COURT NO. 1, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
(Through Virtual Hearing)

OA No 1209/ 2020

Wg Cdr Shyam Naithani ... **Applicant**

Versus

Union of India & Ors. ... **Respondents**

WITH

OA 1210/2020

Gp Capt Suman Roy Chowdhury ... **Applicant**

Versus

Union Of India & Ors ... **Respondents**

For the Applicants - **Mr Ankur Chhibber, Advocate with Mr Karan Deo Bhagel, Advocate**

For the Respondents - **Gp Capt Karan Singh Bhati, Senior CGSC**

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN P.M. HARIZ, MEMBER (A)

O R D E R

1. This original application has been filed under Section 14 of the Armed Forces Tribunal Act 2007 by the applicants, both, serving officers of the Indian Airforce. Wg Cdr Shyam Naithani, applicant in OA 1209/2020, and Gp Capt Suman Roy Chowdhury, applicant in OA 1210/2020 were both posted at Srinagar Air force Station as the Senior Air Traffic Controller (SATCO) and Chief Operations Officer (COO) respectively in February 2019.

2. Consequent to the terrorist attack on a vehicle convoy at Lethpora in Pulwama District of J&K on 14.02.2019, the Indian Air Force carried out an air strike in the early hours of 26.02.2019 on a terrorist camp in the vicinity

of the town of Balakot in Khyber Pakhtunkhwa province of Pakistan. Known as 'Balakot Air Strike', it is said to have demolished a terrorist camp and killed several terrorists. Subsequent to this air strike, it is common ground that a war like situation emerged and in that situation an air accident took place on 27.02.2019 involving an IAF helicopter Mi 17 V5 (ZP 5220). As a result of this accident, six officers of the Indian Air Force and one civilian lost their lives and the helicopter too was completely destroyed. A Court of Inquiry (CoI) was convened to inquire into this flying accident in accordance with the Air Force Act and Rules. IAF helicopter Mi 17 V5 (ZP 5220). This case refers to various provisions of Air Force Order 08/2014 (here after referred to as AFO 08/2014), The Air Force Act, 1950 (here after referred to as Act), The Air Force Rules 1969 (here after ref to as AF Rules) and Defence Services Regulations, Regulations for the Air Force, 1968 (here after referred to as AF Regulations).

3. The applicants are aggrieved by the actions of Respondents in conduct of the CoI proceedings convened pursuant to Terms of Reference (TOR) dated 07.03.2019, being contrary to Para 49 of the Air Force Order 08/2014 (AFO 08/2014) and further that the proceedings of the CoI, it's findings and opinion dated 12.07.2019 being contrary to the mandatory provisions of law. Both applicants have filed their respective OAs with the following prayers :-

(a) Quash the CoI proceedings convened pursuant to TOR dated 07.03.2019 being contrary to Para 49 of AFO 08/2014.

(b) Quash the Findings and Opinion dated 12.07.2019 of the CoI being an outcome of illegal CoI conducted without competent members in violation of Para 48(b)(iv) of AFO 08/2014 and held in contravention of the mandatory provision of rule 156(2) of AF Rules.

(c) Set aside order dated 19.08.2020 and 27.08.2020 being contrary to Rule 156 of the AF Rules.

(d) Quash any other order that may be passed pursuant to the findings and opinion dated 12.07.2019 of the CoI being contrary to the mandatory provisions of law.

(e) Pass any other order or directions as may be deemed appropriate in the facts and circumstances of the case.

4. Pending final decision on the application, the applicant also sought an interim relief to the extent that the Respondents be restrained from taking any action against the applicant pursuant to Findings dated 12.07.2019 (Impugned Order) including, but not limited to initiation of proceedings against the applicant under Rule 24 of the AF Rules.

Brief Facts of the Case

5. Both the applicants, Wg Cdr Shyam Naithani (OA 1209/2020) and Gp Capt Suman Roy (OA 1210/2020) are serving Airforce Officers.

(a) Wg Cdr Shyam Naithani has 22 years of exemplary service in the Administrative Branch as an Air Traffic Controller. On 06.03.2017 he was posted to Srinagar from Air Force Station, Pathankot and assumed the appointment of Senior Air Traffic Controller (SATCO) at Air Force Station, Srinagar. The applicant was conferred the AOC-In-C's Commendation Card in 2007 for his professional competency and excellence. The SATCO is the senior most air-traffic controller and as per the charter of duties enumerated in Para 845 of the AF Regulations the responsibilities of the SATCO were totally different from that of the Duty Air Traffic Controller (DATCO). The duty of SATCO is administrative in nature and he merely has administrative control over the DATCO who independently performed majority of the air-traffic control activities.

(b) Gp Capt Suman Roy has 24 years of exemplary service as a fighter pilot. In April 2017 he was posted as the Chief Operations Officer (COO) at Air Force Station, Srinagar. The applicant was

conferred the CAS Commendation Card in 2009 for his exceptional work and dedication to duty. On 12.09.2018 he also received a letter of appreciation from the Hon'ble Raksha Manti for his competence.

(c) Both the applicants had strenuous and demanding jobs since Srinagar was an important airfield with its own peculiarities and is jointly used by the Air Force, Army Aviation, para military aviation, State government and civil aviation.

6. The brief facts of the case as per both the applicants are similar in nature and are given in subsequent paragraphs. The facts as given by the applicant in OA 1209/2020 are elaborated here, which will then be examined for various issues as prayed for by both the applicants.

7. As per the applicant in OA 1209/2020, consequent to the air accident involving IAF helicopter Mi 17 V5 (ZP 5220) that took place on 27.02.2019, a CoI as per AFO 08/2014, was convened by the Chief of Air Staff (CAS) in March 2019 to investigate this Category-1 accident, record the CoI proceedings and determine the factual information as per IAFF(AO) 1243. The CoI was ordered on 07.03.2019 and the TOR was also issued on the same day, and on 08.03.2019 the Presiding Officer was briefed by DG (I&S) Air HQ, although the DG (I&S) was neither the convening authority nor competent to issue the TOR. As per the applicant, the issuance of the TOR and briefing of the Presiding Officer by the DG(I&S) even before the court of enquiry could investigate the matter was contrary to Para 784 of the AF Regulations and Para 49 of AFO 08/2014. As per Para 784 of the AF Regulations and Para 49 of the AFO the TOR for the CoI could only be issued by Respondent No 2, the CAS and no one else.

8. The CoI assembled on 11.03.2019 to conduct its proceedings. However, the applicant was neither given a copy of the terms of reference nor the convening order. The CoI did not even have a specialist ATC officer with the requisite qualification which was a mandatory requirement to investigate the accident as per the para 48 (b)(iv) of AFO 08/2014. Hence

the Constitution of the CoI was bad in law and vitiated the entire proceedings which was the basis for subsequent actions including the intended disciplinary proceedings against the applicant.

9. The CoI failed to invoke Rule 156 (2) of AF Rules when for the first time Witness No. 2 and 3 who were the applicant's immediate subordinates, made a direct statement against the applicant. This denied the applicant his right to be present at the recording of the proceedings from the beginning and the opportunity to defend himself as contemplated under Rule 156 (2). In this connection the applicant referred to a judgement of the Hon'ble High Court of Delhi in ***Lt Gen Surendra Kumar Sahni versus Chief of the Army Staff and others*** ***[2008(3) SLR 39]*** which analysed the rights provided by Rule 180 of the Army Rules and is in *pari materia* to Rule 156(2) of the AF Rules.

