

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

O.A NO. 40 of 2010

IN THE MATTER OF:

Commander N. Rajesh Kumar**APPLICANT**
Through : Mr. Sukhjinder Singh, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Ms. Jyoti Singh, Senior Advocate with Ms. Jagrati Singh
counsel for the respondents

AND

OA No.41 of 2010

Lt. Cdr. MV Birajdar**APPLICANT**
Through : Mr. Sukhjinder Singh, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Ms. Jyoti Singh, Senior Advocate with Ms. Jagrati Singh
counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 23.09.2011

1. By way of this common order, we shall hereby dispose off both the above mentioned Original Applications being OA Nos.40/2010 and 41/2010 as facts and circumstances of both the cases are common in

nature. Arguments in both the cases are also heard together and the reliefs sought in both the cases are also similar in nature.

2. The OA No.40/2010 is being discussed first. The applicant in this OA has prayed that the Board of Inquiry (BOI) proceedings and the orders issued by the convening authority (respondent No.3), appointing an Investigating Officer to record summary of evidence (based on the BOI) in terms of Regulation 149, Regulation for the Navy Part-II (Statutory) be declared null and void, and be quashed and set aside. The applicant has also prayed that respondents 4,6,7,8 and 9 be brought to justice for hatching and perpetrating a deep-rooted conspiracy. Lastly, it has been prayed that the applicant should be given a copy of the BOI proceedings in terms of Regulation 209, Regulations for the Navy Part (II) Statutory.

3. As an interim prayer, the applicant has prayed that the recording of summary of evidence in terms of Regulation 149 be kept in abeyance till the disposal of this OA.

4. Brief facts of the case are that the applicant was commissioned as a Technical Naval Engineering Officer on 27.11.1993. During his training and also subsequently, the applicant took part in "Static Parachute Jumping". The applicant was also selected to undergo "Sky Diving". The applicant also specialised in Submarine and was awarded the Dolphin and Dived Watch keeping certificate. Because of his

interest in Para Jumping and Sky Diving, the applicant excelled in Sky Diving and was responsible for creating a Sky Diving Team in the Navy. The applicant also conducted various basic and advanced courses for Sky Diving for wide range of Naval Personnel, Army Personnel, Cadets and few civilian personnel from Civil and Military aircrafts at many places like Hissar, Karnal, Nahan, Bangalore, Visakhapatnam, Cochin, Port Blair etc. The applicant also represented India at the National and International levels competitions. Consequently, because of his performances, the applicant was awarded several commendations from C-in-C and also from the Chief of the Naval Staff.

5. During the deputation of the team for WPC 08 France, A Borah, LME and Lt. Cdr. S.K. Karthikeyan, respondent No.6 and GM Rao, LME opted to stay behind in the hotel and rest of the team left for the DZ which was hour away from the place of stay. The hotel management reported that there was a case of molestation by 2 members of Indian team. On returned to the hotel, the team members were told by the Lt. Cdr S.K. Karthikeyan a story which was totally different from what had actually happened. On meeting the MA France in his office on the next date, he informed the applicant that the hotel manager has reported a case of molestation and the lady is admitted in the hospital for observation as she was hysterical and terrified. The

matter was also reported to the Principal Director Adventure Physical Fitness and Sports Activities (PDAPSA), respondent No.4 at Delhi by the MA. On return to India, the applicant made a detailed report of the incident in the 3rd Week of August 2008. The COs were asked to investigate and take action. But to the applicant's belief and knowledge no action has been taken by anyone. The applicant also states that there were several other incidences of moral turpitude of respondent No.6 in association with the sailor, which came to light.

6. To avenge the truthful report of the applicant to the authorities against the Lt Cdr S.K. Karthikeyan and 2 sailors, Lt Cdr Karthikeyan made a complaint against the applicant and without verifying the details of the complaint, a BOI was convened in November 2008. The PDAPSA (Respondent No.4) was inimically disposed towards the applicant due to proximity of respondent No.6 with him.

7. In November 2008, when the applicant was posted at Viskhapatnam, respondent No.4 directed the applicant to report at his office at Naval Headquarters, New Delhi on 25.11.2008 for discussion. However, on reaching New Delhi, it turned out that the applicant was directed to appear before the President of the Board of Inquiry (respondent No.7) for allegations made by respondent No.6, Lt Cdr S.K. Karthikeyan vide his complaint. The BOI commenced its proceedings on 24.11.2008 in the absence of the applicant and as

such the applicant was caught unawares about the convening of the BOI. The applicant was kept in total dark because the convening order was not served upon him.

8. The BOI has since been completed without having been adhered to the rules and regulations which are laid down. The BOI submitted its report on 05.08.2009.

