

UNION OF INDIA AND OTHERS

v.

SANJAY JETHI AND ANOTHER
(CIVIL APPEAL NO. 891+ OF 2012)

OCTOBER 18, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Armed Forces Rules, 1954 – rr.177, 179 and 180 – Armed Forces Tribunal – Tribunal setting aside the decision rendered by the Additional Court of Inquiry and consequential action taken or orders passed pursuant to the said order against first respondent and directing to convene a fresh Court of Inquiry (COI) with a different Presiding Officer and other independent members – Propriety – Held: On facts, proper – What really weighed with the Tribunal while passing the impugned order was that such members constituted the COI who were biased or reasoned to be biased and such bias was discernible – In quasi-judicial proceedings, the authority empowered to decide a dispute between the contesting parties has to be free from bias – When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties – In the case at hand, the Technical Members of the Tribunal had compiled the documents, adopted the methodology, made observations, drawn inferences and expressed the view and, above all, they had prepared the report which was brought on record as a document – To say, they had not played any role would tantamount to blinking at reality – Their inclusion as the Technical Members was not legally permissible – Even applying the rigorous substantive test, a case of prejudice came into full play in the case at hand – Once a COI has been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views

- A *in writing behind the back of the person and assumed the role of the recommending authority which is statutory in nature to take disciplinary action – Law does not countenance the same – Also, in the fitness of things, the Presiding Officer should have recused himself to preside over the COI since his inclusion in the COI had been objected to, on an earlier occasion, yet he was allowed to continue and was not changed – Natural justice – Bias.*

- C *Armed Forces Rules, 1954 – r.180 – Court of Inquiry (COI) – What r.180 postulates – Held: r.180 has a binding effect on the COI – The Rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action – Thus understood, the language employed in r.180 postulates of a fair, just and reasonable delineation – Duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back.*

- F *Armed Forces Tribunal Act, 2007 – s.14 – Jurisdiction, powers and authority of the tribunal in service matters – Held: Tribunal required to decide both questions of law and facts that may be raised before it and conferred powers to deal with the cases in promptitude – Promptitude does not ostracize or drive away the apposite exposition of facts and necessary ratiocination – A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in support of the view expressed having due regard to the rational methodology, are imperative.*

- H *Administrative Law – Natural Justice – Bias – Effect of – Held: Bias is an insegregable facet of the concept of natural justice as a genus – Question of bias would arise depending*

on the facts and circumstances of the case – Challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being coram non-judice. A

The legal propriety of the judgment passed by the Armed Forces Tribunal setting aside the decision rendered by the Additional Court of Inquiry (COI) and consequential action taken or orders passed pursuant to the said order against the first respondent and directing to convene a fresh Court of Inquiry (COI) with a different Presiding Officer and other independent members, was called in question in the present appeal. B C

Four reasons weighed with the Tribunal while passing the impugned judgment, namely, (i) that though the tribunal vide its earlier judgment had directed the witnesses concerned with the annexures which were brought on record before the COI were to be made available for cross-examination, the said witnesses were not made subject to cross-examination by the delinquent officer; (ii) that though the inclusion of the Presiding Officer in the COI had been objected to on earlier occasion, he was allowed to continue and was not changed; (iii) that in spite of the Technical Members had prepared and arranged the documents which would mean that they had expressed an opinion at an earlier stage, yet they were retained as Members of the COI as a consequence of which the principles of natural justice were violated, for one cannot be the judge in his own cause; and (iv) that the doctrine of bias comes into play as the Presiding Officer as well as the Technical Members would have a tendency to support their own reports/ documents and it is against the spirit of Rule 180. D E F G

The issues that therefore emerged for consideration before this Court were whether the tribunal was justified in holding that the constitution of the COI which consisted of two Technical Members and the Presiding H

- A Officer was vitiated as there was possibility of their having an interest in the proceedings as a consequence of which being biased or there could be a perception or likelihood of bias in the decision making process which would raise a doubt pertaining to the decision by a
- B prudent or rational person; and whether the Presiding Officer and the Technical Members should have been made available for cross-examination in a COI to meet the necessary command of Rule 180 of the Armed Forces Rules, 1954 and further whether there was a real violation
- C of the principles of natural justice which ultimately vitiated the proceedings of the Additional COI.

Dismissing the appeal, the Court

- HELD:1. The authorities, as far as Rule 180 of the
- D Armed Forces Rules, 1954 is concerned, are to the effect that when a COI is set up under Rule 177 and during the course of enquiry, character or military reputation of a person is likely to be affected, he should be granted full opportunity to participate in the proceedings; that the COI
 - E in its very nature is likely to examine certain issues generally concerning a situation or persons; that his participation could not be avoided on a mercurial plea that no specific enquiry was directed against the person whose character or military reputation is involved; that
 - F the concerned person shall be afforded full opportunity so that nothing is done at his back and without opportunity of participation; that it is the command of the said provision to ensure such participation; that it is not a condition precedent to always hold that a COI for
 - G proceeding a trial by court martial where character or military reputation of the officer concerned is likely to be affected; that the COI is in the nature of a fact finding enquiry committee; that the participation in a COI is at a stage prior to the trial by court martial; that the said rule
 - H gives adequate protection to the person affected at the

stage of COI and there is no provision for supplying the accused with a copy of the report of the COI; and that the proceedings before a COI are not adversarial proceedings. [Para 23] [519-D-H]

Lt. Col. Prithi Pal Singh Bedi v. Union of India and others AIR 1982 SC 1413; 1983 (1) SCR 393; *Uma Nath Pandey and others v. State of U.P. and another* AIR 2009 SC 2375: 2009 (4) SCR 374; *Major General Inder Jit Kumar v. Union of India and others* (1997) 9 SCC 1; *Union of India and Others v. Major A. Hussain (IC-14827)*: (1998) 1 SCC 537: 1997 (6) Suppl. SCR 218 and *Major G.S. Sodhi v. Union of India* (1991) 2 SCC 382 – referred to.

2.1. In the instant case, what really weighed with the tribunal while passing the impugned order is that such members constituted the COI who were biased or reasoned to be biased and such bias is discernible. Bias is an insegregable facet of the concept of natural justice as a genus. The fundamental principles of natural justice are ingrained in the decision making process to prevent miscarriage of justice. It is applicable to administrative enquiries and administrative proceedings. It is also fundamental facet of principle of natural justice that in the case of quasi-judicial proceeding the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties. [Para 29] [523-A-D]

2.2. The question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic

- A concept of legitimacy of interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being *coram non-judice*. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. What is relevant
- B is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a court is required to adopt a deliberative and logical
- C thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition. [Para 45] [532-B-E]

- D *A.K. Kraipak v. Union of India* (1969) 2 SCC 262: 1970 (1) SCR 457; *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation and others* AIR 1959 SC 308: 1959 Suppl. SCR 319 *Gullappalli Nageswarrao v. State of A.P. and others* AIR 1959 SC 1376: 1960 SCR 580 *Dr. G. Sarana v. University of Lucknow and others* (1976) 3 SCC 585: 1977 (1) SCR 64; *Manak Lal v. Dr. Prem Chand Singhvi and others* AIR 1957 SC 425: 1957 SCR 575; *Secretary to Government, Transport Deptt., Madras v. Munuswamy Mudaliar and another* 1988 (Supp) SCC 651: 1988 Suppl.
- E SCR 673; *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others* (2001) 1 SCC 182: 2000 (4) Suppl. SCR 248; *S. Parthasarathi v. State of Andhra Pradesh* (1974) 3 SCC 459: 1974 (1) SCR 697; *G.N. Nayak v. Goa University and others* (2002) 2 SCC 712: 2002 (1) SCR 636; *Delhi Financial Corpn. and another v. Rajiv Anand and others* (2004) 11 SCC 625; *Chandra Kumar Chopra v. Union of India and others* (2012) 6 SCC 369: 2012 (5) SCR 1029; *State of Gujarat and another v. Justice R.A. Mehta (Retired) and others* (2013) 3 SCC 1: 2013 (1) SCR 1; *Ranjit Thakur v. Union of India and others* (1987) 4 SCC 611: 1988 (1) SCR
- H

