

(Reserved)

A.F.R.
Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****T.A. No. 27 of 2010**Tuesday, the 16th day of January, 2018**Hon'ble Mr. Justice D.P. Singh, Member (J)**
Hon'ble Air Marshal BBP Sinha, Member (A)

Maj Gen Nilendra Kumar, son of Late Sri A.C. Chaturvedi, resident of 38, Canning Lane, New Delhi-1 and presently posted as Judge Advocate General, Army Headquarters, New Delhi.

.... Petitioner

Ld. Counsel for the : **Shri Dipak Seth, Advocate**
petitioner

Verses

1. Union of India through Secretary, Ministry of Defence, South Block, New Delhi-11.
2. Lt General Gautam Dutt, Presiding Officer, Court of Inquiry, Headquarter Central Command, Lucknow.
3. Lt Col Anil Kumar Chandra, Assistant Judge Advocate General, Headquarter Western Command, Chandi Mandir, Haryana.
4. Lt Gen I.J. Koshy, Director General Artillery, Army Headquarter, New Delhi- 11.
5. General Officer Commanding in Chief, Headquarters, Western Command, Chandi Mandir, Haryana.
6. Chief of Army Staff, Army Headquarters, South Block, New Delhi-II

... Respondents

Ld. Counsel for the : **Dr. Shailendra Sharma Atal,**
Respondents **Advocate,** Assisted by
Maj SalenXaxa, OIC Legal Cell.**ORDER****“Per Hon'ble Mr. Justice Devi Pratap Singh, Member ‘J’ ”**

1. Petitioner Maj Gen of JAG Branch of the Indian Army (now former) had preferred the Writ Petition in the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, being aggrieved with the convening order for holding a Court of Inquiry on certain grounds. During pendency of the writ petition the Court of Inquiry was concluded and in pursuance thereof petitioner has been punished with severe displeasure. This petition has been received by transfer to the present Tribunal under Section 34 of the Armed Forces Tribunal Act, 2007 and registered as T.A. No. 27 of 2010.

BRIEF FACTS

2. Petitioner joined the Indian Army as Commissioned Officer through National Defence Academy in 1965 and commissioned to the Regiment of Artillery on 21.12.1969 from the Indian Military Academy, Dehradun. Because of bright service record in due course of time he appears to have been promoted to the rank of Maj Gen in JAG Branch, which is the apex post of Judge Advocate General Branch since 01.09.2001 at Army Head Quarters, New Delhi. According to the petitioner's counsel he authored more than 10 books and presented above 100 papers in different seminars through his scholarly work. For his distinguished service he appears to have been awarded VishishtSeva Medal in 2004 and AtiVishishtSeva Medal in 2005 by Hon'ble the President of India. The post of Maj Gen of the JAG Branch works under the Adjutant General through the Director General (Discipline), Ceremonial and Welfare, holding rank of Lieutenant General. At the time of controversy in question one Lt Gen I.J. Koshy was DG DC & W i.e. for the period from 01.09.2006 to 24.01.2008. According to petitioner's counsel a writ of quo warranto was filed by his junior Netra Pal Singh in Delhi High Court in January, 2007. It is alleged that it was a proxy writ petition got filed by respondent no.3. This inference has been drawn that said petition contained

certain confidential documents, which cannot be availed by JCO of a lowest rung i.e. L/ Naik. Allegation raised against the petitioner was that he is not holding a valid law degree, having membership of Bar Council of Delhi and Supreme Court Bar Association, maintaining a web site, copy rights violation in the book authored by him, sale of books authored by him from his government accommodation, promoting/ pushing sale of books authored by him, stayed in Government Inspection Bungalow for two days while on leave but paid less rates levied while on duty and improper retention/ carriage of a CD on voice recognition software and so on. The petition was dismissed by Delhi High Court on 09.08.2007. It appears that while working as Head of the JAG Branch, petitioner submitted a representation to the Chief of Army Staff on 18.09.2007, pointing out certain lapses on the part of his own boss Lt Gen I.J. Koshy (respondents no.4) and certain other officers. According to the petitioner the lapses affected the fairness of administration of justice in Army and impinges the credibility of Army but the petitioner could not receive any reply from the Chief of Army on his representation. Petitioner thereafter preferred a statutory complaint on 27.09.2007 against the respondent no.4, which also remained unattended.

3. In the meantime, petitioner's wife Smt. Rekha Chaturvedi allegedly had undergone a major surgery on 11.07.2007 at New Delhi for the removal of malignant cancer, followed by chemotherapy, radiation therapy, counselling and follow up tests. In this situation to meet out the requirement, petitioner continuously applied for grant of 60 days leave to look after her ailing wife which was granted after re-scheduling the dates of leave.

4. It appears that being aggrieved with the alleged harassment on behalf of respondents no.3 and 4, petitioner submitted a letter to the Chief of Army Staff

on 22.10.2007, pointing out his grievance against the respondent no.3 but instead of taking notice of petitioner's complaint against the respondents no.3 and 4, oneman investigation was set up to be conducted by Lt Gen Venugopal. His leave was recalled on 19.12.2007 with a direction to him to appear before oneman investigation committee vide order of the said date. The oneman investigation continued from 24.12.2007 to 27.12.2007.

5. According to the petitioner's counsel under Army Act and Rules framed thereunder there is no such provision for oneman investigation. It is only the Court of Inquiry, which is statutory in nature, under which a fact finding inquiry may be held.

