* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 25.04.2016
Pronounced on: 19.07.2016

\+ **W.P.(C) 7916/2013, C.M. NOS. 3076/2015 & 4847/2015**

PUJA DUBEY ……Petitioner
Through: Ms. Rekha Palli, Sr. Advocate with Ms. Garima Sachdeva, Ms. Punam Singh, Ms. Ankita Patnaik and Ms. Shruti Munjal, Advocates.

Versus

UNION OF INDIA AND ORS. ……..Respondents
Through: Sh. Rajesh Gogna, Advocate, for Respondent Nos. 1 and 2.
Sh. Ankur Chhibber, Advocate, for Respondent Nos. 3 to 12.
Major Sunil Sheron, Record Officer and Major Varun Luthara, AHQ.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. In these proceedings under Article 226 of the Constitution, the petitioner's claim is for a direction to quash the findings and opinion of the Court of Inquiry convened on 23.11.2011 and the recommendations made by it on 16.03.2012 which revived the recommendations of the earlier Court of Inquiry. The earlier Court of Inquiry and its recommendations would hereafter be referred to as the "first Court of Inquiry"; the Court of Inquiry and its recommendations that are the subject matter of present proceedings

shall be hereafter referred to as the "second Court of Inquiry" or "second COI". The petitioner also seeks a direction to initiate action against Respondent Nos. 5 to 12 commensurate with the recommendations of the second Court of Inquiry. The proceedings in the Court of Inquiry are in respect of an unfortunate accident which led to the death of the 12 year old minor son - Ansh Kumar Dubey (hereafter "Ansh") – of the petitioner and Lt. Col. Ajay Kumar Dubey. He died on 08.06.2007 in a parasailing accident during a camp organized by Army Wives Welfare Association (AWWA), conducted by the Jat Regimental Centre (hereafter "JRC").

2. The JRC, Bareilly held a summer camp for children from 4th to 9th June 2007. This camp featured several activities including parasailing for children in the age group of 12- 15 years. The petitioner's son Ansh, who was 12 years and 11 months of age, applied for the parasailing event held on 8th June, 2007. At around 06.00 AM that day, parasailing was conducted at the JRC firing range. The petitioner states that Ms. Roopali Bajpai (hereafter "Roopali"), aged 18 years, was asked to go first. After having worn the half body harness halfway, she refused to do the parasailing due to the poor condition of the harness. Thereafter, Ansh was asked. He had parasailed earlier on four occasions; twice at Tejpur (Assam) when he was 8 years and twice at Jammu at the age of 10 years. Ansh complained about the harness to the Officer-in-charge as well as the staff. Respondent No.12 Naik Lokesh Kumar briefed the children. Recruit Maan Singh gave a demonstration. CHM Rajbal Singh (Respondent No.11) fitted the harness to Ansh. According to the petitioner, as Ansh commenced parasailing, the half body harness along with the parachute slipped out of his body and he came down

like a stone from a height of about 100 feet and hit the hard ground. The petitioner later learnt that a covered LPT truck was used to transport Ansh to the hospital where he was declared brought dead. A Court of Inquiry (COI) was ordered the same day. However, neither the petitioner nor her husband nor their 9 year old daughter who had witnessed the event, were examined by the COI. The petitioner kept representing to the authorities for copies of the photographs of the event and report of the COI. She was constrained to lodge an FIR No.095740 dated 7th December, 2007 in respect of six army personnel, including Respondent Nos. 4 to 7, alleging commission of offence under Section 304-A IPC. Initially the charge sheet had been filed against two persons, i.e. Respondent Nos. 11 and 12 on 7th June, 2008. However, a supplementary charge sheet was filed against four more officers, i.e. Respondent Nos. 6 to 9 on 3rd September 2008. Thereafter, the petitioner wrote letters seeking imposition of DV ban against those named in the charge sheet but the authorities took no action. Aggrieved by the filing of charge sheet against him, Respondent Nos. 11 filed a petition under Section 482 Cr.PC being Criminal Misc. Application No.33936 of 2008 before the High Court of Allahabad. While directing notice in the issue, the Allahabad High Court stayed the proceedings in Criminal Case No.1951/2008 before the Judicial Magistrate-II, Bareilly.

3. The first COI concluded proceedings; its report was not given to the petitioner; the respondents' failure to impose a DV ban against the charge-sheeted officers, coupled with the failure to furnish the COI report led the petitioner to file W.P.(C) 1607/2008 in this Court. On 10th July, 2008, this Court recorded a statement made on behalf of the respondents that all the

documents of the COI, including the photographs would be supplied to the petitioner. The said order was further modified by the learned Single Judge on 25th July, 2008, directing the respondent to supply to the petitioner the opinions and findings of the COI. This Court disposed of the petition. Thereafter, the petitioner was supplied with a copy of the report of the COI.