9. Several witnesses were alleged to have been examined behind the back of the applicant and the provisions of Regulation 205 were not complied with. So much so that even when the applicant was away on temporary duty, the evidence was recorded in his absence. It is also alleged that when the applicant was available in Delhi, the Board recorded its evidence in Visakhapatnam despite the fact that only the Presiding Officer was present there.

10. Ld. Counsel for the applicant also stated that the applicant had put in several complaints regarding the infirmities that the BOI was suffering from procedural and legal defects. The representations were disposed off on 16.02.2011. But the applicant had not received copy of the same.

11. Ld. Counsel for the applicant submitted that the BOI had not followed the Section 209 of the Naval Regulations Part-II (Statutory), 1965. Section 209 reads as under:-

"209. Right of certain persons to copies of proceedings.—*The following persons shall be entitled to a copy of the proceedings of a board not including any report made by the board:--*

- (a) *Any person subject to naval law who is tried by a court martial in respect of any matter or thing which has been reported on by a board; or*
- (b) *Any person in Government service whose character, conduct or reputation is, in the opinion of the Chief of the Naval Staff, affected by anything in the evidence before or in the report of a board, unless the Chief of the Naval Staff sees reason to order otherwise.*

Explanation. *For the purpose of this regulation 'proceedings' shall include findings of the board but shall not include recommendations of the board.*

12. Ld. Counsel for the applicant argued that the copies of the BOI have not been handed over to the applicant. He further stated that procedure as laid down in Regulation 202 was not adhered to as no convening order was issued or atleast the copy of the same was not handed over to the applicant. Regulation 202 mandates as under:-

"202. Procedure,---(1) *The Board shall be guided by the provisions of these regulations and also by the Navy Orders in force for the time being and the written instructions of the convening authority provided that the Navy Orders and the written instructions are not inconsistent with anything contained in these regulations.*

(2) *The Board may 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.*"

13. Ld. Counsel for the applicant further submitted that the BOI can only be ordered under certain specific circumstances which are laid down in Section 197. The same are as under:-

"197. Convening of Boards of Inquiry.---(1) *A board of Inquiry may be convened by the Chief of the Naval Staff or any Administrative Authority, or when two or more ships are in company, by the senior naval officer present, whenever any matter arises upon which he requires to be thoroughly informed.*

(2) *An Administrative Authority or the senior naval officer present shall convene a board of inquiry when so directed by superior authority or when so required by any regulations, Government instructions or Navy Orders.*"

14. Ld. Counsel for the applicant also submitted that in this manner, the respondents have continued to violate the procedure as laid down in the Regulations and also the procedure as mandated in Regulation 50 of Navy Orders (Special), NO (Special) 2/2002. The same is as under:-

"50. Right of certain persons for Copies of Proceedings. *In accordance with Regulations 209 of Regulations for the Navy Part II (Statutory), the following persons shall be entitled to a copy of the proceedings:-*

- (a) *Any person subject to Naval Law, who is being tried by a Court Martial in respect of any matter reported on by the Board.*
- (b) *Any government servant, whose character, conduct or reputation is in the opinion of the Naval Headquarters, affected by anything in the evidence before the BOI, or in the report of the BOI unless Naval Headquarters have reason to order otherwise.*
- (c) *In death cases, one copy of the inquiry proceedings may be handed over to the next of the kin of the deceased, at the discretion of the convening authority. However, Board Proceedings related to Naval Operations shall not be handed over without prior approval of the Naval Headquarters."*

15. Ld. Counsel for the applicant also argued that based on the Board proceedings, no chargesheet was handed over to him. Besides, Cdr. A.Y. Thorat was incorrectly made to do the audit since the same person was an interested party.

16. Ld. Counsel for the applicant also argued that Regulation 151(2) was also not complied with which gives mandate that the charges will be read out to the accused, which was not done in this case. Section 151(2) is as under:-

"151(2) The Commanding Officer shall formulate the charges and he shall charge the accused with having committed the offences listed in the charge sheet and the Commanding Officer shall thereupon caution the accused as follows:-

"Do you wish to make any statement? You are not obliged to anything unless you wish to do so but whatever you say will be taken down in writing and may be given as evidence."

17. Ld. Counsel for the applicant also argued that Regulation 205 was not complied with which is essential when the character or conduct of a person in the Navy is involved. Regulation 205 mandates as under:-

"205. Procedure when character or conduct of a person in Government service is involved.---(1) Save in the case of a prisoner of war who is still absent, whenever any inquiry affects the character or reputation of a person in Government service or may result in the imputation of liability or responsibility for any loss or damage or is made for the contravention of any regulations or general or local orders, full opportunity shall 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 him and producing any witness in his defence.

(2) The President of the Board shall take such steps as may be necessary to ensure that any such person so affected and not previously notified, receives notice of and fully understands, his rights under this regulation."

