

(2009) 04 MAD CK 0208

In the Madras High Court

Case No : Writ Petition No. 34489 of 2003 and W.P.M.P. No's. 44545 of 2003, 15722 and 26070 of 2004, 39349 of 2005 and M.P. No. 2 of 2006

S.K. Dey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-04-2009

Acts Referred:

Army Rules, 1954 — Rule 177
Coast Guard (Discipline) Rules, 1983 — Rule 20, 23, 49(2)
Coast Guard (General) Rules, 1986 — Rule 19, 22, 23, 24, 25
Coast Guard Act, 1978 — Section 38
Constitution of India, 1950 — Article 14

Citation : (2009) 04 MAD CK 0208

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : V. Prakash, SC for S. Balathandayuthapani, for the Appellant; B. Santhakumar, SCGSC, for the Respondent

Judgement

K. Chandru, J.—Heard the arguments of Mr. V. Prakash, the learned Senior Counsel assisted by Mr. S. Balathandapani, the learned

Counsel for the petitioner and Mr. B. Shanthakumar, the learned Senior Central Government Standing Counsel and perused the records.

2. These seven writ petitions are filed by the same petitioner, who was working as D.I.G., Coast Guard. In W.P. No. 34489 of 2003, the writ

petition is directed against the constitution of Board of Inquiry (BOI) vide order dated 18.7.2003, the order of attachment, dated 25.09.2003 as

well as the tentative Chage memo dated 22.10.2003 and for a consequential direction to convene a promotion board to consider the case of the

petitioner for promotion to the post of Inspector of General with effect from October, 2000. The said writ petition was admitted on 25.11.2003.

Pending the writ petition, this Court, by an order, dated 25.11.2003 granted an interim stay, staying the attachment order dated 25.09.2003. The

petitioner also got the stay of the tentative charge memo, dated 22.10.2003. On behalf of the respondents, a counter affidavit together with a

vacate stay petition in WVMP Nos. 48 and 49 of 2004 were filed.

3. When those matters, came up along with two other writ petitions WP Nos. 35875 and 36673 of 2003, this Court made the stay absolute and

directed the main matters to be listed for final hearing. In the meanwhile, the respondents 2, 3, 4 and 5 have filed counter-affidavits in that writ

petition. The petitioner has also filed a rejoinder affidavit in these matters.

4. Subsequently, the petitioner filed W.P. No. 35875 of 2003, seeking to challenge the order, dated 25.11.2003. This Court admitted the writ

petition 08.12.2003 and granted an interim-stay of the said order. Subsequently, a vacate stay petition was filed in WVMP No. 171 of 2004. But,

however, by a common order, dated 15.6.2004, the interim stay was made absolute.

5. The Writ Petition in W.P. No. 36673 of 2003 is filed, seeking for a direction to the second respondent D.G. Coast Guard to forward his

representation to the first respondent, Government of India and to direct the first respondent to consider the posting of the petitioner as the

Regional Commander (East) in the place of the third respondent in that writ petition or in the alternative to post him as the Commanding Officer

CGAS, Chennai. That writ petition was admitted on 16.12.2003. On behalf of the third respondent, a counter affidavit, dated 03.02.2004 was

filed. The petitioner has filed a common rejoinder.

6. In W.P. No. 13428 of 2004, the petitioner sought for a declaration, declaring the constitution of board of officers for investigation in reference

to the CGHQ letter No. 1191, dated 29.04.2004 as illegal and ultravires. That writ petition was admitted and an interim injunction was granted on

05.05.2004. A counter affidavit by respondents 2 and 3 had been filed.

7. In W.P. No. 21552 of 2004, the petitioner sought to quash the show cause memo, bearing OF/1191, dated 2.7.2004. The writ petition was

admitted on 26.7.2004 and an interim stay was granted. A counter affidavit was filed on behalf of all the respondents.

8. In W.P. No. 36735 of 2005, the petitioner sought for quashing the proceedings

No. 124/ CGDTG, dated 28.10.2005 issued by the D.G.Coast

Guard and for a consequential direction to promote the petitioner as I.G., as per the rules. The said writ petition was admitted on 16.11.2005.

Pending the writ petition, this Court directed one post to be kept vacant, if it is available or the next vacancy that may arise in the immediate future.

A counter affidavit has also been filed by the respondents.

