

(2008) 10 DEL CK 0082
In the Delhi High Court
Case No : WP (C) No. 9509 of 2004

Lt. Cdr., M.P. Verma

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-10-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 100, 102, 165
Evidence Act, 1872 — Section 155, 155(2), 27
Navy (Disciplinary and Miscellaneous Provisions) Regulations, 1965 — Regulation 148, 148(1), 148(5), 149, 151
Navy Act, 1957 — Section 101, 102, 103, 104, 105
Navy Rules — Rule 16
Prevention of Corruption Act, 1988 — Section 13, 13(1), 13(2), 3, 4

Citation : (2009) 156 DLT 41

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Meet Malhotra and Sukhjinder Singh, for the Appellant; Jyoti Singh and Ankur Chhiber, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—The petitioner joined Indian Navy as Air Artificer Sailor in November, 1968 and was commissioned as an officer on 1.4.1981. He superannuated on 30.09.2000. Prior to superannuation he was posted as Deputy Controller of Procurement (Central Purchase/Direct Purchase) in the Material Organization, Mumbai. By virtue of an agreement entered into by him with the Central Government, he was re-employed in the Indian Navy soon after his retirement i.e., w.e.f. 01.10.2000 which appointment continued till 21.5.2004. During this period also, he was posted as Deputy Controller of Procurement in Ghatkopar Mumbai and as such he was responsible for various procurement activities on behalf of Navy.

2. In or around June 2003 Intelligence inputs were received by the Navy

Authorities about extortion of illegal gratification by some Naval officers from the vendors for giving them contracts for supply of defence equipments. On being satisfied that the petitioner was involved in such practices his house was raided, from where a sum of Rs. 6,91,700/- was recovered hidden in a servant quarter. A diary maintained by the petitioner in his own handwriting as confirmed by the handwriting expert was also recovered from his brief case, which contained details about the receipt of money from the vendors so obliged. Thus the petitioner was attached with the Commanding Officer, INS ANGRE for disciplinary purposes and was sent for trial on 17 charges for acquiring assets disproportionate to his known sources of income u/s 13(1)(d) r/w 13(2) of the Prevention of Corruption Act, 1988 as also u/s 77(2) of the Navy Act, 1957 (for short "the said Act"). He was tried by a General Court Martial which found him guilty of charges No. 2, 3, 5, 6, 8, 9, 10, 13, 15 and 17 and sentenced the petitioner to undergo simple imprisonment for one year, dismissal from service besides imposing fine of Rs. 6,91,700/-. The petitioner was dismissed from the service of Indian Navy w.e.f. 21.05.2004. However he could not be arrested for undergoing the simple imprisonment due to a stay in respect of his arrest granted by Mumbai High Court and later extended by the Apex Court, which is continuing even till date.

3. The charges for which the petitioner has been convicted are highlighted as under:

(2) Did at about 1900 hrs on 05 September 2002, being a public servant posted as Deputy Controller Procurement (Central Purchase/Direct Purchase) at Material Organisation (Mumbai), by abusing his position as public servant obtain for himself pecuniary advantage comprising Rs. 50,000/- (Rupees Fifty Thousand) in cash from Mr. KS Subramanian, General Manager, Safari Industries (India) Limited, suppliers of suitcases to the Indian Navy, at Hotel Meghdoot, near Ghatkopar Railway Station, Mumbai, and thereby committed an offence u/s 13(1)(d)(ii) of the Prevention of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

(3) Was at about 1600 hrs on 07 Dec 2002, guilty of conduct unbecoming the character of an officer in that he accepted Rs. 5,000/- (Rupees Five Thousand) in cash at Kala Ghoda, Mumbai from Mr. Vijay Kumar Singhal, Proprietor of M/s Computer Stationery, Mumbai, suppliers of computer related items to the Indian Navy, and thereby committed an offence punishable u/s 54(2) of the Navy Act, 1957.

(5) Did at about 1330 hrs on 13 February, 2003 being a public servant posted as Joint Controller Procurement (Central Purchase) at Material Organisation (Mumbai), by abusing his position as public servant, obtain for himself pecuniary advantage comprising Rs. 10,000/- (rupees Ten Thousand) in cash, from Mr. Akar A. Filmwala, Parnter of M/s Equip-Tronics, Mumbai, suppliers of Electrical and Electronic items to the Indian Navy. In his officer in Material Organisation (Mumbai), and thereby committed an offence u/s 13(1)(d)(ii) of the Prevention

of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

(6) Was at about 1600 hrs on 08 Mar 2003, guilty of conduct unbecoming the character of an officer in that he accepted Rs. 5000/- (Rupees Five Thousand) in cash at Kala Ghoda, Mumbai from Mr. Vijay Kumar Singhal, Proprietor of M/s Computer Stationery, Mumbai, suppliers of computer related items to the Indian Navy, and thereby committed an offence punishable u/s 54(2) of the Navy Act, 1957.

(8) Did at about 2000 hrs on 07 April 2003, being a public servant posted as Joint Controller Procurement (Central Purchase/Direct Purchase) at Material Organisation (Mumbai), by abusing his position as public servant, obtain for himself, pecuniary advantage comprising Rs. 5,000/- (Rupees Five Thousand) in cash from Mr. Om Prakash Toshniwal, Senior Manager M/s Arjay Apparel Industries Limited, Mumbai, suppliers of vests and briefs to the Indian Navy, at his residence in Material Organisation (Mumbai), and thereby committed an offence u/s 13(1)(d)(ii) of the Prevention of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

(9) Did at about 1400 hrs on 12 April 2003, being a public servant posted as Joint Controller Procurement (Central Purchase/Direct Purchase) at Material Organisation (Mumbai), by abusing his position as public servant, obtain for himself pecuniary advantage comprising Rs. 10,000/- (Rupees Ten Thousand) in cash from Mr. Akbar A. Filmwala, Partner of M/s Equip-Tronics, Mumbai, suppliers of Electrical and Electronic items to the Indian Navy, in his office in Material Organisation (Mumbai), and thereby committed an offence u/s 13(1)(d)(ii) of the Prevention of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

(10) Did at about 1100 hrs on 26 April 2003, being a public servant posted as Deputy Controller Procurement (Central Purchase/Direct Purchase) at Material Organisation (Mumbai) by abusing his position as public servant, obtain for himself pecuniary advantage comprising Rs. 1,00,000/- (Rupees One Lakh), in cash from Mr. Ashok Kalra, Chief General Manager (Commercial), Lakhani Industries Limited, Faridabad, suppliers of shoes to the Indian Navy, in his office in Material Organisation (Mumbai), and thereby committed an offence u/s 13(1)(d)(ii) of the Prevention of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

(13) Did at about 1700 hrs on 09 May 2003, being a public servant posted as Deputy Controller Procurement (Central Purchase/Direct Purchase) at Material Organisation (Mumbai) by abusing his position as public servant, obtain for himself pecuniary advantage comprising Rs. 10,000/- (Rupees Ten thousand) in cash from Mr. Venugopal Asopa, representative of M/s Asopa Traders, Visakhapatnam, suppliers of peak caps and clothing items to the Indian Navy, in

his office in Material Organisation (Mumbai), and thereby committed an offence u/s 13(1)(d)(ii) of the Prevention of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

(15) Was at about 1600 hrs on 04 June 2003 guilty of conduct unbecoming the character of an officer in that he accepted a gift of Rs. 5000/- (Rupees five Thousand) in cash, in his office in Material Organisation (Mumbai) from Mr. Vijay Kumar Singhal, Proprietor of M/s Computer Stationery, Mumbai, suppliers of computer related items to the Indian Navy, and thereby committed an offence punishable u/s 54(2) of the Navy Act, 1957.

(17) Did at about 2200 hrs on 08 June 2003, being a public servant posted as Deputy Controller Procurement (Central Purchase/Direct Purchase) at Material Organisation (Mumbai), possess pecuniary resources to the extent of Rs. 6,91,700/- (Rupees six lakhs ninety one thousand seven hundred) in cash, namely, Rs. 6,76,000/- (Rupees six lakhs seventy six thousand) recovered from an air bag in the servants quarter attached with his residence at 3, Saraswati, Naval Park, Material Organisation (Mumbai) and Rs. 15,700/- (Rupees fifteen thousand seven hundred) in an almirah in the said residence, which is disproportionate to his known sources of income namely salary for which could not satisfactorily account, and thereby committed an offence u/s 13(1)(e) of the Prevention of Corruption Act, 1988, punishable u/s 13(2) of the said Act, read in conjunction with Section 77(2) of the Navy Act, 1957.

