

(2013) 09 DEL CK 0430

In the Delhi High Court

Case No : Writ Petition (C) No. 6563 of 2011

Avtar Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 19(1)(g), 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 161
Customs Act, 1962 — Section 104
Navy Act, 1957 — Section 160, 161, 162, 163, 164
Penal Code, 1860 (IPC) — Section 403

Citation : (2013) 09 DEL CK 0430

Hon'ble Judges : Gita Mittal, J;Deepa Sharma, J

Bench : Division Bench

Advocate : D.J. Singh, for the Appellant; Jyoti Singh and Mr. Himanshu Bajaj, CGSC, Ms. Tina Singh and Lt. Commander Varun Singh (Navy) for R-1 and 3, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—The present writ petition has been filed by the petitioner assailing the following:-

(i) the order dated 1st November, 1990 passed in terms of Regulation 169 of the Navy (Discipline and Miscellaneous Provisions) Regulations, 1965 convening the court martial of the petitioner which was communicated by Commander B.K. Ahluwalia, Trial Judge Advocate on the 2nd of November, 1990 on twenty seven charges.

(ii) the order dated 15th March, 1991 of the court martial finding the petitioner guilty of commission of eight charges, i.e., 4th 6th 7th 20th (of Rs. 13,852/- only) 23rd 25th 26th and 27th charge (out of the 27 charges for which he was tried) as well as the order of same date awarding the sentence of 24 months rigorous imprisonment, dismissal from service and fine of Rs. 10,000/- or six

months imprisonment in default of payment of fine which was imposed on him.

(iii) the order dated 27th August, 1991 passed by Admiral L.R. Ramdas, Chief of the Naval Staff u/s 163 of the Navy Act, 1957 maintaining the conviction of the petitioner on all charges except the charge 20 and reducing the sentence of imprisonment to the period of imprisonment already undergone while maintaining the other punishments.

(iv) the order dated 8th December, 2010 passed by the Armed Forces Tribunal in T.A. No. 23/2009

(v) and the order dated 23rd December, 2010 passed in M.A. No. 448/2010 by the Armed Forces Tribunal.

The writ petitioner complains of violation of his Fundamental Rights under Articles 14, 19(1)(g) and 21 of Constitution of India as well as his statutory rights under the Navy Act, 1957 and principles of natural justice.

Factual Narration

2. The petitioner was commissioned into the Indian Navy on 1st July, 1970 as Sub-Lieutenant. It is an admitted position that the petitioner was awarded the Sword of Honour for being the Best Mid-Shipman of his course. He has held various important assignments ashore and afloat during his career with the Navy having specialized in "Clearance Diving". Between 1977-78, he was deputed to undergo a specialist course in the USSR. He is an alumna of the prestigious Defence Services Staff College, Wellington. So far as operational activities in which the petitioner has participated are concerned, the petitioner took part in the 1971 Indo-Pak war on the western front; in 1985, he was deputed to Ireland to recover the Black Boxes of the ill-fated Jumbo "Kanishka", which he successfully recovered; in 1989, the petitioner participated in the IPKF operations at Sri Lanka for which he was awarded by the President of India on Republic Day in 1990 and was honoured being "mentioned in dispatches" for his devotion to duty.

3. The appointment of Command Diving Officer in Headquarters Eastern Naval Command, Visakhapatnam was the last assignment held by him. By 1988, the petitioner had an unblemished record of over 20 years of dedicated service with the Indian Navy. The petitioner submits that he had an illustrious career and was a committed soldier till such time he was wrongly implicated in the case under consideration. This narration of facts is not disputed in the counter affidavit which has been filed before us.

4. So far as the case against the petitioner is concerned, it becomes necessary to refer to his posting in August, 1988 as Commanding Officer of INS Magar, a ship which was based at Visakhapatnam. The petitioner has contended that during his tenure as the Commanding Officer, the ship remained very active operationally and participated in events of national importance including the President's Review of the Indian Navy; the IPKF operations in Sri Lanka as well as other

tasks.

5. The petitioner states that the INS Magar was the first of its class and had been built by a Public Sector Undertaking, that is M/s. Garden Reach Ship Builders and Engineers Ltd. ("GRSE" hereafter). Certain repair and modifications termed as the ship's "refit" were required in 1987 which were effected in the ship.

6. The case against the petitioner commenced on receipt of an anonymous letter in 1989 by the authorities.

In respect of charges leveled in this anonymous letter, a Board of Enquiry was instituted by the Vice Admiral L. Ramdas (the then Flag Officer Commanding-in-Chief, Eastern Naval Command).

7. After receipt of the report of the Board of Inquiry, Vice Admiral L. Ramdas appointed an Investigating Officer under Regulation 148 who recorded the Summary of Evidence in the matter. We are informed that the petitioner was not associated with this.

8. The petitioner has submitted that Commander B.K. Ahluwalia was the then Judge Advocate of the Command, who helped the investigating officer in drafting the chargesheet and the circumstantial letter i.e. the application for trial by court martial of the petitioner.

9. It is also necessary to note that the then Vice Admiral L. Ramdas who was the Flag Officer Commanding-in-Chief, Eastern Naval Command was the Convening Authority who took the decision on 1st November, 1990 to try the petitioner by court martial.

10. We may also note that the petitioner had filed a writ petition before the Andhra Pradesh High Court on 2nd January 1991 praying, inter alia, for a stay of the court martial proceedings. The High Court granted a stay of the court martial proceedings on 4th January 1991. This order was vacated on 26th February 1991.

11. The court martial proceedings recommenced which culminated in the finding of guilt against the petitioner on the 15th of March, 1991 on eight out of 27 charges which had been framed against him and the award of punishment of rigorous imprisonment as class A prisoner; dismissal from Naval service; fine of Rs. 10,000/- for six months imprisonment in default. The petitioner was kept in close custody since 15th March, 1991. The petitioner's request dated 16th March, 1991 for suspension of sentence till judicial review by the Judge Advocate General (Navy) was rejected by an order dated 17th March, 1991 passed by the Chief of the Naval Staff and on the 18th of March, 1991, the petitioner was committed to jail.

12. The petitioner again approached the High Court of Andhra Pradesh for stay of the order dated 15th March, 1991. By order dated 28th March, 1991, the sentence was stayed conditionally furnishing of personal bond in the sum of Rs. 20,000/- with two sureties of like amount while the other two sentence were

maintained. The petitioner was released from custody on furnishing two sureties to the Convening Authority.

13. It is on record that on 8th March, 1991, the said Convening Authority moved Andhra Pradesh High Court for recall of the previous order of suspension of sentence which was recalled by an order dated 24th June, 1991. On 21st July, 1991, the petitioner was again confined to custody. In the record produced before us, it is pointed out that though the Andhra Pradesh High Court had directed that the petitioner be kept in Naval Custody, he was committed to Central Jail (Tihar) up to 30th July, 1991.

14. The petitioner's writ petition was disposed of by the Division Bench of the Andhra Pradesh High Court on 22nd July, 1991 permitting the petitioner to seek other remedy u/s 160 or 162 of the Navy Act as well as interim suspension of sentence u/s 164 of the Navy Act.

15. The petitioner was given liberty to urge all claims and contentions raised by him in the writ petition which were required to be considered on their own merits though the court extended the suspension of sentence upto and inclusive of 30th August, 1991 to enable the petitioner to approach the Naval Authority for judicial review.

16. An application on 29th of July, 1991 seeking judicial review u/s 160 of the Navy Act, 1957 by the Judge Advocate General (Navy) by the petitioner was made. This review was held at New Delhi on 19th-20th August, 1991. It is noteworthy that by the time the petitioner's judicial review came up for consideration, Vice Admiral L. Ramdas stood promoted as Admiral and had also been appointed as Chief of the Naval Staff.

17. An order dated 27th August, 1991 was passed by Admiral L. Ramdas in judicial review of the order of conviction and sentence of the petitioner. By this order, Admiral L. Ramdas dropped one charge i.e. Charge No. 20 against the petitioner and reduced his sentence of imprisonment to the period already spent in jail. The other two punishments were however maintained. We are informed that in order to avoid further imprisonment of six months, the petitioner deposited the fine of Rs. 10,000/- on the 5th of September, 1991 in terms of order of punishment.

18. Aggrieved by the above orders of the respondents, the petitioner filed W.P. (C) No. 3582/1997 in this court. This petition was transferred to the Armed Forces Tribunal where it was registered as T.A. No. 23/2009. The Armed Forces Tribunal considered the matter at length. By the judgment dated 8th December, 2010 the Tribunal set aside the findings of guilt of the court martial on all charges other than the charge No. 7. The Tribunal also sustained the sentence of dismissal from service.

19. So far as the challenge in the present writ petition is concerned, a legal objection has been premised by learned counsel for the petitioner on the

violation of Regulation 156 Navy (Discipline and Miscellaneous Provisions) Regulations, 1965 ("Navy Regulations" hereafter) by the respondents.

20. Before considering the working of Regulation 156 (Navy Discipline and Miscellaneous Provisions) Regulations, 1965, we may for the convenience set out the provisions of Regulations 153, 155, 156 and 157 which read as follows:-

153. Application for Trial-Circumstantial Letter.

(1) An application for the trial by the court martial of any person shall be made as follows:-

There shall be forwarded to the convening authority through the usual channels a letter, hereinafter called the circumstantial letter, reporting the circumstances on which the charges or charges are founded in the order of their occurrence, and in sufficient detail to show the real nature and extent of the offence; when words constitute the substance of the offence, they are to be fully and exactly set out. The letter shall not refer in any way to the previous character, conduct or conviction of the accused, or contain any reference to facts prejudicial to him than such as bear directly on the charges.

(2) When a charge is drawn u/s 55 the circumstantial letter shall contain specific details of every respect in which it is alleged that the accused was at fault.

(3) Any statement made by the accused in the course of inquiries or during an investigation or after he had been charged shall not be included in the circumstantial letter unless it constitutes an essential part of the alleged offence, such as in a charge of perjury and such statement shall be forwarded as an annexure to the circumstantial letter in a separate document and reference shall be made in the circumstantial letter itself to the fact that such statement was made and to its inclusion in the annexure.

(4) If the Commanding Officer should desire to enter into further explanations as to his reasons for asking for a court martial which would necessarily refer to the previous conduct or antecedent of the accused, he shall do so orally or by separate letter to the convening authority.

155. The Charge Sheet. (1) The charge sheet shall contain the list of charges on which it is proposed to try the accused.

(2) Subject to the provisions of the Act, a charge sheet may contain one or more charges.

(3) Every charge sheet shall begin with the name and description of the person charged and state his rank, the number and the ship to which he belongs.

(4) Each charge shall deal with a distinct offence and in no case shall an offence be described in the alternative in the same charge.

(5) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(6) If the law which creates an offence does not give it any specific name, so much of the definition of the offence must be stated so as to give the accused notice of the matter with which he is charged.

(7) The law and the section of the law against which an offence is said to have been committed shall be mentioned in the charge.

(8) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged with is fulfilled in the particular case.