9. In W.P. No. 19402 of 2006, the prayer of the petitioner is to quash the order sent in the form of telegram dated 16.6.2006 issued by the fifth

respondent, ceasing the petitioner from Flying Cadre. Notice of motion was ordered on 26.6.2006. Pending the notice, an interim stay of reduction

in pay and allowances and recovery of salary of the petitioner for four weeks was ordered. Subsequently, the same was not extended. On behalf

of the respondents, a counter affidavit has been filed.

10. Since there was an insistence for an early hearing of the writ petitions, the matters were grouped together and posted for hearing finally on

03.07.2008. Subsequently, on behalf of the petitioner, a list of authorities were circulated on 21.7.2008. The matter was further posted on

19.01.2009 for further clarification and again reserved for orders.

11. The brief facts leading to the filing of various cases are as follows:

The petitioner joined Indian Navy as Sub Lieutenant on 01.01.1974. Subsequently, on 23.4.1986, he was absorbed as a Deputy Commander in

the Coast Guard constituted under Coast Guard Act, 1978, Central Act, 30 of 1978. He was promoted to the rank of Commandant on

27.05.1988. Subsequently, on 07.10.1996, he was promoted as D.I.G. The respondent Union of India approved three posts of Inspector General

vacancies as Regional Commander for upgradation from D.I.G. to I.G. On 24.09.2001, the petitioner was already a Regional Commander (A&N

Region) was promoted as I.G. Officiating. On 01.10.2001, the third respondent (Vice Admiral O.P. Bansal) (Naval Officer on deputation) was

made as Director General of Coast Guard. On 04.05.2002, the petitioner sent a representation for convening a departmental promotional

committee. The petitioner's request was rejected by the D.I.G. (Administration) K.Balasubramaniam. When the petitioner's case was not

considered, I.G. Paleri was confirmed as a regular promottee on 14.06.2004. On 13.1.2003, Vice Admiral S.Mehta, another Naval Officer

became D.G. Coast Guard and O.P.Bansal was transferred to Andaman Command.

12. During July, 2003, the petitioner was absent in his station at Andaman. It is at that stage, certain complaints were received against the petitioner

by fourth respondent S.C.Thyagi, who was the D.I.G. at that time. The complaint was received on 16.7.2003 and the said D.I.G. visited the office

of R-3 O.P.Bansal and they conspired together. On 18.7.2003, the D.I.G. S.C.Thyagi sent complaints, dated 16.7.2003 and 18.7.2003 to the

Director General of Coast Guard.

13. On 18.7.2003 itself, a Board of Inquiry was convened by the D.G. Coast Guard to investigate into the alleged financial irregularities committed

by the petitioner in the Andaman Nicobar Region connected with the improprieties in offloading of jobs to local trade and expenditure from public

and non public funds including misappropriation and misuse of items purchased from these funds. It was the grievance of the petitioner, the

convening of Board of Inquiry by D.G. Coast Guard without the complaint examined by the concerned Directorate or Headquarters. The B.O.I.

(Board of Inquiry) was convened in haste and the same was alleged to be in violation of Rule 19 of the Coast Guard (General) Rules. On

12.08.2003, the B.O.I. proceedings were forwarded to the D.G. CG Head quarters by its Presiding Officer. On 14.08.2003, the proceedings

were received at the Headquarters at New Delhi and was examined. In the meanwhile, the petitioner sent a representation, dated 15.09.2003 to

the Honourable Defence Minister and complained about the procedure adopted by the respondents.

14. On 25.09.2003, the second respondent decided to initiate a disciplinary proceedings against the petitioner and he was attached to the Coast

Guard station at Chennai, vide letter dated 25.09.2003. On 29.09.2003, the petitioner reported before the 5th respondent D.I.G. Coast Guard at

Chennai. Therefore, the attachment order was obeyed by the petitioner. On 20.10.2003, the hearing of charges was made by the 5th respondent

in terms of Rule 20 of the Coast Guard (Disciplinary) Rules, 1983. On 22.10.2003, tentative charges were framed against the petitioner and the

recording of evidence was fixed on 30.10.2003. In the meanwhile, on 30.10.2003, the petitioner reported sick and he did not appear in the

enquiry on the day. He was also admitted to the military hospital at Chennai on

03.11.2003. Since he could not attend the enquiry, he was informed that fresh dates will be intimated for recording of evidence.

15. On 13.11.2003, the C.G. Head Quarters sent a letter to the 5th respondent to include a 10th charge regarding misappropriation of boat in the ongoing of recording of evidence. On 15.11.2003, the petitioner was discharged from the hospital and the recording of evidence was fixed on

25.11.2003. On that day, the petitioner filed W.P. No. 34489 of 2003 and obtained an interim stay of further proceedings pursuant to tentative charges and staying of order of attachment. On the same day, the 5th respondent framed the 10th charge and issued notice for recording of further evidence on the additional charge, fixing the date as 27.11.2003.