4. After receipt of the first Court of Inquiry report, the petitioner felt aggrieved and preferred W.P.(C) 8837/2009, pointing to various infirmities in the findings. The petitioner relied upon the statements of three witnesses, i.e. Roopali, Zarah Khan (hereafter "Zarah") and Radha Chaudhary (hereafter "Radha"), who deposed about what emerged on the day of the accident and the condition of the camp. She also complained that the first COI proceeded as if no log-books regarding parasailing equipment usage existed, though she was able to obtain a copy thereof under the RTI Act. The petitioner pointed out that criminal proceedings had been drawn against Respondent Nos. 4 to 9, 11 and 12 and that as a consequence, a DV ban ought to be imposed on them. She further urged that the failure to appreciate eyewitness version of the three individuals as well as that of her daughter, who was present during the incident, vitiated the report. W.P.(C) 8837/2009 was disposed of by a judgment-dated 03.05.2011. The learned Single Judge had considered the report of the first COI in the light of the proceedings and the evidence and expressed dissatisfaction with the explanation for not including the petitioner, her husband as well as their daughter, i.e. the sister of Ansh, who was an eye-witness to the entire incident. The Court was unimpressed by the explanation of the respondent that associating the sister was inessential because she was traumatized and could not have been

coherent. In para 13.15 of the judgment dated 03.05.2011, the Court noticed and extracted the statements of the other three eyewitnesses. In para 17, the Court expressed the opinion that the explanation regarding Ansh's sister not being associated due to traumatization was unconvincing. On the basis of these and after appreciation of the materials, the Court was of the opinion that the evidence on the record had not been considered appropriately.

5. The Court, in the previous judgment dated 03.05.2011 concluded as follows:

> *"19. Then there is the noting in the medical case sheet of the Military Hospital at Bareilly where Ansh Kumar Dubey was brought at around 7.15 am on 8th June 2007 declared dead on arrival. Obviously the officer who accompanied the child narrated how the incident occurred to the Doctor who noted that "today during parasailing training at about 0645 hrs the retaining harness allegedly opened and the boy fell to ground from a height of about 100 feet."*
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> *20. These may be separate pieces of evidence but their importance in reconstructing the sequence of events on 8th June 2007 was not correctly appreciated by the COI. The inescapable conclusion is that the COI failed to record the statements of witnesses who were present at the event and further failed to correctly appreciate the evidence on record. It is also significant that Lt. Col. Sanjay Bajpai wrote to the Petitioner on 11th January 2009 specifically disagreeing with some of the paragraphs of the Report of the COI. These are matters which deserve the attention of the COI. The relevance of the log book regarding the use of the parasailing equipment will also be required to be considered by the COI.*
>
> *21. The indemnity bond given by the Petitioner's husband, who is a serving officer on 30th May 2007, may be relevant to the claim for damages but does not obviate a proper inquiry into the incident and the fixing of responsibility on those concerned*

with ensuring that all reasonable measures of safety for the parasailing event. Moreover as the Petitioner does not press the relief of compensation in this petition, the indemnity bond does not come in the way of the other reliefs prayed for in the petition.

22. The contention that the reconvening of the COI and the report that will be submitted by it will prejudice the criminal proceedings against Respondents 6 to 12 is misconceived inasmuch as the two proceedings are independent of each other. The effect that the report of the COI will have is for the court seized of the criminal proceedings to consider.

23. For the aforementioned reasons, the analysis and the findings rendered in the Report submitted on 2nd July 2007 by the COI convened on 8th June 2007 are hereby set aside. It is, however, clarified that the recommendations made by the COI in para 89 about the measures to prevent mishaps like the one that formed the subject matter of inquiry would remain. The evidence already recorded by the COI would also remain. In addition to the evidence already available on record, which will be looked into afresh by the COI which will be reconvened in terms of this order, the COI will also take on record the statements of Ms. Roopali Bajaj, Ms. Zarah Khan and Ms. Radha Chaudhary that have been produced by the Petitioner along with this petition. The COI will give a further opportunity for any further evidence to be produced before it by the Petitioner and others in the form of sworn affidavits for which it will issue a public notice. The reconvened COI will give thirty days' time for the purpose. The COI can devise a flexible procedure to further examine any of the deponents of the affidavits by itself or by appointing commissioners. This exercise shall be completed by the reconvened COI within a period of three months after it re-assembles pursuant to the fresh convening order."

6. In the light of the above developments and the Court's directions, a fresh convening order constituting the second Court of Inquiry was issued on 23.11.2011. The Convening Order specially directed that the evidence of

Roopali, Radha and Zarah would be recorded and that the terms of reference were as follows:

"CONVENING ORDER

XXXXXX XXXXXX XXXXXX

2. Terms of References

(a) To investigate into the circumstances under which, Master Ansh Dubey son of IC-45811X Lt. Col. A.K. Dubey of 104 GL Sec (now posted at HQ 14 Corps Pro Unit) died on 08 Jun 2007, while taking part in Para Sailing event during the AWWA Summer Camp organized at JRC Bareilly.

(b) To record additional evidence (in addition to evidence already recorded in Court of Inquiry conducted earlier vide Station Headquarters, Bareilly convening order No.2501/104 GL Sec/A (PC) dated 08 June 2007).

I To record statements of witnesses as directed in the Court Order of 03 May 2011 on WP No.8837/2009 filed by Mrs. Puja Dubey wife of Lt. Col. AK Dubey and mother of Master Ansh Kumar Dubey Vs. UOI in Hon'ble High Court of Delhi (Regn No.46/1364).

(d) Having recorded the statements/evidence, analyse the same denovo alongwith the evidence already recorded in C of I proceedings convened vide Station Headquarters, Bareilly convening order No.2501/104 GL Sec/A (PC) dated 08 Jul 2007, the Court shall give fresh findings and opinion.

3. Copy of Court Order and earlier Court of Inquiry proceedings dated 08 Jun 2007is enclosed in original for Presiding Officer only.