4. Prior to filing of the present writ petition, the petitioner did prefer a statutory appeal before the Central Government under Sections 162/163 of the Act against his conviction and sentence. The said appeal was dismissed during the pendency of the writ petition vide order dated 4th May, 2005. The petitioner has amended his petition and has filed the amended petition thereby also challenging the order of the Central Government dated 4th May, 2005 in addition to the prayers earlier made.

5. One of the objections raised by the petitioner against his trial by a Court Martial is that he was not subject to the said Act and therefore could not have been tried under the Naval Law. This objection had been rejected by a Division Bench of this Court presided over by Dr. Justice M.K. Sharma and Ms. Justice Reva Khetrapal vide their order dated 19.5.2006 which has also not been reversed even by the Apex Court.

6. By the aforesaid order it has been held:

That the petitioner admittedly was a re-employed personnel with the Navy just after his retirement in terms of an agreement entered into by him with Central Government of his own volition in terms of Section 6 of the Act and, therefore, in accordance with the terms and conditions laid down under the Navy instructions 5/8/58 he subjected himself to Naval law. By virtue of the aforesaid instructions and in view of Section 6(1) of the Navy Act, any person who is not otherwise subject to Naval law but enters into an agreement with the Central Government

to serve in particular ship or otherwise of his own volition, becomes subject to Naval law.

7. It was further held that all uniformed persons belonging to Indian Navy and serving anywhere in the Navy become subject to Naval law when they themselves of their own volition subject themselves to the provisions of the said Act by entering into an agreement u/s 6 of the said Act. It was also observed that at the relevant time the petitioner was admittedly in the contractual employment of the Navy as is reflected from his own letter dated 1.10.2003 seeking his release from the service of the Navy w.e.f. 31.12.2003.

8. The petitioner aggrieved by the aforesaid judgment also approached Hon'ble Supreme Court of India. However, the Apex court while disposing of his petition did not set aside the order and only made following observations;

The High Court of Delhi by order dated 24th March, 2005 directed the Central Government to proceed with the disposal of the representation made by the petitioner u/s 162 of the Navy Act. The High Court has clarified that the pendency of the writ petition shall not come in the way while disposing of the representation by the Central Government. The learned Additional Solicitor General for the Union of India, at the time of hearing, placed before us an order passed by the Central Government, Ministry of Defence dated 22nd May, 2004 under Sections 162 and 163 of the Navy Act, 1957. By the said order, the conviction was upheld and the prayer made by the petitioner was dismissed as devoid of merits.

At this stage, Mr. L.N. Rao, learned Senior Counsel appearing for the petitioner, brought to our notice that an application for amendment of writ petition filed by the petitioner in the High Court has already been allowed by the High Court. The petitioner has filed the amended writ petition in this S.L.P.

The High Court, while disposing of the writ petition, directed the registry of the said court to place the matter before the regular Bench on 10th July, 2006 for hearing the main pleas raised by the writ petitioner pertaining to the findings and sentence of the Court Martial.

Now, since amendment application has also been allowed, we request the High Court to consider the amended writ petition and also the plea raised by the petitioner pertaining to the findings and sentence of the Court Martial on merits and after affording opportunity to both the parties.

Till the disposal of the writ petition, the order passed by the High court in the impugned order vacating the stay shall stand stayed. In other words, the petitioner will not be arrested till the disposal of the writ petition.

The SLP is disposed of accordingly. No costs.

9. The petitioner has also not pressed this point before us again. Even otherwise, there is no reason for us to have a review of the well reasoned order of the

Coordinate Bench of this Court on the issue. Hence, we conclude that the petitioner was subject to Naval law in the relevant period and asking him to face trial by a Court Martial was not illegal.

10. Additionally the petitioner has pointed out some procedural irregularities in the Convening of the Court Martial, its constitution and substitution of its two Members while the trial was on. Objection has also been raised about the role of the Trial Judge Advocate during the Course of trial. It is claimed that those infirmities vitiates the trial. Some other infractions have also been pointed. It has been pleaded;-

(i) That the petitioner was forcibly taken to Naval Ship INS Kunjali and was given third degree treatment to extract confessional statement and that the sum of Rs. 6,91,700/- recovered from his house was not the bribe money but was the money belonging to the petitioner as received by him towards an agreement to sell produced on record for sale of his property at Pune, Flat No. 43, First Floor, Flat No. 3 situated in M.P. Co-operative Housing Society Ltd. Sahnani, Pune in January, 2003. It is submitted that this aspect has been completely overlooked by the Court Martial.

(ii) The petitioner was borne with the Material Superintendent (MS) in Material Organization (MO) Mumbai, and as such MS(MO) alone was competent to make an application for his trial in accordance with Regulation 148(5) of the Regulations, Navy Part II (Statutory). Such application could not have been made by the Commanding Officer of INS ANGRE.

(iii) The Investigating Officer had to be appointed by his Commanding Officer in terms. However, the C-in-C himself appointed the investigating officer whereas it should also have been done by MS (MO) thereby C in C took excessive personal interest in the proceedings.

(iv) That the Convening Authority had only to appoint the President of the Court Martial u/s 97(12) while the other members were to be chosen by the President in terms of Section 97(19) and 97(20) of the Act. But the convening authority handpicked various junior officers as members of the court martial illegally by substituting two members of the Court Martial itself. Reliance has been placed upon the letter of the convening authority dated 16th January, 2004 which is an excuse list, exempting all officers falling in between the seniority of the members which is subsequent to the order appointing the President.

(v) An objection was raised regarding sitting of those members in Court Martial who were not invited by the President of the Court Martial u/s 97(19) of the Navy and were handpicked at the behest of higher authority. This objection was not only against their competence but also regarding their impartiality and should have been put to vote by the Court Martial. However instead of doing so it was decided by the Trial Judge Advocate herself. This Act of the trial Judge Advocate was thus in violation of the judgment of the Apex Court in the case of Union of India (UOI) and Others Vs. Shivendra Bikaram Singh, which is sufficient to vitiate

the trial.

(vi) The petitioner had requested for an interview with the witnesses for the prosecution on 31.01.2004 and 04.03.2004 under Regulation 172(5) which ought to have been granted by the Court Martial. However it was refused. This affected the preparation of the petitioner's defence and therefore affects the partiality of the procedure undertaken by the court martial.

(vii) Petitioner was also not supplied copies of the charge sheet and statement of witness supporting the charge sheet which was violative of Regulation 151 and vitiates the trial in view of the Judgment of the Supreme Court in Union of India (UOI) and Others Vs. B.N. Jha,

(viii) Charges leveled against the petitioner were not proved by leading any independent evidence. In fact the findings of the Court Martial are based upon the noting of bribe money recorded in the diary only which cannot be taken as proof of such entries without corroboration from independent sources. The testimony of the bribe givers relied upon by the Court Martial was not admissible without prosecuting them together with the petitioner or otherwise. It has been submitted that the those witnesses were none else but accomplices and were induced by Navy by continuously placing the orders on them despite discovery of story of so-called illegal gratifications allegedly paid by them to the petitioner.

(ix) That Navy had no jurisdiction to exempt civilians from punishment and should have lodged FIR against all the accused person (who would also include the bribe givers) and they ought to have been tried under the Prevention of Corruption Act under the aegis of the designated Court. It is stated that the Navy procured testimony of the bribe givers by inducing them which is an offence in the eyes of law. Instead of black listing the fourteen offenders the Navy authorities produced those vendors as prosecution witnesses. This also impeaches their credit u/s 155(2) of the Evidence Act and makes their testimony inadmissible in evidence. In fact, the statement made by the vendors was also vitiated on account of the pressure imposed upon them by police/provost officer, Commander A. Saran and Commander Tomar.

