

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

+ W.P.(C) 6614/2007

% Reserved on: 28th August, 2008
Date of Decision: 5th September, 2008

NAIB SUBEDAR MANJEET SINGH Petitioner
Through Mr. Rajeev Anand, Advocate.

versus

UOI & ORS. Respondents
Through Ms. Barkha Babbar, Advocate
with Major S.S. Pandey, Dy JAG

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG,J

1. The petitioner was employed in Indian Army on 17.12.1999 and was posted as Naib Subedar in 167 field regiment detailed in J&K in or around December 2003. He was served with an order passed by the respondents dated 20.07.2005 whereby he has been awarded with the punishment of “Severe Displeasure (Recordable)” on the basis of the findings returned by a Court of Inquiry(COI) held against Lance Naik Jagtar Singh posted in the same regiment. Before awarding the punishment as aforesaid, a

show cause notice was also issued to the petitioner on the directions of the GOC 16 Corps who found the petitioner blame worthy even though he was not a party to the Inquiry.

2. It is the case of the petitioner that on 7th December, 2003 at the field location of the Unit Battery in J & K, Lance Naik Jagtar Singh fired indiscriminately from his service weapon. This caused the death of two of his colleagues and injured one posted in the same Regiment, and thereafter, Jagtar Singh also attempted to commit suicide. A Court of Inquiry was ordered by Headquarter 29 Infantry Division vide the order No. 3013/2/167/A3 dated 08.12.2003 **to investigate the circumstances under which No. 1496656N Lance Naik Jagtar Singh of 167 Field Regiment fired indiscriminately from his personal weapon 5.56 mm INSAS rifle causing death of Hav Ramesh Singh and Hav Ajit Singh and injury to Hav Baldev Singh and thereafter attempted to commit suicide on that day.**

3. The Court of Inquiry examined as many as 40 witnesses including the petitioner. Before issuing the show cause notice the respondents granted an opportunity to the petitioner to cross-examine the witnesses recorded during the Court of Inquiry after the Inquiry was concluded without issuing any notice to him and also without supplying the copies of the statements of those witnesses. Yet based upon the findings returned in the COI the petitioner was found blameworthy for having not controlled the situation by the GOC 16 corps and a show cause notice dated 20.6.2004 was served upon him to show cause as to why

appropriate censure be not awarded to the petitioner. The show cause notice dated 20th June, 2004 reads as under:

"CONFIDENTIAL"

HQ 16 Corps.
C/o 56 APO
2710/29D/A3 (iv)

20 Jun 04

JC.262675M Nb. Sub Manjeet Singh
167 Fd Regt
C/o 56 APO

SHOW CAUSE NOTICE:JCO

1. A Court of Inquiry was ordered by HQ 29 Inf Div vide their convening order NO. 3013/2/167/A3 dt. 08 Dec 2003 to investigate the circumstances under which No. 14496656N Lance Hav Jagtar Singh of 167 Fd Regt fired indiscriminately from his personal wpn 5.56 mm INSAS Rif and caused death of NO. 14347165Y Hav Ramesh Singh and NO. 14350951H Hav Ajit Singh and injury to NO. 14462587W Hav Baldev Singh and thereafter attempted to commit suicide on 07 Dec 2003.
2. **The proceedings of the C of I were placed before the General Officer Commanding 16 Corps who has found that you are blameworthy for deliberately avoiding taking action as Junior Commissioned Officer to control the situation at the time when L/Hav Jagtar Singh opened fire in the Unit Lines.**
3. It appears to GOC 16 Corps that your censure in appropriate form is called for the above lapse on your part. You are, therefore, afforded an opportunity to explain your conduct on the above count as to why censure of GOC 16 Corps, in appropriate form be not conveyed to you for the above lapse on your part.
4. You should submit your reply to Show Cause Notice within one month of its receipt failing which it would be assumed that you have no grounds to urge against the proposed action and an exparte decision will be taken.
5. A copy of court of inquiry proceedings is forwarded herewith for your perusal and early return please.
6. This show cause notice will be ack.