6. Petitioner wrote another letter to the Chief of Army Staff on 31.01.2008 and sought audience which was denied. However, he met Vice Chief of Army Staff, to whom he submitted a complaint and objection against the said oneman inquiry (supra). According to the petitioner's counsel instead of deciding petitioner's representation, including statutory representation, a Court of Inquiry was set up and petitioner was informed through a notice dated 28.01.2008. Submission of the petitioner's counsel is that the Court of Inquiry was instituted on the basis of an unsigned complaint. The Court of Inquiry contained total 15 allegations, out of which with regard to 7 allegations i.e. clause 2(a), (b), (d), (e), (f), (j) and (k) as well as clause 2 (j) the finding is concluded by the judgment of Delhi High Court in Writ Petition No. 171 R/C of 2002. The submission on behalf of the petitioner is that upon the allegations against the petitioner, over which the Delhi High Court has already recorded a finding by exonerating the petitioner, it was not open to the respondents to make it part of Court of Inquiry on account of its attaining finality. Court of Inquiry commenced from 19.02.2008 and concluded on 24.02.2008. Objection raised by the petitioner with regard to jurisdiction, principles of applicability of

res judicata and principles of natural justice, were summarily rejected by the Court of Inquiry. It was respondent no.2, who was Presiding Officer of Court of Inquiry in terms of convening order dated 27.01.2008. It is also argued by the petitioner's counsel Shri Dipak Seth that petitioner was departmentally boycotted by officers at Lucknow under the fear of respondent no.4. Preliminary objection raised by the petitioner's counsel has been rejected by this Tribunal vide order dated 08.08.2017 on the ground that the petitioner had admitted in the High Court for adjudication of controversy on merit.

7. The Court of Inquiry is based on certain allegations of Western Command through Maj Gen Gurudeep Singh and also by Army Head Quarters. But final order for Court of Inquiry is by an unauthorised person Maj Gen Gurudeep Singh. We have noted in our order dated 28.03.2017 that how a subordinate authority could have framed charges and passed the final order in violation of Army Rule 177 (3) of the Army Rules, 1954 without application of mind i.e. by GOC-in-C Western Command. The order sheet dated 28.03.2017 is reproduced as under :-

"28.03.2017

Hon'ble Mr. Justice D.P. Singh, Member (J)

Hon'ble Air Marshal Anil Chopra, Member (A)

Present : Shri Dipak Seth, learned counsel for the petitioner and Dr. Shailendra Sharma Atal, learned counsel for the respondents, assisted by Maj Soma John, OIC Legal Cell.

Original record has been produced before the Tribunal.

The record shows that letter dated 25.01.2008 was issued by Army Headquarters (Discipline and Vigilance), Adjutant General's Branch in reference to letter dated 14.01.2008 sent by Headquarters Western Command i.e. Major General Gurdeep Singh and one another letter dated 08.01.2008 of Directorate of Discipline and Vigilance. Letter dated 25.01.2008 refers to the proposal that the Court of Inquiry be ordered by Headquarters Western Command to investigate various acts of omission and commission with regard to Major General Nilendra Kumar, AVSM, VSM as recommended in

para 4 (a) of recommendations of GOC-in-C Western Command on the basis of one man investigation report.

The Headquarter after receipt of these letters directed that in addition to issues raised therein, additionally other issues also be investigated by Court of Inquiry i.e. movement of original identity card register from HQ Central Command (JAG Branch), writing directly to Prime Minister in contravention to provisions of A.O. 22/07, allegation that JAG has got a AWHO flat booked Benami in the name of one of his subordinate officer Lt Col Anand who is working in his office and other similar allegation.

The Army Headquarters also directed that Court of Inquiry shall be composed of Lt Gen Gautam Dutt, VSM Chief of Staff, HQ Central Command as Presiding Officer and Maj Gen T.K. Das, ADG T, Sigs Directorate and one Maj Gen to be detailed from HQ Western Command. It further provides that legal assistance for the Court of Inquiry may be organised under aegis of Dy JAG of any Corps HQ Western Command. Both the Dy JAG and Additional JAG of HQ Western Command shall also be involved in Court of Inquiry. The Army Headquarters further directed that draft convening order sent by Western Command be modified accordingly. Thus it appears that proposal sent by Western Command was further modified by the Army Headquarters adding certain other charges.

Court of Inquiry by order dated 27.01.2008 is based on certain allegations decided by not only the Western Command through Maj Gen Gurdeep Singh but also by the Army Headquarters itself.

A question cropped up whether a subordinate authority or authority of equal rank could frame charges or the Army Headquarters could have initiated a Court of Inquiry in view of Rule 177 (3) of the Army Rules, 1954?

Shri Dipak Seth, Ld. Counsel for the petitioner submitted that GOC-in-C Western Command should have applied his own mind independently for passing the convening order. It could not have been initiated by a subordinate authority of Maj Gen rank or even authority like the Army Headquarters. The record reveals that the whole matter seems to be processed by Maj Gen Gurdeep Singh which has been then approved by the Chief of the Staff and GOC-in-C.

It is further argued that letter dated 25.01.2008 (Annexure 15 to the petition) reveals that charges were added on the basis of unsigned complaint dated 10.12.2007 against the petitioner written by Dr.Jagmohan, Advocate Supreme Court but during course of inquiry Dr.Jagmohan, Advocate was never summoned nor

appeared to establish the genuineness of the complaint allegedly sent by him.

List the case on 29.03.2017 for further hearing as prayed by Ld. Counsel for the respondents.

Original records shall again be produced on said date for perusal of the Tribunal.”

