

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

Reserved on : 21.04.2016
Pronounced on: 02.05.2017

+ **W.P.(C) 3414/2013**

SANJEET SINGH KAILA

..... Petitioner

Through: Sh. Bharat. S. Kumar, Ms. Julien George
and Sh. Sai Deepak, Advocates.

Versus

UNION OF INDIA AND ANR.

..... Respondents

Through : Sh. Akshay Makhija, CGSC with Sh.
Sanjugeeta Moktan, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

%

*“....There is honor in A Soldier you hear it when he talks.
There is courage in A Soldier you can see it in his eyes,
There is loyalty in A Soldier that he will not compromise.
There is something in A Soldier that makes him stand apart,
There is strength in A Soldier that beats from his heart.
A Soldier isn't a title any man can be hired to do,
A Soldier is the soul of that man buried deep inside of you.
A Soldier's job isn't finished after an 8 hour day or a 40 hour week,
A Soldier is always A Soldier even while he sleeps.
A Soldier serves his country first and his life is left behind,
A Soldier has to sacrifice what comes first in a civilian's mind...”*

-Angela Goodwin

1. The petitioner, an air warrior holding the rank of a Wing Commander in the Indian Air Force, sues the Union of India through the Ministry of Defence (MoD- hereafter called “UOI”) and the Hindustan Aeronautics Ltd. (HAL) under Article 226 of the Constitution of India, claiming directions towards appropriate relief for infraction of his fundamental right to life under

Article 21 of the Constitution of India. He sustained injuries while bailing out of a fighter aircraft, whilst on duty as a fighter pilot in a MiG 21 aircraft.

2. On 4th January 2005, whilst on a routine training sortie, the petitioner's MiG 21 (T-75) burst into flames soon after take off; he bailed out after all responses to save the aircraft failed. The aircraft crashed over Nal Air Base. The petitioner ejected only seconds before the aircraft hit the ground but not before he managed to steer it away from human habitation, saving several lives in the process. The petitioner sustained injuries, which progressed into a condition called Cervicalgia, forcing him into a medical category lower than the one that was required of him to continue as a fighter pilot. He sues for compensation and an apology from the UOI and HAL. He bases this claim *inter alia* on his knowledge, ascertained through RTI applications filed in 2012 and 2013, that the cause for the accident was poor workmanship on the part of HAL, resulting in a fatigue crack, fatal to the aircraft. He claims therefore, that the lack of airworthiness of the aircraft, induced by purely human factors, resulted in, violation of his right to life under Article 21 of the Constitution, more specifically, his right to work in a safe environment.

3. The petitioner is an experienced pilot, now posted as a Commanding Officer of a National Cadet Corps squadron. HAL is one of the largest Aerospace companies in Asia. Founded in 1964, it is primarily involved in the aerospace industry with its primary activities including, but not limited to manufacturing and assembling of aircrafts, navigation and related communication equipment, as well as airport operation. The UOI administers, through the MOD, and supervises all agencies and functions relating to national security and the Indian Armed forces. The MoD is tasked

to obtain policy directions from the UOI on all defence and security related matters and communicate with them for implementation to the Services Headquarters, Inter Services Organizations, Production Establishments and Research and Development Organizations. The MoD has to ensure effective implementation of the UOI's policy directions and execution of approved programmes within the allocated resources. The IAF consistently relies on HAL for manufacture, assemblage and maintenance of its aircrafts. HAL, one of the primary aerospace companies which supplies aircrafts to the IAF, provides manufacturing/maintenance services to the IAF, in terms of its requirements, so as to not only help the IAF in maintaining a war ready fleet of aircraft, but also in preserving the safety of the pilot flying the sophisticated yet robust flying machines.

4. The incident leading to the present petition occurred on 04.01.2005 when the petitioner embarked on a regular flight exercise along with three other pilots. Immediately after take-off and upon retracting the under-carriage, he experienced a drift¹ to the left side of the aircraft. Simultaneously he was informed by his wingman², of a fire at the rear end of his aircraft, which he saw from his rear view periscope. Assessing the emergency, the petitioner carried out all the Standard Operating Procedures (hereafter referred to as SOP). He then directed the second aircraft to deviate away from him, activated the on-board fire-extinguisher got out the aircraft wheels and attempted to turn towards the runway for a reciprocal landing. Realizing that the aircraft was completely uncontrollable, the petitioner determined that he could survive only if he were to eject. He however stayed

¹ An aircraft "drifts" from its planned course either due to strong wind, or other factors: (<http://en.mimi.hu/aviation/drift.html>)

² the pilot flying the second aircraft

within the aircraft so as to be able to wrangle it away from a densely populated village, ejecting only 1.5-2 seconds before the aircraft hit the ground, about 300 m above ground level (AGL).

5. As a result of the manner in which the ejection took place, the Petitioner suffered physical injuries; he was hospitalized and remained inactive between 04.01.2005 and 11.01.2005. Upon his release, the petitioner continued to serve as a fighter pilot for 9 months, enduring excruciating pain 5-6 hours after each flight. Finally on 07.11.2005, he was forced to report sick due to the severity of the pain. A comprehensive medical examination followed, which revealed that he was suffering from Cervicalgia³. Furthermore, a scrutiny of his MRI report, conducted on 27.01.2005, revealed disc bulges of the 4th, 5th, 6th and 7th vertebrae (cervical spine), caused on impact during the air crash. The medical report stated that the disability was suffered during the course of *bona fide* service, and in circumstances that were not within the pilot's control or were wholly outside his control. It also stated that the petitioner was unfit to continue with his existing flying duties which was directly attributable to the incident. Apparently, the injury was of such nature that it impeded the petitioner's ability to perform everyday tasks. The petitioner was shifted to a non-flying category until September 2007. Following this he was permanently placed in the lower medical category by the IAF since late August 2007. The relevant portions of the medical report and observations are extracted below:

³Cervicalgia is a term used to describe pain or significant discomfort in the neck, particularly the back and/or sides. Another way cervicalgia is described is as intense forms of pain that localized to the region of the cervical spine. <https://www.verywell.com/cervicalgia-definition-296573> accessed on 26-01-2017 at 15:14 hrs.

“(i) Opinion of concerned specialist

OPINION OF WG. CDR. PK TYAGI MD DBN MNAMS

CLASSIFIED SPECIALIST AVIATION MEDICINE 46WG AF DT 10 JAN 05

This 34 Yrs Old Fighter pilot ejected from MIG 21 BIS Type 75 aircraft on 04 Jan 05 at around 1036 Hrs.

The officer was hospitalized and investigated at 187 MH in accordance with IAF 4303 (3rd Ed) par 6.9.6(a), (b), (c). Radiographs of the entire spine and both feet revealed no bony injury. The officer was discharged from 187 MH on 07 Jan 05.

His appointment for MRI has been asked from AH (R&R) so that he can be reviewed at 1AM after 06 weeks.

O/E:	General Examination	Height : 174 cm Ideal Weight: 67.5 Kg, Overweight by : Nil BMI: 24.33 Kg/M ² Waist circumference: 89 cm Waist to Hip Ratio: 0.90 Pulse: 84/m BP: 130/88 m of Hg (RA sitting Casual)
Relevant Systemic Exam.	Spine:	No tenderness, deformity, swelling. No paraspinal spasm Movement full and free
	CVS:	NAD
	CNS:	No neurological deficit
	Resp: Abd:	NAD
Invesigations:	X-Ray:	LS Spine/Dorsal Spine – NAD Cervical Spine – NAD Both Heels-NAD
		CT Scan Cervical Spine & D11 to L2- Normal Study

--	--	--

In view of the above the officer is placed in LMC A4G4(T-06 weeks) in accordance with IAP 4303 (3rd Ed) para 6.9.6(d). Next review at 1 AM, IAF with MRI Spine after 06 weeks.