4. The Court will examine element of negligence if any, at any stage in the conduct of the event in ensuring the safety precautions required and pinpoint responsibility accordingly. Army Rule 180 will be applied, wherever required."

7. The second COI was held and its report was finalized. On the basis of the report, the Officiating General Officer Commanding (OC), Uttar Bharat issued directions on 16.03.2012. The COI report rendered its conclusions, which were forwarded to the concerned commanding officer, i.e. the GOC. The GOC issued order/directions dated 16.3.2012, which summarized the findings and located responsibility of individual officers.

8. On the basis of the order/directions, the penalties/administrative action were recommended and implemented. The administrative orders were as follows:

> *"16. **Administrative Action** I direct that administrative action be taken in the form noted against each against the following:-*
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> | | | |
> |---|---|---|
> | *(a)* | *IC-33450X Brigadier (now Major General) DL Choudhary (Retired)* | *Counselling in writing by the General Officer Commanding, Uttar Bharat Area.* |
> | *(b)* | *IC-37570N Colonel (now Brigadier) Rajesh Anand* | *Reproof be administered by the General Officer Commanding, Uttar Bharat Area.* |
> | *(c)* | *IC-55409F Major (now Lieutenant Colonel) Kartikeyan Rao* | *Censure be awarded at the level of the General Officer Commanding, Uttar Bharat Area.* |
> | *(d)* | *JC-489654K Subedar - Ravinder Singh* | *Censure be awarded at the level of the General Officer Commanding, Uttar Bharat Area."* |

9. The above order also recommended disciplinary action, in the following terms:

> *"17. **Disciplinary Action**: I direct that disciplinary action be taken against the following:-*
>
> *(a) No.3179463L CHM Rajbal Singh (Retired)*
>
> *(b) No.3186280X Naik/General Duty Lokesh Kumar."*

Submission of parties

10. Ms. Rekha Palli, learned senior counsel for the Petitioner urges that the report of the second COI and the actions taken thereon are grossly inadequate; there has been travesty of justice in a serious accident which resulted in a grave tragedy and loss of the petitioner's son's life. It is contended that despite this Court's directions on two occasions, the Army authorities deliberately subverted the second COI proceedings to shield the guilty. To paper over the misconduct of officers, by way of their gross negligence, the Army recommended - very casually- light or no penalty at all. Resultantly, those implicated by the COI got off lightly - virtually with no penalty and in fact were promoted. Just to make a show of action, the respondents resorted to recommending disciplinary action against non-commissioned officers, one of whom even retired.

11. It was urged that not only did the Army authorities not take adequate and proportionate action against those guilty of rank negligence, but even acted in a vindictive manner against the Petitioner's husband, who is victim of the respondent's ire inasmuch as he has not been promoted deliberately. Every action to deny him

proper grading and promotion was undertaken just because the petitioner, a distraught mother who lost her son, sought justice from the court.

12. It is urged that the respondents were duty bound to apply their mind and ensure that justice to the victim was appropriately done and not in a ritualistic manner. In view of the clear findings that the Officer in charge had no previous experience and in view of the other findings which pointed to systematic negligence and overlooking on the part of the senior officers, including the two Brigadiers, who had inspected the site and the equipment (and also presumably noticed the deficiencies listed in the COI report) the officers too should have been meted out with serious penalties in the very least. It was urged that the submission of charge sheet against a number of Respondents meant that there was reasonable cause against them (which is the standard for even framing of charge) sufficient to conclude that the preponderance of probabilities of their liability was proved. In such case, their civil liability, including the liability for disciplinary action and suitable penalty was warranted. As a disciplined force, which requires its personnel to maintain high standards of conduct and effectiveness, the respondents were duty bound to ensure that such negligence was sufficiently punished to act as a deterrent in future and prevent further mishaps. The respondents' omission in this regard is utterly arbitrary.

13. The respondents, particularly the Indian Army, urge that the petition is without merit and should be rejected. It is submitted that the ground urged, i.e that the COI was presided over by an officer junior in rank to those whose

conduct was under a cloud, is untenable. It was sought to be stressed that the said officer has rendered independent and objective findings, based on which not only was action recommended but even taken. The stand in the counter affidavit and during the hearings was that (a) there are divergent eyewitness accounts about the sequence of events and hence it is yet to be established whether Petitioner's son slipped out of the harness or whether both butterfly fasteners accidently opened up releasing him from the line attached to the prime mover. Further, according to certain witnesses, all medical help was provided including a qualified doctor and within 7-8 minutes Ansh was taken to the Military Hospital. (b) Though it is alleged that the Petitioner was not called as witness on 07.12.2007 but in Nov 2011 when given a chance she did not appear before it to depose nor did her husband Lt Col AK Dubey till after much persuasion to do so. He deposed on 27.01.2012, when all other witnesses had already deposed except for the three witnesses for which the court had already directed to give their statements on affidavit. Hence, they could not be cross examined to bring out additional facts or contradictions.

14. It was argued by Mr. Rajesh Gogna at one stage that even though the official Army officers authorized to brief him did not do so and rather chose to interact on each date of hearing with the private counsel appearing for the other respondents (i.e the officers who were indicted by the COI), nevertheless from the materials on record, it is evident that due application of mind of the authorities was bestowed upon all relevant considerations. These included material facts such as the deficiencies which were noticed by the COI and listed by it. Furthermore, the action recommended was duly taken note of and appropriate penalties, in the form of censure/reprimand, which were administrative action, was taken in respect of the officers who did not

perform their duties properly. Since the role of the non-commissioned officers was graver, which resulted in the avoidable loss of life, disciplinary action was taken against the two personnel.