8. While hearing the arguments of respondents on 29.03.2017, we have noted that the Para-5 of the Army Order of 2000 provides that before relying upon the unsigned complaint its genuineness must be ascertained. The relevant portion of order dated 29.03.2017 is reproduced as under:-

“We requested the respondents to apprise the Tribunal with regard to manner and mode of receipt of the unsigned complaint; whether it was received through registered post or some person had given it by hand, attention has not been invited to office note which indicate as to how and in what manner it was received and forwarded to higher authorities for follow up action. Even during course of inquiry no effort seems to have been made to contact or call Dr.Jagmohan, Advocate. Para 5 of the Army Order of 2000 provides that genuineness is also to be ascertained. There appears to be complete denial of procedural provision while relying upon the unsigned complaint. We repeatedly directed the respondents to produce the entire original records which means the ‘original record’ and not ‘photocopy’ of the original record.

The ministerial note which may disclose process adopted by respondents to investigate the matter on the basis of unsigned complaint or proceed with the court of inquiry seems to have not been maintained or produced before the Tribunal in accordance with ministerial rule at the stage of Raksha Mantri, Chief of the Army Staff and GOC-in-C, Western Command.

Subject to payment of Rs 10,000/- (Rupees ten thousand only), we give a last opportunity to the respondents to produce the original record of all the three levels (supra) before the Tribunal on the next date of hearing since genuineness of the complaint and other proceedings have been challenged which necessitated to peruse the original records. In case original records of all the three levels are not produced, needless to say we may be constrained to take an adverse view against the respondents.”

9. From the record it appears that the investigation proceeded against the petitioner on the basis of unsigned complaint sent by one Jagmohan. During

perusal of original record on 04.05.2017 we have noted that the unsigned complaint does not bear signature of Jagmohan, allegedly to be an Advocate of Supreme Court and also it does not indicate who received the unsigned complaint in the office of Chief of Army Staff. For convenience the order sheet dated 04.05.2017 is reproduced as under :-

“Present : Shri Deepak Seth, Ld. Counsel for the petitioner and Dr. Shailendra Sharma Atal, Ld. Counsel for the respondents, assisted by Maj Soma John, OIC Legal Cell.

Unsigned complaint purported to have been made by one Jag Mohan which is typed one, finds place on original record which has been produced before us for perusal. From a scrutiny, it would appear that it does not indicate how it was received and how the matter was processed after receipt of the complaint. Further, no ministerial noting is on record indicating the procedure adopted for taking action against the Applicant in pursuance of such complaint. There is also nothing on the record to show any order by the authority recording satisfaction or prima facie case on the basis of alleged complaint of one Jagmohan to proceed against the petitioner.”

10. High Court by an interim order dated 20.03.2008 provided that the result of the Court of Inquiry shall be subject to further order of this Court. The order dated 20.03.2008 passed by the High Court is reproduced as under :-

*“Hon’ble U.K. Dhaon, J.
Hon’ble Devi Prasad Singh, J.*

Heard Sri J.N. Mathur assisted by Sri Dipak Seth, learned counsel for the petitioner and Sri Ritu Raj Awasthi, learned Assistant Solicitor General of India, assisted by Sri Alok Mathur for opposite parties no. 1,5 and 6.

The learned counsel for the Union of India may file a detailed counter affidavit to the writ petition within two weeks.

List/ put up this petition on 08.04.2008.

In the meantime, the result of the Court of Enquiry shall be subject to further order of this Court”

11. The learned counsel for the petitioner Shri Dipak Seth while assailing the Court of Inquiry as well as punishment awarded thereon submitted as under:-

(1) The punishment awarded through notice, relying upon Court of Inquiry is in violation of Army Rule 180.

(2) Convening order has been signed by Maj Gen Western Command, who was not competent authority in view of provision contained in Army Rule 170(3) as it should have been signed by GOC-in-C Central Command. It is also stated that the Adjutant General is also not competent to make signature.

(3) Oneman inquiry has been appointed not by the competent authority. Otherwise also, under Army Act and Army Rules framed thereunder respondents have no power to convene one man inquiry against the spirit of rule of law. Out of 15 charges 7 are covered by the finding of High Court, hence convening order for Court of Inquiry suffers from non-application of mind.

12. Objection filed by the petitioner against the notice for proposed punishment dated 25.01.2008 seems to have been decided by an unreasoned and cryptic order without considering the grounds and material brought on record by the petitioner while submitting reply.

13. On the other hand, learned counsel for the respondents defended the impugned order of punishment and submitted that there was grave allegation of corruption against the petitioner abusing the government machinery and hence it does not suffer from any impropriety or illegality. It is submitted that one man committee held by Venugopal does not suffer from any impropriety or illegality and Court on Inquiry was also held in conformity with Army Rule 180, which do not call for any interference.

14. We have considered the arguments advanced by both the sides and perused the record.

15. Now we come to first limb of argument. The Court of Inquiry was constituted in pursuance to Army Rule 177. According to clause (3) of Army Rule 177 a Court of Inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps. In the present case the convening order has been passed by Maj Gen Gurdeep Singh, Incharge Administration, General Officer Commanding in Chief. For convenience Army Rule 177 is reproduced as under :-

“177. Courts of Inquiry. —(1) A court of inquiry is an assembly of officers or of officers and junior commissioned officers or warrant officers or non-commissioned officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them.

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

(3) A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps.”