16. The petitioner filed W.P. No. 35875 of 2003 against the inclusion of the 10th charge framed by the respondents and that writ petition was admitted on 08.12.2003 and an interim stay was also granted against the 10th charge. The petitioner also filed W.P. No. 36673 of 2003 on

11.12.2003 to consider his case for being posted as Regional Commander Coast Guard (East) and an interim injunction from filling up post of

Regional Commander (East) from drawing personnel from the Navy. But however, on 19.12.2003, one Commando Chitinivis was posted as the

Regional Commander CG East.

17. It is at this juncture, the petitioner filed W.P. No. 36735 of 2005 on 16.11.2005, questioning the order dated 28.10.2005, promoting three

officers as Commanders of A&N Region, West Region and East Region. This Court, by an order, dated 13.03.2006 passed the following order:

Even though the prayer in the petition is for an injunction restraining the respondents 1 & 2 from filling up the post of Inspector General the other

persons selected were already appointed and granting injunction at this stage is not proper. Learned Counsel for the petitioner requested to keep

one post vacant if the posts are in existence. Learned senior counsel also pointed out that in WPMP 33146 of 2004 in WP 27248 of 2004 by

order dated 24.9.2004, this Court ordered to keep one post vacant.

Following the said order, there will be a direction to keep one post vacant if the post is available or in the vacancy that will arise in the immediate

future.

18. Thereafter, the petitioner filed W.P. No. 13428 of 2004, declaring the constitution of board of officers for investigation by the order of

CGHQ, dated 29.04.2004, as illegal and had also obtained an interim injunction. The petitioner also filed W.P. No. 21552 of 2004, challenging

the show cause memo, dated 2.7.2004, wherein, additional list of charges was given. In W.P. No. 19402 of 2006, he is challenging to the

telegraphic order, dated 16.6.2006, by which he was removed from Flying Cadre with effect from 19.11.2002 in view of the fact that he was not

holding valid Aviation Medical category and therefore, he will cease to draw flying pay with effect from 19.11.2002.

19. The last case, namely W.P. No. 19402 of 2006 is taken up as first for disposal. By the said order, the petitioner will not only lose a sum of Rs.

5250/- p.m., but also the alleged wrongful sum of Rs. 2,31,000/- paid already is likely to be recovered from him. The petitioner had stated that he

was holding the medical certificate issued by the authorized medical officer on 21.04.2006. In any event, he had stated that the recovery has been

made without notice to him and it is opposed to the principles of natural justice. In the counter affidavit, dated 28.08.2006, it is stated that the

petitioner had not exhausted the statutory departmental remedies available to him under the Chapter VI of the Coast Guard (General) Rules, 1986.

However, in paragraph No. 14(b) of the counter affidavit, it has been averred as follows:

...Bur for the improperly drawn flying pay for the past years Respondent No. 5 needs to recover the same. Thus, there is no violation of Article 14

or any other the provisions of the Constitution as alleged by the petitioner. There is prima facie documentary evidence which support the case of

Respondents and justify his removal from Aviation cadre on medical grounds since not being in the flying Medical Category for a prolonged

duration.

20. But, the Supreme Court in Bhagwan Shukla Vs. Union of India and others, , has held that even in a case of wrong fixation of pay, any

recovery made as it involved civil consequences, such recoveries must be preceded by a notice. The relevant passage found in para 3 of the said

judgment may be extracted below:

3.We have heard learned Counsel for the parties. That the petitioner's basic pay

had been fixed since 1970 at Rs. 190 p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs. 181 p.m. from Rs. 190 p.m. in 1991 retrospectively w.e.f. 18-12-1970.

The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the (sic employee) concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25-7-1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17-9-1993 as well as the order (memorandum) impugned before the Tribunal dated 25-7-1991 reducing the basic pay of the appellant from Rs. 190 to Rs. 181 w.e.f. 18-12-1970.

21. In the present case, admittedly, no such notice was given to the petitioner. Hence the writ petition deserves to be allowed. Accordingly, W.P.

No. 19402 of 2006 will stand allowed. The miscellaneous petition in MP No. 2 of 2006 will stand closed. However, there will be no order as to costs. This will not prevent the respondents from conducting a proper enquiry before ordering withdrawal of flying allowance and recovery of alleged excess payment.