15. It was submitted by the Central Government that the plea regarding inadequate penalty should not be considered by this court. Counsel stressed on the fact that the fairness of proceedings is what can be the legitimate subject of judicial review. On this aspect, there can be no two opinions that the COI was conducted according to law, in a just and fair manner. All material witnesses, including the petitioner were afforded the chance to give their depositions. The depositions before the COI were duly considered before findings were rendered. Having regard to all the circumstances of the case, appropriate and suitable action, which is the duty and prerogative of the Army officials was taken. Being a disciplined force, the Army works under certain parameters. The action taken against the private respondent officers and non-commissioned personnel is fair, reasonable and wholly warranted by the circumstances and findings recorded in the COI.

16. Learned counsel for the private respondents, i.e Mr. Ankur Chibber, argued that this court should not interfere with the findings and report of the second COI nor the administrative measures. It was urged that the Indian Army conducted two COI which threadbare went into the role played by individual respondents and the standards applicable for the activity in question, especially with respect to the equipment used, the safety measures in place as well as the medical response in case of an emergency.

Analysis and Conclusions

17. Before proceeding to consider the report of the second CoI, it would be essential to consider the statement of two eyewitnesses, who were consistent with their previous depositions (in the first CoI). The first would be the statement of Zarah Khan. She stated, *inter alia* that:

> *"Miss Rupali Bajpai (age approximately 18 yrs) was to go second so she started wearing the harness. However she did not wear it completely and she removed it due to some reasons and then Major Kartikayen Rao, who was present there as officer-in-charge asked Ansh that he will go first, as he has done it earlier also. Ansh agreed and started wearing the harness The harness that was given to Ansh was of very old vintage as per its condition. Havildar Rajbal Singh fixed the harness on Ansh. As it was very loose Ansh pointed out that it is very loose and also something is missing from the chesty. On this Major Rao said that Para Sailing can be done like this also as you have just seen Recruit Maan Singh doing it. Ansh was convinced by Major Kartikayen Rao who finally checked him and asked him to go for Para Sailing. Initially, the raise in the air was very smooth, but suddenly there was a jerk and his grip was loosened. I clearly saw his hands moving up the strap and straightened. He was still holding the straps immediately: there was another jerk due to which his hands became totally free. He flipped 180 degree backwards and the harness, which he was wearing came out through his feet side and he fell down as a stone on the hard ground without the harness. -In the air, he struggled for a moment but became still and fell down without any motion.."*

Another eyewitness, Radha Chaudhary, had earlier deposed *inter alia,* as follows:

> *"Then, one recruit BHAIYA, who had neither done nor seen parasailing earlier, did parasailing. Thereafter Rupali Bajpai*

wore the harness but removed due to some reasons and denied to do the parasailing. Now Major Rao asked Ansh to go for parasailing, but Ansh said something to Major Rao, then Major Rao also said something to Ansh. Later Ansh said something to the person who tied the harness to Ansh. But later Ansh was tied with the same harness."

This eyewitness, however, later clarified that the earlier statement was obtained under duress and that she did not wish to adhere to it in the second CoI. Miss Rupali Bajpai stuck to her statement; she clearly had deposed that *"Ansh complained about the equipment but he was reassured that this was also used in para sailing."*

18. These two statements are of significance, because the second CoI did not seem to attach much importance; it rather went by Ms. Rupali Bajpai's signed disclaimer, to the effect that her statement in the earlier CoI proceedings was given at the behest of the Petitioner's husband. The findings of the second CoI, to the extent they are relevant, are extracted below:

" Only one original safety pin is issued alongwith the seat type harness and it gets worn out due to its frequent use. Therefore, adhoc safety pins were being used during the parasailing event organized on 08 June 2007, in which Master Ansh Kumar Dubey had a fatal free fall ***(As per statement of witness No.1)****. However, as per the manual there is no mention of use of safety pins as part of parasailing equipment* ***(Exhibit No.8).***

10. As per the statement of witnesses, the butterfly hooks, D-rings, the straps of canopy and towing ropes were found intact and without any damage, after the accident. The local and adhoc safety pins, which were used were found hanging with the cord after the accident. However, one safety pin was found to be bent at various places ***(As per statement of witness No.1, 4 & 5)***

11. Master Ansh Kumar Dubey was one of the selected candidate above 10 years of age and a volunteer for the first launch as he had some previous parasailing experience ***(As per statement of witness No.1, 4, 5, 13 and 14). However, as per the statement of witness No.7, 15 & 16*** *Master Ansh Kumar Dubey was asked by OIC parasailing to go for parasailing after denial by Miss Roopali Bajpai.*

12. The harness was fitted on Master Ansh Kumar Dubey by Nk. Lokesh Kumar and CHM Rajbal Singh. The adhoc safety pins were also fitted in the eye lets of the butterfly hooks by Nk. Lokesh Kumar and CHM Rajbal Singh. After the ok report, OIC parasailing Maj (Now Lt. Col) Kartikeyan Rao physically checked the harness, helmet and safety pins as part of the pre launch safety checks. Col (Now Retired) VC Goyal (RMO) asked Maj (Now Lt. Col) Kartikeyan Rao to check the fitness and fitment of the parasailing equipment which were found to be in order before the launch ***(As per statement of witness no.1, 4, 5, 8, 14 and 15).***