16. A perusal of the convening order indicates that Maj Gen, an officer to the rank of Maj Gen dealing with Incharge Administration, General Officer Commanding in Chief has passed the impugned convening order directing a Court of Inquiry though the convening order under Army Rule 177(3). It has been categorically pleaded by the petitioner that no approval was accorded by GOC-in-C authorising the Incharge Administration to issue the order for Court of Inquiry. For convenience the convening order for Court on Inquiry is reproduced as under :-

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CONVENING ORDER

1. A Court of Inquiry composed as under will assemble at place, date and time to be decided by the Presiding Officer to investigate into the allegations leveled against IC-23978F Major General Nilendra Kumar, AVSM, VSM, Judge Advocate General, Integrated Headquarters of Ministry of Defence (Army):-

T.A. No. 27 of 2010 Maj Gen Nilendra Kumar

Presiding Officer	-IC-23266 Lieutenant General Gautam Dutt, VSM Chief of Staff, Headquarters Central Command.
Members	1. IC-30056 Major General TK Das Additional Director General Telecommunication Signals Directorate. 2. IC-27638W Major General Parwinder Singh, SM Major General Artillery Headquarters Western Command

2. The court shall record evidence as may arise during the Court of Inquiry to investigate into the following issues:-

(a) Continued Illegal Membership of Bar Council of Delhi in contravention to laid down orders vide Bar Council of Delhi, Notice No 579/2002 dated 24 May 2002 and Army Headquarters (Judge Advocate General) letter No B/80517/FWD/JAG dated 14 June 2002.

(b) Misleading superior military authorities for seeking their approval for obtaining membership, incorrect declaration of personal details at Paras 9 and 12 of Membership Application Form for Supreme Court Bar Association, and illegal continuation of membership of Supreme Court Bar Association in contravention to Army Rule 19 and Army Headquarters (Director General Military Intelligence) letter No A/40102/MI-11 dated 29 March 2000.

(c) Deliberate and planned attempt to deny Study Leave to Major (now Lieutenant Colonel) Anil Chandra by endorsing negative remarks/comments and misguiding various Appointments and Directorates with regard to grant of said leave.

(d) Launch of private website on Internet in contravention to Special Army Order 3/S/2001.

(e) Permitting sale of books from official residence (1102, Sangli Apartments, Copernicus Marg, New Delhi) in contravention to Special Army Order 10/S/86 and Para 1024 of Regulations for the Army (Revised Edition, 1987).

(f) Promoting sale of books authored/co-authored by Judge Advocate General and his wife, Mrs Rekha Chaturvedi in contravention to Para 339 of Regulations for the Army (Revised Edition, 1987).

(g) Interacting directly with Mr Jayant Prasad, Ambassador to Switzerland and Extraordinary and Plenipotentiary Permanent Representative of India to the Conference on disarmament to propose his name for participation in Session of Group of Government Experts from 14 November 2005 to 22 November 2005 at Geneva in contravention to Para 558 of Regulations for Army (Revised Edition, 1987) and forwarding proposal for visit to Brazil in contravention to Government of India, Office Memorandum dated 30 March 1995 forwarded to all Branches of Integrated Headquarters of Ministry of Defence (Army) vide Adjutant General Branch Inter Office Note No B/01236/P/Misc/AG Coord (a) dated 03 September 2007. Establish monetary benefits/gains, if any, accrued from various foreign trips.

(h) Financial impropriety, if any, in the publication of the book 'MIL LAW-THEN, NOW AND BEYOND'.

(j) Ascertain veracity of Affidavit dated 27 February 1998 allegedly submitted by the Officer in the personal property dispute case at Lucknow and legal validity of certificate obtained on 28 March 2000 under Indian Soldier's Litigation Act.

(k) Copy Right violation, if any, in the reproduction of notes to various sections and rules of the Army Act.

(l) Visited Headquarters Central Command (Judge Advocate General Branch) on 24 February 2007 and moved original Identity Card Register

without permission of the General Officer Commanding-in-Chief or Chief of Staff, Central Command. The visit was subsequent to filing of writ petition by Naik Netrapal.

(m) Wrote directly to the Prime Minister in contravention to Army Order 22/87 for writing a foreword for his book "Tribute to the Genius of Nani Palkhiwala".

(n) Booked a flat at NOIDA with Army Welfare Housing Organisation benami in the name of a subordinate Officer Lt Col NK Anand, being ineligible to apply for the same himself.

(o) Maj S Prabhu converted a sum of Rs 3.4 lacs from black money into white on instructions of the Judge Advocate General from his ICICI Bank (Account No 000701210654), 9A Phelps Road, Cannaught Place, New Delhi, which was paid towards applying for a flat (probably ELDICO) at Greater Noida, for his son-in-law.

(p) The Judge Advocate General and Maj S Prabhu acted as judges in the ICRC "moot court competitions" and received payment by cheques for these illegal duties.

3. The Court will also investigate any other related matter including acts of omission/commission that may come to its notice.

4. The Court will ascertain full facts of the case, pin point the lapses and record its findings and opinion.

5. Army Rule 180 will be complied with. An endorsement will be made by the Presiding Officer to this effect on conclusion of statement of each witness and signed by those in whose respect Army Rule 180 has been invoked. Attention is drawn to Army Headquarters letter No 46440/AG/DV-1(P) dated 02 July 2007.

6. Attention of the Court is drawn to the guidelines given for the conduct of Courts of inquiry, as contained in Army Headquarters letter No 46440/AG/DV-1(P) dated 03 May 2001.

7. The Court of Inquiry proceedings duly completed in all respects in quadruplicate, including manuscript copy, shall be submitted to this Headquarters by 28 February 2008.

Case No: 0337/Comp/JAG/A4

Headquarters
Western Command (DV)
PIN-908543
C/O 56 APO

Sd/- x xxxx
(Gurdeep Singh)
Major General
Major General Incharge Administration
for General Officer Commanding-in-Chief

27 January 2008

Distribution

1. Director General Discipline, Ceremonial & Welfare
Adjutant General's Branch
Integrated Headquarters of MoD (Army)
PIN-900256
C/O 56 APO
2. Additional Director General
Discipline & Vigilance (DV-4)
Adjutant General's Branch
Integrated Headquarters of MoD (Army)
PIN-900256
C/O 56 APO
3. Director General Signals
Signal Directorate

Integrated Headquarters MoD (Army)
PIN-900256
C/O 56 APO

4. *Chief of Staff Secretariat*
Headquarters Central Command
PIN-908544
C/O 56 APO
5. *Major General Nilendra Kumar, AVSM, VSM*
Judge Advocate General
Integrated Headquarters, MoD (Army)
PIN-900256
C/O 56 APO
6. *Office copy.*

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17. A perusal of the convening order indicates that there is no reference of alleged fact as argued by the counsel for the respondents that the order for Court of Inquiry was passed with the prior approval of GOC-in-C. In the absence of any reference with regard to approval by the higher authority, convening order seems to be per se bad, which vitiates the entire subsequent action relying upon the Court of Inquiry. It has been held by Hon'ble Supreme Court in a case reported in 2010 (10) SCC 677, **Ritesh Tewari and another vs. State of U.P. and others** that subsequent action/ development cannot validate the action which was not lawful at its inception since illegality strikes at root of the order. It shall be beyond the competence of any authority to validate such order.

18. There is one more reason why the convening order is bad. Even if convening order is given by the competent authority, the principle against sub-delegation is reasoned from the maxim '*delegatus non potest delegare*' i.e. means a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute conferred it, which cannot be delegated further to any subordinate or higher authority, unless it is authorised to do so. Army Rule 177 (supra) does not empower GOC-in-C to delegate his power to any subordinate authority, like in the present case to Maj Gen

Gurdeep Singh, vide AIR 1967 SC 295 **Barium Chemicals Ltd vs. Company Law Board.**

19. Even discretionary power entrusted by Statute to a particular authority cannot be further delegated, except as otherwise provided in the Statute. If any decision is taken by a statutory authority at the behest or on the suggestion of a person who has no statutory role to play, the same would be ultra vires. In (2004) 2 SCC Page-65 (at page 74-75) **BahadursinghLakhubhai Gohil vs. Jagdishbhai M. Kamalia** their Lordships of Hon'ble Supreme Court held as under :-

"24. The impugned order was preceded by a direction of the Home Minister on 7.9.1996. A change in the opinion came into being only upon change in the holder of the office and that too within a few days. Not only had the matter not been admittedly placed on the agenda of the meeting dated 25.7.1997, the same was considered showing undue haste.

25. In S.P. Kapoor (Dr.) v. State of H.P. this Court held that ;when a thing is done in a post-haste manner, mala fide would be presumed, stating : 71 Page 71 of 85

26. It is also well settled that if any decision is taken by a statutory authority at the behest or on the suggestion of a person who has no statutory role to play, the same would be ultra vires. (See Commr. of Police v. GordhandasBhanji and Mohinder Singh Gill v. Chief Election Commr.)"

The aforesaid proposition of law also emerges out from the judgment of Hon'ble Supreme Court, reported in AIR 2003 SC 146, **Union of India vs. D.N. Jha.**

20. The judicial or quasi-judicial power conferred by a statute cannot be delegated except when specifically permitted, vide AIR 1956 SC 285, **Pradyat Kumar vs. Chief Justice of Calcutta High Court**, AIR 1965 SC 1486 **Bombay Municipal Corporation vs. Dhondu**, AIR 2000 SC 2008 **Skypak Couriers Ltd. Vs. Tata Chemicals Ltd.**

21. There is one more thing as noted in the order sheet dated 28.03.2017 on the basis of record that it was Army Head Quarters, who directed to hold Court of Inquiry vide letter dated 25.01.2008 through its Adjutant General's

Branch in reference to letter dated 14.01.2008 sent by Headquarters Western Command i.e. Major General Gurdeep Singh and one another letter dated 08.01.2008 of Directors of Discipline and Vigilance. Thus, the proposal for Court of Inquiry was sent by Maj Gen Gurdeep Singh vide letter dated 14.01.2008 and respondent no.4. The Head Quarters added additional issues to be investigated by the Court of Inquiry, including writing a letter to the Prime Minister and possessing of property in the name of one Subordinate Officer Lt Col Anand. Army Head Quarters directed to hold a Court of Inquiry, composed of Lt Gen Gautam Dutt, VSM Chief of Staff, HQ Central Command as Presiding Officer and Maj Gen T.K. Das, ADG T, Sigs Directorate and one Maj Gen to be detailed from HQ Western Command. The Army Head Quarters further directed that draft convening order sent by Western Command be modified accordingly. Thus, it is evident that the proposal sent by Western Command was further modified by the Army Head Quarters' adding some other additional charges.

22. The Court of Inquiry dated 27.01.2008 is based not only on the allegations and recommendation of Western Command through Maj Gen Gurdeep Singh but also by adding additional charges by Army Head Quarters. Hence question comes up for consideration whether direction issued by Army Head Quarters is in consonance with Army power conferred by Army Rule 177 (3).

23. One interesting fact borne out from record is that the charges were added on the basis of an unsigned complaint dated 10.12.2007, alleged to have been written by one Jagmohan, Advocate, Supreme Court, who was never summoned or appeared.

24. GOC-in-C had not passed any order to convene the Court of Inquiry but acted on the instructions issued by the Head Quarters, which is evident from

one another letter dated 25.01.2008, sent by Maj Gen P.K. Rath, ADG D&V, For Adjutant General. For convenience the letter dated 25.01.2008 is reproduced as under :-

"Tele : 23793319

Discipline and Vigilance (DV-4)
Adjutant General's Branch
IHQ of MoD (Army)
DHQ, PO, New Delhi-110011

B/29185/1/530/AG/DV-4

25 Jan 2008

Maj Gen Gurdeep Singh
MG-IC-Adm
HQ Western Comd
Pin-908543
c/o 56 APO

C OF I TO INVESTIGATE INTO COMPLAINTS AGAINST MAJ GEN NILENDRA
KUMAR, AVSM, VSM, JAG

1. Please refer to your letter No 0337/Comp/JAG/A4 dt 14 Jan 2008 and DV Dte Sig No 351299/AG/DV-4 dt 18 Jan 2008.

2. A C of I be ordered by HQ Western Comd to investigate various acts of omission/commission in r/o IC-23978F Maj Gen Nilendra Kumar, AVSM, VSM, JAG (Army) as recommended in Para 4(a) of Recommendations of GOC-in-C Western Comd on the One Man Inv Report, in addn following issues be also investigated by the C of I:-

(a) Mov of original Identity Card Register from HQ Central Comd (JAG Br).

(b) Writing directly to Prime Minister in contravention to provisions of AO 22/-7.

(c) Allegation that JAG has got a AWHO flat booked benami in the name of one of his subordinate offr Lt Col Anand who is working in his office. The flat is in Greater Noida Scheme of AWHO and there are financial transactions betn these two offr through cheque payments. It also alleges that Maj S Prabhu converted a sum of Rs 3,40,000/- from Black Money into white on instrs of Maj Gen Nilendra Kumar, AVSM, VSM from his ICICI Bank, 9A Phelps Rd, Cannaught Place, New Delhi A/C No 00070121654 for applying for Greater Noida Flat (may be ELDICO for his son-in-law). It also alleges that Maj Gen Nilendra Kumar, AVSM, VSM acted as Judge in ICRC moot court competitions and recd cheque payment for these unofficial and illegal duties (A copy of complaint (unsigned) dt 10 Dec 07 against JAG purportedly written by Dr. Jag Mohan, Advocate, Supreme Court addsd to Hon'ble RM on this issue is encl for ref and inv).

3. The C of I will be composed as under:-

(a) Presiding Offr -IC-23266 Lt Gen Gautam Dutt, VSM,
COS, HQ Central Comd.

(b) Members

(i) IC-30056 Maj Gen TK Das, ADG T, Sigs Dte.

(ii) One Maj Gen to be detailed from HQ Western Comd.

4. Gen Offrs mentioned at Para 3(a) and (b) (i) are being made available on your request vide letter No 0337/Comp/JAG dt 14 Jan 2008.

5. *Legal advise for the C of I may be org under aegis of Dy JAG of any Corps HQ under your comd as both Dy JAG and AJAG of HQ Western Comd will be involved in C of I.*

6. *Please ensure that the draft convening order fwd by you is modified accordingly and issued to all concerned immediately. The C of I is required to be completed on "TOP PRIORITY".*

Sd/- x xxxx
(PK Rath)
Maj Gen
ADG D&V
For Adjutant General

Encls : As stated "

25. At the face of record the letter dated 25.01.2008 is per se bad in law for the reason that the Maj Gen had issued the letter for Adjutant General. Both the authorities were not competent to direct for addition of charges in view of provision contained in Army Rule 177. Thus, the Court of Inquiry suffers from extraneous reasons at the dictate of higher authority and without application of mind by GOC-in-C or Officer in Command. Such action where competent authority has not applied his mind and acted on the instructions of higher officer is not sustainable.

26. In the case reported in (2004) 2 SCC 65: **BahadursinhLakhubhai Gohil vs. Jagdishbhai M. Kamalia and others**, their lordships of Hon'ble Supreme Court deprecated such action. It has been held that if any decision is taken by the statutory authority at the behest or on the suggestion of a person, who has no statutory role to play, the same would be ultra vires. Their lordships relied upon the earlier judgment reported in AIR 1952 SC 16, **Commissioner of Police, vs. GordhandasBhanji** and (1978) 1 SCC 405 **Mohinder Singh Gill vs. Chief Election Commissioner**.

27. It is further held that when a thing is done in a post-haste manner, mala fide would be presumed in view of the opinion expressed by Hon'ble Supreme Court in the case reported in (1981) 4 SCC 716 **S.P.Kapoor (Dr.) vs. State of H.P.** The aforesaid proposition is also borne out from one earlier judgment reported in (1984) 2 SCC 41: **Chandrika Jha vs. State of Bihar**

and others. In Chandrika Jha (supra), the action of Chief Minister of State was in issue whereby the Chief Minister issued certain direction and the Minister interfered with the working of statutory functionary under his department. Their Lordship of Hon'ble Supreme Court defined the executive power of the State as under:-

“12. We fail to appreciate the propriety of the Chief Minister passing orders for extending the term of the first Board of Directors. Under the Cabinet system of Government, the Chief Minister occupies a position of pre-eminence and he virtually carries on the governance of the State. The Chief Minister may call for any information which is available to the Minister-in charge of any department and may issue necessary directions for carrying on the general administration of the State Government. Presumably, the Chief Minister dealt with the question as if it were an executive function of the State Government and thereby clearly exceeded his powers in usurping the statutory functions of the Registrar under bye-law 29 in extending the term of the first Board of Directors from time to time. The executive power of the State vested in the Governor under Art. 154 (1) connotes the residual or governmental functions that remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision. Some of the functions exercised under "executive powers" may include powers such as the supervisory jurisdiction of the State Government under s.65A of the Act. The Executive cannot, however, go against the provisions of the Constitution or of any law.

13. The action of the then Chief Minister cannot also be supported by the terms of s.65A of the Act which essentially confers revisional power on the State Government. There was no proceeding pending before the Registrar in relation to any of the matters specified in s.65A of the Act nor had the Registrar passed any order in respect thereto. In the absence of any such proceeding or such order, there was no occasion for the State Government to invoke its powers under s.65A of the Act. In our opinion, the State Government cannot for itself exercise the statutory functions of the Registrar under the Act or the Rules.