(9) The charge shall contain such particulars as to time and place of the alleged offence and of the person, if any against whom or the thing, if any, in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(10) When the nature of the case is such that the particular mentioned in the foregoing sub-regulation do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, unless such particulars are stated in the circumstantial letter.

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

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

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

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

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

156. Examination of Charges and Evidence-(1) When the convening authority has received the circumstantial letter and other documents herein before

referred to, he shall, before he orders a court martial to assemble, satisfy himself that the charges are correct and sufficient and that they are properly framed and carefully drawn up.

(2) The convening authority shall not convene a court martial unless he has satisfied himself that the evidence if uncontradicted or unexplained will probably suffice to ensure a conviction.

(underlined by us)

157. Amendment of Charges by Convening authority. (1) The convening authority may amend the charges submitted to him and thereupon a fresh charge sheet shall be drawn up and signed by the convening authority and the charge sheet so amended shall stand substituted for the original charge sheet.

(2) Where the charge sheet has not been amended, it shall be counter signed by the convening authority.

Violation of Regulation 156-non application of mind by the Convening Authority.

21. Two fold submissions are made by Mr. D.J. Singh, Advocate in support of this objection. The first rests on the proceedings and steps undertaken by the respondents from reading of the charges (under Reg 153) to convening of the court material (under reg. 156) on the 1st of Nov 1990).

The second submission is that there was no material or evidence to support the charges against the petitioner and that the commanding officer and the Convening Authority acted in great haste overlooking this important aspect of the matter while directing the court material to be convened. It is pointed out that the Tribunal has found the petitioner guilty of only Charge No. 7. On the 1st of November, when the trial by court martial was ordered, there was not a word of evidence to support the charge.

22. On the 1st of November, 1990, a charge sheet was read out to the petitioner which contained 28 charges in accordance with Regulation 153 of the (Navy Discipline and Miscellaneous Provisions) Regulations, 1965. As per the Regulation 153, after the final charge sheet was read out to the petitioner, a circumstantial letter which was in the nature of an application for trial by court martial was required to be prepared by Rear Admiral S.K. Das, the Commanding Officer.

23. In this application, details of the charges and the material on which they were framed, were required to be set out. The statement to this effect is found in para 56 of the application dated 1st November, 1990 made by the Commanding Officer to the Convening Authority. The initial charge sheet along with circumstantial letter and other documents including the list of witnesses in the prosecution as well as summary of evidence in support of the charges were thereafter required to be forwarded to the Convening Authority.

24. The petitioner has drawn our attention to Regulation 155 which sets out the requirement of the list of charges on which the accused person is proposed to be

tried. Each charge is required to deal with a distinct offence and in no case, can an offence be described in the alternative for the same charge.

25. It is evident from the above that Regulations 156 and 159 come into operation on receipt of the circumstantial letter as well as the aforementioned documents by the Convening Authority. As per the mandate of Regulation 156, the Convening Authority is required to satisfy himself that the charges are correct and sufficient, that they are properly framed and carefully drawn up. In addition, the Convening Authority is required to be satisfied that the evidence, if uncontradicted or unexplained, will probably be sufficient to ensure conviction. The Convening Authority can exercise his discretion only thereafter to direct that the court martial be convened. The Commanding Officer is to make a recommendation to the Commander-in-chief. The decision as to whether to convene a court martial has to be taken by the Commander-in-chief.

26. The importance of the compliance of Regulation 156 is writ large from the jurisdiction conferred upon the Convening Authority under Regulation 157 to even amend the charges submitted to him and thereafter direct a fresh charge sheet to be drawn up. As per Regulation 157, the Convening Authority was to take such decision on the circumstantial letter as may be necessary on the basis of the charge sheet and the summary of evidence.

27. After satisfaction in terms of the above regulations, under Regulation 159, the Convening Authority is required to issue warrants to the officer nominated by him as the President of the court martial directing him to assemble a court martial.

28. It appears that there was an inconsistency between the charge sheet and the contents of the circumstantial letter. In the charge sheet, allegations of misappropriation had been made whereas in the circumstantial letter, reference was made to diversion of funds for the purposes of the ships ward room and captain's cabin in lieu of various repair work.

29. Mr. D.J. Singh, learned counsel appearing for the petitioner has urged at length that reading of the charge sheet to the petitioner (which commenced at about 14:30 hours on the 1st of November, 1990) was a long drawn out process and was completed only at about 16:00 hours on the same day. In accordance with the Regulations aforementioned, the circumstantial letter ought to have been prepared only thereafter. Such a circumstantial letter accompanied by the initial charge sheet, list of witnesses, summary of evidence of 58 witnesses and list of 148 exhibits of the prosecution was required to be forwarded for the consideration of the Convening Authority.

As per the respondents, this was also done on the 1st of November, 1990 itself, obviously after 1630 hours.

30. The petitioner has pointed out that this bunch of documents ran in excess of thousand pages and included large number of documents with minute statistical

data and details, given the number and nature of charges which had been leveled against the petitioner.

31. Learned counsel has submitted that the consideration by the Convening Authority under Regulation 156 is a very important stage of the whole matter. Mr. Singh has painstakingly urged that the large number of documents which were placed before the Convening Authority required detailed consideration and proper application of mind by the Convening Authority as the Regulations require his "satisfaction" to the charges and the evidence in support. The respondents claim that the Convening Authority examined the circumstantial evidence and all these documents also on the 1st of November, 1990 itself.

32. So far as Convening Authority is concerned, an amended charge sheet under Regulation 157 of the Navy Regulations was also signed and issued by him on the 1st of November, 1990. Charge No. 27 of the original charge sheet was dropped in the amended charge sheet. In addition thereto, the Convening Authority also ordered the court martial and effected the appointment of the Trial Judge Advocate on the 1st of November, 1990 itself.

33. Significantly the reading of the charges commenced only at about 14:30 hours on this date and ended at about 16:00 hours. This is undisputed. The circumstantial letter was prepared thereafter. The petitioner has urged that very timing of the events on 1st November, 1990 belies the respondents' stand that there was due compliance with Regulation 156 and application of mind by the Convening Authority in terms thereof.

34. The amended charge sheet, circumstantial letter and documents were served upon the petitioner on the very next day i.e. the 2nd of November, 1990 by the Trial Judge Advocate, Commander B.K. Ahluwalia.

35. Learned counsel for the petitioner points out that as a result of the dropping of the charge, concerned portions in the circumstantial letter required modifications. This was not done. This circumstance is also pressed in support of the petitioner's contention that there was no application of mind to the material which was placed before the Convening Authority.

36. If the respondent's plea were to be accepted, it would require acceptance of the suggestion that preparation of the circumstantial letter and compilation of the record which included documents in excess of 1000 pages; summary of evidence of over 55 witnesses; copies of exhibits, etc. for perusal of the Convening Authority was undertaken after completion of the reading of the charges to the petitioner after about 16:00 hours on the same day. It further means that the Convening Authority examined the Circumstantial Letter as well as the accompanying record, charge sheet, applied his mind thereto and passed the order convening the court martial, appointing the Trial Judge Advocate as well as amending the Charge Sheet.

37. In support of this submission that there was no application of mind by the

Convening Authority as there was insufficient time to do so, learned counsel for the petitioner has placed reliance on the pronouncement of the Bombay High Court reported dated 10th October, Zahoor Ahmed Peshimam and another Vs. The Union of India and others, . This case arose in the context of preventive detention under COFEPOSA. It was urged on behalf of the petitioner that having regard to the voluminous documents, the detaining authority did not have sufficient time to consider the material before issuing the order of detention and as such there was no application of mind by the detaining authority. Mr. D.J. Singh, learned counsel for the petitioner has referred to para 22 of this pronouncement and submits that the factual narration in this paragraph is on all fours with the instant case. The relevant portion of the same is set out hereafter:

22. It is true that in (Umesh Chandra Verma v. Union of India), Criminal Appeal No. 878 of 1985 decided on December 20, 1985, the Apex Court had set aside the order of detention, which was passed on the night of 13th June, 1985 when large quantity of contraband gold was recovered from the detenu. The detenu was interrogated almost the whole day on the 13th June, 1985 and at 6-00 P.M. he was formally arrested u/s 104 of the Customs Act. The order of detention was made on the same night. Relying upon the documents, which included the arrest memo prepared at 6-00 P.M., the Court came to the conclusion that the documents and the proposal for detention must have been placed before the detaining authority after 6-00 P.M. in which case it would certainly have been difficult for the detaining authority to make the order the same night. It was in these peculiar facts that the Court came to the conclusion that the detaining authority could not have possibly applied its mind to the voluminous documentary evidence which was placed before him and, therefore, quashed the order of detention. With respect, we do not think that the ratio of the above decision has any application to the facts of the case before us. We have already indicated earlier, and we will elaborate later, that the proposal had reached the detaining authority along with 2272 out of 2301 pages much earlier. The proposal was sent to the Head Office on 18th April, 1996 which consisted of as many as 2272 pages. It was only the additional material in few pages, (in all 29 pages) which was sent on subsequent dates, which, in turn was forwarded by the Head Office of the sponsoring authority to the detaining authority immediately.

23. Both the learned Counsel Shri Khan and Shri Gupte placed reliance on three un-reported decisions of this Court. In Criminal Writ Petition No. 397 of 1992 of Mohd. Ahmed Ibrahim, decided on 22nd April, 1992 (Puranik & Chapalgaonkar, JJ.), the proposal consisted of 262 pages. The order of detention was issued by the detaining authority in Delhi on 9th April, 1991 though the papers were sent by the sponsoring authority from Mumbai on 9th April, 1991 itself, alongwith the documents to Delhi. Some of the documents had come into existence on 9th April, 1991 itself. Some documents had come into existence on the 4th and 8th April, 1991 and they have been referred to as having taken birth in the week preceding the order of detention. It was in these peculiar facts that this Court came to the conclusion that the material was so voluminous and the time left

with the detaining authority was so short that there was non-application of mind on the part of the detaining authority to the material placed before him and, therefore, the order of detention was liable to be struck down. While doing so, this Court made it clear that it did not propose to lay down a general proposition that if the order of detention is passed on the same day on which the proposal was received or immediately thereafter, the order of detention will be bad. On the facts of the case, the learned Judges came to the conclusion that the evidence was so voluminous and the time at the disposal of the detaining authority was so short that the only conclusion that could be reached was that there was non-application of mind on the part of the detaining authority. These observations are to be found in para 6 of the Judgment in Mohd. Ahmed Ibrahim's case.

24. In Criminal Writ Petition No. 991 of 1992 of Smt. Varsha Vilas Jadhav v. The State of Maharashtra and others, decided on 23rd October, 1992 (Puranik & Da'Silva, JJ.), the order of detention was passed on 15th July, 1992. The proposal consisted of number of documents running into 240 foolscap closely typed pages. The detaining authority received the proposal and the documents at 4-00 P.M. on 15th July, 1992 itself and the order of detention was passed at 7-00 P.M. on the same day. It was in these peculiar facts that looking into the voluminous record of the case, running into 240 foolscap closely typed pages, including several documents in vernacular, this Court came to the conclusion that it would not have been possible for the detaining authority to go through the entire documents, apply its mind to them, formulate the grounds of detention and issue the orders of detention and get it typed and sign the same-all within three hours as contended. It was, therefore, that the order of detention was held to suffer from non-application of mind and was, therefore, set aside. These findings are to be found in para 14 of the Judgment.