512 and Major G.S. Sodhi v. Union of India (1991) 2 SCC 382 – referred to. A

Frome United Breweries v. Bath Justices (1926) AC 586; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1968) 3 WLR 694; *Franklin v. Minister of Town and Country Planning* 1948 AC 87; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* (2000) 1 AC 119; *Locabail Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* 2000 QB 451; *Ebner, Re.* (1999) 161 ALR 55; *President of the Republic of South Africa v. South African Rugby Football Union* (1999) 4 SA 147; *Vassiliadas v. Vassiliades* AIR 1945 PC 38; *Allinson v. General Council of Medical Education and Registration* (1894) 1 QB 759; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1969) 1 QB 577; *Public Utilities Commission of the District of Columbia v. Pollak* 343 US 451 and *Regina v. Liverpool City Justices, ex parte Topping* (1983) 1 All ER 490 – referred to. B C D

Principles of Administrative Law by J.A.C. Griffith and H Street (Fourth Edition) – referred to. E

Halsbury's Laws of England, Fourth Edition, Volume 2, paragraph 551

3. The case at hand is to be appreciated in its factual backdrop whether there has been “really likelihood of bias”. In a COI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on the COI. The Rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face H F G

A disciplinary action. Thus understood, the language employed in the Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that the COI may not always be essential or *sine qua non* for initiation of a court martial but the another spectrum is once the authority has exercised the power to hold such an inquiry and the COI has recommended for disciplinary action, then the recommendation of the COI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the Rule, for the language employed in the said Rule is absolutely clear and unambiguous. One cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of factual matrix of each case. [Para 46] [532-F-H; 533-A-E]

4. In the case at hand, initially the COI was constituted by three members by order dated 22.7.2009 and it was asked to investigate certain issues. Thereafter, an amendment was brought regarding composition of the COI vide order dated 28.7.2009. The core of controversy, is the inclusion of the Technical Members and the Presiding Officer in the COI. The respondent raised the plea of bias against the Technical Members and had objected to the inclusion of Brig. N.S. Ahamed as Presiding Officer. The Technical Members have expressed their opinion after analysis of the documents. They have, in detail, scrutinized the documents, drawn their inferences and made their observations. By no stretch of imagination it can be said that it is an arrangement of documents or pagination of documents.

True it is, they are not the authors of the original documents but their analysis and inference have been used against the respondent in the earlier COI and in the Additional COI. It cannot be brushed aside by saying that Technical Members did not sign the final report. Once they have given an opinion, the possibility to support the same cannot be totally discarded. That is where the real likelihood of bias comes into play. If one has something substantial, relevant or material to do with the case he is disqualified. In the case at hand, the Technical Members had compiled the documents, adopted the methodology, made observations, drawn inferences and expressed the view and, above all, they had prepared the report which has been brought on record as a document. To say, they had not played any role would tantamount to blinking at reality. Their inclusion as the Technical Members is not legally permissible. It is so as the said respondent is bound to be prejudiced. Even applying the rigorous substantive test, a case of prejudice comes into full play in the case at hand. [Paras 47, 48, 51 and 52] [533-F; 534-C; 536-D-E; 537-D-H; 538-A-B]

5. Once a COI has been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views in writing behind the back of the person and assume the role of the recommending authority which is statutory in nature to take disciplinary action. Law does not countenance the same. In the present case it is irrefragably clear that the recommendation of the COI was the sole basis on which the disciplinary action has been initiated. Nothing else had come on record as observed by the tribunal on earlier occasion as well as by the impugned order and the said finding is unassailable. That being the position, in the fitness of things, the Presiding Officer should have recused himself to preside over the COI. However, on

A earlier occasion the tribunal had not quashed the entire proceedings and the same was not challenged by either of the parties. Therefore, the Additional COI which has been directed by the tribunal by the impugned judgment, shall only function as an Additional COI and deal with the documents which were produced earlier before the tribunal. [Para 54] [539-G-H; 540-A-C]

6. Respondent No. 1 at one point of time had filed a long list of witnesses. On the earlier occasion the tribunal permitted for examination or cross-examination of witnesses who had something to do with the documents. The Additional COI shall keep that in view so that there is no procrastination of the proceedings at the behest of the delinquent officer, for natural justice has also its own limitations. [Para 55] [540-D-E]

7. Though, in the case at hand, the verdict of the tribunal is being sustained, it is found that the tribunal did not advert to the necessitous facts. Section 14 of the Armed Forces Tribunal Act, 2007 occurs in Chapter III of the said Act and deals with jurisdiction, powers and authority of the tribunal in service matters. Under subsection (5) of Section 14 the tribunal is required to decide both questions of law and facts that may be raised before it. The tribunal has been conferred powers to deal with the cases in promptitude. Promptitude does not ostracize or drives away the apposite exposition of facts and necessary ratiocination. A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in support of the view expressed having due regard to the rational methodology, are imperative. [Para 56] [540-F-H; 541-A-C]

Case Law Reference:

	1983 (1) SCR 393	referred to	Para 4
H	2009 (4) SCR 374	referred to	Para 5

(1997) 9 SCC 1	referred to	Para 20	A
(1991) 2 SCC 382	referred to	Para 20	
1997 (6) Suppl. SCR 218	referred to	Para 22	
1970 (1) SCR 457	referred to	Para 29	B
1959 Suppl. SCR	referred to	Para 29	
1960 SCR 580	referred to	Para 29	
1977 (1) SCR 64	referred to	Para 29	
1957 SCR 575	referred to	Para 29	C
(1926) AC 586	referred to	Para 31	
1988 Suppl. SCR 673	referred to	Para 34	
2000 (4) Suppl. SCR 248	referred to	Para 35	D
1974 (1) SCR 697	referred to	Para 36	
(1968) 3 WLR 694	referred to	Para 36	
1948 AC 87	referred to	Para 36	E
(2000) 1 AC 119	referred to	Para 36	
2000 QB 451	referred to	Para 36	
(1999) 161 ALR 55	referred to	Para 36	F
(1999) 4 SA 147	referred to	Para 36	
2002 (1) SCR 636	referred to	Para 37	
(2004) 11 SCC 625	referred to	Para 38	
2012 (5) SCR 1029	referred to	Para 39	G
2013 (1) SCR 1	referred to	Para 40	
1988 (1) SCR 512	referred to	Para 42	

A	(1991) 2 SCC 382	referred to	Para 42
	AIR 1945 PC 38	referred to	Para 42
	(1894) 1 QB 759	referred to	Para 43
B	(1969) 1 QB 577	referred to	Para 43
	343 US 451	referred to	Para 43
	(1983) 1 All ER 490	referred to	Para 43

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8914 of 2012.

From the Judgment & Order dated 12.10.2012 of the Armed Forces Tribunal, Regional Bench, Mumbai in Transfer Application No. 38 of 2011.

D Paras Kuhad, ASG, Jitin Chaturvedi, R. Balasubramaniam, Abhinav Mukherjee, Shalaj Mridul, B.V. Balaram Das for the Appellants.

E Shekhar Naphade, Ashok K. Mahajan for the Respondents.

The Judgment of the Court was delivered by

F **DIPAK MISRA, J.** 1. The legal propriety of the judgment and order dated 12.12.2012 in TA No. 38 of 2011 passed by the Armed Forces Tribunal, Regional Bench at Mumbai (for short "the tribunal") setting aside the decision rendered by the Additional Court of Inquiry and consequential action taken or orders passed pursuant to the said order and directing to convene a fresh Court of Inquiry (COI) with a different Presiding Officer and other independent members, if decision is taken to proceed against the 1st respondent, is called in question in the present appeal.

