IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

O.A NO. 283 OF 2010

COL. SANJAY JETHI ...APPLICANT

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MS. JYOTI SINGH FOR APPLICANT

M/S. ANIL SRIVASTAVA
&
AMIT KUMAR WITH LT. COL. NAVEEN SHARMA FOR R 1 TO 3
MS. ANJANA GOSSAIN FOR R 4 AND 5

CORAM

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S.DHILLON, MEMBER

J U D G M E N T
08.10.2010

1. This application under Section 14 of the Armed Forces Tribunal Act 2007 has been brought for quashing the recommendations of the Court of Inquiry (COI) as being partisan, mala fide and violative of the mandatory

rules and the principles of natural justice. Simultaneously, prayer has also been made for setting aside the attachment order dated 5.8.2008 and the convening order dated 23.2.2010, which was issued based on the recommendations of the COI.

2. The factual matrix giving rise to this application is: The applicant holds the rank of Colonel in the Army Ordnance Corps. On 5.8.2009, based on a complaint made by one of the officers alleging irregularity in the hiring of Civil Hired Transports (CHT), which were used for the purpose of supply of ordnance stores to units spread over the Country, including remotest field and high altitude area, he was illegally attached with HQ Sub Area. As a result of the said complaint, the respondents convened a Board of Officers on 21.7.2009. On 22.7.2009, the said Board seized the entire records pertaining to hiring of CHTs, without giving the applicant an opportunity of being heard.

3. It is contended by the applicant that a false and frivolous complaint was made by one of the officers posted under him attributing allegations of committing irregularity in hiring of civil hired transport (CHT)

when the applicant was posted as Commandant, Centre Ordnance Depot, Mumbai. Such complaint was the outcome of a conspiracy, as a group of officers who were directly responsible for hiring of CHT, with a view to save themselves; have made such false complaint. Acting upon such frivolous complaint, the General Officer Commanding in Chief, Pune, without verifying the truthfulness in the allegations, initiated action against the applicant by making his attachment with HQ Sub Area on 6.8.2009 and also convened a board of officers on 21.7.2009 for ascertaining the truthfulness in the allegations. The entire records pertaining to CHTs were seized by the board of officers on 22.7.2009. That board of officers have not given any opportunity to the applicant to place correct facts and rushed up in giving report against the applicant. On the premises of that report, a COI was convened against the applicant to investigate the alleged charges of misappropriation of CHT fund in connivance with the contractors in the dispatch of CHTs if any. The General Officer Commanding in Chief was highly prejudiced against the applicant and without any basis, mechanically exercised the powers under Army instruction No. 30/86 removing the

applicant as Commandant, Central Ordnance Depot and attaching him to Mumbai Sub Area. To the contrary, the complainant and other officers, who were instrumental in sending such complaint, were allowed to continue at the same place. The complainant and that group of officers threatened the witnesses to state against the applicant in that way there was no occasion for the applicant to have a fair hearing at the COI. It was also contended by the applicant that the Court of Inquiry was conducted in a most arbitrary and partisan manner supposedly influenced by the issuance of the illegal attachment order. Not only this, in the course of inquiry, when the examination of some of the witnesses was in progress, the complainant and other conspirators were allowed to remain in the room. Resultantly, there was no possibility for the witnesses to have stated the truth. By not following the procedure for ensuring fair court of inquiry, the rights of the applicant were adversely affected. The applicant was also not allowed to properly cross examine the witnesses. The COI arbitrarily disallowed the questions which were relevant for the purpose of ascertaining the truth of the statements of the witnesses. Not only this, the applicant was deprived

of making direct cross examination of the witnesses as he was required to formulate the questions in writing and pass on to the Presiding Officer for the purpose of cross examination, which was not proper. The procedure for testing the veracity of the witnesses was not followed and the presiding officer himself chose to prefer one or the other question which suited to the convening authority. In that way, the applicant was deprived the right to cross examine the witnesses as contemplated under Army Rule 180. The witnesses were also allowed to change their statements. Under such circumstances, the findings of the COI would have no sanctity. Further by way of amendment, the recommendations of the COI was also assailed on the ground that certain evidence/documents which were not produced in the COI were taken on record and copies of the documents were not made available to the applicant. But the COI preferred to make those documents/reports as annexures to its recommendations. Such procedure adopted in the COI would itself reflect with regard to the non adherence of the rules requiring opportunity to be given to the individual whose character or military reputation was being affected.