22. In so far as the promotion of the petitioner, for which grievance is made in W.P. No. 36673 of 2003 and W.P. No. 36735 of 2005 is

concerned, the petitioner seeks for placing him to be posted as Regional Commander (East) in the place of the third respondent

P.S.Balasubramanian. In W.P. No. 36735 of 2005, the petitioner questioned the proceedings of the D.G. Coast Guards, dated 28.10.2005

promoting three other persons namely R-3 to R-5 as Commanders of the

respective Regions. Though the petitioner contended that the Commander-in-Chief of CG was drawn for the Navy and it has become the practice to fill up all the main posts in the CG with deputationists for the Navy and it was malafide on their part not to give promotion to the petitioner, yet such a contention is not legally valid and this Court is not inclined to go into such wide allegations. In this context, in the counter affidavit, dated 11.03.2004 in W.P. No. 36673 of 2003, it has been averred as follows:

His detailed representation dated 15.09.2003 containing all the main issues being put forward before this Hon'ble Court in his affidavits has been recently disposed of by the Central Government under a speaking order dated 25.02.2004 and nothing survives.

23. A copy of the petitioner's representation dated 15.09.2003 and the reply sent by the Ministry dated 25.02.2004 has been enclosed in an additional typed set dated 2.7.2008 by the respondents. Subsequently, the petitioner sent a further representation, dated 3.3.2004, which has been replied by the Government of India, Ministry of Defence, vide their order dated 17.3.2004. The said reply reads as follows:

Whereas, DIG SK Dey (0156-D) has submitted a representation dated 3.3.2004 addressed to the Defence Secretary, Ministry of Defence stating, inter-alia, that some of the points raised in his representation dated 15.9.2003 have not been considered properly and that he has not received the final orders dated 25.2.2004 disposing of his ROG, directly from the office of Defence Secretary nor has any official communication annexed to the orders.

And whereas, the points raised by the officer in his representation dated 3.3.2004 have been considered and have been found to be devoid of merit because all the points raised in his earlier representation dated 15.9.2003 were duly examined and were rejected by the Competent Authority. As regard his another point that he did not get the MOD's order dated 25.2.2004 disposing of his representation dated 15.9.2003 directly from the Defence Secretary's office, it is stated that the final orders issued by MOD on the representation submitted by the aggrieved officers" are served on them through the normal service channel and not directly by the MOD.

Now, Therefore, the representation dated 3.3.2004 submitted by DIG Dey is rejected.

24. Therefore, the W.P. No. 36673 of 2003 deserves to be dismissed as the petitioner had not challenged the final orders passed by the

Government of India on the statutory representation made under Rule 32 of the Coast Guard (General) Rules, 1986 and accordingly dismissed.

Accordingly, WPMP.44545 of 2003 will stand dismissed.

25. But, in so far as W.P. No. 36735 of 2005 is concerned, in the counter affidavit, dated 16.2.2006 filed on behalf of the respondent, in

paragraph 10(c) and 11, it has been averred as follows:

10(c)...the petitioner has been duly considered by the Promotion Board convened in Aug 2005 without taking cognizance of the pending

disciplinary action against him. In the event he had come within the number of vacancies which were three in this case, a suitable appointment

would have been kept unfilled to cater for petitioner's promotion after his exoneration from the charges under examination through the disciplinary

action. It is submitted that equal opportunity was accorded to the petitioner and his right has been honoured in the matter of his consideration for

promotion to the rank of Inspector General.

11. ...The fourth post presently held by Inspector General P.Paleri, Deputy Director General at Coast Guard Headquarters is likely to fall vacant

on 01 Sep 2006 consequent to his retirement from service on 31 Aug 2006. This appointment cannot be kept unfilled due to administrative

reasons. However, as the initial promotion is made on acting basis to be confirmed after successful completion of one year in the higher rank as per

the provisions of the Coast Guard (Seniority and Promotion) Rules, 1987, the junior most acting Inspector General may not be confirmed till

disposal of the Writ Petition. It is submitted that the petitioner is eligible for consideration for promotion to the rank of Inspector General in the

second look and will be considered accordingly by a Promotion Board to be convened at the relevant time.

26. It is also stated in the reply affidavit that the sealed cover procedure is not applicable to Coast Guard service and that based on the

recommendation of the Promotional Board, the Ministry of Defence being the competent authority had granted its approval for promoting three

officers holding the rank of D.I.G. to the rank of I.G. and it has also been given effect to from 31.10.2005. Except recording the undertaking given

by the respondents, no further relief can be granted to the petitioner. Hence, W.P. No. 36735 of 2005 stands dismissed. In view of the dismissal

of the writ petition, WPMP No. 39349 of 2005 will stand closed.