G 2. The factual score as depicted is that on 5.8.2009, a complaint was made by one of the officers alleging irregularity in the hiring of Civil Hired Transport (CHT), which were used

for the purpose of supply of ordnance stores to units spread over the country, including remotest field and high altitude area by the respondent No. 1 who holds the rank of Colonel in the Army. On the basis of a complaint, the General Officer Commanding-in-Chief, Pune initiated an action against the respondent No. 1 by making his attachment with HQ Sub Area on 6.8. 2009 and also convened a Board of Officers on 21.7.2009 for ascertaining the truthfulness of the allegations. On 22.7.2009 the said Board seized the entire records and submitted a report. On the premises of that report, a COI was convened against the respondent No. 1 to investigate into the alleged irregularities.

3. The COI conducted an inquiry and on 8.3.2010 recommended for taking appropriate disciplinary action against the 1st respondent and some other officers. On the basis of the said recommendation on 23.2.2010 the first respondent was attached to the Head Quarters, Mumbai Sub Area till finalization of the disciplinary proceedings. At that juncture, respondent No. 1 filed Original Application No. 283 of 2010 before the Principal Bench of the tribunal at New Delhi challenging the COI proceedings contending, inter alia, that he had been deprived of the right of cross-examination as stipulated under Rule 180 of the Armed Forces Rules, 1954 (for short "the Rules"); and that there had been non-supply of documents which were annexed after conclusion of the proceedings before the COI. As the factual matrix would unveil, on 17.6.2010 the hearing of charges commenced and the Commanding Officer, Mumbai Sub Area, under Rule 22 directed for recording of Summary of Evidence under Rule 23.

4. The Original Application filed before the tribunal was disposed of on 8.10.2010. While dealing with the grievance pertaining to violation of Rule 180, especially the deprivation of the right to cross-examine, the tribunal referred to the decision in *Lt. Col. Prithi Pal Singh Bedi v. Union of India* and

- A *others*¹, certain passages from Administrative Law by De Smith and applicability of the principles of natural justice and came to hold that as the 1st respondent had remained present throughout the course of COI and had been given opportunity to cross-examine the witnesses and, therefore, the grievance
- B that he was not afforded full opportunity to cross-examine did not merit consideration. In fact, the tribunal opined that in-depth cross-examination was allowed to the respondent No. 1 and the Presiding officer asking for written questions to be submitted, could be treated as fair and reasonable exercise of discretion
- C and hence, there was no illegality or irregularity in the conduct of the COI.

5. A contention was advanced that after conclusion of the proceedings by the COI when the report was submitted, certain documents which were not made available to the said
- D respondent were annexed to justify his culpability. The tribunal found force in the said submission and opined that it was the duty of the COI to find out the truth by holding suitable investigation about the documents that were annexed afterwards. This opinion was formed on scrutiny of the language
- E employed in Rule 180 and placing reliance on the dictum in *Uma Nath Pandey and others v. State of U.P. and another*². This led to the ultimate conclusion that such enclosing of the documents along with the report by the COI amounted to violation of Rule 180 inasmuch as the said report was treated
- F as the sole basis for initiating the disciplinary proceedings against the respondent No. 1. It was also held that it would be difficult for the authority concerned to proceed for hearing on the point of charge to take into account those documents which were subsequently annexed, and in all fairness, an Additional
- G COI should be convened affording full opportunity to the parties, by examining or cross-examining any of the witnesses pertaining to those annexures.

H 2. AIR 2009 SC 2375.

6. Being of this view the tribunal directed the authority to convene an Additional COI limiting to the documents which were subsequently annexed to the report of the COI and granting liberty to the delinquent officer to cross-examine any of the witnesses, if produced, pertaining to those documents.

7. In pursuance to the aforesaid order, the Additional COI reassembled and the respondent No. 1 was shown all the documents and he perused the same, as the proceedings would reveal, availing considerable length of time. At that stage, he made a request for grant of permission to cross-examine the Technical Members but the same was denied on the ground that as per Rule 180 he could only cross-examine the witnesses and not the Members. However, certain other witnesses were examined and cross-examined in the COI and, eventually, a report was sent by the Presiding Officer.

8. Being grievd by the said order the respondent No. 1 preferred an Original Application under Section 14 of the Armed Forces Tribunal Act, 2007 for quashing of the Additional COI as there had been infraction of Rule 180 and for issue of appropriate direction for holding a fresh Additional COI with new Members who are independent and unbiased and the said Original Application was transferred to the Regional Bench at Mumbai where it was registered as TA No. 38/2011. For claiming such relief heavy reliance was placed on the order passed on earlier occasion in OA No. 283/2010. It was contended before the tribunal that Brig. N.S. Ahmed, who was the earlier Presiding Officer of the COI, had continued as the Presiding Officer of the Additional COI despite objections raised by the applicant therein and in spite of the request to constitute a fresh COI without him. It was highlighted that the concerned Brigadier should have been made available for cross-examination as he was the author of the document, i.e., Ext. XLI which was referred to in the order dated 8.10.2010 in OA No. 283/2010. It was brought to the notice of the tribunal that in the Additional COI Lt. Col. Sandeep Sinha and Maj.

- A Sanjeev Narula were also retained as Technical Members despite the factum that those two officers were responsible for preparing the appendices 'N' to 'AB' to Ext. XLIX and on that ground he had been deprived of the opportunity of cross-examining them. It was further put forth that the document, vide
- B Ext. XXXV, was not shown or allowed for his perusal although the said document was a complete report making serious allegations of misappropriation and fraud against the applicant therein. In essence, the grievance that was agitated before the tribunal was that certain documents were not supplied and the
- C authors of document had become the Members of the Additional COI. It was also submitted that as the Additional COI had already submitted the report and the next phase of the proceedings, i.e., Summary of Evidence was about to be over the same also deserved to be quashed.
- D 9. The said submissions were resisted by the respondents therein contending that Ext. XLI contains the observations of the Court on the two letters referred to it, i.e., COD, Mumbai letter No. 2754/Gen/Cont dated 4.8.2008 and DGOS IHQ of MoD (Army) letter No. PC-2/13357/RI00159/Fin/OS-4(e) dated
- E 6.8.2009 and these two letters were earlier perused by respondent No. 1. Emphasis was laid on the fact that there is no provision for cross-examination of the Presiding Officer of the COI on the basis of his observations made in the COI. As regards the cross-examination of the Technical Members, it
- F was opposed on the ground that the Technical Members had only collated the data which was taken into consideration for formation of an opinion by the COI and the same was done to comply with the order passed on the earlier occasion. It was put forth that Technical Members had only signed the day's
- G proceedings and had no role to play in the final opinion expressed by the COI. That apart, it was stressed that the Technical Members had been produced as witnesses in Summary of Evidence and every opportunity had been granted to the applicant therein to cross-examine them and, therefore,
- H no prejudice has been caused to him due to their non-

production in the COI for cross-examination.

10. It was also contended that request of the applicant therein to cross-examine the authors of the document XLI and XLIX was beyond the scope of the Rule and was also not in accord with the earlier judgment passed on 8.10.2010. It was put forth that Technical Members were allowed only to assist the Presiding Officer in the proceedings and not allowed to form any opinion and finding. Their inclusion in the Additional COI would not vitiate the enquiry as it does not violate the spirit of Rule 180.

11. The tribunal first dealt with the contention relating to inclusion of Technical Members in the Additional COI. In that context, it observed that the Technical Members were undoubtedly involved and connected with the matter being investigated and since they had submitted their report, it was obvious that those members would certainly support their own report/ documents and it would not be possible for them to arrive at a different finding than what they had already found as their personal credibility would be at stake. Taking note of this fact situation and also the factum that the respondent herein had raised his objection at the initial stage pertaining to inclusion of these officers in the Additional COI, the tribunal opined that the apprehension expressed by him was well-founded.

