

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI.**

O.A.No. 292 of 2010

Lt.Col. R.K.Sharma

...Petitioner

Versus

Union of India & Anr.

...Respondent

For the Petitioner : Shri P.S. Sharma, Advocate

For the Respondents: Shri. R. Balasubramanian, Advocate

C O R A M:

**HON'BLE MR. JUSTICE A.K.MATHUR, CHAIRPERSON
HON'BLE LT.GEN. S.S.DHILLON, MEMBER (A)**

**JUDGEMENT
09.05.2011**

1. Petitioner by this petition has challenged the Censure order of the General Officer Commanding-in-Chief, Northern Command dated 5.11.2008 and the order dated 11.1.2010 regarding the deferment of the case of the applicant by the Selection Board for promotion to the substantive rank of Col. (TS) held in December, 2009. He also prayed that respondent may be directed to reconsider the case of

promotion of the applicant to the substantive rank of Col. (TS) from the due date.

2. The petitioner was granted permanent commission in the Army and assigned to Army Service Corps. He was considered by the Selection Board for promotion to acting Colonel in April, 2006 as a fresh case of 1989 batch but was not empanelled for promotion to next higher rank based on his overall profile and higher comparative batch merit as intimated by military secretary branch by its communication dated 15.6.2006.
3. It is further stated that on 22.6.2006, the applicant was posted in 5171 ASC Battalion (MT) and functioned as Officer Commanding "C" Company. On 23.7.2006, the applicant was posted out from 5171 ASC Battalion (MT) and was posted to 358(1) Composite Platoon, ASC at Ambala as Officer commanding.
4. The petitioner was informed by the communication dated 12.7.2007 that he was considered by Selection Board in May, 2007 for promotion to the rank of acting Colonel as a

review case of 1989 batch but he was not empanelled for promotion to the next higher rank.

5. It is alleged that on 17.11.2007, a Court of Inquiry was convened to inquire into various irregularities alleged to have been committed by Sub Maj Madan Lal, Hav. Yash Pal, Hav Parida and Nb Sub (then Hav) CG Annanavar while they were posted in 5171 ASC Battalion (MT).
6. The Court of Inquiry was assembled on 22.11.2007 at Udhampur and recorded the statements of as many as 39 witnesses under Rule 180 of the Army Rules. The Court of Inquiry in the case of Nb Sub (Then Hav) CG Annanavar was required to examine the circumstances under which the said JCO (Then Hav) was caught while stealing a 30x30 tarpaulin and was made to bear the cost of construction of a Guard room in 'C' company amounting to Rs.40,000/- to the applicant who was the company commander at the relevant time and that affected the character and military reputation of the applicant.

7. The JCO was examined at the commencement stage of Court of Inquiry proceedings, therefore, the petitioner's presence should have been ensured and a court of notice should have been given to him under Rule 180. However, no such notice was given to him and in his absence it is alleged number of witnesses were examined and ultimately on 9.3.2008, petitioner was also summoned in the Court of Inquiry and was examined as a witness. He objected that he is being examined when all the other witnesses have been examined and since his reputation and character is involved, he may be allowed to examine other witnesses who have deposed against him. He asked for certain records and requested that statement of Nb Sub CG Annanavar, Lt. Col. R.S. Waraich and Col. Sunil Khosla may be provided and he may be permitted to cross-examine the witnesses. Whatever documents which were available with the Court of Inquiry were given to him and on his request these witnesses were called and he was permitted to cross-examine them.

8. It is also mentioned that the statement of these witnesses were read out and petitioner was permitted to go through them, then he was called to cross-examine the witnesses in the way he chooses. He was given full opportunity to cross-examine the Nb Sub CG Annanavar who deposed in the statement that:

"I was posted to 5171 ASC Bn MT from Oct, 2003 to June, 2006 in the rank of Hav. and was posted at NCO of Officers Mess from 2005 to 2006 and during my duties as property NCO I had got one tarpaulin condemned and did not deposit it. The tarpaulin was spare in my store and after getting relieved from the duties of property NCO, I was detailed at Devika water point. At the water point the shed roof was leaking so I put this tarpaulin over the roof. One jawan asked me for the tarpaulin and I gave it to him. The matter was reported to C Coy OC, Lt. Col. RK Sharma. I was called by the OC and asked about the tarpaulin to which I agreed and gave a written statement to him in this regard. I told the OC that a mistake has been committed by me and whatever punishment is given will be acceptable to me. Lt.Col. RK Sharma asked me to bear the cost of the guard room constructed in C Coy. Since I was in zone of promotion, I accepted it and I was also made to give a written statement that I am paying this money on my own. The cost was more than Rs.45,000/- I did not had that kind of money so asked OC to reduce the amount but the same was not agreed by the OC. I gave the amount in the month of March, 2006 amounting to Rs.15,000 to the OC. Subsequently, I applied for AFPP fund withdrawal of Rs.45,000/- in the month of April, 2006 which was received in end of May. On receipt of the same, I paid more than 30,000/- to the OC. Thereafter, I went on posting to 744 Tpt Coy ASC. My OC was officiating at that time as CO and I was given clearance only after I had paid the entire amount. I was informed afterwards that approx. Rs.17,000/- would be refunded to me. During the month of September, 2006 when I came to visit Vaishno Devi, I came to the unit and collected the money from 21C, Lt.Col. RS Waraich in his office.

9. This witness was called again on the request of petitioner and he was given full permission to cross-examine the

witness. Similarly, Lt.Col. RS Waraich who was successor of the petitioner also appeared and was cross-examined by the petitioner and he admitted that a sum of Rs.17,000/- was given back to Nb Sub CG Annanavar. Petitioner himself examined the other witnesses. On the basis of this Court of Inquiry, the petitioner was given a show cause notice and he filed his reply and in that the allegations were denied by him. The authorities after considering the Court of Inquiry findings and after going through the reply given by the petitioner in show cause notice passed an Award of Censure on 23.04.2007. On account of this Censure, the petitioner could not be promoted to the post of Col. Substantive (TS), therefore, he is driven to file the present petition.

10. A reply was filed by the Respondent and Respondent has said that a Court of Inquiry was convened to investigate into the various allegations levelled based on anonymous complaint including the circumstances under which Hav. CG Annanavar was caught stealing a 30' x 30' tarpaulin and was made to bear the cost of construction of Guard room in 'C' Company amounting to Rs.48,000/-. The petitioner was

called on 08.03.2008 for appearing before the Court of Inquiry and Court of Inquiry was convened on 9.3.2008 and statement of Nb Sub CG Annanavar was read out to the petitioner who then submitted a letter requesting for certain following documents:

- (1) Hand written confession of Nb Sub CG Anananavar regarding the tarpaulin incident*
- (2) Pay details of Nb Sub CG Annanavar during Mar 06 to June 06.*
- (3) AFPP Fund withdrawal application of Nb Sub CG Annanawar.*
- (4) AFPP fund payment details of Nb Sub CG Annanawar.*

11. It is alleged that Court of Inquiry was convened on 10.3.2008 and petitioner was provided photocopies of the said documents but he refused to accept and asked for the original. When the court assembled on 12.3.2008 again, it was found that the applicant had been placed sick in Quarters for 24 hrs (from 12 Mar to 13 Mar 08). The court again assembled on 13.3.2008 but the applicant was again Sick and did not participate and finally court assembled on 15th March and applicant gave another application to the Court requesting for the following documents:

- (a) Copy of the convening order*

(b) *Copies of the statement of all the witnesses along with all the exhibits*

12. The court apprised the contents of the convening order and the relevant portions of the statements and questions and answers of the witnesses, Nb Sub CG Annanavar, Lt.Col RS Waraich & Col. Sunil Khosla were read out and relevant portions of statement, questions & answers of the witnesses were again read out in the court and he was given an opportunity to cross-examine the witnesses. The petitioner examined all the aforesaid witnesses and copy of confession statement of Nb Sub CG Annanavar was shown as the original was not in possession. Petitioner also recorded the statement and answered all the questions.
13. After the Court of Inquiry was over and on the basis of finding of the Court of Inquiry a show cause notice was issued to the applicant and a reply to the show cause notice which was considered by the competent authority and after that petitioner was awarded 'Severe Displeasure' (Recordable) by the GOC-in-Chief, Northern Command on

5.1.2008, which as per policy would remain operative for three years upto Nov. 2011.

14. It is pointed out that after a period of three years he will be considered again for promotion to the post of Colonel as per the MS policy dated 30.5.2008.
15. We considered the rival submissions of the parties and perused the record. The main grievance of the petitioner is that there is serious violation of Court of Inquiry under rule 180 of the Army Rules and he was not given proper opportunity. He pointed out that on account of not being given proper opportunity, the finding of the Court of Inquiry cannot be made basis for show cause notice and the punishment of recordable warning.
16. In this connection learned counsel for the claimant has invited our attention to the decision given by the Hon'ble Delhi High Court in the case of **Maj.Gen. Rakesh Kumar Loomba Vs. Union of India (2008 VI AD (DELHI) 621)**. As against this Respondent's counsel pointed out that petitioner had been given all the reasonable opportunity to defend

himself. That Nb Sub CG Annanavar who deposed against him has been called back for the cross examination likewise Lt. Col. R.S. Waraich and Col. Sunil Khosla, therefore, the conduct of the Court of Inquiry is fair and petitioner has been given all reasonable opportunity.

17. In this connection, Learned counsel has invited our attention to the decision of the Apex Court given in the case of ***Haryana Financial Corporation and Anr. Versus Kailash Chandra Ahuja (2008 9 SCC 31)***, that in departmental enquiry, the charged employee must show that prejudice has been caused to him or not. It also held that non-furnishing of report does not by itself render punishment invalid. Therefore, the principle of prejudice has been invoked by the Apex Court relying on the earlier decision of the Apex Court that unless prejudice is shown, then the small breach here and there will not vitiate the whole court of inquiry.

18. After examining all the records it appears that petitioner wanted to examine these three witnesses. The extracts of all the witnesses were read out to him and petitioner has

cross-examined all the three witnesses at length and Nb Sub CG Annanavar has consistently maintained that he was asked to pay a sum of Rs.45,000/- out of Rs.17,000/- were returned back to him for construction of the Guard room and if he had not paid he would have suffered as his case was due for promotion and it is also subsequently corroborated from the statement of Col. R.S. Waraich that a sum of Rs.17,000/- were returned back on the directions given by the Col. Sunil Khosla that the money was lying in unit and which was due to Nb Sub CG Annanavar as the remaining amount of the construction of the guard room have sought to be returned back and Nb Sub CG Annanavar has accepted the sum of Rs.17,000/- and that has been confirmed by the Lt.Col. Waraich. That shows there was interlink between release of remaining amount Rs.17,000/- back to the Nb Sub CG Annanavar.

19. Petitioner had sufficient opportunity to cross-examine the witnesses and he has not been able to show in what way his case has been prejudiced. He himself has examined the Nb Sub CG Annanavar extensively and cross-examined the

Lt.Col. R.S. Waraich as well as Col. Sunil Khosla, but nothing substantial could be brought out by him in cross-examination of all the three witnesses. Therefore, in conduct of Court of Inquiry there is no violation of rule 180 of the Army Rules. So far as fact finding of inquiry is concerned, it is based on the material which was available on record. It is established beyond doubt that petitioner pressurised Nb Sub CG Annanavar to ease out this money for construction of Guard room. This conduct of petitioner was unbecoming of officer.

17. Thus in these circumstances we are of the opinion that order passed by the respondent is correct and there is no ground to interfere in this petition, and the same is dismissed.
18. No order as to costs.

[Justice A.K. Mathur]
Chairperson

[Lt. Gen. SS DHILLON]
Member (A)

New Delhi
9th May, 2011