(x) That the panchnamas were prepared in violation of Section 100, 102 and 165 of the Cr.P.C. by tampering with the original panchnama and by not observing safeguards as provided for under Sections 3 to 5 of the Prevention of Corruption Act inasmuch as, the bribe giver were not tried with the petitioner as observed by the Hon''ble Supreme Court in the case of P. Nallammal Etc. Vs. State Rep. by Inspector of Police,

(xi) The disclosure statement allegedly made by the petitioner Ex.P-50 was inadmissible being contrary to provisions of Section 27 of the Evidence Act.

(xii) The President of the Court Martial had not applied his mind inasmuch as, throughout the proceedings he was issuing SMSs to such a large extent which shows that he gave no attention to trial as is apparent from the report of the

MTNL in their affidavit at pages 413 to 424 of the paper book.

(xiii) That the entire action taken by the C-in-C himself without involving the concerned officials violated the Scheme of the Navy Act and the Regulations framed there under which shows his personal interest and excessive command influence which also vitiates the entire proceedings.

11. In addition to that the petitioner has also mentioned some of the instances regarding the bias of the Trial Judge Advocate during trial. In this regard, it has been submitted that:

(i) The TJA examined and recorded the depositions of the officer of the Court without administering him oath in violation of Section 110 of the Navy Act.

(ii) The summary of evidence of PW1, 2, 12 and 14 was not provided to the petitioner in violation of Regulation 169 read with Regulation 149, Regulations Navy Part II.

(iii) The TJA ruled that the head of the organization can certify copies of the documents as correct. This is contrary to Section 133 of the Navy Act because it is only the Commanding Officer or the Secretary of Ministry of Defence can do so.

(iv) TJA failed to take note of the provisions of Section 65A and 65B of the Evidence Act despite the fact, Section 130 of the Navy Act makes Evidence Act applicable to the Naval Trial.

(v) TJA permitted postponement of cross-examination of Commander A. Saran but when petitioner's Counsel commenced cross-examination imposed stringent restrictions.

12. Petitioner also stated that the Trial Judge Advocate was a short service commissioned officer whose services were coming to an end during the pendency of the court martial and was extended for a year, and has not discharged her duties impartially. She acted with bias and committed number of illegalities while performing her functions during the Court Martial in addition to what has been stated above.

13. The petitioner also assailed the order of Central Government rejecting his appeal as an order passed without application of mind and without considering the submissions made by the petitioner. It has been prayed that the petitioner be exonerated of all the charges and his conviction and sentence be set aside. The money recovered be also refunded to him as it belongs to the petitioner and is not bribe money as alleged.

14. The petitioner has also relied upon the following judgments:

1. Dhananjaya Reddy etc. Vs. State of Karnataka,
2. S.N. Mukherjee Vs. Union of India,
3. Mahipal Singh v. Union of India and Ors. 1994 LAB. I.C. 2365

4. Union of India (UOI) and Others Vs. Shivendra Bikaram Singh,
- 5 Union of India and others Vs. Major General Madan Lal Yadav (Retd.),
6. Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others,
7. Union of India (UOI) and Others Vs. B.N. Jha,
- 8 P. Nallammal Etc. Vs. State Rep. by Inspector of Police,

15. The respondents contested the petition by filing a counter affidavit. It has been submitted that by virtue of the agreement entered into by the petitioner with the Central Government for his re-employment in the Indian Navy w.e.f 01.10.2000, the petitioner became a person subject to Naval law in terms of Section 2(1)(b) read in conjunction with Section 6 of the said Act. He was posted as Deputy Controller of Procurement, Central Purchase/Direct Purchase in the Material Organization (Mumbai), which was tasked with procurement of spares and equipments for submarines, battleships and other vessels for the Indian Navy from civilian vendors. On receipt of intelligence inputs alleging involvement of the petitioner and others in taking illegal gratification from the vendors, a raid was conducted at his house and a sum of Rs. 6,91,700/- was recovered along with a diary which was in the handwriting of the petitioner containing the records of bribe money received from the vendors. Thus, in accordance with the provisions contained in the Regulation 148 of the Navy (Disciplinary and Miscellaneous Provisions) Regulations, 1965 (hereinafter referred to as "Regulations") read with Navy Instructions 95/69, the petitioner was attached with the Commanding Officer, INS ANGRE and was tried by a Court Martial for 17 Charges involving corrupt practices and acquisition of assets disproportionate to the known sources of his income u/s 13(i)(d) read with Section 13(2) of the said Act on 12 counts and u/s 77(2) of the said Act on 5 counts for conducting himself unbecoming of the character of an officer and accepting various sums of money.

16. The charges were read out to the petitioner on 19.12.2003 when he was also asked to submit his explanation to which the petitioner replied, "Sir, I do not wish to make any statement at this stage". Hence Commanding Officer, INS Angre made an application for the trial of the petitioner by court martial in terms of Regulation 153 of the Regulations. The convening authority approved the trial by court martial. The Court martial found the petitioner guilty of 12 out of 17 charges based upon evidence of 23 prosecution witnesses and 66 documents. The proceedings were undertaken in accordance with the provisions of the Navy Act and Regulations. The petitioner during the entire proceedings was represented by the Counsel of his own choice and had cross-examined all the witnesses at length and after the conclusion of the court martial, he was sentenced to undergo simple imprisonment of 12 calendar months, dismissal from service and was imposed fine of Rs. 6,91,700/-.

17. The petitioner's appeal filed u/s 162 of the Act was considered by the Central Government but no merit was found therein and has been rejected by a well-

reasoned order dated 04.05.2005. It has been denied that there was any infraction of the Act or the Regulations framed thereunder. It is also denied that there was any bias, command influence or non application of mind by the authorities while conducting the trial. It has also been denied that any illegality had been committed by the Trial Judge Advocate during the Court Martial.

18. Insofar as the plea of the petitioner, that he was not under the command of the Commanding Officer, INS ANGRE and therefore, he had no jurisdiction to issue charge sheet to the petitioner is concerned, it is submitted that all personnel appointed in establishments in Mumbai and/or Maharashtra who are not commissioned on a ship, customarily belong to INS Angre as ?Additional? in terms of Regulations 242-244 of the Regulations and accordingly the Commanding Officer of INS ANGRE assumes all disciplinary powers of a Commanding Officer in respect of such personnel in terms of Regulation 148 of the Regulations. Thus, it is stated that after the attachment of the petitioner with INS Angre in terms of Navy Instructions 95/69 w.e.f. 09.06.2003, every action taken by the the Commanding Officer, INS Angre, in relation to the departmental proceedings taken against the petitioner was fully justified.

19. It has been denied that the members of the Court Martial were hand picked by the convening authority in violation of Section 97(19) of the Act and Regulation 168. It is stated that reading of Section 97(12) of the Act shows that it is the prerogative of the convening authority to appoint the President of the Court Martial while the other members have to be chosen by the President of the Court Martial out of the other eligible members whose list is supplied to him by the convening authority before the commencement of the Court Martial. It is submitted that the substitution of two members about which objection is being taken were substituted by the President of the Court Martial on account of the premature retirement of one of the members and another member being posted in a sensitive billet who could not be spared due to the exigencies of service. It is also stated that by then the Court Martial proceedings had not even started. The objection of the petitioner in this regard was rightly rejected by TJA, as the objection was only regarding the competence of those members to sit in the Court Martial and was not about their impartiality. It is stated that the Court martial started on 20.01.2004 but was adjourned due to the petitioner filing Writ Petition in Mumbai High Court. It was only after the matter was finally disposed of by the said court, the Court Martial reassembled on 07.04.2004. By that time the trial had not even commenced. Thus, there was no illegality in the substitution of the members who were not available at the time of re-assembly of the Court Martial on 7th April, 2004. Moreover, the substitution was only out of the available officers who were junior in rank to the President out of the list provided before the commencement of the Court Martial.

20. It has been also stated that the offender cannot demand that he be tried under provisions of any particular statute when the offences alleged against him can be tried against Navy Act.

21. As regards applicability of the provisions of Cr.P.C. in the framing of charges, it has been submitted that the Cr.P.C. does not apply to the proceedings under the said Act, reference has been made to a judgment of the Supreme Court in *Ajmer Singh and Others Vs. Union of India (UOI) and Others*,

22. The respondents have specifically denied that there was any violation of the Statute or the Regulations framed thereunder in Constituting the Court Martial or in the substitution of its members or even otherwise. They have also defended the role of the TJA throughout the proceedings which, it is stated, was in accordance with the role assigned to her and in conformity with the provisions of the Act and the relevant Regulations.