12. After so holding the tribunal proceeded to deal with the mandate of Rule 180 and relying on the decision rendered in *Lt. Col Prithi Pal Singh Bedi* (supra) and certain other decisions of the High Courts came to hold as follows: -

"..... that the respondents did not produce the maker of those documents XLIX and XLI for cross examination by the applicant, although he specifically prayed for it which was also directed in judgment passed in OA 283/2010. The applicant objected from the very beginning not to include Brig NS Ahmed and two Technical Members in the

A Addl. COI so that a fair trial can be held and they could be
cross examined by him. But the respondents turned a deaf
ear to such request of the applicant and in fact that has
B been done at their own risks. The categorical direction in
the earlier OA 283/2010 dt. 8.10.2010 passed by the
Principal Bench of AFT is that in the additional COI the
petitioner is to be afforded with full opportunities to examine
and cross examine the witnesses pertaining to those
documents. The respondents, could have convened the
C additional COI with different members when there are
various other officers available for holding the additional
inquiry, but they preferred not to do so and in turn creators
of some vital documents were inducted as members
allowing themselves to decide upon the documents created
by them and they being the Members of the inquiry were
D not produced for cross examination by the applicant. Such
action on the part of the respondents is contrary to fair play
in action."

13. The tribunal observed that as the applicant therein was
not allowed to cross-examine the makers of documents XLIX
E and XLI, the respondents therein not only violated the provisions
of Rule 180 but also did not comply with the directions
contained in the earlier judgment passed in OA No. 283/2010.
The tribunal proceeded to state that the contention advanced
by the respondents therein that on reading of Rule 180 it cannot
F be discerned that the Presiding Officer and Technical Member
of the COI were required to be produced as witnesses was
devoid of merit. After so stating the tribunal held that the
respondents therein should not have included Brig. N.S. Ahmad
as Presiding Officer and Lt. Col. Sandeep Sinha and Maj.
G Sanjeev Narula as Technical Members in the said Additional
COI, for whatever might be the role of the Technical Members,
nonetheless they were Members of the Additional COI and
must have applied their mind while preparing the inquiry report.

H 14. Being of this opinion, the tribunal concluded that the

decision rendered by Additional COI was in violation of the provisions contained in Rule 180 and, accordingly, set aside the same and also all consequential actions taken on the basis of the said Additional COI. It granted liberty to the respondents therein to convene a fresh Additional COI with a different Presiding Officer and other independent Members.

15. The centripetal issues that emerge for consideration are whether the tribunal was justified in holding that the constitution of the COI which consisted of two Technical Members and the Presiding Officer was vitiated as there was possibility of their having an interest in the proceedings as a consequence of which being biased or there could be a perception or likelihood of bias in the decision making process which would raise a doubt pertaining to the decision by a prudent or rational person; whether the Presiding Officer and the Technical Members should have been made available for cross-examination in a COI to meet the necessary command of Rule 180 and further regard being had to the earlier order passed in OA No. 283 of 2010; and whether there has been real violation of the principles of natural justice which ultimately vitiates the proceedings of the Additional COI.

16. To appreciate the said aspects we shall first proceed to examine the schematic contents of the Rules in issue and how they have been understood and interpreted by this Court. Chapter VI of the Rules provides for COI. Rule 177 deals with the Constitution of COI and its role, namely, to collect evidence and if so required to report with regard to any matter which may be referred to them. Rule 179 provides the procedure by which a COI shall be guided.

17. Rule 180 on which the present controversy revolves deals with the procedure when character of person subject to the Act is involved. It is as follows:-

"180. Procedure when character of a person subject to the Act is involved. - Save in the case of a prisoner

- A of war who is still absent whenever any inquiry affects the character of military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of any fully understands his rights, under this rule."
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17. Rule 182 stipulates that the proceeding of Courts of Inquiry or any confession statement or answer to a question made or given at a COI shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial or such person for willfully giving false evidence before that court. The proviso to the rule states nothing in the said rules shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witnesses. Rule 184 which has been substituted by S.R.O. 44, dated 24th January, 1985 deals with right of certain persons to copies of statements and documents.
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18. Rule 180 had come up for consideration in *Lt. Col Prithi Pal Singh Bedi* (supra). In the said case a contention was advanced that it was obligatory upon the authorities concerned to appoint a COI whenever it affects the character or military reputation of a persons subject to the Act and in such an enquiry full opportunity must be afforded to such person of being present throughout the enquiry and of making any statement or giving any evidence he may wish to make or give and of cross-examining any witness whose evidence in his opinion affects
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the character or military reputation and producing any witness in defence of his character or military reputation. It was further urged before the court that on a correct interpretation of Rule 180, it would appear whenever the character of a person subject to the Act is involved in any inquiry, a COI must be set up. Repelling the said submission the learned judges opined thus:-

"Rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the Courts of inquiry. Rule 180 cannot be construed to mean that whenever or wherever in any inquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up of a Court of inquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a Court of inquiry is set up and in the course of inquiry by the Court of inquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of Court of inquiry. Court of inquiry by its very nature is likely to examine certain issues generally concerning a situation or persons."

[Emphasis supplied]

19. Thereafter, the Court dealt with the proceedings where the participation of a person is obligatory and where it is not required. The said delineation is as follows:-

"Where collective fine is desired to be imposed, a Court of inquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an inquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific inquiry was directed against the person whose character or military reputation is involved. To ensure that such a person whose character or military reputation is likely to be affected by the

- A proceedings of the Court of inquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation. Rule 180 merely makes an enabling provision to ensure such participation. But it cannot be used to say that whenever in any other inquiry or an inquiry before a Commanding officer under R. 22 or a convening officer under Rule 37 of the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior inquiry by the Court of inquiry is a sine qua non."

C [Underlining is ours]

20. In *Major General Inderjit Kumar v. Union of India and others*,³ a two-Judge Bench observed that COI is set up under Rule 177 to collect evidence and to report, if so required, with regard to any matter which may be referred to it. The COI is in the nature of a fact-finding inquiry committee. The learned Judges proceeded to state that Army Rule 180 provides, inter alia, that whenever any inquiry affects the character or military reputation of a person subject to the Army Act, full opportunity must be afforded to such a person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation and the presiding officer of the COI is required to take such steps as may be necessary to ensure that any such person so affected receives notice of and fully understands his rights under this rule.

- G 21. In that case the appellant therein was present before the COI and witnesses were examined by the COI in his presence and were offered to him for cross-examination, but he declined to cross-examine them. In fact, he had moved an application for adjournment for preparing his defence. He had

H 3. (1997) 9 SCC 1.

also applied for the evidence adduced before the COI should be reduced to writing. The COI noticed that sufficient time had been granted to him for preparation of his defence after receipt of the COI proceedings by him and, accordingly, refused the application for adjournment. Be it noted, a contention was advanced that a copy of the report of the COI should be provided to him. Dealing with the said aspect, this Court ruled thus: -

"There is no provision for supplying the accused with a copy of the report of the Court of Inquiry. The procedure relating to a Court of Inquiry and the framing of charges was examined by this Court in the case of *Major G.S. Sodhi v. Union of India*⁴. This Court said that the Court of Inquiry and participation in the Court of Inquiry is at a stage prior to the trial by court-martial. It is the order of the court-martial which results in deprivation of liberty and not any order directing that a charge be heard or that a summary of evidence be recorded or that a court-martial be convened. Principles of natural justice are not attracted to such a preliminary inquiry. Army Rule 180, however, which is set out earlier gives adequate protection to the person affected even at the stage of the Court of Inquiry. In the present case, the appellant was given that protection. He was present at the Court of Inquiry and evidence was recorded in his presence. He was given an opportunity to cross-examine witnesses, make a statement or examine defence witnesses."

[Emphasis supplied]

22. In *Union of India and Others v. Major A. Hussain (IC-14827)*⁵, Union of India and its functionaries had challenged the decision of the High Court which had quashed the court-martial proceedings including the confirmation of the sentence on the

4. (1991) 2 SCC 382.

5. (1998) 1 SCC 537.

A ground that the delinquent officers had denied reasonable opportunity to defend himself as he was not communicated the conclusion reached. In the said case the High Court opined that during the proceeding under Section 22 of the Act, the copies submitted in earlier COI were not supplied; that he was not given

B assistance of a defending officer of his choice; that he was not provided a loan which was already sanctioned to engage a new counsel; and that the documents for which he had made a request to the convening authority long before assembly of the court-martial were not provided. This court referred to Rule 180

C and 184 of the Army Rules and various other provisions and in that context came to hold that the respondent had been unable to show if there was any non-compliance with the provisions of Rules 22, 23 and 24 and Army Order No. 70/84. The Court referred to the decisions in *Lt. Col. Prithi Pal Singh Bedi* (supra)

D *Major G.S. Sodhi* (supra) and observed that in *G.S. Sodhi* case this Court with reference to Rules 22 to 25 said that procedural defects, unless those were vital and substantial, would not affect the trial. The Court, in the case before it, said that the accused had duly participated in the proceedings regarding recording of summary of evidence and that there was no flagrant violation

E of any procedure or provision causing prejudice to the accused. Thereafter, the learned Judges adverted to the role of COI and opined thus: -

F "Proceedings before a Court of Inquiry are not adversarial proceedings and is also not a part of pre-trial investigation.

In *Major General Inderjit Kumar v. Union of India* this Court has held that the Court of Inquiry is in the nature of a fact-finding enquiry committee. The appellant in that case had contended that a copy of the report of the Court of Inquiry was not given to him and that had vitiated the entire court-martial. He had relied upon Rule 184 in this connection. With reference to Rule 184, the Court said that there was no provision for supplying the accused with a copy of the report of the Court of Inquiry. This Court

G considered the judgment in *Major G.S. Sodhi* case and

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observed that supply of a copy of the report of enquiry to the accused was not necessary because proceedings of the court of inquiry were in the nature of preliminary enquiry and further that rules of natural justice were not applicable during the proceedings of the court of inquiry though adequate protection was given by Rule 180. This Court also said that under Rule 177, a court of inquiry can be set up to collect evidence and to report, if so required, with regard to any matter which may be referred to it. Rule 177, therefore, does not mandate that a court of inquiry must invariably be set up in each and every case prior to recording of summary of evidence or convening of a court-martial."

[Emphasis supplied]

23. The aforesaid authorities, as far as Rule 180 is concerned, are to the effect that when a COI is set up under Rule 177 and during the course of enquiry character or military reputation of a person is likely to be affected, he should be granted full opportunity to participate in the proceedings; that the COI in its very nature is likely to examine certain issues generally concerning a situation or persons; that his participation could not be avoided on a mercurial plea that no specific enquiry was directed against the person whose character or military reputation is involved; that the concerned person shall be afforded full opportunity so that nothing is done at his back and without opportunity of participation; that it is the command of the said provision to ensure such participation; that it not a condition precedent to always hold that a COI for proceeding a trial by court martial where character or military reputation of the officer concerned is likely to be affected; that the COI is in the nature of a fact finding enquiry committee; that the participation in a COI is at a stage prior to the trial by court martial; that the said rule gives adequate protection to the person affected at the stage of COI and there is no provision for supplying the accused with a copy of the report of the COI; and that the proceedings before a COI are not adversarial proceedings.

- A 24. Keeping in view the aforesaid principles which have—
 been laid down by this Court, we are required to scrutinise—
 whether the tribunal has appositely applied the principles in
 quashing the Additional COI including its composition. To
 appreciate the said position we think it necessary to refer to
 B the earlier order passed by the tribunal. In the earlier decision,
 the tribunal took note of the fact that COI while submitting the
 Report had annexed certain documents and the said
 documents were produced in a tabular chart which is as
 follows:-

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	EXHIBIT NO.	LETTER NO. AND DATE	REMARKS
D	1	XLIX including all appendices	Still not shown/ given to applicant
E	2.	LXIX	CMM Jabalpur Letter No. 126/CL/HQ dt 05 Nov 2009
F	3	L	Still not shown/ given to applicant
	4	LXVIII	-Do-
	5.	XXXV	-Do-
	6.	XLI	-Do-
	7.	LV	-Do-
G	8.	ZXVI	(a) FOD Lr No.50060/ Tfc/X/ dt. 30 Nov 2009 (b) 22 ABOD Lr.No. C/1224/499/Tfc dt. 01 Dec 2009 (c) FOD Lr. No. G3334/ PC/Tfc dt 30 Nov 2009
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25. Thereafter, the tribunal appreciating the submissions held thus;- A

“As has clearly been stated in AR 180, a fair opportunity is to be afforded to an individual whose character and military reputation is involved. In this case, the documents were not given to the applicant warranting judicial review by this Tribunal. We find that the mandatory procedure under AR 180 was not followed by the respondents with regard to those documents which were subsequently annexed to the report. Therefore, that portion of the report, which deals with the conduct and reputation of the applicant without giving him an opportunity of being heard in the inquiry, should be taken to be vitiated for violation of AR 180. It is true that the report of the COI has no legal force proprio vigore. But, however, it is seen in this case that the findings rendered by the COI have been taken as the sole basis for initiating disciplinary proceedings against the applicant. In these circumstances, the applicant is entitled to put forward his grievance that the COI has given findings regarding his conduct without giving him an opportunity to put forward his defence as regards those annexures; the applicant was obviously not afforded opportunity to see the documents which were annexed to the report of COI. It would be difficult for the authority concerned to proceed for hearing on the point of charge to take into account those documents which were subsequently annexed. In all fairness, an additional COI is to be convened affording full opportunity to the parties, by examining or cross examining any of the witnesses pertaining to those annexures. The additional COI would remain confined to the annexures referred to above.” B C D E F G

[Underlining is ours]

26. After so holding, the tribunal directed the concerned authority to pass orders convening an Additional COI limiting H

A to the documents which were subsequently annexed to the report of the COI and the applicant was granted liberty to cross examine any of the witnesses, if produced, pertaining to those documents.

B 27. We may note here with profit that the aforesaid order was not assailed by the Union of India and its functionaries.

C 28. We have referred to the earlier order in extensor despite the same having gone unchallenged, for it is submitted by Mr. Kuhad, learned Additional Solicitor General, that the said order has to be understood in the backdrop of the fact situation. There can be no trace of doubt that the tribunal had passed directions to the limited extent, but it had specified the documents and directed for full grant of opportunity to the delinquent officer.