27. The other four writ petitions, viz., W.P. No. 34489 of 2003, 35875 of 2003, 13428 of 2004 and 21552 of 2004 can be disposed of together

as they all relate to initiation of disciplinary action against the petitioner arising out of the report of the Board of Inquiry (BOI) on 16.7.2003, based

upon the report of S.C.Thyagi, Commandant, Coast Guard Region, A&N vide his report dated 16.7.2003 and 18.7.2003. According to the

petitioner, the constitution of the Board of Inquiry was motivated and the petitioner's absence in the station from 01.7.2003 to 22.7.2003 was

made use of by the said officer for writing such letters. By writing such letters, he was rewarded with a regular promotion to the post of D.I.G. The

report sent by the officers was immediately acted upon by the Headquarters which had without following the due procedure constituted the Board

of Inquiry vide the impugned proceedings dated 18.7.2003. He also submitted that the Board of Inquiry was constituted comprising of three

officers who were subordinates to him. The Presiding Officer Mr. Raj was on deputation to the Navy and was directly under the control of the

third respondent. Commandant A.R.Mohile was the Unit Head under him and therefore the constitution of BOI was illegal. The third respondent

Vice Admiral O.P.Bandal played a key role in constituting the BOI who was inimically disposed towards him. Therefore, he wanted the second

respondent's order dated 18.7.2003 and the consequential order dated 25.9.2003 (attaching the petitioner to C.G.S. Chennai) as well as the

tentative chargesheet dated 22.10.2003 to be set aside.

28. In the counter affidavit filed in this writ petition, these allegations were denied. It was also stated that there were no procedural irregularities. In

paragraphs 5 and 6 of the counter affidavit filed by the fifth respondent, dated "nil" (December 2003), it has been averred as follows:

5. I respectfully submit that all officers concerned were put on notice and Board of Inquiry commenced proceeding on 21.7.2003. The petitioner

on 29.7.2003, appeared and deposed before the Board of Inquiry. On completion

of his deposition when he was given the option to sit throughout the proceedings, he exercised the same and participated throughout the proceedings by cross examining the witnesses who deposed before the Board during the proceedings which were conducted on day to day basis and examination of total 25 witnesses was completed on 06.8.2003. The petitioner when he appeared before the Board on 29.7.2003, was handed over copy of the proceedings containing deposition of witnesses already recorded and was told that he should inform the Board in case he wishes to cross-examine any of them.

6. I respectfully submit that the finalised proceedings of the Board of Inquiry were forwarded by the Board Presiding Officer to the 2nd respondent herein vide his letter No. 242/GPR/BOI/1 dated 12.8.2003. The second respondent received the said Board of Inquiry proceedings at Coast Guard Headquarters, New Delhi on 14.8.2003 and the same thereafter were examined in detail. After careful examination of the facts and documents forming part of the Board of Inquiry proceedings, the 2nd respondent on 12.9.2003 directed to initiate disciplinary action against the petitioner herein for the specific lapses on his part as then Regional Commander, A&N Region attributed by the Board.

29. As contended by the respondents, the petitioner fully participated in the BOI and did not raise any objection. In fact the petitioner's statement was recorded as Witness No. 11 and for Question No. 281 and the answer as well as the minutes recorded by BOI is as follows:

Q.281. Do you wish to state anything to the Board, Sir?

A. I have certain documents to be given to the Board in form of a written statement.

(The board accepted the written statement from the witness. Same is (Marked - Exhibit-64)

The board offered the witness No. 11, DIG SK Dey (0156-D) (0156-D) an option to sit through the board proceedings. The witness exercised the option. A copy of proceedings till deposition of witness number 10 (Question Nos. 01 to 261) was handed over to the witness. The witness was informed that he should inform the board if he wishes to cross-examine any other witness. There being no further questions, he was permitted to withdraw with instruction to be present throughout further proceedings of the

board.