(Underlining by us)

Undoubtedly this judgment has been rendered in the context of an order of preventive detention. However, it underlines the importance of availability of sufficient time to scrutinise the requisite records before taking a decision, to support a plea that the decision was an informed one, and arrived at after due application of mind.

38. The scrutiny of and application of mind to the circumstantial letter; charge sheet; summary of evidence; exhibits dealing with minute statistical details; decision to amend and retyping of the charge sheet; issuance of various orders relating to the court martial, is claimed to have been completed by the Convening Authority on receipt of this voluminous record on the 1st of November, 1990 itself. Interestingly all claimed to have done after 16:00 hours (when the hearing of charges was completed), only a couple of working hours remain available. It is humanly impossible to have meaningfully completed the above exercise within the available working hours.

39. In this regard, learned counsel for the petitioner has also drawn our attention to the pronouncement reported at *Rajiv Arora Vs. Union of India (UOI) and Others*, wherein the court held as follows:-

14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review. Before a court martial proceeding is convened, legal requirements therefore must be satisfied. Satisfaction of the officer concerned must be premised on a finding that evidence justified a trial on those charges. Such a satisfaction cannot be arrived at without any evidence. If an order is passed without any evidence, the same must be held to be perverse.

(Underlining by us)

40. The respondents have not even ventured to give an explanation for this turn of events. We therefore, find substance in the petitioner's objection that the Convening Authority did not comply with the requirements of Regulation 156. There was no application of mind to the material available with the respondents. The Convening Authority did not examine the material on record to be satisfied about the charges levelled against the petitioner.

Charges were finalised when the Summary of Evidence was not completed.

41. We may now examine the second leg of the submission that Regulation 156 has been violated by the Convening Authority. The charge sheet dated 1st November, 1990 included charge No. 7. This is the only charge of which the petitioner has been found guilty by the Armed Forces Tribunal. Learned counsel for the petitioner has submitted that the Summary of Evidence which was placed before the Convening Authority did not contain an iota of evidence on this charge against the petitioner.

42. The prosecution was aware that there was no evidence at all on charge No. 7 when the trial of the petitioner had been directed and commenced. PW4-Lt. A.K. Ahuja, who made deposition on this charge in court, had not spoken a word on this charge in his statement recorded on 27th of June, 1990 in the Summary of Evidence.

43. After the court martial had commenced proceeding, additional statements were recorded in the Summary of Evidence. The statement of Shri D.K. Das, Branch Manager, State Bank of India was recorded on the 8th of November, 1990 while that of Wing Commander K.C. Dawra (Retd.), Director Finance, Air Force Naval Housing Board was recorded on the 30th of November, 2011 as part of the Summary of Evidence. This was in an attempt to find evidence on charge No. 7 against the petitioner on this charge.

44. The above circumstance lends substance in the petitioner's contention that

the statement of Shri D.K. Das, Branch Manager, State Bank of India and Wing Commander Dawra were manipulated by the prosecution on 8th of November, 1990 and 30th of November, 1990. Shri Das was examined thereafter as PW 12 while Shri Dawra was examined as PW 8 during the petitioner's trial by court martial.

45. It appears that the order directing convening of court martial as well as the order of appointment of the Trial Judge Advocate were passed when there was no evidence/material on record in support of charge No. 7.

46. As per Regulation 156, the Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to ensure a "conviction". On the issue of what would constitute "satisfaction", reference may usefully be made to the pronouncement of the Supreme Court reported at Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, wherein the court held thus:-

19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution.

(Underlining by us)

47. I State of West Bengal and Another Vs. Alpana Roy and Others, , the Supreme Court has noted that providing sufficient reasons for a decision could indicate an application of mind on the part of a judicial or quasi-judicial authority.

48. We may also note the authoritative and binding laid down in Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, wherein the court was concerned with an employee charged with misconduct for his alleged negligent handling of a company cheque book. This charge was overturned on the basis that the arbitrator failed to apply his mind to the submissions of the appellant. An issue was also raised as to whether there was any evidence to substantiate the charge. It was concluded by the court that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are based on conjectures and surmises, the enquiry suffers from the infirmity of non-application of mind and stands vitiated.

49. The petitioner has further pointed out that the proceedings of the court martial commenced on the 10th of November, 1990. However, the summary of evidence was not complete and recorded even between 8th of November, 1990 to 3rd December, 1990. It is complained that this was in violation of Regulation 149 of the Navy Regulations (Part-II) which envisages recording of the complete summary of evidence before an application for trial can be made. These facts clearly support the petitioner's contention that recording of the summary of evidence was undertaken on different occasions by the respondents to fill the gaps and lacunae in the prosecution case. It also substantiates the petitioner's grievance that the summary of evidence was given to him on different occasion by the Trial Judge Advocate.

50. So far as application of the principles laid down in the aforementioned judicial precedents to the instant case is concerned, it is an admitted position that on 1st of November, 1990, there was no evidence on charge No. 7 in the Summary of Evidence which could have been considered by the Convening Authority to direct a trial on this charge. It therefore, has to be held that the direction of the Convening Authority to direct the court martial was based on conjectures and surmises rather than any material in support of the charges. There was no evidence before the Convening Authority at all on charge No. 7. The Convening Authority failed to comply with the mandate of Regulation 156.

Failure to permit inspection of documents

51. The petitioner asked for inspection of documents on the 7th of November, 1990 on which the prosecutor was directed to permit inspection to the petitioner. The petitioner's defending officer, (the present counsel) who was stationed in Delhi, visited Visakhapatnam on 19th November, 1990 for inspection of the documents. It is complained that no meaningful inspection was permitted inasmuch as the documents relied upon by the prosecutor had not been segregated but were part of bulky files and records which contained irrelevant data and documents not relating to the case. This was the only inspection granted to the petitioner before the Trial.

52. A request for photocopy of the documents was made which was turned down by the Trial Judge Advocate. A total of two hours was granted for inspection of voluminous documents. The petitioner's defending officer recorded his protest vide letter dated 20th November, 1990 and 21st November, 1990. In view of this protest, the Trial Judge Advocate vide letter dated 23rd November, 1990 instructed the prosecutor to provide photocopy of documents and vide letter dated 29th November, 1990 directed the prosecutor to flag the relevant documents.

In answer, the prosecutor addressed a letter dated 30th November, 1990 expressing his inability to do so as it would disclose his strategy. The petitioner was thus neither permitted a proper inspection of the records nor furnished copies thereof.

Change of Judge Advocate

53. The petitioner has also made a grievance with regard to the appointment of the Trial Judge Advocate and challenged the legality thereof. The submission is that wide powers are conferred on the Trial Judge Advocate during the court martial proceedings. Therefore it is essential to have an independent, unbiased and fair Trial Judge Advocate ("TJA") especially someone who has not engaged with the subject matter of the trial prior to the court martial.

54. In this regard, it is pointed out that Regulation 159 of the Navy Regulations mandates the appointment of Trial Judge Advocate who is to conduct the court martial proceedings. The duties of the Trial Judge Advocate are specified under the Regulation 159 of the Navy Regulations which provides as follows:-

159. Convening of Court Martial. (1) When the convening authority is satisfied that all the documents are in order and that a court martial ought to be convened, he shall issue a warrant in the prescribed form together with a copy of the charge sheet to the officer nominated by him as president of the court martial directing him to assemble a court martial at the place and on the date mentioned in the warrant.

(2) The circumstantial letter shall not be communicated to the president or to the other members of the court until the court assembles and is duly sworn.

(3) The summary of evidence shall on no account be given to the president or the other members of the court at any stage of the proceedings.

55. The Trial Judge Advocate ("TJA") is legally required to ensure that the trial is conducted in accordance with the Provisions of the Indian Navy and the Regulations framed thereunder. From the above, it appears that the Trial Judge Advocate does not sit with the members of the court martial at the time they give their findings on the charges but he sits with them at the time of deciding the sentence under Regulation 157.

56. The Regulations confer further powers on the TJA. Any objection against the question put to a witness is required to be decided by the TJA under Regulation 179. By virtue of Regulation 182, the TJA is permitted to allow a witness to be called or recalled by the prosecutor. The final summing up of the evidence is also done by the TJA. Under Regulation 191, the TJA is also responsible for ensuring that the proceedings of the court martial are duly recorded and prepared. It is therefore imperative that the TJA is an independent person who acts in an unbiased and impartial manner and ensures that the court martial is conducted in due compliance of the requirements of law as well as the principles of natural justice.

57. The petitioner points out that the Commander B.K. Ahluwalia was the Judge Advocate of the Eastern Naval Command at the relevant time. Therefore he was the Head of the Legal Department of that Command. It is undisputed that Commander Ahluwalia was associated with the drawing of the charge sheet

against the petitioner and drafting of the circumstantial letter. He advised the authorities before the convening of the court martial and thereafter, was advising the prosecutor as well. Yet by the order dated 1st November, 1990 he was appointed the Trial Judge Advocate for the petitioners court martial as well.

58. In view of the involvement of Commander B.K. Ahluwalia, the Trial Judge Advocate in the drafting of the charge sheet and his having tendered advice to the prosecutor in drawing up the charges, involvement in framing the circumstantial letter and the records, the petitioner's defending officer had addressed a letter dated 20th November, 1990 requesting for change of the Trial Judge Advocate as his participation in the pre-trial proceedings would have clouded his objectivity and impartiality. It has been urged that the failure of the TJA to follow up with his instructions with regard to the documents, manifests his lack of neutrality.

59. The petitioner voiced his apprehensions about the impartiality of the Trial Judge Advocate in his letter dated 1st December, 1990 also. However, his request for change of Trial Judge Advocate was rejected vide letter dated 5th December, 1990 sent by the Convening Authority.

60. The petitioner has also contended that the circumstantial letter and the records were processed by the same Judge Advocate General who made recommendations to the Convening Authority premised on the board of inquiry and the summary of evidence. He had also participated in the court martial. The judicial review requested by the petitioner pursuant to the provisions in the Regulations was placed before this very Judge Advocate General. The petitioner had thus objected to his objectivity.

61. It has been submitted that having taken a prima facie view in the matter and having actively engaged in the processing of the records coupled with the recommendations which had been made, the proceedings and orders against the petitioner are vitiated on account of the institutional bias on the part of the Judge Advocate General also.

62. On the aspect of institutional bias of the Trial Judge Advocate, learned counsel for petitioner has placed reliance on the pronouncement of the Himachal Pradesh High Court reported at Sansar Chand Vs. Union of India (UOI) and Others, . In this case also an objection was taken with regard to bias of the Judge Advocate in a general court martial under the Army Act. On this issue, the court has observed as follows:-

32. It must be borne in mind that not only a bias but a real likelihood of bias will also result in disqualification. The Supreme Court in S. Parthasarathi v. State of Andhra Pradesh 1974 (1) SLR 427, dealing with a similar question observed thus:

The question then is: whether a real likelihood of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively or, upon the basis of the impressions that might reasonable be left on the minds of

the party aggrieved or the public at large.