18. Ld. Counsel for the applicant also made certain specific allegations regarding non-compliance of regulation 205 in the case of witness No.30, Mr. Jasbir Singh of Amber Aviation, Witness No.18 Shri

J.S. Arora of M/s Greyhound Business Combines, Witness No.1 Lt Cdr S. Karthikeyan, Witness No.5 Lt. Anand Revi, Witness No.16 Shri Yogesh Daga of M/s Varsha Enterprises, Witness No.17 Shri J.S. Pandey, LEMA, Witness No.8 Shri G.M. Rao, LME, witness No.10 Cdr NK Tanwar, witness No.13 Lt A Panchal, witness No.12 B Rajkumar, POWTR.

19. Ld. Counsel for the applicant also argued that certain documents in the BOI were fudged but still taken on record and especially relating to the attendance of the applicant on 25.11.2008 when the applicant was still in Visakhapatnam. He lodged a protest on 10.12.2008 with the Presiding Officer of the BOI but no action was taken. In the same letter, he also sought to see the convening order which clearly stated that the BOI was against the OIC, Sky Diving Team and since he himself was the OIC Sky Diving Team, a clear case has been made out that Regulation 205 should have been invoked ab initio.

20. Ld. Counsel for the applicant further stated that certain documents were destroyed despite the fact that they were material. A protest was lodged by the applicant to the President of the BOI on 19.01.2009. These were crucial bit of evidence and once the inquiry had been initiated, these documents should not have been destroyed.

21. Ld. Counsel for the applicant also argued that the Board also adopted certain illegal means of obtaining evidence. He further submits that the BOI did not adhere to the Regulation 204 read in conjunction with Regulation 233 of Regulation for the Navy Part-II (Statutory) to summon the witnesses and asked questions in presence of the applicant. The Board also resorted to taking evidence in-camera. It also resorted to statements being taken only by the Presiding Officer who visited Visakhapatnam for the very purpose. Ld. Counsel for the applicant also argued that despite the fact that applicant had submitted a questionnaire to be asked from the witnesses, the Board did not consider it appropriate to obtain the answers.

22. Ld. Counsel for the applicant also argued that based on the illegal findings and recommendations of the BOI, the applicant was remanded for recording summary of evidence. That it was already a foregone conclusion that a GCM was being ordered. This was pre-supposing the guilt of the applicant. Ld. Counsel for the applicant stated that on 20.8.2009, the CO had summoned the applicant, read out a tentative charge-sheet and ordered recording of summary of evidence. He argued that this violates the principles of natural justice and should not be permitted to continue and hence the interim plea

that the recording of evidence should be kept in abeyance till such time this case is decided.

23. In support of his contentions, Ld. Counsel for the applicant cited the following judgments.

24. In **AIR 1993 Supreme Court 1997 titled State Bank of India and Others Vs D.C. Aggarwal and another**, their Lordships have observed that *"Imposition of punishment to an employee, on material which is not only not supplied but not disclosed to him, has not been countenanced by this Court. Procedural fairness is as much essence of right and liberty as the substantive law itself."*

Their Lordships have further observed that *"the order is vitiated not because of mechanical exercise of power or for non-supply of the inquiry report but for relying and acting on material which was not only irrelevant but could not have been looked into. Purpose of supplying document is to contest its veracity or give explanation."*

25. In **1967 SLR 465 in the matter of State of Orissa Vs Dr. (Miss) Binapani Dei**, their Lordships have observed that *"It is true that some preliminary enquiry was made by Dr. S. Mitra. But the report of the Enquiry Officer was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why April 16, 1907 should not be accepted as the date of birth and without*

recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value."

26. In **AIR 1987 Supreme Court 71 in the matter of Institute of Chartered Accountants of India Vs L.K. Ratna and others**, their Lordships have observed that *"There is nothing in Regulation 14 which excludes the operation of the principle of natural justice entitling the member to be heard by the Council when it proceeds to render its finding. The principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary."*

27. In **(1998) 1 SCC 537 in the matter of Union of India and Others Vs Major A. Hussain**, their Lordships have observed that *"mere want of proper and adequate pre-trial investigation would not, in absence of prejudice to the accused or violation of a mandatory provision, vitiate the court martial."*

28. In **OA No.485/2010 titled Lt Col Prasad Purohit Vs UOI & Ors.**, passed by the AFT, the Hon'ble Bench observed that *"since the applicant was not in the same station, Army Rule 180 could have been applied accordingly"*.