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32. Recruit Man Singh was detailed to give demonstration of parasailing to the children who himself was doing it for the first time, which is a violation of the SOP and manual ***(As per statement of witness No.10 of the earlier C of I and 7 of this C of I).***

*33. Use of half body harness for the minor children was not correct since it increases the chances of children slipping out of harness while in the air due to loose/ill-fitting (****Exhibit No.19)***

34. The vehicle used as prime mover was a 2.5 Ton vehicle which is contrary to the Howell International Manual ***(as per statement of witness No.7 of this C of I and Exhibit No.8).***

35. The tarpaulin of the 2.5 Ton vehicle was not removed which was a mandatory requirement so that the driver can see the parasailor while in the air ***(As per statement of witness No.7, 14, 15 and 16)***

*36. The officer detailed as OIC was not a parasailing qualified officer and had not done any parasailing himself (**as per statement of witness No.5 & 7).***

*37. The certificate and the course report submitted by CHM Rajbal Singh, Nk Lokesh Kumar and Sub Ravinder Singh does not make them qualified to carry out instructor duties for a parasailing camp being conducted for the minor children or anyone **(as per statement of witness no. 7 and Exhibit No.21).***

*38. On 08 Jun 2007 the non-availability of fully equipped ambulance vehicle at the accident site was a very important factor as the availability of the same could have saved the life of Master Ansh Kumar Dubey **(As per statement of witness No.7, 14 and 15)***

*39. The briefing given to the children by Nk Lokesh Kumar on the conduct of the parasailing was in inadequate and not as per the guidelines of the manual and SOP **(As per statement of witness No.7)***

*40. On 03 Jun 2007, two full body harnesses were sent to Lucknow for parasailing camp from JRC. In reply to questionnaire Brig Rajesh Anand stated that training battalion commander had interviewed the party carrying two full body harnesses to Lucknow on 03 June 2007. This is a clear failure of forethought and execution at the appropriate level of officers for proper conduct of parasailing **(As per statement of witness No.7 and Exhibit No.17 and reply to the questionnaire by Brig. Rajesh Anand).** However, a no objection certificate dated 30 may 2007 was submitted by Lt Col AK Dubey stating that organization shall not be held responsible for illness, injury or accident during the camp and further stated to agree with the rules of the camp.*

*41. No indemnity bond was submitted by the parents of Ansh Kumar Dubey specifically for the Parasailing **(As per statement of witness No.7).***

42. As per the log book maintained by JRC a total of approximately 2000 launches have been shown for all the five

parasail held by JRC. The contention of Lt. Col. AK Dubey that parasail and harness used by Master Ansh Kumar Dubey, was used more than the authorized launches is not correct as it has been amply clarified in the reply to the questionnaire by Brig Rajesh Anand that the records of launches provided earlier is for all four serviceable and one unserviceable parasail and harnesses (not for any specific harness/parasail) held on charge with the JRC.

*43. There were two digital cameras used to click the photograph of parasailing on 08 June 2007. However on the orders of Hon'ble High Court of Delhi when the said memory cards were taken to the Stellar Information System Limited, Gurgaon for recovery of said photographs, the memory cards were found to be deliberately broken and tampered (**As per exhibit no.23).***

*44. JRC was not authorized an ambulance on their Peace Establishment, however, no requisition of ambulance was made by JRC from military hospital while conduct of parasailing on 08 Jun 2007 **(Exhibit No.26)***

45. The statement given by Miss Radha Choudhary before the earlier C of I, Lt Col AK Dubey on 20 Jul 2008 which was submitted before the Hon'ble Delhi Court and the statement given to this C of I in the form of affidavit is contradicting and it seems that the above witness is unclear about the facts on ground about the case.

*46. The parasailing site was visited by Brig (Now Maj Gen Retired) D.L. Choudhary, Commandant, JRC and Maj Gen (Now Lt. Gen Retired) DS Chauhan, GOC UB Area and the complete parasailing equipment and the accident site were inspected by the officers in detail. **(As per statement of witness No.1, 3, 4 & 5)."***

19. The order/directions of the GOC dated 16.03.2012 may be summarized as follows:

(1) The JRC had *two full body harnesses and three half body harnesses.*

(2) The camp for June, 2007 was known and planned at least two months earlier despite this *"two full body harnesses were sent on 03 Jun 2007 to Lucknow for a parasailing camp. This was a failure of forethought and planning on the part the officers and staff involved in planning and conduct of the event."*

(3) The JRC should have- and could have made a requisition "*to Military Hospital, Bareilly or 306 Field Ambulance for ambulance vehicle to secure medical services for the said event."* This was not done; there was no ambulance to cover medical emergencies and accidents for the event.