The tests of real "likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it. Whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seem to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry, nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision. [See per Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1968) 3 WLR 694 at P. 707-etc].

63. In support of this submission reliance has also been placed on the pronouncement of the Supreme Court reported at *Union of India and Another Vs. Charanjit S. Gill and Others*,

64. Given the extent of the involvement of Commander B.K. Ahluwalia with every step in the matter at the pre-court martial stage as noticed above, he is bound to have an interest in the outcome of the case. Having been instrumental in drawing up of the charges and drafting of the circumstantial letter, the possibility of his nursing bias against the petitioner.

Denial of a fair Judicial Review-Non compliance of Section 160 and 161 of the Navy Act

65. On behalf of the petitioner, it was submitted that he was denied fair judicial review u/s 160 of the Navy Act, 1957 by the respondents. The petitioner made an application dated 29th July, 1991 for judicial review by the Judge Advocate General in terms of Section 162 of the Navy Act. It is submitted that the judicial review was improperly conducted by the very person who had prima facie found merit in the charges and had passed the order dated 1st November, 1990 convening the court martial. The factual narration in this regard is undisputed.

66. The order dated 1st of November, 1990 amending the charge sheet against the petitioner as well as the order of the same date directing court martial to be convened was passed by the Vice Admiral L. Ramdas (as the then Flag Officer Commanding-in-Chief of the Eastern Naval Command). Prior thereto, in 1989, he had initiated the board of inquiry as well. Thereafter, on receipt of its report, he had appointed the Investigating Officer and ordered recording of the Summary of Evidence. The then Vice Admiral, Ramdas had passed the orders on 1st November, 1990 appointing the Trial Judge Advocate and the prosecutor.

67. In 1991, on receipt of the petitioner's application dated 29th July, 1991, the Judge Advocate General carried out the review u/s 160 of the Navy Act. In accordance with Section 160 of the Navy Act, his report was placed before the Chief of the Naval Staff. On this date, Vice Admiral L. Ramdas stood promoted as Admiral and had been appointed as the Chief of the Naval Staff. The report of the Judge Advocate General was thus placed before the very person who had already examined the matter at the initial stages, prima facie found merit in the charge sheet and directed the court martial to be convened.

68. Learned counsel for the petitioner has relied upon Sections 160 & 161 of the Navy Act while objecting to manner in which the judicial review was undertaken. Before proceeding to examine the petitioner's contention, we may note the statutory regime which applies. In this regard, Sections 160 and 161 of the Navy Act deserves to be considered in extenso and reads as follows:-

160. Judicial review by the Judge Advocate General of the Navy (1) All proceedings of trials by court-martial or by disciplinary courts shall be reviewed by the Judge Advocate General of the Navy either on his own motion or on application made to him within the prescribed time by any person aggrieved by any sentence or finding, and the Judge Advocate General of the Navy shall transmit the report of such review together with such recommendations as may appear just and proper to the Chief of the Naval Staff for his consideration and for such action as the Chief of the Naval Staff may think fit.

(2) Where any person aggrieved has made an application under sub-section (1), the Judge Advocate General of the Navy may, if the circumstances of the case so require, give him an opportunity of being heard either in person or through a legal practitioner or an officer of the Indian Navy.

161. Consideration by the Chief of the Naval Staff (1) On receipt of the report and recommendations if any, u/s 160, the Chief of the Naval Staff shall in all cases of capital sentence and in all cases where the court-martial is ordered by the President, and may in other cases transmit the proceedings and the report to the Central Government together with such recommendations as he may deem fit to make.

(2) Nothing in section 160 or this section shall authorise the Judge Advocate General of the Navy or the Chief of the Naval Staff to make any recommendation for setting aside, or the Central Government to set aside, an order of acquittal passed under this Act.

69. A reading of the section 160 would show that the review by the Judge Advocate General can be either suo moto or an application made to him by an aggrieved person. The Judge Advocate General is required to transmit the report of such review with such recommendations as may appear just and appropriate, to the Chief of the Navy Staff for his consideration and for such action as the Chief of the Navy Staff deems fit. In the instant case, the petitioner sought the review by an application u/s 160 of the Navy Act.

70. We notice that there is no statutory mandate u/s 161 that the Chief of the Naval Staff must necessarily consider the report of the JAG himself.

Section 161 of the Navy Act permits the Chief of the Naval Staff to transmit the proceedings as well as report of the Judge Advocate to the Central Government in cases as the present with such recommendations as he may deem fit. Thus discretion is conferred on the Chief of the Naval Staff, in cases other than cases of capital sentence, whether to consider the report of the Judge Advocate General on judicial review or to refer the matter to the Central Government.

71. The question which arises is as to whether there was real likelihood of bias in the mind of the Chief of the Naval Staff against the petitioner and therefore he should not have considered the report of the Judge Advocate General himself and should have forwarded it for consideration to the Central Government.

72. The challenge by the petitioner rests on the well settled principle that no one can be a judge in his own cause. We are required to examine as to whether the examination by the Chief of the Naval Staff of the report of the Judge Advocate General tantamounts to his having as acted as judge in his own cause. In this regard reference may usefully be made to the binding principles laid down in the judgment reported at A.K. Kraipak and Others Vs. Union of India (UOI) and Others, . In this case the Supreme Court was concerned with the constitution of a Selection Board. One of the members was to be considered for selection. In that context, it was observed that it was against all canons of justice for a man to judge in his own cause. The court observed that the real question was not whether he was biased or not as it is difficult to prove the state of mind of a person. What is required to be seen is whether there is reasonable ground for believing that a person is likely to have been biased. A mere suspicion of bias is not sufficient. There has to be reasonable likelihood of bias. The Supreme Court emphasised that while deciding the question of bias, the Court is required to take into consideration human probabilities and ordinary course of human conduct.

73. The principles governing the "doctrine of bias" vis-a-vis judicial tribunals were laid down in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, The two principles emphasised were that:

(i) no man shall be a judge in his own cause;

(ii) justice should not only be done but manifestly and undoubtedly seem to be done. These two maxims have the consequence that if a member of a judicial body is subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal.

74. We may usefully refer to the decision of the Supreme Court reported at Ranjit Thakur Vs. Union of India (UOI) and Others, In this case the Appellant was dismissed from the Army for disobeying superior's orders and the very officer

whose orders he alleged to have disobeyed, sat as a member of the court martial. It was held that the proceedings were vitiated by bias. We may usefully extract the relevant observations of the Supreme Court which read as follows:-

15. The second limb of the contention is as to the effect of alleged bias on part of respondent 4. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way.

16. It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "corm non-judice". (See AIR 1945 38 (Privy Council))

17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" but to look at the mind of the party before him.

22. Thus tested the conclusion becomes inescapable that, having regard to the antecedent events, the participation of Respondent 4 in the Courts-Martial rendered the proceedings corm non-judice.

75. In *S. Parthasarathi Vs. State of Andhra Pradesh*, an issue was raised with regard to an enquiry by an inquiry officer against whom bias was pleaded and established. The court was thus concerned with the test of likelihood of bias. It was held that if right minded persons would think there is a real likelihood of bias on the part of an officer, he must not conduct the inquiry. It was further observed that surmises or conjectures would not be enough, there must exist circumstances from which reasonable man would think that it is probable or likely that the inquiring officer will be prejudiced against the delinquent officer.

76. At this juncture, we may usefully reproduce a passage from the judgment reported at (1969) 1 QB 577, *599 Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* wherein Lord Denning M.R. observed thus:-

...in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

77. The observations of the Supreme Court in the judgment reported at *Crawford*

Bayley and Co. and Others Vs. Union of India (UOI) and Others, referred to the circumstances under which the doctrine of bias, i.e., no man can be judge in his own cause, can be applied. It was held that for this doctrine to come into play, it must be shown that the officer concerned has a personal bias or connection or a personal interest or was personally connected in the matter concerned or has already taken a decision one way or the other which he may be interested in supporting.

78. Mr. Singh, learned counsel for the petitioner has drawn our attention also to the judicial pronouncement reported at Ramesh Ahluwalia Vs. State of Punjab and Others, In this case, the school principal had supported the case of the school management against the delinquent employee. A question arose about the propriety of the participation by the same school principal in the disciplinary proceedings. It was held that the participation of the principal was inappropriate inasmuch as he had already supported the case of the school management. The Supreme Court reiterated the established legal principle that justice must not only be done but it must also appear to be done.

79. Mr. Singh, learned counsel for the petitioner has also placed reliance on the principle laid down by the Supreme Court in Justice P.D. Dinakaran Vs. Hon''ble Judges Inquiry Committee and Others,

After a detailed discussion, binding principles were laid down by the Supreme Court in para 43 of the pronouncement, the court cited with approval a judgment of Queen''s Bench which reads as follows:-

43. In R. v. Rand [(1866) LR 1 QB 230] the Queen''s Bench was called upon to consider whether the factum of two Justices being trustees of a hospital and a friendly society respectively, each of which had lent money to Bradford Corporation on bonds charging the corporate fund were disqualified from participating in the proceedings which resulted in issue of certificate in favour of the corporation to take water of certain streams without permission of the mill owners. While answering the question in negative, Blackburn, J. evolved the following rule:

...There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is: for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere; but in the present

case there is no ground for doubting that the Justices acted perfectly bona fide; and the only question is, whether in strict law, under such circumstances, the certificate of such Justices is void, as it would be if they had a pecuniary interest; and we think that *R. v. Dean and Chapter of Rochester* [(1851) 17 QB 1] is an authority, that circumstances, from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest.

80. In W.P.(C) No. 237/1966 dated 4th May, 1967 *Sumer Chand Jain v. Union of India*, the Supreme Court found that some indication of personal preference of a quasi-adjudicator might not vitiate proceedings on the basis of bias if "duty" and "interest" could be kept separate. The case dealt with a member of a departmental promotion committee who was favourable towards one of the candidates. Notwithstanding his favouritism, the proceedings of the committee were not vitiated because there was no conflict between duty and interest of the committee members and no one was a judge in his own cause.

81. In the instant case, there is nothing to show such independence on the part of the Chief of Naval Staff reviewing authority. Both had taken a view at several stages in the matter.

82. The Chief of the Naval Staff while functioning as the Flag Officer Commanding-in-Chief, Eastern Naval Command had already taken a view at every stage of the matter after receipt of the anonymous complaint. It is unnecessary to go into the question as to whether or not the judicial review by the Chief of the Naval Staff was actually fair or not. Given his involvement in the prosecution of the petitioner at the earlier pre-trial stages; his having accorded his satisfaction with regard to the charges against the petitioner and ordered the court martial to convene, there is every possibility of his being biased against the petitioner. He had taken a view in the matter. It is reasonable to expect that he would be interested in supporting it. He was the authority who passed the orders appointing the prosecutor as well as the Trial Judge Advocate. To expect independence of mind from such person when judicial review of those very orders is sought is certainly a far fetched possibility. The decision to dispose of the report of the Judge Advocate General and not to refer the matter to the Central Government lacks the perception of fairness. This decision was violative of the principles of natural justice. It tantamounts to denial of an independent, impartial and fair judicial review u/s 161 of the Navy Act to the petitioner.