Even in the concluding portion of the BOI, the petitioner was cautioned under Rule 39(3) of the Coast Guard (General) Rules, 1986 about the

right regarding self-incrimination. Thereafter, the petitioner was questioned from Question No. 937 to 958 and the BOI in the concluding portion

on 06.11.2003 recorded as follows:

(There being no further question the witness was permitted to withdraw)

(Witness who were given option to sit through had no further cross examination of any other witness nor did have any witnesses for their defence

for deposition)

30. In this context, it is necessary to refer to the judgment of the Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India

(UOI) and Others, . The following passage found in paragraph 3 may be usefully extracted below:

37. ...But when it comes to an officer, a person belonging to the upper bracket in the Armed Forces, the necessary presumption being that he is a

highly educated, knowledgeable, intelligent person, compliance with Rules 22, 23 and 24 is not obligatory but would have to be complied with if

the officer so requires it. This is quite rational and understandable. One cannot be heard to say that he would not insist upon an enquiry in which he

can participate which is his right, and then turn round and contend that failure to hold the enquiry in accordance with the principles of natural justice

as enacted in Rules 22, 23 and 24 though he did not insist upon it, would not merely invalidate the enquiry....

31. It may also be necessary to refer to the decision of the Supreme Court in Major G.S. Sodhi Vs. Union of India (UOI), , for the purpose of

showing that once a person participates in the enquiry, he cannot turn back and repudiate the very constitution of the committee. The following

passage found in paragraph 16 may be usefully reproduced below:

In this context the learned Counsel also submitted that the convening order constituting the court of inquiry is defective and that Col. B. Bahadur is

junior to the petitioner. According to the petitioner he was only an Acting Colonel. Therefore he cannot be treated as superior officer to him.

Reliance is placed on Army Regulation 518 wherein it is stated that when the character or military reputation of an officer is likely to be a material

issue, the presiding officer of the court of inquiry, wherever possible, will be senior in rank and other members at least equivalent in rank to that

officer. It is also submitted that Col. Bahadur can at the most be termed as a re-employed officer and as per the re-employment policy laid down

in Army Headquarters" Letter dated September 7, 1988 such re-employed officers are being posted against the vacancy of Captain and generally

being employed for carrying out the routine administrative duties of the station. Therefore, according to the petitioner the court of inquiry is

presided over by a junior officer. We are unable to accept this submission. The fact remains that Col. Bahadur at the relevant time was a Colonel

and therefore superior to the petitioner and consequently it cannot be stated that junior officer presided. Even otherwise we are mainly concerned

with the court-martial, its constitution and proceedings held by the said court. A feeble attempt was also made that Lt. Col. S.K. Maini who was

inimical towards the petitioner was influenced by others and he initiated the court of inquiry. Having considered all the aspects and the averments in

the counter-affidavit sworn in by Lt. Col. S.K. Maini, we find no substance in this submission. The petitioner also placed reliance on his

submissions made during the court of inquiry wherein he stated that he had to examine the injury reports in respect of Captain Shukla and Captain

Chadha in order to know the nature of injuries sustained by them and therefore his statement is inconclusive for want of their cross-examination. At

this distance of time particularly having regard to the fact that the petitioner fully participated in the general court-martial also, we cannot conclude

that the entire proceedings were vitiated on this slender ground namely that his statement before the court of inquiry was inconclusive just for the

reason that he has not seen the medical certificates in respect of the injuries found on those two officers. For the above reasons we are unable to

see any serious legal infirmity in convening the court of inquiry and recording of summary of evidence or in respect of other steps contemplated

under Rules 22 to 25.

32. The above two decisions will show that the petitioners cannot attack either the constitution of the BOI or the attachment order or the tentative

charges framed against him. It is also brought to the notice of this Court that the attachment order itself was cancelled by a proceedings dated

21.11.2008 issued by the Headquarters, New Delhi.

33. The Supreme Court in a subsequent judgment in Ram Sunder Ram v. Union of India and Ors. reported in (2007) 13 SCC 255 dealt with the

scope of Court of Inquiry under the Army Rules. The following passages found in paragraphs 18 and 20 may be extracted below:

18. ...We are, however, satisfied on the material placed before us that the court of inquiry was formed under Rule 177 of the Army Rules and the

purpose of court of inquiry was to collect the evidence for the information of superior officers to make up their mind about the involvement of the

appellant and the other army officials in the racket of clandestine sale of petrol. In the court of inquiry, the appellant was heard and was given

proper and adequate opportunity to cross-examine the witnesses, which he did not choose to avail. The respondents, in Para 20 of the counter-

affidavit filed in opposition to the writ petition before the High Court, have made categorical statement that in the court of inquiry the appellant was

given full opportunity to defend his case and to cross-examine the witnesses who appeared and deposed before the recording officer, but the

appellant was just sitting throughout the proceedings and did not avail the opportunity of cross-examining the witnesses. The appellant has not

denied this assertion of the respondents in the rejoinder-affidavit.