10. As per the applicant, between the period 12.03.2019 to 14.03.2019, the CoI had examined a total of 12 witnesses and recorded their statement without the applicant being present which was in complete violation of Rule 156 (2) of the AF Rules. The failure to invoke this Rule also prevented the applicant from watching the demeanour of the 12 witnesses who were examined by the court in his absence. In this connection the applicant referred to the Hon'ble Supreme Court judgement in the case of ***Lt Col Priti Paul Singh Bedi versus Union of India and others*** ***[(1982) 3 SCC 140]*** which categorically held that once the CoI is set up, nothing shall be done behind the back of the officer without giving him full opportunity of participation.

11. It was only on 15.03.2019 after examination of 13 witnesses including the applicant that Para 790(a)(b)(c) of the AF Regulations was applied on the applicant and he was provided the opportunity to be present throughout the enquiry, make additional statements, give evidence in his favour and cross question witnesses. However, this did not serve any purpose since 12 witnesses had already deposed before the COI in the

absence of the applicant and they were bound to support their own statements at this stage even if the applicant cross questioned them. 12.

The applicant made several requests to the COI to recall the witnesses who had been examined in his absence. However, this request was not acceded to and the applicant was only permitted to peruse the evidence already recorded and was subsequently given the liberty to be present and cross question the witness. Moreover, the document pertaining to application of Para 790(a)(b)(c) given to him on 15.03.2019 for his signature had not been signed by any of the members of the COI. It is also pointed out that as per the statement of the Admin Member Wg Cdr HS Bagga, he had been detailed as the Admin Member of the COI only on 15.03.2019 and was thus not present in the COI prior to that date. Moreover, Wg Cdr HS Bagga had backdated and signed the proceedings completed prior to his joining as the Admin Member. This was in clear violation of Para 48(b)(iv) of AFO 08/2014 and thus rendered the entire CoI bad in law. Later, on 28.03.2019, Wg Cdr HS Bagga was replaced by Wg Cdr J Johnson as the new Admin member. Wg Cdr J Johnson in his declaration on 04.04.2019 drew attention of the CoI to the need of a qualified ATC officer as a member. However, this was completely ignored by the CoI. It is the applicant's case that all these indicated an arbitrary approach of the CoI contrary to mandatory positions of law.

13. It was only on 05.06.2019, by when the COI had examined a total of 31 witnesses that the CoI for the first time found the applicant blame worthy on certain counts for the said accident and decided to apply Para 790 (e) of the AF Regulations. The document stating the application of Para 790(e) did not have the signature of the technical member thus indicating once again the capricious nature of the proceedings and procedural infirmities in the conduct of the COI. It is once again the applicant's case that he had been blamed on certain counts when he was not even present at the court of enquiry from 10.03.2019 to 14.03. 2019 when 12 of the witnesses were examined in his absence. Even at this stage

the applicant's request to recall the 12 witnesses who were examined in his absence was denied and the applicant was informed that he could peruse the evidence already recorded and maintained on the computer. Thus, the conduct of the CoI from the beginning and the application of Para 790 (e) of AF Regulations apportioning blame were all in violation of Rule 156(2). Moreover, since Air Force Rules 1969 took precedence over the AF Regulations, the AF Regulations can only supplement the Rules but not supplant them. Thus the AF Rules were intended to prevail over the AF Regulations. Hence it is only Rule 156(2) that could have been invoked in the case of the applicant.

14. The applicant has also stated that Witness No. 16 who gave a statement on 14.06.2019 raised several issues regarding the constitution and conduct of the CoI, and violation of law while conducting the proceedings. The witness had also contended how the Just Culture Model as elucidated in Appendix AG of AFO 08/2014 had not been followed in contravention to Para 64 of the AFO while applying Para 790(e) to this witness. The CoI in its deliberations on 15.06.2019 admitted that consequent to the convening of the CoI, the terms of the CoI had been changed and that in place of IAFF-1243 the investigation was proceeding under Rule 157. Since the accident could only be investigated as per IAFF-1243 the TOR could not be unilaterally changed by the CoI and that this too rendered the entire CoI and its findings bad in law. Witness No. 16 while giving his second additional statement on 10.07.2019 after application of Para 790(e) again stated that there was a needless rush to apply Para 790(e) on him even while certain evidence was still being admitted by the CoI. This too showed the arbitrary approach in the conduct of the CoI.

15. The biased nature of the CoI was also indicated in the fact that the CoI did not record the statement of Air Cmde Amit Verma, AOC, Air Force Station Srinagar on the fateful day of the accident as he had the overall

responsibility for all activities at the base. It was only on 06.07.2019 that his statement was finally recorded at Witness No. 34 and was not found blame worthy on any count.

16. On 12.07.2019 the CoI arrived at its findings and recorded the blame worthiness of the accident and applicant was found blame worthy on six counts despite there being mitigating factors recorded by the CoI. This too clearly showed the predetermined approach of the CoI with supports the assertion that a decision to find the applicant blameworthy had been taken right from the beginning.

17. After recording the findings and recommendations of the CoI the court reconvened on 15.09.2019 with a new Presiding Officer. However, the notice of the reconvened CoI was never given to the applicant which therefore prevented his presence at the CoI which was again in violation of Rule 156(2), especially since Para 790(a)(b)(c) and (e) of the AF Regulations had already been applied on him on 15.03.2019 and 05.06.2019 respectively. Subsequently on 17.09.2019, Para 790(h) of the AF Regulations was applied on Witness No. 34 and he too was found blameworthy though the CoI had initially not found him blame worthy in the findings recorded on 12.07.2019.

18. The CoI also applied Para 790(h) on Witness No. 35 who was AOC, Air Force Station, Srinagar from 09.11.2016 to 27.05.2018. Though Witness No. 35 made specific allegations against the applicant the applicant could neither witness the recording of statement, nor cross question the witness which was also in violation of Rule 156(2). Witness No. 35 had also alleged that the CoI was presupposing blame worthiness and was not following principles of natural justice. Finally, on 17.09.2019 the CoI recorded its deliberations and additional findings with respect to the accident. This too indicated the arbitrariness of the CoI which had different yardstick for different witnesses when it came to apportioning blame worthiness for the accident.

19. Even as the CoI was in progress, numerous articles were published in the media at various points of time, regarding the court of enquiry, the likely actions contemplated and personnel likely to be held responsible. These articles indicated that information pertaining to the CoI was being selectively leaked by the Respondents and that a narrative was being prepared for the blame worthiness of the said accident. It included an article published on 23.08.2019 specifically stating that the applicant and the COO had been found blame worthy. These media reports were thus detrimental to the outcome of the COI as far as it pertained to the applicant.

20. On 03.09.2019 the applicant submitted an application to his CO requesting a copy of the proceedings of the CoI for preparing his defence. However, the Respondents did not supply a copy but went ahead and ordered the initiation of disciplinary action under Rule 24 of the AF Rules. Since the applicant did not receive any reply to his representation dated 03.09.2019 seeking the entire copy of the COI proceedings, he was left with no other option but to approach the Tribunal to seek redressal of grievances. The Applicant thus filed OA 211/2020 before AFT Principal Bench. During the pendency of this OA the respondents intimated the applicant that the competent authority had decided not to give a copy of the CoI, however in compliance with Rule 156, the unclassified portion would be given. The letter also stated that the remaining portion could be perused by the applicant in the office. Once the copy of the redacted CoI was received, the applicant noticed that his signature appended on 15.03.2019 on application of Para 790(a)(b)(c) and on 05.06.2019 on application of Para 790(e) were different from the document which he had originally received on these dates. The applicant once again requested for the entire copy of the CoI proceedings vide his letter dated 20.08.2022 which the respondents did not agree to vide their letter of 27.08.2020. In the applicant's opinion the Respondents had a predetermined approach and were in a hurry to convene a court-martial even when the case had

not reached Rule 24 proceedings. The contents of the letter dated 27.08.2020 was again reflective of the respondents predetermined approach to the case of the applicant and the hurry to punish him.