(4) The JRC used a *"2.5 Ton Prime Mover vehicle for the parasailing event, whereas a Jeep/light van with canopy removed should have been used."*

(5) The driver of the Prime mover had four years experience of driving it, but *"did not have any experience to drive a vehicle for a parasailing event/adventure activity which itself is contrary to Jat Regimental Centre Standard Operating Procedure on conduct of Parasailing..”*

(6) Two "dry" rehearsals were conducted before the event, but in both instances *"no parasail was attached with the prime mover which was contrary to the guidelines/instructions given in the manual for conducting rehearsal."*

(7) *"The Officer detailed as Officer-in-Charge for the parasailing event (Major now Lieutenant Colonel Kartikeyan Rao) was not qualified or experienced in parasailing. The officer had not undergone any parasailing training. As there was no officer posted in Jat Regimental Centre who was qualified or experienced in parasailing, the officer was detailed as overall incharge of the entire event. Officer-in-charge of the event had a very important role to play and hence, an officer with suitable experience in parasailing activities should have been nominated as Officer-in-Charge. In case of non availability of a suitable officer, the same should have been brought to the notice of higher Headquarters for taking up the matter for securing services of a qualified officer from elsewhere."*

(8) *"The recruit who gave the demo to the children was also doing parasailing for the first time which was also in violation of the Standard Operating Procedure on parasailing."*

(9) Photographs taken at the event, which captured the incident were not available and the memory chip had been tampered with. The personnel against whom proceedings were drawn alleged that the petitioner's husband tampered it; however, the COI discounted this *"There is no plausible reason for Lieutenant Colonel AK Dubey to tamper with the memory card. There could be a possibility of Jat Regimental Centre tampering the memory card."* However, findings on this were inconclusive.

20. It is evident that the JRC had two full body harnesses, but chose to send them away to Lucknow, just a day before the event. Now, the Officer

Commanding, a senior Brigadier ranking official, surely knew that the event was scheduled on 04.06.2007 - he even appears to have been present at the time of the first event; it is on the record that he inspected the equipment before the event. If this were so, the absence of what is considered standard equipment for such event would have to be put down to maintain proper supervisory control. Likewise, the lack of an experienced driver, absence of an Ambulance (though it could have been requisitioned), *and the deployment of Major Rao, who had no previous experience in such events* all point to an utterly negligent and indifferent attitude. It is not understandable how an old 2003 vintage half body harness with worn out safety pins could be used for Ansh, whereas a relatively newer version (probably one year or less) was used for demonstration by a full-grown man. The other omissions, such as use of an inappropriate vehicle, improper "dry run" or rehearsal, *without a parasail,* improper use or complete indifference to the use of safety pins which were found to have been worn out, etc. show a complete failure of duties and equipment. If the prescribed drill had been followed, the long list of deficiencies would have been noticed; the superior officers, i.e the two Brigadiers and the Major in charge of the event, do not appear to have bothered themselves about the necessity of running a check list, or insisting on one, before the event, so as to ensure that each item required was there and in good repair. This failure is not a mere administrative lapse, but seriously inexcusable. If the event had led to fatalities of such kind during an official Army exercise, there cannot be any doubt that the private respondents, regardless of their ranks as senior officers would have faced stiffer penalties and Court Martial proceedings. In the present case, the event was one involving children- if anything the level of care and caution

exercised by the respondents should have been proportionately greater, because the participants were completely under the custody (howsoever temporary) of these Army officers.

21. The second CoI gave considerable importance to the later disclaimer of the previous statement, of Radha Chaudhary. However, the depositions of the other two eyewitnesses, i.e Rupali Bajpai and Zarah Khan categorically showed that Ansh was uncomfortable with the equipment (i.e. the half body harness). He was reassured that this was safe. According to one of the witnesses, i.e Rupali, in the theory briefing, the participants had been told that this kind of equipment was not safe as it could lead to the body getting entangled with the parachute.

22. It is rather strange- and certainly illogical that whereas the Army acknowledges the inappropriateness of using half body harnesses in such events (in fact this was not approved), yet the CoI report and the final directions of the GOC studiously downplay this glaring lapse. As a professional body of expert Army officers, supposed to be aware of the importance of adhering to standards of safety, the overlooking of such safety concerns, which led to the tragic death of a child is nothing but rank negligence.

23. *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* or *"Wagon Mound (No. 1)"* [[1961] UKPC 1] has re-stated that liability accrues when a reasonable man having the knowledge and experience to be expected of him does not take that degree of care as to ensure that the consequence which is foreseeable, is averted. The Supreme Court, in *Jay Laxmi Salt Works v State of Gujarat* 1991 (4) SCC 1, held that the law of tort

dealing with negligence fastens liability on failure by one to conform to the duty of care:

> *"11. 'Negligence' ordinarily means failure to do statutory duty or otherwise giving rise to in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are*
>
> *(a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;*
>
> *(b) breach of that duty;*
>
> *(c) consequential damage to B."*
>
> *According to Dias, "[L]iability in negligence is technically described as arising out of damage caused by the breach of a duty to take care."*
>
> *These textbooks thus make it amply clear that the axis around which the law of negligence revolves is duty, duty to take care, duty to take reasonable care."*

The above decision was recently approved and its principle was applied in *Vohra Sadikbhai Rajakbhai & Ors vs State Of Gujarat* (Civil Appeal No. 1866/2016 decided on 10.05.2016).

24. The question then is can it be reasonably contended that the action taken against the private respondents who were found fault with, is too light and, therefore, arbitrary or inadequate? It is well established now, that the exercise of judicial review does extend to reviewing the proportionality of the penal measure adopted by the decision maker or state agency. For instance, this is what the Supreme Court stated in *Chairman-cum-Managing Director, Coal India Limited and Another v. Mukul Kumar Choudhuri & Ors*

[2009 (15) SCC 620], the Court, after analyzing the doctrine of proportionality at length, ruled that: -

> *"19. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.*
>
> *20. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment."*

Earlier too, the principle or doctrine of proportionality was relied on (Ref. *Indian Oil Corporation Ltd v Ashok Kumar* 1997 (3) SCC 72).

25. The Courts have stressed- at least in the realm of administrative law- that penalties and actions should be proportionate to the misconduct - *in the sense that they are not excessive or grossly burdensome.* Yet, conversely, there can be situations where proportionality is to be seen from the other end of the spectrum. The age-old adage is that justice is not only done but must be manifestly seen to be done. In the realm of penology, exercise of discretion in sentencing is the most visible and apt analogy, which immediately crops up in one's mind. Justice to the victim is the subject matter of extensive debate; one of the theories in sentencing and penology is

restorative justice. Approaches vary from giving a prominent role in prosecution of the offender (to the victim or her heirs/dependents) to compensation. In an area where the victim or person harmed by the action or inaction of someone at fault may seemingly have no role other than an eyewitness or as an informant, - as in disciplinary proceedings, or those akin to disciplinary proceedings, it would be hard to deny that the outcome in concrete terms- i.e the disciplinary action taken- would still be a matter of vital concern to such informant/victim. In a case where too harsh a penalty or disciplinary action is meted out to a party, it is still within the realm of judicial remedy, because the party aggrieved in such a case would obviously be the wrongdoer. Judicial redresses is available to him or her. What happens in a converse situation when despite a finding of wrongdoing or guilt, the action of the employer or superior authority is too light as to offend any person with reasonable sensitivities? For instance, in an extreme case where a uniformed personnel is found guilty of sexual harassment of a serious kind, an assault or attempted rape and is yet merely censured or imposed a pay cut, would it be sound exercise of discretion? Can it then be said that the informant who suffered injury, or the victim is remediless? In the opinion of this court, the answer has to be a resounding negative.

26. Judicial review, it is now recognized, is concerned not only with procedural regularity and legality, but also with the decision itself. It has been held that where the order of the decision maker is such that no reasonable person, placed in a like situation, would decide the way it was in fact decided, the Courts can step in and set aside the executive order or the order of the state agency. In one of the early decisions on proportionality in

disciplinary action, the oppressive nature of the order, in the sense that the penalty did not suit the offence, was recognized. However, the "lens" or the test used was that employed in judicial review of executive action, i.e that where the action is such that no reasonable person, faced with similar facts, would have decided so. It was held in *Ranjit Thakur v Union of India* AIR 1987 SC 2386 that:

> *"But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. In the present case, the punishment is so stringently disproportionate as to call for and justify interference."*

Proportionality of the sentence or disciplinary order was explained to mean that the adverse order is not *"commensurate with the gravity of the charges"* proved (Ref. *V. Ramana v Andhra Pradesh State Road Transport Corporation,* AIR 2005 SC 3417; *State of Meghalaya v Mecken Singh N. Marak* AIR 2008 SC 2862).

27. Commenting on the need to take commensurate or adequate measures when an employee is found guilty of sexually harassing a co-worker, this court had observed, in *Samridhi Devi vs Union Of India* 125 (2005) DLT 284, as follows:

> *"32. Vishaka and its subsequent application, by the Supreme Court, in the Apparel Export Promotion case, were aimed at ensuring a workplace safe from sexual harassment, and*

protection of female employees from hostile circumstances in employment, on that account. The elaborate guidelines, evolved and put in place were a sequel to the court's declaration of law that such gender based unacceptable behavior had to be outlawed, and were contrary to Articles 15(1) and 21 of the Constitution of India. The declaration took note of provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979. The Committee on the Elimination of Discrimination against Women (CEDAW), set up under the Convention, adopted in January 1992 General Recommendation No. 19 on violence against women. Paras 17 and 18 recognized the ill effects of sexual harassment at the workplace, and subsequently provided for measures, to be taken by respective states for elimination of such practices. Such practices have to be outlawed not only because they result in gender discrimination, but also since they create a hostile work environment, which undermines the dignity, self-esteem and confidence of the female employees, and tends to alienate them. The aim of the Supreme Court, while evolving the guidelines in Vishaka was to ensure a fair, secure and comfortable work environment, and completely eliminate situations, or possibilities where the protector could abuse his trust, and turn predator.

33. In the United states of America, Congress had enacted Section 703, Title VI of the Civil Rights Act, 1964, to address the issue of sexual harassment at the workplace; one of the first cases to be decided by the US Supreme Court, was in the year 1986, i.e Meritor v. Vinison 1986 (477) US 57. Australia has enacted the Sex Discrimination Act 1984; the United Kingdom enacted the Sex Discrimination Act, 1975, and also framed the Sexual Discrimination and Employment Protection (Remedies) Regulations, 1993. All these measures are functional, and there is considerable body of case-law on various nuances of the issues.

34. The courts, specially in the United States, have been willing

to intervene on a range of issues and complaints, including inadequate response or action by the employer, resulting in liability. Thus, it has been ruled in some decisions (Ref Ellison v. Brady 924 F. 2d 872 [1991], Fuller v. City of Oakland 47 F.3d. 1522 [1995] and Yamaguchi v. Widnall 109 F.3d. 1475 [1997]) that appropriate remedial and corrective action includes measures reasonably calculated to end current harassment and to deter future harassment from the same, or other offenders. The 9th US Court of Appeals, in Yamaguchi's case (supra) summarised the position as follows :

"An employer is liable for a co-worker's sexual harassment only if, after the employer learns of the alleged conduct, he fails to take adequate remedial measures. These measures must include immediate and corrective action reasonably calculated 1) to end the current harassment, and 2) to deter future harassment from the same offender or others. Fuller v. City of Oakland, Cal., 47 F. 3d 1522, 1528 (9th Cir. 1995) (citing Ellison v. Bardy, 924 F.2d 872, 882 (9th Cir. 1991). In Ellison, this court held that to avoid liability an employer must take at least some fort of disciplinary action against a harassing co-worker in order to prevent future workplace sexual harassment. Intekofer v. Turage, 973, F.2d 773, 777 (9th Cir, 1992); Ellison, 924 F.2d at 881-82 ("[employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment" and "{e}mployers have a duty to `express{} strong disapproval' of sexual harassment, and to `develop {} appropriate sanction' . "(quoting 29 C.F.R. S 1604.11(f) ; see also Fuller, 47 F.3d at 1529. Failing to "take even the mildest form of disciplinary action" renders the remedy insufficient under Title VII. Ellison, 924 F.2d at 882. Page 1968 The adequacy of the employer' response depends on the seriousness of the sexual harassment. Id."

35. The objective of putting in place guidelines in Vishaka was to ensure that the workplace was rendered safe, and assure other female employees that in the event of similar future behavior, the employer would take prompt and serious action.

In that sense, the requirement of taking action is not merely subjective to the incident, or facts of a case, it is to comply with, and sub-serve a wider societal purpose."

This court thereafter concluded as follows:

"38. The debate or discourse on proportionality thus incorporates, as an essential element, the weight, undue or otherwise given to one or the other relevant factor. If the order gives excessive weight to one consideration, to the point of ignoring all other factors, the manifest imbalance results in a disproportionate order.

39. There is no gainsaying the importance of displaying sensitivity while considering appropriate penalty for a proved misconduct of sexual harassment. The measure adopted by the employer has to not merely be subjective, unlike other instances of misconduct; it services a wider purpose of assuring a safe workplace, and signals the willingness of the employer to address such issues with seriousness and promptitude. This consideration can never be overlooked in such cases. A reading of the appellate authority's order, however shows that it considered only the adverse impact of a dismissal order upon the fourth respondent. That is no doubt a consideration, but it cannot be the only factor. The impugned order is therefore, disproportionate."

28. Having regard to the above and the findings recorded earlier about the report of the CoI and the nature of administrative action imposed on the contesting respondents, this court holds that the action against the contesting respondents IC-33450X Brigadier (now Major General) DL Choudhary (Retired), i.e *"Counselling in writing by the General Officer Commanding, Uttar Bharat Area";* IC-37570N Colonel (now Brigadier) Rajesh Anand (i.e *"Reproof" be administered by the General Officer Commanding, Uttar*

Bharat Area") IC-55409F Major (now Lt. Colonel) Kartikeyan Rao (*"Censure be awarded at the level of the General Officer Commanding, Uttar Bharat Area")* and JC-489654 Subedar Ravinder Singh (*"Censure be awarded at the level of the General Officer Commanding, Uttar Bharat Area")* is incommensurate, inadequate and, therefore, not in proportion to the gravity of the acts of omission they were held guilty of. The administrative orders issued against them are consequently set aside. The Army authorities are directed to initiate appropriate disciplinary action in regard to the said respondents' inaction and omission, within 6 weeks from today. The proceedings so initiated shall be conducted and concluded expeditiously, preferably within 4 months from today. The disciplinary action recommended against the other contesting respondents, if not finalized as of now, shall be concluded as early as possible; within 3 months.

29. It is also necessary to record here- with some regret- that the pleadings of the Army, in this case, were combative and adversarial. References to the petitioner and her husband (a serving Army officer) more often than not had an accusatory note. At no point of time does the Army appear to have thought it appropriate- as an institution – to extend sympathy. The report of the second CoI clearly brought out culpable omissions on the part of Army officers, who were able to get off lightly, thanks to the impugned action; yet, no one within the organization thought it fit to write a line of apology to the grieving parents. *"Apologizing does not always mean you're wrong and the other person is right. It just means you value your relationship more than your ego."* (Mark Matthews). In this litany of errors- of broken safety pins, of defective half harnesses, of absent doctors and inexperienced officers, what was lost, tragically, was a young life- irreplaceable by any account and

un-compensable by any standard. This Court had earlier thought it appropriate that, irrespective of the outcome of the case, the Army, at the highest level, in its response to the unfortunate incident, provide a healing touch to the petitioner. The Chief of Army Staff was requested to look into the matter. However, what was tendered was a letter of condolence without any indication of an apology. Would it then have mattered if the Army had officially said *"Sorry"*. It is time for all of everyone to move forward – beyond egos, beyond perceptions of "propriety" (whatever that means in such cases) and *as institutions, to reach out to those with hurt feelings.* Doing that shows humaneness, - and courage; stony silence is not machismo. It is hoped that this is a wake-up call for the Army to take remedial measures in such cases.

30. The writ petition is allowed in the above terms. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JULY 19, 2016