

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: September 16, 2016

Judgment delivered on: November 04, 2016

+ W.P.(C) 7123/2016, CM No.29307/2016

PADAM KUMAR

..... Petitioner

Through: Ms. Jyoti Singh, Sr. Adv. with Ms.
Tinu Bajwa, Mr. Amandeep Joshi, Mr.
Sameer Sharma and Mr. Dinesh
Yadav, Advs.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Sanjay Jain, ASG with Mr. Vijay
Joshi, Sr. Panel Counsel, Ms. Shreya
Sinha, Mr. Sumit Misra, Ms. Karnika
Singh & Ms. Meenakshi Pandey,
Advs.

CORAM:

HON'BLE MS JUSTICE INDIRA BANERJEE

HON'BLE MR JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The challenge in this writ petition is to the communication dated June 03, 2016 from Senior Administrative Officer on behalf of Director General, Border Road Organization to the Chief Engineer (HQ), Brahamank whereby, the Chief Engineer was directed to forward charge sheets along with list of

documents with regard to certain officers including the petitioner herein. It may be noted here, the said communication was not addressed to the petitioner.

2. The case set up by the petitioner is that he was promoted as Superintending Engineer in Border Road Organization-respondent No.3 in December, 2005. Between November 2007 and July 2010, he was posted as Commander, 44 Border Roads Task Force at Along in Arunachal Pradesh; at project Brahamank in East Siang district of Arunachal Pradesh in the rank of Superintending Engineer and Director, Works & Budget, where he continues as on date.

3. It is his case that on February 26, 2015, he received a summon for attending Court of Inquiry, which was convened to enquire into alleged deficiency of Hume Pipes in the year 2008-2009. It is also his case that the summon was later amended to report for Court of Inquiry in July, 2015. According to him, he attended the Court of Inquiry on July 28, 2015, where he requested, for supply of relevant documents under Rule 184(2) of the Army Rules, 1954, the request was not acceded to by the respondents. In August, 2015, the Court of Inquiry submitted its report to the respondent No.3, in which the petitioner was held to be blameworthy for the alleged loss

of Hume pipes. It is his case that on September 28, 2015, the petitioner submitted a representation highlighting anomalies in the conduct of Court of Inquiry. Instead of replying to the representation, summon was issued to attend another Court of Inquiry on the same subject. On January 15, 2016, he submitted another representation to set aside the reconvening order of COI and seeking a reply to his representation dated September 28, 2015. Pursuant thereto, on January 29, 2016, the respondents replied to the petitioner to attend the Court of Inquiry, failing which disciplinary action would be taken against him. It is his case, that he attended the Court of Inquiry under protest. It is also his case that Rule 180 of the Army Rules was invoked against the petitioner. His further request for supply of documents was again refused. The Additional Court of Inquiry submitted its report in February 2016 to the respondent No.3.

4. On February 15, 2016, the petitioner received a letter dated January 22, 2016 informing him that the representation dated September 28, 2015 has been disposed of as a pseudonymous complaint. On February 16, 2016, March 21, 2016, the petitioner made representations for setting aside of the COI as well as for the supply of documents under Rule 184(2) of the Army Rules, which request was turned down by the respondents as they refused to

supply the relevant documents. It is the case of the petitioner that the respondents issued an order holding the petitioner blameworthy for various lapses based on the Court of Inquiry, which was followed by the impugned communication dated June 03, 2016.

5. Ms. Jyoti Singh, learned Senior Counsel appearing for the petitioner would make two submissions. The first being that the respondents, having subjected the petitioner to Rule 180 of the Army Rules, 1954 during the Court of Inquiry could not have denied the petitioner the relevant documents and the right of cross examination in violation of the statutory Rules, principles of natural justice and the law laid down by the Supreme Court in that regard. She would also state, that the proposed charge sheet sought to be issued by the respondents, would be for deficiencies pertaining to the year 2008-2009 and the same cannot be issued after an inordinate delay of about seven years. In support of her contention, she would rely upon the following judgments:-

(i) 2014 (3) SLR 338 Union of India and others v. Sanjay Jethi and others.

(ii) Writ Petition (C) No. 11839/2006 decided on January 11, 2007 Lt. Gen. Surendra Kumar Sahni v. Chief of Army Staff and others;

(iii) Writ Petition (C) No. 3831/2007 decided on June 02, 2008 Major General Rakesh Kumar Loomba v. Union of India, Through Secretary and others;

6. On the other hand, Mr. Sanjay Jain, learned Additional Solicitor General would submit that the present petition filed by the petitioner is not maintainable being premature, inasmuch as only a decision has been taken to initiate disciplinary proceedings against the petitioner. The charge sheet is yet to be issued. The petitioner would be at liberty to approach the Court after the proceedings are over and if the same results in a penalty, and that also after exhausting the departmental remedies. That apart, it is his submission that the petitioner was given fair and sufficient opportunity, inasmuch as he was given documents and had also cross examined the witnesses. He also states, that the respondents intend to issue a charge sheet under the CCS(CCA) Rules. In other words, he clarifies that the respondents do not intend to proceed against the petitioner under the Army Act/Rules. He states, that the Court of Inquiry, at the most, is a preliminary inquiry against the petitioner and the petitioner is not entitled to the documents/right of cross examination as he would be given all the documents, on which the respondents seek to rely upon and opportunity to cross examine all the

witnesses to be produced at the time of the proceedings. He has referred to the judgments of the Supreme Court in the case reported **(1983) 3 SCC 401 R. Viswan and others v. Union of India and others** and **(1998) 1 SCC 537 Union of India and others v. Major A. Hussain.**

7. Having heard the learned counsel for the parties, insofar as the challenge to the impugned communication dated June 03, 2016 is concerned, the said communication is not addressed to the petitioner. It is only an intra departmental communication, whereby, one authority is asking the other authority to forward the charge sheets along with the list of documents with regard to certain officers including the petitioner. That apart, the communication is only a step towards issuance of charge sheet. Even if a charge sheet is issued, the petitioner would have a remedy by filing a reply to the same and taking such objections both in law and on facts on the same. There is no cause of action for the petitioner to approach this Court by way of this petition at this stage. The law in this regard is quite well settled inasmuch as the Supreme Court in the case of **Union of India v. Ashok Kacker (1995) SCC Supplementary 1 SCC 180** held that the respondent shall have full opportunity to reply to the charge sheet and raise all the points available to him including those which have been urged before the Supreme

Court. The Supreme Court further held that this was not the stage at which the Tribunal ought to have entertained such an application for quashing of the charge sheet and appropriate course for the respondent to adopt is, to file a reply to the charge sheet and invite the decision thereon. That apart, a further question, which arises from the submissions made by Ms. Jyoti Singh, is that, whether the petitioner would be entitled to the documents as sought for, including the report of the Court of Inquiry and also the right of cross examination of the witnesses at this stage, in view of Rule 180 of the Army Rules, more particularly when he is being proceeded under the provisions of the CCS (CCA) Rules. To answer this question, it is important to note the submission made by Mr. Sanjay Jain that the petitioner is not being proceeded under the Army Act/Rules. Rather, a decision has been taken to issue a charge sheet under the provisions of the CCS (CCA) Rules. If that being the position, no doubt, the petitioner was subjected to the provisions of Rule 180 of the Army Rules, 1954 during the conduct of the Court of Inquiry, this, it appears primarily because the other officers, who were subjected to the Court of Inquiry were governed by the Army Act/Rules. The petitioner was given documents and right of cross examination of certain witnesses during the Court of Inquiry. It may be the

case of the petitioner that he was entitled to further documents and the right of cross examination of certain witnesses, which according to him, have been denied. According to us, the same would not be to the prejudice of the petitioner, inasmuch as the petitioner, who would be issued a charge sheet under the provisions of the CCS (CCA) Rules would be given all the documents, on which the respondents sought to rely upon.

8. That apart, he would have the right to cross examine all the witnesses, whom the respondent shall produce to prove the charges. The plea of Ms. Jyoti Singh that Rule 180 need to be followed in the case of the petitioner, more so when it is a statutory rule and not following would lead to violation of principles of natural justice and the judgment of the Supreme Court and this Court in the case of *Sanjay Jethi (supra)* and *Lt. Gen. Surendra Kumar Sahni (supra)* are concerned, the said judgments are distinguishable inasmuch as, the Supreme Court and this Court have held Rule 180 of the Army Rules is mandatory and need to be followed for the reason that in those cases, action after Court of Inquiry continued under the Army Act/Rules, inasmuch as they were proceeded / to be proceeded under Rule 22, Record of Evidence (RoE), Summary of Evidence and / or General Court Martial and not under CCS (CCA) Rules. Since the violation of Rule 180

would be, to the prejudice of those officers as action against them continued under the Army Act/Rules, the Supreme Court held so and we intend to deal with each of the case relied upon by Ms. Jyoti Singh in that regard.

9. Insofar as the judgment heavily relied upon by Ms. Jyoti Singh in the case of *Union of India v. Sanjay Jethi and others (supra)* is concerned, in the said case, as is clear from paras 2 and 3 that on August 5, 2009 a complaint was made by one of the officers alleging irregularity in the hiring of Civil Hired Transport, which were used for the purpose of supply of ordinance stores to units spread over the country, including remotest field and high altitude area by the respondent No. 1 therein namely Sanjay Jethi, who held the rank of Colonel in the Army. On the basis of a complaint, the General Officer Commanding-in-Chief, Pune initiated an action against the respondent No. 1 by making his attachment with HQ Sub Area on August 6, 2009 and also convened a Board of Officers on July 21, 2009 for ascertaining the truthfulness of the allegations. On July 22, 2009 the said Board seized the entire record and submitted a report. On the premises of that report, a COI was convened against the respondent No. 1 to investigate into the alleged irregularities. The COI conducted an inquiry and on March 8, 2010 recommended for taking appropriate disciplinary action against the

respondent No.1 and some other officers. On the basis of the said recommendation on February 23, 2010 the first Respondent was attached to the Head Quarters, Mumbai Sub Area till the finalization of the disciplinary proceedings. At that juncture, respondent No. 1 filed Original Application No. 283 of 2010 before the Principal Bench of the Tribunal at New Delhi challenging the COI proceedings as stipulated under Rule 180 of the Armed Forces Rules, 1954 (for short "the Rules"); and that there has been non-supply of documents which were annexed after conclusion of the proceedings before the COI. On June 17, 2010 the hearing of charges commenced and the Commanding Officer, Mumbai Sub Area, under Rule 22 directed for recording of Summary of Evidence under Rule 23. The Original Application was disposed of on October 8, 2010. While dealing with the grievance pertaining to violation of Rule 180, especially the deprivation of the right to cross-examine, the tribunal referred to the decision in ***Lt. Col. Prithi Pal Singh Bedi v. Union of India and Ors. AIR 1982 SC 1413***, and came to hold that as the first respondent had remained present throughout the course of COI and had been given opportunity to cross-examine the witnesses and, therefore, the grievance that he was not afforded full opportunity to cross-examine did not merit consideration. In fact, the

Tribunal opined that in-depth cross-examination was allowed to the respondent No. 1 and the Presiding officer asking for written questions to be submitted, could be treated as fair and reasonable exercise of discretion and hence, there was no illegality or irregularity in the conduct of the COI.

10. A contention was raised before the Tribunal that after conclusion of the proceedings by the COI when the report was submitted, certain documents which were not made available to the said respondent were annexed to justify his culpability. The tribunal found force in the said submission and opined that it was the duty of the COI to find out the truth by holding suitable investigation about the documents that were annexed afterwards. This opinion was formed on scrutiny of the language employed in Rule 180 and also by placing reliance on the judgment of the Supreme Court in the case of *Uma Nath Pandey and Ors. v. State of U.P. and Anr.* **AIR 2009 SC 2375**. It was held that the enclosing of the documents along with the report by the COI amounted to violation of Rule 180 inasmuch as the said report was treated as the sole basis for initiating the disciplinary proceedings against the respondent No. 1. It was also held that it would be difficult for the authority concerned to proceed for hearing on the point of charge to take into account those documents which were subsequently

annexed, and in all fairness, an Additional COI should be convened affording full opportunity to the parties, by examining or cross-examining any of the witnesses pertaining to those annexures. Accordingly, a direction in that regard was given by the Tribunal and an Additional COI reassembled and the respondent No. 1 was shown all the documents and he perused the same, as the proceedings would reveal, availing considerable length of time. At that stage, respondent No.1 made a request for grant of permission to cross-examine the Technical Members but the same was denied on the ground that as per Rule 180 he could only cross-examine the witnesses and not the Members. However, certain other witnesses were examined and cross-examined in the COI and, eventually, a report was sent by the Presiding Officer. Being grieved by the said order the respondent No. 1 preferred a fresh Original Application before the Armed Forces Tribunal. In the fresh proceedings, a plea was raised about holding of the Additional COI by Brig. N.S. Ahmed, who was the earlier Presiding Officer of the COI and continued to be the Presiding Officer of the Additional COI despite objections raised by the respondent No.1. An objection was also raised with regard to officers namely Lt. Col. Sandeep Sinha and Major Sanjeev Narula. The Tribunal relying upon the judgment in the case of ***Lt. Col. Prithi Pal***

Singh Bedi (supra), has held that convening the Additional COI with the same Members is contrary to fair play in action. The Tribunal concluded that the decision rendered by Additional COI was in violation of the provisions contained in Rule 180 and accordingly, set aside the same and all consequential actions taken on the basis of the said Additional COI. It granted liberty to the respondents therein to convene a fresh Additional COI with different Presiding Officer and other independent Members.

11. The issue, which arose before the Supreme Court was whether the Tribunal was justified in holding that the constitution of the COI, which consisted of two Technical Members and the Presiding Officer was vitiated as there was a possibility of their having an interest in the proceedings, as a consequence of which being biased or there could be a perception or likelihood of bias in the decision making process which would raise a doubt pertaining to the decision by a prudent or rational person. The question was also whether the Presiding Officer and the Technical Members should have been made available for cross-examination in a COI to meet the necessary command of Rule 180 and further regard being had to the earlier order passed in OA No. 283 of 2010; and whether there has been real violation of the principles of natural justice which ultimately vitiates the proceedings of

the Additional COI. The Supreme Court referred to the Army Rules including Rule 177, which deals with constitution of the COI and its role, namely, to collect evidence and if so required to report with regard to any matter which may be referred to them. It also referred to Rule 179, which provides the procedure by which COI shall be guided. Then it noted the provisions of Rule 180 and Rule 182. According to the Supreme Court, Rule 182 stipulates that the proceeding of Courts of Inquiry or any confession statement or answer to a question made or given at a COI shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the Court be given against any such person except upon the trial or such person for willfully giving false evidence before that court. The Supreme Court also held that the proviso to the Rule states, nothing in the said Rules shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness. Rule 184 which has been substituted by S.R.O. 44, dated January 24, 1985 deals with right of certain persons to copies of statements and documents. The Supreme Court, thereafter, referred to its judgment in *Lt. Col. Prithi Pal Singh Bedi (supra)* including the judgment of *Union of India and others vs. Manor A. Hussain (supra)*. The Supreme

Court was of the view that the authorities, it referred to, are to the effect that when a COI is set up under Rule 177 and during the course of enquiry character or military reputation of a person is likely to be affected, he should be granted full opportunity to participate in the proceedings; that the COI in its very nature is likely to examine certain issues generally concerning a situation or persons; that his participation could not be avoided on a mercurial plea that no specific enquiry was directed against the person whose character or military reputation is involved; that the concerned person shall be afforded full opportunity so that nothing is done at his back and without opportunity of participation; that it is the command of the said provision to ensure such participation; that it is not a condition precedent to always hold a COI before proceeding in trial by Court martial where character or military reputation of the officer concerned is likely to be affected; that the COI is in the nature of a fact finding enquiry committee; that the participation in a COI is at a stage prior to the trial by Court martial; that the said rule gives adequate protection to the person affected at the stage of COI and there is no provision for supplying the accused with a copy of the report of the COI; and that the proceedings before a COI are not adversarial proceedings. The Supreme Court went on to decide the issue noted above

also taking into consideration the fact situation and referring to various judgments. In para 47, it held as under:-

“47. Keeping in view the principles laid down in the aforesaid precedents and how this Court has understood and dealt with the plea of bias, the case at hand is to be appreciated in its factual backdrop whether there has been "really likelihood of bias". In a COI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on the COI. The Rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action. Thus understood, the language employed in the Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that the COI may not always be essential or sine qua non for initiation of a Court martial but the another spectrum is once the authority has exercised the power to hold such an inquiry and the COI has recommended for disciplinary action, then the recommendation of the COI is subject to

judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the Rule, for the language employed in the said Rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of factual matrix of each case."

12. From the above, it is noted that the Supreme Court has laid emphasis that in a COI, participation of delinquent officer when the character or military reputation is likely to be affected is a categorical imperative. In other words, given the fact that the officer's character or military reputation is likely to be affected, the participation has to be meaningful, effective and he has to be given adequate opportunity. The Supreme Court considering the fact situation and also noting its judgment in the case of ***State v. N.S. Gnaneswaran (2013) 3 SCC 594***, held that the inclusion of the Presiding Officer Brig. N.S. Ahamed and the two Technical Members, a case of prejudice comes into full play, inasmuch as the inclusion of the Technical Members was not legally permissible and the Presiding Officer should have recused himself.

13. Insofar as the judgment in the case of ***Lt. Gen. Surendra Kumar***

Sahni (supra) is concerned, this Court was concerned with facts where the petitioner, who was working, at the relevant time, as Director General of Supply & Transport of the Army Service Corps for quashing and setting aside the proceedings and recommendation of the Court of Inquiry. The case of the petitioner was that the Court of Inquiry conducted by the respondents is void and nonest as the same was ordered on the basis of an anonymous and pseudonymous complaint. It was stated that, enquiry though not directed against the petitioner but it was intended to falsely implicate and humiliate the petitioner at the end of his career. The case of the petitioner before the Court was on the interpretation of Rule 180 of the Rules. His case was that there was no compliance of the requirement of Rule 180. Thus, the proceedings, findings and order of attachment for the purpose of taking disciplinary action against the petitioner cannot stand according to law and are liable to be set aside. The respondents therein had pleaded that the Court of Inquiry was in the form of a fact finding enquiry and was not directed against any individual. The Court examined 23 witnesses. The petitioner was examined as witness No.22. Each witness was examined for his role in the procurement procedure. The Court found 12 Army Personnel including the petitioner and found them prima facie blameworthy for their

improprieties. On the basis of this Court of Inquiry, the Competent Authority directed that disciplinary action be taken against the petitioner and for such purpose he was being attached by the orders, which have been impugned by the petitioner in the writ petition. It was also the case of the respondents that the attachment of the petitioner to the unit has been done so that the commanding officer may carry out hearing of the charge and then order summary of evidence and if so ordered, Army Rule 22, 23 and 24 of the Army Rules 1960 will be duly complied with. It was also stated that various safeguards are available to the petitioner under Section 164(1) and (2) of the Army Act and no prejudice has been caused to the petitioner. They have denied that there was any breach of Rule 180 of the Rules and even if there is any breach, it is of no consequence as respondents have duly proposed to comply with the requirements of Rules 22 to 24 of the relevant rules and it is only after compliance with the said provisions that the Court Martial is to commence on the basis of findings recorded by summary of evidence. The petitioner would have right to cross-examine such witnesses as may be necessary. The ground on which the petitioner is being attached to a unit where Commanding Officer is junior to him in seniority, is stated to be not based on any statutory provision.

14. The respondents have taken an alternative stand that the enquiry was of general nature and there was no occasion for giving opportunity to the petitioner to cross examine the number of witnesses, which had been examined during the course of Court of Inquiry. The petitioner was granted liberty in terms of Rule 180 when he was examined as witness No.22 and in any case the alleged violation is of no consequence as the respondents are going to comply with requirements of Rules 22 to 24 of the relevant rules. This Court on the issue whether Rule 180 is mandatory or directory had referred to various judgments of the Supreme Court and High Courts and held that the view taken by all the High Courts and Supreme Court is that wherever reputation and character of a person, subject to Army Act is likely to be affected, the requirements of law is compliance to Rule 180 and to that extent the provisions of Rule 180 are mandatory. Wherever, there is a lapse or default prejudicially affecting the right or protection given to a person in terms of said Rule, the proceedings would be vitiated. of course, conducting of a Court of Inquiry is not a sine qua non to commencement of any proceedings under Rule 22 or convening of a Court Martial. The Supreme Court by referring to *Lt. Col. Prithi Pal Singh Bedi (supra)* has held that Rule 180 merely makes an enabling provision to ensure such participation by

the delinquent officer. But the said judgment 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 Inquiry is a sine qua non. This Court in para 26, held that holding of Court of Inquiry may not be essential but once the authority exercises its powers to hold such an enquiry and where the enquiry affects or is likely to affect the character or military reputation of a person subject to the Act, then compliance to the requirements of Rule 180 would be mandatory. This Court also notes that the statement of the officer was self-incriminating, on the basis of which the respondents proposed to take further action against the petitioner under Rule 22 or holding of a General Court Martial. The same would bring his military reputation or character in question then the authorities were obliged to serve and notify the petitioner that they intend to proceed and look into the conduct of the petitioner on that basis itself and as such, it becomes obligatory to follow Rule 180 (emphasis is ours).

15. In *Major General Rakesh Kumar Loomba (supra)*, this Court has taken a similar view that Rule 180 of the Army Rules is required to be

followed as is envisaged full opportunity to be ill-fated to a person whose character of military reputation is likely to be affected in the enquiry. But one aspect, which differentiates all the aforesaid cases with the case in hand is that the officers in the aforesaid three cases, i.e. ***Lieutenant General Surendra Kumar Sahni (supra)***, ***Major General Rakesh Kumar Loomba (supra)*** and ***Sanjay Jethi (supra)*** are all officers against whom further action based on the conclusion of the COI was to be taken under the Army Rules by recording summary of evidence, General Court Martial. Whereas, in the case in hand, the proceedings have to be initiated under the CCS (CCA) Rules. There is no provision akin to Court of Inquiry under the CCS (CCA) Rules, 1965. In other words, the petitioner could have straightway been charge sheeted for misconduct. As stated by learned ASG that all the documents, which shall be relied upon by the respondents during the enquiry shall be supplied to the petitioner, we take the said statement on record.

16. In so far as the plea of Ms. Jyoti Singh, learned Senior Counsel that the proposed initiation of disciplinary proceedings for transaction taken in the year 2008-2009 shall be hit by delay is concerned, law in that regard is well settled. She argued that the respondents should have some explanation to give for the delay that has occurred. The petitioner shall be at liberty to

take the plea of delay in reply to the charge sheet issued to the petitioner, which aspect shall be considered by the disciplinary authority.

17. In view of the aforesaid discussion, we do not see any merit to interfere in the impugned order. The writ petition is dismissed with no costs.

CM No.29307/2016 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

INDIRA BANERJEE, J

NOVEMBER 04, 2016/AK