21. The applicants had initially filed OA 211/2020 and OA 212/2020 with the prayer that the respondents be directed to supply the entire proceedings of the court of enquiry convened by the CAS under AFO 8/2014 to investigate the accident involving the IAF helicopter Mi 17 V5 (ZP 5220) on 27.02.2019. This Tribunal had found that the applicants were entitled to be supplied a copy of the unclassified portion of the court of enquiry and that they were also entitled to inspect the entire court of enquiry proceedings, including classified portion, based on which the charges against them had been framed. The Tribunal in its Order dated 09.09.2020 had directed the respondents that the CoI proceedings in entirety, including classified portion, be made available for inspection by the applicants at 11 AM on 11.09 2020 and on two subsequent consecutive working days 12.09 2020 and 14.09 2020 as required.

22. Subsequently the applicants filed the OAs under consideration and the Tribunal vide their order dated 14.09.2020 directed the respondents that further actions on the report of the CoI be kept in abeyance with effect from the date of the order to the next date, apart from the actions permitted by the Tribunal in it's order dated 09.09.2020 passed while disposing of OA 211/2020 and OA 212/2020. The order also stated that all observations made in that order were prima facie in nature only for the purpose of considering the question of interim relief and should not be termed as final determination by the Tribunal. The respondents filed the counter affidavit on 28.09.2020 and the matter was heard on 9.10.2020. Having heard both parties, the Tribunal in its order dated 09.10.2020 concluded that the requirements of Rule 156 (2) read along with Para 790 of the Regulations had been complied with in respect of both applicants. That being the case, the Tribunal vacated the interim protection granted in

its order dated 14.9.2020 subject to final determination of various question raised in the OA. Accordingly, the respondents were permitted to proceed with the actions initiated in accordance with law and concluded as per law, subject to any order or direction that may be issued by the Tribunal in the matter. The order also directed that all of the remaining issues under discussion would be considered at the time of the final hearing.

23. Consequent to the vacation of the stay by the Order dated 14.09.2020, both applicants filed Writ petitions [WP(C) 8313/2020 & 8320/2020] in the Delhi High Court with identical prayers, in that, the Tribunal Order dated 14.09.2020 be quashed and the respondents be restrained from taking any action, including initiating disciplinary action against the applicants based on the impugned order. The WPs were dismissed vide the Hon'ble Delhi High Court judgement dated 05.11.2020.

Arguments by the Counsel for the Applicants

24. The Counsel opened the arguments by stating that it was intended to argue on the technical aspects of the conduct of CoI and not on the merits of the CoI. The Counsel recapitulated the sequence leading to the air accident involving the IAF helicopter Mi 17 V5 (ZP 5220), in which six IAF personnel and a civilian died and the helicopter was completely destroyed. He then took us through AFO 08/2014 dated 08.05.2014 which lays down the procedure for 'Reporting and Investigation of Aircraft Accidents and Incidents'. He then drew our attention to Para 47 of the AFO and emphasized that the CAS is the only authority authorized to convene a CoI in case of a Cat-1 accident; a fatal accident in which the air crew on duty are fatally injured. The Counsel then added that in the case at hand, while the CoI had been convened by the CAS, the TOR had been issued by a different agency, which is contrary to the instructions, as there are no delegated powers in this regard.

25. The Learned Counsel then took us through the details of the constitution of the CoI and elaborated the details contained in Para 49 of

the AFO. The Counsel added that apart from the members from the Flying and Technical Branches, it was also vital to have representatives from other appropriate Specialist Branches based on the type of accident. In particular, where ATS aspects and associated subjects such as RCFF (actual emergency/ ground run) and bird strikes are likely to be deliberated, an ATCO shall be detailed, who for CoI investigating Cat I/II/III accidents must be a Command Examiner holding Cat A certification. The Counsel then emphasized how in the present case, the requisite specialist reps were not detailed when the CoI was initially constituted; in particular there was no ATC rep, nor were a AD C&R rep or a SAGW rep detailed. The presence of the SAGW rep was considered vital since the missile system employed at the Base was a new weapon system and very few personnel had requisite knowledge about its capabilities, employment and the operational command and control system.

26. The Learned Counsel then elaborated the details pertaining to the absence of the Admin Member. The CoI was convened and TOR issued on 07.03.2019. While the Court commenced its hearing on 11.03.2019 the Signal detailing the Admin member was initiated only on 15.03.2019 and the officer reported on 16.03.2019 by which time 14 witnesses had already been examined. On joining, the Admin Member read the statements given by the 14 witnesses and ante dated his signature. The Counsel then added that even this member has replaced on 28.03.2019. A fresh member, an ATC qualified officer, who though did not have the required Cat joined the CoI on 04 .04.2019. The Counsel then took us through the observations made by this new member regarding certain lacune in the conduct of the CoI and handling of electronic evidence which is required to be accompanied by a certificate of the custodian and then taken on charge. The Counsel then added that subsequently the electronic evidence was manipulated and used against the applicant. The Counsel vehemently stated that it was imperative that members were physically present and

only then would their authentication be valid. And if the quorum of the CoI is not full, then the entire proceedings of the CoI becomes invalid.

27. The Learned Counsel then took us through Air Force Act Sec 189, Sec 156 of AF and Para 790 of the AF Regulations, and emphasized that as given in Sec 156 (2) AF Rules '....*Save in the case of a prisoner of war who is still absent, whenever any inquiry affects the character or service 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 statements and of giving any evidence he may wish to make or give, and of cross-examining and witness whose evidence, in his opinion, affects his character or service reputation, and producing any witnesses in defence of his character or service reputation'*. Further elaborating on the conduct of the CoI, the Counsel added that 13 witnesses had been examined in the absence of the applicants, and that even when Witness 4 had made allegations against Witnesses No 2 and 7 provisions of Sec 156(2) of AF Rules had not been invoked. The absence of the applicants at the recording of the statements of these witnesses had denied that applicants an opportunity to watch the demeanor of the witness when they gave their statements, which is often different in the presence of the person against whom a statement is being given. The Counsel then went on to state that if indeed the applicants had to cross examine the witness, it was imperative that they were given a complete copy of the CoI. On the contrary, the applicants were instructed to read the statements on the computer terminal on which the statements had been recorded. The Counsel then added that consequent to Witness 16 giving additional statement, on 15.06.2019 the TOR was changed and the Court mentioned that the CoI would proceed there and after under Air force Rule 157. The Counsel vehemently stated that this Rule pertained to imposition of collective fines under sub-section (1) of Sec 90 of the AF Act; and that Sec 90 was not even relevant to officers. Thus, the CoI itself had changed the TOR without reference to the convening and authority.