23. As far as the plea of the appointment of Investigating Officer by the C-in-C at the request of the Commanding Officer, INS Angre is concerned, it is submitted that it was only an administrative order. Since there was no manpower available with the Commanding Officer to carry out the investigation which, in any case, was within the power of the C-in-C and, therefore, there was no illegality even on that aspect of the matter.

24. It is submitted that the other pleas raised by the petitioner relates to day-to-day procedure followed by the court martial and appreciation of evidence which it is stated needs no interference by this Court in its jurisdiction under Article 226 of the Constitution of India. Reliance has been placed upon a judgment of the Apex Court in the case of *Union of India and Others Vs. Himmat Singh Chahar*,

25. According to the respondents, it is submitted that the judgment relied upon by the petitioner i.e., *Shivendra Bikaram Singh (supra)*, has no application to the facts of this case. Rather the case is governed by the judgment delivered in the case of *Himmat Singh Chahar (Supra)*. Hence, no interference is called for by this Court in the facts and circumstances of this case inasmuch as the scope of judicial review is limited to examination of legal infirmities, if any, committed by the authorities while holding the trial of the accused and no more.

26. We have heard the submissions of the Ld. Counsel appearing for the parties. We have also gone through the record and their written submissions. The controversies arising for our consideration in this case is enumerated as under:

(A) The scope of interference in Court Martial proceedings while exercising our jurisdiction under Article 226 of the Constitution of India?

(B) Whether there is any violation either of the provisions of the Act or the Rules and Regulations framed there under by the Navy authorities while convening the Court Martial, Constituting the same, substituting its members or in the appointment of the Investigating Officer?

(C) Whether the Trial Judge Advocate has acted illegally in having rejected the objections raised by the petitioner with regard to the competence of the two members to sit as members of the Court Martial in place of the original members under the orders of the Convening Authority and not by the President of the

Court Martial. Was the objection necessarily required to have been put to vote by the Court Martial?

27. The question at (A) above stands firmly settled by Apex Court in a number of judgments delivered by it. It has been held that this Court, while exercising its writ jurisdiction cannot sit as a Court of Appeal with a view to re-appreciate the evidence recorded Court Martial so as to substitute its own opinion in respect of the findings returned. However, the writ courts can go for a Judicial Review even in respect of Court Martial Proceedings pertaining to Armed Forces whenever it is brought to their notice that the Court Martial while holding the trial, convicting and sentencing a person, has acted beyond the provisions of the Act or the Rules and Regulations framed thereunder. Interferences may also be called for if the proceedings are vitiated due to bias or mala fides on the part of Authorities and also where the sentence awarded by the Court Martial is shockingly disproportionate to the offence.

28. In this regard reference can be made to the judgment of the Apex Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, . In the said case while dealing with the infraction of the provisions of the Act and the Rules in relation to the Army Act, it was held:

The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute. The often quoted words of Frankfurter, J. in *Vitarelli v. Seaton* 359 US 535 are again worth recalling :

...If dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

29. In the same judgment, it was also observed:

The second limb of the contention is as to the effect of the alleged bias on the 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 whether respondent 4 was likely to decide the matter only in a particular way.

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 coram non iudice.

30. In Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , the Apex Court held:

23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the Court-Martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a Court-Martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands.

31. Similarly, in the case of Union of India and Others Vs. Himmat Singh Chahar, which is also relied upon by learned Counsel for the respondent and deals with the provisions of the said Act, it was held:

4. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval Staff and then by the Union government then ordinarily there should be a finality to the findings arrived at by the competent authority in the Court-Martial proceedings. It is of course true and notwithstanding the finality attached to the orders of the competent authority in the court- martial proceedings the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act.

32. In the case of Union of India (UOI) and Others Vs. Shivendra Bikaram Singh, , heavily relied upon by the petitioner, the Apex Court took note of the observations made in its earlier judgments in the following words:

that though the Court Martial proceedings are subject to judicial review by the High Court in exercise of its writ jurisdiction, the Court Martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. In exercise of its jurisdiction the High Court will not minutely examine the record of the Court Martial as if it was sitting in appeal. If the Court Martial has been properly convened, and there is no challenge to its composition, and the proceedings are in accordance with the procedure prescribed, the High Court, or for that matter any court, must stay its hand. Proceedings of a Court Martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure since these proceedings remain to a significant degree, a specialized part of overall mechanism by which military discipline is preserved. The Court Martial discharges judicial function and the procedure prescribed provide for a fair trial to the accused. Therefore, unless it is shown that prejudice has been caused or mandatory provisions have been violated, the High Court

should not allow the challenge to validity of the conviction and sentence of the accused when evidence is sufficient.

33. The Apex Court concluded by holding;

32. We, however, find considerable force in the submission urged on behalf of the appellant that having found that there was a breach of mandatory provision of the Act which vitiated the proceedings before the Court Martial, the High Court was not justified in considering the evidence on record even for the limited purpose of discovering whether there was any legal evidence to sustain the charges. Counsel for the respondent on the other hand submitted that it was within the power of judicial review of the High Court to quash an order of conviction recorded by the Court Martial if it came to the conclusion that the finding of the Court Martial was perverse as there was no legal evidence whatsoever to support the conviction. In our view, in the facts and circumstances of this case this question had become academic once it was found that the proceedings before the Court Martial were vitiated on account of noncompliance with the provisions of Section 102 of the Act. If the very constitution of the Court Martial was not in accordance with law, then any proceedings taken before such an improper Court Martial was a nullity as far as the trial is concerned. As a consequence, the evidence recorded before such a Court Martial had no sanctity in law and, therefore, did not deserve any further consideration.

34. The extent and Scope of Judicial Review was also explained by the Apex Court in Ranjit Thakur's case (supra), wherein it is held:

Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Service Unions v. Minister For The Civil Service (1984) 3 W L R 1174 Lord Daillock said:

...Judicial Review has, I think, developed to a stage today when without re-iterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the

possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community...

35. Thus, we hold that the scope of interference by this Court in respect of any Court Martial proceedings is limited to the extent of holding a judicial review so as to examine if there is any violation of the statute or the rules framed thereunder and further to find out if the process adopted in convicting and sentencing the accused does not suffer from any bias or mala fide which may vitiate the trial. Interference can also be caused if the sentence imposed upon the accused is found to be shockingly disproportionate.

36. It is in this context that we would now examine the other objections raised by the petitioner to find out if there are procedural infirmities which may vitiate the procedure resulting in the conviction and sentence awarded to the petitioner as alleged and would answer issues enlisted at (B) and (C) above.

37. In this regard, we have already extracted the case of the petitioner in para 9 above. At the outset, it may be observed that in this case the conviction of the petitioner is not based upon his confession but is based upon the findings returned by the Court Martial after conducting a fully contested trial in which the petitioner was represented by a qualified Advocate having experience of Naval Law and was an Advocate of his own choice. Thus, his case will have to be examined in the aforesaid premises.

38. The first and foremost objection of the petitioner is that he being an officer borne in Materials Organization (Mumbai), Commanding Officer INS ANGRE had no authority either to appoint the Investigation Officer or to make an application for his Court Martial, which authority was only vested in MS(MO). Thus the action of the Commanding Officer INS ANGRE is violative of Regulation 148(5), which is reproduced here under:

148 When application for court martial be made:

(5) In the case of an officer serving a Naval establishment not commissioned as a ship, the application for trial shall be made by the head of that establishment, unless such establishment is under the command of a Commanding Officer of one of Indian Naval Ships.

39. Regarding the attachment of the petitioner with Commanding Officer INS Angre, the respondents gave two justifications. Firstly, they relied upon NI 95/69 which permits them to attach the petitioner for disciplinary purposes with INS Angre or any other ship. Once such attachment takes place then the commanding officer of that ship becomes entitled to take all necessary actions against the officer including carrying out further investigations so that the Commanding Officer is satisfied in respect of charges leveled against the officer before he makes an application for his trial by a Court Martial. For that purpose, he can also appoint an investigating officer in accordance with Regulations 148

(supra) and 149. These Regulations are reproduced hereunder:

148 When application for court martial be made: (1) The Commanding Officer shall make an application for the trial of an offender by court martial in the following cases, namely:

- (a) When an offence has been committed by a sailor, which it is beyond his power to try;
- (b) When the Commanding Officer considers that an offence has been committed by a sailor which is beyond his powers to punish adequately;
- (c) When any offence has been committed which he considers ought to be tried by court martial;
- (d) If the accused has exercised his option in accordance with these Regulations to be tried by court martial;
- (e) When so directed by his superior authority.

(2) If a Commanding Officer himself is to be tried, an application for trial shall be made by his superior authority

(3) In the case of an officer serving in Naval Headquarters, the application for trial shall be made by an officer designated in this behalf by the chief of the Naval Staff.

(4) In the case of an officer on the staff of an Administrative Authority, the application for trial shall be made by such officer as may be designated by the Administrative Authority.

(5) In the case of an officer serving a Naval establishment not commissioned as a ship, the application for trial shall be made by the head of that establishment, unless such establishment is under the command of a Commanding Officer of one of Indian Naval Ships.

(6) Where an officer other than a Commanding Officer is required to make an application for trial by court martial, references here in after to the Commanding Officer shall include references to such other officer.

149. Procedure for investigation and taking down summary of evidence: (1) Before a Commanding Officer proceeds to make an application for trial by court martial he shall either investigate the case himself or appoint a suitable person to investigate the case and to record a summary of evidence.

(2) The investigating officer shall take down in writing the evidence of any person whose appears to be relevant and the evidence of each witness after it has been recorded shall be read over to him and shall be signed by him or if he cannot write, his name shall be attested by his mark and witnessed by the investigating officer as a token of the correctness of the evidence recorded.

(3) The evidence of the witness shall be recorded in the English language and if the witness does not understand the English language, the statement as recorded shall be interpreted to him in the language, which he understands and a notation shall be made to the effect.

(4) If owing to the exigencies of service or any other grounds including the expense and the loss of time involved the attendance of any witness cannot in the opinion of the investigating officer be readily procured, some other officer may be directed by the Commanding Officer to take the evidence of the witness, or a written statement of the witness relating to the charge shall be obtained and such statement shall be included in the summary of evidence.

40. The Navy Instructions 95/69 are also reproduced hereunder:

95. Classification of Moves on Attachment of Officers to other Ships/ Establishments for disciplinary purposes.

Officers against whom disciplinary actions is contemplated may, where necessary, be attached to other ships/establishments at the discretion of Chief of Naval Staff/Flag Officer Commanding-in-Chief, Western Naval Command, Bombay/Flag Officer Commanding-in-Chief, Eastern Naval Command, Vishakhapatnam/Commodore Commanding, Southern Naval Area, Cochin, for the purpose of investigation and progress of disciplinary cases. During such period officers will continue to be held against the appointments held by them immediately before attachment, and no replacement will be made until completion of the disciplinary proceedings.

2. Moves of Officers on attachment to other ships/establishments under para I above shall not, notwithstanding the provisions of Rule 16, Travel Regulations, be classified as permanent, even if the period of attachment exceeds three months, but will be treated as only temporary. Since such an attachment is not for the performance of any specific duty in the ship/establishment to which so attached, no daily allowance will be admissible for the period of halt with the ship/establishment concerned, unless an officer is detailed to perform some specific duty during such attachment.

41. The 2nd justification given by the respondents is that even otherwise the petitioner was borne on INS ANGRE in terms of Regulations 242 to 244, which are also reproduced for the sake of convenience:

242. Additional for Special Service.- Captain and other officers of the Executive Branch, borne on the books of the any of Indian Naval Ships as "Additional, for special or particular service", shall never assume the charge and command, of the ships in which they are so borne, or any other charge or command, except that which may appertain to the special or particular service for which they are borne, unless they receive from the Chief of the Naval Staff express authority to the contrary.

243. "Additional" not for Special Service.- Captains and other officers of the

Executive Branch who are borne on the books of any of Indian Naval Ships as "Additional", but not for any special or particular service, shall take rank and command in the ships in which they are so borne, and be considered as if they belonged to the complements of such ships.

244. Other Officers "Additional".- Officers of branches other than the Executive Branch, and all persons not included in the Regulations 242 and 243 who are borne on the books of any of Indian Naval Ships as "Additional", shall perform the duties for which they are appointed, shall be considered as belonging to the ships in which they are borne, and shall take rank and precedence according to their respective positions in the Indian Navy.

42. A perusal of the aforesaid Regulations shows that the Captains and other officials of the Executive Branch borne on the books in the Indian Naval Ships as Additional for special or particular services [which in this case is the Materials Organization (MO)], never assume the charge and command of the ship in which they are borne or any other charge and command except which may pertain to the special or particular service for which they are borne. As per Regulation 244, officers of the branch other than the executive branch and all persons not included in Regulations 242 and 243 which are borne on any of the Indian Naval Ships as Additional shall perform the duties for which they are appointed and are to be considered belonging to the ships in which they are borne and shall take rank and precedence according to their respective position in the Indian Navy. In terms of the aforesaid regulations, the Petitioner who was born on INS Angre as "Additional" though assigned to Material Organization, Mumbai was under the command of INS ANGRE for disciplinary proceedings and, therefore, his attachment with INS Angre was fully justified both on account of the Regulations stated above as well as the Navy Instructions.

43. As far as the appointment of Investigating Officer by the Convening Authority is concerned, it may be observed that the Commanding Officer, INS ANGRE had to make the application for trial by Court Martial in respect of the Petitioner in accordance with the directions of the superior authority, i.e., C-in-C in accordance with the Regulation 148(1)(e). The appointment of Investigating Officer by C-in-C on a request made by the Commanding Officer for administrative reasons of not having adequate manpower cannot be termed as illegal. In any event, no allegation of any mala fides has been leveled against the C-in-C, who was even otherwise the competent authority to sanction the Court Martial of the Petitioner to take disciplinary action against him. Thus, we do not find any infirmity either in the attachment of the petitioner with INS Angre or any other action taken by the Commanding Officer of the said ship in relations to the disciplinary action taken against the petitioner.

44. As regard the next point urged by the petitioner regarding substitution of two members of the court martial being contrary to Sections 97(18) and (19) of the said Act, we may observe that in accordance with Regulation 167, a general notice of Court Martial by way of signal was issued once it was decided to

commence the Court Martial w.e.f. 20.1.2004. However, on account of a stay granted by Bombay High Court in Writ Petition No. 95/04 filed by the petitioner inter alia impugning the convening of the Court Martial in its wisdom deferred the trial till the matter was finally disposed of by the High Court on 11.3.2004. By that time, two members of the Court Martial to whom General Signal notifying the convening of the Court Martial had been issued namely Cd. R.D. Nadkarni and Cdr. R.K. Dash were not available. Accordingly, apprehending dissolution of the Court Martial in the absence of two members u/s 123 of the Said Act, the President decided to replace the two members from the list of officers which was available with him after excluding the members from the excuse list sent to the President prior to 20.01.2004 much before the Court Martial re-assembled. In fact, by that time even the trial had not commenced which could have commenced only after the stage contemplated by Section 103 was over. Reference can be made in this regard to para 20 of the judgment in the case of Shivendra Bikaram Singh (*supra*), which reads as under:

20. It would thus appear that before the trial commences, objections to membership of the court have to be considered with a view to ensure fairness of trial and to avoid charge of bias against any of the members of the Court Martial. Section 102 lays down the provisions, which shall apply to the disposal of objections raised by the prosecutor as well as the accused. Clause (a) provides that any member may be objected on a ground, which affects his competency to act as an impartial judge, and the trial judge advocate may reject summarily without reference to the members of the court any objection not made on such ground. Clauses (b) to (e) lay down the procedure to be followed by the members of the Court Martial while considering such objections.

45. For the sake of reference provisions contained under Sections 97(18) and (19) of the Said Act and Regulation 167 are reproduced hereunder:

97. Constitution of courts-martial

(18) Members of the court-martial other than the president shall be appointed, subject to the provisions of the foregoing sub-sections, in the manner provided in Sub-section (19).