29. In **OA No.283/2010 titled Col Sanjay Sethi Vs UOI & Ors.**, the Hon'ble AFT Bench had observed that *"compliance of Army Rule 180 is essential for all investigations"*.
30. In **(Mil LJ 2008 Del 150) titled Maj Gen Rakesh Kumar Loomba Vs UOI & Ors.**, the Hon'ble High Court of Delhi held that *"COI was set aside for non-compliance of Army Rule 180"*.
31. In **1987 LAB.I.C. 860 in the matter of Vinayak Daulatrao Nalawade Vs Corps Commander, Lt. Gen. G.O.C. H.Q. 15 Corps**, the Hon'ble High Court of Jammy and Kashmir opined that the *"application of Army Rule 180 is obligatory."*
32. In **AIR 1996 MP 233 in the matter of R.P. Shukla Vs Central Officer Commanding-in-Chief, Lucknow**, the Hon'ble Court held that CO has discretion whether to proceed with the charge but before convening the summary court martial, *"he is duty bound to satisfy the procedure laid down under Rule 180"*.
33. In **(2003) 8 SCC 361 in the matter of State of Bihar Vs Lal Krishna Advani and others**, the principle of natural justice has been accepted and it should be taken in the shape of a statutory provision.
34. In **Writ Petition No.2934 of 2001 in the matter of Mr. R.K. Singh and Others Vs The Union of India and others**, their Lordships

have maintained that the principles of natural justice could not be violated.

35. In **2008(3) SLR in the matter of Surendra Kumar Sahni Vs Chief of Army Staff (Delhi)**, the Hon'ble Court had struck down the COI for non-compliance of Army Rule 180.

36. In **Criminal Writ Petition No.1160 of 2007 in the matter of Nochur R. Vasudevan, LMA Vs The Union of India**, the Hon'ble Bombay High Court has held that it was essential that chargesheet should have been supplied to the accused and non-supply of chargesheet made the trial vitiated.

37. Ld. Counsel for the applicant further argued that the composition of the Board of Officers was also incorrect. There was an officer who was junior to the applicant and therefore, should not have been made a Member. He argued that in one incident in which finding has been given, a witness has been examined on e-mail because the witness was in US and whatever was said by the witness in the e-mail, was attached in the COI proceedings. Cross examination of such a witness was out of question.

38. Ld. Counsel for the respondents stated that status as of today is that Regulation 152(4) has been invoked in which the applicant has been remanded for trial. Application for trial under Regulation 153 will

be made by the CO in due course. He argued that Regulation 148, Regulation for the Navy Part-II (Statutory) defines as to when a CO can make an application for trial. Read with Regulation 149 which pertains to recording of summary of evidence, there is a process of BOI and the action to be taken by the CO is not sequential.

39. Ld. Counsel for the respondents stated that representation made by the applicant is disposed off and communicated to the applicant vide letter dated 2.2.2011. It is on record that the applicant refused to receive the same. Ld. Counsel also argued that on completion of BOI, a copy of the proceedings were supplied to the applicant, who again refused to accept the proceedings and insisted that the findings and the annexures should also be included in the process which was done so and now the BOI proceedings have already been handed over to the applicant.

40. Ld. Counsel for the respondents also argued that composition of the BOI was based on the convening order which was issued. The convening order was based on the complaint made by Lt Cdr. S.K. Karthikeyan. Since Lt Cdr S.K. Karthikeyan was the main complainant and he had not named any individual in his letter, similarly the terms of reference of the BOI did not name any individual. However, as soon as the BOI realised that "the character or conduct of a person in

Government service is involved" regulation 205 was immediately invoked.

41. Ld. Counsel for the respondents submitted that the applicant had not exhausted the departmental remedies and hence could not come directly before the AFT.

42. Ld. Counsel for the respondents also stated that the President of the BOI was Commander A.Y. Thorat, therefore, senior to the applicant. Other members were Commander S.K. Sharma who was again a senior to the applicant and Ltd. Cdr K.V. Narsimhan, who was of the same rank as of the applicant and therefore, the composition of the Board was correct.

43. Ld. Counsel for the respondents drew our attention to page 23 and 24 of the BOI proceedings in which both the applicants had opted to sit through the proceedings. However, Lt Cdr Birajdar had subsequently retracted and decided to withdraw from attending the Board proceedings. (page 278 of the BOI proceedings refer)

44. Ld. Counsel for the respondents stated that since Regulation 205 was applied in the case of the applicants, the proceedings of the BOI ensured the principles of natural justice.

45. Ld. Counsel also contested that the convening order has now been supplied to the applicants as per Regulation.

46. In support of her contentions, Ld. Counsel for the respondents quoted the judgment passed by the AFT Court No.1 in **TA No.395 of 2009 titled Commander Vinod Kumar Jha Vs UOI & Ors.**, wherein the Hon'ble Court had observed that *"Therefore analysis of Chapter 7 of the Board of Inquiry makes it abundantly clear that whenever a Chief of Naval Staff or Administrative authority desires to be thoroughly informed of any matter, then an inquiry can be ordered. In case the inquiry is against any particular person involving his character or reputation then he is required to be given full opportunity to cross-examine of the witnesses and be permitted to be present throughout the inquiry. But in case it is not against any particular person involving his character and reputation then it is not necessary to give any opportunity to such a incumbent. In that case proper procedure as given in Chapter VII is to be followed except 205 because this was a fact finding inquiry and not an inquiry into the character and reputation of the petitioner."*

47. As regards the allegation of the applicant of having taken the evidence in-camera is concerned, Ld. Counsel for the respondents argued that the individual (witness) himself wanted to depose only before the Board and not in the presence of the officers. However, he was informed by the Board of Officers that the transcript of his statement will be shown to the concerned applicants and they will be

free to cross-examine or ask him questions. Therefore, the spirit of Regulation 205 was not violated in this case. The particular witness had himself made a request to be examined in-camera and considering the circumstances, the Board permitted the same. However, the transcript of the same was provided to the applicant who was at liberty to cross examine the witness.

48. The purpose of the BOI have been clearly stated in para 2 of NO (Special) 2/2002 which is as under:-

"2. Purpose of Board of Inquiry. *A Board of Inquiry (BOI) may be convened to inquire into any issue on which the Chief of the Naval Staff, the Commanders-in-Chief or the competent senior Naval Officer is required to be fully informed, so as to arrive at the correct conclusion. It is an exercise to ascertain clearly and judiciously all factors including operational, administrative, procedural, disciplinary, technical, financial, etc., so that the lessons learnt, as well as the remedial measure could be promulgated. Accordingly, it is the primary bounden duty of a BOI to reconstruct the sequence of event and circumstances that have led to the incident under inquiry, with particular attention to the existing Regulations, Instructions, Orders, Policies and Procedures on the subject and the deviations there from, if any.*

49. Ld. Counsel for the respondents further submitted that status as of date is that a tentative charge-sheet has been read out to the applicant and the process of reducing the evidence in writing has been completed. The GCM has also been convened and is in the process of trying the case.

50. Having heard both the Learned counsels at great length and having examined the documents on record, keeping in view the observations made in the judgments cited by parties and perused the proceedings of the BOI, we feel that the main issues that have been raised by the applicants are as under:-

- (i) Composition of the Board of Officers
- (ii) Not handing over of the copy of the Convening Order of the BOI as per regulations and also not handing over the copy of the allegations made against the applicant.
- (iii) Violation of the provisions of Regulation 205 of Regulation for the Navy Part-II (Statutory). Specifically where, the applicants were not permitted to cross examine the witnesses, and obtaining of evidence from certain witnesses in the absence of the applicant.

51. We have examined the copy of the convening order of the BOI. The BOI gives out the convening order dated November 2008 (date illegible) constituted the Board as follows:-

- (a) Commander AY Thorat - President
- (b) Cdr S.K. Sharma - Member
- (c) Lt Cdr K.V. Narsimhan - Member

52. We observe from the above that all the officers were either senior to the applicant or at least of the same rank. In this respect, Regulation 198(3) lays down that *"As far as practicable, the president and members shall be senior or relatively senior to the person whose conduct is under inquiry and persons whose evidence may be required by the Board shall not be nominated as members."* Therefore, it implies that it is not a mandatory requirement. In view of this, the composition of the BOI was correct. In any case, the terms of reference of the BOI did not specify the applicant as an accused and therefore, the convening authority was well within its right to appoint an officer of the same rank as one of the members. In view of the foregoing, the composition of the BOI was correct and legal. The contentions raised by the applicants in this respect are not sustainable.

53. In the terms of reference which have been mentioned in the BOI, the operative para states as under:-

"1. You are hereby required to assemble at DAPSA/IHQ MoD(N), New Delhi at 1000h on 17 Nov 08 as a Board of Inquiry whereon Commander A Y Thorat (03898-H), JDPRO is to be

President and to hold full and careful investigation into circumstances leading to the allegations of financial irregularities in expenditures carried out by IN Sky Diving Team as reported by Lt Cdr S. Karthikeyan (42140-Y) vide letter 242 SK dated 22 Oct 08 (copy enclosed). The terms of reference of the Board are to include inter-alia the following:-

- (a) Organisational structure and individual responsibilities, specifically in connection with the organisation and conduct of various events as well as the participation in such events.*
- (b) Financial accounting procedures and deviations therefrom, if any, and the persons responsible.*
- (c) Modus operandi adopted in the alleged financial irregularities, persons involved and the quantum of amount involved, if any."*

54. We have also examined the compliant made by Lt Cdr S. Karthikeyan dated 22.10.2008 which figures in the terms of reference of the convening order of the BOI. There is no mention of the applicants by name. It talks about financial irregularities of the Sky Diving Team. Thus, the BOI very correctly commenced its proceedings by obtaining evidence of Lt Cdr S. Karthikeyan on 24.11.2008. As soon as the BOI realised that "character and conduct of a person in Government service is involved", Regulation 205 of Regulation for the Navy Part-II (Statutory) was invoked (page 34-35 of the proceedings of

the BOI refers). Thus, it is seen that Regulation 205 of Regulation for the Navy Part-II (Statutory) was immediately complied with by the Board of Officers as soon as it was revealed by the statement of Lt Cdr. S. Karthikeyan (PW-1) that the applicants' character or conduct as a Government servant may be involved. The applicants were notified (page 34 and 35 of the BOI proceedings) on 25 Nov 08. Though applicant Cdr N. Rajesh Kumar has disputed the date of notification but to our mind it is not material.