14. Neither the Chief Minister nor the Minister for Cooperation or Industries had the power to arrogate to himself the statutory

functions of the Registrar under bye- law 29. The act of the then Chief Minister in extending the term of the Committee of Management from time to time was not within his power. Such action was violative of the provisions of the Rules and the bye-laws framed thereunder. The Act as amended from time to time was enacted for the purpose of making the cooperative societies broad-based and democratizing the institution rather than to allow them to be monopolized by a few persons. The action of the Chief Minister meant the very negation of the beneficial measures contemplated by the Act.”

Since the Chief Minister and Minister for Cooperative of Industries interfered with the statutory functions of the Registrar under the Act, their Lordship held that neither the Chief Minister nor the Minister for Cooperation or Industries had the power to arrogate to himself the statutory functions of the Registrar under bye-law 29. The extension of term of committee of management by the Chief Minister was not within his power. The Minister for Industries also exceeded his own authority in directing the manner in which the new Board of Directors was to be constituted by the Registrar under the relevant law.

28. In (2008) 7 SCC 117: ***Pancham Chand and others vs. State of Himachal Pradesh and others***, Hon’ble Supreme Court reiterated the aforesaid proposition of law and held that Chief Minister or any authority other than the statutory authority could not entertain the application for grant of permit nor could issue any order thereon. The authority under the Act, has also no power to issue any direction except when the matter comes up before it under the statute (para 22).

29. In (2010) 11 SCC 557: ***Manohar Lal (Dead) By Lrs. Vs. Ugrasen (Dead) by Lrs. &Ors***, Hon’ble Supreme Court has summarized the law on the point, to quote as under:-

“23. Therefore, the law on the question can be summarized to the effect that no higher authority in the

hierarchy or any appellate or revisional authority can exercise the power of the statutory authority nor can the superior authority mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act.”

30. In (2011) 5 SCC 435: **Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others vs. Director General of Civil Aviation &Ors**, their lordships of Hon'ble Supreme Court summarized the law with regard to interference by higher authorities as under, to quote:-

“26. The contention has raised before the High Court that the Circular dated 29.5.2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the Statutory Authority. In a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, violation and decision making authority and be prepared to give way to carry out command having no sanction in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide: **The Purtabpur Co., Ltd v. Cane Commissioner of Bihar &Ors.**, AIR 1970 SC 1896; **Chandrika Jha v. State of Bihar &Ors.**, AIR 1984 SC 322; **Tarlochan Dev Sharma vs. State of Punjab &Ors.**, AIR 2001 SC 2524; and **Manohar Lal (D) by L.Rs. vs. Ugrasen (D) by L.Rs&Ors.**, AIR 2010 SC 2210.

27. Similar view has been re-iterated by this Court in **Commissioner of Police, Bombay vs. GordhandasBhanji**, AIR 1952 SC 16; **BahadursinhLakhubhai Gohil vs. Jagdishbhai M. Kamalia&Ors.**, AIR 2004 SC 1159; and **Pancham Chand &Ors vs. State of Himachal Pradesh &Ors.**, AIR 2008 SC 1888, observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the Constitutional scheme.

28. In view of the above, the legal position emerges that the authority who has been vested with the power to exercise its discretion alone can pass the order. Even senior official cannot

provide for any guideline or direction to the authority under the statute to act in a particular manner.”

31. In view of above, since the Court of Inquiry has been activated on the instructions issued by the higher authority or not by the competent authority under Army Rule 177, it suffers from the vice of arbitrariness and is not sustainable. Attention has not been invited to any other material on record which may indicate that the Officer in Command had taken independent decision before proceeding to convene the Court of Inquiry.

REASONED ORDER

32. Now, it is well settled principle of law that every order passed by Quasi-judicial authority, must be speaking and reasoned vide, ***K.R. Deb vs. The Collector of Central Excise, Shillong, AIR 1971 SC 1447; State of Assam &Anr. Vs. J.N. Roy Biswas, AIR 1975 SC 2277; State of Punjab vs. Kashmir Singh, 1997 SCC (L&S) 88; Union of India &Ors. Vs. P. Thayagarajan, AIR 1999 SC 449; and Union of India vs. K.D. Pandey &Anr., (2002) 10 SCC 471; (JT 2010(4) SC 35, Assistant Commissioner, Commercial, Tax Department, Works, Contract and Leasing, Quota Vs. Shukla and Brothers, 2010 (4) SCC 785, CCT vs. Shukla and Brothers.***

33. The present case is covered by the Latin maxims; ‘*Debilefundamentumfallitopus*’, which means when the foundation fails everything falls and ‘*Delegatapotestas non potestdelegari*’, which means a delegated power cannot be delegated.

34. In view of above, power conferred to Officer in Command under Army Rule 177 cannot be delegated to any other person for any reason whatsoever and it can be done only by amending rules appropriately and not otherwise. Further it is well settled proposition of law that a thing should be done in the manner provided by Act or Statute and not otherwise, vide ***Nazir***

