Anthulay v. R.S. Nayak**, AIR 1988 SC 1531: JT 1988 (2) SC 325: (1988) 2 SCC 602; **State of Uttar Pradesh v. Synthetics and Chemicals Ltd**; (1991) 4 SCC 139: JT 1991 (3) SC 268; **B. Shama Rao v.***

Union Territory of Pondicherry, AIR 1967 SC 1480: 1967 (2) SCJ 749: (1967) 2 SCR 650; **Municipal Corporation of Delhi v. Gurnam Kaur**, AIR 1989 SC 38: 1988 (3) SCJ 674: (1989) 1 SCC 101; **Director of Settlements, A.P. v. M.R. Apparao**, AIR 2002 SC 1598: 2002 AIR SCW 1504: (2002) 4 SCC 638; **Manda Jaganath v. K.S. Rathnam**, AIR 2004 SC 3600: 2004 AIR SCW 3499: (2004) 7 SCC 492; **Sunita Devi v. State of Bihar**, AIR 2005 SC 498: 2004 AIR SCW 7116: (2005) 1 SCC 608; **Central Board of Dawoodi Bohra Community v. State of Maharashtra**, (2005) 2 SCC 673: AIR 2005 SC 752: 2005 AIR SCW 349; and **Narmada Bachao Andolan (III) v. State of Madhya Pradesh**, 2011 SC 1989: 2011 AIR SCW 3337: (2011) 5 SCALE 624;

Usha Bharti v. State of Uttar Pradesh, (2014) 4 SCALE 275: AIR 2014 SC 1686: 2014 SCW 1981;

P. Ramakrishnam Raju v. Union of India, AIR 2014 SC 1619: 2014 AIR SCW 2239: (2014) 4 SCALE 329;

State of Tamil Nadu v. State of Kerala, AIR 2014 SC 2407: 2014 AIR SCW 3178: (2014) 12 SCC 696; and **Hyder Consulting (UK) Ltd. v. State of Orissa**, (2015) 2 SCC 189).”

42. Apart from the above, Special Bench of Hon'ble Supreme Court in the case of L. Chandra Kumar

reported in (1997) 3 SCC 261 held that constitutional validity of a statutory provisions may also be looked into by the Tribunal except the Act under which it has been constituted. Para 90 of the aforesaid decision being relevant is quoted below.

"90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under [Article 226/227](#) cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the

other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under [Article 226/227](#) of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.”

43. It may be noted that in case of **L. Chandra Kumar (supra)**, Hon'ble Supreme Court has not considered the exclusion of certain power of High Court and Supreme Court contained in Article 227 (4) and 136 (2) of the Constitution which keeps beyond the purview the superintendence of High Court over the Tribunal. In view of the above, the Tribunal possessed jurisdiction to decide the constitutional issues and issue appropriate order or direction to discover facts. In the event of non compliance of order, tribunal may take appropriate coercive action & issue warrant of arrest & production. (supra)

MALAFIDES

44. The Applicant in the instant case attributed malafides on the part of respondent no. 4 who was the Initiating officer to initiate the ACR in question. So far as factual allegation that respondent no. 4 called the Applicant and his wife in his office and made immoral proposal having sexual innuendoes virtually calling the wife to his residence for service benefits seems to prove bias. From a scrutiny of the affidavit of Respondent no 5 to whom the Applicant approached to ventilate his grievance (supra), it would appear that whatever folly is there, it was on the part of respondent no 5 who inspite of due communication has persuaded the Applicant not to file any written complaint to save his career and keep the matter pending. The only whitewash that was done by him was to call the respondent no. 4 and give dressing down in the presence of the Applicant without taking any concrete action to maintain the discipline. It is common knowledge that humiliation or undignified behaviour that ladies ordinarily undergo, is not brought to law to save the family honour.

45. While submitting non statutory complaint, the Applicant categorically pleaded and pointed out with regard to unsavoury behaviour of respondent no. 4.

The relevant portion from the non statutory complaint i.e. paras 3 to 11 being relevant is reproduced below.

"3. Complaint against CR pd 07 Dec 2004 to 31 may 2005 and 01 Jun 2005 to 31 May 2006. I have strong apprehension that my IO must have intentionally graded me low in QAP portion of the CRs to deliberately spoil my carrier prospects in order to extract revenge due to reasons brought out in subsequent paragraphs despite working with utmost efficiency and sincerity towards the org. it is pertinent to mention here that no such adverse remarks were reflected in the shown portion/pen picture of the aforesaid CRs.

4. Reasons for Low Grade in CRs. I was posted to 23 Inf Div Ord Unit from Jun 2004 to Sep 2006. Col Arvind Singh Rawat (now Lt Gen) presently posted as Comdt, CMM, Jabalpur was the CO (IO).

5. In Apr 2005, while the ladies were present in the unit premises for candle making class, CO invited me alongwith my wife for a cup of tea at his office. Despite strong objection that it was not in order to call a lady wife in the office, he insisted that he wanted to discuss something urgent. Accordingly, I alongwith my wife visited the CO's office during the office hours. The CO told that though I was doing well in service but that was not good enough to get to the higher rank in the Army. Thereafter the CO shamelessly gave a derogatory/immoral proposal to get promotions and good postings. He also made certain demeaning and filthy remarks in the presence of my wife which were inappropriate and

immoral as per the military norms. However, I vehemently objected to his immoral conduct and reported the matter to Col Anuj Mathur (now Brig & JAK Center Comdt), Col GS HQ 23 Infantry Division who concurred with me on the matter and assured me to audience of the GOC.

6. *I met Maj Gen Dalip Bhardwaj, VSM (retd as Lt Gen), then GOC, 23 Inf Div and my wife met Mrs Reju Bhardwaj (GOC's wife) in presence of Mrs Anuj Mathur (wife of Col GS, HQ 23 Inf Div) in this regard. GOC assured me that he would be calling the CO for explanation and strict action would be taken against Col Arvind Singh Rawat (now Lt Gen). I also intimated the GOC that I would be fwd the complaint in writing but GOC advised me not to initiate any written complaint as he would resolve the issue. Honouring the GOC's assurance, I did not intimate any written complaint at that point of time.*

7. *Subsequently Col Arvind Singh Rawat (now Lt Gen) was called at HQ 23 Inf Div. On return from Div HQ, he called me in his office and threatened that now he would ensure my non promotion to next rank as I had reported the matter to GOC. I again conveyed this particular incident to the GOC who again reassured me that he would take personal interest to resolve the issue.*

8. *Prior to this incident, my professional competence and hard work was appreciated by Col Arvind Singh Rawat (now Lt Gen), IO. He appreciated my efforts for conducting and implementing the Amn Mgt Package cadre from 22 Dec 2004 to 08 Jan 2005 at Fmn Level (copy*

of hand written draft for higher HQs is att as Appx 'C').

9. Consequently to keep the Reviewing Office, ie Maj Gen Dalip Bharadwaj, VSM (Ltd Lt Gen) unaware about my professional work, the CO did not project the effort put in my me to the higher HQs with a specific aim to grade me low in ACR. However I continued working sincerely keeping faith in the organization. As ammunition qualified officer, certain important efforts and contribution made during ibid tenure are as under :-

(a) I was responsible for safe storage and insp of entire amn at Fmn Amn Dump. GOC 23 Inf Div had appreciated the efforts in UAC Dec 2004.

(b) I alongwith a scientist from CFEES worked out the entire layout plan of Amn Depot planned at Gaya as a member of a BOO presided by Comdt, ASC Centre, North.

(c) I carried out svy and study alongwith an Engr Offr (Lt Col Amod Chandana, present SO to VCOAS) as directed by HQ 1 Corps regarding shifting of mines from various Amn depots to Amn Depots of SWC to ascertain the implementation OF Op Lgs recommendations given post OP PARAKRAM.

10. Misconduct with wife of Lt Col AB Upadhyay. Col Arvind Singh Rawat (now Lt Gen) is habitual of misbehaving with ladies. During my tenure in 23 Inf Div Ord Unit, he misbehaved with the wife of Lt Col AB Upadhyay also who is presently posted at COC Centre. The matter was reported to the GOC. If required the details of the same will be provided by the undersigned.

11. Despite all odds, I stood upright for my self respect, worked hard with utmost sincerity and faith in the organization due to which Col Arvind Singh Rawat (now Lt Gen) could not point out a single flaw in my professional competence during the tenure in 23 Inf Div Ord Unit.

46. In spite of categorical allegation while passing the impugned order, the competent authority had not tried to enter into dispute. There is not even an iota of whisper with regard to averments contained in paras 3 to 11 of the non statutory complaint. For the sake of ready reference paras 4 to 7 of the impugned order dated 10th June 2014 as communicated by the Military Secretary's Branch are reproduced below.

"4. The COAS has examined the complaint of the officer in detail alongwith his overall profile and other relevant documents. After consideration of all aspects of the complaint and viewing it against the redress sought, it has emerged that all the CRs in the reckonable profile are well corroborated, performance based and technically valid except IO's assessment in CRs 12/04-05/05 and 06.05-05/06, which are inconsistent and merit interference.

5. The COAS has, therefore, directed that partial redress be granted to the officer by way of expunction of IO's assessment at Para 24 (d)- 'Tolerance for Ambiguity' in CRs 12/04-05/05 and 06/05-05/06 on grounds of inconsistency.

6. The COAS has further directed that the above aberrations be expunged from the CR dossier of the

officer and he be considered afresh for promotion in accordance with the existing rules and regulations.

7. Necessary expunctions as per order of COAS have been carried out in the CRD of the officer. The officer may be informed accordingly. Please acknowledge."

47. It is well settled proposition of law that whenever a grievance is raised and statutory remedy is availed, then authority concerned has to go through the pleading and materials on record and after recording his own opinion, over the issue raised, the final decision has to be taken with due communication to the complainant. In the present case, non statutory complaint dated 24th Jan 2014 has been decided without application of mind to defence and grounds set up by the Applicant. Accordingly, the impugned order seems to suffer from vice of arbitrariness as well as non application of mind.

48. The Applicant suffered not only from the end of respondent no 5 who had prevented him from filing any written complaint but also suffered on account of omission and commission of MS Branch who while deciding the Applicant's statutory complaint had not looked into the allegations specifically pleaded in the non statutory complaint. This prima facie shows bias

and malice in law on the part of the authorities involved in adjudication process.

49. Certain other features and materials on record further establish the unsavoury treatment meted out to the Applicant by the respondents. Materials on record shows that the respondent no. 4 had every point of time, tried to persecute and humiliate the Applicant. To begin with, by DO letter dated 11th May 2011, (Annexure A -3) Brigadier M.R.Babu in his letter addressed to Brigadier L.M.Arora, commended the service rendered by the Applicant for his commitment and personal involvement to the assigned task as of highest order. The same is also borne out from Annexure A-4. It also shows that the Applicant wrote a book review of the book titled **"Simple Way to success, peace and Happiness in the Army"** authored by Pradeep Goel, a retired Lt Col. The review of the book was done by the Applicant with his own quote "It is better to die of your feet than to kneel on your knees."

50. In spite of long list of achievements in service career, from time to time, the respondent no. 4 wrote letters commenting on Applicant's performance and administrative works. Vide letter dated 25th April 2005, the respondent no. 4 write to Applicant that property

returns for car purchase has not been submitted. The letter was allegedly based on unfounded facts. While submitting reply the Applicant categorically submitted that he had purchased Maruti Car in Feb 2006 with SBI Loan which finds mention in property return submitted in 2006. It would appear that inspite of the fact that property return was filed in Feb 2006, threat was given by respondent no. 4 through letter dated 25.04.2005 to face General Court Martial. Again by letter dated 23rd April 2005 respondent no. 4 informed the Applicant with regard to certain carelessness in service and but recalled the said letter on the ground that the position was explained on telephonic conversation. Thus on one hand, threatening letter was sent but only after two days it was recalled on the verbal justification stated to be made by the Applicant though Applicant has denied the same By letter dated 22.11.2005 (Annexure A-9) the Applicant was warned not to make request for leave due to low officers' state in the Unit. By another letter dated 12.04.2006, the Applicant was held to be suffering from immature behaviour which amounts to insubordination on telephone during the course of conversation. He was advised to be more disciplined and mature. His prayer for leave was declined. It appears that by letter dated 13th April

2006, the Applicant made a prayer for leave due to some important commitment at home.

51. The materials on record show that the Applicant's father was retiring on 29th April 2006 and hence he prayed for grant of leave to give company to him which was denied. Letter dated April 2013, (Annexure A-13) contains the sorry tale articulated by the Applicant which he communicated to respondent no. 4. The materials on record including affidavit of respondents no. 4 and 5 prima facie establishes the highhandedness on the part of the respondent no. 4. It appears that failing to pursue the Applicant during the course of meeting, he became annoyed and started to deal him differently which is not required of an officer of the rank of commanding officer keeping in view the high standard of Army.

52. The issue of "malus animus" was considered in ***Tara Chand Khatri vs. Municipal Corporation of Delhi and Ors***, AIR 1977 SC 567, wherein the Hon'ble Supreme Court has held that the High Court would be justified in refusing to carry on investigation into the allegation of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition and burden of establishing mala fide

lies very heavily on the person who alleges it and there must be sufficient material to establish *malus animus*.

The Hon'ble Supreme Court, in ***E.P. Royappa vs State of Tamil Nadu & Anr***, AIR 1974 SC 555; ***M/S. Sukhwinder Pal Bipan Kumar & Ors vs. State of Punjab & Ors***, AIR 1982 SC 65; and ***Shivajirao Nilangekar Patil vs. Dr. Mahesh Madhav Gosavi & Ors.***, AIR 1987 SC 294 reiterated the same view.

In ***M. Sankaranarayanan, IAS vs. State of Karnataka & Ors.***, AIR 1993 SC 763, the Hon'ble Supreme Court observed that the Court may "draw a reasonable inference of *mala fide* from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of institution, surmise or conjecture".

In ***N.K. Singh vs. Union of India & Ors.***, (1994) 6 SCC 98, the Hon'ble Supreme Court has held that "the inference of *mala fides* should be drawn by reading in between the lines and taking into account the attendant circumstances".

53. There has to be strong and convincing evidence to establish the allegations of *mala fides*, specifically alleged in the petition as the same cannot merely be presumed. The presumption is in favour of the bona

fides of the order unless contradicted by acceptable material. (vide ***State of U.P. vs Dr. V.N. Prasad***, 1995 Suppl (2) SCC 151; ***Arvind Dattatraya Dhande vs. State of Maharashtra & Ors.***, (1997) 6 SCC 169; ***Utkal University vs. Dr. Nrusingha Charan Sarangi & Ors.***, (1999) 2 SCC 193; ***Kiran Gupta & Ors vs. State of U.P. & Ors.***, (2000) 7 SCC 719; ***Netai Bag & Ors. Vs. State of W.B. & Ors.***, (2000) 8 SCC 262; and ***State of Punjab vs. VK Khanna & Ors.***, (2001) SC 343; and ***M/s. Samant & Anr. Vs. Bombay Stock Exchange & Ors.***, AIR 2001 SC 2117).

In ***First Land Acquisition Collector & Ors. Vs. Nirodhi Prakash Gangoli & Anr.***, AIR 2002 SC 1314; and ***Jasvinder Singh & Ors. Vs. State of J&K & Ors.***, (2003) 2 SCC 132, the Apex Court held that burden of proving mala fides is very heavy on the person who alleges it. Mere allegation is not enough. Party making such allegations is under the legal obligation to place specific materials before the court to substantiate the said allegations.

54. In the present case, there is enough material on record (supra) which establish malicious intent of respondent no-4, to persecute the applicant.

55. The State is under obligation to act fairly without ill will or malice-in facts or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide ***Jaichand Lal Sethia vs. The State of West Bengal & Ors.***, AIR 1967 SC 483; ***A.D.M. Jabalpur vs Shiv Kant Shukla***, AIR 1976 SC 1207; ***State of AP vs. Goverdhanlal Pitti***, AIR 2003 SC 1941.

56. Learned counsel for the Applicant invited attention to a case reported in **(1986) 1SCC 133 Express Newspaper Papers Pvt Ltd and others vs**

Union of India and others. In the said case, Hon'ble Supreme court relied upon Judicial Review of Administration Action, Fourth Edn by Prof. De Smith as well as Administrative law by Prof. H.W.R Wade and held that in case power is not exercised bonafide for the end design, then it shall be fraud on powers and void the order. Their Lordship held that concept of a bad faith eludes the decision where allegation is uncontroverted. The person against whom such allegations have been made, should come forward with answer refuting or denying such allegations. Relevant portion of the said decision is quoted below for ready reference.

"Where certain allegations against the Minister went uncontroverted, had occasion to administer a word of caution. Where mala fide are alleged, it is necessary that the person against whom such allegations are made should come forward with an answer refuting or denying such allegations. For otherwise such allegations remain unrebutted and the Court would in such a case be constrained to accept the allegations so remaining unrebutted and unanswered on the test of probability. That precisely is the position in the present case, in the absence of any counter- affidavit by any of the respondents."

57. Hon'ble the Supreme Court while concluding the findings with regard to abuse of power held as under:

"119. Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an

*authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers. The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister as in [S. Pratap Singh v. State of Punjab](#), [1964] 4 S.C.R. 733. A power is exercised maliciously if its repository is motivated by personal Animosity towards those who are directly affected by its exercise. Use of a power for an 'alien' purpose other than the one for which the power is conferred in mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power and it was observed as early as in 1904 by Lord Lindley in *General Assembly of Free Church of Scotland v. Overtown*, L.R. [1904] A.C. 515, 'that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purpose for which they are conferred'. It was said that Warrington, C.J., in *Short v. Poole Corporation*, L.R. [1926] Ch. D.66, that :*

"No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative.

In [Lazarus Estates Ltd. v. Beasley](#), [1956] 1 Q.B. 702 at pp.712-13, Lord Denning, LJ. said :

"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

See also, in [L Lazarus](#) case at p.722 per Lord Parker, CJ :

"'Fraud' vitiates all transactions known to the law of however high a degree of solemnity.

All these three English decisions have been cited with approval by this Court in [Partap Singh's](#) case."

120. [In Dr. Ram Manohar Lohia v. State of Bihar & Ors.](#), [1966] 1 S.C.R. 708, it was laid down that the Courts had always acted to restrain a misuse of statutory power and more readily when improper

motives underlie it. Exercise of power for collateral purpose has similarly been held to be a sufficient reason to strike down the action. [In State of Punjab v. Ramjilal & Ors.](#), [1971] 2 S.C.R. 550, it was held that it was not necessary that any named officer was responsible for the act where the validity of action taken by a Government was challenged as mala fide as it may not be known to a private person as to what matters were considered and placed before the final authority and who had acted on behalf of the Government in passing the order. This does not mean that vague allegations of mala fide are enough to dislodge the burden resting on the person who makes the same a though what is required in this connection is not a proof to the hilt as held in [Barium Chemicals Ltd. & Anr. v. Company Law Board](#), [1966] Supp. S.C.R. 311, the abuse of authority must appear to be reasonably probable.”

58. In another case reported in **1992 Supp (1) SCC 222 State of Bihar and Another vs P.P.Sharma & Anr.**, the Apex Court re-asserted that the order with bad faith or malice should not stand on record. Their Lordships held that even in the absence of any prohibition expressed or implied, preliminary enquiry is desirable. Their Lordships further held as under:

“[In State of U.P. v. B.K. Joshi](#), [1964] 3 SCR 71 Mudholkare,J. in a separate, but concurring judgment at page 86 and 87 held that even in the absence of any prohibition in [the Code](#), express or implied, a preliminary enquiry before listing the offence was held to be desirable. In this view, though it was desirable to have preliminary inquiry done, the omission in this regard by the Administrator or to obtain administrative sanction before laying the First Information Report would at best be an irregularity, but not a condition precedent to set in motion the investigation into the offence alleged against the respondents.”

59. The Supreme Court also held that freedom from bias is an integral part of principles of natural justice. When bias is imputed to exist, the person ought not to take part in decision making process. The para 55 of the said decision being relevant is quoted below.

"It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo-nominee as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegation would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. Admittedly, both R.K. Singh and G.N. Sharma were not impleaded. On this ground alone the High Court should have stopped enquiry into the allegation of mala fides or bias alleged against them. Nothing has been alleged, nor brought to our notice that preceding laying the complaint before the police, R.K. Singh had any personal animosity against the respondents. Nothing has also been brought to our notice, nor alleged either in the High Court or in this court that after his filing the complaint he had any say in the investigation conducted by the Investigating Officer or exercised any pressure to investigate the case in any particular way to secure the conviction of the respondents. The only allegation relied on by the High Court is that R.K. Singh before laying the First Information Report did not look into certain documents or did not deliver them up for a week to the Investigating Officer. Had he considered things would be favourable to the respondents and that no administrative sanction was obtained. That by itself in our considered view would not lead to any irresistible conclusion that R.K. Singh was actuated with any personal bias or mala fides against Sharma or Dutt. At the most it may be said that he had not properly exercised his discretion before laying the complaint. Equally no personal bias was alleged to the

Investigating Officer nor found in this regard by the High Court. The ground on which reliance was placed and found acceptable to the High Court is that when the documents said to be favourable to the respondents were brought to his notice, he did not investigate into those facts on the ground of being "irrelevant". Free from bias is an integral part of the principles of natural justice. When bias was imputed to be existed, he ought not to take part in a decision making process. Police Officer has a statutory duty to investigate into the crime suspected to have been committed by the accused, by collecting necessary evidence to connect the accused with the crime. Investigator exercises no judicial or quasi-judicial duty except the statutory function of a ministerial nature to collect the evidence. With his expertise, skill or knowledge he has to find whether the accused committed the offence alleged against. If the accused is aware that the Investigating Officer was personally biased against him, it is his primary duty to bring it to the notice of the higher authorities or the court at the earliest, of the circumstances or on the grounds on which he believed that the Investigating Officer is actuated with malice and impartial investigation cannot be had. If he allows the Investigating Officer to complete the investigation and the report submitted, it amounts to his waiving the objection and he would not be allowed to impeach the chargesheet on the ground of the alleged bias or mala fides. Moreover, the Investigating Officer would be available to cross-examination at the trial of the case and it would be open to the accused to elicit from the Investigating Officer necessary circumstances of ground to throw doubt on the impartiality of the Investigating Officer and must establish its effect on the prosecution evidence adduced at the trial. It is for the court to consider how far it has effected materially the result of the trial. The evidence collected during investigation would be subject to proof as per [Evidence Act](#) and tested by cross-examination. The reasoning of the Courts below that it an authority does not act impartially or in good faith then a reasonable mind can

definitely infer the bias for reason best known to the authorities is too wide a statement of law in the context of police/Investigating Officer."

60. Hon'ble Supreme Court in the case of P.P.Sharma (supra) further held that when material is brought to the notice of investigating officer regarding existence of certain documents that throw doubt on complicity of accused, the matter should have been investigated,

Another case cited by the learned Counsel for the applicant is **Col A.K.Singh vs Union of India and Others 2010 SCC Online AFT 795**. In this case Hon. Apex Court set aside the entry initiated by the Initiating officer even though Initiating officer and Reviewing officer were not made party.

61. Keeping in view the aforesaid facts and materials on record (supra), an inference may be drawn with regard to existence of bias on the part of the respondent no. 4, and as the Initiating officer, should not have been permitted to initiate the entry under the Army Order.

62. Since facts have been admitted, it was incumbent on respondent as Commander 23, Infantry Division to institute enquiry and ferret out the correctness of allegations raised by the Applicant with regard to

unethical conduct of respondent no. 4 which was unfairly not done.

SAFEGUARDS FOR WOMEN IN INDIA

63. Constitution of India not only grants equality to women but also empower the State to adopt measures of positive safeguards in favour of women for neutralizing the cumulative socio-economic education and political disadvantages placed by them. Article 14, 15, 15 (3), 16, 39 (a), 39 (b), 39 (c) and 42 of the Constitution of India are of specific importance in this regard. Apart from Constitutional provisions, Immoral Traffic (Prevention) Act 1956, Indecent Representation of Women (Prohibition) Act 1986 are some of the Acts which represent different facets of women security.

64. Sexual harassment of women in any form over all or otherwise invited attention of Hon'ble Supreme Court in case of **Vishakha vs State of Rajasthan delivered on 13th August 1997**, in which Hon'ble Supreme Court had issued guidelines to secure the women from harassment against sexual assault, violence or harassment. The guidelines rendered in Vishakha's case have been further codified by Parliament by enacting Sexual Harassment of Women at work place (Prevention, Prohibition and Redressal)

Act 2013, giving another statutory form to protect the women from any kind of violence or harassment.

65. National Commission for women has been constituted to look into any sort of complaint suffered by them at any place including the office where the Applicant alongwith his wife has been mentally tortured with indecent comments. In the Indian Penal Code, any kind of tortures both mental and physical are punishable under section 498, and 498 A of the Act. Section 498 of the Indian Penal Code makes it punishable any person who takes away or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man. Adultery has also been made punishable under section 497 of the Indian Penal Code. Section 354 of the Indian Penal Code deals with sexual harassment of women. Section 354 A makes sexual harassment punishable in case a person advances involving unwelcome and explicit sexual overtures or raises a demand or request for sexual favour in anyway. Section 354 A being relevant is quoted below for ready reference.

1. A man committing any of the following acts—
 - (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
 - (ii) a demand or request for sexual favours; or

- (iii) showing pornography against the will of a woman;
or
- (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

2. Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
3. Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

Similarly section 354 B, 354 C and 354 D make voyeurism and stalking punishable.

66. Under sections 65, 66, 67, and 68 of the Army Act, abetment to commit an offence has been made punishable. Under Army Regulation 325, it is the duty of the Commanding officer to make every effort to prevent crime and to suppress any tendency to screen its existence. Section 236 further provides that the officers will adopt towards subordinates or equal and junior ranks such methods of command and treatment as will not only ensure respect for authority, but also foster the feelings of self respect and personal honour essential to military efficiency and will avoid intemperate language or an offensive manner. Chapter VII of the Army Act provides for different omission and commission of the Army Personnel. Sections 45, 46 and 47 of the Army Act deal with unbecoming conduct,

disgraceful conduct and ill-treatment to subordinates. For ready reference, sections 45, 46 and 47 of the Army Act being relevant are quoted below.

"45. Unbecoming conduct. -Any officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and the character expected of him shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned.

