

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

% Date of Reserve : 27.03.2008
Date of Decision : 02.06.2008

+ **WP(C) No.3831/2007**

Major General Rakesh Kumar Loomba Petitioner

Versus

1. Union of India, Through Secretary
2. Chief of the Army Staff
3. Military Secretary Respondents

Advocates who appeared in this case :

For the petitioner : Mr. Valmiki Mehta, Sr. Advocate with
Ms. Jyoti Singh, Mr. Ankur Chhibber and
Mr. Aditya Chhiber, Advocates

For the respondents : Mr. Rajeeve Mehra with Mr. Arvind Sharma,
Mr. Priyanka, Advocates and Brig. T.
Parsad, Dy. JAG

And

+ **WP(C) No.3904/2007**

Major General Rakesh Kumar Loomba Petitioner

Versus

1. Union of India, Through Secretary
2. Chief of the Army Staff
3. Lieutenant General P K Singh
4. Adjutant General
5. Lieutenant General N S Brar Respondents

Advocates who appeared in this case :

For the petitioner : Mr. Valmiki Mehta, Sr. Advocate with
Ms. Jyoti Singh, Mr. Ankur Chhibber and
Mr. Aditya Chhiber, Advocates

For the respondents : Mr. Rajeeve Mehra with Mr. Arvind Sharma,
Mr. Priyanka, Advocates and Brig. T.
Parsad, Dy. JAG

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE J.M. MALIK

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

J.M.MALIK, J.

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1. This judgment shall decide two writ petitions detailed above, which are between the same parties and deal with identical facts and similar questions of law. The key controversy which revolves around the present writ petitions is about the rights of a delinquent in context of Army Rule 180. Petitioner Major General Rakesh Kumar Loomba was awarded a recordable censure on 07.04.2007. A court of inquiry(hereinafter referred as COI) was convened by Head Quarter South dated 6th December, 2006 to investigate the circumstances "under which a swimming pool measuring approximately 25 metre X 13 metre with average

depth of 1.8 metre was constructed at Hisar in the garb of providing Static Water Tank (SWT) by irregular utilization of funds for the purpose other than the sanctioned works.” The COI was also required to enquire into the source of funds for construction of the said swimming pool, and whether or not sanction of competent authority was obtained and financial irregularities, if any, committed. Consequent upon that the petitioner was not promoted. Thereafter, two above mentioned writ petitions were filed with the prayers to quash the recordable censure award passed by the respondents along with other connected proceeding and qua second writ petition the petitioner be promoted to the rank of Lieutenant General on the basis and foundation of the selection made by the competent authority with all consequential benefits.

2. Adumbrated in brief the facts of these writs are these. The petitioner was commissioned in the Armoured Corps on 14.06.1970. In the year 1983, the petitioner attended Defence Services Staff College, Wellington and obtained degree of M Sc (Defence Studies). He was posted as a Brigade Major of an Infantry Brigade on The Line of Control, deployed opposite Pakistan during January 1984 to February 1986 on promotion to

the rank of Colonel. He was posted as Colonel Military Secretary of a Corps during the period August 1988 to June 1990 and commanded an Armoured Regiment from December 1990 to June 1993. Thereafter he was selected for the Higher Command Course at College of Combat, Mhow and obtained the qualification of M.Phil. from Devi Ahilya Vishwa Vidyalaya, Indore during July 1993 to April 1994. He was then posted as Colonel General Staff of an Armoured Division in June 1994 to August 1996. He became Colonel Instructor at School of Armoured Warfare, Armoured Corps Centre and School, Ahmednagar in September 1996 to December 1997. The petitioner was awarded General Officer Commanding-in-Chief Central Command, Commendation on 26.01.1997. The petitioner commanded an independent Armoured Brigade, including during 'Operation Vijay' between the period January 1998 to 2001. The petitioner was again awarded General Officer Commanding-in-Chief Western Command, Commendation on 26.01.2001. He also attended the prestigious National Defence College Course, New Delhi during January 2001 to November 2001. He was Brigadier General Staff of a Corps, including the period of 'Operation Parakram' during December 2001 to January 2004. The petitioner assumed the

command of 33 Armoured Division on 16.02.2004 and was awarded General Officer Commanding-in-Chief Southern Command, Commendation on 17.02.2004.

3. However, the problem started when the petitioner accorded Administrative Approval for construction of a Static Water Tank(hereinafter referred as SWT) for Hisar Military Station while working as Major General. The petitioner vide letter dated 29.02.2004 gave the approval on the following terms :

“1. Under the provisions of Government of India Ministry of Defence letter No.95533/POL/CSS/E2/WPC /687/DO-II/D(W-1) dated 17 January 86, as amended vide Government of India, Ministry of Defence letter No 3(7)/93/D(Works) dated 26 August 98, General Officer Commanding 33 Armoured Division accepts the necessity and accords administrative approval for construction of a static water tank of 110 KL capacity and a water pump for fire fighting in Hisar Military Station amounting Rs.9,81,000/-(Rupees nine lac eighty one thousand only) as per approximate estimate Part I and II attached.

2. The works cater for long term requirement in terms of Para 16A(b), Defence Works Procedure 1986 and will be carried out by MES or under arrangements by them.

3. The expenditure involved will be debitable to Major Head 2076 Defence Service (Army) Minor Head III, Sub Head ‘B’ Low Budgeted Work.