83. We may note that the respondents could not controvert any of these submissions. There is, thus, merit in the petitioner's grievance that he has been denied fair judicial review in terms of the spirit, intendment and purpose of the same u/s 161 of the Navy Act.

Plea that it was a case of "no evidence" to support the charge

84. The petitioner has assailed the judgment dated 8th December, 2010 of the Armed Forces Tribunal finding him guilty of charge No. 7 on the ground that there was no evidence to support the charge. He was absolved of all other

charges for which the court martial has found him guilty.

85. Before examining this submission, it is essential to set down the parameters within which the High Court would exercise its power of judicial review into the orders passed by the court martial to the extent which has been affirmed by the Armed Forces Tribunal. In this regard, we may usefully set down the principles laid down by the Supreme Court on the scope of judicial review in the judgment reported at B.C. Chaturvedi Vs. Union of India and others, wherein a challenge was laid to the proceedings before the disciplinary authority even though the contours of the burden of proof before the disciplinary authority and a court martial would be different inasmuch as the court martial tries a person for criminal offence by the special procedure, which in the instant case is provided under the Navy Act and the prosecution would be required to discharge the onus of proof beyond reasonable doubt; whereas disciplinary proceedings tests the evidence produced before it on a principles of preponderance of probabilities.

86. So far as appreciation of evidence in the judicial review under Article 226 of the Constitution of India is concerned, the court in para 12 held that the findings must be based on some evidence. The observation of the court reads thus:-

12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappraise the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case

87. On this very issue in a judgment reported at S.S. Mehta (Captain) Vs. Union of India and Others, , the court held thus:-

58. The proposition of law is clearly laid down by the Supreme Court that the Court can examine the records to find out whether the finding or conclusion by the disciplinary authority is supported by evidence on record. The Court can analyse the evidence, to come to the conclusion whether the findings are supported by evidence on record. The Court is not concerned with the sufficiency of evidence. If the Court comes to the conclusion that the finding or the conclusion is perverse and it is not based on any evidence, the Court can interfere. In this case, I am clearly of the view that there is absolutely no evidence against the petitioner and the decision of the Court Martial is based on no evidence and it could be characterized as perverse.

88. In a judgment reported at Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , the court reiterated that the court martial proceedings are subjected to judicial review by the High Court under Article 226 of the Constitution. The court noted that the High Court should not allow the challenge to the validity of the conviction and sentence of the accused inter alia when evidence is sufficient.

89. Before considering the rival contentions, it is necessary to set out the charge No. 7 itself which reads as follows:-

(7) Did on 30th December 1988, in his capacity as Commanding Officer, Indian Naval Ship Magar, dishonestly misappropriate certain movable property to wit a sum of Rs. 20,000.00 (Rupees Twenty thousand only) from Saving Bank Account No. C-3081 held in the name of Commanding Officer, Indian Naval Ship Magar for payment of Air Force Naval Housing Board, New Delhi towards a flat booked by him for his personal use, thereby committed an offence punishable u/s 403 of Indian Penal Code read in conjunction with section 77(2) of the Navy Act 1957.

90. The charge thus related to preparation of a draft of rupees fifty thousand on behalf of the petitioner for payment to the Naval Housing Board.

91. The petitioner disputes that he has misappropriated any amount from S.B. Account No. C3081 which was held in the name of the Commanding Officer, INS "Magar". In support of this contention, reliance has been placed on the testimony of PW-12-Shri D.K. Das, Branch Manager, State Bank of India recorded before the court martial. It is urged that confusion appears to have been arisen because of two saving bank accounts maintained with the State Bank of India and two cheques for the same amount (Rs. 20,000/-) having been drawn on these accounts on the same day. One saving bank account being account No. C3081 was held in the name of the Commanding Officer, INS Magar which was operated jointly by the petitioner herein and the Staff Officer Lt. A.K. Ahuja. The petitioner was maintaining a separate personal account bearing S.B. No. C7635 in the same bank.

92. So far as the ship INS Magar was concerned, as noted above, M/s. Garden Reach Ship Builders and Engineers (GRSE), a public sector undertaking was responsible for its construction, all repairs and supplies. Mr. D.J. Singh, learned

counsel for the petitioner has pointed out that the Managing Director of this public sector undertaking was a retired Admiral from the Indian Navy.

93. Certain repair and refit work was undertaken on the INS Magar in 1988 which was closely monitored by this public sector undertaking. In addition, the work undertaken and all supplies were overlooked by the Work Overseeing Team (WOT) which had been appointed during the ships refit. The WOT included representatives of the Naval Headquarters, a representative from the ship as well as a representative of M/s. Garden Reach Ship Builders and Engineers (GRSE).

94. It is an admitted position before us that the total sum of Rs. 3,43,104.80 received towards repairs/refitting activities was actually deposited with the ship's saving bank account No. C3081. Against this, a total of Rs. 3,22,404/- was spent from the account before 30th December, 1988. As such the amount of Rs. 20,700.80 was left in the account as on 30th December, 1988. It is also undisputed that the ship was sailing after the completion of the refitting activities immediately thereafter.

95. Before examining the petitioner's explanation for the expenditure on which this amount has been expended, it is necessary to examine the prosecution's case against the petitioner on the charge as noted above.

96. In the Summary of Evidence, statement of Lt. A.K. Ahuja was recorded on 28th of January, 1990. In this statement, Lt. A.K. Ahuja did not disclose any misdoing by the petitioner relating to the charge No. 7 levelled against the petitioner. He was brought in before the court martial as PW-4 whose statement was recorded on 2nd of March, 1991 to support the charge against the petitioner when he made material improvements over his statement dated 28th of January, 1990. This testimony has been assailed on the ground that the same deserves to be disbelieved, that this evidence was a clearly concocted and that he was tutored witness.

97. The pertinent evidence on this issue is that of Shri D.K. Das, Branch Manager, State Bank of India, who appeared as PW12.

98. It is noteworthy that the summary of evidence and the exhibits were placed before the Convening Authority before the court martial was ordered on 1st of November, 1990. On this date, there was no evidence to support charge No. 7 in this material. Conscious of this, the prosecution recorded additional evidence even after the Convening Authority had ordered the court martial. The parties have placed before us a statement of Shri D.K. Das, Branch Manager so recorded on 8th of November, 1990 as part of the summary of evidence. In this statement, Shri Das had stated about the preparation of the bank draft for Rs. 50,000/- which was the subject matter of the charge:

(n) A draft in favour of Air force Naval Housing Board was made by us on 30.12.88 for Rs. 50,000/- Rs. 20,000/- was paid by cheque No. 184159 from the account of Commanding Officer, INS Magar and balance Rs. 30,000/- paid in

cash, signed by Commander Avtar Singh (Draft No. 112759 Rs. 30,000/- was withdrawn on 30.12.88 from A/C No. C-7635, personal account of Commander Avtar Singh).

99. We may note that the above statement was made by Shri Das, the Branch Manager based on the letter dated 23rd June, 1990 wherein it was mentioned as follows:-

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13. A cheque No. 184159 for Rs. 20,000/- fvg. Self paid by us on 30.12.88.

14. A draft in favour of Air Force Naval Housing Board was made by us on 30.12.88 for Rs. 50,000/-, Rs. 20,000/- was paid by cheque No. 184159 from the account of Commanding Officer, INS Magar and balance Rs. 30,000/- paid in cash, signed by Commander Avtar Singh INS Magar C/O Navy Officer Hastings, Calcutta (Draft No. 112739 Rs. 30,000/- was withdrawn on 30.12.88 from A/C. No. C-7635, personal account of Commander Avtar Singh.

xxx

100. It is noteworthy that the witness categorically referred to a cash amount of Rs. 30,000/- and cheque of Rs. 20,000/- which went into the making of the draft of Rs. 50,000/-. This draft was deposited on behalf of the petitioner to the Air Force Naval Housing Building Board. It appears that there was some confusion and mistake in the mind of Shri Das with regard to the account from which the cheque of Rs. 20,000/- was given and the date on which the amount of Rs. 30,000/- was withdrawn. Testifying as PW-12, Shri D.K. Das, Branch Manager gave the following clarification before the court martial in answer to question No. 1008 put by the prosecutor:-

Q. 1008 I am showing this Exhibit P-56 which account do these details belong to?

A. These details which I have forwarded belong to the account No. C-3081 of CO. INS Magar in our bank. In this letter we have detailed most of the transactions which took place in that account since its opening. I have given serial numbers and altogether 17 numbers have been given here. So just after the query was received regarding this account the whole details were submitted. Before coming to appear this court I had gone through records once again and I have brought the records with me, there I observed item No. 14 reds draft in favour of AFHNB was made by us on 30 Dec 88 for Rs. 50,000/- and Rs. 20,000/- was paid by cheque No. 184189 from the account of CO. INS Magar and the balance of Rs. 30,000/- paid in cash signed by Cdr Avtar Singh. I submit before court part of this information was not correct. We have observed this as a general mistake. A draft in favour of AFHNB was made on 30 Dec 88 for Rs. 50,000/- part of this portion upto this information was correct. Rs. 20,000/- was paid by cheque was also correct. Whereas the cheque number which you have mentioned is not correct. The correct cheque number is 180854 for Rs. 20,000/- instead of 184159 and the relevant cheque was on SBI account No. C7635 of Cdr Avtar

Singh. This cheque was not on the account of CO. INS Magar. However, the balance of Rs. 30,000/- of the draft in question was paid in cash. It was general mistake occurred due to the fact that Rs. 20,000/- was withdrawn from SBI account No. C7635 of Cdr Avtar Singh personal account and also from C3081 that is account of CO. INS Magar.

(Emphasis by us)

101. The Branch Manager, State Bank of India has therefore clearly explained the mistake in the letter sent by the Bank (Exh. P-56) statement which was recorded in the summary of evidence.

102. The statement of account of the petitioner's Saving Bank account C7635 was proved on record which shows that an amount of Rs. 50,000/- had been withdrawn by the petitioner shortly before the preparation of the bank draft. The prosecution had thus clearly established the availability of this cash amount in the hand.

103. PW-12 Shri D.K. Das, Branch Manager had deposed before the court that the bank had made a mistake when it stated cheque No. 184159 for the sum of Rs. 20,000/- pertaining to the ships account was used. Whereas, in actual fact, it was cheque No. 180854 from the petitioner's account which was used for making the draft. The witness repeatedly refers to the balance amount of Rs. 30,000/- having been received in cash. The following extract from the deposition of PW 12 Shri D.K. Das is relevant in this regard:

Q. 1028 For this draft 112759 how much money was in cash and how much was in the form of cheque or cheques?

A. Rs. 30,000/- was deposited in cash and Rs. 20,000/- was paid by means of a cheque.

Q. 1029 This cheque of Rs. 20,000/- was from which account and given the cheque number also?

A. From the face of it I cannot say what is the cheque number and account from which it is paid. Since I had to go through the records I have seen that there is one withdrawal of Rs. 20,000/- in Cdr Avtar Singh's personal account No. C7635 Cheque No. is 18054. There it is written also to cheque (draft). I may submit, on the same date there was another withdrawal of Rs. 20,000/- from INS Magar account also. So that created the confusion for mistake occurred in giving the confusion for mistake occurred in giving the fact in P 56.