Sd/-(VK Chaturvedi)
Brig Adm for GOC"

4. The petitioner replied to the show cause notice. However the reply did not find favour with the respondents and censure in the form of SEVERE DISPLEASURE (RECORDABLE) was issued to the petitioner by the GOC 16 Corps. It is this order which has been impugned before us. It reads as under:

"CENSURE ORDERS OF GENERAL OFFICER
COMMANDING 16 CORPS TO BE CONVEYED TO
JC-262675M NAIB SUBEDAR MANJEET SINGH OF
167 FIELD REGIMENT.

1. I have considered the reply to the show cause notice submitted by JC-262675M Naib Subedar Manjeet Singh of 167 Field Regiment vide his letter No Nil dated 14 Jul 2004.
2. I find that there is inadequate merit in the reply. The Junior Commissioned Officer is blameworthy for deliberately avoiding to take action to control the situation at the time when Lance Havildar Jagtar Singh opened fire in the Unit Lines.
3. I, therefore, direct that my 'Severe Displeasure' (Recordable) be conveyed to JC-262675M Naib Subedar Manjeet Singh of 167 Field Regiment.

Sd/-(Sudhir Sharma)
Lt Gen GOC"

5. As a consequence thereof the petitioner was also not considered for promotion for the rank of Subedar. Aggrieved by the aforesaid, the petitioner raised his grievances by filing statutory complaint dated 5th January, 2006 and 30th January, 2007 under Section 26 of the Army Act 1950. However, the complaints so made were rejected vide communications dated

13.1. 2007 and dated 23.03.2007 sent to the petitioner. The petitioner also served a legal notice dated 2.6.2007 which remained un-replied till date. Hence the petitioner filed the present writ petition.

6. Before us the petitioner has assailed the impugned order which has been admittedly issued based upon the findings returned by the COI held in the case of Jagtar Singh as illegal because it was issued without complying with the provisions of Rule 180 of the Army Rules, 1954 which lays down a mandatory procedure to be followed whenever the character or military reputation of a person subject to the provisions of Army Act is questioned while holding a court of enquiry. The said provision is reproduced herein for the sake of reference:

"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 the 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 the character or military reputation and producing any witnesses in defence of his character or military reputation. The prescribing officer of the court shall take steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of any fully understands his rights, under this rules."

7. Explaining his grievance, the petitioner has submitted that in the instant case Court of inquiry was conducted only against Jagtar Singh and the petitioner was merely a witness who

deposed in respect of the incident. There were 39 other witnesses. It is only after recording the statement of all the witnesses that the petitioner was asked to cross-examine them without even supplying the copies of the statement so recorded. Thus it is stated that there was no compliance of Rule 180 of the Act in this case, as no opportunity was given to the petitioner to remain present during the COI when the statement of the witnesses was recorded or to cross examine them at the same time or to make a statement in defence or to lead defence witnesses, if any. It is also submitted that even after the completion of the Court of Inquiry no proceeding was initiated against the petitioner viz. hearing by the Commanding Officer, recording of Summary of Evidence or holding a Court Martial.

8. It is submitted that the petitioner was put under immense pressure from the unit to get the matter hushed up and told to give a dictum reply as required by his seniors. The petitioner accordingly gave his reply dated 12.07.2004 which in the peculiar fact and circumstances was made at the instance and in the interest of the unit of the petitioner. It is also the case of the petitioner that the order of censure issued by GOC 16 corps dated 20th July, 2005 is arbitrary, illegal, violative of principles of natural justice and contrary to the provisions contained under the Army Act and the Rules framed thereunder and, in particular, Rule 180 thereof. This also resulted in supersession of the petitioner despite his fitness for the promotion to the rank of

Subedar. According to him, his complaints were also wrongfully rejected by the authorities.

9. Detailing the circumstances, the petitioner submitted that he was not negligent when the incident took place on 7th December, 2003 nor did he avoided taking action, whatever was possible when Lance Naik Jagtar Singh fired indiscriminately. It is stated that the petitioner cannot be held blameworthy because he was not in Command of the troops at the time of the incident; was not the Senior JCO vested with the responsibility over the troops; he was not present on the spot when the firing was resorted to by Lance Naik Havildar Jagtar Singh although Havildar Major (Key position in the battery) was present on the spot and has been exonerated in the incident. It is also stated that no firing or any untoward incident occurred after the petitioner reached the spot. It is also his case that the incident has taken place in the Counter Insurgency Scenario where in the first instance, upon indiscriminate firing by L/Hav Jagtar Singh, it was the first and foremost duty of the Commanders to find out if there was some militant attack/action before jumping in the situation and it was in the fraction of seconds that the indiscriminate firing ceased and the situation was under control when the delinquent gave his weapon to the Battery 21C present on the scene of incident.

10. On the other hand, the respondents have justified the action taken. Detailing the circumstances, it has been pleaded that the petitioner was one of the Junior Commissioned Officer deployed in the Counter Terrorist Column, at Ujh Barrage in 29 Infantry

Division. The action was taken against him based **upon the finding returned by the Court of Inquiry** conducted against Lance Naik Jagtar Singh. In view of the circumstances which came to the light, the GOC 16 Corps decided to take administrative action against the petitioner for the omission and commission on his part where he deliberately avoided taking action as a Junior Commissioned Officer to control the situation at the time when one non commissioned officer opened fire indiscriminately in unit lines after issuing a show cause notice where it was very specifically stated that the circumstances brought to light during the Court of Inquiry held against Lance Naik Jagtar Singh makes it apparent, that the petitioner was negligent in performance of his duties as JCO at the time of the aforesaid incident. It has also been stated that the provisions of Rule 180 of the Army Rules, 1954 were complied with inasmuch soon after the Court of Inquiry reached to a conclusion that there were circumstances which were affecting the character, military reputation of the petitioner, he was given an opportunity of cross examination of the witnesses produced during the Court of Inquiry but the petitioner failed to avail the opportunity. Thus, taking into consideration the overall conduct of the petitioner, he was awarded punishment simply with “Severe Displeasure (Recordable)” which was also awarded to all others who were similarly responsible. It is also stated that the show cause notice was issued to the petitioner on account of directions and recommendations given by the General Officer Commanding, 16

Corps. It is also pleaded that before filing the present petition no grievance was made regarding alleged violation of Rule 180.

11. It will be appropriate to take note of the observations made by the GOC which resulted in issuing of the show cause notice to the petitioner as appears in Annexure R-2 filed by the respondents

- "1. I agree with the findings and the opinion of the Court.
2. The perusal of Court of Inquiry reveals serious disciplinary and administration lapses at all levels of the command in 167 Field Regiment. It also reveals that the basic clad down drill and management practices were not being adhered to/followed by officers and Junior Commissioned Officers, which resulted in the preventable shoot out on 07 December 2003 at Ujh Barrage Post resulting in death of two Non Commissioned Officers. The following facts have emerged:-
 - a) Number 14496656N Lance Havildar Jagtar Singh Committed murder of Number 14347165Y Havildar (General Duty) Ramesh Singh and Number 14350951H Havildar (General Duty) Ajit Singh and attempted to murder Number 14462587W Havildar Baldev Singh (General Duty) by causing gun shot wound injury before attempting to commit suicide by causing gun shot wound injuries to himself with his personal weapon Rifle INSAS Registered Number 15576913.
 - b) Number 14462587W Havildar Baldev Singh had deliberately avoided to give correct version of the incident and tried to mislead the Court despite being prime witness in the incident.
 - c) IC 37715 N Colonel RK Chadha, Commanding Officer, 167 Field Regiment had displayed poor officer management and failed to ensure adequate precautionary measures to avoid such incidents being the Commanding Officer of 167 Field Regiment.
 - d) IC 51335A Major DR Mishra, the Battery Commander, had not fully involved himself in the operational and administrative aspects of the battery and on 07 December 2003 he had left the Battery location in sensitive area without prior permission of HQ 78 Infantry Brigade under whom the Battery was deployed for operational tasks in contravention to the existing orders on the subject.
 - e) Though IC 59107M Captain Ashutosh Sharma tried to stop Lance Havildar Jagtar Singh from shooting himself, he did not exercise adequate command and control over the Battery, being second in command, prior to the incident.

- f) JC 262651H Naib Subedar Mohinder Singh, JC 262481K Naib Subedar Prakash Chand and JC 262675M Naib Subedar Manjeet Singh deliberately arrived late at the place of incident in a bid to distance their personal involvement instead of reacting promptly and controlling the situation on the ground immediately on hearing the sound of first gun-shot. They are also found to be blameworthy for not attending the roll call parades, a mandatory drill followed in every sub unit.
3. I direct that:-
- (a) Disciplinary action be initiated against Number 14496656N Lance Havildar (General Duty) Jagtar Singh for committing murder of Number 14350951H Havildar (General Duty) Ramesh Singh and Number 14347165Y Havildar (General Duty) Ajit Singh, and attempt to commit murder of Number 14462587W Havildar (General Duty) Baldev Singh and attempting to commit suicide.
 - (d) Disciplinary action be initiated against Number 14462587W Havildar (General Duty) Baldev Singh for deliberately avoiding to give correct version of the incident despite being the prime witness of the incident.
 - (e) Administrative action at the level of General Officer Commanding 29 Infantry Division be initiated against IC 59107M Captain Ashutosh Sharma for not fully involving himself in the operational and administrative aspects of the Battery.
4. I recommend that administrative action at the level of General Officer Commanding 16 Corps be initiated against:-
- (a) IC 37715N Colonel RK Chadha, Commanding Officer, 167 Field Regiment for failing to ensure precautionary measures to avoid such incidents, being a command responsibility.
 - (b) IC 51335A Major DR Mishra for not fully involving himself in the operational and administrative aspects of the Battery, and for leaving the CT column location on 07 December 2003 without taking prior approval of Headquarters 78 Infantry Brigade.
 - (c) JC 262651H Naib Subedar Mohinder Singh, JC 262481K Naib Subedar Prakash Chand and JC 262675M Naib Subedar Manjeet Singh for deliberately avoiding taking action as Junior Commissioned Officers to control the situation
5. The deaths of Number 14347165Y Havildar (General Duty) Ramesh Singh and Number 14350951H Havildar (General Duty) Ajit Singh of 167 Field Regiment are attributable to military service in field and the gunshot wound injury sustained by Number 14462587W Havildar Baldev Singh

(General Duty) is also attributable to military service in field.

Station:C/o 56 APO (A N Aul)
Major General
Dated:15Mar2004 General Officer Commanding”

12. We have heard the submissions made by the parties and have also perused the record produced by the respondents. While deciding a petition under Article 226 of the Constitution of India it is not for us to go into the factual controversies but we can certainly look into the violation of the mandatory procedures to be followed as prescribed under the Army Act and the Rules framed thereunder.

A perusal of the record of the Court of Inquiry goes to show that in the present case as many as 40 witnesses had been examined during the Court of Inquiry held against Lance Naik Jagtar Singh. It is not clear as to how much time had been taken to record the statements of the aforesaid witnesses. None of the witnesses have made any categorical allegation against the petitioner.

13. Rule 180 of the Army Rule mandates that whenever it is proposed to take any action against the incumbent whose reputation and character is found to be in question on account of the evidence recorded during the court of enquiry, it becomes necessary to follow the procedure as prescribed by the Rule (supra) in toto. However what has been done by the respondents was only to permit the petitioner to cross examine the witnesses

after the conclusion of the enquiry that also without supplying the copies of the evidence so recorded which was a misnomer. The relevant observation, in this regard, can be inferred from a perusal of the Court of Inquiry in the manner as below :

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CROSS EXAMINATION OF WITNESSES ON 17 JAN 04

The court decides to invoke provisions of Army Rule 180 against the following :-

- | | | |
|-----|-------------------------------|-----------------|
| (a) | IC-37715N Colonel | RK Chadha |
| (b) | IC-51335A Major | DR Mishra |
| (c) | IC-59107M Captain | Ashutosh Sharma |
| (d) | JC-262481K Naib Subedar | Parkash Chand |
| (e) | JC-262675M Naib Subedar | Manjeet Singh |
| (f) | JC-262651H Naib Subedar | Mohinder Singh |
| (g) | 14398556M Lance Havildar (TA) | Jai Singh |
| (h) | 15120927K Naik (GD) | Paramjeet Singh |

The complete Court of Inquiry (the statement of all the witnesses) were read over in their presence and they declined to cross-examine any witness.

Sd/-x/x/x/x/x
IC-37715N Colonel RK Chadha

Sd/-x/x/x/x/x
IC-51335A Major DR Mishra

Sd/-x/x/x/x/x
IC-59107M Captain Ashutosh Sharma

Sd/-x/x/x/x/x
JC-262481K Naib Subedar Parkash Chand

Sd/-x/x/x/x/x
JC-262675M Naib Subedar Manjeet Singh

Sd/-x/x/x/x/x
JC-262651H Naib Subedar Mohinder Singh

Sd/-x/x/x/x/x
14398556M Lance Havildar (TA) Jai Singh

Sd/-x/x/x/x/x
15120927K Naik (GD) Paramjeet Singh

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14. It has been submitted by the petitioner that following of procedure as provided under Rule 180 of the Army Rules was mandatory which required the respondents to have issued a notice to the petitioner giving him an opportunity to remain present throughout the court of enquiry from the stage when the evidence came against him; cross examine the witnesses whose evidence were likely to affect his character or military reputation, making a statement in defence and to produce the evidence in defence of his character or military reputation. However nothing of the kind has been done. Non compliance of the aforesaid procedure makes the entire proceedings taken out against the petitioner by issuing show cause notice and awarding of the punishment as illegal and unsustainable in law.

15. In this regard the petitioners have relied upon a judgment delivered by a Division Bench of this Court in the W.P.(C) 11839/2006 on 11.01.2007 in the case of Lt. Gen. Surendra Kumar Sahni Vs. Chief of Army Staff and Ors. Some of the paragraphs of this judgment which speaks for themselves and supports the case of the petitioner are reproduced for the sake of reference:

“18. Army authorities are vested with the powers but equally true is that they are entrusted with certain duties. The provisions of law like Rules 22, 24 and 180 of the Army Rules enjoins on the authorities important responsibilities omission of which could be of serious consequences particularly when they cause prejudice to the basic protections available to the member of the Force under different provisions as the Supreme Court in the case of Lt. Col. Prithi Pal Singh Bedi (supra) had held as under:

When an offence is committed and a trial by a

general court martial is to be held, there is no provision which requires that a court of enquiry should be set up before the trial is directed. To ensure that such a person whose character or military reputation is likely to be affected by the proceedings of the court of enquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation, Rule 180 merely makes an enabling provision to ensure such participation. But it cannot be used to say that whenever in any other enquiry or an enquiry before a commanding officer under Rule 22 or a convening officer under Rule 37 or the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior enquiry by the court of enquiry is a sine qua non.

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 Ors. 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 defense (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 defense 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."

16. It has been held by this Court in *Maj. Harbhajan Singh v. Ministry of defence and Ors.* 1982 (Vol. 21) LLT 262, and by Supreme Court in *Lt. Col. Prithi Pal Singh Bedi v. UOI AIR 1982 SC 1413* and *Ors. Capt. Dharam Pal Kukrety and Ors. v. UOI and Ors.* and *Capt. Chander Kumar Chopra v. UOI and Ors.* 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 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 as per 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.

17. As stated above, Ambit and scope of Rule 180 also came to be considered by the Supreme Court in *Prithi Pal Singh v. Union of India* (Supra). Rule 180 was held not be construed to mean that whenever and wherever any inquiry in respect of any person subject to the Act, his character, or military reputation is likely to be affected, setting up of a Court of Inquiry is a sine qua non. Rule 180 has been held to be mandatory to be followed whenever a court of enquiry is set up. The Supreme Court has thus made it clear that setting up of a Court of

Inquiry is not a sine qua non for any inquiry which may be set up under the Army Act. However, it has laid down that if a court of Inquiry is held, compliance with R.180 is imperative. It proceeds to say:

... Rule 180 merely makes it obligatory that whenever a Court of Inquiry is set up and in the course of inquiry by the Court of Inquiry character or military reputation of a person is likely to be affected then such a person must be given full opportunity to participate in the proceedings of Court of Inquiry. Court of Inquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a court of Inquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an inquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that person whose character or military reputation is likely to be affected by the proceedings of the Court of Inquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation. Rule 180 merely makes an enabling provision to ensure such participation

In the instant case Court of Inquiry was set up though it was not necessary for the authorities to set it up. But once Court of Inquiry has been set up, mandate of R.180 is to be followed and if its provisions are vocative that would amount to denying equality before law and equal protection of law to a person who is subject to Army Act and against whom court of Inquiry is set up.