55. It is also seen from the proceedings of the BOI that subsequently the applicant Lt Cdr MV Birajdar revoked the option to sit through the proceedings of the BOI at a later date. (refer page 278 of the BOI proceedings).

56. During course of submissions, the Ld. Counsel for the applicant had submitted a list of witnesses in whose case the applicant was not given opportunity to cross examine and/or the evidence was taken down in the absence of the applicant. We have perused the record made available by respondents in this respect. We now proceed to examine the status of each witness accordingly.

57. PW-1 Lt Cdr S. Karthikeyan: The witness was examined by the BOI at 1200 H on 24.11.2008. The investigation commenced with PW-1 because he was the author of the complaint made on 22.10.2008 and had reported the matter of which subject the BOI was

convened. Therefore, he was examined first. During the investigation when it emerged that Lt Cdr N. Rajesh was involved and that his character or conduct as a Government servant may be affected, the Board adjourned and invoked the provisions of Regulation 205 of Regulation for the Navy Part-II (Statutory). Both the applicants were duly cautioned subsequently on 25.11.2008 under Regulation 205 which is evidenced at page 34 of the BOI proceedings.

58. PW-5 Lt. Anand Revi: This witness was examined on 29.11.2008 at 1200 Hours. Lt Cdr N Rajesh Kumar was SIQ on 28th and 29th Nov 2008 (page 47 of the Board Proceedings refers). The applicant was intimated that Board is permitting all witnesses whose cross examination has been completed to return to their respective units. It was also brought out by the Board that *"in case any questionnaire is received subsequently from the applicant, arrangements for cross examination will be made by recalling the witnesses, if required"* (page 177 of the board proceeding refers).

59. PW-10 Cdr N.K. Tomar: The witness was examined on various occasions including at Visakhapatnam. The applicant was informed that "in case he still has some questions to be asked from this witness, the same should be handed over to the Board alongiwth questionnaire for other witnesses by AM 17 Dec 2008" (page 174 refers).

60. PW-12, B. Ray Kumar, POWTR: The witness was examined on 12.12.2008. When the applicant was asked to submit his questions which he wanted to ask from this witness and he was also advised to *"look at the transcripts of all the witnesses who were examined during his absence"* (page 361 of board proceedings refers).

61. PW-13, Lt A.K. Panchal: This witness was examined on 14.12.2008. The applicant was advised to go through the transcripts of the witness and provide the questionnaire so that he could be summoned for cross examination (page 361 of the board proceedings refers).

62. PW-16, Shri Yogesh Daga, M/s Varsha Enterprises: This witness was examined at Visakhapatnam. Being a civilian, the Board had no authority to summon this witness to Delhi. Despite that, the applicant was asked to submit a questionnaire which he would like to ask from this witness and was also advised to look at the transcripts of the statements given by the witness which was recorded during his absence (page 361 of the board proceedings refers).

63. PW-17, J.S. Pande, LEMA: This witness was examined on 23.12.2008 at Visakhapatnam. The witness was asked 10 questions of general nature. The witness in his statement/answers to the questions did not name any person or even the applicants in any manner. Despite that, the applicants were permitted to go through the

transcripts and formulate a questionnaire, if they so desire (page 212 and 361 of the board proceedings refers).

64. PW-8, G.M. Rao, LME: The witness was examined on several occasions. At one stage, the witness himself requested that he be permitted to depose without the presence of the applicant. The Board having considered his request, permitted him to depose when the applicants were not present. Despite that, the Board intimated that *"the transcripts of the witness as he had deposed was available to the applicant and the applicant could handover a questionnaire to be asked to the witness"*. Page 120 of the Board proceedings refers in which the Board has observed that *"the Board Proceedings cannot be stopped for non-availability of the officers only because he has given the option to sit through under the provisions of Regulation 205 of Regulation for the Navy Part-II (Statutory). However, transcripts of witnesses examinations carried out in the absence of officers is being shown on request. The decision to hear this witness in-camera was taken based on the specific request of the witness after confirming the legal requirements with the Office of the JAG telephonically"*.