Sd/-xxx

(PK Tyagi)

Wg Cdr

Cl. Spl. Av Med

(k) Recommendations of Medical Board

In view of the above it is recommended that the officer be placed in low medical category A4G4(T-06 Weeks). Next Review at 1 AM IAF.

Adv:- Not to lift weight.

i. - Not to run or jump.

Sd/- (A. Bhardwaj)

Flt. Lt

Medical Officer

46 Wg, AF

Member

Sd/- (B.K. Dehuri)

Wg. Cdr

Sq.Commander Med. Sqn

46 Wing, AF

President

Place: 46 Wg AF

Date: 10 Jan 05"

6. The relevant extracts of the opinion of the medical expert Wg. Cdr. N. Taneja, Classified Specialist (Av Med) at 1 AM IAF dated 30th August, 2007 after the examination of the petitioner is reproduced below:

"37 year old aircrew from fighter stream

Post ejection cervicalgia (Ejection Jan 05)

Unable to withstand G stress

Rec A3G3 (T-12) fit transport aircraft/gliders during last review at IAM in Jun 07.

Has reported for review with executive report on flying.

Remains asymptomatic on ground and physically active. Locomotor system – Cervical spine – No deformity/swelling

- *Para spinal tenderness present*
- *Movements full and free*
- *No sensory neurological deficit*
- *Hand grip adequate*

Executive report on flying dated 14 Aug 07 on 2 hours sorties on AN-32 and 45 mins on gliders satisfactory.

MRI Cervical spine in Dec 05. Bulge C4-5 C5-6 C6-7 discs indenting CSF space. No cord or root compression.

This aircrew has recovered adequately for restreaming to transport/gliders aircraft.

Executive report on flying is satisfactory.

Present evaluation reveals no deficit.

Recommended medical category A2G1(P) (fit transports, unfit for fighters/helicopters).

Sd/-

(N TANEJA), WG CDRCL SPL (AV MED)

I AM IAF”

7. After the crash, the IAF conducted an inquiry along with HAL to identify its cause. Extensive investigations by the IAF revealed that the incident was caused due to the development of a fatigue crack in the welded portion of the After Burner manifold leading to a fire in the aircraft. This

revelation came to the knowledge of the petitioner only through replies to consecutive RTI applications in 2012 and 2013 dated 14.08.2012 and 06.03.2013 respectively. The replies to the RTI applications revealed that no part in the ill fated mishap was attributed to pilot error; it was consistently expressed that the petitioner was alert to the emergency, recognized it and took appropriate action in terms of the SOP, *as well as displayed good airmanship by continuing to turn away from a nearby village*. As far as the cause for the accident was concerned, the reply attributed it to poor workmanship and a manufacturing defect, both the responsibility of HAL. The conclusions of the Court of Inquiry had also reached the same consensus wherein it placed the onus of the crash on HAL.

8. Subsequently, on 25.12.2012, the petitioner represented to the UOI through the MoD seeking compensation for the loss he had endured as a result of the air-crash. The representation went unanswered, following which the petitioner sought response by reminders dated 29.01.2013 and 06.03.2013. Despite these, no response was received. As a result, the petitioner approached this court under Article 226 of the Constitution of India.

9. The relevant portions of the findings of the Court of Inquiry, which were produced by the UOI, as to the causes of the mishap, were that

“likely cause of fire was gushing out of unatomised fuel under pressure from the failed nozzle of AB manifold at 3 O’clock position, after the engagement of afterburner. This fuel caused localized burning: jet nozzle at 3 O’clock area leading to tearing of antivibration heat shield at elevated temperature. Streak marks were seen on 3 O’clock area of jet pipe during the wreckage examination. Further an opening of 40 mm diameter was made in inner heat shield due to dislodgement of material

because of localized heating. This caused venting of flames from the hole on to the starboard stabilizer at frame No.34A. This caused a drag force reported by the pilot after take off as well as caused the ac to roll to the right. Venting of flames caused burning of stabilizer and aircraft skin on starboard side. This was witnessed as sparks by witness no.2 since stabilizer skin and adjoining RF skin is made of duralumin alloy. Secondary fire spread along the starboard side of fuselage from frame no.34 A to frame No.28, where fire sensors are located, causing the fire warning light and audio warning to come on. At the same time both hydraulic warning lights also came on due to rupture of hydraulic reservoir located at frame no.28. During the secondary fire, starboard flap trailing edge located at frame no.28 also got burnt at the root.

12. Due to localized burning of unatomised fuel an additional flame was observed coming out of the afterburner and the same was corroborated by the statements of witness nos. 3 and 11.”

The findings also recorded the following, in the conclusions:

“Why it happened

4. After engagement of afterburner, one of the afterburner manifold nozzles at 3 o'clock position had fatigue failure causing gushing out of unatomised fuel under pressure. This resulted in excessive heating in the 3 o'clock position in the jet pipe and a prominent after burner flame witnessed from the ground. Due to elevated temperature and localized heating, the antivibration heat shield (150x35 mm) got dislodged leading further to creation of a 40 mm diameter hole in the heat shield. The stainless steel outer heat shield got melted causing the afterburner flame to exit from the hole at 3 o'clock position which was experienced as a force by the pilot which pushed the ac to the left after take off. This flame caused the starboard stabilizer to catch fire which was seen as bright sparks due to alloying element content of duralumin material of stabilizer and

rear fuselage skin. Secondary fire spread on the right side of the fuselage from frame no.34A to 28 causing fire warning light to come on. It is assessed that hydraulic reservoir burst due to fire causing both hydraulic warning lights also to come on simultaneously since only main system pressure and return lines are present on the right hand side of the ac between Frame nos. 34A and 28.

How it happened

5. The engine had completed 1107 h of its total life of 1200 h. The nozzle of the after burner manifold failed due to fatigue close to completion of its total life. Cause of fatigue could not be determined during lab tests. Due to the damaged condition of after burner manifolds after the accident, it was not possible to determine whether the failed nozzle belonged to main or additional after burner manifold, but it was determined that it was originally located around 3 o'clock position. This fatigue failure of afterburner manifold occurred 246:45 h after the X-ray and dye penetrant check during the last overhaul at HAL.

6. Sabotage. The element of sabotage as a contributory factor is ruled out as there is no evidence to suggest the same.

7. The category of damage to ac C-2236 and aero engine is Cat. E. The cost of damage is provisionally assessed as Rs.4,40,37,250 (Rupees four crore forty lakh thirty seven thousand and two hundred fifty only). The provisional loss statement is attached at Appendix 'J'.

8. The cost of damage to flying clothing is assessed as Rs.37604 (Rupees thirty seven thousand six hundred and four only). The provisional loss statement is attached at Appendix 'K'.

9. The cost of damage to navigation inventory items is assessed as Rs.23,760 (Rupees twenty three thousand seven hundred and sixty only). The provisional loss statement is attached at appendix L.

10. Safety services. The reaction of the safety services was

not as per plan. There was no SFS&IO posted at the time of the accident. COO, DMO and Sqn pilots reached the site individually and independently. Shifting of the pilot to MH Bikaner from the crash site was done promptly. Better communications and mobility are required for more effective search and rescue.

11. There has been no damage to any civilian life or to any civilian property. The no claim certificate and FIR are attached at Appendix M.”

“RECOMMENDATIONS

1. Fatigue failure of AB manifold nozzle occurred despite incorporation of X-ray and dye penetrant check. Feasibility of ultra sound crack detection check during overhauls, to determine presence of micro cracks may be examined by HAL.

2. Improvement of welded joints of AB manifold nozzles through suitable change of material/technology to be considered by HAL Koraput.”