18. Rule 180 is framed under the Army Act. The rule has a statutory force and it is binding on the authorities as also on the person who is brought before the Court of Inquiry. The procedural safeguards envisaged under the rule are not only fair but also just. It ensures fairness in action and affords equality before law and equal protection

of law to a person who is subject to Army Act and who is brought before the court of Inquiry. It is true that the persons bound by the Army Rules belong to a disciplined force but they do not lose their right under Article 14 of the Constitution of India on that ground. A person subject to Army Act does not cease to be a citizen of India and has certain rights which are to be enforced subject to Article 33 of the Constitution. A special procedure is given in the Army Act and the Rules framed there under for dealing with the person subject to the Army Act. The procedure does not derogate from the generality of power conferred by Article 33 of the Constitution of India, therefore, the law which is applied in relation to armed forces may not satisfy the requirements of Article 21 of the Constitution of India but if the law and procedure is prescribed, it has got to be applied during the court of Inquiry or during the Court Martial.

19. It is one of the fundamental features of our Constitution that a person subject to Army Act continues to be a citizen of India and is not wholly deprived of his rights under the Constitution. In the larger interests of national security and military discipline the Parliament may restrict or abrogate such rights in their application to Armed forces but the basic feature which the Parliament would not like to alter is that persons subject to Army Act cannot be denied equality before law and equal protection of law. Therefore the guarantees contained under the Article 14 of the Constitution are available to the persons subject to Army Act in the same manner in which these guarantees are available to the other citizens of India. If the inquiry is sought to be held into the conduct of the Army Offices or into his reputation, a procedure which is fair, just and reasonable is to be adopted and the persons holding such an enquiry must be unbiased. This is exactly what is embodied in

R.180 of the Army Rules.

20. The said rule requires that if an enquiry is held in respect of matters which affects the character or military reputation of a person subject to the Army Act, full opportunity must be afforded to such person throughout the inquiry. He is to be given an opportunity to make statement, give evidence and cross-examine the witnesses whose statement in his opinion affect his character and military reputation, so on and so forth. The authorities are under an obligation to examine the witnesses in the presence of the person whose character on military reputation is under investigation. That would mean cross-examination of all witnesses as also the examination-in-chief of the witnesses is to be conducted in his presence. It is the option of the person against whom inquiry is conducted to cross-examine the witnesses and this option cannot be exercised by the person who conducts the inquiry. The rule is a safeguard against arbitrariness, and ensures fair enquiry. If fairness is not observed as is mandated by the rule during the inquiry, the action of the authority conducting the inquiry can be assailed and termed as arbitrary.

21. In *Col. Prithi Pal Singh Bedi Vs. Union of India* (supra) while recognizing that the Army Rules and the Army Act have to be applied and strictly followed even if the Rules are not meeting the requirement of Article 21, it was observed:

“The Parliament has the power to restrict or abrogate any of the rights conferred by Part III of the Constitution in their application to the

members of the Armed Forces so as to ensure the proper discharge of duties and maintenance of discipline amongst them. The Act is one such law and, therefore, any of the provisions of the Act cannot be struck down on the only ground that they restrict or abrogate or tend to restrict or abrogate any of the rights conferred by part III of the Constitution and this would indisputably include Art. 21. But even apart from this, it is not possible to subscribe to the view that even where the prescribed procedure inheres compliance with principles of natural justice but makes the same dependent upon the requisition by the person against whom the inquiry is held, it would be violative of Art. 21 which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. If the procedure established by law prescribes compliance with principles of natural justice but makes it dependent upon a requisition by the person against whom an inquiry according to such procedure is to be held, it is difficult to accept the submission that such procedure would be violative of Art. 21. And as far as the Rules are concerned, they have made clear distinction between an officer governed by the Act and any other person subject to the Act. Expression 'Officer; has been defined to mean a person commissioned defined to mean a person commissioned, gazetted or in pay as an officer in the regular Army and includes various other categories set out therein. **By the very definition an officer would be a person belonging to the upper bracket in the Armed Forces and any person other than an officer subject to the provisions of the Act would necessarily imply persons belonging to the lower categories in the army service. Now, in respect of such persons belonging to the lower category it is mandatory that Rr.22, 23 and 24 have to be followed and there is no escape from it except on the pain of invalidation of the inquiry. "**