20. ...Reliance was placed on para 13 of the judgment of this Court in Major Suresh Chand Mehra. In that case, this Court held that the court of

inquiry, as provided under Rule 177 of the Army Rules, is merely held for the purpose of collecting evidence and if so required, to report in regard

to any matter which may be referred to the officers and such an inquiry is for the purpose of a preliminary investigation and cannot be equated with

a trial or court martial. All the above cited decisions are of no assistance to the appellant in the peculiar facts of the case on hand. We are satisfied

that there is ample evidence on record in support of the judgment and order of the Division Bench of the High Court and there is nothing that

would justify this Court interfering with it.

34. Further, the Supreme Court had clarified the purpose of an attachment order in the decision relating to Chief of Army Staff and others Vs.

Major E.P. Chadha, . In paragraph 16, it held as follows:

16. The only purpose of attachment of any army officer to a different unit is that

the disciplinary proceedings against him could be speedily and satisfactorily completed without any interference by him.

Hence W.P. No. 34489 of 2003 deserves to be dismissed.

35. In W.P. No. 13428 of 2004, the petitioner challenged the constitution of Board of Inquiry by the Headquarters Letter No. 1191 dated

29.4.2004 as illegal and malafide. In this context, the petitioner made the following averments in paragraphs 9 to 11 of the affidavit filed in support

of the writ petition and it may be usefully reproduced below:

9. I respectfully submit that immediately thereafter in connection with the same transactions in respect of the Board of Inquiry Proceedings under

reference No. DG/SECTT/0110 of Officers to investigate. This decision was taken on 29.4.2004 obviously because of the fact that this

Honourable Court decided to hear the matter after vacation.

10. I respectfully submit that the decision to constitute Board of Officers was taken on 29.4.2004 and Board of Officers itself was constituted on

30.4.2004.

11. I respectfully submit that the telegram from Coast Guard Headquarters to the Commandant Coast Guard (East) and Commandant Coast

guard (Andaman and Nicobar) issued on 30.4.2004 at 5.28 p.m. has not been served on me and therefore I am unable to produce the copy of the

said telegram. I being not a party to the aforesaid telegram.

36. In response to these allegations, a counter affidavit was filed by respondents 2 and 3 dated 23.6.2004. In paragraph 6 of the counter affidavit,

it has been controverted as follows:

6. I denied the allegations those made in paras 9 to 17 of the affidavit as false and baseless and I state that the aforesaid administrative Board of

Officers ordered by the present Regional Commander, Coast Guard Region (A&N) is totally different from convening of a statutory Board of

Inquiry provided for under Rule 36 of Coast Guard (General) Rules, 1986 and the same has nothing to do with the lis pending before this Hon"ble

Court. The constituting of the said Board of Officers is ultimately aimed for assisting the present Regional Commander, Coast Guard Region

(A&N) in streamlining the corrective actions needed to prevent future irregularities while at the same time quantify the exact loss of public money,

which has occurred resultant to earlier acts and omissions of various personnel posted at Coast Guard Regional Headquarters (A&N), Port Blair.

Further that the constitution of said Board of Officers is purely an administrative measure and the petitioner under the guise of above writ petition is

attempting to interfere in administration and functioning of the Coast Guard authorities. The report which the said Board of Officers is required to

submit will be based on professional scrutiny of various documents held in the Coast Guard Regional Headquarters (A&N) Port Blair and this

Board will not be following the detailed investigation procedure of examining witnesses as in the case of a Board of Inquiry provided for in Rules

38 and 39 of the Coast Guard (General) Rules, 1986 as amplified in Coast Guard Order 4/92.

In the light of the above stand of the respondents, WP.13428 of 2004 will stand dismissed.

37. In W.P. No. 35875 of 2003, the petitioner challenges the additional charge memo No. 10 dated 25.11.2003. In paragraphs 1 to 3 of the

charge memo, the petitioner was charged with the following misconduct:

1. Refer to this office letter of even number dated 22 Oct 2003 regarding order for Record of Evidence.

2. Based on documentary evidence available with Coast Guard, a prima facie case of misappropriation of apprehended Indonesian Boat ""Sumber

Laut-4"" between Feb - Oct 2001 exists and the alleged offence has been included in the chargesheet for the Record of Evidence. The details of

charge are as follows:

Misappropriating Vessel/Boat taken into custody

In that he, at Port Blair, during the tenure as Regional Commander (A&N) during Feb-Oct 2001, did misappropriate the Indonesian Boat namely

Sumbar Laut-4"" apprehended by Coast Guard Ship Bhikaji Cama in Feb 2001 with an intent for personal gain, thereby committed an offence u/s

38 of Coast Guard Act 1978.

