**THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH**
**NEW DELHI**
**(Court No.2)**

**O.A NO. 88 of 2012**

**IN THE MATTER OF:**

**Brig R.S. Rathore .....APPLICANT**
Through : Mr. S.S. Pandey, counsel for the applicant

**Vs.**

**UNION OF INDIA AND OTHERS ...RESPONDENTS**
Through: Mr. R. Balasubramaniam, Asstt. Solicitor General with Mr. J.S. Yadav, counsel for the respondents

**CORAM:**

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER**
**HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

**JUDGMENT**

**Date: 29.05.2012**

1. This OA was filed in the Armed Forces Tribunal on 05.03.2012 and was registered as OA No.88/2012.

2. Vide this OA, the applicant has challenged the validity of COI as well as the attachment order dated 01.02.2012. He has also challenged the imposing of Disciplinary and Vigilance Ban (DV Ban) on him and has sought that the same be quashed. He also seeks consequential benefits.

3. Brief facts of the case are that the applicant was commissioned in the Army on 22.12.1979. He was posted as Commandant, COD Dehu Road on 27.06.2008. Subsequently, he picked up the rank of

Brig on 01.08.2008. The applicant relinquished the appointment on 23.10.2009. After he had relinquished his appointment, a test audit was carried out in October-November, 2009 pertaining to the year 2008. During this audit, certain shortcomings were observed by the audit authorities and a Factual Statement of Case (FSC) was issued on 08.03.2010. This FSC had three observations pertaining to the period in which the applicant was in Command. Subsequently, a draft audit para was issued in July 2010 in which the gravamen of the audit para FSC were modified.

4. It is alleged that based on the FSC, instead of responding to the audit authorities, the case was forwarded to the local administrative authority who ordered a one man inquiry to be conducted by Brig Sanjiv Talwar. On completion of the one man inquiry, a COI was ordered on 23.10.2010 in which the Presiding Officer was again Brig Sanjiv Talwar and members were Commandant 512 Army Base Workshop and Commandant CAFVD, Kirkee.

5. On completion of the COI, it is alleged that the GOC-in-C took a decision to initiate disciplinary action against the applicant despite the fact that Rule 180 was not applied in letter and spirit by the COI. Based on this recommendation, an attachment order dated 02.03.2012 was issued for the applicant to be attached to HQ 41 Arty Division.

6. Learned counsel for the applicant argued that the composition of the COI was flawed. Firstly, the Presiding Officer had already

conducted a one man inquiry; therefore, he had an interest and connection in the case. Having submitted his one man report, it would have been humanly impossible for the same person to negate his findings of that in the one man report and therefore, the COI was more of a sham to come to the same conclusion as his one man inquiry report. He submitted that the Court may like to go through the one man investigation report and the findings of the COI.

7. Learned counsel for the applicant also argued that in the audit report, both in the FSC and the draft test audit para, both COD Dehu Road and CAFVD were implicated. By appointing Commandant of CAFVD as a member of the COI, even though he was not posted there during the time of this audit report, he had a vested interest in ensuring that only Commandant Dehu Road is investigated by the COI and the CAFVD is left completely.

8. Learned counsel for the applicant argued that Rule 180 was not invoked in case of the applicant. He was not permitted to cross examine the witness No.1. He has no complaint against witnesses No.2 to 9 but he argued that witness No.1 was most material witness because he had produced all the documents, some of which he was also the author and therefore, it was very material that witness No.1 should have been cross examined. In that case certain other documents would have been produced to the Court and perhaps the applicant would have been absolved of all the charges. He asserted

that as of now, the charges pertain to lack of supervision and having failed in making a SOP during his tenure.

9. Learned counsel for the applicant argued that the attachment order dated 02.03.2012 was premature because the competent authority who was issuing the attachment order has not yet received the COI proceedings. This clearly stands out in the signal dated 02.03.2012. So, there was total non-application of mind and based on recommendations forwarded by GOC-in-C, the attachment order was issued which is incorrect.

10. In support of his contentions, learned counsel for the applicant relied upon following citations:-

(i) **AIR 1987 SC 454(1) Ashok Kumar Yadav Vs State of Haryana** wherein the Hon'ble Apex Court has held that :

> "*It is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is "in accordance with natural justice and commonsense that the justice likely be so biased should be incapacitated from sitting*".

(ii) **AIR 2006 SCC 2544 Crawford Bayley and Co. Vs UOI** wherein the Hon'ble Apex Court has held that the doctrine of 'no man can be a judge in his own cause' comes into play only when it is shown that officer concerned has personal bias or personal interest or that he has

already taken a decision which he may be interested in supporting the same.

(iii) **AIR 1973 SCC 2701 S. Parthasarathi Vs State of A.P.** wherein the Hon'ble Apex Court has held that :

> *".....The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seem to be done. If right minded persons would think that there is likelihood of bias on the part of the inquiring officer, he must not conduct the enquiry; nevertheless there must be a real likelihood of bias."*

(iv) **AIR 1993 SCC 2155 Rattan Lal Sharma Vs Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School** and others wherein the Hon'ble Apex Court has held that :

> *"If a person has a pecuniary interest, such interest, even if very small, disqualifies such person. For appreciating a case of personal bias or bias to the subject matter the test is whether there was a real likelihood of a bias even though such bias has not in fact taken place*."

(v) **AIR 1994 SCC 1074 Managing Director, ECIL, Hyderabad etc. etc. Vs B. Karunakar, etc. etc.,** wherein the Hon'ble Apex Court has held as under:-

*"If after hearing the parties, The Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment the Courts/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short-cuts. Since it is the Court/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate of revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."*

(vi) **AIR 2003 SCC 1416 Union of India Vs B.N. Jha** wherein the Hon'ble Apex Court has observed that a finding of guilt should be arrived at by a Court only after it has been supported by evidence and this evidence must be analysed and only then finding of guilt can be arrived at by the Court; any deviation to this procedure will bring one to the conclusion that there has been no evidence brought on record to prove the guilt of the respondents.

(vii) **WPC 6614/2007 in Naib Subedar Manjeet Singh Vs UOI and Ors.,** decided on 05.09.2008 by the Hon'ble High Court of Delhi wherein the Hon'ble Court has held as under:-

> "*It is one of the fundamental features of our Constitution that a person subject to Army Act continues to be a citizen of India and is not wholly deprived of his rights under the Constitution. In the larger interests of national security and military discipline the Parliament may restrict or abrogate such rights in their application to Armed forces but the basic feature which the Parliament would not like to alter is that persons subject to Army Act cannot be denied equality before law and equal protection of law. Therefore the guarantees contained under the Article 14 of the Constitution are available to the persons subject to Army Act in the same manner in which these guarantees are available to the other citizens of India. If the inquiry is sought to be held into the conduct of the Army Offices or into his reputation, a procedure which is fair, just and reasonable is to be adopted and the persons holding such an enquiry must be unbiased. This is exactly what is embodied in R.180 of the Army Rules."*

11. Learned counsel for the respondents argued that this application was beyond the jurisdiction of this Hon'ble Tribunal because the COI was convened on 23.10.2010 by HQ M&G Area and it was held at Dehu Road, Pune. The COI was finalised on 06.01.2012 and was

submitted to the HQ M&G Area. The decision for initiating disciplinary action was taken by GOC-in-C at Pune and a request was made to the Army HQ to attach the officer for subsequent proceedings based on the directions of the GOC-in-C. The attachment order was issued on 02.03.2012 as the applicant was posted in Ladakh and was not within the jurisdiction of GOC-in-C at Pune. Therefore, the attachment order had to come from the Army HQ at Delhi. Considering the above that the applicant's posting was in Ladakh and the cause of action was in Pune, the jurisdiction for this application lies either at Mumbai or at Chandigarh.

12. Learned counsel for the respondents further submitted that under the Army Act and Rule 127 of the Army Rules, there is no prohibition on the officer who has conducted a one man inquiry to be a Presiding Officer of the COI. He argued that rather he is most eligible having been conversant with the case he had carried out a one man investigation. In support of his contention, learned counsel for the respondents cited **AIR 1980 SC 1170 Sunil Kumar Banerjee Vs State of West Bengal and Ors**., wherein their Lordships have held as under:-

> *"....We find no basis for the contention of the appellant that there was a reasonable apprehension in his mind that the Enquiry Officer was prejudiced against him. Nor do we agree with the statement that the Enquiry Officer combined in himself the role*

*of the prosecutor and the judge. It appears that when the preliminary report of investigation was considered by the Vigilance Commissioner with a view to recommend to the disciplinary authority whether a disciplinary proceeding should be instituted or not, the report of investigation was referred by the Vigilance Commissioner to Shri A.N. Mukherji for his views and for the preparation of draft charges if institution of disciplinary proceedings was to be recommended. Shri Mukherji expressed his opinion that there was material for framing five charges and he also prepared five draft charges and forwarded them to the Vigilance Commissioner. The Vigilance Commissioner in turn forwarded the papers to the Government who finally decided to institute a disciplinary proceeding against the appellant. Thereafter Shri A. N. Mukherji was appointed as Enquiry Officer. From the circumstance that Shri Mukherji considered the report of investigation with a view to find out if there was material for framing charges and prepared draft charges, it cannot possibly be said that Shri A. N. Mukherji, when he was later appointed as Enquiry Officer constituted himself both as prosecutor and judge*."

13. Learned counsel for the respondents further argued that the Commandant, CAFVD who was the Member of the COI had assumed the appointment in 2010. Therefore, he was not the Commandant during the period when the charges were being investigated. He had

taken over only in 2010. The incident is of 2008. Therefore, it cannot be said that he had a vested interest in the case.

14. Learned counsel for the respondents further stated that the Army Rule 180 was applied in letter and spirit. In fact the COI had recommended on 27.06.2011 to apply the provisions of Army Rule 180. The documents shows that except for witness No.1, all other witnesses submitted themselves for cross examination.

15. Learned counsel for the respondents further argued that the Convening Order was of a general nature (Annexure A-5) and it did not implicate the applicant, therefore Rule 180 was not applied right from the beginning. But, however, as soon as it was realised that the applicant's character and military reputation will be involved, Army Rule 180 was invoked. He argued that in February 2011, the convening authority had observed that Rule 180 was not applied in letter and spirit and therefore, the COI was reassembled.

16. Learned counsel for the respondents further contended that as regards cross examination of witness No.1 who had produced only the documents, a certificate was issued by the applicant in which he has stated that "*This is to certify that all relevant documents related to the subject C & I (Irregularities and malpractices in dispatch of stores through CHT by COD Dehu Road) were made available to me for perusal as and when required by me during the course of investigations*". Therefore, the cross examination of witness No.1 was

considered not essential since the witness No.1 had only produced the documents.

17. We have heard both the parties at length and have examined the documents produced before us. We shall now deal with each point of contention between two parties as under.

18. **Jurisdiction:** We are of the opinion that the COI was conducted on the orders of HQ M&G Area on 23.10.2010. The COI was finalised on 06.01.2012 by the GOC M&G Area and directs that disciplinary action should be initiated against the applicant.

19. Based on the directions of GOC M&G Area, it was stated that the case was taken up through HQ Southern Command with Army HQ to attach the applicant so that disciplinary action could be initiated since the applicant was posted in Northern Command Area. This aspect is understandable because the applicant did not come under the jurisdiction of HQ Southern Command and thus the attachment order perforce had to be issued by the Army HQ.

20. This raised two issues qua the jurisdiction. Though the cause of action is at Mumbai on the date of filing of application i.e. 05.03.2012, but the Mumbai Bench of the Armed Force Tribunal was not operational on that day. The second issue is regarding attachment order. At the moment the prayer of the applicant is to cancel the attachment order dated 01.02.2012. Therefore, the cause of action clearly lies at AFT Principal Bench at New Delhi. Therefore, we are of

the opinion that this Tribunal is having the jurisdiction to entertain this case.

21. **Composition of COI**: We have considered the allegations regarding the officer who conducted the one man investigation and was also appointed as the Presiding Officer of the COI. The respondents have claimed that there is no prohibition under the Army Act and under Rule 127 of the Army Rules on the person who conducted the one man investigation to be the Presiding Officer of the COI which was conducted subsequently. In order to strengthen their contentions, learned counsel for the respondents relied upon the judgment of Hon'ble Apex Court in Sunil Kumar Banerjee (Supra). In this case, we find that the case was referred by the Vigilance Commissioner to Shri A.N. Mukherjee for his views and for preparation of draft charges if institution of disciplinary proceedings was to be recommended. Shri Mukherjee expressed his opinion that there was material for framing five charges and he also prepared five draft charges and forwarded them to the Vigilance Commissioner. The Vigilance Commissioner in turn forwarded the papers to the Government who finally decided to institute a disciplinary proceedings against the appellant and Shri A.N. Mukherjee was appointed as the Enquiry Officer. Shri Mukherjee had not conducted the preliminary inquiry. It was conducted by the Vigilance Commissioner. He had only given his opinion based on the preliminary inquiry and framed draft charges.

22. On the other hand, the applicant has contended that the Presiding Officer was the same person who had conducted the preliminary inquiry. Therefore, the Presiding Officer was biased. He stated that the findings of the one man inquiry and that of the COI are similar in nature. We called for the one man inquiry as also the COI to examine this allegation. The opinion of the one man inquiry runs into a single sheet while the opinion of the COI runs into three pages. There are no findings in the one man inquiry while the findings of the COI run into 12 pages. However, the gravamen of the opinion in the one man investigation and that in the findings and opinion of the COI are similar. Albeit, the COI contained much more details having examined the various witnesses.

23. We have also taken into account the citations given by the applicant in the matters of **Naib Subedar Manjeet Singh Vs UOI and Ors**.,(supra); **Managing Director, ECIL, Hyderabad etc. etc. Vs B. Karunakar, etc. (**Supra**) and Rattan Lal Sharma Vs Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School** (supra). Having considered the rival contentions advanced by learned counsel for both the parties, we are of this opinion that the policy letter dated 12.02.2010 which says "COURTS OF INQUIRY: AMPLIFICATION NOTES. The amplification notes at paras 9 and 10 lays down as under:-

"*9. Relevant factors to decide selection of members are:-*

*(a) Rank*

*(b) Suitability and availability to conduct the matter of investigation*

*(c) Residual tenure in station/service*

*(d)* ***No personal interest/connection****.*

*10. Should it not be administratively feasible to provide rank and compatible quorum for the C of I, then it is obligatory for the convening authority to record reasons to the effect in writing."*

24. Examining this position as stated in the policy letter of 12.02.2010, it is quite obvious that in this case particular case, the Presiding Officer of the COI was undoubtedly connected with the matter being investigated since he had already conducted the one man investigation. Besides, he had given an opinion in his one man investigation. It is, therefore, not possible for him to arrive at a different finding then what he had already found in the one man investigation because otherwise, he would have lost his credibility.

25. Thus, we are of this opinion that there is an element of bias in this case as contained in para 8(d) of the Amplification Note: "No personal interest/connection".

26. We have also examined the allegation that the Commandant CAFVD was made a Member of the COI. It was contended by the learned counsel for the respondents that the Commandant who was

appointed as Member of the COI had assumed his appointment only in 2010. The allegations that were being inquired into were of 2008. Therefore, he had no interest/connection with the outcome of the COI. We have examined the findings of one man investigation in which at para 36, the investigation officer has opined that "*I am also of the opinion that CAFVD, Kirkee has failed to exercise adequate checks related to vehicle capacity, transit time and transhipment and has in isolated cases loaded vehicles below capacity*". Despite this opinion, the COI has not covered the CAFVD in the inquiry. No separate inquiry has also been ordered. Therefore, it is logical that the Commandant of the CAFVD, although he was not holding the appointment in 2008, he had a vested interest in the outcome of the inquiry so that his department i.e. CAFVD is not subjected to a separate COI.

27. In view of the foregoing, we are of this opinion that the composition of the COI was flawed as the Presiding Officer having been the one man investigation officer earlier was biased as also one of the Members who was the Commandant of the CAFVD had interest in the outcome of the COI.

28. **Application of Army Rule 180**: As regards the application of Army Rule 180 is concerned, we have examined the documents produced before us. The convening order does not name the applicant in person and therefore, Army rule 180 could not have been applied right from the beginning. The convening order of

23.10.2010 states "*To investigate and ascertain irregularities and malpractices in the dispatch of stores through CHT for the period April 2006 to October 2008 by COD, Dehu Road*". Therefore, application of Army Rule 180 at the commencement of the inquiry was not required. The competent authority having realised that the Army Rule 180 has not been applied, ordered reassembling of the COI on 27.06.2011. On this date, Army Rule 180 was applied and all witnesses except witness No.1 were recalled and cross examined. We have satisfied ourselves as regards this statement from the proceedings of the COI produced before us. Witness No.1 was not cross examined because he had only produced documents which were on his charge. A certificate was obtained from the applicant to say that he was provided with the documents as and when required. The applicant, however, disputed this contention and said that witness No.1 was material because he could have been asked to produce certain additional documents which would have cleared the applicant of the charges that were being levelled against him now.

29. Be that as it may, we are of the opinion that since the COI was reassembled on 27.06.2011, witness No.1 should have also been summoned for cross examination, if that was so. However, we find that in the absence of cross examination of witness No.1, the proceedings of the COI cannot be said to be vitiated.

30. **Attachment Order**: Based on the directions of GOC M&G Area dated 06.01.2012, a request for attachment order was forwarded through the chain of Command alongwith brief on 31.01.2012 seeking attachment of the applicant for further action. Though the applicant has contested that there was no application of mind by the competent authority at Delhi i.e., COAS before the attachment order was issued because even the proceedings of the COI was not received by them, therefore, the attachment order issued was unfair. However, we feel that the competent authority who was GOC M&G Area had already taken the decision as to initiate disciplinary action against the applicant. This could have only been achieved after the applicant was attached for which a request was sent alongwith the brief. Thus, the attachment order by the Army HQ was a mere formality and cannot be said to be illegal and unjust. However, since the COI in itself is under scrutiny for legality, the issue of attachment order does not have any grounds to be sustained, since its was based on the decision of the competent authority taken in pursuance of the COI proceedings.

31. **Audit Report:** As regards the scope of the convening order, we are of this opinion that the respondents are empowered to undertake any action on investigation despite the fact whether this has been reported by the audit authorities or not. It is agreed that FSC dated 08.03.2010 contain several instances of malpractices while DAP had only one observation. Therefore, the respondents have free to

investigate any aspect of what they felt incorrectly been undertaken and they are well within their rights to do so.

32. In view of the foregoing, we are of this opinion that the COI which was conducted under the orders of GOC M&G Area, the composition of the COI was incorrect, illegal and flawed. Therefore, the inquiry is vitiated in the eyes of law. In view of the above, we remand the case back to the respondents for reconvening the COI, if required and for further action. The present inquiry convened on 23.10.2010 and finalised on 06.01.2012 is thus quashed.

33. Since the inquiry has been quashed, the attachment order dated 02.03.2012 qua the applicant is also set aside. As such, the DV Ban imposed on the applicant stands quashed and set aside. The applicant will be entitled to all consequential benefits. The respondents are free to take further action, as deemed appropriate in the matter.

34. In the light of above discussion, the OA is partly allowed. No orders as to costs.

**(M.L. NAIDU)**
**(Administrative Member)**

**(MANAK MOHTA)**
**(Judicial Member)**

**Announced in the open Court**
**on this 29th day of May, 2012.**