10. The petitioner also complains that despite his medical downgrading and complete change in the direction of his career, as it is no longer possible for him to continue flying combat aircraft and indeed flying is painful and furthermore, despite the mental agony and trauma undergone by him, the respondents have not compensated him. It is urged that after the replies to the queries under RTI were forthcoming, the true nature of the negligence of the respondents and their attempts to cover up the issue have become apparent. It is argued that the absence of any scheme to compensate its officers, by the MoD- in its various forces for what are clearly injuries that occur due to the fault or negligence of its maintenance or standard of workmanship, the state should be held responsible and directed to pay compensation. During the hearing the court had required the parties to file an affidavit as to the nature

of insurance coverage which the IAF or MoD had undertaken for the petitioner. In his affidavit, the petitioner has stated that soon after his induction, he joined the *Air Force Group Insurance Society (hereinafter referred to as "AFGIS")* as a member and has been paying premium. He also states that he

“paid a total sum of Rs.6,07,095/- as premiums for the policies undertaken by me over the past 25 years. I say that I am currently contributing Rs.4485/- per month towards the insurance policies of AFGIS.”

The coverage is 45% of the risk element and 55%, is the saving element. The risk element is forfeited and only the savings element is retained. In the event of death the sum paid would be ₹ 60 lakhs + the survival benefit (SB); for 100% disability it would be ₹ 30 lakhs + SB; 50% disability the sum is ₹ 15 lakhs + SB; 20% it is ₹ 6 lakhs + SB and less than 20% no amount is paid. He also avers that his

“disability, despite being degenerative in nature, does not fall in any of the categories enumerated by the insurance schemes of AFGIS, I am at presently not eligible to attain any compensation from any of the policies I have undertaken. I further say that the UOI has, to the best of my knowledge, not taken any insurance policy for me.”

11. The MoD in reply to the above concedes that the group insurance benefits are payable in the manner indicated by the petitioner and also states that he is a member of the Flying Pay Linked Insurance Scheme 14, which would recompense loss of flying pay. However, since his determined disability is less than 20% no benefit is payable to him. It is stated that only if an officer becomes permanently unfit for flying duties would he be eligible

for *ex-gratia* compensation of ₹ 7500 per month for 36 months and that since in his case, it did not cease, that payment stoppage did not take place.

Contentions of the Petitioner:

12. The core basis for the petitioner's claim for compensation and his primary argument is that his right to work in a safe environment, an un-enumerated but integral component of the fundamental right to life and liberty under Article 21 of the Constitution has been violated by the Respondents. To stress upon the inviolability of the right, learned counsel for the petitioner Mr. Bharat Kumar relies upon *Vishakha v. State of Rajasthan* AIR 1997 SC 3011 which held in express terms that "*the fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe working environment"*". In the context of how this right is triggered in this case, it is submitted that "*safe environment*" would extend to the *equipment supplied* to the Indian Armed Forces, the maintenance of safety standards including in repairs and handling of equipment by its personnel. While a member of the Armed Forces ungrudgingly consents to the risk that comes with his enlistment in the forces, this does not justify providing personnel with poor equipment and resultantly negligently putting them in harm's way. In other words, a willingness to live with the risk that comes naturally with the job does not negate the responsibility and care owed towards members of the Armed Forces of the State.

13. It is submitted that the duty to protect a soldier's life, places an obligation upon the respondents to take all reasonable steps to prevent manufacturing and technical snags. It is also submitted that even from a larger perspective, any defective defence equipment handled and operated by

the forces places them not only in danger but also significantly endangers and jeopardizes the security and defense preparedness of the nation. In this regard *R (On the application of Smith) v. Oxfordshire Assistant Deputy Coroner* [2008] EWHC 694 is relied upon. Learned counsel also argues that the petition is not covered under Section 27 of the Air Force Act, 1950. Counsel argues that Section 27 requiring a complaint to be made to the Central Government first, operates merely against a generic wrong committed by a superior officer/Commanding Officer against an officer and not necessarily and specifically a fundamental right.

14. To establish that the culpability of the accident lay with the respondents learned counsel relies on the Court of Inquiry report and the replies to the RTI applications filed by the petitioner. It is submitted that pursuant to the crash of the MiG 21 aircraft, an extensive inquiry was undertaken involving both the IAF officials and HAL. The CoI proceedings took note of not only the complete range of technical parameters but also interviewed and sought corroboration from witnesses. As far as the RTI applications are concerned, learned counsel submits that the replies received without exception attributed the cause of the accident to HAL. Notably though, the second reply dated 09.04.2013, stated that HAL was yet to accept responsibility of the manufacturing defect.

15. Countering the respondent's objection that the writ petition was inordinately delayed, it was argued that it was only when the petitioner received a reply to his RTI application on 04.06.2012 did he become aware of the fact that there was an avoidable manufacturing defect in the aircraft introduced as a result of the poor workmanship of HAL. Upon this knowledge, the petitioner sent a representation dated 25.12.2012 attributing

HAL's responsibility for the crash on HAL. The petition was filed immediately after he realized that no reply was forthcoming from the respondents. It was further submitted that the period of "delay" as such did not create any rights in favour of the respondents or any other third party, nor did it alter the position in any manner. The petitioner cited *M/s Dehri Rohtas Light Railway Company Ltd. v. District Board, Bhojpur and Ors* (1992) 2 SCC 598 and *Shankara Co-op Housing Society Ltd. v. M. Prabhakar & Ors* (2011) 5 SCC 607.

16. Finally, learned counsel stressed upon the impact the crash has had on the petitioner's life. He argued that the permanence of the injury caused by the crash has resulted in altering the trajectory of his service, specifically, that he is no longer fit to be a fighter pilot and can consequently not be the Commander of a Fighter Squadron. This post of Commander it is argued is essential to proceed to even higher operational posts within the Air Force. Beyond the Air Force, learned counsel also submits that the petitioner shall now also miss out on his prospects as a civil aviation pilot post retirement, a lucrative and often common option for air force pilots once they retire. It was held in *D.K. Basu v. State of West Bengal* AIR 1997 SC 610 that compensation is an acknowledged remedy for the enforcement of fundamental rights.

Contentions of the Respondents:

17. Learned Counsel for the respondents do not oppose the assertion that the right to life under Article 21 includes within its fold, the right to work in a safe environment and that the petitioner is entitled to such right, but instead argues that there has been no infringement of this right in the present case. The essential basis for this contention, counsel argues, is that the petitioner is

a fighter pilot in the Air Force and therefore is instrumental in the carrying out of the sovereign function of the State i.e. the defend the nation and her boundaries. Learned counsel argues that implicit within such a job, is the risk of an accident, a risk that was voluntarily taken up by the petitioner. In such a situation, an accident, which occurs in the line of duty cannot be equated with an act of negligence on the part of the respondents. Learned Counsel further states that it is incorrect and unfair for the petitioner to aver that no accountability was affixed to the crash. An elaborate CoI determined the cause of the crash and served as the launch-pad for remedial measures to prevent the recurrence of such an accident. Learned counsel further states that the Union takes all possible precautions to provide to its Armed Forces the best possible equipment and environment within which those enlisted under it are able to effectively and safely perform their duties. Despite this, when accidents like the one described here take place, it must be attributed to a manifestation of the inherent risk of flying and not any lack of care on behalf of the Union.

18. It is possible during flying that any instrument or equipment may fail due to various reasons. It is submitted that such failure does not ipso facto involve violation of any fundamental right. It is nevertheless also submitted that remedial measures following the crash were taken, including the implementation of a dye-penetrant check at the base of the spokes of the afterburner manifold, replacement of the entire sector of the afterburner manifold in the event a crack is detected, and proper stowage of after burner manifolds on hangars after quality assurance checks have been completed prior to installation on the engine.

19. On the question of lost opportunities of the petitioner as a result of the injuries sustained in the crash, learned counsel states that the petitioner repeatedly turned down the opportunities presented to him. Learned counsel submitted that the petitioner refused to undergo an FCL course, thus denying himself a qualification which had a direct impact on his career progression. Additionally, the petitioner also refused to convert to transport aircraft or the SAGW stream. The Union also submits that the petitioner had been performing well in the cockpit and underwent the course for becoming a 'Qualified Flying Instructor' successfully. The petitioner however, of his own volition, unrelated to his health, opted out of the course of 'Fighter Combat Leader' citing reasons of his wife's health. He further declined a posting into the SAGW stream and a shift to transport aircraft. This, the Union asserts, clearly reveals that the petitioner opted out of important opportunities for career progression within the mainstream (combat units) of the IAF. It is submitted that the ejection has not hampered the petitioner's promotional prospects since he had regained the medical category for eligibility for promotion to the rank of Group Captain. The Union relies upon the medical examination conducted in December 2006 and November 2007 which while declaring him permanently unfit for fighter jets/helicopters, stated that he was fit for transport and gliders.

20. Plainly stating that the petitioner can no longer follow the roadmap to higher posts as was originally intended by him is not reason enough to conclude that the petitioner will forever be barred from progressing further. There is no dearth of cases where pilots, even after ejections, have been promoted to the highest ranks on the sheer strength of their performances in their re-assigned tasks.

21. Learned counsel for HAL supplemented the UOI's argument. It was submitted that the petition was not maintainable in light of Section 27 of the Air Force Act which necessitates a complaint to the Central Government in the event an officer finds himself, in his opinion, to have been wronged by his superior or Commanding Officer. Further echoing the argument of the Union that a pilot consents to the risks that come with flying, learned counsel submits that HAL manufactures the aircraft according to the specifications given by the Government of India and at the very maximum, it is the Air Force and by extension the Government that is liable for any mishap that may occur, and not HAL.

22. On the point of the responsibility for the crash, HAL makes a distinction between the kind of repairs HAL and the Air Force is responsible for. HAL highlights its responsibility pertaining to the aircrafts begin and end at 1) manufacturing the aircraft, 2) supplying the same to its end user, Indian Air Force, based on the work order placed by Ministry of Defence, 3) provide repairing and overhauling service for the aircraft supplied, 4) and repair/rectify/replace the parts during the warranty period. At the time of handing over of the aircraft, a battery of tests are performed to check its fitness. Only after the Air Force fully satisfies itself as to the airworthiness of the aircraft does it accept possession of it. Counsel for HAL submits that with particular reference to the aircraft that crashed, the Air Force did not raise any complaints. Neither was any crack noticed during the last overhaul of the After Burner (AB) manifold. It is hence, incorrect to attribute poor workmanship to HAL. HAL submits that the day-to-day servicing and maintenance of the aircraft is the responsibility of the Air Force and is undertaken by them as detailed in the Preventive Maintenance Scheduler for

MiG 21 T-75 Manual. 21. HAL specifically denies that it provides maintenance services with respect to the aircrafts and is responsible only to the extent of overhaul at scheduled intervals. HAL further submits that the time specified between engine overhauls is 400 hours, of which the aircraft involved in the crash had done 246:45 hours. There was no intimation by the Air Force that there were any noticeable cracks in the afterburner manifold that could be attributed to the poor workmanship of HAL. HAL further submits that the CoI report is based merely on assumptions and hence cannot conclusively affix any liability upon HAL. The said aircraft if at all had a crack would not have been cleared for takeoff and would not have flown 246:45 hours before the crash. It is right in saying that any soldier voluntarily accepts the risks and sacrifice that comes with being a soldier. Therefore, the petitioner's fundamental right to work in a safe environment is not violated and hence the writ petition is not maintainable before the Court and must be dismissed. Section 27 of the Air Force Act read with Regulation 622 gives the petitioner an alternate and first platform redress for his grievance.

23. It is also submitted that the CoI report nowhere attributed any fault or omission on the part of the HAL. Counsel stressed the fact that the presentation of the report subsequently and the inclusion of some observations attributing HAL's fault was protested by it, when the minutes of the meeting dated 13-07-2005 were made available to it. In the absence of any material or evidence, those observations were surmises and did not enable the petitioner to rely upon them to cast liability. In any case, the questions urged and the basis for compensation are disputed questions; the

CoI did not attribute any omission or fault or wrongdoing to the HAL; it cannot therefore be made liable for compensation.

24. The HAL even suggests that the petitioner's medical category is on account of his age! (at the time of the injury, he was 34 years) and avers that:

“It is further submitted that the petitioner is trying to camouflage his own fault and negligence by naming his delay in approaching the medical board as motivation to serve the country. It is further submitted that had the petitioner acted prudently and diligently in reporting his condition to the medical board, he could have been treated well enough to recover from the pain and therefore could have served the country for a longer time.”

Counsel also pointed out that the discretionary jurisdiction under Article 226 of the Constitution should be exercised judiciously and only in clear cut cases where infraction of any Fundamental right or violation of a statutory obligation is apparent, and wherever the facts do not point to convincing proof, the courts should not award compensation in exercise of public law jurisdiction. In support of this proposition, learned counsel relied on the judgment in *Rabindra Nath Ghosal v. University of Calcutta* (2002) 7 SCC 478; *S.P.S. Rathore v State of Haryana* 2005 (10) SCC 1; *Sube Singh v State of Haryana* AIR 2006 SC 1117; *Rajender Singh Pathania v State (NCT) of Delhi* 2011 (13) SCC 329. It was also argued that the courts should not ignore self-imposed constraints such as the doctrine of laches or territorial limitations while exercising powers under Article 226 of the Constitution of India. Reliance was placed on the decision reported as *Kusum Ingots and Alloys Ltd. v Union of India* AIR 2004 SC 2321.

Analysis and Conclusions:

25. The first objection of the respondents was Section 27 of the Air Force Act. This provision, in the opinion of the court, in no way precludes the maintainability of the present petition. It only obliges an IAF officer to seek redress for his grievances by complaining to the Central Government in an appropriate procedure if he upon "*due application made to his commanding officer does not receive the redress to which he considers himself entitled*". There is no bar to approaching the court; nor indeed can there be preclusion of a public law remedy under Article 226 of the Constitution of India. Therefore, the respondents' arguments on this score are insubstantial. HAL's argument that the petitioner's injuries are not relatable to, or attributable to the incident, is clearly misconceived; the medical reports on record consistently talk of his injuries being "*Post ejection cervicalgia*". The IAF has also certified that the injuries which were sustained at the time of rendering official service, were attributable to a fault in the equipment due to poor workmanship; more importantly the CoI clearly records that the petitioner adopted all the standard operating procedures and was completely absolved of blame. To this extent the petitioner has submitted the minutes of the meeting of the presentation of the CoI report before officials of the IAF as well as HAL, dated 21.07.2005 and has also provided a copy of the remarks dated 29.07.2005 made by the Chief of Air Staff with respect to the incident, both of which have been considered by this Court. Pertinently, both the documents attribute the accident to poor workmanship. In this background, therefore, HAL's arguments on this score – especially contributory negligence by the petitioner and injuries not being on account of the crash, are factually baseless; they are consequently rejected. As to the

issue of laches and territorial jurisdiction, the court notices that the petitioner became aware of his permanent medical downgrading only in 2007. The respondents never thought it fit to disclose the report of the CoI or the opinion to him. After his repeated efforts, the RTI query yielded a reply on 19-07-2012 that “*the cause of the accident is attributed to manufacturing defect. However, HAL has not accepted the liability as yet.*” The same reply also stated that “*the CoI final remarks mention that the pilot displayed good airmanship by continuing to turn away from a nearby village.*” In these circumstances, the question of delay in approaching the court, cannot be considered fatal to the action. As far as territorial jurisdiction goes, there is no doubt that the Nal Air Base is geographically situated in Rajasthan; the CoI proceedings too were undertaken there. However, the records of the CoI and the final decision – pursuant to the minutes of the high level meeting held in Delhi, and the Chief of Air Staff’s decision, were all taken in Delhi. The reply to the petitioner’s queries also did not emanate from Rajasthan. The enunciation of the principle in *Kusum Ingots (supra)* is not of a bar of jurisdiction, in such cases, but rather, the doctrine of *forum conveniens*. By the very rule, *forum conveniens* does not preclude jurisdiction; instead it relegates the parties to a forum, which can conveniently exercise jurisdiction over the matter. In the facts of this case, the court holds that Article 226 (2) clothes it with sufficient jurisdiction to hear and decide this case.