Ahmed Vs. King Emperor, AIR 1936 PC 253; **Deep Chand Vs. State of Rajasthan**, AIR 1961 SC 1527; **Patna Improvement Trust Vs. Smt. Lakshmi Devi and others**, AIR 1963 SC 1077; **State of U.P. Vs. Singhara Singh and another**, AIR 1964 SC 358; **Barium Chemicals Ltd Vs. Company Law Board**, AIR 1967 SC 295 (Para 34); **Chandra Kishore Jha Vs. Mahavir Prasad and others**, (1999) 8 SCC 266; **Delhi Administration Vs. Gurdip Singh Uvan and others**, (2000) 7 SCC 296; **Dhananjay Reddy Vs. State of Karnataka**, AIR 2001 SC 1512; **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others**, (2002) 1 SCC 633; **Prabhashankar Dubey Vs. State of M.P.**, AIR 2004 SC 486; **Ramphal Kundu Vs. Kamal Sharma**, AIR 2004 SC 1657, **Tailor Vs. Tailor**(1876) 1 Ch. D. 426; **Nikka Ram Vs. State of Himachal Pradesh**, AIR 1972 SC 2077; **Ramchandra Keshav Adke Vs. Govind Joti Chavre and others**, AIR 1975 SC 915; **Chettiam Veetil Ammad and another Vs. Taluk Land Board and others**, AIR 1979 SC 1573; **State of Bihar and others Vs. J.A.C. Saldanna and others**, AIR 1980 SC 326; **A.K.Roy and another Vs. State of Punjab and others**, AIR 1986 SC 2160 and **State of Mizoram Vs. Biakchhawna**, (1995) 1 SCC 156.

35. While submitting reply to the show cause notice petitioner had drawn attention of authority concerned towards the aforesaid facts and placed other related material but strange enough the reply to show cause notice dated 21.10.2008 has been rejected without considering and discussing the reply submitted by petitioner by the Chief of Army Staff as emerges from Para-6 of the order passed, which is reproduced as under :-

“6. Having taken cognizance of the above lapses, I hereby direct that my “Severe Displeasure” be conveyed to IC-23978F Maj Gen Nilendra Kumar, AVSM, VSM, JAG (Army).”

36. Now the administrative law has travelled long way and it is well settled that the authority, whether judicial or quasi-judicial should act fairly by passing a reasoned or speaking order and not cryptic one. It is settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. In ***Kumari Shrelekha Vidyarthi vs. State of Uttar Pradesh***, AIR 1991 SC 537: AIR SCW 77: JT 1990 (4) 211, the Hon'ble Supreme Court has observed as under :-

“Every State action may be informed by reason and it follows, that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is the trite law that “be you ever so high, the laws are above you.” This is what a man in power must remember always.”

37. In ***LIC of India vs. Consumer, Education & Research Centre***, (1995) 5 SCC 482: AIR 1995 SC 1811: 1995 AIR SCW 2834, Hon'ble Supreme Court has observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. “Duty to act fairly” is part of fair procedure envisaged under articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. Same view has been reiterated by the Hon'ble Supreme Court in ***Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation***, AIR 1993 SC 935: 1992 AIR SCW 3629: (1993) 2 SCC 279; and ***Union of India vs. M.L. Capoor***, AIR 1974 SC 87: (1974) 1 SCR 797: 1974 Lab IC 338. In ***State of West Bengal vs. Atul Krishna Shaw***, AIR 1990 SC 2205: (1990) Supp 1 SCR 91, Hon'ble Supreme Court observed that “giving of reasons is an essential element of administration of justice. A right

to reason is, therefore, an indispensable part of sound system of judicial review." In ***Krishna Swami vs. Union of India***, (1992) 4 SCC 605: AIR 1993 SC 1407: (1992) 4 SCR 53, Hon'ble Supreme Court observed that the rule of law requires that any action or decision of statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that "reasons are the links between the material, the foundation for these erections and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusion reached. Lest it may not be arbitrary, unfair and unjust, violate article 14 or unfair procedure offending article 21. Similar view has been taken by the Hon'ble Supreme Court in ***Institute of Chartered Accountants of India vs. L.K. Ratna***, AIR 1987 SC 71: (1986) 4 SCC 537: (1987) 61 Com Cas 266; ***Board of Trustees of the Port of Bombay vs. DilipkumarRaghavendranath Nadkarni***, AIR 1983 SC 109: (1983) 1 SCC 124: (1983) 1 SCWR 177, followed by Rajasthan High Court in ***Rameshwari Devi vs. State of Rajasthan***, AIR 1999 Raj 47: 1998 (2) Raj LR 263: 1999 (1) Raj LW 398. In ***Vasant D. Bhavsar vs. Bar Council of India***, (1999) 1 SCC 45, Hon'ble Supreme Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based. Similar view has been reiterated in ***Indian Charge Chrome Ltd. Vs. Union of India***, AIR 2003 SC 953: 2003 AIR SCW 440: (2003) 2 SCC 533 and ***Secretary, Ministry of Chemicals &Fertilizers, Govt. of India vs. CIPLA Ltd.***, AIR 2003 SC 3078: 2003 AIR SCW 3932: (2003) 7 SCC 1.

38. In the case reported in (2010) 4 SCC 785, **CCT vs. Shukla and Brothers** their Lordships held that reason is the very life of law. When the reason of law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements.

39. The concept of reasoned judgment has become an indispensable part of the basic rule of law and, in fact, is a mandatory requirement of the procedural law. In one other case, reported in **Assistant Commissioner, Commercial Tax Department, Works, Contract and Leasing, Quota vs. Shukla and Brothers**, JT 2010 (4) SC 35 Hon'ble Supreme Court held that it shall be obligatory on the part of the judicial or quasi-judicial authority to pass a reasoned order while exercising statutory jurisdiction.

40. In view of above, the impugned order passed by the authorities concerned suffers from the vice of arbitrariness and is hit by Article 14 of the Constitution of India and T.A. deserves to be allowed.

ORDER

41. T.A. is **allowed** and the impugned convening order dated 27.01.2008, as contained in Annexure No.1, show cause notice dated 21.10.2008 and punishment order dated 21.11.2008 issued by respondent no.6 as contained

in Annexures No.24 and 25 respectively are set aside with all consequential benefits.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)
Dated: 16th, January 2018

(Justice Devi Prasad Singh)
Member (J)

JPT