65. PW-18, Shri G.S. Arora, Grey Hound Business Combines: This witness was also examined at Vishakhapatnam. He being a civilian, could not have been summoned by the Board of Officers to depose at Delhi. Hence the requirements of obtaining his statement at

Vishakhapatnam. In this case, the applicants were asked by the Board for a questionnaire that he would like to ask from this witness and the applicants were permitted to go through the transcripts of this witness which he could examine (page 216 and 361 refers).

66. PW-30, Jasbir Singh, Amber Aviation: This witness was examined on 30.1.2009 at 1330 hours. The applicant handed over a set of 11 questions for cross examination of this witness and therefore, the Board has complied with the requirements of Regulation 205 of Regulation for the Navy Part-II (Statutory).

67. Having gone through the proceedings of the BOI and specifically examining the manner in which the BOI has conducted its proceedings by giving opportunity to the applicants to cross examine the witnesses under Regulation 205 of Regulation for the Navy Part-II (Statutory) and also having seen the deposition of witnesses in particular which were named by the applicants and in which regulation 205 of Regulation for the Navy Part-II (Statutory) was being contested, we do not find that the applicants have not been given adequate opportunity under the regulation 205 to cross examine the witnesses. While examining the deposition of each witness, specifically the witnesses as pointed out by the applicant, we have also come across proceedings of the Board which states as under:-

"The Board enquired about the status of bank statements which were required to be produced by Lt Cdr N Rajesh wherein the witness stated that he could not visit the bank because of Ty Duty commitment. The Board thereafter informed him that he should produce the following documents when the Board reconvenes on 19 jan 09:-

(a) Bank Statements

(b) Any questions which he propoes to ask from the various witnesses.

(c) Any witness that he wishes to produce.

Lt Cdr N Rajesh was also advised to have a look at the transcripts of witnesses who were examined during his absence."

68. We have considered the arguments of the learned counsel for the applicant that provisions of Army Rule 180 are para materia to Regulation 205 of the Navy Regulations Part II (Stat). We concede that the spirit of Army Rule 180 and Regulation 205 of the Navy Regulation Part II (Stat) are similar, but all the same, there are material differences both in the provisions and procedural applicability. Similarly, we find that provisions of Regulation 148 and 149 differ materially with that of Army Rules 22 and 23. Regulation 148 and 149 of the Naval Regulations Part-II (Statutory) reads as under:-

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

- (a) *when an offence has been committed by a sailor which it is beyond his powers to try;*
 - (b) *when the Commanding Officer considers that an offence has been committed by a sailor which is beyond his powers to punish adequately;*
 - (c) *when an offence has been committed which he considers ought to be tried by court martial'*
 - (d) *if the accused has exercised his option in accordance with these regulations to be tried by the court martial;*
 - (e) *when so directed by his superior authority.*
- (2) *If a Commanding Officer himself is to be tried, an application for trial shall be made by his superior authority.*
- (3) *In the case of an officer serving in Naval Headquarters, the application for trial shall be made by an officer designated in this behalf by the Chief of the Naval Staff.*
- (4) *In the case of an officer on the staff of an Administrative Authority, the application for trial shall be made by such officer as may be designated by the Administrative Authority.*
- (5) *In the case of the officer serving in a naval establishment not commissioner as a ship, the application for trial shall be made by the head of that establishment, unless such*

establishment is under the command of a Commanding Officer of one of Indian Naval Ships.

- (6) *where an officer other than a Commanding Officer is required to make an application for trial by court martial, reference hereinafter to the Commanding Officer shall include reference to such other officer.*

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

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

- (3) *The evidence of the witness shall be recorded in the English language and if the witness does not understand the English language, the statement as recorded shall be interpreted to*

him in the language which he understands, and a notation shall be made to that effect.

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

69. Be that as it may, the paramount consideration is that we have to see whether the applicants have suffered any sort of prejudice by adopting the procedure by BOI in concluding the investigation. We examined the proceedings in view of the submissions made and material produced by the parties and the law and judgments cited by the parties. We are of the opinion that no prejudice has been suffered by the applicants. In this respect following judgments are also relevant.

70. In **(1991) 2 SCC 382, Maj G.S. Sodhi Vs UOI & Others**, their Lordships held that procedural defects, unless vital and substantial will not effect the trial. In **(1998) 1 SCC 537, UOI & Others Vs Maj A Hussain**, held that mere want of proper and adequate pre-trial investigation would not in absence of prejudice to the accused or

violation of mandatory provisions, vitiate the court martial. Their Lordships further observed "*supply of a copy of the report of enquiry to the accused was not necessary because proceedings of the Court of Inquiry were in nature of preliminary enquiry and further that rules of natural justice were not applicable during the proceedings of the COI though adequate protection was given by Rule 180.*" They further observed that "*when there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court martial unless it is shown that he accused has been prejudiced or mandatory provisions have been violated.*" In **AIR 1991 Supreme Court 483 Maj Suresh Chandra Mehta Vs Defence Secretary & Others**, it was held that inquiry under Section 177(1) cannot be equated with trial since the enquiry is in nature of preliminary investigation.