28. The Learned Counsel then explained how thought the findings had been finalised on 12.07.2019, the CoI was reconvened on 15.09.2019 with a new Presiding Officer. He then argued that since the new Presiding Officer was the AOC J&K, and that since the accident had taken place in his AOR, his detailment was violative of Para 46 of AFO 08/14, which states that the convening authority is to ensure that the personnel detailed for the CoI have no direct connection or personal interest in the case under investigation. The reconvened CoI then examined new witnesses, Witness No 34 and 35; and once again, the applicants were not intimated and were therefore, not present during the proceedings of the reconvened CoI contrary to Rule 156(2). The Counsel then went on to state that despite the applicants seeking copies of the CoI, to which they were entitled, they were denied the documents, because of which they had to file OA 211/2020 and 212/2020. It was only with the intervention of the Hon'ble Tribunal in these two OAs that the applicants finally got a copy of the redacted CoI and were also permitted to peruse the original in the office of the Respondents. The Counsel then stated that though the applicants had given a list of documents to be provided; none were given and it's the apprehension of the applicants that many of them may have been destroyed.

29. The Learned Counsel relied on the following cases to support various issues made during the argument, specially to emphasise the sanctity of presence of members of a quorum entrusted for CoI/ Selection etc; relevance and adherence to Army Rule 180 and the fact that it is *pari materia* with AF Rule 156(2):-

(a) *Hon'ble High Court of Maharashtra, Amrutlal Manohar Kanjariya Vs State of Maharashtra, WP No 8551 0f 2012 dated 04.03.2014 [2013(4) Mh.L.J].*

(b) *Hon'ble Supreme Court, State of Andhra Pradesh and Anr Vs Dr Mohanjit Singh and Anr, CA No 3865 of 1986, dated 01.14.1988 [1988(Supp) Supreme Court Cases 562].*

(c) *AFT Regional Bench Lucknow, Hav Ramvir Singh Vs UoI and ors, OA 229 of 2014, dated 11.01.2017 [2017 SCC OnLine AFT 19].*

(d) *Hon'ble Supreme Court, Lt Col Prithipal Singh Bedi, Capt Dharampal Kukrety and Anr, Capt Chander Kumar Chopra Vs UoI in WPs 4903 of 1981, 1513 of 1979, 5390 of 1980 dated 25.08.1982 [(1982) 3 SCC].*

(e) *Hon'ble High Court of Jammu & Kashmir, Vinayak Daultatrao Nalawade Vs Corps Commnader, HQ 15 Corps, WP 490 of 1985 dated 05.05.1986 (1986 SCC Online J&K 47: 1987 Lab IC 860).*

(f) *Hon'ble Delhi High Court, SK Dahiya Vs UoI , WP(C) 15526 of 2006 dated 24.08.2007[ILR (2007)Supp.(4)Delhi 189].*

(g) *Hon'ble Delhi High Court, Lt Gen SK Sahni Vs Chief of Army Staff & ors, WP(C) 11839 of 2006 dated 11.01.2007 [(2008) 3 SLR 39 (DB)] .*

(h) Hon'ble Supreme Court, UoI Vs Sanjay Jethi and Anrs, CA 8914 of 2012, dated 18.10.2013 [(2013) 16 SCC 116].

(i) *AFT Principal Bench, New Delhi, Wg Cdr S Yadav Vs UoI & Ors, TA 217 0f 2009 dated 16.05.2014.*

(k) Hon'ble Supreme Court, UoI Vs Sep Virendra Kumar, CA 9267 of 2019, dated 07.01.2020 [(2020) 2 SCC 714].

30. The learned Counsel for the applicants concluded by emphasizing the fact that the conduct of the CoI was vitiated by the nonadherence to the statutory provisions and therefore the CoI requires to be quashed and the applicants remanded back for a fresh CoI to be conducted as per the statutory provisions.

Arguments by the Counsel for the Respondents

31. The learned Counsel for the Respondents commenced his arguments by briefly reiterating the sequence of events which led to the air accident involving IAF helicopter Mi 17 V5 (ZP 5220) and the resultant fatalities of six air force personnel and one civilian, and the complete destruction of the helicopter. He then elaborated that both the applicants have prayed that the CoI Proceedings be quashed primarily on three grounds; that the TOR as contained in the Convening Order issued on 07.03.2019 was contrary to Para 49 of AFO 08/2014; that the CoI had been conducted in violation of Para 48(b)(iv) of AFO 08/2014 in as much as that a competent technical expert member, as required was not present; and that the CoI was held in contravention of the mandatory provisions of Rule 156(2) of the AF Rules. He then elaborated that the Respondents had filed the counter affidavit in the matter on 28.09.2020, and also made a prayer that the interim stay granted to the applicants by the Hon'ble tribunal on 14.09.2020 be vacated. The matter was heard on 30.09.2010 and 09.10.2020 and the stay was vacated by the Hon'ble Tribunal in its order dated 09.10.2020. The various aspects pertaining to the prayer that the CoI was held in contravention of the mandatory provisions of Rule 156(2) of the AF Rules had been deliberated in detail, based on which the stay was vacated. He then added that he would advance the arguments of the Respondents on the first two grounds in detail and briefly recapitulate the issues pertaining to the third aspect which has already been deliberated upon.

32. The Counsel stated that the CoI and its TOR were meant to investigate a Cat-I air accident and was not ordered against the applicants; that it was a fact finding body under Rule 154 of the AF Rules which the CoI was required to investigate as per the TOR given to it. However, subsequently, from the statements being recorded, as it appeared that the professional reputation and character of the applicants was likely to be affected adversely by the statements coming up before the CoI, sub-paras

(a),(b),(c) of Para 790 of AF Regulations were complied with. The Counsel added that the procedures given in these para are very elaborate and self explanatory, and that all opportunities given therein were not only provided but it is so recorded in the proceedings. Further, as part of the process given in Para 790 (e), the final blame is to be attached which has also been complied with. He further added that since the matter concerns very serious allegations against the applicants, it was only after the CoI, its findings and recommendations were examined by the competent authority that the competent authority then took the decision to initiate disciplinary proceedings against the applicants.

33. The Counsel then took us through the relevant aspects of AFO 08/2014 pertaining to the designated authority authorised to convene CoI. He elaborated that, as given in Para 47 of the AFO, in all cases of Cat-I accidents and fatal accident/incident in which aircrew on duty are fatally injured, the CAS is the authority for convening the CoI. The instant CoI was duly also therefore convened in accordance with Para 47 and 48 of AFO 08/2014 to inquire into the aircraft accident Mi- 17 V5 ZP 5220 which occurred on 27.02.2019. He then emphasised the aspect and relevance of the fact that the AFO is issued by the CAS under Para 917 of Regulations for the Air Force, and that the plain reading of Para 48 of AFO, clearly states that the CAS has delegated the powers with regard to the constitution of a CoI to DG I&S. Moreover, the 'Terms of Reference' placed as Appendix 'AA' is a part of AFO 08/2014 issued by the CAS. Therefore, there is no illegality or irregularity whatsoever in the same being issued by the DG I&S. The CoI after considering all the relevant facts and circumstances of the case held the applicant blameworthy on various counts, which was approved by the Competent Authority i.e. the CAS after considering the entire evidence on record, who directed that disciplinary action be initiated against the applicant.

34. Referring to the argument of the Counsel for the Applicant that the CoI should have had specialist reps from AD C&R and ATC, the Counsel elaborated upon the provisions of Para 48, AFO 08/2014 regarding the 'Constitution of a CoI' and in particular Para 48(b)(iv) regarding reps from specialist branches. He then added in this case when the CoI commenced, the CoI did not need a specialist then as the pilot from the 'Flying Branch' had adequate knowledge of AD C&R and functioning of ATC. He added that due to exigencies of service they commenced the CoI and the ATC Rep (Wg Cdr Bagga) could join in only on 15.03.2019. Then the Court concluded that they also required a legally qualified officer and accordingly an ATC officer who was also legally qualified (Wg Cdr Johnson) was detailed and he joined the CoI on 04.04.2019.