4. X X X X”

4. Sanction of General Officer Commanding 10 Corps including technical approval of Chief Engineer Bhatinda Zone was obtained and there were no observations regarding dimensions, costing, technical specifications or any other related issues. The operational role of the Armoured Division was changed in February 2004, necessitating establishment of encounter crossings across canal obstacles, including in the forward tier of enemy defences. As such the petitioner directed the Brigade Commanders and Commanding Officers to carry out extensive training in negotiating water obstacle systems, specially swimming across canals in full battle loads, with improvised expedients and for this purpose they were to ensure that all troops were proficient in watermanship to rule out any loss of life due to drowning. The petitioner's Brigade Commanders and Commanding Officers recommended dual usage of the SWT to include watermanship training. The sanction of the Lieutenant General T.S. Pathak, AVSM, YSM, the then General Officer Commanding 1 Corps was also obtained. Subsequently, other facilities were added as and when projected for its dual utilisation. In order to enable dual use of the SWT for

watermanship training, the requirement of a water re-cycling and purification plant was projected.

5. The above said proposal was sanctioned vide order dated 09.03.2004 by Mr. J.S. Kohli, Brigadier Administration for GOC. The relevant portion runs as follows :

“3. Sanction of GOC 10 Corps is hereby conveyed for execution of the following work under Major head 4076 Capital Outlay on Defence Services Sub Head 01, Major Head 202 construction works (2) New Expenditure during financial year 2003-04:-

Ser No.	Stn	Job No	Name of Wk	Ceiling (Lakhs)	Funds (Lakhs)
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81 Sub Area

(a)	Hisar	33AD/LBW /W-3/ 2003-04	Construction of a static water tank of 110 KL capacity and water pump for fire fighting in Hisar Military Station	9.81	9.81
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6. Again petitioner had forwarded “statement of case for obtaining sanction of competent financial authority for incurring expenditure of Rs. 3 lakhs on training cum welfare facility” vide letter dated 17.04.2004. In para nos. 1 & 3, he gave its justification. The same are reproduced as follows :

“1. Presently Hisar Military Station does not have facility for training of troops in crossing of canal/water obstacles. A water storage tank of 1,10,000 Gallon capacity (Size 28 meters by 13 meters) is under construction for fire fighting purpose. By installing a water filtration plant, it can be used not only for storage of water for fire fighting but also for swimming by troops and families of all ranks in the station. An expenditure of Rs.3,00,000/-(rupees three lacs only) is likely to be incurred for installation of the filtration plant.

2. X X X X

3. Hisar Military Station accommodates troops and families of 33 Armoured Division. Being an armed division, troops of the fmn have to be trained for offensive operations in developed and semi developed terrain involving crossing of water obstacles. Facility for training of troops in swimming presently does not exist in the station. Construction of a full fledged swimming pool in the station is unlikely to fructify in the near future. A water storage tank of 1.1 lakh Gallon capacity is already under construction for storing of water for fire fighting purpose. Installation of a water filtration plant at the tank would enable use of the tank for dual purpose i.e. for storage of water for fire fighting as well as for training of troops in swimming and crossing water obstacles. The tank would also be used by families of all ranks in station for swimming as a welfare measure.”

7. The said proposal was sanctioned vide order dated 27.04.2004 which runs with the caption :

“Sanction of the GOC 1 Corps to incur an expenditure of Rs.3,00,000.00 (Rupees three lakhs only) out of GOC fund HQ 33 Armoured Division for installation of water filtration plant.

It is noteworthy that sanction was not given by 10 corps.

8. The petitioner commanded 33 Armoured Division from 16.02.2004 to 27.05.2005 and was thereafter posted as Commander, Higher Command Wing. Thereafter, 19 months later a COI was convened by respondent no. 3 on 06.12.2006 and finalized on 31.01.2007. Thereafter, the show cause notice dated 06.02.2007 was served to the petitioner. Its relevant extract is produced as follows :

“1. A court of inquiry was convened by this HQ vide Convening Order No. 55933/C of I/Hissar/Q3W dated 06 Dec 2006, to investigate the circumstances under which a swimming pool measuring approximately 25 mtr x 13 mtr with an average depth of 1.8 mtr was constructed at Hissar Military Station in the garb of providing Static Water Tank (SWT) by irregular utilization of funds for the purpose other than the sanctioned works. The court was also required to enquire into the source of funds for construction of the said swimming pool and whether or not sanction of competent authority was obtained and financial irregularities, if any committed.

2. On perusal of the court of inquiry proceedings, it is revealed that Major Work Projects (MWP) for swimming pool was projected by HQ 33 Armd Div as part of their projections for MWPs in the years 2000-2001 and 2001-2002, however this was not listed in the approved list as issued by QMG Branch vide their letters dated 13 April 2000(Annex I). This work was again projected by HQ 33 Armd Div to HQ 10 Corps for the year 2005-2006 but the same was not included in the MWP fwd by HQ 10 Corps to HQ Western Command. Thereafter, a Board of Officers was convened by HQ 33 Army Div vide Convening Order No. 4204/13/MW/Q3W(PC-9) dated 27 Feb 04 to

examine the requirement for construction of Static Water Tank of 110 KL capacity and a water pump for fire fighting at Hissar Military Station. The board of officers visited the site on 27 Feb 04 and recommended the following :-

(a) A Static Water Tank of size 25 mtr x 13 mtr with average depth approx 1.8 mtr i.e 110 KL capacity along with water pump and necessary connection should be provided at Hissar Military Station.