46. Certain forms of disgraceful conduct.-Any person subject to this Act who commits any of the following offences, that is to say,

(a) Is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or

(b) Malingers, or feigns, or produces disease or infirmity in himself, or intentionally delays his cure or aggravates his disease or infirmity; or

(c) With intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or that person; shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

47. Ill-treating a subordinate. -Any officer, junior commissioned officer, warrant officer or non-commissioned officer who uses criminal force to or otherwise ill-treats any person subject to this Act, being his subordinate in rank or position, shall, on conviction by court-martial, be liable to suffer imprisonment for a term

which may extend to seven years or such less punishment as is in this Act mentioned."

67. In the conspectus of the above and regard being had to constitutional and statutory mandates, in case the allegations are found to be true after due inquiry, the respondent no. 4 may be punished vis a vis the unbecoming conduct of an Army personnel. To cap it all, a prima facie case seems to be made out against the respondent no. 4 to initiate inquiry or investigation in accordance with the Rules.

ANNUAL CONFIDENTIAL REPORTS

68. We have already observed by drawing attention to Army Order 45 of 2001 wherein it is envisaged that in case, the Initiating officer is involved in any controversy co-relating to officer against whom he has to initiate the ACR, then the Initiating officer shall not be entitled to award the entry and in certain circumstances, he should be debarred. The ACRs of the Applicant for the period in question, for the period earlier to it and for the period subsequent to it in the form of chart as provided by the respondents from the original record are reproduced below.

CONFIDENTIAL

S No	CR Period	IO	RO	SRO	FTO	HTO	Remarks	
1.	Jan 01 to Nov 01	7	7	-	-	-		
2.	Jan 02 to Sep 02	9	7	-	-	-		
3.	Jan 03 to Sep 03	8	6	-	-	-		
4.	Jul 04 to Dec 04	8	8	-	-	-		
5.	Dec 04 to May 05	8	8	-	8	8	Para 24 (b) of IO expunged by COAS -do- (both non criteria report)	
6.	Jun 05 to May 06	8	8	-	8	8		
7.	Sep 06 to Feb 07	8	-	-	8	-		
8.	Feb 07 to Dec 07	9	9	8	9	9		
9.	Jan 08 to Oct 08	9	9	9	9	9		
10.	Jan 09 to Sep 09	8	8	8	8	8		
11.	Sep 09 to Apr 10	Non Initiation Report.						
12.	Jun 10 to Apr 11	9	9	9	9	9		
13.	Jun 11 to Jan 12	9	9	9	9	9		
14.	Feb 12 to May 12	9	9	9	-	-		
15.	Jun 12 to May 13	9	9	9	-	-		
16.	Jun 13 to Dec 13	9	9	9	-	-		
17.	Jan 14 to May 14	9	9	9	-	-		
18.	Jun 14 to Dec 14	9	9	9	-	-		
19.	Dec 14 to May 15	9	9	8	-	-		

69. A perusal of the aforesaid entry subsequent to Dec 2005 to May 2006 on the basis of record shows that the Applicant was rated outstanding with box grading '9'. Even the hidden portion was full of outstanding point of '9' in different columns. The pen picture of the period in question also reveals that the

Applicant was given outstanding performance but unfortunately for him, hidden portion has been downgraded which prima facie keeping in view the case history seems to be deliberate and intentional. The pen-pictures between 7th Dec 2004 to 31st May 2005 and 1st June 2005 to 31st May 2006 are reproduced as under:-

ACR PROFILE (PEN PICTURE) OF APPLICANT

CR Period (07 Dec 2004 to 31 May 2005)

Initiating Officer

8

An officer with impressive military bearing who has done well in all the tasks allotted to him. He is capable of putting in sustained hard work for long duration and requires no supervision. He has shown the potential for growth in service. Has the ability to take on additional responsibilities. Takes part in all unit activities. Socially the couple conducts as per service norms.

Reviewing Officer

8

Harshwardhan is a sincere and hardworking offr who as Oic ATS has performed his task commendably. A diligent worker who has an eye for detail. He wilfully takes on addl responsibilities. As a couple they possess the desired social grace.

CR Period (01 Jun 2005 to 31 May 2006)Initiating Officer

8

Harsh has an impressive military bearing. He is hard working and is able to put in sustained work for long periods. He has effective intelligence and can produce workable solutions. He has taken part in all sports events of the unit. He is social and conducts himself with grace in social functions.

Reviewing Officer

8

Lt Col Harshwardhan is a professionally competent offr who has performed creditably during the period under review. He has the ability to apply his knowledge to ground. He actively takes part in all unit activities.

CR Period (20 Sep 2006 to 14 Feb 2007)

(The CR was endorsed by RO)

Reviewing Officer

8

A hard working, sincere and dedicated offr. He is professionally competent and understands the nuances of Lgs sp in peace and war. He is fluent in both written and verbal expression. He forms an integral part of team and always willing to shoulder addl resp.

CR Period (15 Feb 07 to 31 Dec 07)Initiating Officer

9

A smart offr with a tall bearing. He is extremely hard working, sincere, dedicated and devoted to the organization. The offr in his tenure was looking after unit sub depot and Inventory management gp has performed outstandingly well. He is intelligent and can handle complex ord problem with ease. Team man who makes an impact and constitutes positively. Strongly recommended for Foreign assignment.

Reviewing Officer

9

Maj Harshwardhan Singh is a smart, sincere, diligent conscientious and industrious offr. He is professionally competent. He displays drive, determination and resoluteness. He is dependable. Accepts addl responsibilities willingly. His performance as Sub Depot Cdr has been outstanding. He has been able to meet the requirements of unit's dependence on the Depot. He is sensitive towards user satisfaction. An effective member of the team.