3. The above charge is only tentative and charges may be added/deleted depending upon the evidence adduced.

38. In the counter affidavit dated 03.2.2004 filed by the fourth respondent, the justification for framing the additional charge was set out in

paragraph 7 which is as follows:

7....The alleged misappropriation of this Indonesian Fishing Boat by the petitioner was brought to the notice of this Coast Guard Chief vigilance

Officer through a source information. After examination of relevant documents prima facie established that there exist an apparent case of

misappropriation of boat by the petitioner for his personal gains. As per the records available at Regional Headquarters (A&N) at Port Blair, this

fact was not earlier investigated by DIG AK Mahajan in Jan.2002 who had the taken over from to the petitioner. The allegations of the petitioner

that with malafide intention this charge has been included after 2 1/2 years are imaginary and baseless since this misappropriation has come to light

now for the first time hence necessary action were now being initiated against the petitioner. The petitioner will get all opportunities to disprove this

and other the tentative charges framed against him during recording of evidence by the Commanding Officer in accordance with Rule 23 of the

Coast Guard (Discipline) Rules 1983. During the said recording of evidence, the petitioner will have every right to cross examination all witnesses

and to examine his own witnesses, including making of statement if he wishes on which he cannot be questioned.

39. In this context, it is necessary to refer to Rule 49(2) of the Coast Guard (Discipline) Rules 1983, which is as follows;

49. Amendment of the charge by the Coast Guard Court.-

(1). At any time during the trial by a Coast Guard Court if it appears to be court that there is in the chargesheet:

(a) (omitted)

(b) (omitted)

(2) If at any time during a trial it appears to the Coast Guard Court before it closes to deliberate on its findings that it is desirable in the interests of

justice to make any addition to, omission from, or alteration in a charge which cannot be made under Sub-rule (1), it may, if such addition,

omission, or alteration can be made without unfairness to the accused, and with the concurrence of the Law Officer so amend the charge.

In the light of the above, W.P. No. 35875 of 2003 will stand dismissed.

40. In W.P. No. 21552 of 2004, the petitioner challenged the showcause notice dated 02.7.2004 wherein the petitioner was asked to showcause

as to how he had authorised procurements of various materials at an exorbitant

prices leading to the huge loss to the public exchequer. A list of 12 items were set out in the Annexure to the showcause memo and the loss was estimated to Rs. 1,04,277/=. The petitioner contended that neither he was present during the purchase of those items nor the expenditures were authorised by him. But however, he had not given any reply to the showcause notice but had straightaway filed the writ petition before this Court and obtained an interim order. In response to the notice on the writ petition, the respondents have filed a counter affidavit dated 12.1.2005.

41. In paragraph 6 of the counter affidavit, the following justification has been made for the issuance of the showcause notice:

6. ...it is respectfully submitted that the procurement action having been initiated on 10.4.2003, the petitioner himself has expressly accorded

approvals in some cases and in other cases his verbal approval was obtained. If the petitioner's contention that he had not accorded approval

being out of station was true then he should not have any apprehensions and would have clarified the irregularities which the petitioner has not done

so. With regard to issue of this Show cause notice dated 02.7.2004 and not including the said irregularities in the earlier notices, it is submitted that

Coast Guard Ship is considered as a separate accounting unit and the financial irregularities were not looked into earlier. It is further submitted that

issue of Show Cause Notice dated 02.7.2004 is in no way connected to the pending case against the petitioner and it is independent of other

irregularities committed by the petitioner.

In the light of the above, it may not be proper to interfere with the showcause notice at the threshold. It is for the petitioner to submit his

explanation and defend himself in the enquiry to be held for the said purpose.

42. The counsel for the petitioner relied upon the following decision of the Supreme Court in Chief of Army Staff and Others Vs. Major Dharam

Pal Kukrety, , to justify that this Court can interfere even with a showcause notice. However, the parameters set out in the said judgment for

interfering with the showcause notice are not available to the petitioner in the present case. Hence, this WP will also stand dismissed.

43. In the result, W.P. No. 19402 of 2006 will stand allowed. The other W.Ps. Viz., W.P.Nos. 34489, 35875 and 36673 of 2003, 13428 and

21552 of 2004 and 36735 of 2005 will stand dismissed. All the connected MPs

are closed. No costs.