(b) The location of Static Water Tank should be in close vicinity of Centralized Ammunition Dump in the Station.

(c) Since the work is of important nature and authorized in the scale of accommodation, therefore, the same should be sanctioned on top priority.

Consequent thereof, you as GOC 33 Armd Div had vide orders dated 29 Feb 2004 accorded administrative approval for construction of a Static Water Tank of 110 KL (amended to 1.10 lac gallons) capacity and a water pump for fire fighting in Hissar thereof. The said work was executed through the MES and on ground a swimming Pool was constructed at distance of approx 2.5 Km from the Central Ammunition Dump, thereby contravening the terms of administrative approval and therein willfully Swimming Pool at Hissar. For the construction of the said swimming pool, expenditure was incurred out of Public Fund, Regimental Fund and Environmental Fund as follows :

- | | | |
|----------------------|---|-----------------|
| (a) Public Fund | - | Rs. 16,43,700/- |
| (b) GOC Fund | - | Rs. 7,72,156/- |
| (c) Environment Fund | - | Rs. 1,05,000/- |

3. The said court of inquiry was placed before the GOC – in – C this HQ, who has observed the following lapses on your part :

(a) That you as GOC 33 Armd Div had failed to carry out the expenditure of Public Funds for the purpose for which they were sanctioned in violation of the duty cast upon you in terms of Para 20 of the Financial Regulations, Parts I, 1983.

(b) That you improperly sanctioned expenditure out of GOC Fund and Enviornmental Fund, details as mentioned in Para 2 (b) and (c) above.

4. It appears to the GOC-in-C that his censure in appropriate form is called for, or the above lapses on your part.

5, 6 & 7 x x x x"

9. The petitioner submitted his reply to the above-said show cause notice vide reply dated 15th March, 2007. Thereafter, the petitioner received a censure order by respondent No.3 dated 7th Apri, 2007. The relevant extract reads :

"2. Having considered the reply submitted by the General Officer, I have come to the conclusion that the same is devoid of merit and lacks substance. He has committed the following lapses:-

(a) He as GOC 33 Armd Div, had accorded Administrative Approval for the construction of a Static Water Tank of 110 KL capacity alongwith a water pump. The manner in which the Static Water Tank was constructed without any water pump, at a distance of approx 2.5 KM from the Central Ammunition Dump had thus defeated the purpose for which Administrative Approval had been accorded. He, being the controlling officer of the Public funds. Deviated the use of said funds from the purpose for which they were provided for. He thus violated Para 20 of the Financial Regulations, Part – I, 1983.

(b) As GOC 33 Armd Div, he improperly accorded sanction of expenditure out of GOC's Fund for creation of ancillaries for the said swimming pool, contrary to the instructions contained in Army Order 9/2001/PS.

3. For the said lapses, I direct my '**Severe Displeasure (Recordable)**' be conveyed to IC-24283L Maj Gen R.K. Loomba of HC Wing, Army War College, Mhow."

10. The Special Selection Board was held at Army Headquarters comprising of Chief of Army Staff, Vice Chief of Army Staff and all Army Commanders for consideration of officers of the rank of Major General for promotion to the rank of Lieutenant General on 30.09.2005. The petitioner was approved for the acting rank of Lieutenant General, General Cadre in 'Command and Staff' stream by the Government on 05.04.2006.

11. The petitioner was placed at serial 13. However, Major General D S Bartwal, VSM, who was placed at serial 15 was promoted to the rank of Lieutenant General. Again Lieutenant General (then Major General) BS Jaswal, AVSM, VSM, who was placed at serial 14, was also promoted. As on 1st January, 2007 there was no ban imposed on the petitioner for promotion to the rank of Lieutenant General. Since there was a clear vacancy available in "command and staff" stream, the petitioner's performance continuing to be satisfactory and he being in

medical category SHAPE-1, the petitioner should have been promoted before officers junior to the petitioner.

12. The Court of Inquiry examined few witnesses at the petitioner's back, took a number of documents on record without the same being produced in evidence and committed other illegalities. Colonel D.V.S. Rana, Colonel Q (Works), was examined on 26th December, 2006 in the absence of the petitioner and all documents were taken on record during petitioner's absence. No opportunity was granted to the petitioner to cross-examine the said witness. HQ 10 Corps letter dated 9th March, 2004 states, "sanction of GOC 10 Corps is hereby conveyed for execution of the following works under Major Head 4076 capital outlay on Defence Services Sub Head 01, Major Head 202 Construction Works (2), new expenditure during FY 2003-2004". The said document was not intentionally produced by Colonel DVS Rana which if produced would have exonerated the petitioner completely. The report of the "Comptroller of Auditor General of India, Union of Government, Defence Services (Army and Ordnance Factories) for the year ending March 2006" should have been processed by HQ Western Command and in case of any anomaly, the COI should have been

ordered by GOC-in-C Western Command. There is jurisdictional error in convening of the COI.