26. Before discussing the issues, it is imperative to first clarify the scope of this judgment. This Court is not adjudicating in any manner upon the airworthiness of MiG 21s as a fleet of aircraft enlisted in the IAF. It is, needless to say, not a question over which any court has jurisdiction to adjudicate upon. Though it is of singular importance that the equipment

which is instrumental in the protection of the borders of the nation are in turn, worthy of those who must operate them to reach that end, the courts are simply not equipped with the power or expertise to take decisions with regard to what equipment is best suited for that purpose. The outcome of this judgment must not be construed as a comment on the MiG 21 as an aircraft, its susceptibility, if any, to aerial accidents, or any structural flaws, which are the result of the design of the craft. This court covers only one question in relation to the crash of one particular aircraft, which it is alleged, was caused as a result of poor workmanship on the afterburner manifold on the aircraft and whether this lack of workmanship resulted in the violation of a fundamental right of the pilot flying the aircraft.

27. It has been argued that the events, which have transpired, have led to a violation of the petitioner's right to work in a safe environment. The fundamental right to life and liberty under Article 21 of the Constitution of India occupies a transcendental position. Over the years, the right to life has been expanded to include within its fold, various facets of what is considered to be the essential facets of a life of dignity; a life that represents the minimum that the State must ensure and seek to protect. Amongst these facets of 'life' is the right to work in a safe environment. It denotes that an individual engaged in public employment, shall at the very least, work in an environment that is secure and does not expose him to unnecessary harm.

28. Needless harm is defined by the nature of the employment itself. In other words, what is deemed 'safe' in a given 'environment' will have to be defined as those conditions, which are crucial to the overall accomplishment of the duties the public servant has been enlisted for. Therefore, the word 'safe' is not a term to be construed generically, but with deference to the

context in which it is used. The Supreme Court in *Vishakha*(supra) first declared the constitutional imperative that citizens must be safe in the environment they work in. That judgment was delivered in the context of the rampant sexual harassment of women at the workplace and the complete absence of a redress mechanism. ‘Safety’ therefore, was a function of the inter-relationship between men and women, the pressing need for gender equality and the indispensability of being cognizant of sexual harassment, along with the provision of a redress system. This principle of a safe working environment must now be contextualized with regard to the facts before this court.

29. The Union and HAL have argued that fighter pilots assent to the inherent risks of flying. In other words, this risk they incur is part and parcel of their job description. This assent therefore, absolves or rather protects the government against any liability or fault when an accident takes place. The petitioner, on the other hand, argues that this ‘assent’ does not extend to acts of gross negligence in manufacturing of aircrafts through which the life of personnel is put in danger. This Court has considered the submissions and is inclined to agree with the petitioner.

30. At first blush, the argument of the Union and HAL above resembles closely, the concept of *Volenti Non Fit Injuria*. A concept in tort law, the principle states that where the plaintiff is aware of the risk(s) of an act and assents to it regardless, any damage arising from such act, cannot give rise to a successful plea for violation of a civil right and consequently, a valid claim for compensation. This principle however comes down to a correct assessment of *what risk the plaintiff assents to, as well as the incidental and necessary and foreseeable risks that are a natural function of or related to the*

act in question. What must therefore be examined, is two-fold; first, if a manufacturing defect of the nature complained of, falls within the category of risk that a pilot assents to and second, whether the respondents owed a duty of care to avoid such a defect.

31. To digress for a moment, this Court, even at the risk of restatement, points out that our discussion is one for the violation of a fundamental right and *not a civil action for tort*. Those are distinguishable from discussions from other common law jurisdictions, which disallow tort actions by military persons against their employer, the State. Similar cases may be adverted to in defense of the proposition that a redress can only be sought through independent legislations and orders, which specifically provide for compensation and gratuity for injured military personnel in the line of duty. In the United States of America, the prime example is the *Feres* doctrine⁴, where the US Supreme Court held that the USA is not liable under the Federal Tort Claims Act for injuries to members of the armed forces while on active duty. We find the need to distinguish this for the cases wherein compensation has been claimed and denied under the Feres Doctrine bear an uncanny resemblance to the facts at hand. In *Stencel Aero Engineering Corporation v. United States* 431 U.S. 666 1977, the compensation to a National Guard officer who was permanently injured when the ejection system of his fighter aircraft malfunctioned during a midair emergency, was rejected. The *rationale* of the Supreme Court covers the availability of a claim under the Veterans' Benefit Act and the adverse effect that such claims

⁴ A doctrine that bars claims against the federal government by members of the armed forces and their families for injuries arising from or in the course of activity incident to military service; decided by US Supreme Court in *Feres v. United States*, 340 U.S. 135.

would have upon military discipline, as the trial would inevitably involve the second-guessing of military orders.

32. In the UK, the position is now different. In *Osman v United Kingdom* (1998) 29 EHRR 245 it was held as follows:

“Whenever a state undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the state’s positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events.”

33. In *Smith and others (FC) (Appellants) v The Ministry of Defence* [2013] 4 All ER 794, the facts were that a claim was made for breach of Article 2 (European Human Rights Convention embodied in UK Law, by the Protection of Human Rights Act, 1998) and common law negligence alleging that soldiers were sent out on patrol, in Iraq, in unsuitable Snatch Land Rovers that were not fitted with a piece of new equipment known as ‘Element A’, which may have helped them detect the improvised explosive device (IED) that later detonated, killing some on board. Separately, another claim was brought in regard to the Challenger tanks involved in a fatal friendly fire incident. It was claimed that they were similarly ill equipped with a device that may have helped them distinguish friend from foe. The MoD disputed the Article 2 breach on the grounds that there was no jurisdiction for such a claim, and rebuked negligence on the grounds of combat immunity. This was decisively rejected. Lord Hope, speaking for the majority of the UK Supreme Court (which overruled the claim for sovereign

immunity which had till that time prevailed in the UK, in respect of injuries of military personnel during war and like situations) said:

"Close attention must be paid to the time when the alleged failures are said to have taken place, and to the circumstances in which and the persons by whom the decisions that gave rise to them were taken. It will be easier to find that the duty of care has been breached where the failure can be attributed to decisions about training or equipment that were taken before deployment, when there was time to assess the risks to life that had to be planned for, than it will be where they are attributable to what was taking place in theatre. The more constrained he is by decisions that have already been taken for reasons of policy at a high level of command beforehand or by the effects of contact with the enemy, the more difficult it will be to find that the decision-taker in theatre was at fault. Great care needs to be taken not to subject those responsible for decisions at any level that affect what takes place on the battlefield, or in operations of the kind that were being conducted in Iraq after the end of hostilities, to duties that are unrealistic or excessively burdensome.

100. The sad fact is that, while members of the armed forces on active service can be given some measure of protection against death and injury, the nature of the job they do means that this can never be complete. They deserve our respect because they are willing to face these risks in the national interest, and the law will always attach importance to the protection of life and physical safety. But it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong. The court must be especially careful, in their case, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.

Conclusion

101. For these reasons I would allow the Snatch Land Rover claimants' appeal against the decision of the Court of Appeal that the soldiers in these cases were not within the United Kingdom's jurisdiction for the purposes of article 2 of the Convention at the time of their deaths. I would, however, dismiss the MOD's application that the Snatch Land Rover claims should be struck out on the ground that the claims are not within the scope of that article. I would dismiss the MOD's application that the Challenger claims should be struck out on the ground of combat immunity and on the ground that it would not be fair, just or reasonable to extend the duty of care to those cases. I would also dismiss the MOD's cross appeal against the decision of the Court of Appeal to dismiss its application to strike out the Ellis claim based on negligence."

Even the narrower view of Lord Carnworth held that the suit could not be dismissed on the ground of sovereign immunity, merely because the injuries or fatalities occurred during combat or war like situations:

"If as I believe the policy reasons for excluding liability are related to the special features of war or active hostilities, it would be wrong in my view to apply the same approach to peace-keeping operations, however intrinsically dangerous. The ordinary principles of negligence, as illustrated by cases such as Hughes and Rigby, can when necessary be sufficiently restrictive to ensure that most such claims, whether relating to advance procurement and training, or decisions on the ground, will be doomed to failure. On the other hand, the pleaded claims in the present cases go further. It is alleged, as I understand, that there was an unjustified failure, following earlier incidents, to take readily available steps to deal with a known and preventable risk. I would not regard such claims as necessarily excluded as a matter of general policy, either at common law or under article 2. Since all the issues will now have to be considered at trial, it is unnecessary and probably undesirable for me to say more."

34. Whilst this Court is not bound by the decisions of foreign jurisdictions, but can nevertheless use this as an instance to deter any tendency to interweave the two, i.e., *the concept of sovereign immunity from civil actions and the liability arising from the violation of a fundamental right*. The latter exists independent of an action under civil law. The State's liability therefore is of a wholly different nature. Further, the fundamental rights apply uniformly to all citizens, which includes persons belonging to the armed forces. The only exception to this is Article 33 of the Constitution, which allows the Parliament to determine to what extent the fundamental rights, may be restricted or abrogated in their application to the members of the Armed Forces. There is however, no such assertion to this effect, in the case at hand.

35. Public authority tort liability is fairly well established in our country. *Pushpa Thakur v. Union of India and Anr.* (1984) ACJ SC 559 was a case where the Supreme Court while reversing a decision of the Punjab & Haryana High Court which placed reliance on a Full Bench decision of that court in *Baxi Amrik Singh v. Union of India* (1973) PLR (75) 1 held that where the accident was caused by negligence of the driver of military truck the principle of sovereign immunity was not available to the State. *Union of India v. Hardeo Dutta Tirtharam* AIR 1986 Bom 350 was a decision where a military truck driver knocked down a Subedar; compensation was claimed. The Army claimed sovereign immunity, which was overruled. In *Union of India v. Sugrabai*, (AIR 1969 Bom 13), the sovereign immunity plea was rejected by the Bombay High Court. In that case, a military driver of a truck carrying a Records Sound Ranging machine from military workshop to military school of artillery killed a cyclist. It was held that the driver was not

acting in exercise of sovereign powers. The Bombay High Court observed in the following words:

“Sovereign powers are vested in the State in order that it may discharge its sovereign functions. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. The State would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power. But it cannot be said that every act which is necessary for the discharge of a sovereign function and which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency.”

Pushpa Thakur’s (supra) ruling was upheld in Nagendra Singh v State of AP (1994) 6 SCC 205 where it was ruled as follows:

"But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par

with any other juristic legal entity. Any watertight compartmentalisation of the functions of the State as "sovereign and non-sovereign" or "governmental or non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the 'financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation', or because of 'logical and practical ground', or that 'there could be no legal right as against the State which made the law gradually gave way to the movement from, 'State irresponsibility to State responsibility.' In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity."

36. This Court shall now, first answer the question with regard to the contention of 'risk'. To what risks does a participant in a particular activity assent to and how is that to be determined? A common example in cases of risk assessment is that of a spectator's knowledge of the risk involved in

watching a particular sporting event. In a game of cricket, for instance, an injury caused to a spectator by a stray ball slammed for a boundary will not give rise to an actionable cause as such a risk *is inherent and indivisible from the essential nature of the game*. However, in *White v. Blackmore* [1972] 2 Q.B. 651, a logical and crucial distinction was drawn. The Court stated therein:

“Thus a spectator’s knowledge that a particular sporting event involves an element of risk does not mean that he is aware of, and thereby consented to, negligence by the organisers in respect of the safety arrangements.”

Again, in *Smith v. Charles Baker and Sons* [1891] A.C. 325; 65 L.T. 467, the Court adverted to the nature and scope of the risk a plaintiff participating in an activity which causes him harm, assents to. The Court used the phrase, “*risk incident*”

“The maxim of volenti non fit injuria is based on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error. (emphasis supplied)

The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act, If he clearly foresaw the likelihood of such a result, and, not withstanding, continued to work, I think that, according to the authorities, he ought to be regarded as volens. The case may be very different when there is no inherent peril in the work

performed by the servant, and the risk to which he is exposed arises from a defect in the machine used in another department over which he has no control.(emphasis supplied)

37. In *Haseldine v. Daw* [1941] 3 All E.R. 156, the access to a block of apartments let out to tenants was by way of a hydraulic lift which remained in the occupation of the landlord. The landlord contracted with an engineering firm, to service the lift when necessary. An employee of the engineers repacked one of the glands of the lift and negligently failed to replace it properly thereby causing the gland to fracture when the lift was worked. The plaintiff, using the lift was injured when the fractured gland caused the lift to plummet to the bottom of the well.

“The principle contended for must be this: that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it is carefully constructed.”

.....

“If the repairers do their work carelessly, or fail to report a danger of which they as experts ought to be aware I do not see why the principle of Donoghue should not apply to them.”

which is fitting for the case at hand.

38. The Court would address itself to the specific question in this case; is the risk of a manufacturing defect which is not by design, but a result of a lack of skill on the part of the persons in-charge of servicing the aircraft, a risk incident or appurtenant to the activity a pilot discharges as a member of the Air Force? The answer must emphatically be in negative. A pilot is entitled to care and protection within the tenets of what is within the control

of his or her employers, and the bare minimum that his or her employers are expected to ensure, and that is that the aircraft and the machinery they operate is not seriously compromised by sub-par maintenance or substandard maintenance. That is a risk that no pilot consents to implicitly as a function of her or his job description. This is not to say that every mechanical error in an aircraft or a machine will invariably invite liability or fault. Mechanical defects in an aircraft, as in any machine, are possible. An aircraft is after all a machine, which is prone to malfunctioning even when perfectly and efficiently cared for (even under ideal conditions). Weather conditions in conjunction with reactions of instruments not previously anticipated, or the cumulative effect of factors outside the control of those responsible, will not lead to an affixing of liability on the State or the manufacturer of machinery. That risk of a malfunction is inherent within the operation of the aircraft, as with any machine. Neither will mere general wear and tear of a machine with age result in liability, if it is otherwise in an airworthy condition according to prescribed standards. This would rightly fall under the risk a pilot assents to. A manufacturing defect or a defect attributable to less than standard maintenance, which is avoidable and compromises the strength of an aircraft however, is altogether different; it can give rise to liability and an actionable claim to damages.

39. HAL urged that the Air Force ought to have noticed the defect in the aircraft involved in the crash while ascertaining its airworthiness, that in the absence of a noticeable crack, no liability can be affixed upon HAL and if at all had a crack been present, the aircraft would not have flown 246:45 hours before the crash. This Court is un-persuaded by this line of argument. First,

for a company that manufactures sophisticated equipment, it will do well to remember that not every improperly handled repair is discernable on the surface, or will for that matter, make its presence felt in the immediate aftermath of the repair. It is even more incredulous that HAL would suggest that a crack should have been noticed in the after burner manifold, especially in light of the fact that extensive investigations by the IAF as well as the CoI have revealed that the incident was caused due to the *development of a fatigue crack* in the welded portion of the after burner manifold leading to a fire in the aircraft. While the Court does not deem it necessary and shall not enter a detailed exposition on the exact dimensions and specifics of the development of the crack, nevertheless, there are certain characteristics of fatigue cracks that are definitional.

40. Fatigue cracks⁵ in welded joints are the result either of enormous loads carried over a period of time longer than is intended, or when the welded joint itself suffers from a defect. Fundamentally, in the latter case, such a crack is the result of pressure placed on the joint of an already compromised component which results in a disproportionate load placed on the joint that is improperly welded, thereby causing the pre-mature buildup of fatigue which ultimately, when unable to take the stress imposed upon it, breaks down. What is to be seen is whether the fatigue in the welded joint occurred substantially earlier than it would have if the joint had been welded properly.

⁵A fatigue occurs when a material (in this case, the aircraft) is subjected to repeated stress such as loading and unloading. If the loads are above a certain threshold, microscopic cracks will begin to form at the stress concentrators such as the surface, persistent slip bands (PSBs), and grain interfaces. This develops into a crack of a critical size, the crack will spread suddenly, and the structure will fracture. (Stephens, Ralph I.; Fuchs, Henry O. (2001):*Metal Fatigue in Engineering* (Second ed.).

41. By HAL's admission, it has been stated that engine overhauls is 400 hours and that the aircraft had flown 246:45 hours at the time of the crash, which is only a little over half. That it flew for as long as it did is not a testament to the airworthiness of the aircraft, as HAL wishes to argue, but a measure of the time within which the joint finally gave up. The argument is an archetypal example of "glass half full" optimism that is however, completely misplaced in the circumstances of the case. Secondly, whether the Air Force should have seen it (i.e the fatigue) is, in this case besides the point. Unless great negligence is proved on part of the Air Force in carrying out the checks, before receiving possession of the aircraft, the fact that they did not notice a crack, if already present, will under no circumstances, absolve HAL or the Union of its liability. There is no such proof of any form of negligence on behalf of the Air Force or its personnel. Third, fatigue cracks are exceedingly difficult to see, particularly in the initial stages of crack growth. Since no significant change of dimension occurs in a cracked member or component, the crack may easily progress to a considerable extent. A fatigue crack therefore, by its very definition, is unnoticeable till the stress that causes the fatigue is imposed. It progresses over a period of time. The crack however can ultimately and inevitably be correlated to the quality of the welding performed. Early fatigue formation is therefore by itself evidence of pre-existing flaws in the manufacturing.

42. Apart from the CoI proceedings, the official records produced show that towards the completion of the CoI proceedings, a significant meeting was held at Subroto Hall, Directorate of Flight Safety. Air HQ, Delhi on 13.07.2005. At this meeting, which involved not only the Vice Chief of Air Staff but also top officials of HAL, the cause of the fatigue, which caused the

aircraft to crash was *narrowed down to inadequate workmanship during welding of the nozzle to the afterburner manifold*. Importantly, in the remarks finally made by the Chief of Air Staff on 29.07.2005, the observations made at the Subroto Hall meeting were reiterated and endorsed; his remarks were that

“the accident was caused due to the poor workmanship during welding of the nozzle at the 3 O’Clock position on the after burner manifold....the accident is attributable to poor workmanship on the afterburner manifold at HAL during production”.

HAL’s position is that these minutes of meeting and observations were communicated to it later and that it did not accept them. HAL's mulish insistence of blamelessness and that the petitioner has no actionable claim is meritless and indefensible. The minutes of the meeting and the Chief of Air Staff's observations lay bare two facts: one, that the expenditure incurred toward repairs (in excess of ₹ 4.4 crores) were to be borne by HAL; two "poor workmanship" the cause determined for the crash, is attributed to HAL. There is sufficient objective evidence to this. And, there is no contrary material to suggest that its plea about lack of any fault is credible. In fact there is no challenge to the recommendation of *“Improvement of welded joints of AB manifold nozzles through suitable change of material/technology to be considered by HAL Koraput.”* That no other such incident occurred after the accident, which is the subject matter of this case, in fact reinforces the Air Force’s conclusions that the accident occurred on account of HAL’s negligence.

43. The court now turns to the question of compensation. The Constitution guarantees through Article 32, the redressal for the violation of fundamental

rights. Traditionally, this redressal finds expression in the issuance of writs by the courts, mandating action from the State, which results in the vindication of the right. At the same time, the courts have, over the years recognized that there exist certain violations, which cannot, as such “be set right.” The violation in such cases causes irreversible damage, a situation where the traditional writs are rendered obsolete. There exists no longer, any manner in which a right can, so to speak, be exercised. For illustration, an act of custodial torture by the State may never be ‘undone’. An individual approaching the courts as a victim of such torture may (if the torture is continuing) seek for action, which mandates that it cease. However, more importantly, and in addition to this, she/he seeks redress of the irreversible violation of his right to life under Article 21. There is, in such a case, no corresponding residual exercise of the right. In juxtaposition to this is the case where an appointment, to which a petitioner is lawfully entitled, has not been made. A resulting appointment mandated by a writ of mandamus by the court involves the actual exercise of the right, which was up until the order of the Court, obstructed. This is in contrast to the earlier illustration where no action of the State, can revert to a situation where the torture never took place. The violation is in its very nature, absolute and irreversible. In the absence of alternative tools of redressal mere recognition that a fundamental right was violated, even if from the highest courts of the land, does little to bring relief to those wronged. In these circumstances, it is unreasonable for the courts to refuse to evolve new methods through which Article 32 may reach even those violations where traditional redressal methods are obsolescent.

44. A long line of judgments of the Supreme Court have held beyond doubt that when a person or citizen, where appropriate, has suffered a violation of their fundamental right, the courts are not in any manner enjoined or restricted by the reliefs of the writs expressly mentioned in Article 32 of the Constitution. The spirit of Article 32 mandates redressal of the right violated, a classic manifestation of *ubi jus ibi remedium*, essentially that a right is never without remedy.

45. Constitutional tort as a distinct *species* of liability which state agencies and officials have to shoulder, for violation of a citizen's rights, has been recognized *despite* laws shielding individual officials from liability for action taken in good faith, in due observance of their official acts. In the United States, this was first recognized in *Bivens v. Six Unknown Named⁶ Agents*, where the Supreme Court agreed with an aggrieved plaintiff who complained of unlawful search of his premises without a warrant, contrary to his Fourth amendment rights. He was allowed to sue for compensation.

46. The jurisprudence of the Indian Supreme Court teaches that from the decision in *Nilabati Behera v. State of Orissa* (1993) 2 SCC 74 the courts' jurisdiction to award monetary compensation toward infraction of the Constitution has been established on sound footing, in the following manner:

" a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of

⁶*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); this decision was later followed when constitutional tort as a distinct cause of action, was recognized, in *Davis v Passman* 442 US 228 (1979); In *Carlson v Green* 446 US 14 (1980) the supreme court held that a damages remedy would be available despite the absence of any statute conferring such a right, unless: (1) Congress had provided an alternative remedy which it "explicitly declared to be a substitute for recovery directly under the Constitution"; or (2) "the defendant could demonstrate any "special factors counseling hesitation." Other decisions include *FDIC v Meyer* 510 US 471 (1994), and *Correctional Services Corporation v Malesko* 534 US 61 (2001).

which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution."

The court summarized the position later in *Rabindra Nath Ghosal v. University of Calcutta*(2002) 7 SCC 478 as follows:

"8. There can be no dispute with the proposition of law. A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is undoubtedly an acknowledged remedy for protection and enforcement of such right and such a claim based on strict liability made by resorting to a constitutional remedy, provided for the enforcement of fundamental right is distinct from, and in addition to the remedy in private law for damages for the tort, as was held by this Court in Nilabati Behera⁴. It is in fact an innovation of a new tool with the court which are the protectors of the civil liberty of the citizens and the court, in exercise of the same, would be in a position to grant compensation when it comes to the conclusion that there has been a violation of

fundamental rights under Article 21. It is in this context, this Court has observed: (SCC p. 767, para 32)

“The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction.

9. The courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in public law proceedings. Consequently when the court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens.”

47. What are the components of compensation in writ proceedings? A look at the history/pattern of awarding compensation in writ proceedings will reveal that there are enduring or guiding principles in compensation determination. That being said, it is perhaps unwise to delineate precise principles or rules since writ proceedings unlike other statutes such as the Motor Vehicles Act, the Workmen’s Compensation Act or Contracts Act for that matter, cover a much larger, fluid conspectus of facts. The considerations in each case may be widely different from the other, thereby rendering strict principle either obsolete or limiting. Much of this is also dictated by the reasons for which compensation is granted. The awarding of damages to a person wronged by the tortious act of another is not complicated when the award is made for the loss of or damage to property; the value of the property is easily discernable and quantifiable.

Compensation in such cases is nearly synonymous with restitution, whereby the Court attempts to restore the position as it existed before the act causing such loss to be committed. The task is however, far more complex when the courts seeks to “make good” the loss caused by the sufferance of personal injuries- personal injuries bringing within its fold not only the immediate pain and affliction but also the (in most cases) potential loss which is caused as a result of the physical impairment. Nevertheless, the considerations on the basis of which compensation is awarded in a particular case must be clearly set out, so to at the very least create a pattern of factors that are likely to be considered in successive cases. Further, it is important to lay out discernable standards to hold to account the State or those who act on its behalf, which can be the bar for the quality of services that they render and the consequences they are likely to face, in the event their actions result in such accidents. It is necessary to discuss here the HAL’s argument that it is not expedient or desirable to direct payment of any compensation, given that its negligence was not established or proved clearly. This is sought to be supported by reliance on *Rabindra Nath Ghosal (supra)*; *Rathi (supra)* and other decisions. Those decisions are authority- unquestionably – for the proposition that where liability is not discernable clearly, the courts should be circumspect and should abstain from directing compensation. However, this court finds some distinguishing factors in the present case. Firstly, the crash was not attributable to the petitioner; he used all the professional skill and experience he had, to cause minimal damage to the aircraft, no damage to any others (as seen by the fact that he steered the plane’s course from a village) and maximum damage to himself. Secondly, the CoI elaborately considered the materials, including the technical reports of the Aeronautical

laboratory, and those of witnesses; the cause, though inconclusive, strongly indicated poor or inadequate workmanship during the maintenance operations of HAL. If one keeps in mind the fact that in such cases, there cannot be “conclusive proof” given the nature of the incident, the materials and conclusions are weighed keeping in mind the rule of evidence in civil cases, i.e preponderance of probabilities (rather than beyond reasonable doubt, which applies in criminal cases) the circumstances and fact appearing from the record are sufficient to lead to HAL’s liability. The evidence considered by the CoI would be no different from that a court would consider; it would also seek assistance of experts. In this case, the report of a laboratory and expert evidence too was considered. Therefore, it cannot be held that the court should desist from directing payment of compensation. The materials on record point to poor and inadequate workmanship at the hands of HAL, rendering it liable for negligence. Furthermore, the acts were done in its capacity as a public agency acting for the IAF. There cannot be any question that its liability for violation of Article 21 can be avoided.

48. At the time of the incident, the petitioner was 34 years of age. There is no dispute that he was medically downgraded; he suffered from constant pain. The UOI had asserted that he had to complete two courses: ‘Qualified Flying Instructor’ (QFI) and ‘Flight Combat Leader’ (FCL) courses. He asserts that in the past, there were numerous instances whereby an officer progressed after completing only one of those courses; he had completed the QFI course, but was forced to opt out due to his wife’s health condition; he cites a letter of 02.09-.2007 which was concurred by higher officers, to the AOC, Air Force Wing that his motivation to fly did not cease. His CO and the Air Commodore agreed with this view. The petitioner asserts that given

his medical condition, the only option left for him was to pursue a training career, which he is reconciled to; nevertheless he seeks vindication of his grievance that the respondents are answerable for not providing a safe workplace, in the circumstances of the case.

49. The court is conscious of the mental agony, which the petitioner would have undergone, as a result of the trauma, which he faced. While that is *ipso facto* difficult to quantify, in view of the inherent risks that his job entailed, what is however actionable is the fact that the injuries and the attendant permanent medical grading he is subjected to has irrevocably affected his career trajectory. He cannot fly a fighter aircraft. From being an ace fighter pilot, to commanding the NCC training corps is a far cry. Whilst injuries normally incurred or even on account of accidents, that occur for no one's fault are understandable, the injuries here were suffered on account of someone- HAL's negligence and failure to adhere to proper standards of workmanship. Moreover, the petitioner could approach the court only after the RTI queries were responded to, leading to disclosure of the relevant information. Furthermore, though conclusions of the CoI were available, to the extent that they vindicated the petitioner, the truth was withheld from him despite his several efforts, which would further justify his claim for compensation. This court therefore holds that the UOI is liable to compensate the petitioner ₹ 5 lakhs for the trauma and agony which he underwent all the while and is also liable for non-disclosure of relevant information relating to an unsafe workplace. As far as the HAL is concerned, the court holds it liable to compensate the petitioner ₹ 50 lakhs for exposing him to more than the reasonable and ordinary risk which he undertook, solely on account of the inadequate and less than standard workmanship that

it undertook for the aircraft. The damages are based on the assumption that the balance of the petitioner's services, i.e. 20 years, would have resulted in higher annual average overall income of ₹2.5 lakhs per year, taking into account career progression etc. The court hereby directs that the UOI consider the feasibility of keeping in place a policy to insure its pilots- such as the petitioners- against the special risks they undertake in the discharge of their duties. The *premia* paid and the insurance policy taken out should be such as to indemnify the particular kinds of injuries that pilots are likely to suffer, in such incidents- both physical and mental.

50. In conclusion, the court observes that none can be insensible to the piquancy in the pageant of life; more so, those who enlist in the service of their country in its armed forces. Yet to fling that to their teeth when accused of exposing them to more than the risks they had bargained (as the HAL does, here) is to belittle their spirit of sacrifice, which this court finds insensitive, even offensive. A soldier or an air warrior like the petitioner can be expected to be aware of the "normal" risks that he undertakes to accept in the course of a career that is removed from the ordinary. That assumption of risk at the same time raises the threshold bar on his employer and those assigned by the employer to maintain the standards in respect of the workplace and the technical equipment, which such officers and warriors have to handle and live with. The HAL's insistence of blamelessness and the stony silence maintained by the UOI in keeping the petitioner in the dark, and for its share of lapse in providing a safe workplace- with standard equipment, maintained to highest standard, are indefensible. A soldier or officer's honour and dignity is as much a part of his right to life; it is to be respected just as much, if not more, for the reason that it is offered

unhesitatingly and fully in defending the borders of the nation. Unlike “hired guns” they stand guard so that the rest exercise our liberties. Denying them the right to a safe workplace with standard equipment constitutes violation of their right to life and dignity.

51. In view of the foregoing conclusions, the UOI is held responsible to compensate the petitioner ₹5 lakhs for the trauma and agony which he underwent all the while and is also liable for non-disclosure of relevant information relating to an unsafe workplace. The HAL is liable to compensate the petitioner ₹50 lakhs. Both the amounts shall be paid to the petitioner within four weeks from today. The costs of these proceedings, quantified at ₹ 50,000/- shall be borne by HAL. The writ petition is allowed in these terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MAY 2, 2017