71. In the case of **(1996) 3 SCC 364, State Bank of India & Ors., Vs S.K. Sharma**, it was held that in case of procedural provisions which is not of substantial or mandatory character and if no prejudice is caused to the delinquent, no interference of Court is called for. In case there is a violation of only a fact of the principles i.e., no adequate opportunity/no fair hearing was given, test of prejudice

should be applied, and if no prejudice is cause, no interference would be called for. **In (1997) 9 SCC 1, Maj Gen Inderjit Kumar Vs UOI & Ors.**, it was held that supply of a copy of the report to the charged was not necessary because proceedings of the Court of Inquiry are in the nature of preliminary inquiry. Thus, rules of natural justice are not compromised because Court of Inquiry and participation in a Court of Inquiry is at a stage prior to the Trial by a court martial.

72. In view of the foregoing, we find that there is no merit in the allegations that the BOI did not comply with the provisions of Regulation 205 of Regulation for the Navy Part-II (Statutory). There is no substantial violation of Regulation 205 which can vitiate a fair trial. In any case under Regulation 207 of the Navy Regulations Part-II (Statutory), proceedings of the BOI are not admissible in the trial of the delinquent and no finding can be made on the basis of BOI proceedings. Even the summary of evidence shall not be given to the member of the Court on any account under Regulation 159. Thus, there are no grounds for us to interfere in the progress of the case. Detailed analysis of the evidence is not desirable at this stage as the matter is pending for further proceedings.

73. Ld. Counsel for the applicant had pleaded that some witnesses who were not examined by the BOI, but consulted on telephone/e-mail, were brought in as witnesses in the summary of evidence which

was recorded by the respondents. We have considered this aspect. In light of Regulations of the Navy and special Naval Order 02/2002, para 4 and especially para 4(a) which read as under:-

*"4. **Board of Inquiry and Disciplinary Action.** Disciplinary cases not involving any major operational, administrative, procedural, technical or financial aspects need not be inquired into by or interposed with a Bol unless so required by virtue of any specific Regulations, Instructions or Orders on the subject. Such cases can be dealt with by an appropriate Naval Tribunal (Court martial, Disciplinary Court, Summary Trial) or by award of Censure, which can effectively deal with the misdemeanour without any loss of time. The mode of trial, in any given case, would depend upon the circumstances of the case, malafide intentions (mens rea) and the prescribed punishment for the offence as per the Naval Act 1957 or any other statute as well as type of Naval Tribunal that is empowered to award that punishment commensurable with the alleged offence. In this connection following aspects are also relevant:-*

(a) In case of incidents involving disciplinary action, where an inquiry has been convened and if there is a prima-facie case of a distinct offence(s) that would lead to a trial by Court Martial or Summary Trial of a person, the Commanders-in-Chief need not await for the outcome of the Bol irrespective of whether the Bol

is under process or being analysed at Command Headquarters or NHQ but instead initiate proceedings with a view to bring the accused to trial by appropriate Naval Tribunal.

(b)....."

74. Keeping in view the legal position given in Regulation 148 and 149 and para 4(a) of Naval Order 2/S/2002, we are of the opinion that by this action, the applicant has not suffered any prejudice and this contention is not sustainable since he will have full opportunity to cross examine each witness during the trial.

Case No.41/2010

75. The case of Lt Gen M.V. Birajdar Vs UOI & Ors.,(OA No.41/2010) is based on similar facts. However, the applicant opted out from invoking of provisions of Regulation 205 of the Regulations for the Navy Part-II (Statutory) which was endorsed by the BOI at page 278, which reads as under:-

"On 02 Jan 2009 at 1120 Witness No.3 Lt Cdr MV Birajdar approached the Board and expressed his desire to not to sit through the proceedings of the Board of Inquiry as opted by him earlier. The officer was given an option to sit through the proceedings under Article 205 of Regs (Navy) Part II and he had thereafter been present during the examination of witnesses. However, due to personal reasons, the

officer has now requested not to be present for further proceedings of the BOI. The Board after due consideration accepted and agreed to the witness's request. However, the witness was directed to make himself available for examination on the date as and when intimated by the BOI."

76. We are also informed by the Ld. Counsel of the applicants that in case of Cdr N. Rajesh Kumar, (which has also been confirmed by the respondents) that recording of summary of evidence has already been completed and the GCM has been convened. In case of Lt Cdr MV Birajdar, the recording of summary of evidence under Regulation 149 is in progress. In view of the above, the case merits no interference.

74. Both the OAs being OA No.40/2010 and 41/2010 are hereby dismissed on merit. No orders as to costs. A copy of this judgment be kept in OA No.41/2010 also.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 23rd day of September, 2011.