D 29. At this juncture, we may refer to the analysis made by the tribunal in the impugned judgment while setting aside the Additional COI. On a scrutiny of the impugned judgment of the tribunal, four reasons, namely, (i) that though the tribunal vide its earlier judgment dated 8.10.2010 had directed the witnesses concerned with the annexures which were brought on record before the COI were to be made available for cross-examination, the said witnesses like the makers of the documents XLI and XLIX were not made subject to cross-examination by the delinquent officer; (ii) that though the inclusion of the Presiding Officer in the COI had been objected to on earlier occasion, he was allowed to continue and was not changed; (iii) that in spite of the Technical Members had prepared and arranged the documents which would mean that they had expressed an opinion at an earlier stage, yet they were retained as Members of the COI as a consequence of which the principles of natural justice were violated, for one cannot be the judge in his own cause; and (iv) that the doctrine of bias comes into play as the Presiding Officer as well as the Technical Members would have a tendency to support their own reports/
F documents and it is against the spirit of Rule 180. In essence,
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what has really weighed with the tribunal while passing the impugned order is that such members constituted the COI who were biased or reasoned to be biased and such bias is discernible. To appreciate the said facet of reasoning it is necessary to understand when the doctrine of bias really comes into play, for bias is an insegregable facet of the concept of natural justice as a genus. The fundamental principles of natural justice are ingrained in the decision making process to prevent miscarriage of justice. It is applicable to administrative enquiries and administrative proceedings as has been held in *A.K. Kraipak v. Union of India*⁶. It is also fundamental facet of principle of natural justice that in the case of quasi-judicial proceeding the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties and the said principle has been laid down in *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation and others*⁷, *Gullappalli Nageswarrao v. State of A.P. and others*⁸ and *Dr. G. Sarana v. University of Lucknow and others*⁹.

30. In *Manak Lal v. Dr. Prem Chand Singhvi and others*¹⁰ the Court has stated thus: -

"It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in

6. (1969) 2 SCC 262.

7. AIR 1959 SC 308.

8. AIR 1959 SC 1376.

9. (1976) 3 SCC 585.

10. AIR 1957 SC 425.

- A fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.”
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31. In *Dr. G. Sarana* (supra), the learned Judges referred to the *Principles of Administrative Law* by J.A.C. Griffith and H. Street (Fourth Edition), and observed that the position with regard to bias has been aptly and succinctly stated thus:

- C “The prohibition or bias strikes against factors which may improperly influence a judge in deciding in favour of one party. The first of the three disabling types of bias is bias on the subject-matter. Only rarely will this bias invalidate proceedings. “A mere general interest in the general object to be pursued would not disqualify,” said Field J., holding that a Magistrate who subscribed to the Royal Society for the Prevention of Cruelty to Animals was not thereby disabled from trying a charge brought by that body of cruelty to a horse. There must be some direct connection with the litigation. If there is such prejudice on the subject-matter that the court has reached fixed and unalterable conclusions not founded on reason or understanding, so that there is not a fair hearing, that is bias of which the courts will take account, as where a justice announced his intention of convicting anyone coming before him on a charge of supplying liquor after the permitted hours. . .
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- Secondly, a pecuniary interest, however, slight will disqualify, even though it is not proved that the decision is in any way affected.
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- The third type of bias is personal bias. A judge may be a relative, friend or business associate of a party, or he may be personally hostile as a result of events happening either before or during the course of a trial. The courts have not
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been consistent in laying down when bias of this type will invalidate a hearing. The House of Lords in *Frome United Breweries v. Bath Justices*¹¹ approved an earlier test of whether "there is a real likelihood of bias." The House of Lords has since approved a dictum of Lord Hewart that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" although it did not mention another test suggested by him in the same judgment: Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

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32. Eventually in the said decision it has been ruled that what has to be seen in a case where there is an allegation of bias in respect of a member of an administrative board or body is whether there is a reasonable ground for believing that he was likely to have been biased. In other words, whether there is substantial possibility of bias animating the mind of the member against the aggrieved party.

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33. At this juncture, we may refer with profit to Halsbury's Laws of England, Fourth Edition, Volume 2, paragraph 551, where it has been observed: -

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"The test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias".¹²

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34. In *Secretary to Government, Transport Deptt., Madras v. Munuswamy Mudaliar and another*¹³, while dealing with the concept of bias as a part of natural Justice, the Court observed that a predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The

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11. 1926 AC 586.

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12. R v. Moore, ex parte Brooks [1969] 2 OR 677, 6 DLR (3d) 465.

13. 1988 (Supp) SCC 651.

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- A reasonable apprehension must be based on cogent materials. Needless to say, personal bias is one of the limbs of bias, namely, pecuniary bias, personal bias and official bias.

- B 35. In *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others*¹⁴, the Court referred to a passage from the view expressed by Mathew, J. in *S. Parthasarathi v. State of Andhra Pradesh*¹⁵: -

- C “16. The tests of ‘real likelihood’ and ‘reasonable suspicion’ are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right-minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*¹⁶ (WLR at p. 707).”

- G 36. Thereafter, the two-Judge Bench referred to the decision in *Franklin v. Minister of Town and Country Planning*¹⁷ and the sounding of a different note and the dilution of the

14. (2001) 1 SCC 182.

15. (1974) 3 SCC 459.

16. (1968) 3 WLR 694.

H 17 1948 AC 87.

principle by English Courts in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)*¹⁸ and the view expressed by Lord Hutton in the said case and thereafter proceeded to analyse the doctrine propounded in *Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.]*¹⁹ where the Court of Appeal had upon detailed analysis of the decision in *R. v. Gough*²⁰ together with *Dimes case*²¹, *Pinochet case* (supra) as also *Ebner, Re*²², and the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union*²³ opined that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The learned Judges took note of the fact that the Court of Appeal continued to give effect that everything will depend upon facts which may include the nature of the issue to be decided. Eventually, this Court ruled thus: -

“The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom — in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in *Locabail case*.”

18. (2000) 1 AC 119.

19. 2000 QB 451.

20. 1993 AC 646.

21. 3 House of Lords Cases 759.

22. (1999) 161 ALR 55.

23. (1999) 4 SA 147.

A [Emphasis supplied]

37. In *G.N. Nayak v. Goa University and others*²⁴ it has been laid down that it is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest — whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.

38. In *Delhi Financial Corpn. and another v. Rajiv Anand and others*,²⁵ while dealing with the concept of doctrine that “no man can be a judge in his own cause”, the Court opined that the said principle can be applied only in two cases where the person concerned has a personal interest or has himself already done some act or taken a decision in the matter concerned. The Court further observed that an officer of a statutory corporation has been appointed as an authority, does not by itself bring the said doctrine into operation. The learned Judges further proceeded to state that in individual cases bias may be shown against a particular person but in the absence of any proof of personal bias or connection merely because officers of a particular corporation are named as the authority does not mean that those officers would be biased. Unless the officer concerned is personally interested question of bias or conflict between his interest and his duty would not arise.

39. In *Chandra Kumar Chopra v. Union of India and*

24. (2002) 2 SCC 712.

25. (2004) 11 SCC 625.

others²⁶ it has been held that mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record should show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum. The plea of bias it is to be scrutinised on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum.

40. In *State of Gujarat and another v. Justice R.A. Mehta (Retired) and others*,²⁷ a two-Judge Bench dealing with "bias" has observed thus: -

"Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim *nemo debet esse judex in propria causa*. It applies only when the interest attributed to an individual is such so as to tempt him to make a decision in favour of, or to further his own cause. There may not be a case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided or dealt with impartially but where the circumstances are such so as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias."

26. (2012) 6 SCC 369.

27. (2013) 3 SCC 1.

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41. In the said case, it has been further observed that in the event that actual proof of prejudice is available, the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary precondition, for what is relevant, is actually the reasonableness of the apprehension in this regard in the mind of such party. In case such apprehension exists the trial/judgment/order, etc. would stand vitiated for want of impartiality and such judgment/order becomes a nullity. The trial becomes *coram non judice*.

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42. At this juncture, we think it apt to refer to the pronouncements in *Ranjit Thakur v. Union of India and others*²⁸ and *Major G.S. Sodhi v. Union of India*²⁹. In *Ranjit Thakur's* case the Court was dealing with justifiability of an order of dismissal passed by the summary court martial of which one of the members was the respondent No. 4 therein. The said respondent had sentenced the appellant to suffer sentence of 28 days rigorous imprisonment for violating the norms for representation to higher authorities and the representation that was sent to the higher authorities pertained to the ill-treatment at the hands of the respondent No. 4. Keeping the said factual backdrop in view the Court referred to the procedural safeguards provided under Section 130 of the Act and opined that the proceedings of summary court martial was infirm in law. Thereafter, the learned Judges proceeded to deal with the second limb of arguments also. It related to bias on the part of the respondent No. 4 therein. In that context, the Court observed as follows: -

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"16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimum requirements of natural justice; is composed of impartial

28. (1987) 4 SCC 611.