35. Referring to the assertion by the Counsel for the applicant regarding the reconvening of the CoI on 15.09.2019, change of Presiding Officer and the examination of Witness No 34 & 35, the Learned Counsel for the Respondents said that the convening authority after considering the evidence on record in the CoI was of the view that in addition to those already found blameworthy, both the former and present Air Officer Commanding (AOC) of Srinagar AF Station are also to be held blameworthy on certain grounds and accordingly directed that the CoI be reconvened.

36. Referring to the issue regarding the applicability of AF Regulations, the Learned Counsel for the Respondents stated that it is a well settled point of law by the Hon'ble Supreme Court that the Regulations will be considered as statutory provisions. He then elaborated that the statutory provisions for conduct of CoI are covered in Rules 154 to 157 of the AF Rules. Rule 156 (2) inter-alia provides that whenever any inquiry affects the character or service 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 statements 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 service reputation, and producing any witnesses in defence of his character or service reputation. Para 790 of the AF Regulations, issued by Ministry of Defence and having the force of executive instructions requiring compliance clearly elaborates the procedure to be followed for giving effect to provisions of Rule 156 (2) of AF Rules. The Counsel then went on to explain the process as provided by Para 790 (a)(b)(c) of AF Regulations and vehemently stated that these statutory provisions had been meticulously complied with in respect of the applicants. The details of when the applicants had given their statement, when the provisions of Para 790 were applied, details of witnesses cross examined and dates on which additional statements were given have all been provided at Annexure R-2.

37. The Learned Counsel then stated that the application suffered from many maintainability issues which were not examined in detail when the arguments were heard initially. The Counsel stated that the applicants were well aware of the fact that they have been apportioned blame in the CoI and have since been attached to 12 Wing AF for initiation of disciplinary proceedings under Rule 24,25 & 26 of the AF Rules. He added that the applicants have challenged the proceedings of the CoI only with the motive of delaying the impending disciplinary proceedings initiated against them. The Counsel argued that the applicants had initially made representations to be provided copies of the CoI and had later filed OAs 211/2020 and 212/2020 seeking copies of the CoI; requisite relief had been provided to the applicants by this Hon'ble Tribunal in their Order dated 09.09.2020 However, since the applicants had not challenged the CoI at that stage on the ground that statutory provisions had not been complied with, it does not give them any entitlement to make such a prayer in the current applications. The Counsel then vehemently stated that the applicants had not exhausted alternate remedies in terms of Sec 21 of the AFT Act, since they did not avail of the Departmental remedy available to them under Sec 27 of the AF Act. The Counsel elaborated why the OA lacked jurisdiction in

this Hon'ble Tribunal and said that the applicants have given their address as at Chandigarh. Merely because they were called to HQs WAC, Subroto Park for inspection of the CoI proceedings as directed by this Hon'ble Tribunal, it would not give him jurisdiction before the Hon'ble AFT (PB) without invoking the provisions of Rules 6 of the AFT (Procedure) Rules, 2008. Moreover, the applicants were ordered to be attached to 12 Wing Air Force, Chandigarh for hearing of the charges by the Commanding Officer under Rule 24 of Air Force Rules, 1969, therefore, no cause of action has arisen for the Applicant to challenge before this Hon'ble Tribunal. Thus, the instant QA is neither maintainable nor liable to be admitted on these grounds.

38. The Counsel then took us through the difference in Army and AF Rules on the issue of hearing of charge, admissibility of CoI and related issues. Elaborating on the provisions under the Army law the Counsel said that Army Rule 22(1) which dealt with hearing of charges against an accused person inter-alia stipulates that "*Every charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witnesses and make such statement as may be necessary for his defence*". It also stipulates that where the charge against the accused arises as a result of investigation by a CoI, wherein the provisions of Rule 180 have been complied with in respect of that accused, the Commanding Officer may dispense with the procedure in Sub Rule 1. Further, Army Rule 182 (Proceedings of court of inquiry not admissible in evidence) stipulates that "*the proceedings of a court of inquiry, or any confession or statement, or answer to a question made or given at a court of inquiry, 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 of such person for wilfully giving false evidence before the court; provided that nothing in this rule shall prevent*

the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness"

39. Elaborating on the provisions under AF Law, the Counsel said that AF Rule 24 (1) which dealt with the disposal of the charge or adjournment for taking down the summary of evidence stipulates that "*Every charge against a person subject to the Act shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence'.* Further, Para 156 (6) of AF Regulations stipulates that "*the proceedings of a court of inquiry, or any confession or statement or answer to a question made or given at a court of inquiry, shall not be admissible in evidence against a person subject to Air Force Law, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for wilfully giving false evidence before that court.*

40. It is explicitly apparent from the aforesaid provisions that, unlike under Army Act and Rules there are no provision under AF Act and AF Rules whereby the hearing of the charge under para 24 (1) of AF Rules can be dispensed with by the Commanding officer and SoE can be directly ordered. Further, while under Army Rule 182 the CoI proceedings can be used by the prosecution or the defence for the purpose of cross-examining any witness, but the same is not permissible under AF Rules. The Counsel then concluded this issue by reiterating that the CoI cannot be used by the CO while hearing the charge and therefore any issue /deficiency in the CoI remains curable as far as the applicants are concerned, and that there is no prejudice or mala fides as made out by the applicants.

41. The Learned Counsel then made reference to the following cases:-

(a) *Hon'ble Supreme Court, Lt Col Prithipal Singh Bedi, Capt Dharampal Kukrety and Anr, Capt Chander Kumar Chopra Vs UoI in WPs 4903 of 1981, 1513 of 1979, 5390 of 1980 dated 25.08.1982*

[(1982) 3 SCC] regarding the fine balance required to be exercised in examining guaranteed fundamental rights to armed forces personnel and necessity of discipline .

(b) *Hon'ble Supreme Court, Major General Inder Jit Kumar Vs UoI & ors, CA 2105 of 1997, dated 20.03.1997 [(1997) 9 SCC 1]; that it is the order of a court martial which results in deprivation of liberty and not any other order prior to that. Principles of natural justice are not attracted to such a preliminary inquiry.*

(c) Hon'ble Supreme Court, UoI Vs Sep Virendra Kumar, CA 9267 of 2019, dated 07.01.2020 [(2020) 2 SCC 714] pertaining to interpretation of AR 180. CoI are a fact finding inquiry conducted at a pre investigation stage, irregularities at the intermediary stages cannot be the basis of setting aside the orders passed by a Court Martial, and if there have been defects on compliance of AR 180, it must be rectified.

(d) Hon'ble Supreme Court, UoI Vs Lt Colonel Dharamvir Singh, CA 1714 of 2019, dated 15.02.2019 [xxxxxxx xxxx xxx] that Court cannot take upon itself the essential function of determining whether or not recourse to disciplinary jurisdiction was warranted or not; pre emptive judicial strikes are unwarranted.

(e) AFT Principal Bench, New Delhi, Hav Sham Das D Vs UoI & Ors, OA 176 of 2015 dated 07.04.2015 pertaining to the fact that the AFT can examine appeals under Sec 15 of AFT Act only against the final order of a Court Martial.

(f) AFT Principal Bench, New Delhi, Col Manish Kumar Chakraborty Vs UoI & Ors, OA 1369 of 2016 dated 10.11.2016. pertaining to the fact that an applicant can't impeach a CoI when the disciplinary process it self is in progress, and that the Tribunal will not interfere in the ongoing process.