104. Questions on these aspects were put to this witness by the court as well, which may also be set out and read thus:-

Q. 1044 Mr. Das my experience when the customer presents to the banker normally an amount in cash or cheque the details of cheque etc are written on bank draft slip. In this particular case Cdr Avtar Singh had requested for a bank draft or AFNHB for a sum of Rs. 50,000/-. Could you check from your records

and tell us further details on the DD slip? A. Actually on the DD requisition slip which Cdr Avtar Singh submitted to us only deposit Rs. 30,000/- in cash is mentioned and duly authenticated by the concerned officer and Rs. 20,000/- by cheque. The details of the cheque are not mentioned."

"Q. 1049 How did this error occur that you quoted a wrong bank account number. What made you to look subsequently into the other account number and say that a mistake had occurred?

A. Actually when the IO came and asked for these vouchers and particulars we brought it out and going through the account of CO. Magar the draft itself there was a payment by cheque for Rs. 20,000/- rest by cash. I was seeing the debit in CO. Magar's account of Rs. 20,000/- which is identical with amount of cheque deposited against issuance of draft. I thought it was the same withdrawal. But after receiving the summons when I was required to produce the certified copies of the records I have to carefully scrutiny all the records and at that stage only the withdrawal in Cdr Avtar Singh's personal account for issuance of the draft had come to my notice.

105. The above testimony is unequivocal that the cheque of Rs. 20,000/- from the petitioner's personal account was used for preparation of the draft and the balance amount of rupees thirty thousand was by cash. Despite repeated efforts to persuade this witness to show that the cash amount withdrawn by cheque No. 184159 from the ship's saving bank account No. C3081 on 30th December, 1990 was used towards preparation of the draft, the witness did not say so.

106. It is clearly evident that a total amount of Rs. 30,000/- was given by cash to the bank and a cheque of Rs. 20,000/- was given from the petitioner's personal account was used for the preparation of the bank draft.

107. The record placed before us would show that after prolonged adjournments, the respondents produced the then Lieutenant A.K. Ahuja as PW-4 as a witness. In his deposition, this witness went to the extent of saying that he had fraudulently affixed signatures on several documents at the instance of the petitioner who was the Commanding Officer of the ship. The witness has been disbelieved on all counts. The court martial also rejected his testimony in support of twenty charges on which the petitioner was acquitted while holding the petitioner guilty of seven charges. The Armed Forces Tribunal disbelieved the testimony of Lieutenant A.K. Ahuja on further six charges (for which he had been convicted by the court martial).

108. Before us, the respondents accept that Lt. A.K. Ahuja had uttered not a word of evidence on charge No. 7 in the statement given by him in the summary of evidence on the 27th of June, 1990. However, while appearing in the court martial as PW-4 on 2nd of March, 1991, this witness for the first time claimed that the petitioner had given him only a sum of Rs. 10,000/- in cash while an amount of Rs. 20,000/- was withdrawn on 30th December, 1988 from the ship's account and utilized for preparation of the bank draft of Rs. 50,000/- for

payment to the Air Force Naval Housing board which was the subject matter of the charge.

109. It has been contended by Ms. Jyoti Singh, learned Senior Counsel for the respondents that PW4-Lt. A.K. Ahuja was not cross-examined on behalf of the petitioner with regard to his testimony. We fail to see as to how this would absolve the respondents i.e. the prosecution of the burden of proof of the charge beyond reasonable doubt.

110. A perusal of the testimony of this witness would show that the prosecution was relying on answers to leading question suggesting the case in the charge to the witness to which he merely answered in affirmative.

111. Placing reliance on Tahsildar Singh and Another Vs. The State of Uttar Pradesh, ., it is contended that as PW-4 had made no previous statement on the charge, the petitioner had no occasion to confront him with the same.

112. On this aspect, we may note that Armed Forces Tribunal has noted the submission made on behalf of the petitioner that he had arranged an amount of Rs. 50,000/- from his mother which was deposited in his aforesaid SB Account No. C-7635. We find that this deposit stands duly reflected in the statement of account of the petitioner's saving bank account proved by the prosecution on the record of the court martial as Exh. C-06. The petitioner had actually withdrawn an amount of Rs. 50,000/- from his personal account on the eve of ship's departure from Calcutta for personal use. Our attention is drawn to the Exh. C-96-which is the bank statement of account of SB account No. C-7635 (page 233). The deposit of Rs. 50,000/- as well as withdrawal of Rs. 50,000/- (just before the cheque transaction of Rs. 20,000/- on 30th December, 1988) are reflected therein. This document thus establishes that the petitioner had available a large amount and had the capacity to pay Rs. 30,000/- in cash and the cheque of Rs. 20,000/- dated 30th December, 1988 towards preparation of the said bank draft of Rs. 50,000/-. The evidence of the independent witness PW 12 Sh. D.K. Das clearly supports this position who has referred to cash amount of Rs. 30,000/-.

113. There is yet another important circumstance which has been overlooked in this matter. Mr. Singh, learned counsel for the petitioner has drawn our attention to the several documents which were the subject matter of the charges on which the petitioner was tried by the court martial to which PW 4-Lt. A.K. Ahuja was signatory. PW4-Lt. A.K. Ahuja's main evidence was to the effect that he had signed fraudulent bills and documents at the instance of the petitioner.

His testimony therefore would be in the nature of accomplice evidence.

114. It is an admitted position that so far as Charge No. 7 is concerned, there is no evidence to support the same, other than the sole testimony of PW4 Lt. A.K. Ahuja. It would be unsafe and legally impressible to use uncorroborated testimony of an accomplice witness to bring home a finding of guilt for a criminal

offence against a person. For this reason as well, the finding of guilt of the petitioner premised on the uncorroborated testimony of PW-4 is not sustainable.

115. Learned Senior counsel for the respondent has urged that PW4-Lt. A.K. Ahuja was a right hand man of the petitioner and had been appointed as staff officer. Learned counsel for the petitioner has urged that there were disciplinary issues so far as this officer was concerned and the petitioner had given responsibility to him in order to enable officer to get his act together.

116. We find that this was never the case of the prosecution in the court martial and the petitioner never had any chance to explain as to what was the position of the PW4-Lt. A.K. Ahuja on the ship. In any case, the same is irrelevant for the purpose of the present case. The testimony of PW4-Lt. A.K. Ahuja is a belated after thought and concocted long after the trial had started. The petitioner was taken by surprise so far as this testimony is concerned. The petitioner was also faced with 27 charges during trial involving matters of minute accounting details, voluminous documents relied upon by the petitioner and evidence of a large number of witnesses. The refusal of the prosecution to permit inspection of records and other difficulties have been pointed out by learned counsel for the petitioner. The complete contradiction between the oral testimony of PW4-Lt. A.K. Ahuja as against the evidence of PW12-Shri D.K. Das, Branch Manager, State Bank of India, Fort William Branch, Calcutta which is supported by documentary evidence leave us with no manner of doubt that PW 4 Lt. A.K. Ahuja was a tutored witness unworthy of reliance. It is the testimony of PW 12 an independent witness must be accepted.

117. Mr. D.J. Singh, learned counsel appearing for the petitioner has brought out the important circumstance that PW4-Lt. A.K. Ahuja was certainly nursing vengeance against the petitioner. During cross-examination, PW4-Lt. A.K. Ahuja gave evidence with regard to an occasion when the petitioner had roughed him up on board the ship. PW 4 Lt. A.K. Ahuja has further stated that he felt humiliated by the treatment meted out to him by the petitioner.

It is pointed out that PW 4 was taken heavy drinking. PW11-Lt. (SDG) Dr. G.S. Deol has also deposed about the fact that PW4-Lt. A.K. Ahuja was taken to excessive drinking, on occasions from the time the bar opened till it closed even. In answer to question Nos. 2225 and 2259 PW-30 Cdr George has also testified with regard to the addiction to alcohol of PW4-Lt. A.K. Ahuja. Before the Tribunal, the petitioner had also highlighted the testimony of PW-53 in question No. Q/A 4349 to the effect that his own batch mates kept away from Lt. A.K. Ahuja as they felt that he was not a right sort of person to deal with.

118. This factual position regarding the habits of PW 4; the episode between the petitioner and him; as well as his culpability/participation in the alleged offences; certainly gave him the animus to depose against the petitioner.

119. Reference is made to the judgment of the Supreme Court reported at Khalil Khan Vs. State of Madhya Pradesh, In this case, the court was concerned with

material improvement in the statement made by PWs-1, 2, 5 and 8 in court over than the statement made to the police. On this aspect, the Supreme Court has ruled thus:-

6. We have heard the learned counsel for fee parties and perused the records as noted above. The prosecution case rests mainly on the fact that the deceased had make a dying declaration. This fact assumes all importance because there was no eye witness to the incident Apart from all other discrepancies in the evidence of PWs. 1, 2, 5 & 8, we notice that this important fact, namely, that the deceased did make a statement implicating the appellant as the assailant, was not made to the investigating officer when their statements were first recorded and their saying for the first time before the court this fact raises some doubts as to the veracity of said fact. Taking into consideration the nature of injuries suffered and the prosecution evidence itself that the deceased while being taking to the hospital had become unconscious, we think it is not safe to rely upon the evidence of these witnesses who have made this important statement as to the dying declaration for the first time before the Court While holding so, we have borne in mind the fact that all these witnesses are very closely related to the deceased.

120. On this aspect, a reference has been made to yet another pronouncement of the Supreme Court reported at Rudrappa Ramappa Jainpur and Others Vs. State of Karnataka, wherein on a similar issue the court held thus:-(para 13 & 14)

13...So far as the other accused are concerned, the evidence is not consistent. PW-2, the informant alleged in the course of her deposition that A-6 and A-7 had also assaulted the deceased with the wooden handle of the axe and a cycle chain respectively. However, the informant in her first information report did not say so and, therefore, her evidence in court as against A-6 and A-7 assaulting the deceased was not found acceptable by the trial court.

14. PW-6 asserted that A-4, A-5 and A-7 had also assaulted the deceased but it was found that he had not said so in the course of investigation in his statement recorded u/s 161 Cr. P.C. The trial court, therefore, did not accept this part of the evidence of PW-6, PW-4 stated that as many as 5 other accused, apart from A-1 and A-2 assaulted the deceased and in this connection he involved A-3, A-4, A-6, A-7 and A-8. No other witness had stated so and, therefore, the trial court did not accept this part of his evidence. On the other hand PWs. 3, 5 and 8 deposed that only A-1 and A-2 had actually assaulted the deceased. On the basis of such evidence on record, we do not find any fault with the finding of the trial court that only A-1 and A-2 assaulted the deceased and no other accused assaulted him.

