IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

O.A NO. 485 OF 2010

LT COL PRASAD PUROHIT ...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MS. NEELA GOKHALE FOR THE APPELLANT
MS. ANJANA GOSAIN FOR THE RESPONDENTS

CORAM

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. Z.U SHAH, MEMBER

J U D G M E N T
09.03.2011

1. The challenge in this O.A under Section 14 of the Armed Forces Tribunal Act 2007 is directed against the proceedings of the Court of Inquiry convened vide Letter No.190105/D/PUROHIT/M/AG/DV of HQ Central Command dated 4.4.2009 being violative of the Army Act and the Rules made thereunder.

2. Briefly, the facts of the case are: The appellant was commissioned in the Maratha Lt Infantry on 20.8.1994. After about eight years, he changed to the Intelligence Corps and was under probation with 31 Counter Insurgency Unit (31 CIU). During probation, he requested for a posting to Pune on compassionate grounds. Since there being no vacancy, he was posted to Deolali as Intelligence Officer of A Team of 3 Detachment of Southern Command Liaison Unit (SCLU). While so, suspecting his involvement in the Malegaon bomb blast incident, he was interrogated by Col. RK Shrivastava, Director, MI and he had to face extreme inhuman treatment. The applicant along with other co-accused was being prosecuted for the offences under the Maharashtra Control of Organised Crime Act (MCOCA). While so, a Court of Inquiry was convened vide order dated 4.4.2009. The Court of Inquiry commenced on 7.4.2009.

3. It is submitted that the applicant was not afforded a full and fair opportunity of being present throughout the proceedings and to cross examine the witnesses, thereby violating Army Rule 180. Army Rule 180 stipulates that whenever the character or military reputation of the person is involved, he must be given full opportunity of being present throughout the inquiry and making of any statement and 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 witness in defence of his character or military reputation. The appellant was constantly making requests to the Presiding Officer of the Court of Inquiry to afford him opportunity of being present and to cross examine the witnesses, but he turned a deaf ear. Therefore, the rights of the applicant were seriously jeopardised. Allegedly, some of the witnesses examined deposed against him affecting his character and military reputation.

4. Counsel for the respondents, on the other hand, submitted that the appellant was afforded adequate opportunity to remain present throughout the court of inquiry and make statement in defence. When the appellant was under judicial custody under MCOCA, he was brought before the court of inquiry under police escort on 13.4.2009 and in his presence the examination of Witness No.1 was finished on 14.4.2009 at 1.00 p.m. Subsequently, the appellant was not available when the court of inquiry took place between 15.4.2009 and 17.4.2009, as he had to be present before a criminal court. His examination from 18.4.2009 to 20.4.2009 was complete. He was present throughout and was given full

opportunity to cross examine the witnesses and nothing was recorded in his absence. Since the applicant was transferred to Nasik on 29.8.2010, the Court of Inquiry proceedings were concluded. In his absence the court of inquiry proceedings were finished on 1.9.2010. The appellant was throughout present when the witnesses were examined earlier, except on 1.9.2010, on which date certain witnesses were examined by the court of inquiry in the absence of the appellant. However, no significance was attached to those witnesses, who were examined in the absence of the appellant in the court of inquiry while formulating its opinion in respect of the appellant. In no way, the appellant was prejudiced when the witnesses were examined on 1.9.2010 in his absence.

5. In this case, there is no dispute with regard to the fact that the appellant was present in the Court of Inquiry held on 14.4.2009 when Witness No.1 was examined and further from 18.4.2009 to 20.8.2009 and also on 28.8.2009 when the other witnesses were examined. But, on 1.9.2010, when he was transferred to Nasik, some witnesses were examined that too in his absence. But submission was made on behalf of the respondents that it would not make any difference as they were not material witnesses and it would not in any way vitiate his further trial on

the basis of the recommendations of the Court of Inquiry. It may be mentioned that Army Rule 180 requires the presence of the accused during the Court of Inquiry. This rule has the mandatory import and cannot in any way be given a go by, merely because the offender was in judicial custody of another Court. Recording of evidence, in his absence, whether it would prejudice him or not, but at least render those statements to be ex parte, which is prohibited under Army Rule 180. This would vitiate the subsequent proceedings based on the ex parte recording of the statements of the witnesses, where the appellant had no opportunity to cross examine them.