22. It may also be relevant to take note of the following observations made in the aforesaid case, i.e:-

"Reluctance of the apex court more concerned with civil law to interfere with the

internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilized community governed by the liberty oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must be preceded by an inquiry ensuring fair, just and reasonable procedure and trial by a Judge of unquestioned integrity and wholly unbiased. A marked difference in the procedure for trial of an offence by the Criminal Court and the Court martial is apt to generate dissatisfaction arising out of this differential treatment”.

23. In **Dhanajaya Reddy Vs. State of Karnataka**, (2001) 4 SCC 9

it has been held as under:-

“where a law requires something to be done in certain manner that must be done in that manner or not at all if the rules require confession to the record in a particular manner then it should have been done in that manner having not followed the rules affects the confession even if one go to rule 23 and applies the same to the facts of this case it is apparent, that the caution which were given to the accused was after recording the plea of guilt and not before it. Moreover, in this case there was no evidence except the evidence of the accused regarding summary of evidence.

In that case it was also held: Purpose of Summary of Evidence, as per the rule position itself, cannot be under estimated. Since the record of Summary of Evidence forms the basis on which it is to be further decided whether to hold General Court Martial or not

and, since at the time of recording witnesses by the Officer nominated to record Summary of Evidence accused is given chance to cross-examine the prosecution witnesses and to lead his defence witnesses, not giving such an opportunity to the accused person is definitely going to cause prejudice to such a person. The procedure which is to be followed at the time of recording evidence by the Officer nominated to record Summary of Evidence is, therefore, mandatory and infraction thereof may entail the entire proceedings including General Court Martial, to be illegal and these can be quashed."

24. Learned counsel appearing for the respondents pointed out that in the present case once an opportunity was given to the respondents to cross examine the witnesses, there was sufficient compliance of the provisions as contained under Rule 180 of Army Rules and thus, the punishment of censure which is nothing else but recording of "Severe Displeasure (Recordable)" against a person who failed to comply with his obligations in a situation like the one which resulted in loss of two lives and injury to a third personnel ought not to be interfered in the peculiar facts and circumstance of this case while exercising jurisdiction under Rule 226 of the Constitution of India. However, We do not find any strength in the submissions made by the learned counsel for the respondent for the reasons as discussed above. The views expressed by the Apex Court and a co-ordinate bench of this Court are binding on us.

25. In fact, in a judgment delivered by this Court in the case of Malkiat Singh Vs. Union of India in CWP 3900/1998 decided on 24.7.2008, we have ourselves emphasized that violation of the rules which are mandatory in nature vitiates the proceedings

taken out by the Army Authorities against an army personnel more so when he is not an officer.

26. Taking into consideration the legal position as discussed above, we have no hesitation but to hold that the basis of the punishment awarded to the petitioner is the findings returned by the Court of Inquiry which on account of non-compliance of Rule 180 of the Army Rules cannot be sustained. In view of the foregoing discussions we issue following directions to the respondents:

- a) We set aside the show cause notice issued to the petitioner dated 20th June, 2004. Consequently, the punishment awarded to the petitioner is also set aside with liberty to the respondents to hold the Court of Inquiry afresh, if they so decide after giving full opportunity to the petitioner under Rule 180 of the Army Rules after providing copies of the statements of the witnesses and opportunity to the petitioner to recall as many witnesses as he wants for the purpose of cross examination, to make a statement in his defence and to produce defence witnesses as he may desire within a period of six months from today.
- b) We also direct that the petitioner should be considered for his promotion to the rank of Subedar in case he is otherwise fit from the date his other counterparts have been so promoted by ignoring the punishment of “Severe Displeasure (Recordable)” for the reasons stated above. In case the petitioner is promoted to the post of Subedar, all

consequential benefits shall also be provided to him.

27. With these observations, the writ petition is allowed with no orders as to costs.

MOOL CHAND GARG, J

SANJAY KISHAN KAUL, J

SEPTEMBER 05, 2008
anb