(19) Subject to the provisions of Sub-section (11), the president shall summon all officers except such as are exempted under the provisions of Sub-section (20), next in seniority to himself present at the place where the court-martial shall be held, to sit thereon until the number of nine or such other number not less than five as is attainable is complete.

167. General notice of court martial: (1) Whenever a court martial is ordered such timely notice as may be practicable and which, as a general rule, shall not be less than ninety-six hours, or on active service, not less than twenty-four hours, shall be given by general orders or by signal to the ships present so that the proper officers may be prepared to attend at the place and hour appointed.

(2) The names of the president and of the officers whose presence it is anticipated will be required shall be made known and after it is made known, no officer junior to the president of a rank eligible to sit as a member shall proceed on leave of absence without the express authority of the convening authority or in his absence from the place where the court martial is to be held, of the senior Naval Officer present.

46. The position is further clarified by Regulation 168 of the Statutory Regulations which is also reproduced hereinafter;

168. Transmission to president of list of officers eligible to sit on court martial:

(1) As soon as practicable but not later than the morning of the day appointed for the court martial, the convening authority, or in his absence from the place where the court martial is to be held, the senior Naval Officer present shall send to the president a list of the officers who are eligible and may be required to sit as members notifying if there be any whose attendance is not attainable on ground of sickness or as being exempted on ground of urgent public duty.

(2) Such list shall also give the names of the officers absent on leave.

47. According to the aforesaid Regulation a list of eligible members was required to have been sent to the President by the Convening Authority from the senior most level officer as soon as applicable but not later than the morning of the date when the Court Martial is to commence. In the present case, the date of the Court Martial was 20.01.2004 and the list including the name of those two officers who had been substituted was sent before that date. And therefore, the names of those two officers were very much available with the President when the substitution took place after excluding the names of those officers who could not be spared for participation in the Court Martial on account of exigencies. Thus, when it became impracticable for the two earlier members to sit in the Court Martial and the trial had yet not begun, there was nothing wrong to nominate the two officers whose name appeared in the list circulated to the President in terms of Regulation 168 and who were eligible. Thus there was no illegality in such appointment because it is basically the duty of the C-in-C to provide for the officers to sit in the Court Martial to be selected by the President. Moreover, there is neither any allegation of mala fide nor bias either against the two officials or against the higher authority.

48. Now coming to the next objection (C) of the Petitioner about the role of the Trial Judge Advocate who disposed of the objection of the petitioner about the nomination of two new members to the Court Martial herself, instead of putting it to vote before the Court Martial, it may be relevant to take note of the precise objections raised by the petitioner in this regard before the Court Martial which is as under:

Hon"ble President and Members of this Hon"ble Court and the learned TJA, my objection about the members of this August body is in terms of Section 97 of the Navy Act, 1957. Section 97, Sub-section (12) provides that, the President of a

Court Martial shall be named by the authority ordering the same or by any officer empowered by such authority to name the President. This procedure has been followed by the convening authority. However, procedure for appointing members of this Hon'ble Court has been in fact wittingly or unwittingly done which I will point out before this Hon'ble Court, subject to the provisions of Sub-section (11) which talks that minimum members drawn should be from two different ships. Sub-section (19), subject to the provisions of Sub-section (11), the President shall summon all officers except such as are exempted under the provisions of Sub-section (20), next in seniority to himself until the number of nine or such other number not less than five is available. Under these provisions the President shall summon those members except exempted by the convening authority. In this case the convening authority has also nominated the members under his own signature as the list will show which has been read in this Hon'ble Court. Under the mandate of Section 97, Sub-section (19) of the Navy Act, 1957, it is the prerogative and mandatory function of the President to summon those members, in other words to nominate those members down the line in accordance with their seniority except those members who have been exempted by the convening authority. What has been done in this case, every officer down the line junior to the President has been exempted in such a way so that those members which the convening authority wanted to nominate have been left for exemption to enable the convening authority to circumvent the procedure of nominating the President himself which amounts to stepping into the shoes of the President of the Court Martial and therefore, the President of the Court Martial has to peremptorily perform his statutory and mandatory duty to summon and nominate the members. For this purpose I would like to inspect the list of members excused from attending this Court Martial. It has now become a public documents and I have a right to inspect this documents in view of Supreme Court Judgment in the case of Banjalal v. Union of India which I shall rely and produce before this Hon'ble Court in due course of time in view of the principles of natural justice. Notwithstanding the proceedings are not to be made available as per the provisions, yet in view of the principles of natural justice inspection of the proceedings of the Court Martial cannot be denied. I therefore request that this list which eventually I am entitled to be made available to me for inspection so that I can bring the objection on this count to the notice of this Hon'ble Court. For this purpose, I reiterate Sub-section (19) of Section 97 of the Navy Act which reads as under:

Sub-section (19). Subject to the provisions of Sub-section (11), the president shall summon of all officers except such as are exempted under the provisions of Sub-section (20), next in seniority to himself present at the place where the Court Martial shall be held, to sit thereon until the number of nine or such other number not less than five as is attainable is complete.

It is therefore, my humble submission that neutrality Clause or impartiality Clause enshrined in Section 102 of the Navy Act 1957 has been violated by the convening authority and therefore the constitution of this Court martial is hit by

mandate of Section 102 read with Section 97 Sub-section (12) and Sub-section (19), thereof the Navy Act, 1957. Therefore, the convening of this Hon'ble Court is vitiated in view of infraction of neutrality Clause or impartiality Clause as pointed out by me.

49. Having gone through the record and the objection raised by the petitioner as aforesaid, we do not agree with the petitioner that by the aforesaid objection the petitioner also challenged the impartiality of the two members which would have mandated the Trial Judge Advocate to have put the objection to vote by the Court Martial. It was at the most an objection u/s 102(1)(a) of the Act which was within the competence of the Trial Judge Advocate to have disposed of.

50. The relevant provision of the Said Act stipulates that objection regarding the Constitution of the Court Martial which does not attack the impartiality of the members are not required to be put to the vote of the Court Martial for the simple reason that the purpose of putting such an objection to vote is to give an opportunity to the members of the Court Martial to themselves decide whether they would like to remain as part of the Court Martial or not in view of the objection so raised. Such objections can be disposed of by the Trial Judge Advocate himself/herself.

51. At this stage reference to some of the paragraphs from the Judgment of the Apex Court delivered in the case of Shivendra Bikaram Singh (Supra) relied upon by the Petitioner becomes relevant. The scheme of the Act is noted by the Apex Court in this regard in paras 16 to 21 of the aforesaid judgment which are reproduced as under:

16. It would be beneficial to notice a few provisions of the Navy Act, 1957, which would disclose the scheme of the Act and the procedure to be followed in a Court Martial proceedings.

17. Section 93 provides that an offence triable under the Act may be tried and punished by court-martial. Section 97 provides that court-martial shall be constituted and convened, subject to the provisions of the Sub-sections to Section 97, by the President, the Chief of the Naval Staff, or any officer empowered in this behalf by commission from the Chief of the Naval Staff. Sub-section (6) thereof provides that a court-martial shall consist of not less than five and not more than nine officers. Sub-sections (7) to (22) lay down the qualifications of the officers entitled to sit as a member of the court-martial and other details relating to the constitution of a court-martial. Section 99 lays down that every court-martial shall be attended by a person referred to as the trial judge advocate who shall be either a judge advocate in the department of the judge advocate general of the Navy or any fit person appointed by the convening officer. Sub-section (2) provides that the trial judge advocate shall administer oath to every witness at the trial and shall perform such other duties as are provided in the Act and as may be prescribed. Sections 101 to 103 are of considerable significance in this case and they are, therefore, reproduced for

sake of convenience:

101. Commencement of proceedings. (1) As soon as the Court has been assembled the accused shall be brought before it and the prosecutor, the person or persons, if any defending the accused and the audience admitted.

(2) Except where the accused defends himself, he may be defended by such person or persons as may be prescribed.

(3) The trial judge advocate shall read out the warrant for assembling the court and the names of officers who are exempted from attending under Sub-section (20) of Section 97 together with the reasons for such exemption.

(4) The trial judge advocate shall read out the names of the officers composing the court and shall ask the prosecutor whether he objects to any of them.

(5) If the prosecutor shall have made no objection or after any objection made by the prosecutor has been disposed of, the trial judge advocate shall ask the accused if he objects to any member of the court.

102. Objections to members. - The following provisions shall apply to the disposal of objections raised by the prosecutor as well as the accused:

(a) any member may be objected to on a ground which affects his competency to act as an impartial judge; and the trial judge advocate may reject summarily without reference to the members of the court any objection not made on such grounds;

(b) objections to members shall be decided separately, those to the officer lowest in rank being taken first: provided that if the objection is to the president, such objection shall be decided first and all the other members whether objected to or not shall vote as to the disposal of the objection;

(c) on an objection being allowed by one-half or more of the officers entitled to decide the objection, the member objected to shall at once retire and his place shall be filled up before an objection against another member is taken up;

(d) should the president be objected to and the objection be allowed, the court shall adjourn until a new president has been appointed by the convening authority or by the officer empowered in this behalf by the convening authority; and

(e) should a member be objected to on the ground of being summoned as a witness, and should it be found that the objection has been made in good faith and that the officer is to give evidence as to facts and not merely as to character, the objection shall be allowed.

103. Further objections. -(1) The trial judge advocate shall then ask the accused whether he has any further objection to make respecting the constitution of the court; and should the accused raise any such objection, it shall then be decided by the court, which decision shall be final and the constitution of the court-

martial shall not be afterwards impeached and it shall be deemed in all respects to have been duly constituted.

(2) If the accused should have no further objection to make to the constitution of the court or if any objection is disallowed, the members and the trial judge advocate shall then make an oath or affirmation in the form set out in Section 104.

18. These provisions lay down the manner in which the proceedings commence before the Court Martial and the objections, which are to be considered even before the trial begins. These provisions, therefore, apply at the pre-trial stage. After the provisions of Sections 101 to 103 are complied with, the President and every member of the Court Martial is required to be administered an oath or affirmation in the form and manner prescribed by Section 104 of the Act. Thereafter u/s 105 when the court is ready to commence the trial, the trial judge advocate is required to read out the charges and ask the accused whether he pleads guilty or not guilty. If he pleads guilty and the court accepts the plea, it shall be recorded as a finding of the court and the court shall proceed to take steps to pass sentence unless there are other charges to be tried in which event the sentence shall be deferred until after the findings on such charges are given. If the accused pleads not guilty or refuses to, or does not, plead or if he claims to be tried, the court shall proceed to try the accused. Section 113 provides that when the case for the defence and the prosecutor's reply, if any, are concluded, the trial judge advocate shall proceed to sum up in open court the evidence for the prosecution and the defence and lay down the law by which the court is to be guided. Section 114 lays down the duties of the trial judge advocate at such trial. It is the duty of a trial judge advocate to decide at the trial all questions of law arising in the course of the trial, and specially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of the questions asked by or on behalf of the parties; and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties. u/s 115 it is the duty of the court to decide which view of the facts is true and then arrive at the finding, which under such view ought to be arrived at. u/s 116 after the trial judge advocate has finished his summing up, the court is to be cleared to consider the finding. The trial judge advocate shall not sit with the court when the court is considering the finding and no person shall speak to or hold any communication with the court while the court is considering the finding. Thereafter u/s 117 the court is required to reassemble and the President shall inform the trial judge advocate in open court what is the finding of the court as ascertained in accordance with Section 124.

19. It will thus appear that the steps taken before the stage is reached u/s 104 of the Act for administering oath or affirmation to the President and the members of the Court Martial, are taken at the pre-trial stage. Though the proceedings commence before the Court Martial for compliance of the requirements of Sections 101, 102 and 103 of the Act, the trial commences only after the

President and the members of the Court Martial are administered oath as required by Section 104 of the Act and the accused is produced before the Court Martial. Sub-section (3) of Section 101 directs the trial judge advocate to read out the warrant for assembling the court and the names of officers who are exempted from attending together with the reasons for such exemption. After the warrant is read out, the trial judge is required to read out the names of the officers composing the court. It shall then ask the prosecutor whether he objects to any of them. If any objection is made by the prosecutor the same has to be disposed of. However, if the prosecutor has no objection, the trial judge advocate shall ask the accused if he objects to any member of the court.

20. It would thus appear that before the trial commences, objections to membership of the court have to be considered with a view to ensure fairness of trial and to avoid charge of bias against any of the members of the Court Martial. Section 102 lays down the provisions, which shall apply to the disposal of objections raised by the prosecutor as well as the accused. Clause (a) provides that any member may be objected on a ground, which affects his competency to act as an impartial judge, and the trial judge advocate may reject summarily without reference to the members of the court any objection not made on such ground. Clauses (b) to (e) lay down the procedure to be followed by the members of the Court Martial while considering such objections.

21. Section 103 refers to further objections. Clause (a) of Section 103 begins with the words "the trial judge advocate shall then ask the accused whether he has any further objections to make respecting the constitution of the court". If the accused raises any such objection, that is required to be decided by the court, which decision shall be final and the constitution of the court martial shall not be afterwards impeached, and it shall be deemed in all respects to have been duly constituted. In case the accused has no further objection to make or the objection made is disallowed, the members and the trial judge advocate shall then make an oath or affirmation in the form set out in Section 104. From the scheme of these Sections it is quite apparent that before the trial commences, all objections to the constitution of the Court Martial must be considered and decided. Section 102 is confined to an objection on the ground, which affects the competency of the President or a member of the Court Martial to act as an impartial judge. As would be clear from a reading of this Section as a whole it does not provide for the consideration of any other objection at that stage. The Section that follows i.e. Section 103 refers to any further objection respecting the constitution of the Court Martial. It is, therefore, open to the accused to raise further objections on other grounds respecting the constitution of the Court Martial, and for this purpose he may urge the ground of breach of any or the provisions of the sub-sections of Section 97 of the Act, or any other objection which he has respecting the constitution of the Court Martial. These objections have to be decided u/s 103 by the Court Martial, which must mean all the members of the Court Martial, who are entitled to sit as a Court after the disposal of objections, if any, u/s 102 of the Act.

52. A reference can now be also made to paras 22 and 23 of the judgment in this regard. The Apex Court had taken note of the distinction with respect to an objection about the competence and impartiality in its judgment. The aforesaid paragraphs are reproduced hereunder:

22. We then come back to Section 102 of the Act, particularly Clause (a) thereof. The real controversy in the instant case is the nature of authority exercised by the trial judge advocate to reject summarily, without reference to the members of the Court Martial any objection not made on a ground, which affects the competency of a member to act as an impartial judge. While the respondent contends that all objections made on a ground which affects the competency of a member to act as an impartial judge have to be decided in accordance with the procedure laid down in Clauses (b) to (e) of Section 102, according to the appellant it is open to the trial judge advocate to reject summarily even an objection to a member on the ground which affects his competency to act as an impartial judge. It is contended that even if the ground urged, though it affects the competency of a member to act as an impartial judge, the trial judge advocate may reject the same if he finds no merit in it.

23. We are inclined to accept the contention put forth by the respondent. Clause (a) of Section 102 is in two parts. The first part refers to any objection against a member on the ground, which affects his competency to act as an impartial judge. The second part deals with the authority of the trial judge advocate to reject summarily without reference to the members of the court "any objection not made on such grounds". It was not disputed before us that if there was a valid ground urged affecting the competency of a member to act as an impartial judge, the same has to be decided in accordance with the procedure laid down under Clauses (b), (c), (d) and (e) of Section 102. The first part of Clause (a) enables the prosecutor and the accused to raise an objection of the nature specified. The second part of Clause (a) only empowers the trial judge advocate to reject summarily any objection not made on such grounds. To us it appears that the clear intention of the legislature was that at the stage of Section 102 only the objections relating to membership of the court martial on a ground affecting the competency of any member to act as a court martial are required to be considered. Every other objection regarding constitution of the court martial on other grounds has to be considered later, and that is what is provided by Section 103 of the Act.

All grounds other than the ground which affects the competency of a member to act as an impartial judge, is required to be decided by the court, and no discretion is left with the trial judge advocate. Reading the two provisions together the scheme of the Act appears to be that in the first instance the court has to consider whether any of its member is disentitled to sit as a member of the court martial on the ground that he is not competent to act as an impartial judge. No other objection is to be entertained at this stage. Therefore, when an objection to any member is raised on a ground other than the ground, which

affects his competency to act as an impartial judge, the trial judge advocate is authorized to reject the same summarily without reference to the members of the court martial. But if any member is objected to on the ground, which affects his competency to act as an impartial judge, the trial judge advocate has no discretion in the matter and he must place the matter before the court, which must consider the objection in accordance with the procedure laid down in Clauses (b) to (e) of Section 102. Whether there is any merit in the objection, is not a matter to be considered by the trial judge advocate, since he is not vested with the jurisdiction to decide such objections. That power has to be exercised by the court itself. The only authority that is given to the trial judge advocate under Clause (a) of Section 102 is to reject at that stage all other objections without reference to the members of the court martial which are not on a ground which affects the competency of a member to act as an impartial judge. This is because such other objections may be considered later after the constitution of the court is first finalized after disposal of objections to membership of the court martial on the ground, which affects the competency of any member to act as an impartial judge. The scheme of the Act, therefore, is to provide for two stages at which the objections to the constitution of the court martial have to be considered. Section 102 clarifies that at that stage only those objections have to be considered which proceed on a ground, which affects the competency of any member to act as an impartial judge. All other objections to the constitution of the court have to be considered after the objections on the grounds specified in Clause (a) of Section 102 of the Act are disposed of. Those other objections have to be disposed of in the manner laid down u/s 103 of the Act.

53. The action of the Trial Judge Advocate in the aforesaid case was set aside in view of the specific allegations of impartiality made against the President of the Court Martial making him ineligible to sit in the court martial and, therefore, it was a situation where the objection was required to have been put to vote to the court martial in view of what has been stated above. It would therefore be relevant to refer para 24 of the aforesaid judgment, which is reproduced as under:

24. The High Court has taken the same view as we have taken of the provisions of Sections 102 and 103 of the Act. The trial judge advocate, in the instant case, rejected summarily the objection taken by the respondent to the membership of two of the officers, while the objection against the third officer was rejected by the court itself. Having perused the minutes of the trial judge advocate it cannot be said that the ground on which the objection was taken was not one, which affected the concerned member to act as an impartial judge. The objection as against the president of the court, namely Captain Rajiv Girotra was that he was a course-mate of Cdr. Baijal, with whose wife the respondent was alleged to have had adulterous connections. Similar objection was taken to the membership of Cdr. Suresh Mehta that he was the course-mate of the complainant. It would thus appear that the respondent objected to their membership on a ground, which affected their competency to act as an impartial judge. The question

whether the objection was sustainable or not, was a question which had to be decided by the members of the Court Martial in accordance with the provisions of Clauses (b) to (e) of Section 102. Instead of following the procedure laid down by the aforesaid subsections, the trial judge advocate usurped the jurisdiction of the court and rejected summarily the objection of the respondent after going through the material on record, holding that the objections were not sustainable. In doing so he clearly over stepped the limitations of his jurisdiction and decided a matter which the court alone, and not he, was empowered to decide. The question whether the ground is substantiated by material brought on record is a question, which relates to the merit of the objection. The respondent may be able to substantiate the ground urged by him or he may fail to do so, In that event his objection may be rejected by the members of the court martial but that is not to say that the ground on which objection was taken did not affect the competency of a member to act as an impartial judge. The jurisdiction of the trial judge advocate under Clause (a) of Section 102 is limited to the extent of finding out whether the objection is on the ground specified in the first part of Clause (a). If it was such a ground, then regardless of its merit, the objection had to be decided by the court martial in accordance with the procedure laid down in that section. If it was not such a ground as specified in the first part of Section 102, it was then his discretion to summarily reject the same. The words of the Section are "may reject summarily" which is indicative of a discretion vested in him. That is because if the objection is an objection respecting the constitution of the court, but not on the ground specified in Clause (a) of Section 102, then he may rather than dismissing the objection reserve it for consideration after the objections under Sections 102 are disposed of and the objections under Sections 103 are taken up for consideration.

54. Having perused the aforesaid Judgment we are satisfied that the present was not a case where the objection raised by the Petitioner was an objection qua the impartiality of the two members as was the case in Shivendra Bikaram Singh (supra) where the allegations were specific regarding impartiality. As such, we do not agree with the Counsel for the learned Petitioner that either in the constitution of Court Martial or substitution of its members, or in the role of the Trial Judge Advocate, there was any infirmity. Thus objections (B) and (C) are also answered accordingly.

55. As regards the allegation that there was any bias on the part of C-in-C or that he exercised undue command influence, in the absence of any material submitted by the Petitioner to substantiate these allegations, they fall to the ground and have no legs to stand.

56. Similarly, the allegations that the President of the Court Martial had not applied his mind while holding the trial has also not been substantiated inasmuch as merely because some SMS's were sent by the President on a particular day or two would not reflect the non-application of mind by the President of the Court Martial, more so when the accused was duly represented by defence Counsel

who has cross-examined each and every witness throughout the trial and has made all objections whatever were available to him while recording the evidence of those witnesses.

57. The reference made by the Petitioner that there was infraction of Section 155(2) of the Evidence Act having not tried the vendors as co-accused per se would also not vitiate the trial inasmuch as even if others had not been prosecuted, the actions of the Petitioner cannot escape the rigors of the provisions of the said Act to which he was subject to and therefore would be liable to be prosecuted if offences committed can be tried under the said Act. The provision is also reproduced as under:

Section 155. Impeaching credit of witness.- The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the Court, by the party who calls him:

(2) By proof that the witness has been bribed, or has [accepted] of the offer of a bribe, or has received any other corrupt inducement to give his evidence;

The aforesaid provision goes to show that this objection is relevant for appreciation of evidence by the Court Martial of such witnesses who had been bribed or accepted the offer of a bribe or received any other corrupt inducement to give his evidence for the court martial. This Court while exercising writ jurisdiction and holding a judicial review is not required to reweigh the evidence as such exercise would be beyond our jurisdiction. More so, when no specific material has been placed in this regard which may prove giving of bribe or acceptance of bribe by the witnesses, as alleged.

58. An objection was also taken by the petitioner that he has not been permitted to have interview with the witnesses of the prosecution while relying upon Regulation 172(5) but the said Regulation does not permit granting such an interview qua the witnesses of the prosecution. Moreover, the respondents have stated that even then the petitioner was allowed to have an interview with the witnesses but he did not avail the opportunity.

59. With regard to the agreement to sell having not been considered by the Court Martial as an evidence to explain the acquisition of money by the Petitioner which has been recovered from his house, it can simply be observed that firstly the person who allegedly entered into the agreement for purchasing the subject property has not appeared as a witness before the Court Martial nor the money was paid by way of cheque nor anything has been placed on record that the agreement was brought to the notice of the authorities by the Petitioner at the relevant time. Moreover, the agreement pertains to January 2003 whereas the money has been recovered in June 2003. It is even otherwise difficult to accept that such a huge amount of money would be kept as it is by a person in his house after entering into an agreement to sell which was necessitated by a specific purpose as the petitioner had tried to explain. In any event, the manner in which the agreement had been executed raises many doubts about its

authenticity.

60. Even otherwise, looking to the role assigned to this Court while exercising writ jurisdiction in relation to a matter concerning validity of a Court Martial by Armed Forces, the jurisdiction is very limited. We have not to re-appreciate the evidence or have to displace the conclusions drawn by a duly constituted Court Martial having acted in accordance with law in coming to its own conclusion. This also disposes of other objections raised by the Petitioner in the course of his submissions and in the pleadings in his amended writ petition.

61. We have also gone through the order passed by the Central Government which has taken note of each and every objection raised by the Petitioner and has dealt with it. Thus, it is not a case where the Central Government has not applied its mind while disposing of the appeal filed by the Petitioner. Having gone through the other judgments cited by the petitioner we are of the considered view that those judgments does not come to the rescue of the petitioner in this case.

62. Taking all these facts into consideration, we find no reason to interfere with the conclusions drawn by the Court Martial or the finding of conviction or the sentence imposed. Consequently, we dismiss the writ petition and also vacate the interim orders passed in CM No. 6815/2004, which application also stands disposed of. The parties are, however, left to bear their own costs.