6. Under Army Act Rule 177, a Court of Inquiry can be set up to collect evidence and to report, if so required, with regard to any matter which can be referred to it. The Court of Inquiry is a fact finding authority. Army Rule 180 provides, inter alia, that 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 witnesses 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 of inquiry is required to take such steps as may be necessary to ensure that any such person so affected receives notice of the date when the witnesses are examined.

7. Army Rule 180 has a mandatory import. In the decision reported in **Col. Prithi Pal Singh Bedi** v. **Union of India** (AIR 1982 SC 1413), the apex Court held that whenever a Court of Inquiry is held, it is obligatory to follow the procedure prescribed for the Court of Inquiry. In **Col Prithi Pal Singh Bedi's case** (supra) at paragraph 41, the apex Court held thus:

> "Rule 180 sets up a stage in the procedure prescribed for the Court of Inquiry. 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 Inquiry is a sine qua non. 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 a 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 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 Inquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation."

8. Army Rule 180 stipulates that presence of the person is necessary during the Court of Inquiry. If it is not done, then further action, on which court martial is held, would be vitiated and all the subsequent proceedings based on such recommendation would, therefore, be void ab initio. It is well established that when a certain procedure is mandatory in nature, it should be done in that manner and no other manner. Where the accused was not present during the Court of Inquiry and did not participate at the stage of Court of Inquiry, it would be violative of the

mandatory rule. The Court of Inquiry is required, by mandatory Army Rule 180, to observe the principles of natural justice and, therefore, even during the course of investigation, a Court of Inquiry cannot flout the rules of natural justice and if it does so, it cannot be said that the accused person had opportunity of hearing during the course of court martial. The Court of Inquiry makes an investigation into the criminal offence punishable with jail sentence. Therefore, the mandatory character of Rule 180 cannot be ignored while holding a court martial.

9. Further, it may be mentioned that Army Rule 180 mandates that if the Court of Inquiry affects the character or military reputation of any person subject to the Act, he should be afforded full opportunity of being present throughout the inquiry and 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. There is no dispute that certain witnesses were examined on 1.9.2010 without ensuring the presence of the appellant and affording him the opportunity to cross examine as mandated by Army Rule 180. Adherence to Army Rule 180 was required to be made by the Court of Inquiry. In this regard, it would be appropriate to refer to certain

English decisions. In **Admiralty Commrs**. v. **Valverda (Owners)** (1938 AC 173 (AC at p. 194)), the House of Lords observed that even long established conveyancing practice, although not as authoritative as a judicial decisions, will clause the House of Lords to hesitate before declaring it wrong, and in **Button** v. **Director of Public Prosecution** (1966 AC 591), the House of Lords observed that:

> "in *Corpus Juris Secundum*, a contemporary statement of American Law, the stare decisis rule has been stated to be a principle of law which has become settled by a series of decisions generally, is binding on the Courts and should be followed in similar cases. It has been stated that this rule is based on expediency and public policy and should be strictly adhered to by the Courts. Under this rule Courts are bound to follow the common law as it has been judicially declared in previously adjudicated cases and rules of substantive law should be reasonably interpreted and administered. This rule has to preserve the harmony and stability of the law and to make as steadfast as possible judicially declared principles affecting the rights of property, it being indispensable to the due administration of justice, especially by a Court of last resort, that a question once deliberately examined and declared should be considered as settled and closed to further argument. It is a salutary rule, entitled to great weight and ordinarily should be strictly adhered to by the Courts. The Courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one, or equitable

> considerations might suggest a different result and although it has been erroneously applied in a particular case. The rule represents an element of continuity in law and is rooted in the psychologic need to satisfy reasonable expectations, but it is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable when such adherence involves collision with a prior doctrine more embrancing in its scope, intrinsically sounder and verified by experience."

10. From a perusal of the entire materials on record, it appears that certain witnesses were examined on 1.9.2010; wherein the appellant had no opportunity to cross examine them. The Court of Inquiry, therefore, suffers from the vice of irregularity.

11. In the given circumstances, it would be just and proper to direct the respondents to further convene the Court of Inquiry from the stage when the statements of the witnesses were recorded on 1.9.2010 in absence of the appellant, and to afford opportunity to the appellant to cross examine those witnesses, after permitting the appellant or his counsel to go through the statements of the witnesses recorded on that date and further to permit the appellant to adduce evidence in his

defence and additional report of court of inquiry on the basis of the evidence adduced. The application is disposed of accordingly.

(Z.U SHAH)
MEMBER

(S.S KULSHRESTHA)
MEMBER