121. Learned counsel for the petitioner urges that the petitioner's conduct was completely above board and all transactions transparent. It is urged that all amounts received for the ship were properly accounted for. The petitioner has also explained the manner in which the amount of Rs. 20,000/- which was

withdrawn from the account of the ship on the 30th of December, 1988 was appropriated. It has been urged that during the ship refit, it had been proposed to purchase an Admiral's Deck Chair and a tilting chair for the Captain. This proposal had the approval of Garden Reach Ship Builders and Engineers and with their consent, these chairs were supplied by M/s. Art and Kraft.

122. The payments for these chairs had to be made, before they could be supplied. Processing of bills was a time consuming process. As per a practice prevalent on ships, the amounts were taken from the canteen fund (non-public fund) against a temporary receipt to be reimbursed to the canteen fund when the payment was received after being processed.

123. It is pointed out by learned counsel for the petitioner that the prosecution witnesses have supported the petitioner with regard to the existence of the practice. Our attention has been drawn to question No. 896 which was put to PW 11-Lt. Commander (Special Duty Gunner) Dr. G.S. Deol in his cross examination. The question and the answer of the witness deserves to be considered in extenso and reads as follows:-

Q. 896 I would like to invite your attention to a very common practice on board ships. Namely if I want to buy something in a hurry and money is not available in a particular fund we take some money from a nonpublic fund on a ty. receipt and buy the item. Subsequently when we get the money from a source then we restore the money and tear off the sheet. Was this practice in vogue in Magar?

(Witness sought the protection of the court which was granted to him.)

A. Yes, Sir.

124. It was thus in evidence that though irregular, but on board ships, if money required for affecting a purchase was not available in a particular fund, it was temporarily taken from a non-public fund on a temporary receipt to buy the item. This amount is restored to the non-public fund, on receipt of the payment under the appropriate head. In this writ petition, we are not concerned with the legality or propriety of this practice. However, what stood established from the deposition of PW 11 that such practice was in vogue on board not only the INS Magar but on board all ships.

125. It is important to note that the bills of M/s. Art and Kraft dated 8th October, 1988 for a revolving/tilting chair for the amount of Rs. 6,720/- was submitted on 31st October, 1988 to M/s. Garden Reach Ship Builders and Engineers Limited who released the amount after due scrutiny to the Commanding Officer of the ship (the petitioner) only on the 23rd of November, 1988.

126. The bill dated 11th October, 1988 of M/s. Art and Kraft for the high back/tilting/revolving chair for the amount of Rs. 7,000/- was submitted to M/s. Garden Reach Ship Builders and Engineers Limited on 23rd October, 1988 which released the amount on 23rd of November, 1988 again after an obvious scrutiny.

127. Our attention has also been drawn to communication dated 18th November, 1988 of INS Magar which included the aforementioned bills dated 8th October, 1988 and 11th October, 1988 for the amount of Rs. 6,720/- and 7,000/- in respect of two chairs.

A request was made for reimbursing the amounts of several bills which totalled Rs. 1,89,350.00 mentioned in this letter. These bills included the bills for the chairs.

128. As per statement of account of S.B. A/c. No. C3081 of the ship account, this amount of Rs. 1,89,350/- was credited only on 29th of November, 1988.

129. In order to establish that these two chairs were actually received on board, INS Magar, PW11-Lt. CDR (SDG) Dr. G.S. Deol in his answers to question No. 900, 901 and 902; PW9-Lt. D. Bali Q/A 543, 544 (page 202) and PW4-Lt. A.K. Ahuja (question Nos. Q/A 900, 901, 902 (page 267) and Q/A 4976 (page 1016) confirm the fact that these chairs actually came on board the ship.

130. Learned counsel for the petitioner has pointed out that the work being conducted on the ship by M/s. Garden Reach Ship Builders and Engineers Limited was under the strict scrutiny of the Work Overseeing Team (WOT) which consisted of officials from the GRSE; Ship's Officer and an WOT/CG Inspector/Owner's representative (i.e., from the Naval Headquarter). It is pointed out that WOT was regularly conducting the inspection of the work being completed and reports under their signatures were submitted. These reports have also been relied upon by the respondents before the court martial.

131. Mr. D.J. Singh, learned counsel for the petitioner has further explained that in order to enable accounting while referring to different items, the respondents adopted alphabetic nomenclatures. For instances for engineering goods, the alphabet "E" was used; for hull fittings and fixture; the alphabet "H" is used (this would include the chairs in question) and reference to electrical items is prefixed by the alphabet "L". The respondents proved a Work Completion Report dated 4th November, 1988 on record as Exh. P-42 before the court martial. This report is duly signed by the three members (which included the GRSE Officer; Ship's Officer and the WOT/CG Inspector/Owner's representative i.e., an officer from the Naval Headquarter) has been placed before us. We find that at serial No. 1126 of this work completion report, the following entry stands made:-

1126. H. Mod 31. One No Admirals chair high back/tilting chair fully upholstered procured and supplied as per Bill No. 10/A&K/88-89 dt. 11.10.88 delivered to ship. Chair retaining arrangement welded on desk to suit in Ware House. Job found satisfactory.

132. Further at serial No. 1155 (page 229) the following entry is contained:-

1155. H. Mod 54. One No. Captain's chair, revolving/Tilting chair fully upholstered for OPS Room delivered to ship. Retaining socket welded to deck at No. 10. Job found satisfactory. Bill No. 5(A&K) 88-89 dt. 8-(illegible).

This document was relied upon by the prosecution before the court martial. The document is handwritten and bears the signatures of three independent officials who had been constituted the Work Overseeing Team and had recorded the Work Completion Report. The respondents do not assail the correctness of this document.

133. It is noteworthy that there is no dispute so far as the correctness or the authenticity of the Work Completion Report is concerned which establishes that the two chairs had been duly supplied and installed on board the ship.

In view of the aforementioned documents, the submission of the respondents before us that the chairs never came on board the ship has to be rejected.

134. Our attention has been drawn to the copy of the bills dated 8th October, 1988 (Ex. P-36), which contains "H 54" in handwriting. The bill dated 11th October, 1988 (Ex. P37) similarly contains H 35 in handwriting. "11-54" and "H-31" have been mentioned by the authority while processing the bills, obviously after due scrutiny.

135. We also find in the communication dated 18th November, 1988 reference is made to the Work Completion Report which was signed by the WOT and the ship's officer in which again reference to "H-54" and "H-31" is made.

It is noted therein that these two are amongst the items which were brought by the ship and payment was sought.

136. The letter dated 28th November, 1988 from the ship to the Finance section seeks the amounts of several bills totalling Rs. 1,89,350.00 including the said bills for the chairs. This letter refers to "reimbursement" suggesting that payments stood made.

137. Ms. Jyoti Singh, learned Senior Counsel has referred to a receipt dated 25th June, 1990 issued by M/s. Art and Kraft for the amount of Rs. 1,01,050/- towards three bills by a cheque dated 8th December, 1988. Learned Senior counsel would contend that the three bills included the bills for the chairs. On the other hand, it is pointed out by Mr. D.J. Singh for the respondent that the three bills referred to in this receipt were mentioned as being for the amounts of Rs. 45,000/-; Rs. 17,230.00 and Rs. 6,720.00 bringing their total to Rs. 68,950.00. The receipt for Rs. 1,01,050/- is therefore, not for the mentioned bills.

138. It is pointed out that Garden Reach Ship Builders was using M/s. Art and Kraft for undertaking the refit and making the supplies. The petitioner has placed on record the statement of account reflecting the amounts received by the ship from the authorities towards the refit; as well as the withdrawals and disbursement by the petitioner towards the bills for the various works and items. This statement of account reflects the following:-

(i) As on 30th December, 1988, the total amount received into account No. C3081 was Rs. 3,43,104.80.

- (ii) The total amount withdrawn therefrom was to the tune of Rs. 3,43,004.80.
- (iii) The amount received from M/s. Garden Reach Ship Builders and Engineers (GRSE)
- (iv) The ship's account was opened by drawing Rs. 100/- from the ship's canteen account.
- (v) The total amount paid to M/s. Art and Kraft towards renovation of the wardroom and CO's cabin was to the tune of Rs. 3,01,050/-. This is manifested from the bills and receipt available on record.
- (vi) The remaining amount of Rs. 42,054.80 was utilized to meet the following expenses:-
- (vii) Thereafter only a balance of Rs. 20,700.80 remained in the saving bank account. The amount of Rs. 20,000/- was withdrawn by cash on the 30th of December, 1988 from the SB A/c. No. C3081 which was used for making payment towards the godrej executive chairs and wooden headings for the wardroom and wooden boxes for ship's speakers.
- (viii) The bills proved on record shows that the total cost of the two chairs was Rs. 13,200/-
- (ix) The amount of the bills for the chairs had been taken on temporary receipt from the non-public fund (canteen fund) and returned to it from the amount of Rs. 20,000/-
- (x) The balance amount was used to make payment for the wooden headings and wooden boxes for speakers. This aspect has not been considered in detail inasmuch as the same is not the subject matter of the charge.
- (xi) Thus, after utilization of the amount of Rs. 20,000/- in the above manner, amount of Rs. 20,000/- was not available for misappropriate by the petitioner.

139. It is an admitted position before us that an audit was conducted of the accounts of the ship. No complaint or objection whatsoever with regard to the manner in which funds released to the ship have been utilized was made or received by or from the auditors.

140. M/s. Garden Reach Ship Builders and Engineers Limited was a public sector undertaking effecting the refit which had made no complaint at all.

141. The Work Completion Report recorded by the Work Overseeing Team which included a representative of the Naval HQs, reflects no discrepancy or doubt with regard to the work and supplies.

142. The above discussion would show that the case of the prosecution so far as charge No. 7 is concerned rests on suspicion and conjectures only because two cheques for the same amount, one from the ship's account and another drawn on the petitioner's personal account, were issued on the same date by him.

143. The court martial was held on 28 charges. One charge was dropped by the Convening Authority. The court martial upheld 8 charges while dismissing others. These charges were of serious nature and included the offence of misappropriation. In Judicial Review, u/s 160 of the Navy Act, one more charge was dropped. The Armed Forces Tribunal found that the respondents had been unable to prove further six charges on the same evidence and convicted the petitioner only with regard to charge No. 7.

144. We may note that even the Armed Forces Tribunal was not satisfied with the evidence led by the prosecution on the charge in question on which it has made the following observations in the impugned order:-

13....This account was not supposed to be operated by the appellant for his personal benefit. In that backdrop, it can be presumed that the appellant has misappropriated Rs. 20,000/- by drawing it from the account of CO., INS Magar. The manner in which the appellant allegedly acted may or may not involved fraudulent conduct, but it covers dishonest intention to misappropriate money, that is to say, the appellant misappropriated the money which was allotted for a different purpose.