13. The Auditor had incorrectly clubbed the works of different nature, sanctioned by difference CFAs, in different time frames and at different sites. The petitioner had only sanctioned a LBW costing Rs. 9.81 lacs which was in his financial powers and for which sanctions had been accorded but has now been blamed for misuse of delegated powers of sanctioning authority amounting to Rs. 23.38 lakhs as per the censure order, whereas in para 2(a) of the show cause notice the petitioner was found blameworthy for incurring expenditure out of public fund amounting to Rs.16,43,400/- even though Administrative approval by petitioner is meaningless till sanctioned by the higher authorities.

14. The respondents have contested both these writ petitions. The main objection raised by the respondents is that the work in question was not accomplished as per requirements and the petitioner transgressed the limits. The alleged duality of purpose of construction was raised at late stage. The same was increased from 110 KL to 1.10 Lakh Gallons. This stage was sought by communication dated 14.03.2004. The relevant portion of the letter is reproduced as follows :

“(a) Capacity erroneously mentioned as 110 KL may please be amended to 1.10 LG (size remaining the same), at following places :

- (I) Adm Approval Para 1, line 5.
- (II) BOO, Para 3(a) line 2.
- (III) S of C, Para 4.
- (IV) S of C, Para 6, line 9.
- (V) Scrutiny certificate of GE, line 2.
- (VI) AE Part I, Name of wk.
- (VII) AE Part II – Name of wk and coln No. 2(Description.

(b) Authority in AE Pt II may please be corrected from 12 (a to f), which are reproduced as follows.

Ser. No.	Description of Items	Floor Area (SM)/ Scale	Special Facilities	Planning Notes
12.	Static Water Tanks	Capacity		
	(a) Ammunition Depots	225 KL		There should be suitable arrangements for replenishing the static water tanks expeditiously. Irrespective of its location and distance from source of water supply it should not take more than 18 hrs to completely refill the tank. Distance from the area under protection should be as under – (a) 100M to 200M (b) 100M to 200M (c) 100 M to 200M (d) 100M to 150 M (e) 100M to 200M (f) 100M to 200M
	(b) Explosive Magazines, Ammunition and Explosive Storage Areas	225 KL		
	(c) POL Depots holding more than 2250 KL of POL	225 KL		
	(d) Installations holding more than 2750 Cubic Metres of timber	225 KL		
	(e) Bomb Dumps	110 KL		
	(f) Explosive Process Area	110 KL		

15. On 14.05.2004 tenders were invited. On 11.12.2004 works stand completed. The photographs were attached with the counter affidavit which clearly go to show that :

“(i) in place of a Static Water Tank, a Swimming Pool is constructed;

(ii) in place of Class Rooms, Changing Rooms are constructed;

(iii) the entire area is bounded by a Wall;

(iv) obviously, the same would be inaccessible for vehicles necessary to be deployed at the time of a Fire at the Depot or elsewhere;

(v) besides the main Swimming Pool, a Baby Pool / Child Pool is also constructed as well as a Jacuzzi;

(vi) no Water Pump installed;

(vii) no necessary Pipe Lines for the purposes of fire fighting installed;

(viii) the Swimming Pool, admittedly, exists at a distance of about 2.5 kilometers from the Ammunition Depot.”

16. The petitioner contends that he approached 1 Corps for release of funds and same were sanctioned for Filtration Pump. On 09.04.2004, 1 Corps was approached for expenditure of Rs.3 Lakhs. Whenever public funds are utilized, the approval is required from 10 Corps. It is explained that for use of Regimental Funds, administrative approval was required from 1 Corps. Thus,

the approvals of the Works Branch and Administrative Branch are different. At any cost, 1 Corps confirmed that it did not accord any sanction for dual use.

17. Vide letter dated 27.04.2006, the Director of Audit, Defence Services, Western Command, conveyed and enclosed the draft photographs for the report of CAG for the year ending March, 2006 relating to the regular construction of works etc. Ministry of Defence made request for information, documents and comments. The comments were forwarded but were found not satisfactory by Ministry of Defence. A detailed inquiry was ordered by the Ministry of Defence. Pursuant to the directions Brigadier Manik Sabharwal from 1 Corps was appointed for investigation. Brigadier Manik is an Engineering Officer and a Commander of an Engineering Brigade. On 24.11.2006 recommendations of General Officer Commanding 1 Corps on the One Man Inquiry were received. On 06.12.2006 court of inquiry was convened. Lt. General N.S. Brar was appointed as the Presiding Officer of the Court of Inquiry. He was not posted as Corps Commander at that time. He took over as Corps Commander on 01.04.2006. It is explained that GOC 1 Corps

would have been ineligible to be appointed as Presiding Officer, since he had given recommendations for the One Man Inquiry.

18. Entire proceedings including statements of witnesses were placed on the record. The court itself decided to invoke AR 180 as statement of witness no. 6 was likely to affect the reputation of Major General R.K. Loomba, the petitioner, Brigadier R.C. Chadha, Colonel B.S. Badwal, Colonel M.K. Bindal. Major General R.K. Loomba, the petitioner himself cross-examined witness no. 6 in exercise of his rights in terms of AR 180. Colonel M.K. Bindal and Colonel B.S. Badwal cross examined witness no. 6 in exercise of their rights in terms of Army Rule 180. Major General R.K. Loomba also cross examined witness no. 8 Colonel B.S. Badwal, witness no. 9 Brigadier R.C. Chadha in exercise of his rights in terms of AR 180. Major General R.K. Loomba cross examined witness no. 3 in exercise of his rights in terms of Army Rule 180.

19. We have heard the counsel for the parties at considerable length. The principal argument urged by the learned counsel for the respondents has two prongs. Firstly, the AR 180 was not violated and secondly that an employee of a State is not entitled to a promotion to a higher post as a matter of right. The learned counsel for the respondent had placed reliance on following

cases. In Lt. Col Ramesh Mohan Vs. Union of India and others, Mil LJ 2002 J & K 166, it was held :

“24. We have discussed the facts in detail. No where name of appellant appears. It is a matter of investigation and only on investigation it would be known whether any offence is committed or not and if committed who are the responsible persons for the act or the omission. Therefore, it cannot be said that when Court of Inquiry is constituted to collect evidence, the person who is likely to be prosecuted, should be also called at the enquiry proceedings and should be given an opportunity of cross-examining the witnesses. In the opinion of this Court, it would be beyond the scope of Rule 179 of the Army Rules to permit a person to remain present at the enquiry which is constituted for the purpose of collection of evidence and to make report only. When it is not certain as to who are the persons involved, there is no question to invoke Rule 180 of the Army Rules.

25. It is required to be noted that so far as Rule 180 is concerned, if there is no specific allegation, then one may not be knowing about a person who is responsible for act or omission. It is in view of this, it appears that the provision has been made in later part of Rule 180, which reads as under :-

“180.....The Presiding Officer of the Court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified, receives notice of an fully understands his rights under this rule.”

20. The facts of this case do not dovetail with the facts of this case. In the instant case the name of the petitioner appeared. This was not a case of investigation. In the instant case, there was specific allegation and the person was known.

21. The learned counsel for the respondent has also cited another case reported in Maj A.R. Malhotra Vs. Union of India and others, Mil LJ 2005 J & K 184. In this case the court of inquiry commenced on 10.07.2003. Appellant was called to appear for the first time on 15.07.2003. Witnesses examined in absence of appellant were re-called and appellant cross-examined them. Consequent to court of inquiry, Commanding Officer ordered for recording of Summary of Evidence. Same was challenged on the ground of violation of Army Rule 180 for not recording the statements of witnesses in presence of the appellant. It was held that there was no violation of Army Rule 180. It was further held that question of giving opportunity to participate in court of inquiry arises only when it appears that ongoing inquiry is likely to affect the character or Military Reputation. There can be no grievance against the commencement of inquiry in absence of concerned person. Army Rule 180 is only enabling provision to participate in the proceedings before the court of inquiry. Court of inquiry by itself means little unless the Commanding Officer decides to get Summary of Evidence recorded. Option under Army Rule 24 after recording of Summary of Evidence yet to be

exercised by Commanding Officer. It was held that the grievance of the appellant was premature and the appeal was dismissed.

22. This case is also distinguishable from the instant case as in this case all the witnesses were recalled and the appellant in that case had cross-examined them. In that case the inquiry was not likely to affect the character or military reputation.

23. The last authority cited in this context is reported in Major General Inderjit Kumar Vs. Union of India and others, 1997 (9) SCC 1, wherein, it was held :

“7. Under Rule 177 of Army Rules, 1954, a Court of Inquiry can be set up to collect evidence and to report, if so required, with regard to any matter which may be referred to it. The Court of Inquiry is in the nature of a fact-finding inquiry committee. Army Rule 180 provides, inter alia, that whenever any inquiry affects the character or military reputation of a person subject to the Army Act, full opportunity must be afforded to such a person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the Court of Inquiry is required to take such steps as may be necessary to ensure that any such person so affected receives notice of and fully understands his rights under this rule. The appellant was accordingly present before the Court of Inquiry. Witnesses were examined by the Court of Inquiry in the presence of the appellant and were offered to the appellant for cross-examination. He, however, declined to cross-examine

the witnesses. Instead, the appellant moved an application for an adjournment for preparing his defence. He also applied that the evidence adduced before the Court of Inquiry should be reduced to writing. The Court of Inquiry noticed that sufficient time had been granted to the appellant for preparation of his defence after receipt of the Court of Inquiry proceedings by him. Hence his application for adjournment was refused. The hearing on charges took place in the presence of the appellant. At the conclusion of the hearing on charges, an order was passed that evidence be reduced to writing and a recommendation was made to convene a General Court Martial for trial along with recommendations on charges to be framed. Thereafter the charges were finalised, charge-sheet was issued and General Court Martial was convened.

8. The appellant has also contended that a copy of the report of the Court of Inquiry was not given to him and this has vitiated the entire Court Martial. The appellant has relied upon Rule 184 of the Army Rules, 1954 in this connection. Rule 184, however, provides that the person who is tried by a Court Martial shall be entitled to copies of such statements and documents contained in the proceedings of a Court of Inquiry as are relevant to his prosecution or defence at his trial. There is no provision for supplying the accused with a copy of the report of the Court of Inquiry. The procedure relating to a Court of Inquiry and the framing of charges was examined by this Court in the case of Major G.S. Sodhi v. Union of India (1991) 2 SCC 382. This Court said that the Court of Inquiry and participation in the Court of Inquiry is at a stage prior to the trial by Court Martial. It is the order of the Court Martial which results in deprivation of liberty and not any order directing that a charge be heard or that a summary of evidence be recorded or that a Court Martial be convened. Principles of natural justice are not attracted to such a preliminary inquiry. Army Rule 180, however, which is set out earlier gives adequate protection to the person affected even at the stage of

the Court of Inquiry. In the present case, the appellant was given that protection. He was present at the Court of Inquiry and evidence was recorded in his presence. He was given an opportunity to cross-examine witnesses, make a statement or examine defence witnesses. The order of the Court of Inquiry directing that a Court Martial be convened and framing of charges, therefore, cannot be faulted on this ground since it was conducted in accordance with the relevant Rules”

24. The facts of this case are also different. In this case the Army Man had himself refused to cross examine the witnesses. That was a preliminary enquiry. Opportunity to cross-examine the witnesses in this case was given but the same was not availed of. The evidence was recorded in the presence. COI was conducted in his presence. The law laid down in this authority rather applies to the case of the petitioner on all fours.