H 29. (1991) 2 SCC 382.

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-judice*". (See *Vassiliades v. Vassiliades*³⁰)

43. The Court referred to the decisions in *Allinson v. General Council of Medical Education and Registration*³¹, *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*³², *Public Utilities Commission of the District of Columbia v. Pollak*³³ and *Regina v. Liverpool City Justices, ex parte Topping*³⁴ and, eventually, concluded that the inescapable conclusion was that the participation of respondent No. 4 had rendered the court-martial proceedings *coram non-judice*.

44. In *Major G.S. Sodhi* (supra), the Court did not accept the alleged plea of bias or mala fide as Lt. Col. S.K. Maini, who had ordered summary of evidence against the petitioner therein, was inimical towards him because of certain prior incidents. It was also alleged that he had not acceded to certain requests made by the petitioner during the inquiry. The Court did not accept the same on the ground that the respondent Lt. Col. S.K. Maini was only concerned with the preliminary inquiry and it was for the court martial to try the case and give its verdict and mere allegation of bias and mala fide against him did not affect the court martial proceedings. That apart, the Court observed that the allegations against the said Maini had not been really substantiated and even they are perceived from the point of view of the petitioner therein, it could not be held that it was not reasonable on his part to apprehend that the said officer would act in a biased and partisan manner. Emphasis was laid

30. AIR 1945 PC 38.

31. (1894) 1 QB 750, 758-59.

32. (1969) 1 QB 577, 599.

33. 343 US 451, 466-67 : 96 L ed 1068, 1079.

34. (1983) 1 WLR 119 : (1983) 1 ALL ER 490, 494.

A on the fact that he was only responsible for holding a preliminary enquiry.

45. The principle that can be culled out from the number of authorities fundamentally is that the question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being *coram non-judice*. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. It is to be kept in mind that what is relevant is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition.

46. Keeping in view the principles laid down in the aforesaid precedents and how this Court has understood and dealt with the plea of bias, the case at hand is to be appreciated in its factual backdrop whether there has been "really likelihood of bias". In a COI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on the COI. The Rule provides for procedural safeguards regard being had to the fact that a

person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action. Thus understood, the language employed in the Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that the COI may not always be essential or *sine qua non* for initiation of a court martial but the another spectrum is once the authority has exercised the power to hold such an inquiry and the COI has recommended for disciplinary action, then the recommendation of the COI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the Rule, for the language employed in the said Rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of factual matrix of each case.

47. Coming to the case at hand, we are obliged to state that initially the COI was constituted by three members by order dated 22.7.2009 and it was asked to investigate certain issues. The relevant part of the said order reads thus: -

- "(a) Pers involved incorrupt practice of submitting inflated claims to PCDA in connivance with Tpt Firms with Spl ref to Kaushik Tpt Pvt Ltd.
- (b) Hiring vehs of lower tonnage and submitting bills for hiring of higher tonnages.
- (c) The misappropriation in dispatch of stores to Ord Depot."

A The composition of the Board of Officers were as under: -

(a) Presiding Offr - Brig NS Ahamed, CSO, HQ
MG & G Area.

B (b) Members - 1. Col RV Desai, Jt. Dir DSC
Mumbai Sub Area.

2. Lt. Col Sandeep Sinha,
OC 53 Coy ASC (Sup).

C 48. Thereafter, an amendment was brought regarding
composition of the COI vide order dated 28.7.2009. It reads
as follows: -

"The following amdts will be made in our above convening
order at Para 2: -

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For Presiding Offr - Brig NS Ahamed, CSO,
HQ MG & G Area

Members 1. Col. RV Desai, Jt Dir
DSC Mumbai Sub Area

E

2. Lt Col Sandeep Sinha, OC 53 Coy ACS (Supply)

Read Presiding Offr - Brig NS Ahamed, CSO,
HQ MG & G Area

F

Members 1. Col. RV Desai, Jt Dir
DSC Mumbai Sub Area

2. Col RG Laxman, SO(ECHS) HQ Mumbai Sub Area

G

Technical Members 1. Lt Col Sandeep Sinha
OC 53 Coy ASC (Supply)

2. Maj Sanjeev Narula,
Stn Wksp EME, Mumbai"

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49. It is submitted by Mr. Kuhad, learned ASG, appearing for the appellants, that the Technical Members had only compiled and collated the documents and for such an act they cannot be disqualified to function as Members. It is also urged by him that the said Members only signed the day-to-day proceedings but were not signatories to the final report that was submitted through the officer who convened the COI. In this context we may refer to what has been recorded on 11.2.2011 by the Additional COI: -

"In deference to the directions given by Hon'ble Armed Forces Tribunal Principal bench, New Delhi dated 08 Oct 2010, the following exhibits namely exhibit XLIX, exhibit LXIX, exhibit L, exhibit LXVIII, exhibit XXXV, exhibit XLI, exhibit LV, exhibit LXVI are available for perusal. It is clarified that exhibit XLIX named as technical report containing Appces A to M, the documents produced at the initial Court of Inquiry and which have already been perused by all the witnesses under AR 180 and for easy reference these documents have been compiled in one place marked as Appces A to M of exhibit XLIX. The balance of exhibit XLIX, the technical report forming part of Appces N to AB and extract to Appx N is the collation of information in various formats as per headings given in these Appces from the information available in the Appces A to M of exhibits XLIX.

The court has requested the convening authority HQ MG & G Area to intimate details of documents, copies of Court of Inquiry and exhibits handed over to the witnesses if any during the interim period i.e. 06 Dec 2009 to 07 Feb 2011, vide Presiding Officer HQ MG & G Area (Sigs) letter No. PC-0604/CHT/COD/Addl C of I dated 09 Feb 2011 and the letter is read over. The copy of the letter is attached as exhibit 1."

50. It is not in dispute that the respondent No. 1 perused all the documents and objected to the presence of the Technical

A Members, namely, Lt. Col. Sandeep Sinha and Maj. Sanjeev Narula in the Additional COI proceedings. On 17.2.2011 the Additional COI clarified that Ext. XLIX comprised of appendices as brought about by the court at paragraph 5 of the Additional COI proceedings dated 11.2.2011. At that juncture, the said
 B respondent gave a list of his witnesses. On 24.2.2011 the respondent No. 1 made a prayer to cross-examine the Members of the COI but the said prayer was declined. It is contended by Mr. Kuhad that neither the examination nor the cross-examination of the Presiding Officer and the Members
 C of the COI can be spelt out from the language of Rule 180 as they are not witnesses. We find force in the said submission of the learned senior counsel and hold that neither the Presiding Officer nor the Technical Members of the COI could be made available for cross-examination before the COI.

D 51. The core of controversy, as we notice, is the inclusion of the Technical Members and the Presiding Officer in the COI. As has been stated earlier, the respondent raised the plea of bias against the Technical Members and had objected to the inclusion of Brig. N.S. Ahamed as Presiding Officer. To
 E appreciate the fulcrum of the controversy, we are required to see the role played by the Technical Members at an earlier stage, for it was repeatedly stated before us that they had only compiled the documents. A mere compilation or pagination or for that matter an arrangement of documents may not be an act
 F to compel someone from recusing from a case. He may not be disqualified to be a part of a COI. But on a perusal of the Ext. XLIX we find that it is a "Technical Report" prepared by the two Technical Members. At the beginning it has been stated "Technical Report : Staff C of I". Thereafter it has been
 G mentioned therein that documents in custody of the court were perused for arriving at the technical inputs. The Members have listed the important documents, stated about the methodology they were going to adopt and have given the input which have been brought on record as appendices 'N' to 'Z'. After giving
 H the inputs the members have given their observations stating

that during the course of scrutiny of documents they have observed many financial irregularities. The observations are from paragraph 5(a) to (m). Para 6 deals with inferences and describes the part, namely, "Anomaly along with Inference". The same includes (a) variation between Tonnage mentioned in gate register and bills, (b) variation of CHT Tonnage between Traffic Branch Office copy of consignment note (Bilti) and Bills with financial loss, (c) transshipment details as per office copy of Convoy Note in Traffic Branch and receipted copies of Convoy Note and input, from Consignee Units, (d) Same CHT billed for different tonnages with financial loss, (e) same CHT being hired within close period, (f) variation in billed tonnage of CHTs vis-à-vis actual tonnage as per list given by Kaushik Transport with tender documents with financial loss, (g) CHT billed but date record at variance in Gate Register with respect to reporting and utilization of vehicle note, (h) dispatch to same places in consecutive days amounting to splitting of transaction, (i) variation between actual utilization and the CFA sanction, and (k) preliminary inquiry at COD Malad. On a bare perusal of the same one can easily say that the Technical Members have expressed their opinion after analysis of the documents. They have, in detail, scrutinized the documents, drawn their inferences and made their observations. This document has been marked as Ext. XLIX. By no stretch of imagination it can be said that it is an arrangement of documents or pagination of documents. True it is, they are not the authors of the original documents but their analysis and inference have been used against the respondent in the earlier COI and in the Additional COI. It cannot be brushed aside by saying that Technical Members did not sign the final report. Once they have given an opinion, the possibility to support the same cannot be totally discarded. That is where the real likelihood of bias comes into play. As has been stated in number of authorities which we have reproduced hereinbefore if one has something substantial, relevant or material to do with the case he is disqualified. In the case at hand, we find that the Technical Members had compiled the documents, adopted the methodology, made

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A observations, drawn inferences and expressed the view and, above all, they had prepared the report which has been brought on record as a document. To say, they had not played any role would tantamount to blinking at reality. In our considered view, their inclusion as the Technical Members is not legally
B permissible. It is so as the said respondent is bound to be prejudiced. In this context, we may reproduce a passage from *State v. N.S. Ganeswaran*³⁵:

C "12. The issue also requires to be examined on the touchstone of doctrine of prejudice. Thus, unless in a given situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/ enquiry/result. In judging a question of prejudice, the court must act with a broad vision and look to the substance and not to technicalities. (Vide: *Jankinath Sarangi v. State of Orissa*³⁶, *State of U.P. v. Shatrughan La*³⁷, *State of A.P. v. Thakkidiram Reddy*³⁸ and *Debotosh Pal Choudhury v. Punjab National Bank*³⁹.)"

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52. Even applying the rigorous substantive test, we find that
E a case of prejudice comes into full play in the case at hand.

53. Presently we shall advert to the inclusion of Brig. N.S. Ahamed. In the earlier order dated 8.10.2010 the tribunal had referred to Ext. XLI to be made available to the respondent. The learned senior counsel for the appellants has filed the Ext. XLI
F before us. The same has been prepared by the Presiding Officer. It reads as follows: -

G "On sample perusal of file No. 2751/Gen/18/ Cont of Central Ordnance Depot, Mumbai, it is observed by the

35. (2013) 3 SCC 594.

36. (1969) 3 SCC 392.

37. (1998) 6 SCC 651.

38. (1998) 6 SCC 554.

H 39. (2002) 8 SCC 68.

Court that recommended distribution of stores has been fwd to DGOS by Central Ordnance Depot, Mumbai. The approval is accorded by DGOS which may or may not be the same as recommended by Central Ordnance Depot, Mumbai. A photocopy of Central Ordnance Depot letter No. 2754/Gen/Cont. Dt. 04 Aug 2008 found from DGOS and approval letter of the same IHQ. MOD, MGO letter No. PC 2 to 13357/R1 001519/ Fin/OS-46 dt. 06 Aug 09, this approval is only for issue of items and not dispatch is enclosed as Exhibit XLI."

54. To the said observation/report two letters have been annexed – one written by Rishab Paliwal, Capt., Control Officer, for Commandant, and another by P. Krishna Kumar, SCSO, Jt Dir OS-4E, for Dir Gen Ord Services. On a scrutiny of the same it cannot be said that it pertained to the proceedings before the COI. In fact, on earlier occasion the tribunal had taken exception to the fact that the said documents were not given to the 1st respondent. No doubt, thereafter he had been allowed to peruse the same but he is entitled to explain the same, more so, when a view has been expressed in the document. Mr. Kuhad would contend that the Summary of Evidence had commenced and a number of witnesses, including the Technical Members, have been examined and they have also been cross-examined by the 1st respondent. Be it noted, this Court, while issuing notice and directing stay of the proceedings of the order passed by the tribunal had permitted the appellants to proceed and further proceedings were made subject to the result of the final decision of the appeal. We are compelled to repeat here that once a COI has been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views in writing behind the back of the person and assume the role of the recommending authority which is statutory in nature to take disciplinary action. Law does not countenance the same. In the present case it is irrefragably clear that the

- A recommendation of the COI was the sole basis on which the disciplinary action has been initiated. Nothing else had come on record as observed by the tribunal on earlier occasion as well as by the impugned order and the said finding is unassailable. That being the position, we find in fitness of things,
- B the Presiding Officer should have recused himself to preside over the COI. However, we must make it clear that on earlier occasion the tribunal had not quashed the entire proceedings and the same was not challenged by either of the parties. Therefore, the Additional COI which has been directed by the
- C tribunal by the impugned judgment, shall only function as an Additional COI and deal with the documents which were produced earlier before the tribunal in a tabular chart to which we have referred to hereinbefore.

55. At this juncture, we think it is necessary to observe that
- D the respondent No. 1 at one point of time had filed a long list of witnesses. It is to be borne in mind that on the earlier occasion the tribunal permitted for examination or cross-examination of witnesses who had something to do with the documents. The Additional COI shall keep that in view so that
- E there is no procrastination of the proceedings at the behest of the delinquent officer, for natural justice has also its own limitations. It can be allowed to become an unruly horse.

56. Before parting with the case, we think and we are
- F constrained to think that we should say something about the order of the tribunal. Section 14 of the Armed Forces Tribunal Act, 2007 occurs in Chapter III of the said Act and deals with jurisdiction, powers and authority of the tribunal in service matters. Under sub-section (5) of Section 14 the tribunal is
- G required to decide both questions of law and facts that may be raised before it. The respondent had approached the tribunal under Section 14 of the said Act. In the Statement of Objects and Reasons it has been spelt out for constituting an Armed Forces Tribunal for adjudication of complaints and disputes
- H regarding service matters and appeals arising out of the

verdicts of the court martial to provide for quicker and less
expensive justice to the members of the said armed forces of
the Union. The Preamble of the Act provides for adjudication
or trial by the tribunal of justice and compliance in respect of
many a matter. As we find the tribunal has been conferred
powers to deal with the cases in promptitude. Promptitude
does not ostracize or drives away the apposite exposition of
facts and necessary ratiocination. A seemly depiction of factual
score, succinct analysis of facts and law, pertinent and cogent
reasoning in support of the view expressed having due regard
to the rational methodology, in our considered opinion, are
imperative. We have said so as we find that the tribunal by the
impugned order has not adverted to the necessitous facts. We
say so despite sustaining the verdict.

57. Ex consequenti, the appeal, being sans merit, stands
dismissed leaving the parties to bear their own costs.

Bibhuti Bhushan Bose

Appeal dismissed.