(g) Hon'ble Supreme Court, PEPSU Road Transport Corporation , Patiala Vs Mangal Singh & Ors, CA 4111 of 2008; 4405& 4404 of 2011; 3846 of 2010, dated 12.05.2011 [(2011) 11 SCC 702] regarding both Rules and Regulations being subordinate legislations under powers conferred by a statute and the fact that Regulations have a Force of Law.

Consideration of the Case

42. Having heard and carefully considered the rival arguments on the case, we find that the primary issue before us is whether the applicants were denied their statutory rights during the conduct of the CoI which investigated the air accident involving IAF helicopter Mi 17 V5 (ZP 5220) that took place on 27.02.2019, and resulted in the death of six IAF personnel and one civilian, and the complete destruction of the helicopter. It is also relevant to take into account the prevailing tense overall security situation on our Western borders when this accident took place and the national concern of whether the helicopter was destroyed due to enemy fire or some other reason.

43. The applicants have primarily sought the quashing of the CoI on three grounds; that the TOR as contained in the Convening Order issued on 07.03.2019 was contrary to Para 49 of AFO 08/2014; that the CoI had been conducted in violation of Para 48(b)(iv) of AFO 08/2014 in as much as that a competent technical expert member, as required was not present; and that the CoI was held in contravention of the mandatory provisions of Rule 156(2) of the AF Rules. The Tribunal has therefore examined the various statutes as applicable to this case and then examined each of the main grounds that the applicants have canvassed.

We have perused the complete proceedings of the CoI and connected files submitted by the second Respondent after the final hearing on 09.02.21.

44. AF Rules 154 and 156 of AF Rules lays down the requirement and various process connected with the conduct of a CoI .

154. General.

(1) A court of inquiry is an assembly of officers or of officers and warrant officers directed to collect evidence and if so required, to report with regard to any matter which may be referred to them.

(2) A court of inquiry may be assembled by the officer in command of any unit or portion of the Air Force.

(3) The court may consist of any number of officers of any rank or of one or more officers together with one or more warrant officers. The members of the court may belong to any branch or department of the service, according to the nature of the investigation.

(4) Previous notice shall be given of the time and place of the meeting of a court of inquiry, and of all adjournments of the court, to all persons concerned in the inquiry (except a prisoner of war who is still absent).

(5) It is the duty of a court of inquiry to put such questions to a witness as it thinks desirable for testing the truth or accuracy of any evidence he has given and otherwise for eliciting the truth.

(6) The whole of the proceedings of a court of inquiry shall be forwarded by the presiding officer to the officer who assembled the court.

(7) The court may be reassembled as often as the officer who assembled the court may direct, for the purpose of examining additional witnesses, or further examining any witnesses, or recording further information.

156. Courts of inquiry other than those held under section 107.

(1) The court shall be guided by the written instructions of the authority which assembled the court. The instructions shall be full and specific, and shall state the general character of the information required. They shall also state whether a report is required or not.

(2) Save in the case of a prisoner of war who is still absent, whenever any inquiry affects the character or service 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 statements and of giving any evidence he may wish to make or give,

and of cross-examining and witness whose evidence, in his opinion, affects his character or service reputation, and producing any witnesses in defence of his character or service reputation.

(3) When a court of inquiry is held on prisoners of war, and in any other case in which the officer who assembled the court has so directed, the evidence shall be taken on oath or affirmation, in which case the court shall administer the same oath or affirmation to witnesses as if the court were a court-martial.

(4) The officer who assembled the court shall, when the court is held on a returned prisoner of war or on a prisoner of war who is still absent, direct the court to record its opinion whether the person concerned was taken prisoner through his own wilful neglect of duty, or whether he served with or under, or aided the enemy; he shall also direct the court to record its opinion in the case of a returned prisoner of war, whether he returned as soon as possible to the service, and in the case of prisoner of war still absent, whether he failed to return to the service when it was possible for him to do so. The officer who assembled the court shall also record his own opinion on these points. In other cases, the court shall give no opinion on the conduct of any person unless so directed by the officer who assembled the court.

(5) The members of the court shall not themselves be sworn or affirmed, but when the court is a court of inquiry on recovered prisoners of war, the members shall make the following declaration:— "I.....A.....B....., do declare upon my honour that I will duly and impartially inquire into and give my opinion as to the circumstances in which .....became a prisoner of war, according to the true spirit and meaning of the rules and regulations made under the Air Force Act, 1950, and I do further declare, upon my honour, that I will not on any account or at any time, disclose or discover my own vote or opinion, or that of any particular member of the court, unless required to do so by competent authority.

(6) The proceedings of a court of inquiry, or any confession or statement or answer to a question made or given at a court of inquiry, shall not be admissible in evidence against a person subject to Air Force Law, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for wilfully giving false evidence before that court.

(7) Any person subject to the Act whose character or service reputation is in the opinion of the Chief of the Air Staff, affected by

anything in the evidence before or in the report of a court of inquiry shall be entitled to a copy of the proceedings of such court unless the Chief of the Air Staff sees reason to order otherwise.

(8) Any person subject to the Act who is tried by a court-martial in respect of any matter or thing which has been reported on by a court of inquiry shall be entitled to a copy of the proceedings of such court, including any report made by the Court: Provided that if the Chief of the Air Staff considers that it is against the interests or the security of the State or friendly relations with a foreign State to supply a copy of the proceedings or any part thereof, such person shall not be furnished with such copy, but in such cases he shall, subject to suitable precautions as to security, be permitted inspection of such portions of the proceedings of the court of inquiry, on the basis of which the charges, on which he is arraigned before the court-martial, have been framed.

(9) A copy of the proceedings of the court of inquiry shall be furnished under sub-rules (7) and (8) on payment for the same of a sum calculated at the rate of fifty paise for every two hundred words or part thereof.

(10) A person subject to the Act before he is, under sub-rule (7) or sub-rule (8), furnished with a copy of the proceedings of the court of inquiry or is permitted to inspect any portion of the proceedings shall be required to render certificate that he is aware that he may render himself liable to prosecution under the Official Secrets Act, 1923 (19 of 1923) for any breach of the provision of the said Act, in relation to such proceedings or portion thereof.]

45. During the conduct of the CoI, as per Rule 156(2), whenever any inquiry affects the character or service reputation of a person subject to the AF Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statements and of giving any evidence he may wish to make or give, and of cross-examining and witness whose evidence, in his opinion, affects his character or service reputation, and producing any witnesses in defence of his character or service reputation. Para 790 of the AF Regulations further elaborates the complete process of implementing the direction set forth in AF Rule 156(2). Para 790 of AF Regulations is reproduced below :-

790. Action when Character, etc. of persons is affected

(a) As soon as it appears to the court that the character or professional reputation of an officer or airman is affected by the evidence recorded, or that he is to blame, the affected person is to be so informed by the court. All the evidence recorded up to that stage is to be read over to the affected person, and the court is to explain to the person, if so required by him, how, in its opinion, it appears that the officer's or airman's character or professional reputation is adversely affected, or how he appears to be to blame.

(b) From the time an officer or airman is so informed, in accordance with sub-para (a) above he has the right to be present during all the ensuing proceedings, except when the court is deliberating privately. The fact that an officer or airman to whom this para applies is or is not present will be recorded in the proceedings.

(c) The affected officer or airman may, if he so desires, cross-examine any witness whose evidence was recorded prior to the action taken under sub-para (a) above. He may, likewise, cross-examine subsequent witnesses after their statements have been recorded. He may also request the court to record the evidence of any witness in his defence. The officer or airman may make any statement in his defence.

(d) In case the officer or airman affected cannot, for any reason be present to exercise his privilege under sub-paras (a), (b) and (c) above, the court is to inform him by letter (or otherwise as may be convenient) of the reasons why, in the opinion of the court, his character or professional reputation appears to be affected, or he appears to be to blame. The affected person may make a statement in writing in denial, exculpation, or explanation. This statement is to be attached to the proceedings, and the court is to endeavour, by examining or recalling witnesses, to accord, to the affected person, such protection as is intended in sub paras (a), (b) and (c) above.

(e) If, after recording all the evidence, and after taking such action under sub-paras (a) to (d) above as may be called for in the circumstances the court is of the opinion that an officer or airman is to blame, or that his character or professional reputation, is affected, the entire proceedings are to be shown to the affected person, and

he is to be asked whether he desires any further statement to make. Any such statement is to be recorded, and fresh points are to be fully investigated by the court.

(f) The findings, and recommendations, if called for, of the court may then be made in accordance with the terms of reference.

(g) An officer or airman to whom sub-para (a), (b), (c) or (d) applies does not have the right to demand that the evidence be taken on oath or affirmation, or, except so far as the assembling authority or the court may permit, to be represented by a solicitor or other agent.

(h) If the assembling authority attributes blame to an officer or, an airman other than the officer or airman held to blame by the court, or attributes blame in a way substantially different from that of the court, the proceedings will be returned to the presiding officer of the court (without any endorsement on the proceedings) by the assembling authority together with a statement from the assembling authority as to why that authority considers that blame should be attributed to such officer or airman or in a way substantially different from that of the court. This statement will form part of the court of inquiry proceedings. The court of inquiry will be reconvened and the court will show to the affected person the entire proceedings and statement of the assembling authority. The court will then obtain from the person any statement that he may wish to make and record the evidence of any witnesses he may wish to call in cross-examination or of any fresh witnesses. When complete, the proceedings will be forwarded to the assembling authority together with any additional findings and or recommendations that the court may wish to record. The assembling authority will endorse its remarks on the proceedings only after completion of action under this para.

(j) If blame is attributed by any authority higher than the assembling authority to an officer or airman other than the officer or airman held to blame by the court or the assembling authority, the proceedings will be returned to the assembling authority together with such authority's statement for action as per sub para

(h). The concerned higher authority will endorse its remarks on the proceedings, only after the proceedings are received back from the assembling authority after completion of action. When forwarding the proceedings to higher authority after taking action under this para, the assembling authority or any other intermediary authority may append remarks on any additional findings recommendations made.

(k) The same court which originally investigated the particular occurrence will, as far as possible, be reconvened for purposes of sub-paras (h) and (j). A fresh court is to be assembled only in exceptional circumstances.

46. It has been the argument of the applicants that AF Rules take precedence over the AF Regulations and therefore, the presence of the applicants should have been ensured right from the beginning as given in AF Rule 156(2) and should not have been done as per Para 790 of the AF Regulations. It is a well settled position by the *Hon'ble Supreme Court, PEPSU Road Transport Corporation, Patiala Vs Mangal Singh & Ors, (Supra)* that since both Rules and Regulations being subordinate legislations under powers conferred by a statute, Regulations have a Force of Law.

31. In Vidya Dhar Pande v. Vidyut Grih Siksha Samiti, (1988) 4 SCC 734, the services of the appellant- employee were terminated, in contravention of the service Regulations, by the respondent school. This Court, while reinstating the employee in service, has agreed with the observations made in Sukhdev Singh's case (Supra). While doing so, this Court has stated :

9. The question whether a Regulation framed under power conferred by the provisions of a statute has got statutory power and whether an order made in breach of the said Regulation will be rendered illegal and invalid, came up for consideration before the Constitution Bench in the case of Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi. In this case it was held that: [SCC p. 438 : SCC (L&S) P. 118, para 33] "There is no substantial difference between a rule and a Regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A Regulation framed under a statute applies uniform treatment to every one or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Oil and Industrial Finance Corporation are all required by the statute to frame Regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These Regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violations of rules and Regulations. The existence of rules and Regulations under statute is to

ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory Regulations in the cases under consideration give the employee a statutory status and impose restriction on the employer and the employee with no option to vary the conditions."

10. There is, therefore, no escape from the conclusion that Regulations have force of law. The order of the High Court must, therefore, be reversed on this point unhesitatingly.

47. In the light of the above position, it is imperative that both Rule 156(2) and its operative instructions contained in Para 790 of the AF Regulations are co jointly read and applied in practice. Thus the applicant's arguments that they should only be governed by Rule 156(2) and not Para 790 of AF Regulations are entirely misplaced.

48. One of the grounds on which the applicants has sought the CoI to be quashed was that the CoI was held in contravention of the mandatory provisions of AF Rule 156(2). From the perusal of the Proceedings of the CoI, it has been verified and established that the statutory provisions enshrined in Rule 156(2) and Para 790 of the AF Regulations have been meticulously complied with in respect of the applicants. The details of when the applicants had given their statement, when the provisions of Para 790 were applied, details of witnesses cross examined and dates on which additional statements as given by the Respondents in Annexure R-2 is entirely corroborated. This aspect may be read in conjunction with this Tribunal Order dated 09.10.2020 where in the details have already been examined.

49. Para 917 of the AF Regulations stipulates "*Air Force Orders will be issued by the Chief of the Air Staff on matters of an administrative nature affecting the air force formations and units as a whole*". Investigation of air accidents are undertaken as per the provisions of AFO 08/2014 dated 08.05.2014 "Reporting and Investigation of Aircraft Accidents and Incidents". Para 47 of the AFO lays down the authority to convene a CoI based on the type of accident/ incident and the circumstances and Para 48 lays down the Constitution of a CoI.

47. Authority for convening a CoI into various types of flying accidents/ incidents and the circumstances under which it is to be ordered are given below:-

(a) By the CAS

(i) In all cases of Cat-I accidents.

(ii) In case of a fatal accident/ incident. Ie. When an air crew on duty (including NDA cadet) is fatally injured.

(iii) When a foreign military aircraft is involved in an accident [Refer Para 47(g)].

(iv) When the CAS so desires.

(b) to (g) xxxxxxx

48. Constitution of CoI. The CoI into Cat-I accidents on fighter aircraft shall be normally carried out by AAIB members from the Dte of AS who would directly report to DG (I&S). Type qualified and current flying/ technical members shall be augmented from the field. However, at the discretion of DG (I&S) the entire CoI team may be constituted from the field. CoI for transport and helicopter accidents would be constituted from the field and additional members may be detailed from AAIB at DAS. The Constitution of the COI shall be as follows :-

(a) Presiding Officer. Normally the presiding officer is to be of Flying(Pilot) Branch. However, only in the most exceptional circumstances the convening authority may detail an officer of any other appropriate branch. The presiding officer is to be detailed as per the following guidelines: –

(i) The Presiding Officer would be Director Aerospace safety (AAIB) for Cat-I accidents and PDAS for all fatal accidents on

fighter ac. For all Cat-I and fatal accidents on transport and helicopter aircraft he is to be of the minimum rank of Air Cmde. For other major accident on all fleets (Cat-II and cat -III) he to be of the minimum rank of Gp Capt.

(ii) to (iv) xxxxxxxx

(b) Members. At least one officer from the each branch would be detailed. As per the requirements as follows:-

(i) Flying (Pilot) Branch. The flying member(s) should be experienced and in current flying practice on the type of aircraft involved. (Type qualified and current; desirable FS&AI qualified) ·

(ii) Technical Branch. The technical member should have adequate practical experience on the type of aircraft involved. (Type qualified and current; desirable FS&AI qualified). Additionally, air warriors could also be detailed as members to render specialist advice.

(iii) Aviation Medicine Specialist. A medical member specialist in Aviation Medicine, is to be detailed in all cases of Cat-I accidents and in those involving aero-medical aspects or deaths/ injuries.

(iv) Other Specialist Branches. When an investigation requires specialist professional knowledge, an officer from the appropriate grant should be detailed as a member. In cases of extensive damage to civil/ private property, an officer from the Accounts or Admin Branch should be detailed as a member to complete all formalities for assessing the cost of damage payment of ex-gratia compensation as required. In CoI where ATS aspects and associated subjects such as RCFF (actual emergency/ground run) and bird strikes are being deliberated or likely to be deliberated, ATCO shall be detailed as member. For Cat I,II and III accidents the ATCO should be a Command Examiner holding Cat A. For Cat IV and V incidents the ATCO should be holding minimum Cat B with nine years of service .

50. It is the contention of the applicants that the TOR dated 07.03.2019 was issued in contravention to AFO 08/2014, since CAS who is the only competent authority to convene the CoI for such an accident, the TOR too should have been issued by him and not the DG(I&S). A plain reading of Para 48 indicates that the process of the CoI has been delegated to the DG(I&S) who is the competent authority to issue the ToR and coordinate all aspects of the CoI. As such we do not find any force in the argument advanced by the applicants in this regard. It is also seen from the records that the approval of the CAS has been obtained for issue of the ToR.

51. It is also the contention of the applicants that the CoI conducted without competent members in violation of Para 48(b)(iv) of AFO 08/2014 is invalid and therefore should be quashed. Para 48(b)(iv) stipulates the requirement of specialist members as applicable. It is the case of the applicants that the CoI should have had a ATCO with the specified qualification from the commencement of the CoI. It is an undisputed fact that the Adm member joined the CoI only on 16.3.2019 and that he too had to be replaced by another Adm officer on 04.04.2019, who was both an ATCO and a legally qualified officer. It is seen from the records that in view of the death of a civilian on ground in this accident, and the fact that there was likely to be a case for compensation, the Respondents had accordingly issued instruction for a Adm Member. The incident as per the Respondents did not warrant an ATCO officer then as they did not see any specific special ATC issue in the accident. Moreover, the Presiding Officer and the Flying Branch representative had adequate expertise of normal ATC issues. The Respondents have advanced adequate reasons based on exigencies of service for the delay in appointing a Adm member and his subsequent replacement. The overall security environment and the need to establish at the earliest, the reason for the air accident is a mitigating factor in the urgency with which the CoI was ordered and conducted. Perusal of the proceedings of the CoI including the reasons why the

applicants have been found blame worthy indicates that the absence of ATCO has not caused any prejudice to the applicants statutory rights.

52. It is also the case of the applicants that the conduct of the CoI has been vitiated since it was reconvened, Presiding Officer changed; the fact that the applicants were not intimated about this and not asked to be present when the statement of Witness No 34 and 35 were recorded. Para 790 (h) to (k) of AF Regulations lays down the procedure when the assembling authority attributes blame to an officer or, an airman other than the officer or airman held to blame by the court, which includes returning the proceedings, reconvening the CoI, the affected personnel being shown the entire CoI and record their statement/ cross examination, and return the proceedings to the assembling authority with fresh findings as applicable. Reconvening the CoI is permissible as per AF Rule 154(7) and change of composition of the CoI is permissible as per Para 790(k) of AF Regulations. Change in presiding officer is also mandated as per Para 77 of AFO 03/2008 read with Para 783(c) of the AF Regulations. Since Witness no 34 and 35 were both Air Cmdes, based on the stipulation in Para 783(c) of the AF Regulations, the original presiding officer who was an Air Cmde had to replaced by a Air Vice Marshal. Thus the plea of the applicants in this regard are again misplaced and not valid.

53. It is also seen from the records that Witness No 35 in his statement given to the reconvened CoI on 17 Sep 19 has made certain allegations against the applicants. However, considering the overall circumstances and statements recorded earlier, the court in its deliberations after recording the statement negated these allegations. On conclusion of the reconvened CoI, the Court found Witnesses No 34 and 35 blameworthy, in addition to those found blameworthy earlier. Thus the absence of the applicants at the recording of statements by the reconvened CoI has not caused them any

disadvantage or prejudice. Moreover, considering the fact that the CoI is only a fact finding agency and that under the AF law, the proceedings of the CoI cannot be used against the applicants when disciplinary proceeding are initiated under AF Rule 24, the applicants will have adequate opportunity to contest any statement by various witnesses, if required, during the disciplinary process. The Respondents are however advised to ensure that all statutory measures necessary to uphold the principles of natural justice are scrupulously followed and implemented.

54. The undermentioned cases cited by the Counsel for the applicants does not help their case they all refer to the issues involved in the application of Army Rule 180 in respect of personnel governed by the Army Act. While Army rule 180 and AF Rule 156 is *pari materia* in concept, the application of Rule 156 is enshrined in Para 790 of the AF Regulations which has a force of law, and cannot be mere executive instructions that provides for additional safeguard to ensure compliance with the principles of natural justice.

(d) *Hon'ble Supreme Court, Lt Col Prithipal Singh Bedi, Capt Dharampal Kukrety and Anr, Capt Chander Kumar Chopra Vs UoI in WPs 4903 of 1981, 1513 of 1979, 5390 of 1980 dated 25.08.1982 [(1982) 3 SCC].*

(e) *Hon'ble High Court of Jammu & Kashmir, Vinayak Daultatrao Nalawade Vs Corps Commnader, HQ 15 Corps, WP 490 of 1985 dated 05.05.1986 (1986 SCC Online J&K 47: 1987 Lab IC 860).*

(f) *Hon'ble Delhi High Court, SK Dahiya Vs UoI , WP(C) 15526 of 2006 dated 24.08.2007[ILR (2007)Supp.(4)Delhi 189].*

(g) *Hon'ble Delhi High Court, Lt Gen SK Sahni Vs Chief of Army Staff & ors, WP(C) 11839 of 2006 dated 11.01.2007 [(2008) 3 SLR 39 (DB)].*

(h) Hon'ble Supreme Court, UoI Vs Sanjay Jethi and Anrs, CA 8914 of 2012, dated 18.10.2013 [(2013) 16 SCC 116].

(i) *AFT Principal Bench, New Delhi, Wg Cdr S Yadav Vs UoI & Ors, TA 217 0f 2009 dated 16.05.2014.*

(k) Hon'ble Supreme Court, UoI Vs Sep Virendra Kumar, CA 9267 of 2019, dated 07.01.2020 [(2020) 2 SCC 714]

55. In the result we find that the CoI has been correctly convened by the competent authority as per the provisions of AFO 08/2014. The TOR issued by the DG(I&S) is valid as the conduct of the such investigations has been delegated to DG(I&S). The CoI has been conducted as per the various statutory provisions applicable under the AF law without any prejudice or mala fide and remains curable. Viewed thus, we do not find any merit in the O.As and they are dismissed. No order as to costs.

56. The original records submitted by the Respondent be returned in a sealed cover.

Pronounced in open Court on this 24th day of May 2021.

[redacted]

(RAJENDRA MENON)
CHAIRPERSON

[redacted]

(P.M. HARIZ)
MEMBER (A)