CR Period (01 Jan 08 to 14 Oct 08)

Initiating Officer

9

A hard working, sincere and an upright offr who has performed his duties as Cdr unit sub depot and OIC Inventory management Gp in an exemplary manner. He understands the nuances of Ord Lgs Sp and can translates it effectively on

grnd which has been appreciated by the dependency. The offr is fluent in both his written and verbal expression and forms a contributory member in any team. He is also recommended strongly for foreign assignment.

Reviewing Officer

9

Harshwardhan is a tall smart offr who is diligent and hard working. He has a commendable job as the Cdr of No 1 Sub Depot. Capable of hard work, he has streamlined the inventory management and issue procedure in this Sub Depot. With his foresight and eye for detail, he has been able to ensure accurate forecasting and proactive provisioning of A+B veh spares. He has actively participated in all activities and has been an asset to the org.

70. The pen picture of 2006 onwards have also been reproduced (supra) to demonstrate how high-handedly, the Applicant has been treated by respondent no 4, while awarding entry of the period in question.

71. In view of the above, fairly and reasonably, an inference may be drawn that ACR awarded by the respondent no. 4 for the period in question suffers from malice and lacks consistency. How a person, all of a sudden becomes bad by a quirk of one such entry making him comparatively downgraded and unfit for

promotion is not understandable more-so in the teeth of subsequent entry and even earlier ones.

72. The box grading and assessment made by the Initiating officer, Review Officer and Senior Review Officer should be in tune with the pen picture. While deciding **O.A No 85 of 2015, Lt Col Rohit Mishra vs Union of India**, we have taken note of the Army Order 45 of 2001 in Para 7 and 8 with regard to significance of pen picture and observed as under:

"7. Para 119 of the Army Order 45 of 2001 envisages to observe consistency in reporting. Para 120 of the Army Order provides that whenever the variations in figurative assessments between various reporting officers are not adequately justified in the pen picture or the figurative grading of the reporting officers is not in consonance with their pen picture the concerning reporting officers may be queried by the MS Branch. It will be thereafter mandatory upon the reporting officer to provide the requisite justification. Paras 118,119,120 and 121 of the Army Order 45 of 2001 being relevant are produced below.

"118. In accordance with the aim as defined at Paragraph 5 above, the assessment contained in a CR will be restricted strictly to the performance and potential as observed during the period covered by the report.

Consistency in Reporting.

119. On receipt in the MS Branch, a CR will be scrutinised for consistency in reporting. Criteria for the same is defined below:-

(a) **Outstanding Assessment.**

Award of 9 marks in the box grading has been explicitly justified in the pen picture, indicating achievement by the ratee beyond the call of normal duty.

(b) **Wide Variations.** *Variations of three or more grades in PQs, DPVs, QsAP, Technical Qualities and two points in box grading by the various reporting officers, need to be explicitly elaborated by the reporting officer(s).*

(c) **Inconsistent Recommendations for Promotion and Employment.**

The Recommendation for Promotion will be primarily based on the QsAP. No reason is required to be endorsed by the reporting officers for endorsing a particular shade of Recommendation for Promotion including NOT YET and NOT. However, variation of three points or more in figurative grading of QsAP and/ or three grades in Recommendation for promotion will be communicated the same by the concerned reporting officer(s) and extracts duly signed by the ratee will be forwarded to the MS Branch.

(d) **Average Assessment.** Award of Average grading (4 marks or C plus in UAC) as specified below has been adequately and explicitly justified in the pen picture:-

(i) **Officers from three to eight years service.** C Plus in box grading in UAC.

(ii) **Officers from ninth year service to Cols.** Four marks or below in mandatory PQs which have been designated by an asterisk (*) in the CR form and box grading.

(iii) **Brigs and Maj Gens.** Four marks or below in all PQs, DPVs, QsAP and box grading.

(e) **Low and Below Average Assessment.**

When an officer is awarded Low or Below Average (i.e. 3 or less) marks in any PQ, DPV, QAP, Technical Quality and box grading in the CR, the same will be adequately justified in the pen picture.

(f) **Adverse Remarks and Guidance for Improvement.**

For these to be consistent and acceptable, it will be essential that the remarks endorsed by the reporting officer(s) are supported by figurative assessment in the relevant variables of PQs and/or the DPVs.

120. Whenever the variations in figurative assessments between various reporting officer(s) are not adequately justified in the pen picture or the figurative gradings of the reporting officer (s) is not in consonance with their pen picture, the concerned reporting officer(s) may be queried by the MS Branch. It will thereafter be mandatory upon the reporting officer (s) to provide the requisite justification. During this process, the following will not be accepted:-

(a) Revision of figurative assessment to avoid explicit justification.

(b) Exclusion of Adverse remarks or Guidance for Improvement to avoid communication to the ratee.

121. Adverse/Advisory Remarks.

*(a) **Adverse Remarks.** These remarks are essential to place on records the weakness of the ratee and will be endorsed in the pen picture of the ratee. All weaknesses in the pen picture will be treated as adverse remarks.*

*(b) **Advisory Remarks.** These remarks are endorsed by reporting officers to bring in further improvement in the ratee's performance and overall development, though per-se-they may not reflect any adverse trait of the ratee. Advisory remarks are not construed as weak/adverse. These will be endorsed separately in the space provided for the pen picture. In CR forms, which do not have space specifically for endorsing advisory remarks, these will be written on a separate sheet and will be pasted below the pen picture.*

*(c) **Communication of Adverse/Advisory Remarks.** Both adverse and advisory remarks by any reporting officer(s) are required to be communicated to the ratee.*

8. A combined reading of the aforesaid paras of the Army Order 45 of 2001 on the face of the record shows that whatever assessment is done should ordinarily be in tune with the pen picture and in case there is variation or inconsistency then they shall be justified by some materials on record. In the present case, while awarding entry in the manner reproduced herein above, the Reviewing officer retained the box grading (8) given by the Initiating officer but commented upon domestic problems for adjusting his wife in separated conditions, a subject on which the initiating officer had made no comment whatsoever nor had the SRO who reported subsequently."

73. At the face of the record, the entries recorded by the Initiating officer and others are not in tune with the pen picture and by this reckoning, the same militate against Para 118 to 121 of the Army Order 45 of 2001 (supra). This in turn vitiates the entry in question. It is startling that on one hand the Applicant has been held to be hard working officer and performed his task upto the mark and shown the potential for further growth in

service and also professionally competent officer and on the other hand, lowering the box grading in hidden portion, seems to be not consistent with the earlier and subsequent entries vis a vis the pen-picture.

74. CONCLUSIONS

(i) The finding of the High Court that the Tribunal has no power to direct for enquiry or to obtain fact finding report, seems to be in contravention of the provisions contained in Armed Forces Tribunal Act 2007 as well as the Civil Procedure Code and the law settle by the Division Bench (supra), hence the same is per incuriam to statutory mandate and lacks binding effect. In view of the above discussion, the Tribunal has jurisdiction to direct the respondents to constitute a committee and held an enquiry vis a vis the Applicant complaint with regard to unsavoury behaviour of the respondent no 4 tinged with sexual innuendoes with Applicant's wife in his own office as pleaded in the non statutory complaint which has been decided without recording a finding over the issues raised.

(ii) In view of the statutory provisions (supra), the Tribunal possessed ample power to direct for discovery of facts, to issue commission, procure attendance of

persons even by issuing warrant in case contingency requires.

(iii) Since factual allegations of unsavoury behaviour tinged with sexual innuendoes with Applicant's wife were admitted by the then Division Commander (respondent no 5) while filing affidavit and broadly the same have not been denied by the respondent no 4 also, it was not open to permit the respondent no 4 to record ACR entry as Initiating officer and his action suffers from malice in law and malice in fact.

(iv) The materials placed on record go to establish beyond doubt the mala-fides on the part of the respondent no 4 to oppress and persecute the Applicant. To call an officer in his office was the right of the respondent no 4 for appropriate reason but it was highly irrational on the part of the respondent no 4 to call the Applicant with his wife in his office during office hours and deliver prolonged diatribe in unbecoming manner tinged with sexual innuendoes.

(v) Even the oral complaint made by the Applicant against the high-handedness of the respondent no 4 in employing filthy and unbecoming language in the presence of the wife of the Applicant was sufficient enough for respondent no 5 to initiate the proceeding

instead of dissuading the Applicant from making any complaint in writing which appears to be failure of command and control in the hierarchy of the system to dispense justice and redress the grievance.

(vi) While deciding the non statutory complaint, it was incumbent on the part of the appellate authority to record a finding over the issue raised by the Applicant which includes misfeasance by the respondent no 4 with the wife of the Applicant. By not recording the finding or holding any enquiry, the respondents 1 to 3 have failed to discharge their duties and protect the dignity and honour of an officer of the Indian Army and his wife. Further the entry made by the respondent no 4 and reiterated by senior officers seems to be done mechanically, and lacks consistency and suffers from malice hence cannot be sustained under the underlying principles laid down in the case of Indian Express Newspaper Pvt. Ltd and P.P.Sharma (supra) and requires to be expunged.

75. Before parting with the case, we would like to observe that the respondent no 4 seems to be in the habit of indulging in such misdemeanour inasmuch as there are reportedly 6 or 7 complaints- all made either by the ladies and others individually or unanimously. The complaints seem similar to the complaint made by

the Applicant with regard to remarks made by the respondent no 4 which were tinged with sexual innuendoes. If such is the track record of the respondent no 4 how such person was allowed to rise to such higher rank, is not understandable. Needless to say, ordinarily, ladies do not come forward with complaint except in some exceptional circumstances and they tend to suffer disgraces in silence for fear of suffering ignominy in society they live in. It is hoped that those at the helm of affairs in the Army shall frame such mechanism keeping in view of the guidelines contained in the case of **Vishakha (supra)** and existing penal law for conducting such proceedings in camera in case any complaints are received by ladies against any of the officers of the Army. Such action is rendered necessary to keep the high dignity of the Indian Army intact.

76. As a result of foregoing discussion, the O.A is allowed. The impugned Annual Confidential Reports for the period commencing from 7th Dec 2004 to 31st May 2005 and Ist June 2005 to 31st May 2006 are expunged with all consequential benefits.

77. Since while deciding non statutory complaint a copy of which has been annexed as Annexure No. R.A No 2, the Competent Authority had not recorded any

finding over the allegations pertaining to use of filthy language tinged with sexual innuendoes in the presence of wife of the Applicant (supra), it is directed that the respondents 1 to 3 shall constitute a committee, hold an enquiry and proceed further in accordance with law against the respondent no 4 keeping in view the finding recorded by the Committee. The entire exercise shall be taken to completion within a period not exceeding six months.

78. There shall be no orders as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

Dated: July 21, 2016

MH/-