145. The Tribunal has drawn a presumption against the petitioner based on the testimony of PW4-Lt. A.K. Ahuja whereas the testimony of PW12-Shri D.K. Das, Branch Manager, State Bank of India is supported by documentary evidence of bank statements of the two accounts and the cheques. The testimony of PW 4 Lt. A.K. Ahuja is tenuous and unbelievable. It merits disbelief by the very fact that if the stated facts were true, Lt. Ahuja would have made disclosure thereof on the first occasion. In fact he would have lodged the complaint against the petitioner.

146. It is important to note that PW12-Shri D.K. Das, Branch Manager, State Bank of India had deposed with regard to cash payment of Rs. 30,000/- and payment of Rs. 20,000/- by cheque. This witness has nowhere stated that cash amount of Rs. 30,000/-, comprised of Rs. 20,000/- drawn from the ships account No. C3081 and only Rs. 10,000/- in cash was handed over to PW-4.

147. The observations of the tribunal also show that the prosecution has failed to establish the charge beyond reasonable doubt. The presumption which has been drawn by the Tribunal is not based on any material evidence. The Tribunal also refers to using an amount for a "different purpose" which itself reflects that the amount has not been misappropriated. Mr. D.J. Singh, Advocate refers to depositing or returning the amount to the canteen fund as a "re-arrangement". There is however no evidence to support any element of misappropriation of amounts by the petitioner. This position has been accepted by the Armed Forces Tribunal as well.

148. The respondents have admitted before us that the bills raised towards the refit and the payments reflected as having been made by the petitioner fully tally with the receipt of the amount. In this background, nothing further is required to be examined so far as charge No. 7 is concerned.

149. We may note that the respondents failed to examine the material witnesses that is the members of the Work Overseeing Team who included a representative of the Navy who had certified the works undertaken the processing of the bills and the making of the payments for the refit which supports the innocence of the petitioner.

150. The above discussion would show that charge No. 7 was the sole charge for which the petitioner has been held guilty. In the instant case there was admittedly no evidence on charge No. 7 before the Convening Authority. There was no evidence to support this charge against the petitioner before the court martial. The evidence of the independent witness before the court martial on the contrary supported the innocence of the petitioner. Even the Armed Forces Tribunal has premised the culpability of the petitioner on conjectures without being able to record that the allegations against the petitioner had been proved beyond the reasonable doubt before the court martial.

151. The Armed Forces Tribunal therefore failed to exercise jurisdiction vested in accordance with law in arriving at a finding of guilt of the petitioner so far as charge No. 7 is concerned which error is liable to be corrected by way of appropriate writ in the present proceedings.

152. In a recent judgment reported at Devinder Singh Vs. Municipal Council, Sanaur, the Supreme Court placed reliance on prior judgments reported at Sawarn Singh and Another Vs. State of Punjab and Others, and Syed Yakoob Vs. K.S. Radhakrishnan and Others, reiterating the principle that the Writ Court would intervene if the finding of the Tribunal is not supported by any evidence at all, because in such cases the error amounts to an error of law. It is well settled that Writ Court is not concerned with inadequacy or insufficiency of evidence as a ground for interference.

153. We are satisfied that the finding of the Armed Forces Tribunal in the instant case is based on no evidence at all. The impugned order manifests an error of law which is therefore, not sustainable and is liable to be corrected by issuance of appropriate writ.

154. Before parting with this case, we may note that though no objection has been raised by the respondents with regard to maintainability of the petition, the petitioner has stated that he had filed a Miscellaneous Application No. 448/2010 before the Armed Forces Tribunal for leave to appeal to the Supreme Court which, by an order dated 23rd December, 2010 was rejected. The petitioner thereafter filed a SLP being SLP(C) Nos. 12430-341/2011 before Supreme Court of India which was dismissed "in limine" by an order dated 10th May, 2011. Placing reliance on the pronouncement of the Supreme Court reported at Indian Oil Corporation Ltd. Vs. State of Bihar and others, the petitioner has filed the instant writ petition contending that his right to invoke extra writ jurisdiction of this court under Article 226 of the Constitution of India is preserved. No objection to the maintainability of the present petition on the ground that the

petitioner had filed the SLP before the Supreme Court has been urged. We are guided by the principles laid down by the Supreme Court in Indian Oil Corporation Ltd. (Supra).

155. We therefore, hold that the order dated 8th December, 2010 passed by the Armed Forces Tribunal, Principal Bench, New Delhi; the orders dated 1st November, 1990 and 15th March, 1991 of the General court martial; the order dated 27th August, 1991 of the Chief of the Naval Staff are not sustainable.

156. We are informed that had the petitioners court martial not intervened, by now he would have retired in the normal course. The question which arises is what is the relief which the petitioner would be entitled to? A prayer has been made for grant of all consequential benefits including the salary with effect from 15th March, 1991 as well as pension computed with effect from the date on which the petitioner would have retired had he continued with the respondents.

157. The record of the petitioner noticed by us in the opening paragraphs of this judgment is not disputed. There is no allegation that the petitioner was ever involved or implicated in any other case. As a result of the general court martial not only the promising career of the petitioner was extinguished but he has been deprived of his liberty when he has been imprisoned pursuant to the sentence awarded by the general court martial. The services of the petitioner were terminated and he has been deprived of all benefits of employment ever since.

158. In a judgment reported at Harjinder Singh Vs. Punjab State Warehousing Corporation, the issue of wrongful termination of services of a workman arose in the context of an industrial dispute under the Industrial Dispute Act, 1947. The Labour Court had awarded reinstatement into service of the appellant with compensation of Rs. 87,582. The Learned Single Judge of the High Court substituted the award with an order assuming that the appellant was initially appointed without complying with the equality clause enshrined in Articles 14 and 16 of the Constitution of India and the relevant regulations. The Supreme Court held that the learned Single Judge was not justified in entertaining this new plea raised on behalf of respondents' corporation for the first time during the course of arguments and over turn an otherwise well reasoned award passed by the Labour Court and depriving the appellant of what may be the only source of his sustenance and that of his family. In para 21 of this judgment, the Court quoted an extract from Justice Mathew treatise "Democracy, Equality and Freedom", the relevant part whereof reads as follows:-

27...Where large number of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service might have to remain without means of subsistence for a considerably long time and damages in the shape of wages for a certain period may not be an adequate compensation to the employee for non-employment. In other words, damages would be a poor substitute for reinstatement.

In the instant case, also, the petitioner was the bread earner of the family and by

one stroke of the pen their complete means of support would have been extinguished.

159. On this very aspect, we may carefully refer to Division Bench judgment of the Rajasthan High Court reported at Union of India (UOI) and Others Vs. Ex Sepoy Chander Singh, Union of India & Ors. v. Ex. Sepoy Chander Singh, the court also considered the legality and validity of a sentence imposed upon the respondents by the summary court martial. In this case as well, the court held that the trial was vitiated for non compliance of the rules and also that the punishment was disproportionate and could not have been awarded. On the prayer for reinstatement and the back wages which the petitioner claimed, the opinion of the court authored by B.S. Chauhan, J. (as his lordship then was) the court held as follows:-

32. The issue of entitlement of back wages has been considered time and again by the Hon"ble Apex Court and it has been dealt with differently in different circumstances.

(A) If the termination order is quashed, the employee would be entitled for reinstatement and full back wages, unless there are reasons on record which would justify a departure from the normal order and in that case, the party objecting to it must establish the circumstances necessitated departure. [vide The Punjab National Bank Ltd. Vs. Its Workmen, SC; Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, ; Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671; Smt. Santosh Yadav Vs. State of Haryana and others, Ramesh Chander and Others Vs. Delhi Administration and Others, and Dayaram Dayal Vs. State of M.P. and another [OVERRULED],

(B) If the impugned termination order is set aside only on the ground of being provided with a severe punishment i.e. where the competent court comes to the conclusion that the quantum of punishment was not commensurate with the gravity of misconduct, delinquent employee will not be entitled for back wages for the reason that "public money could not be spent as a premium for such deviant conduct". [Vide Sub-Divisional Inspector (Postal) and Others Vs. K.K. Pavitharan, Raj. State Road Corporation v. Bhagyomal and Ors., 1994 Suppl (1) SCC 573; Malkiat Singh Vs. State of Punjab and Others, ; Deputy Commissioner of Police and Others Vs. Akhlaq Ahmad,

(C) If termination order is quashed on technical grounds, where the authority can further proceed against the delinquent employee, the question of payment of back wages, in case reinstatement is ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings, and depending on the final outcome, [vide C.B. judgment in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.,

33. While considering the issue of entitlement of back wages, court must record a finding that employee was not otherwise gainfully employed during the

relevant period and whether he was free from the blame, [vide State of Uttar Pradesh and Another Vs. Atal Behari Shastri and Another,

160. In the case in hand, the order of termination of the petitioner's service has been quashed on merits. The petitioner's case is covered under Serial No. "A" above. No circumstance which could disentitle the petitioner to grant of full salary has been pointed out. In view of the findings returned by us, the petitioner deserves to be compensated for his confinement which was unwarranted. So far as his dues of salary are concerned, no reason has been pointed out to justify deductions from the petitioner's dues. The respondents have not placed anything to show that the petitioner was in gainful employment after dismissal of service. The principles laid down in para 32 of Union of India & Ors. v. Ex Sepoy Chancier Singh (Supra) would apply to the present case. However, the petitioner has also not made any disclosure in this regard. Almost 23 years has passed since the petitioner was sentenced and has been dismissed from service. The present case is therefore, not a fit case for remitting the matter for reconsideration on this issue to the employers. The petitioner was also compelled to deposit the fine imposed by the court martial in order to avoid further imprisonment in default of the same. Taking a considered view from all angles, we are of the view that the petitioner deserves to be granted amount equivalent to 50% of his salary for the period that he was dismissed. The petitioner would be entitled to the full amount of his pension from the date the same became due and payable.

In view of the foregoing discussion, we direct as follows:-

- (i) The order dated 8th December, 2010 passed by the Armed Forces Tribunal, Principal Bench, New Delhi; the orders dated 1st November, 1990 and 15th March, 1991 of the General Court Martial; the order dated 27th August, 1991 of the Chief of the Naval Staff are hereby set aside and quashed.
- (ii) As a result, the petitioner would be entitled to notional benefits of reinstatement with all consequential benefits with effect from 15th March, 1991.
- (iii) So far as arrears of salary are concerned, the petitioner shall be entitled to 50% thereof with effect from 15th March, 1991 till such date as the petitioner would have retired from service. He shall be entitled to the full amount of pension due and admissible to him from the date on which he would have retired.
- (iv) The respondents shall effect computation of the amounts due and payable to the petitioner in terms of the above within six weeks from today and communicate the same to the petitioner.
- (v) The payment of the amount in terms of the above judgment shall be made to the petitioner within a further period of six weeks thereafter.
- (vi) The petitioner shall be entitled to refund of the amount of Rs. 10,000/- deposited on 5th of September, 1991 which was deposited by him in compliance of the orders dated 15th March, 1991 and 27th August, 1991.

(vii) The petitioner shall be entitled to costs of litigation which is are quantified at Rs. 25,000/- which shall be paid within six weeks. This writ petition is allowed in the above terms.