25. The counsel for the respondent has drawn our attention towards cases reported in Coal India Ltd. & Ors. Vs. Saroj Kumar Mishra, 2007 (5) SCALE 724, (Union of India & Ors. Vs. Sangram Keshari Nayak, 2007 (6) SCALE 348), Santosh Kumar and others Vs. G.R. Chawla and others, (2003) 10 SCC 513, Union of India and others Vs. N.R. Banerjee and others, (1997) 9 SCC 287, Govt. of A.P. and another Vs. B. Vasantha Rao and another, (1999) 5 SCC 183, Government of Orissa Vs. Haraprasad Das and others, (1998) 1 SCC 487, Brig. MJS Bains (Retd) AVSM Vs. UOI and

others,(DB Delhi High Court) in Civil Writ No. 4338/1993, decided on 16.05.1997, Nathu Singh Shekhawat Vs. Union of India & others, S.B. Civil Writ Petition NO. 1251/97 etc. The gist of all these authorities is that no officer, however, can claim or enforce any right that the vacancies should be filled in a particular manner so as to make a room for him for promotion. The petitioner on his empanelment has only a right to be considered for promotion subject to the availability of vacancy and his chance. It is not open to him to insist and enforce any alleged right that the vacancies available should be so rotated in different components of the Army to grant him promotion immediately.

26. The counsel for the respondent has also produced copy of the record of Add Dte Gen Discipline And Vigilance, (AG/DV-1), Provision DV Ban Officer. Its para nos. 3 & 7 are reproduced as follows :

“3. Provision DV Ban is imposed only when the competent disciplinary authority takes cognizance of an offence. Cognizance is taken of an offence as soon as the disciplinary authority, competent for the purpose, applied its mind to the offence with the intention of initiating disciplinary or administrative proceedings against the offender in respect of the offence. Imposition of DV Ban therefore has its origin in the decision of the Commander to initiate disciplinary / administrative action. Similarly, the

removal of Provisional DV Ban is contingent upon the finalization of disciplinary / administrative proceedings against the officer concerned by the competent authority. The duration of provisional DV Ban can therefore be minimized if the cases are finalized expeditiously. Career management as a concept is closely linked with the Discipline and Vigilance aspects of the officer concerned. It is, therefore imperative that commanders in chain must finalise disciplinary / administrative action cases as expeditiously as possible in the interest of both the officer and the organization.

7. Provisional DV Ban will be imposed only when a competent disciplinary authority takes cognizance of an offence. A competent authority takes cognizance of an offence when he decides to proceed (disciplinarily or administratively) against the person who is alleged to have committed the offence. The word “cognizance” issued to indicate the point in time when a disciplinary authority applies his mind for the purpose of proceedings against the individual(s) either disciplinarily or administratively. At the stage of taking cognizance the competent authority has to be satisfied that prima facie, the allegation(s) made against the individual makes an adequate case for summary trial/GCM/SGCM or an administrative action resulting in termination of service or otherwise. **This means where a Court of Inquiry has been held, Provisional DV Ban should only be imposed when directions have been issued thereupon.** Where an administrative action is contemplated without holding a Court of Inquiry Provisional DV Ban is to be imposed from the date of issue of ‘Show Cause Notice’ containing definite allegations against such an officer. Such ‘Show Cause Notice’ should be based on relevant documents/papers to which the competent authority has applied his mind.”

27. The arguments urged by the learned counsel for the respondent have left no impression upon us. In this case the

presence of the petitioner was essential. It was also essential that evidence of the witnesses including the examination-in-chief should have been recorded in his presence. He should have been given an opportunity to cross-examine all the witnesses. This was not a preliminary enquiry. No effective opportunity of defence was given. The main grouse of the petitioner is that he was not given a chance to cross-examine the witnesses. It must be borne in mind that cross-examination of witness is the life blood of our legal system. It is the only way a Judge can decide whom to trust. An answer during the cross-examination may wreck one's case. It was argued on behalf of the petitioner that all the above said witnesses did not state the relevant facts or those facts were not disclosed which he wanted to be placed on the record.

28. Our view is supported by the following cases. The Division Bench of this court in Lt. General S.K. Dahiya Vs. Union of India and others, in WP(C)No.15526/2006, decided on 24.08.2007 held:

“15. We have given our careful consideration to the submissions made at the bar and perused the record. In the light of the view that we are taking on the question of the violation of the Rule 180 of the Army Rules, we consider it unnecessary to go into the alternative grounds urged by Mr. Sud in support of the writ petition. We would, therefore, confine our

discussion to the validity of the proceedings by reference to the alleged violation of Rule 180 of the Army Rules. Rule 180 is as under:

180. Procedure when character of a person subject to the Act is involved.-Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified received notice of and fully understands his rights, under this rule.

16. A plain reading of the above would show that the same is intended to give to any person subject to the provisions of the Act full opportunity to defend himself, in any inquiry that may affect his character or military reputation. The opportunity has to be in regard to the following:

- 1) To be present throughout the inquiry.
- 2) to make any statement in the inquiry.
- 3) to give any evidence he may wish to make or give at the inquiry.
- 4) to cross-examine any witness whose evidence in his opinion affects his character or military reputation.
- 5) to produce any evidence in defence of his character or military reputation.

34. There is in our opinion no merit in that contention. Rule 180 envisage "Full Opportunity" to be afforded to the person whose character or military reputation is likely to be affected in the inquiry. The expression "Full Opportunity" appearing in Rule 180 leaves no manner of doubt that if no opportunity is afforded or if the opportunity is not full, the same would not meet the requirements of Rule 180. Reading out the documents especially when some of them run in scores of pages is no substitute for providing to the officer concerned a copy of such documents. If the documents were relevant to the inquiry as indeed was the position in the instant case and if the Court of Inquiry had considered it necessary or fair to read the same over to the petitioner, there was no earthly reason why copies of the documents could not be furnished especially when the same would enable the petitioner to formulate his response in defence to the charge of irregularities. There is also no gain saying that the right of making a statement, of giving any evidence and of cross-examining any witness or producing any witness in defence of his character or military reputation would include the right to receive from proper custody the documents that are relevant for that purpose. The right of cross-examination or the right to make a statement or adduce defence evidence would be rendered illusory if the Court of inquiry who has exclusive custody over the documents that are relevant to the controversy deprives the officer of an opportunity to look into those documents or to use the same for establishing his defence. We, therefore, have no hesitation in holding that the provisions of Rule 180 of the Army Rules were violated not only in regard to the petitioner's right to adduce evidence in his defence but also in regard to his right to demand copies of documents forming part of the inquiry.

29. In Lt. Gen S.K. Sahni Vs. COAS, in WP(C) No.11839/2006, decided on 11th January, 2007 by DB of this court cited by counsel for the petitioner, it was held :

“19. While spelling out in unambiguous terms, the different protections available to a person under Rule 180, a Division Bench of this court in the case of Col.A.K. Bansal v. UOI and others, CWP 1990/88, decided on 18.1.1991 while quashing the proceedings of the court of inquiry and their findings and the penalty of severe displeasure imposed upon the petitioner in that case, held as under:-

“The rule incorporates salutary principles of natural justice for a fair trial and full right of being heard, to a person whose character or military reputation is likely to be affected in a court of enquiry. Four rights are expressly recognized-(1)The officer has a right to be present throughout the enquiry meaning thereby that the entire evidence is to be recorded in his presence; (2) of making statement in defence (3) cross-examination of the witnesses whose evidence is likely to affect his character or military reputation. It is the judgment of the person whose reputation is in danger to testify as to whether an evidence of a particular witness is likely to affect his character or military reputation, and (4) such a person has a right to produce evidence in defence of his character or military reputation. It is the mandatory duty of the presiding officer not only to make all these opportunities available to the person whose character and military reputation is at stake but no that such person is fully made to understand all the various rights mentioned in that said rule.

It has been held by this Court in Maj Harbhajan Singh Vs. Ministry of Defence and Ors., 1982 (Vol.21) LLT 262, and by Supreme Court in Lt. Col. Prithi Pal Singh Bedi Vs. UOI and Ors., Capt. Dharam Pal Kukrety and Ors. Vs. UOI and Ors., and Capt. Chander Kumar

Chopra Vs. UOI and Ors., AIR 1982 SC Page 1413 that the requirements of Rule 180 are mandatory. The reason for making Rule 180 as mandatory is that it incorporates the principles of natural justice which alone can ensure a fair trial to a person whose character or military reputation is in danger. It is now well settled law that even in administrative action the principles of natural justice must be observed because the administration is obliged to follow fair play in action when it is dealing with the character and reputation of a person. The rule is eminently in public interest. There is one other reason why the requirements of Rule 180 are to be strictly interpreted, the normal protection of fundamental rights of an the provisions of Article 311, available to the civil servants under the Union or a State are not available to military personnel. The army personnel must maintain high degree of efficiency and preparedness at all the times and the same cannot be maintained effectively unless every member of the armed forces is able to see fair play in action. It is admitted by the respondents that the requirements of Rule 180 were not complied with and the petitioner was denied opportunity of cross-examining the witnesses.....”

30. Similar view was taken in authorities reported in UOI and others Vs. Rajbir Singh Khanna and another, AIR 2001 SC 3327, Lt. Col. Prithi Pal Singh Bedi Vs. Union of India and others, AIR 1982 SC 1413.

31. In the result, we hereby find that all the proceedings initiated by the respondents in respect with awarding recordable censure against the petitioner are liable to be quashed as they are a result of utter violation of mandatory AR 180.

32. The next point, which must be borne in mind is that even, if the proceedings of the respondents are presumed to be valid and legal, the punishment of recordable censure should not have come in the way of the promotion of the petitioner. In *Union of India and others Vs. Brig. J.S. Sivia*, MLJ 1996 SC 3, it was held :

“7. The latest Army Order on the subject of Award of censure to Officers is dated January 5, 1989. The relevant paragraphs 2, 5, 6, 8, 9, 10, 13 and 21 are reproduced hereunder:

“2. The award of censure to an officer of a JCO is an administrative action, in accordance with the custom of the service. It takes the form of ‘Severe Displeasure’ (either recordable or otherwise) or ‘Displeasure’ of the officer award the censure, as specified in succeeding paragraphs.

5. Censure is awardable where the act, conduct or omission is of a minor nature, both in nature and gravity. An offences of serious nature under the Army Act will not be disposed of by an award of censure but will be dealt with by initiating a disciplinary action. Attention, in particular, is invited to Para 432 of the Regulations for the Army, 1962, which stipulates that “persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to public or regimental property must be tried by a court martial or prosecuted in a civil court. Such cases will not be disposed of summarily or by administrative action.” In view of the foregoing, there should be no occasion for offences involving moral turpitude, misappropriation, financial or other offences of serious nature being dealt with by award of censure when disciplinary action is possible/feasible. If for some reason, a case of this nature does come across, where trial is inexpedient or impractical, administrative action for

termination of service of the delinquent persons should be initiated.

6. Cases which are not of minor nature and which do not involve moral turpitude, fraud, theft, and dishonesty and where trial of GCM is either not practicable being time barred or is not expedient due to other reasons, may in appropriate cases be discretion of the GOC-in-C be forwarded to Army Headquarters (D&V Dte) for consideration to award of censure by the COAS, so as to avoid resorting to the extreme step of action under the provisions of Army Act Sec 19 read with Army Rule 14.

8. Censure in the form of 'Severe Displeasure' or 'displeasure' awarded by the Central government will remain permanently with the dossier of the officer or the JCO so censured.

9. 'Severe Displeasure' of the Chief of Army Staff will remain with the dossier of the officer or the JCO concerned permanently.

10. Award of a 'Severe Displeasure', by a General Officer Commanding in Chief, or a General Officer Commanding a Corps (not below the rank of Lt Gen) of Director General Assam Rifles (not below the rank of Lt Gen) will be recorded with the dossier of an officer or a JCO only where a specific direction that the censure be so recorded (recordable censure) is endorsed.

13. The award of a censure does not debar an officer from being considered for promotion and may not be itself affect his promotion. However, while it is operative, it is taken cognizance of as part of the officer's overall record of service in assessing his performance for such promotion. The effect of a recordable censure on promotion would be considered in its totality on the overall performance. A censure ceases to have any effect on promotion once it is inoperative as given in paras 21 to 22 below.

21. Recordable Censure on 'Severe Displeasure other than those Awarded by the Authorities at Paras 8 to 9 above. A censure of 'Severe Displeasure' (to be recorded) awarded by General Officer Commanding in Chief or a General Officer Commanding Corps (not below the rank of Lt Gen) or Director General Assam Rifles (not below the rank of Lt Gen) will remain operative for three years from the date of award after which it will automatically lapse and the record expunged from the dossier of the officer or the JCO concerned under intimation to the individual."

8. It is obvious from various documents mentioned above that the award of censure is being regulated by "Customs of the service". The Army Order dated January 24, 1942 takes us to August 26, 1927 and as such there is reasonable basis to assume that the award of censure is being governed by the "Customs of the service" right from the inception of the Indian Army. That being the position the award of censure is the binding rule of the army service. Section 3(v) of the Act and Regulations 9 of the Regulations recognize the existence of "customs of the service". The definition of "Commanding Officer" clearly says that in the discharge of his duties as a Commanding Officer, he has to abide by the "customs of the service". Similarly Regulation 9 which lays down the duties of the Commanding Officer, specifically says that the Commanding Officer has to discharge his functions keeping in view the regulations and the 'customs of the service'. From the scheme of the Act, Rules, Regulations and the various Army orders issued from time to time, it is clear beyond doubt that the award of censure is part of the custom of the Army and has the binding force."

33. Last but not the least it is notable that the court of inquiry did not find any evidence of any misappropriation of the funds in

question. Para no. 13 of the court findings is reproduced as follows :

“13. The completed Static Water Tank of 585 KL, construction of two class rooms with ancillaries and construction of boundary wall around it through works, amounting to a total of Rs.16,43,700/- approximately, supplemented by Regimental Funds for other facilities, amounting to Rs.8,77,156/-, was thus converted into a swimming pool. The total cost incurred was Rs.25,20,856/- approximately. (Witness No. 2, Paragraph No.3, Witness No.3, Paragraph No.2). There is no evidence of any misappropriation of funds.”

34. In the result, we accept both the writ petitions, wherein it is ordered that the recordable censure order and the connected proceedings are hereby quashed and we direct the respondents/competent authority to reconsider the question of promotion of the petitioner within 60 days from the date of this order and in case the petitioner is found to be fit for promotion, he be given the promotion prior to a date when his juniors were promoted with all the consequential benefits. There shall be no order as to costs.

CM No.7232/2007(stay) in WP(C) No.3831/2007

In view of the orders passed in the writ petition, no further orders are required to be passed in this application. The same is disposed of accordingly.

CM No.7365/2007(exemption) in WP(C) No.3904/2007

Allowed, subject to just exceptions.

J.M. MALIK, J.

June 02, 2008
dk

A.K. SIKRI, J.