4. This application was resisted from the side of the respondents contending that some of the reports with regard to adopting of malpractices on hiring of CHT at COD Mumbai were received and on that basis, the higher authorities vide convening order dated 22.7.2009 directed the matter to be investigated for ascertaining the substance in the allegations viz. "(a) Pers involved in corrupt practice of submitting inflated claims to PCDA in connivance with Tpt Firms with spl ref to Kaushik Tpt Pvt Ltd; (b) Hiring vehs of lower tonnage and submitting bills for hiring of higher tonnage; and (c) The misappropriation in dispatch of stores to Ord Depot." The COI constituted one Brigadier and two Colonels, out of them Brig. N.S Ahamed was made Presiding Officer. The COI was conducted strictly in accordance with AR 180 and the applicant throughout remained present in the course of the inquiry and at the time of recording of the statements of the witnesses and he extensively cross examined these witnesses. It would be wrong to say that the applicant was not given any opportunity. Even opportunity was given to the applicant for substantiating his allegations against the group of officers who were alleged to have sent false complaint

as they themselves were involved in such malpractices. Other allegations made in the application were also refuted from the side of the respondents. Further, it has also been submitted that the COI is virtually a fact finding authority and its recommendations are mainly for the satisfaction of the higher authority to take decision in the matter. Whatever report was enclosed with the COI, that was in consonance with the evidence already taken in the course of inquiry.

5. It is contended by learned counsel for the applicant that AR 180 was not adhered to in the course of COI. He was not even afforded full opportunity to cross examine the witnesses on material aspects. He was not allowed to put questions to them directly, which is against the well established principles of cross examination. Moreover, the witnesses were under constant threat and pressure of the officers who were instrumental to the lodging of the complaint against the applicant. Strongly objecting to the contention raised by the counsel for the applicant, counsel for the respondents stated that evidence of the witnesses were recorded in hundreds of pages and when the applicant was not confining himself to the

relevant point, it was within the discretion of the Presiding Officer of the COI to take measures to check irrelevant cross examination. There is no procedural illegality in getting the questions in writing.

6. In this regard, reference to AR 180 may be made. As was held by the apex Court in **Col. Prithi Pal Singh Bedi** v. **Union of India** (AIR 1982 SC 1413), AR 180 has a mandatory import. The Supreme Court held that:

> **"Rule 180 sets up a stage in the procedure prescribed for the Court of Enquiry. It cannot be construed to mean that whenever or wherever in any inquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up a Court of Enquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a Court of Enquiry is set up and in the course of inquiry by the Court of Enquiry character or military reputation of a person is likely to be affected, then such a person must be given a full opportunity to participate in the proceedings of Court of Enquiry. Court of Enquiry 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 Enquiry 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 spacious plea that no specific inquiry was directed against the person whose character or military reputation is involved. To ensure that such 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."

From the above, it is clear that when the COI is not conducted as per the Rules, court martial proceedings would be vitiated. It was strenuously argued by learned counsel for the applicant that Army Rule 180 was not followed. It is a matter of judicial review. In the book of **D. Smith** viz. "**Judicial Review of Administrative Action**", at page 203, the matter has been discussed and it has been observed thus:

> **"The degree of proximity between the investigation in question and an act of decision directly adverse to the interests of the person claiming entitlement to be heard may be important. Thus, one who is empowered or required to conduct a preliminary investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place is not normally under an obligation to comply with the rules of natural justice. But he may be placed under such an obligation if his investigation is an integral and necessary part of a process which may terminate in action adverse to the interests of person claiming to be heard before him; for instance natural justice must be observed by Magistrates conducting a preliminary investigation in respect of a charge of an indictable offence."**

Indisputably, the applicant remained present throughout the course of COI. He was given opportunity to cross examine the witnesses. Nothing was done behind his back. Still grievance of the applicant appears to be that he was not given full right of cross examination. According to him, only those statements which suited them were allowed to be recorded. It is

emphasised by counsel for the respondents that sufficient opportunity was afforded to the applicant to extensively cross examine the witnesses. It is, no doubt, true that cross examination is one of the important procedures for elucidation of facts in the case and reasonable leeway needs to be allowed. At the same time, the Presiding Officer has discretion to decide as to how far it may go or how long it may continue. COI has undoubtedly the discretion in the matter of controlling cross examination of a party. As has already been stated, in depth cross examination was allowed to the applicant, in that it was rightly restricted by the Presiding Officer by asking questions to be submitted in writing, to avoid unnecessarily prolonging the inquiry. It may also be mentioned that a fair and reasonable exercise of discretion asking for written questions to be submitted cannot be agitated in higher forum. We do not find any illegality or irregularity in the conduct of the COI.

7. It has next been argued by counsel for the applicant that the COI, while submitting its report, annexed thereto the following documents:

SL. NO.	EXHIBIT NO.	LETTER NO. AND DATE	REMARKS
1.	XLIX including all appendices	-	Still not shown/given to applicant
2.	LXIX	CMM Jabalpur Letter No. 126/CL/HQ dt. 05 Nov 2009	-
3.	L		Still not shown/given to applicant
4.	LXVIII		- Do -
5.	XXXV		- Do -
6.	XLI		- Do -
7.	LV		- Do -
8.	LXVI	(a) 5 FOD Lr.No. 50060/Tfc/X/Ex dt 30 Nov 2009 (b) 222 ABOD Lr. No. C/1224/499/Tfc dt 01 Dec 2009 (c) 1 FOD Lr. No. G3334/PC/Tfc dt 30 Nov 2009	-

This was done after conclusion of the COI and surreptitiously, its copies were not made available to the applicant. Moreover, there were noticeable discrepancies in the report which were to be clarified by the author of the

report by putting him to cross examination. Further, some of the entries in those documents did not pertain to his period. These documents were just annexed to arbitrarily fix prima facie culpability of the applicant. However, from the side of the respondents, it was conceded that these documents were annexed to the report subsequent to the conclusion of the COI and it would in no way prejudice the applicant. The applicant can question it at the time of hearing of the charge and in the course of trial. Moreover, the COI has simply given its recommendation. COI is a fact finding body. It is constituted for a limited purpose. The contents of the report, without formal proof, could not be taken in evidence. Further, at the appropriate stage of trial, the applicant will have the opportunity to cross examine the witnesses. The effect of non disclosure of relevant documents/annexures has been stated in **Judicial Review of Administrative Action** by **De Smith, Woolf and Jowell**, Fifth Edition, Pg. 442 as follows:

> **"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving**

the use of undisclosed reports by administrative tribunals and other adjudicating bodies. If the deciding body is or has the trappings of a judicial tribunal and receives or appears to receive evidence ex parte which is not fully disclosed, or holds ex parte inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked."

8. While considering the averments made in the petition, this Tribunal held that several kinds of issues/allegations were taken in the course of investigation by COI. But, by enclosing certain annexures, shades of doubt crept in, which were not cleared through suitable investigation. No opportunity could be given to the applicant to get the best picture revealed while considering the nature of the case. It is important to find out how and on what basis these annexures were drawn. The argument on behalf of the applicant that it was the duty of the COI to find out the truth by holding suitable investigation about these annexures, has some force.

9. Counsel for the respondents has stated that the entire materials collected during investigations had been placed before the

convening authority and the applicant would receive copies of the same. But that would not be construed to be compliance of AR 180. As has been stated above, a fair opportunity is required to be afforded to the applicant in the COI, as contemplated under AR 180, which is a rule of natural justice. In **Uma Nath Pandey and others** v. **State of U.P and another** (AIR 2009 SC 2375), the apex Court held that "the concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights, but of

civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

10. The principles of natural justice not only confined to judicial process, but include quasi judicial and administrative process also. We find that so far as the enclosing of the documents along with the report by the COI is concerned, there is violation of AR 180.

11. However, it has been argued by counsel for the respondents that it the settled legal position that the Courts do not exercise the inherent powers and interfere with the investigation. Emphasis has been made that there is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive/inquiry officer, as provided under AR 180. That part of the investigation cannot be interfered with. As has clearly been stated in AR 180, a fair opportunity is to be afforded to an individual whose character and military reputation is involved. In this case, the documents were not given to the applicant warranting judicial review by this Tribunal. We find that the mandatory procedure under AR 180 was

not followed by the respondents with regard to those documents which were subsequently annexed to the report. Therefore, that portion of the report, which deals with the conduct and reputation of the applicant without giving him an opportunity of being heard in the inquiry, should be taken to be vitiated for violation of AR 180. It is true that the report of the COI has no legal force *proprio vigore*. But, however, it is seen in this case that the findings rendered by the COI have been taken as the sole basis for initiating disciplinary proceedings against the applicant. In these circumstances, the applicant is entitled to put forward his grievance that the COI has given findings regarding his conduct without giving him an opportunity to put forward his defence as regards those annexures; the applicant was obviously not afforded opportunity to see the documents which were annexed to the report of COI. 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. In all fairness, an additional COI is to be convened affording full opportunity to the parties, by examining or cross examining any of the witnesses

pertaining to those annexures. The additional COI would remain confined to the annexures referred to above.

12. The O.A is partly allowed. The authority concerned is directed to pass orders convening an additional COI limiting to the documents which were subsequently annexed to the report of the COI. The applicant shall have liberty to cross examine any of the witnesses, if produced, pertaining to those documents. The additional COI shall be completed within fifteen days from its commencement, after due intimation to the parties. The report of additional COI shall be submitted with all promptitude to the authority concerned. The rest of the report of COI is not interfered with.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER