IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

O.A NO. 360 OF 2010

LT. GEN. AVADESH PRAKASH (RETD)
S/O LATE K.C AGRAWAL
PRESENTLY RESIDING AT 5, THYAGARAJ MARG
(NEW RASHTRAPATI BHAWAN)
NEW DELHI – 110 011.

THROUGH : MS. JYOTI SINGH, ADVOCATE

...APPLICANT

VERSUS

1. UNION OF INDIA THROUGH THE SECRETARY,
MINISTRY OF DEFENCE, SOUTH BLOCK,
NEW DELHI.

2. CHIEF OF THE ARMY STAFF,
INTEGRATED HQ OF MINISTRY OF DEFENCE (ARMY),
SOUTH BLOCK, DHQ P.O
NEW DELHI-11.

3. THE ADJUTANT GENERAL BRANCH
DV DIRECTORATE
INTEGRATED HQ OF MOD (ARMY)
SENA BHAVAN, NEW DELHI.

4. GOC-IN-C, HQ EASTERN COMMAND,
FORT WILLIAM, KOLKATA (WEST BENGAL).

5. GOC,
HQ 33 CORPS, C/O. 99 APO.

THROUGH : Mr. ANIL GAUTAM, ADVOCATE WITH LT. COL. NAVEEN SHARMA

...RESPONDENTS

CORAM :

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

JUDGMENT
4.6.2010

1. This petition has been brought for quashing the orders dated 21.4.2010 and 22.4.2010 passed by the Presiding Officer of the Court of Inquiry whereby rejecting the application moved from the side of the applicant to call Shri Dilip Aggarwal (Witness No. 22 in the Court of Inquiry) as a witness in defence. Simultaneously, prayer has been made that the Presiding Officer of the Court of Inquiry be directed to call Dilip

Aggarwal as a witness in defence. It is contended on behalf of the petitioner that the Presiding Officer arbitrarily, without taking care of the directions given by this Tribunal in O.A No. 66 of 2010, declined to summon Shri Dilip Aggarwal as a defence witness. Even otherwise the Statutory Rules confer right to the aggrieved person to examine any of the witnesses in his defence. The right under Army Rule 180 was denied to him without any justified reasons.

2. However, from the side of the respondents, it is contended that pursuant to the directions of this Tribunal in O.A No. 66 of 2010, full opportunity to cross examine the named six witnesses was afforded to the applicant. As regards adducing of evidence in defence, the application moved by the applicant for summoning Shri Dilip Aggarwal to be a defence witness was rejected for the reason that his evidence was already recorded as a prosecution witness in the presence of the applicant. He had every opportunity to cross examine him in the Court of Inquiry. Even before the Principal Bench in O.A No. 66 of 2010, he chose not to exercise his right to cross examine Shri Dilip Aggarwal. In that way, he had waived

his right voluntarily to cross examine that witness. In the context of cross examination of the named six witnesses, for which permission was given in O.A No. 66 of 2010, application for summoning Dilip Aggarwal to be a defence witness would not be maintainable, when he had already given up his right to cross examine him. Moreover, the person who was already examined as a prosecution witness cannot be made a defence witness in the same proceedings. Further, it is also said that in the Court of Inquiry, no such illegality or irregularity had been committed which may require interference by this Tribunal.

3. In order to appreciate the points raised by the learned counsel for the parties, it shall be useful to make a brief narration of the facts. Out of the said 2711 acres of land of "Chumta Tea Estate", approximately 71.55 acres of land was not being used for the purpose of growing tea as the said land was not suitable for plantation. Therefore, the companies made a proposal to the Government of West Bengal to consider the said land for tourism. The State Government accepted the said proposal in principle subject to the lessees complying with certain

pre-conditions. Pursuant to the approval, a long term lease agreement was executed between the State Government and the four companies as lessees. However, in 2008, due to security reasons, the Army (GOC 33 Corps) raised objection to this lease. During the visit of the applicant to Sukhna, Shri Dilip Aggarwal met him and made a suggestion to establish an educational institute in the land in question, for which he wanted a 'no objection certificate' from HQ 33 Corps. The applicant suggested to Shri Dilip Aggarwal to approach the Military Authority. On 18.11.2008, the applicant was invited for dinner by the Corps Commander at his residence, during which the applicant made a passing mention about the proposal suggested by Dilip Aggarwal. In November 2008 itself, the Corps Commander informed the applicant about his inability to accept the proposal. Subsequently, the Army gave a "No Objection" to establish an educational institution only. MoU was finally executed on 20.3.2009. Sometimes in April 2009, Lt. Gen. Rath informed the Army Commander, Lt. Gen. V.K Singh about his decision on the subject, which resulted in a difference of opinion between the two and the Army Commander directed the Corps Commanded that the original stance be maintained

(*emphasis is laid on the statement of Lt. Gen. Rath in the Court of Inquiry*). On 27.5.2009, the Corps HQ wrote to the Government of West Bengal intimating cancellation of the MoU with the four lessees ex parte and requesting to transfer the land to the Army authorities. A show cause notice was given to the applicant allegedly on false and baseless reasons. Subsequently, by letter dated 29.1.2010, he was informed that he would be attached for disciplinary proceedings. Thereafter, a Court of Inquiry was ordered to unearth the truth. It is alleged that the Court of Inquiry was not properly constituted and it was in violation of Army Rule 180.

4. The applicant filed O.A No. 66 of 2010 before this Tribunal to quash the convening order dated 30.9.2009 and the order dated 29.1.2010, by which the respondents invoked Section 123 of the Army Act for the purpose of initiating disciplinary proceedings. The said O.A was allowed in part by this Tribunal vide judgment dated 22.2.2010, with the following directions:

> "80. As a result of our above discussion, we allow this petition in part and direct that copies of depositions (Lt. Col. Jiji Varghese (PW 1), Lt. Gen. PK Rath (PW 2), Lt. Gen. R Halgali (PW 4), Maj. Gen. PC Sen (PW 5), Col. NK Dabas (PW 7), Nb. Sub. Surjit Singh (PW 14) shall be given to the petitioner 15 days in advance and they be called back before Court of Inquiry to be cross examined by the petitioner. Court of Inquiry should be completed within two months from today and, in case, petitioner does not wish to cross examine the witnesses, then, it will be open for the Court of Inquiry to record reason. It will be open to the petitioner to lead any evidence by calling witness or producing any documentary evidence. After completion of the Court of Inquiry, it will be open for the Court of Inquiry to give its finding qua petitioner. The authorities will free be to decide the fate of the case, whether to send it for Court Martial or not to send it for Court Martial. The whole exercise should be done within two months from today. No order as to costs."

In the context of such a direction, it is strenuously argued that it was obligatory on the part of the Presiding Officer of the Court of Inquiry to have afforded opportunity to the petitioner to lead any evidence by

calling witnesses or producing any documentary evidence. He made a written submission that Dilip Aggarwal, who is the material witness in the case, be summoned as a defence witness in the Court of Inquiry. But, ignoring the directions given by this Tribunal, the Presiding Officer declined to summon Dilip Aggarwal as a defence witness.

5. The Presiding Officer of the Court of Inquiry passed the impugned order stating that "for the limited purpose, the Court of Inquiry was re-assembled so as to enable the applicant to cross examine the six named witnesses". The right to cross examine six named witnesses was given to the applicant in the interest of justice by the Principal Bench of this Tribunal, which is clear from Paragraph 73 of the judgment in O.A No. 66 of 2010. Paragraph 73 of the judgment reads thus:

> "73. In order to do justice with parties and looking to security angle, we asked learned counsel for the petitioner to give names of witnesses whom the petitioner wants to cross examine. She gave the names of seven witnesses namely Lt. Col. Jiji Varghese (PW 1), Lt. Gen. PK

Rath (PW 2), Lt. Gen. R Halgali (PW 4), Maj. Gen PC Sen (PW 5), Col. NK Dabas (PW 7), Nb. Sub. Surjit Singh (PW 14) and Mr. S Bajoria (PW 21)"

6. Learned counsel for the applicant vehemently contended that the evidence of Shri Dilip Aggarwal was tendered in the Court of Inquiry as that of other six named witnesses. There was no occasion at that time to cross examine any of these witnesses as his character or military reputation was not affected during the Court of Inquiry. Subsequently, on the application of the applicant, permission to cross examine the named six witnesses was given. Shri Dilip Aggarwal, who was examined in the Court of Inquiry as a prosecution witness, was not cross examined by the applicant. It would amount to intentionally relinquishing his right to cross examine the witness. To the specific query put to the applicant by the Bench in O.A No. 66 of 2010, the applicant gave the names of six persons whom he wanted to cross examine. But at that time he did not give the name of Shri Dilip Aggarwal. This would appear as a voluntary relinquishment of his legal right, which except for such waiver, he could have enjoyed.

7. It is next submitted by learned counsel for the applicant that under Army Rule 180, statutory rights are available to a person to call any of the witnesses in defence or to produce documentary evidence. In that context, direction was also given in O.A No. 66 of 2010 by this Tribunal. Reliance was placed on the decision in **Col. A.K Bansal** v. **Union of India and others** (CWP 1990 of 1988 decided on 18.1.1991), which was followed by the Delhi High Court in **Lt. Gen. Surendra Kumar Sahni** v. **Chief of Army Staff and others** (2008(3) SLR 39). The relevant portion of the judgment is quoted below:

> "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 Inquiry. Four rights are expressly recognised. (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 such person is fully made to understand all the various rights mentioned in that said rule."

This view was propounded by the Delhi High Court on the basis of the decision in **Harbhajan Singh** v. **Ministry of Defence, Government of India and others** (1982(2) SLR 782), wherein Army Rule 180 was held to be having mandatory import. In view of the decision in **Bansal's case** (supra), it is a statutory protection given to the applicant to produce evidence in defence and such right to summon witnesses was declined to the applicant, especially when there was specific direction by this Tribunal in O.A No. 66 of 2010. There is no doubt with regard to the right of the individual whose character and military reputation is affected in the Court of Inquiry, to adduce evidence in defence. But the prominent feature of

this case is that the evidence of Shri Dilip Aggarwal was already tendered in the Court of Inquiry from the side of the prosecution. He could have been cross examined by the applicant, which he did not do. There appears to be no procedure thereby the same witness could be termed as a defence witness and to resile from his earlier statement.

8. The Court of Inquiry was convened to unearth the truth. Its nature is that of a fact finding body. It is required to ascertain the truth on the basis of the materials collected. The scope of judicial review of the Court of Inquiry by this Tribunal is very limited. A Constitution Bench of the apex Court in **Kihoto Hollohan** v. **Zachillhu and others** (1992 Suppl. (2) SCC 651) spelled out the scope of judicial review. The findings could be challenged only on the ground of ultra vires or mala fides or having been made on extraneous considerations. It would be a nullity if the rules of natural justice are violated. We may mention that however limited may be the field of judicial review, the principles of natural justice are to be complied with and in their absence, the order would stand vitiated. The yardstick to judge the grievances that reasonable opportunity has not

been afforded, would, however, be dependent on fact situation. As has already been stated, the statement of Shri Dilip Aggarwal was already tendered in the Court of Inquiry from the side of the prosecution. The applicant never chose to cross examine him nor did he figure his name as a witness in O.A No. 66 of 2010 to be cross examined. The applicant had the right to cross examine that witness which he gave up.

9. Emphasis was also made by learned counsel for the applicant that in view of Army Rule 180, the applicant is entitled to enter into defence and adduce evidence in support of his case. This liberty was given by this Tribunal to the applicant in O.A No. 66 of 2010. Army Rule 180 deals with entering upon defence by an individual whose character and military reputation is affected. He has right to re-call and re-examine persons already examined and it is obligatory on the part of the Presiding Officer to accord permission to him to call that witness in the capacity of defence witness. It is also said that there is no inhibition in Army Rule 180 to call any of the prosecution witnesses as a defence witness. We do not find any force in such a contention. The provisions in Army Rule 180

cannot be understood to mean that compelling attendance of any prosecution witness examined, cross examined or not, to be juxtaposed as a defence witness. This is not the one what was contemplated by Army Rule 180. Reliance may be drawn from the decision in **State of Madhya Pradesh** v. **Badri Yadav and another** (2006(9) SCC 549). Identical question was adjudicated in **Yakub Ismail Bhai Patel** v. **State of Gujarat** (2004(12) SCC 229), wherein it was held that the witnesses already examined by the prosecution cannot be allowed to perjure himself by resiling from the testimony given in court on oath, stating that whatever he had deposed before court as a prosecution witness was not true and was done so at the instance of the police. In that case, the evidence of the prosecution witnesses was relied on by the trial court and also by the High Court. He identified the accused in that case in the court. After a long gap of time, he filed an affidavit stating that whatever he had stated before the court was not true and had done so at the instance of the police. In those facts and circumstances, the apex Court, at paragraphs 38 and 39, made the following observations:

> "38. Significantly this witness, later on filed an affidavit, wherein he had sworn to the fact that whatever he had deposed before court as PW 1 was not true and it was so done at the instance of the police.
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> 39. The averments in the affidavit are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW 1 and filing of affidavit in court later, he was in jail in a narcotic case and that the accused persons were also fellow inmates there."

As to the point agitated that there is no prohibition in Army Rule 180 in calling a prosecution witness in defence, it may be mentioned that the provisions are to be interpreted in a plain and straight manner without adding or substituting or omitting any words therefrom. It shall be useful to quote Army Rule 180, which reads:

> "**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 receives notice of and fully understands his rights, under this rule."

It is implicit from Army Rule 180 that the person, whose character or military reputation is affected in the Court of Inquiry, should be afforded full opportunity of being present throughout the inquiry, 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. It is trite that the provisions of a statute should be read as it is, in the natural manner, plain and straight, without adding, substituting or omitting any words. By doing so, the words used in the provision should be assigned and described in its natural, ordinary and popular meaning. Only when such a plain and straight reading or ascribing the natural and normal meaning to the words or such reading leads to ambiguity, vagueness, uncertainty or not obviously intended by the Legislature, only then the Court should open its eye to look into it and to arrive at the exact meaning of the provision. Here, in this case, as has already been mentioned, the words of Army Rule 180 are clear that if the evidence of a witness examined in the Court of Inquiry in any manner affects the character and military reputation of an individual, he has the right to cross examine that witness. When the right to cross examine a witness is there, it cannot be construed to mean that the same witness be examined again as a defence witness.

10. Giving meaning to the words “producing any witness in defence” not restricting the calling of the prosecution witness as defence

witness would lead to an unhealthy situation and such a construction would lead to manifest absurdity, futility, palpable injustice and anomalies. Reference may be made to the decision in **Andhra Bank** v. **B. Satyanarayana** (JT 2004(2) SC 657), wherein, the apex Court held:

> "A machinery provision, it is trite, must be construed in such a manner so as to make it workable having regard to the doctrine '*ut res magis valeat quam pereat*'".

In **Tinsukhia Electric Supply Co. Ltd** v. **State of Assam and others** (JT 1989(2) SC 217), the apex Court held:

> "The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of a statute must be so construed as to make it effective and operative, on the principle '*ut res magis valent quam pereat*'. It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not

> in judicial review by testing the law for arbitrariness or unreasonableness under Article 14, but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it."

Reference may also be made to the decision **in Madhav Rao, Jivalji Rao Scindia** v. **Union of India** (1971(1) SCC 85), **Union of India** v. **B.S Agarwa**l (1997(8) SCC 89), **Paradise Printers** v. **Union Territory of Chandigarh** (1988(1) SCC 440). By applying the aforesaid principle of interpretation, the words "producing any witness in defence" would mean to examine any witness other than the prosecution witness and not to be juxtaposed as a defence witness.

11. We do not find any merit in the petition. Resultantly, it is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER