
(2012) 07 DEL CK 0227

In the Delhi High Court

Case No : Writ Petition (C) Nos.13360 of 2009 and 13367 of 2009

Colonel A.D. Nargolkar

APPELLANT

Vs

Union of India and Ors

RESPONDENT

Date of Decision : 09-07-2012

Acts Referred:

Army Act, 1950 — Section 134, 27

Constitution of India, 1950 — Article 14, 16, 21, 226, 227

Citation : (2012) 07 DEL CK 0227

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : A.S. Chandhiok, ASG with Mr. Gurpreet S. Parwanda, Ashwani Bharadwaj and Ms. Monika Tyagi, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—The petitioner has challenged the judgment dated 30th September, 2009 passed by the Armed Forces Tribunal, Principal Bench, dismissing the original applications bearing O.A. No. 50/2009 & O.A. No. 53/2009, upholding the order of censure dated 5th June, 2008 imposed on the petitioner. The petitioner has sought the quashing of the Court of Inquiry proceedings initiated against him and the setting aside of the order of severe displeasure (recordable) dated 5th June, 2008. He has further sought directions against the respondents to promote the petitioner as brigadier with all consequential benefits from the date his immediate juniors were promoted. The brief facts as contended by the petitioner are that he had become an officer in the Indian Army in the year 1979 and that during his service he had undergone "stiff selection" based Courses i.e. the Long Gunnery Staff Course (1987), Defence Services Staff College Course (1992) and finally Higher Command Course (2002) which trains select officers for the rank of Major General; and was even sent to France (1999) as part of an Army delegation.

2. In the year 1999 the petitioner was promoted to the rank of Colonel, which is

a post he continued to hold till his retirement. During the period of 2006-07 the petitioner was on study leave sanctioned up to 31st May, 2007, and was at Pune at the time. In the month of January, 2007, the Selection Board No. 2 (DPC) was convened for considering officers of the 1979 batch for promotion to the next higher rank of Brigadier. By letter dated 22nd March, 2007, it was notified that the petitioner along with certain other officers had been empanelled for promotion to the post of Brigadier after a stringent selection procedure. In the said letter it was also stipulated that the government had approved the empanelment of 20 officers for promotion to Brigadier in the Regiment of Artillery and that the petitioner was at serial no. 10. These officers were to be promoted in turn, subject to three conditions i.e. medical fitness, continued satisfactory performance and clearance from DV.

3. The petitioner contended that pursuant to the letter dated 22nd March, 2007 he sent a letter dated 15th May, 2007 to the DG Arty and Col Comdt, Regt of Arty, Lt Gen AS Bajwa, AVSM, VSM requesting that he be posted to a field area and that if in case a field posting is not possible, at least a posting to Aurangabad be issued to the petitioner, which was vacant at the time. The letter further stipulated that as per the petitioner's profile, 20 years were spent in the peace area while only 8 years were spent in the field area, which qualified him for field areas. According to the petitioner, since he had spent a lions-share of his official life in peace areas, he had requested posting to a field area, as it would have been a more challenging task and also since it would better his Career prospects as he could prove his worth in field postings and also since in the Army, field postings are deemed to be a good career progression.

4. In response to the request of the petitioner, the MS Branch replied by its letter dated 22nd May, 2007 that "though Aurangabad is not possible in view of study leave, a field area posting will be considered". The petitioner contended that since his study leave was sanctioned only till 31st May, 2007, there was no reason to not post the petitioner to Aurangabad as stated by the concerned authorities. However, before the letter could take effect, after four days, on 26th May, 2007, the immediate junior to the petitioner, viz. Col Deepak Dhanda, was posted to a field area (19 Arty Bde) and the petitioner was posted as Brigadier i.e. Cdr. 7 Arty Bde at Ferozpur (Punjab) i.e. Peace Area. Thus, according to the petitioner, clearly there was a vacancy in the field area and that despite his specific request, he was not considered for the same.

5. The dispute in the present matter however, has its inception due to the complaint dated 20th July, 2007 that was lodged against the petitioner by an ex-army officer, named Sh. Dhoom Singh Pundir, alleging that the petitioner was harassing his daughter, Mrs. Bhati and son-in-law Col. V.S. Bhati. It was alleged that while his son-in-law's family and the petitioner's family were posted at Ahmedabad, there were difference among them and despite solving the matter with mutual understanding, the petitioner continued to harass and blackmail the complainant by calling him incessantly on his mobile phone and SMSing him, due

to which reason a complaint was also registered with the Panchkula Police Station.

6. On 2nd August, 2007, the petitioner received a legal notice dated 30th July, 2007 from the said complainant stipulating the above mentioned allegations. Yet again on 4th August, 2007 the complainant registered another complaint with the police stipulating that after issuing the legal notice to the petitioner, he again started threatening the complainant as well as his daughter with dire consequences. In response to the legal notice, the petitioner communicated his reply dated 16th August, 2007 whereby he vehemently denied the allegations made by the complainant. According to the petitioner he also informed the Military Secretary, Respondent no. 3, his direct superior about the legal notice, as well as, his reply to the same, who suggested that both sides should desist from any communication. The petitioner further contended that the complaint filed by Sh. Pundir was made only with the intention to prevent his promotion to the post of Brigadier, as on account of being an ex-officer, the complainant was well aware of the workings of the system.

7. Thereafter, on 3rd September, 2007 the respondents forwarded the complaint dated 27th July, 2007 filed by Sh. Pundir, to the petitioner, wherein it was alleged that the petitioner had blackmailed his daughter and son-in-law, after having stolen her affections and even harassed them with the intention of extorting money by calling them incessantly and writing anonymous letters to his daughter.

8. On receiving the complaint dated 27th July, 2007, a Discreet Inquiry was conducted by the Military Intelligence, which as per the petitioner, was done behind his back from 27th July, 2007 to 14th September, 2007. Consequently, on 14th September, 2007, the petitioner's promotion was withheld by way of withholding the DV clearance of the petitioner, and therefore a "deemed sealed cover" procedure stood applied in the case of promotion of the petitioner.

9. Meanwhile, talks were also initiated between the petitioner and the complainant in order to resolve the dispute. According to the petitioner, these talks were carried out under the guidance, management and control of DG Arty Lt. Gen A.S. Bajwa. On 18th September, 2007 the petitioner had met with the complainant and his wife at Delhi in the office of the DG Arty Gen, in order to iron-out their differences. The petitioner has contended that on account of the mediation on the part of the DG Arty, and his influence in the matter, the petitioner agreed to tender a conditional apology to the complainant, in order to satisfy his ego. However, the petitioner had secured the presence of Brigadier A. Srivastava, a serving Deputy Judge Advocate General (DJAG), in order to ensure legal sanctity and also recorded all the calls and SMSs exchanged between both parties. On 22nd September, 2007, the petitioner tendered his conditional apology to the complainant and consequently, on the same day the complaint was withdrawn by Sh. Pundir. The contents of the said apology letter are as follows:

LETTER OF APOLOGY

1. 1, IC-38032M Col AD Nargolkar resident of E-8/12 Salunke Vihar, Kondhwa, Pune - 411048 (Maharashtra) do hereby apologize to Mr DS Pundir resident of Village Khangesra, PO Kot, Distt Panchkula 134118 (Haryana) if it has caused him harassment and mental agony.

2. I understand that Mr DS Pundir is withdrawing his complaint from Army and Civil authorities on my undertaking and assurance of no interference in his personal life and cause future harassment/ threatening. On my failure to abide by this letter of apology and the compromise letter, Mr. DS Pundir shall have the liberty to initiate a fresh complaint against me on the same cause of action.

3. I am liable for a disciplinary action from Army authorities as well as from civil authorities in case I ever violate my undertaking of no communication, contact or interference of any sort in the personal life of Mr. DS Pundir.

4. I am giving this letter of apology on my own free will and without any pressure of any kind from anyone. I will not go back on my undertaking and will not seek any kind of compensation or claim at a later stage.

5. I am signing this document in the presence of my wife Mrs Rohini Nargolkar and witness Mr Rajeev Anand:-

a. Mrs Rohini Nargolkar Signature d/

b. Mr Rajeev Anand Signature d/

7. The above letter of apology has been read and understood by me and it has been prepared on my instructions which are true and correct. I understand to abide by the above undertakings. The witness and my wife, Mrs Rohini Nargolkar, have signed in my presence. Dated 22.09.2009 Place Chandigarh

10. Thereafter, a settlement dated 22nd September, 2007 was also recorded between the petitioner and the complainant, the terms of which are as follows:

SETTLEMENT

This settlement agreement is entered on this 22nd day of September 2007 between COLONEL AD NARGOLKAR (IC-38032M) resident of E-8/12, Salunke Vihar, Kondhawa, Pune-411048 (Maharashtra) hereinafter called the FIRST PART; and DS PUNDIR Village Khangesra, PO Kot, Panchkula (Haryana) 134118 hereinafter called the SECOND PART.

WHEREAS the second part has filed a complaint dated 27.07.2007, addressed to the Chief of Army Staff, against the first part upon occurrence of certain unfortunate events and incidents on which a formal inquiry is initiated by the Army Authorities in addition to a simultaneous complaint filed by the second part against the first part and pending with the civil police authorities Police Post Ramgarh.

The FIRST PART has now tendered an unconditional written apology through letter of apology dated 22.09.2007 to the SECOND PART which has been accepted by the SECOND PART and the parties as a consequence enter into the following agreement:

1. The First PART binds itself by the terms of his letter of apology dated 22.09.2007 and undertakes not to interfere directly or indirectly in the personnel life of the SECOND PART.

2. The SOCOND PART agrees not to pursue his complaint dated 27.07.2007 addressed to the Army Authorities and the Complaints dated 20.07.2007 and dated 04.08.2007 given to Civil Police Authorities and pending as on date. The SECOND PART further undertakes to withdraw these complaints though proper process and upon the adherence and compliance of the terms and commitments of the above mentioned letter of apology tendered by the first part, not to initiate any fresh complaints / litigation against the FIRST PART.

3. The parties agree that there is nothing due or pending between the parties and they have no claim whatsoever each other as also that the PARTIES are not possessing or retaining any articles / documents signed or unsigned or marked belonging to the OTHER PART.

4. Either party shall have the right to further initiate / re-open the withdrawn complaints and petitions if at any point of time any of the parties breach the terms and commitments of the letter of apology dated 22.09.2007 and the present agreement upon which fresh complaints and petitions shall included the cause of action involved in complaints dated 27.07.2007 to Army Authorities.

5. That the parties in the presence of the witnesses agree that there is no inducement, threat or coercion by any part upon the other to enter into the present settlement agreement as also the letter of apology dated 22.09.2007 which is made by free consent and will, fully understanding the contents therein.

6. This Agreement-is made in original. The same shall be kept by the said SECOND PART and Photostat copy may be taken by the FIRST PART for records. In witness whereof, both the parties have set their hands on the agreement in the presence of the witnesses:

11. Thereafter, comments were sought on the matter by the respondents from the petitioner, on account of which he submitted letters dated 23rd September, 2007 and 24th September, 2007 explaining that the misunderstanding between him and the complainant had been sorted and that the same had ultimately culminated in the withdrawal of the complaint by Sh. Pundir by his withdrawal letter dated 22nd September, 2007.

12. However, a convening order had been issued on 17th September, 2007 to initiate the Court of Inquiry (COI) against the petitioner on the allegations made by Sh. Pundir in his complaint directed to the respondents. By letter dated 2nd October, 2007, Sh. Pundir informed the Convening authority that the matter

stood closed from his side and that no inquiry is required and that for this reason he would not be presenting himself in the Inquiry. By letter dated 30th October, 2007 it was communicated to the petitioner that the COI would assemble at Nasirabad near Jaipur on 5th November, 2007. On 6th November, 2007, summons were issued to Sh.Pundir, his daughter and his wife and it was further stipulated that despite the complaint being withdrawn by the complainant, judicial notice u/s 134 of the Army Act was taken and that the investigation has been ordered. In response to the letter of the complainant dated 1st November, 2007, another letter dated 6th November, 2007 was sent to the complainant stating that the Army has taken cognizance of the legal issues raised in his complaint and thus the presence of his family is mandatory. According to the petitioner, this suo motu cognizance of the complaint by letter dated 6th November, 2007 was not informed to him.

13. During the COI proceedings, three witnesses were examined and the petitioner was also asked to defend himself, and allegedly the report was submitted in the 1st week of January 2008 to Respondent no.3 i.e. the Convening Authority of the COI. According to the petitioner, he wrote five letters from December, 2007 to February, 2008 to the Convening and other authorities requesting them to accept his additional evidence. However, all these requests were rejected by the respondents by their letter dated 9th February, 2008 which stated that the petitioner had been afforded all due opportunity to present his case during the COI as per Army Rule 180.

14. Thereafter, the petitioner approached the High Court of Bombay vide WP(C). No. 942/2008, seeking the quashing of the COI proceedings initiated against him. The petitioner also prayed for directions to the respondents to grant him promotion to the rank of Brigadier, which had been held up despite his empanelment. By order dated 12th March, 2008 the Bombay High Court permitted the petitioner to file a reply to the show cause notice, 20 days after the respondents filed their counter affidavit before the Court. Thereafter, counter affidavit dated 18th March, 2008 was filed, wherein for the first time it was disclosed that allegations against the complainant were investigated by the Military Intelligence sources, which culminated into a discreet inquiry report whereupon the respondents had ordered a formal investigation by the Court of Inquiry. On 4th April, 2008 however, the High Court of Mumbai disposed of the petitioner's writ petition, being WP(C) No. 942/2008, and directed the petitioner to first exhaust his statutory remedy, with the liberty to approach the Court thereafter.

15. During the pendency of the writ petition, a show cause notice was issued to the petitioner on 7th March, 2008 on the basis of the COI proceedings, asking an explanation as to why he should not be awarded Censure for the misconduct alleged against him. The contents of the said show cause notice are as follows:

SHOW CAUSE NOTICE

1. A Court of Inquiry was ordered by General Officer Commanding 41 Artillery Division to investigate into the complaint dated 27 July 2007 submitted by Shri DS Pundir against you to the Chief of the Army Staff, making serious allegations against your conduct.

2. The proceedings of the Court of Inquiry were placed before the General Officer Commanding-in-Chief, Southern Command, who after due perusal finds you prima-facie blameworthy for a conduct not expected of an officer with your service and seniority, as enumerated hereunder:-

(a) Misuse of official position as Colonel Administration, Headquarters 11 infantry Division to enter into an improper relationship with Mrs Neelam Bhati, wife of IC-42178X Colonel VS Bhati an officer posted in the same station.

(b) For harassment and mental torture of Shri DS Pundir, his daughter Mrs Neelam Bhati and her husband IC-42178X Colonel VS Bhati through unwarranted communications by telephone calls and SMS messages with an intent to blackmail and extort.

(c) For entering into settlement agreement dated 22 September 2007 with Shri DS Pundir after convening of the Court of Inquiry with the sole aim to undermine and circumvent the due process of law.

3. The General. Officer Commanding-in-Chief, Southern Command is of the opinion that his Censure in an appropriate form is warranted for the aforesaid commissions and misconduct on your part. On his directions and on his behalf, you are hereby afforded an opportunity to explain your ibid conduct and show cause as to why the. proposed Censure of the General Officer Commanding-in-Chief, Southern Command, in an appropriate form be not awarded to you.

4. Your reply to this Show Cause Notice must be submitted through your immediate superior officer in command within a. period of 20 days from the date of receipt of this notice, failing which it shall be presumed that you have nothing to urge in reply and an ex parte decision will be taken. 5. A copy of the Court of Inquiry proceedings including all exhibits, less findings and opinion are enclosed herewith for preparation of your reply. 6. Receipt of this Show Cause Notice will be acknowledged by you.

16. Along with the Show Cause Notice, the petitioner was also supplied with a copy of the COI proceedings and certain exhibits. However, the petitioner contended that the findings and the opinion of the COI i.e. the Inquiry Report of the COI was not supplied.

17. On 14th April, 2008 the petitioner submitted his detailed reply to the show cause notice wherein he gave an exhaustive narration of the facts including the transcripts of SMS texts, voice record sound clips with Mr.Pundhir, DG Arty, Brig Srivastava, Respondent no.2 and others. He also contended that he had not been supplied with the copy of the enquiry conducted by the Discreet Inquiry and other material documents which were taken behind his back and relied upon by

the COI. The petitioner had also offered to withdraw his apology letter, so that the authorities could reassemble the Inquiry and so that the law could take its own course.

18. Thereafter, the petitioner submitted two statutory complaints dated 20th April, 2008 and 26th April, 2008 seeking the quashing of the COI and challenging the stoppage of his promotion by declaring the Discreet Inquiry conducted against him as null and void. He further contended that there was no ground for withholding the DV clearance prior to the issuance of the Show Cause Notice.

19. However on 5th June, 2008 a Censure Order of Severe Displeasure (Recordable) was awarded to the petitioner. This, according to the petitioner, had the effect of equivocally debarring the petitioner from promotion for a period of three years. Regardless, the petitioner has contended that the respondent authorities failed to take into account the detailed pleas of the petitioner given in his reply to the show cause notice dated 14th April, 2008. According to the petitioner, the respondent authorities had only considered the supplementary replies of the petitioner dated 14th May, 2008, 15th May, 2008, 19th May, 2008 and 23rd May, 2008 but did not consider the detailed reply given by the petitioner at the first instance dated 14th May, 2008. The contents of the penalty order dated 5th June, 2008 is as follows:

Confidential Directions Of The General Officer Commanding-In-Chief, Southern Command On The Reply to The Show Cause Notice Dated 07 March 2008 Submitted By IC 38032M Colonel Ad Nargolkar of Headquarters 41 Artillery Division

1. I have perused the replies dated 14 May 2008, 15 May 2008, 19 May 2008 and 23 May 2008 and other relevant records and material forwarded by IC 38032M Colonel AD Nargolkar of Headquarters 41 Artillery Division to the Show Cause Notice dated 07 March 2008 issued by Headquarters Southern Command along with the recommendations of Commanders in the chain.

2. I have duly considered the aforesaid replies to the Show Cause Notice in the light of Court of Inquiry proceedings. I find that the facts and circumstances brought out by the officer in his aforesaid replies do not absolve him of the acts of commission/ omission averred in the Show Cause Notice. I find that the said replies are without any merit or substance and I am not satisfied with the said replies. I, therefore, find IC 38032M Colonel AD Nargolkar blameworthy of the following lapses on his part:

(a) Misuse of official position as Colonel Administration, Headquarters 11 Infantry Division to enter into an improper relationship with Mrs Neelam Bhati, wife of IC 42178X Colonel VS Bhati an officer posted in the same station.

(b) For harassment and mental torture of Shri DS Pundir, his daughter Mrs Neelam Bhati and her husband IC 42178X Colonel VS Bhati through unwarranted communications by telephone calls and SMS messages with an intent to

blackmail and extort.

(c) Entering into settlement agreement dated 22 September 2007 with Shri DS Pundir with the sole aim of undermining and circumventing due process of law being fully aware that a Court of Inquiry has been convened.

3. For the aforesaid lapses, I direct that my "Severe Displeasure" (Recordable) be conveyed to IC 38032M Colonel AD Nargolkar of Headquarters 41 Artillery Division. Place: Pune 411001 (N Thamburaj) Dated: 06 June 2008 Lieutenant General General Officer Commanding-in-Chief Southern Command 21. Thereafter on 18th July, 2008 the Military Secretary's Branch issued an order, declaring the petitioner's earlier empanelment of March 2007 to the post of Brigadier as invalid since the said Censure was treated as a "drop in performance

21. The petitioner contended that he had requested the authorities to give him a copy of the findings of the COI, in order to enable him to file a proper reply. However, since the requested documents were not given to him, he approached the High Court of Bombay, by filing a writ petition bearing W.P(C) No. 5674/2008 for seeking directions to the respondent to supply him with the copies of findings and opinion of the COI. By order dated 1st August, 2008 the Court made a note of the plea of the respondents that they had already provided a copy to the petitioner, however, they would provide another copy within two weeks from the date of the order and thus disposed of the writ petition.

22. Pursuant to the directions of the Bombay High Court, the petitioner received a copy of the COI on 13th August, 2008. Thereafter, the Statutory Complaint dated 20th April, 2008 filed by the petitioner was returned to him on 24th September, 2008 with the observation that it was in the "wrong format". The petitioner contended that the fact that it took 156 days to realize that the Complaint was in the wrong format is indicative of the fact that the respondents had been unnecessarily harassing him. Since as per Para 364 of the Regulations of the Army, statutory complaints are mandatorily required to be disposed of within the prescribed 180 days and since 156 days had already elapsed, the petitioner was left with no other option but to re-submit the statutory complaint dated 3rd October, 2008.

23. On 23rd October, 2008 the petitioner preferred another statutory complaint-6 seeking the setting aside of the CR by Brig VV Raghavan duly reviewed by Respondent no.2 for the period of 1st September, 2007 to 31st August, 2008.

24. By order dated 6th March, 2009 the respondents rejected the Statutory Complaint-4 and held that the petitioner could not be promoted, since the Competent Authority at the Army HQ had withheld the DV clearance for promotion in September, 2009. Since the petitioner had been awarded "severe displeasure (recordable)" the consequence of the same was a "drop in performance" and since "continued satisfactory performance" is a pre-condition to actual promotion, the earlier empanelment for acting rank of Brigadier was no longer valid.

25. By order dated 18th May, 2009 the respondents also rejected the Statutory Complaint dated 3rd October, 2008 of the petitioner. It was concluded that the Discreet Inquiry was conducted by the respondent authorities as per procedures of investigation and was done by the Competent Authority. It was also observed that Sh. Pundir had complained to the then COAS not only as a father-in-law but also as an aggrieved party and thus the argument of the petitioner that the complainant has no locus standi was rejected. It was further held that the settlement drafted by the petitioner was done with the intention of circumventing the impending legal action initiated against him. It was also observed that the petitioner had never informed anyone in his chain-of-command/unit about this action of settlement taken by him.

26. By order dated 16th June, 2009 the respondents also rejected the Statutory Complaint-6 of the petitioner by stating that the statutory complaint of the petitioner had been examined in the light of his career profile, relevant records and analysis/recommendations of the Army headquarters. It was also concluded that the impugned CR 03/08-08/08 was well corroborated, performance based and without any subjectivity or bias. The authorities further stated that the CR is technically valid and that Paras 46 and 47 of the OA 45/2001/MS are not applicable in the case of the petitioner.

27. Aggrieved by the orders rejecting the statutory complaints of the petitioner, he approached the Armed Forces Tribunal by filing original applications bearing O.A. No. 53/2009 and O.A. No. 50/2009 on 11th September, 2009 and praying for the quashing of the entire proceedings of the COI and setting aside the penalty of censure awarded to the petitioner by order dated 5th June, 2008 and the rejection of his statutory complaint by order dated 18th May, 2009. It was contended, inter alia, that the censure order did not reflect the consideration of the detailed reply of the applicant dated 14th April, 2008 to the Show Cause Notice, thereby reflective of the non-application of the mind of the respondent authorities while imposing the penalty of censure; that the COI is non est in the eyes of the law, since the complainant had himself withdrawn his complaint by letter dated 22nd September, 2007 and thus there was no reason for the COI to have convened on a non-existing complaint; that even though the crux of the complaint is that the petitioner had tried to steal the affections of the daughter of the complainant, Mrs Bhati, however, she was never examined during the COI proceedings; that the officer whose wife's affection the petitioner was alleged to have stolen, himself during the enquiry proceedings had emphatically stated "no" to the query, if it is true that the petitioner had stolen the affections of Mrs. Bhati; that the rejection of the petitioner's statutory complaint by order dated 18th May, 2009 on the ground that the superior authorities was not informed about the settlement effected between the complainant and the petitioner, is erroneous since as per the record the settlement had been effected by the highest artillery officer i.e. the DG Arty; that seven documents, each of which are highly prejudicial to the petitioner, were taken on record behind the back of the petitioner, and were relied upon by the COI without bringing the same to the

notice of the petitioner or giving him a reasonable opportunity to defend himself; that the COI is vitiated since there is blatant violation of the principles of natural justice and which enshrined in Rule 180 of the Army Rules i.e. denial of full opportunity to defend himself; that none of the charges framed in the Show Cause Notice was formulated, read out or placed before the petitioner and the reasonable opportunity was not given to him to defend himself against them in the COI; that the only documents relied on before the COI was the complaint, the letters of withdrawal of the complaint and the settlement documents, besides letters of the complainant stating that he does not wish to attend the inquiry proceedings, thus there is no evidence inculcating the guilt of the petitioner; that the entire complaint in itself was based on hearsay, which was admitted by the Complainant himself during his deposition before the Tribunal; that the presiding officers and the members had never assembled together after 3rd December, 2007 to consider, appreciate or evaluate the evidence on record and prepare the inquiry report and finalize the findings; that a secret meeting had taken place on 29th November, 2007 between the Presiding Officer, Col. Bhati and Mr. Pundir in their guest room at 7:30 p.m. which has been corroborated by the deposition of the eye witness, Gunner Jagdevran of 210 Rocket Regiment Nasirabad, himself; that the penalty of recordable censure awarded to the petitioner is disproportionate, in fact no penalty of any type can be awarded to the petitioner in the facts and circumstances.

28. However by a common order dated 30th September, 2009 the Armed forces Tribunal dismissed the original applications of the petitioner. Thereafter, the petitioner also filed a review petition being RA No. 342/2009 dated 11th January, 2010, however, the same was dismissed in limine by order dated 19th January, 2010.

29. Aggrieved by the dismissal of the original applications by the Tribunal, the petitioner has approached this Court in exercise of its jurisdiction under Article 226 by filing the writ petitions bearing WP(C) No.13360/2009, against not promoting him to the post of Brigadier and WP(C) No. 13367/2009 against the court of enquiry initiated against him. It has been contended, inter alia, that Rule 180 of the Army Rules, the provisions of which are mandatory and ensures compliance of the principles of natural justice, have not been adhered to. According to the petitioner, since the nature of the proceedings were such that it directly inculcate his character and reputation, he should have been given a reasonable opportunity to defend himself, instead of taking on record documents, which have not even been intimated to the petitioner.

30. The petitioner further contended that despite the withdrawal of the complaint by Sh. Pundir, the Army Authorities went ahead with the Court of Inquiry, which has no legal basis for doing the same since it was initiated at the first instance itself in order to verify the veracity of the complaint. The petitioner also relied on the letters dated 2nd October, 2007 and 1st November, 2007 to contend that the complainant himself had categorically specified in the same that he had

withdrawn the complaints. He contended that even after withdrawal of complaint by the complainant, if the respondents wanted to continue the COI, then they should have disclosed the documents relied on against him in the alleged discreet enquiry and he should have been given an opportunity to rebut the allegations allegedly substantiated against him in the discreet enquiry.

31. It is also contended that the COI proceedings were merely an eye wash since no proper enquiry had been conducted into the alleged allegations against the petitioner. Summons were sent to Mrs. Bhati, however, in reality the 1st and 2nd summons were sent to the residence of the father of Mrs. Bhati, which were returned back both times with the endorsement that "she does not live here". In the third attempt as well the summons was sent to the address of Col Lt. Bhati at Jullunder, even though it was well known that Mrs. Bhati was residing at Panchkula. The petitioner further contended that in any case the presence of Mrs. Bhati, the prime witness in the said dispute, had not been secured by the respondents during the enquiry.

32. The petitioner vehemently contended that during the COI, seven documents had been taken on record behind his back without giving copies of the same to the petitioner and without even disclosing the contents of the same and thus, he wasn't given the fair opportunity to defend himself and as a result of this he was gravely prejudiced. The seven documents in question are as follows:

(1) The Discreet Inquiry Report by the Military Intelligence dated 14th September, 2009, which according to the petitioner was the only evidence on record to support the charge of improper relationship.

(2) The two police daily dairy reports lodged by the complainant dated 20th July, 2007 and 4th August, 2007 at Police Station Panchkula, which the petitioner has pointed out does not contain the allegations of any blackmail, extortion, stealing the affections of Mrs. Bhati, anonymous letters, which are all the basis of the charges framed against the petitioner and enquired into by the COI. Therefore, the petitioner has contended that he was deprived of the opportunity to challenge the credibility of the complaint.

(3) The letter dated 6th November, 2007 by the Inquiry Officer to the Magistrate wherein it is stated that Judicial Notice of the Complaint was taken vide Section 134 of the Army Act. According to the petitioner, non divulgence of this letter greatly prejudiced the petitioner since he could not point out that Section 134 of the Army Act empowers only Court Martial and not the COI to take judicial notice, which renders the convening of the COI as illegal.

(4) And lastly, the two summons dated 30th October, 2007 and 6th November, 2007 which were sent by the Inquiry Officer to Mrs. Bhati at the address of the complainant, which were consequently returned with the endorsement that "she does not reside here". According to the petitioner this gravely prejudiced him since the contents of these summons were made transparent to him only in the documents supplied on his own request on 6th November, 2007, therefore, he

did not have the opportunity to expose the sheer facade of the efforts made to secure the presence of Mrs. Neelam Bhati.

33. The petitioner also contended that on 3rd December, 2007 it was recorded by the Presiding officer that "at the moment there are no additional documents or witnesses. Should the Convening Authority make available any other documents or witnesses related to the matter, the same would be examined and accepted by the Court with due intimation to Col Nargolkar and opportunity will be given to him to cross-examine under the Army Rules, 180". However, despite the said assurance the above mentioned documents were taken on record on 12th December, 2007 behind the back of the petitioner and in violation of the relevant rules. The petitioner has urged that since the principles of natural justice have been violated, the COI proceedings stand vitiated and consequently the penalty of "severe displeasure (recordable)" deserves to be set aside.

34. The petitioner has further pointed out that since it is clear from the record that the evidence was being taken on record even after 3rd December, 2007, therefore the COI was very much in progress and had not concluded, and therefore, rejecting the admission of additional documents produced by the petitioner, by letter dated 9th February, 2008 was illegal.

35. According to the petitioner, he became aware of the Discreet Enquiry conducted against him only when the respondents had divulged about it in their counter affidavit filed before the High Court of Bombay in W.P(C) No. 942/2008. The respondents categorically stated that the reason for withholding the promotion of the Petitioner was due to the findings of the Discreet Inquiry conducted by the Military Intelligence and that based upon the report of the said Discreet Inquiry, the convening order for the COI was also issued. Thus, the petitioner contends that the Discreet Inquiry was conducted in violation of Rule 179(5) read with Rule 180 of the Army Rules which embodies the principles of natural justice, since the enquiry was conducted behind the back of the petitioner and also since the petitioner was not given an opportunity to defend himself against the adverse findings of the said inquiry nor was he even made aware of the same. According to the petitioner, since the respondents had taken the findings of the Discreet Inquiry on record and the same was heavily relied upon by the COI to inculcate the alleged guilt of the petitioner, therefore the same ought to have been brought to the petitioner's notice, which wasn't done and therefore this has caused great prejudice to the petitioner. The petitioner has further contended that the provisions of Army Rule 180 have not been complied with since he was not given the opportunity to cross-examine the witnesses involved in the discreet inquiry on the basis of which the COI was convened.

36. The petitioner also pointed out that in response to the RTI query filed by the petitioner, by letter dated 14th March, 2009 the respondents themselves had answered that there was no record available with them in regard to the date on which the finding of the COI were signed. This, according to the petitioner, is indicative of the fact that the Inquiry Officers had never assembled at one place

to apply their collective mind to the evidence before them.

37. It is also contended that while rejecting the statutory complaint filed by the petitioner, the respondents have not given a reasoned order and that all his pleas and contentions were not taken into consideration. According to the petitioner, his statutory complaint-5 was rejected on the ground that he had effected the settlement without informing about the same to his superiors with the intention to circumvent the impending legal action and its consequences, however, the petitioner contends that this is reflective of the fact that his pleas and contentions have not been taken into consideration properly since, it is clear from the record and the call transcripts annexed with the petition that the highest Artillery Officer i.e. the DG Arty had himself organized the settlement.

38. With regard to the charges of extortion and blackmail framed against the petitioner, it is contended that the incident alleged by the complainant are related to certain events that had taken place in Ahmedabad some 3-4 years back i.e. 2003-05, when Col. Bhati was serving along with the petitioner. However, the General Officer Commander, respondent no.4, had given the petitioner an "outstanding" grade for his work done during the said period, and thus it is contended that it cannot be inferred that at the time he had committed any misconduct. The petitioner further contended that the very fact that the complaint had been lodged after three years, in itself discredits the veracity of the same and clearly reveals the intention of its author. Also the petitioner has pointed out that even though certain allegations had been imputed by the complainant, with regard to wrong doings committed against Col Bhati and his wife, however, apparently neither of the two have lodged any complaint against the petitioner. Regardless, the petitioner has urged that on perusing the record it is clear that none of the witnesses have deposed anything in support of the charges framed against him and thus the penalty of "severe displeasure (recordable)" is completely disproportionate and therefore deserves to be set aside.

39. Also the petitioner has contended that regarding his promotion to the post of Brigadier, the same had been approved in May, 2007 i.e. much before the show cause notice was issued, which was on 7th March, 2008, while the DV ban was imposed only on March 2008. During the interim period, the petitioner has contended that 10 juniors of his own batch and 20 juniors of the next batch were promoted. Thus the petitioner has contended that in his case Article 14 and 16 of the Indian Constitution have been violated since when his empanelment had been approved by the Government and his posting was pending, no disciplinary proceedings were pending against him.

40. The respondents have refuted the plea and contentions raised by the petitioner. The learned counsel for the respondents has primarily relied on the reasoning as detailed by the Tribunal in the impugned judgment. The respondents have also relied on their record to contradict the pleas and contentions raised by the petitioner.

41. Learned counsel for the respondents has contended that a legal notice dated 30th July, 2007 had been sent to the petitioner, on account of which he was made well aware of the grievances alleged by the complainant. The respondent had also forwarded the complaint dated 27th July, 2007 sent to the respondents by the complainant, to the petitioner for his comments. Thus, the learned counsel contends that the petitioner was well aware of the charges framed against him.

42. It is also pointed out that since COI had convened by order dated 17th September, 2007 on the complaint dated 26th August, 2007, the petitioner was well aware of the same and thus had tried to settle all grievances by entering into the settlement dated 22nd September, 2007, after tendering an apology to the complainant, with the intention of avoiding any legal consequences. The learned counsel further emphasized that even in his reply dated 23rd September, 2007 the petitioner had submitted details regarding the settlement effected between himself and the complainant, however, nowhere is there any mention of a mediation been effected by the DG Arty.

43. However, despite the deal struck between the petitioner and the complainant, the respondents continued to take cognizance of the complaint and enquired into the allegations imputed against the petitioner by summoning the relevant witnesses. The learned counsel has further contended that as per the record, it is clear that along with the show cause notice dated 7th March, 2008, the COI proceedings with all the exhibits was supplied to the petitioner. After taking due consideration of the replies filed by the petitioner, the respondents had deemed it fit to impose the punishment of "Severe Displeasure" (recordable) by order dated 5th June, 2008. According to the learned counsel, Mr. Chandhiok, the principles of natural justice had been complied with and all opportunity was given to the petitioner to defend himself. It is further contended that the statutory complaint of the petitioner was also rejected by the respondents authorities, by order dated 18th May, 2009 only after duly considering all the pleas and contentions of the petitioner.

44. With regard to the plea of the petitioner that the vigilance clearance could not be withheld after issuing the posting order, and therefore, he could not be stopped from being promoted to the post of Brigadier, on the ground that COI pending against him which had convened much later, the learned counsel has contended that the posting order dated 25th May, 2007 had been issued to the petitioner for his joining on 27th June, 2007. However, on 31st May, 2007 a request was received from the petitioner, for the extension of his study leave up to 10th August, 2007. Since the petitioner had sought a change in posting, as per the learned counsel on 15th May, 2007 the first posting order was cancelled, but a new posting was not given on account of his request for study leave. Therefore, for the new posting order, vigilance clearance was required and thus since in the meantime the complaint against the petitioner had been notified to the respondents, his promotion was withheld.

45. The learned counsel further contended that the COI proceedings were conducted in compliance with the relevant rules and regulations and that the petitioner was given every opportunity to cross-examine the witnesses and to defend himself. Also it is urged that there is sufficient evidence on the record to inculcate the guilt of the petitioner and that the Tribunal had rightly dismissed the original applications of the petitioner.

46. This Court has heard the learned counsel for the respondents and the petitioner, who had argued the matter in person, in detail and has also perused the record carefully. The primary issue to be adjudicated in the present matter is whether the COI proceedings and subsequent order dated 5th June, 2008 of severe displeasure (recordable), because of which the petitioner lost his promotion to the post of Brigadier, was done in accordance with the relevant rules and in compliance of the principles of natural justice.

47. From the record it is clear that along with the show cause notice dated 7th March, 2008, the copy of the Court of Inquiry proceedings including the exhibits were supplied to the petitioner, however, it did not contain the findings of the COI. Since no findings or opinion of the COI had been divulged to the petitioner, and the findings of the same was the sole basis for issuing the show cause notice, after which no other inquiry was held, the same ought to have been supplied to the petitioner, in order to enable him to properly defend himself. It is evident from the record that the copy of the COI finding was given to the petitioner only after he had approached the High Court of Bombay by filing WP(C) No.5674/2008, pursuant to which by order dated 1st August, 2008 the Court had directed that the findings of the COI be supplied to the petitioner, which was finally given on 13th August, 2008, after the order of punishment dated 5th June, 2008 had already been passed.

48. The relevant portion containing the observations of the COI is as follows:

11. Mr DS Pundir as well as Col VS Bhati have refused to elaborate on the allegations contained in the complaint. They have either offered no comments or asked the Court to draw its conclusion. Mr DS Pundir has quoted the agreement settlement for being unable to elaborate on the allegations.

12. Col. VS Bhati, in his statement" refused to confirm or deny the allegations against Col AD Nargolkar. At the, same time, he did not state that the allegations in the complaint are false. He stated that the circumstances leading to complaint are of very private and delicate nature which can affect the dignity of him and his family. He has referred to exercising future options against Col AD Nargolkar if the need arose:

13. The allegations in the complaint lodged by Mr. DS Pundir have not been contested by Col AD Nargolkar during the proceedings of the court of Inquiry despite the effect of the allegations on his character and military, reputation and a chance to cross, examine both Mr DS Pundir and Col VS Bhati under provisions of AR 180. In his statement to the court and answers given to various questions

asked by the court, Col AD Nargolkar has cited technicalities that the complaint is not being pursued and is presently non-existent.

14. The court has found Mr. DS Pundir to, be stable, mature and sensible. He was sensitive to the requirements of the social respectability of his own family as well as that of Col AD Nargolkar, contradicting the implication of Col AD Nargolkar that Mr. DS Pundir is old and schizophrenic.

15. Col AD Nargolkar, when asked as to why he tendered an unconditional letter of apology, stated that it was a case of actions, and reactions. He further stated that he found no harm in apologizing to an elder person.

16. Col AD Nargolkar has made no complaints against Mr DS Pundir despite the following:- (a) Mr DS Pundir informed Col AD Nargolkar that he suspected Col AD Nargolkar to be a possible initiator of anonymous extortion and blackmail threats. (b) Mr DS Pundir lodged a complaint against Col AD Nargolkar to the highest army authority in the country questioning his military reputation. (c) Mr DS Pundir sent a lawyer's notice asking him to desist from interference in the lives of the Pundir family. (d) Mr DS Pundir lodged complaint against Col AD Nargolkar at the police station Punchkula.

17. HQ Southern Command letter No 240004/ADN/GSI (B-1) dated 14 Sep 2007 has been forwarded to the Presiding Officer of the court. The following are the findings of the confidential investigations carried out into the matter:-

(a) At Ahmedabad, Mrs Neelam Bhati used to visit the residence of Col AD Nargolkar when Mrs Nargolkar and their children were away at school.

(b) A total of 87 messages were sent from the mobile No of Col AD Nargolkar to the mobile no- of Mr DS Pundir during the period 01 Oct 2006 to 22 Apr 2007.

(c) Col AD Nargolkar was likely to be involved in sale of liquor to civilians in Ahmedabad.

(d) Col AD Nargolkar has been reportedly demanding money from his subordinates for initiating good ACRs.

49. Thus it is clear that since Mr. DS Pundir, as well as, Col VS Bhati had refused and declined to elaborate on the allegations contained in the complaint and as they had offered no comments and had asked the COI to draw its own conclusions, the COI had mainly relied on the outcome of the discreet inquiry conducted against the petitioner which was summarized in the letter dated 14th September, 2007.

50. A perusal of the exhibits provided to the petitioner, however, reveal that the letter dated 14th September, 2007 had not been supplied to the petitioner, nor did it find any mention during the COI proceedings. Thus it is evident that even though the said letter had been specifically relied on by the COI in its findings, which ultimately resulted in the order of penalty dated 5th June, 2008, the same had not been intimated, disclosed and divulged to the petitioner nor was he

given a reasonable opportunity to defend himself against the adverse findings contained therein.

51. The respondents themselves have not denied the reliance placed on the findings of the discreet inquiry report which they cannot do in the facts and circumstances. In fact, in the reply to the show cause notice by the Inquiry officer by letter dated 24th May, 2010, the Inquiry Officer has tried to underplay the same by contending that the findings of the Discreet Inquiry have only corroborated the evidence produced before the COI. However, even if it was only for the purposes of corroboration, since the Discreet Inquiry Report had been relied on by the COI in arriving at the guilt of the petitioner, a copy of the same ought to have been given to the petitioner, in order to enable him to properly defend himself, which is what the principles of natural justice mandates and which has been ensured under the mandatory provisions of Rule 180 of the Army Rules, 1954. From the entire record it is apparent that the respondents have relied on the discreet enquiry to inculcate the petitioner and their plea that the discreet enquiry was only to corroborate the allegations against him, is not sustainable. If the discreet enquiry is not considered, nothing much will be left against the petitioner, except certain assumptions which will be without any basis. Thus in light of this procedural illegality alone the COI proceedings and the consequent penalty order dated 5th June, 2008 deserves to be quashed.

52. With regard to the additional documents taken on record after concluding the COI proceedings, the Inquiry Officer in letter dated 24th May, 2010 had submitted that the Court of Inquiry was completed within a day of the completion of the deposition. However, it was felt that some additional documents could also be procured. Action was initiated and then these documents were procured. According to the Inquiry Officer these documents too merely corroborated what had already been proved in the Court of Inquiry. Thus, though they were submitted along with the Court of Inquiry but they did not become a part of it. Such an explanation is arbitrary and without any legal basis and cannot be accepted. Even if a document allegedly corroborates the facts already allegedly established, the copy of the same ought to have been given to the petitioner. On the contrary, if the alleged documents which only corroborate the facts already established are ignored, the whole allegations against the petitioner will fall flat. This act of the respondents in not supplying the documents which were taken on record later on is in gross violation of the principles of natural justice and substantiates the plea of the petitioner that additional documents were taken behind his back and that opportunity was not given to him to properly defend against the same. The learned counsel for the respondents is unable to show any provision or law which entitles them to take the documents on record and rely on them to only corroborate the facts in this manner. The plea of the respondents is not legally sustainable and cannot be accepted in the facts and circumstances and they cannot be allowed to benefit from the lapses on their part in conducting COI in such a manner. The entire COI will be vitiated in the facts and circumstances and the defect cannot be cured on

the basis of such pleas that the violations, if any, were only to corroborate the allegations.

53. Rule 180 of the Army Rules, 1954 clearly prescribes that when the character or military reputation of a person is affected in an inquiry, then the said person should be afforded full opportunity to be present throughout the inquiry and make a proper defence. The relevant rule is reproduced hereinafter which is as follows:

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.

54. Thus, clearly Rule 180 contemplates that the officer whose character or military reputation is questioned must be given every opportunity to be aware of the evidence that goes against him, in order to enable him to properly defend himself. This does not carve out any exception in respect of facts and documents which are to be used for the purposes of corroboration, as has been alleged by the respondents. In the present case it is clear that in violation of the mandatory provisions of Rule 180 of the Army Rule, 1954 the documents mentioned above, which included the Discreet Inquiry Report which was mainly relied upon by the COI, had been taken behind the back of the petitioner and that he wasn't allowed to submit additional documents as requested by him to rebut the same rather the copies of the same were not given to him and he was not allowed to contradict the same.

55. Rules 184 also ensures the right of the persons to the copies of the statements or documents having a bearing on his/her character or military reputation. The relevant provision is reproduced hereinafter which is as follows:

184. Right of certain persons to copies of statements and documents. -(1) Any person subject to the Act who is tried by a court-martial shall be entitled to copies of such statements and documents contained in the proceedings of a court of inquiry, as are relevant to his prosecution or defence at his trial.

(2) Any person subject to the Act whose character or military reputation is affected by the evidence before a court of inquiry shall be entitled to copies of such statements and documents as have a bearing on his character or military reputation as aforesaid unless the Chief of the Army Staff for reasons recorded by him in writing, orders otherwise.

56. Thus, clearly a copy of the Discreet Enquiry report dated 14th September, 2007 and the findings of the COI ought to have been given to the petitioner before issuing the show cause notice, so that he could properly defend himself and the non disclosure of the same unequivocally and irreparably prejudiced him.

57. In the matter of Lt. General S.K. Dahiya Vs. Union of India (UOI) and Others, the facts of which are quite similar to the present matter, a Division Bench of this Court had carefully considered the issue of whether Rule 180 of the Army Rules, 1954, are mandatory or not. The Division bench has made the following observations:

21. Applying the dual test of the object underlying the provision and the language employed in the same, we are of the opinion that Rule 180 (supra) is mandatory in character. We say so for two distinct reasons. Firstly, because the use of the words "full opportunity must be afforded" appearing in Rule 180 are a clear enough indication that the rule making authority intended the provision to be mandatory. As observed in Lachmi Narain's case (supra), the use of words like "must" instead of "shall" is by itself sufficient for the court to declare that the provision is mandatory in nature making pursuit of any further enquiry unnecessary. What puts the matter beyond the pale of any doubt is the obligation which the rule casts upon the presiding officer of the Court to take all such steps as may be necessary to ensure that any person whose character or military reputation is affected by the enquiry receives notice of the enquiry and fully understands his rights under the rule. It leaves no manner of doubt that the requirement of affording an opportunity of being present in the enquiry and of cross-examining the witnesses or giving evidence in defense is mandatory, for otherwise neither the language of the rule would have been what it is nor would the rule have taken that extra care to ensure that those affected by the inquiry not only get a notice, but fully understand their rights under the Rule.

22. The second but an equally weighty reason why the rule must be held to be mandatory is that the same recognizes the need for the grant of an opportunity to an officer to defend his character and reputation in any inquiry where the same is likely to be affected. Reputation and character of an individual are his most valued possessions. They are held in greater esteem than great riches for an injury to ones reputation and character inflicts a greater suffering than is inflicted by loss of property. Reputation of an individual was recognized by the Supreme Court as a part of fundamental right to life guaranteed under Article 21 of the Constitution in State of Bihar Vs. Lal Krishna Advani and Others, The Court was in that case dealing with the findings recorded by a Commission of Inquiry without notice to the affected person. Even when the recommendations made by the Commission did not ipso facto result in any punitive action against those affected by the same, their Lordships held that just because no proceedings had been initiated against the affected party did not mean that the findings could not be questioned on the ground of violation of the principles of natural justice. The Court not only recognized the significance of reputation of an individual as one of

his most valued possessions, but declared reputation to be a part of the right to life and observed: Right to reputation is a facet of the right to life of a citizen under Article 21 of the Constitution. In case any authority, in discharge of its duties fastened upon it under the law, traverses into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon by a Commission of Inquiry is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review.

23. To the same effect is the decision of the Supreme Court in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, and Smt. Kiran Bedi Vs. Committee of Inquiry and Another, which approved the following passage from an American decision in D.F. Marion v. Minnie Davis 55 ALR 171: The right to enjoyment of a private reputation, un assailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property.

24. There is in the light of the above, no gainsaying that what the rule making authority intended to do was to ensure that no prejudice is caused to a person whose character or military reputation was likely to be affected by reason of the denial of an opportunity to him to participate in the enquiry, cross-examine the witnesses and to adduce evidence in his defense. It would not, Therefore, be unreasonable to say that having regard to the significance attached to the reputation of an individual whether military or otherwise and his character, the right to participate in an enquiry to clear his name by cross-examining the witnesses or adducing evidence in his defense may be implicit in the nature of the enquiry and its implications. So long as the Court of Inquiry proceedings can be used for taking administrative action, as has happened in the instant case, it would be hazardous to recognize the legality of any such inquiry unless there is an inbuilt mechanism ensuring a fair opportunity to the person affected by the same to participate in the inquiry and to prove his innocence. Such being the position, Rule 180 simply codifies the said requirement in explicit terms to avoid miscarriage of justice and complications arising out of a denial of opportunity to the affected person. We have, Therefore, no difficulty in holding that Rule 180 of the Army Rules is mandatory in character. We may now briefly refer to the judicial pronouncements on the subject. In Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, one of the questions that fell for consideration of the apex Court was whether convening of a Court of Inquiry was necessary in every case before convening a court martial. The argument advanced on behalf of the petitioner was that whenever the character of a person subject to the Act is involved in an inquiry, a Court of Inquiry must be set up. The Supreme Court repelled that contention and held that it was not necessary to order a Court of Inquiry whenever or wherever the character or military

reputation of any person subject to the Army Act was likely to be affected. Having said so, the Court declared that in cases where a Court of Inquiry is ordered, compliance with the provisions of Rule 180 was mandatory and grant of opportunity to everyone likely to be affected in terms of injury to his character or military reputation necessary. The Court observed:

Mr. Sanghi, however, urged that on a correct interpretation of Rule 180, it would appear that whenever the character of a person subject to the Act is involved in any inquiry, a court of inquiry must be set up. Rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the courts of inquiry, Rule 180 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 of 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 effected 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 issue 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 specious plea that no specific inquiry was directed against the person whose character or military reputation is involved. To ensure that such a 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, Rule 180 merely makes an enabling provision to ensure such participation."

25. In Major General Inder Jit Kumar Vs. Union of India (UOI) and Others, the Supreme Court reiterated that Army Rule 180 gave adequate protection to the person affected even at the stage of Court of Inquiry. A division bench of this Court in Lt. Gen. Surender Kumar Sahni v. Chief of Army Staff and Ors. W.P.(C) No. 11839/2006 decided on 11th January, 2007 examined the nature of Rule 180 of the Army Rules and held the same to be mandatory in character. The Court observed:

"None of the cases relied upon by the respondents even remotely suggest that provisions of Rule 180 are not mandatory and are directory. The view taken by all the High Courts and the Hon"ble Supreme Court of India is that wherever reputation and character of a person, subject to Army Act is likely to be affected, the requirements of law is compliance to Rule 180 and to that extent the provisions of Rule 180 are mandatory. Wherever, there is a lapse or default prejudicially affecting the right or protection given to a person in terms of said Rule, the proceedings would be vitiated. xxxx xxxx The language of the Rule is

certain and unambiguous, capable of only one interpretation i.e. that to afford a full opportunity in terms of this provision is the responsibility of the competent authority. This obligation and burden is incapable of being shifted at the initial stage. Once an opportunity is afforded at the initial stage then it is for the concerned Officer whose character or military reputation is being affected or is likely to be affected, to exercise the option in regard to what evidence he wishes to give, which witnesses he wishes to cross-examine and what defense, if any, he wishes to lead. xxxx xxxx

Another argument advanced on behalf of the respondents is that the provisions of this Rule are not mandatory and even minimum compliance to the requirements of the Rule would achieve the object, as the proceedings contemplated under Rule 22 are in the nature of fresh proceedings where full and complete opportunity in all respects should be provided to the Officer. In other words, the provisions of Rule 22 are a complete safeguard even where there is no complete compliance to the provisions of Rule 180. This argument needs to be noticed only to be rejected. Such an interpretation would entirely defeat the concept of the basic rule of law where the Legislature in its wisdom has opted "to grant full opportunity in all respects and complete participation by an Officer whose military reputation or character is affected or is likely to be affected". It will be impermissible to read such a provision as "directory or optional" at the discretion of the authority." 26. To the same effect are the decision of the High Court of Jammu & Kashmir in *Vinayak Daultatrao Nalawade v. Core Commander, Lt. Gen. G.O.C.H.Q. 15 Corps.* 1987 LIC 860 and the Single bench decision of the High Court of Punjab & Haryana in *G.S. Sandhu v. UOI* and Ors. 2002 (2) SLR 120. There is, in the light of the above authoritative pronouncements, no gainsaying that Rule 180 (supra) is mandatory in character and that violation of the same would vitiate the Court of Inquiry.

58. In the said case, the legality of a Court of Inquiry proceeding and the severe displeasure (recordable), due to which reason he couldn't be appointed to the post of Director General Supply and Transport (DGST) was questioned by the charged officer. The charged officer had assailed the COI proceedings on the ground that he was denied the copies of important documents essential for the defence of his character and military reputation and the petitioner was denied an opportunity to examine witnesses in defence. With regard to the plea of the petitioner that the copies of important documents were denied to him, after careful consideration the Division Bench had concluded that it was not proper that the documents demanded by the petitioner were not furnished to him even when the said documents formed a part of the proceedings of the Court of Inquiry, which clearly meant that they were considered to be relevant to the issues being examined by the Court of Inquiry. In the said matter, the respondents had urged that the said documents had been read over in the presence of the petitioner, and thus there was no prejudice caused to him and that the recommendations of the one man inquiry which the petitioner had demanded were not provided to him as he was not entitled to the same. The

Division Bench, however, rejected this plea of the respondents and held that Rule 180 envisages "Full Opportunity" to be afforded to the person whose character or military reputation is likely to be affected in the inquiry. The expression "Full Opportunity" appearing in Rule 180 leaves no manner of doubt that if no opportunity is afforded or if the opportunity is not full, the same would not meet the requirements of Rule 180. It was categorically held that if the documents are relevant to the inquiry and if the Court of Inquiry has relied on the same then, the copies of the same have to be provided to the charged officer so as to enable him to formulate his response in defence to the charge of irregularities. It was thus ultimately held that there has not been any hesitation in holding that the provisions of Rule 180 of the Army Rules were violated not only in regard to the petitioner's right to adduce evidence in his defence but also in regard to his right to demand copies of documents forming part of the inquiry. Consequently, it was observed that the award of severe displeasure (recordable) was referable to and based entirely on the findings recorded by the Court of inquiry. Thus, since the court of inquiry proceedings were held to be vitiated on account of violation of Rule 180, the consequential order awarding a severe displeasure was also held to be bad in law. In the present circumstances, two important documents have been withheld from the petitioner, which has been admittedly relied on by the COI. Rule does not carve out any exception not to supply the documents which are only for allegedly corroborating the allegations against an officer. Thus, the non-disclosure of the same to the petitioner is a clear violation of the mandatory provisions of Rule 180 of the Army Rules, 1954 and thus vitiates the entire COI proceedings and consequently the order of censure dated 5th June, 2008 also deserves to be set aside along with COI.

59. It is also clear that while passing the penalty order, which resulted in the petitioner losing out on his promotion to the post of Brigadier, effective for three years, the respondent authorities had not taken into consideration the detailed reply of the petitioner dated 14th April, 2008 and instead referred to only the supplementary replies dated 14th May, 2008, 15th May, 2008, 19th May, 2008 and 23rd May, 2008. Also, it is imperative to note that even the findings of the COI were given to the petitioner only on 13th August, 2008 after the order of 'censure' had been passed. Therefore, in any case the petitioner was not even made aware of the adverse findings noted by the COI, while filing his reply to the Show cause notice dated 7th March, 2008. The respondents too have failed to show any document from the record that could establish that the findings of the COI had indeed been given to the petitioner before issuing the show cause notice. Therefore, the only inference that can be drawn in the circumstances is that the principles of natural justice have been violated and that the petitioner has been gravely prejudiced in the manner the COI proceeding was conducted against him. In fact, the record reveals that the COI's findings have not even been dated and thus the plea of the petitioner that this fact in itself reveals that the member of the COI had not assembled to properly appreciate the evidence on the record and collectively take a decision also cannot be ruled out.

60. Also in any case, if the proceedings of the respondents are presumed to be valid and legal, the punishment of recordable censure in itself is not proper in view of the allegation made against the petitioner and thus, on its own the said recordable censure could not be awarded. The aspect of under what circumstances the censure is awardable was carefully considered by the Apex Court in *Union of India and Ors. v. Brig. J.S. Sivia*, MLJ 1996 SC 3, wherein it was held that as per Para 432 of the Regulations for the Army, 1962, "persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to the public or regimental property must be tried by a court martial or prosecuted in a civil court. Such cases cannot not be disposed of summarily or by administrative action". It is only when there are cases involving allegations of minor nature, and which do not involve moral turpitude, fraud, theft and dishonesty and where trial of GCM is either not practicable being time barred or is not expedient due to other reasons, that it may in appropriate cases within the discretion of the GOC-in-C, that the matter may be forward to the Army Headquarters (D & V Dte) for consideration to award of censure by the COAS, so as to avoid resorting to the extreme step of action under the provisions of Army Act Sec 19 read with Army Rule 14. The relevant portion of the judgment is as follows:

5. Censure is awardable where the act, conduct or omission is of a minor nature, both in nature and gravity. An offence of serious nature under the Army Act will not be disposed of by an award of censure but will be dealt with by initiating a disciplinary action. Attention, in particular, is invited to Para 432 of the Regulations for the Army, 1962, which stipulates that "persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to public or regimental property must be tried by a court martial or prosecuted in a civil court. Such cases will not be disposed of summarily or by administrative action." In view of the foregoing, there should be no occasion for offences involving moral turpitude, misappropriation, financial or other offences of serious nature being dealt with by award of censure when disciplinary action is possible/feasible. If for some reason, a case of this nature does come across, where trial is inexpedient or impractical, administrative action for termination of service of the delinquent persons should be initiated. 6. Cases which are not of minor nature and which do not involve moral turpitude, fraud, theft, and dishonesty and where trial of GCM is either not practicable being time barred or is not expedient due to other reasons, may in appropriate cases be discretion of the GOC-in-C be forwarded to Army Headquarters (D&V Dte) for consideration to award of censure by the COAS, so as to avoid resorting to the extreme step of action under the provisions of Army Act Sec 19 read with Army Rule 14.

61. Thus, from the facts and circumstances it is clear that according to the allegations levelled against the petitioner, which involved charges of moral turpitude, fraud and threat, awarding of censure was not the proper action to be taken by the respondents and instead they ought to have initiated either a Court

martial or could prosecute him in a civil court as observed by the Supreme Court in J.S. Sivia (supra). It is also not the case of the respondents that the situation was such that the Court martial was not possible at that time and therefore, for which reasons have been recorded in writing, "censure" (recordable) had been awarded to the petitioner. Thus, in the facts and circumstances, the order of 'censure' (recordable) against the petitioner could not be done by the respondents for all the reasons elaborated hereinbefore and the said 'censure' awarded to the petitioner dated 5th June, 2008 is liable to be set aside. 62. As per the reasons spelt out hereinbefore, even the COI proceeding are liable to be quashed and consequently the penalty order dated 5th June, 2008 is also liable to be set aside, on account of non compliance of the mandatory provisions of Rule 180 of the Army Rules, 1954, and the other procedural irregularities. In the peculiar facts and circumstances of the case, this Court has also evaluated the evidence produced during the COI proceedings, which allegedly establishes the charges framed against the petitioner according to the respondents.

63. During the COI proceedings, three witnesses were examined namely Lt Col KS Dhesi, as PW-1, Mr. DS Pundir, as PW-3 and Col VS Bhati as PW-4. The complainant, PW-3, had himself categorically deposed that he had withdrawn his complaint as per his letter dated 26th September, 2007 after the agreement was entered into, after the petitioner had tendered an unconditional apology dated 22nd September, 2007, as well as the settlement effected between them on 22 September, 2007. It was also stated that presently the complaint is non-existent in legal terms. After which, to all the queries of the Court, the complainant refused to offer his comments in view of the settlement and the apology tendered by the petitioner. Even to the query if there were other messages addressed to him, he refused to divulge any details and when asked if there was any proof to establish that the above messages had indeed emanated from the mobile no. of the petitioner, he replied that he did not have the necessary competence to comment on the matter. Thus it is clear that the said witness did not substantiate any of the charges framed against the petitioner, whether it was regarding the allegations of blackmail, extortion or stealing the affections of his daughter by abusing his position in the Army. Thereafter, when Col VS Bhati was examined as PW-4 he had deposed that since his father-in-law, PW-3, is the eldest in the family and he respects his decision and since he had already withdrawn the complaint, he had nothing more to add on the complaint as well. In fact, when he was questioned by Q. No. 13 that the complaint had allegations that the petitioner had taken advantage of his position as Col Administration to lay a calculated trap to blackmail him and his wife, he categorically replied that "no he had never blackmailed me". To the Question No. 14 which stipulates that the complaint stated that the petitioner has stolen the affections of Mrs. Neelam Bhati, if it is true, the said witness replied "No". He also deposed that he did not have any complaints against the petitioner. Even with regard to the anonymous letter send to his address, PW-3, deposed that he had no reason to believe that these could have been sent by the petitioner. It is also evident from the record

that the Presiding Officer tried his best to obtain some information relevant to the charge against the petitioner from the said witness in order to substantiate the charges, however, the said witnesses did not divulge anything. The petitioner was also asked if he would like to cross-examine the said witness, however the petitioner stated that "since from the questions by the Court and answers given by Col VS Bhati no incriminating evidence has come against him, he has no questions to ask Col VS Bhati." The tribunal has gone on the assumption that the anonymous letter written to Mrs Bhati and Col Bhati had been written by the petitioner, whereby he had blackmailed both of them and threatened that if the extortion money is not paid, he may put certain compromising letters and photographs on the Army Internet to defame the couple. However, the Tribunal failed to specify any evidence by which it could be inferred in any manner that the anonymous letters had been written by the petitioner, nor has the respondents been successful in establishing the same. In the circumstances it is evident that there was no evidence adduced in the COI which could inculcate the petitioner. In the circumstances, the plea of the respondents that the additional documents were taken on record, even after the conclusion of COI without giving the copies of the same to the petitioner and reasonable opportunity to rebut the same is a futile attempt and plea of the respondents which is not sustainable in the facts and circumstances and in law on any account. Thus the finding of the COI are perverse and without any evidence and cannot be sustained.

64. The grounds on which administrative action is subject to control by judicial review are, "illegality"; "irrationality" and "procedural impropriety". The Court can interfere in such matters, if the decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether the action falls within any of the categories is to be established. To be "irrational" it has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on the basis of facts which do not exist or which are patently erroneous, such exercise of power shall be vitiated. Exercise of power will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on "reasonableness", the court has to find out if the respondents have left out relevant factors or taken into account irrelevant factors. The finding of the COI and pursuant thereto punishment of awarding censure (recordable) to the petitioner suffers from illegality, irrationality and procedural impropriety, as has been detailed hereinbefore.

65. None of the witnesses had substantiated the charges framed against the petitioner. Whatever might have been the reason for the same, it is evident that the complainant himself evaded imputing any allegations against the petitioner. Even if the principle of preponderance of probability is applied widely, it cannot be held that the charges had been substantiated against the petitioner. Perusal of the impugned order of the Tribunal, however, show that the Tribunal negated the plea of the petitioner that none of the documents relied on by the COI were proved. The Tribunal has rather held that it had gone through the statements of

Mr Pundir and the record of COI and that he had proved certain documents during the court of enquiry. Certain SMS and other documents were also relied on by the Tribunal, the details of which were not divulged to avoid alleged embarrassment of the complainant's family, while concluding that the petitioner had committed misconduct. With regard to the aspect of proving the documents during the COI, the Tribunal concluded that in a departmental proceeding preponderance of probability is sufficient and that there is no need to require the standard of strict proof, as is done in a criminal case. The Tribunal also concluded that the COI was conducted in a fair manner and that the petitioner had sufficient opportunity to defend himself. However, from the reason detailed hereinabove it is clear that the Tribunal did not take into consideration any of the pleas and contentions of the petitioner, especially regarding the non disclosure of the Discreet Inquiry report, and additional documents taken by the COI without intimating the petitioner, and also the fact that the reply of the petitioner dated 14th April, 2007, which was exhaustive in its pleas and contentions, was not taken into consideration, while only the subsequent reminders were referred to while imposing the punishment of severe 'displeasure' by order dated 5th June, 2008. Thus, in view of these irregularities this Court is not inclined to agree with the findings of the Tribunal. The decision of the Tribunal is based on its own assumption. The records which had not been established in COI and which were not produced before COI, reliance could not be placed on the same by the Tribunal without giving the copies of the same and disclosing it to the petitioner.

66. With regard to the charge that the petitioner had effected a settlement with the complainant in order to circumvent the consequences of the legal action initiated against him, it is clear that the same too is not substantiated on record. The respondent authorities had rejected the statutory complaint of the petitioner on the ground that the petitioner ought to have informed his superiors regarding the settlement by order dated 18th May, 2009. The Respondent authority also relied on the call records to conclude that the petitioner had effected the settlement with the intention to circumvent the consequences of legal action proposed against him, since he was fully aware that the COI had convened at the time. However, it is clear that while rejecting the pleas of the petitioner, the respondent failed to consider the submission that the petitioner had effected the settlement on account of the advice of the DG Arty, who is his superior. He also submitted call transcripts to establish the advice tendered by DG Arty, wherein he clearly tells the petitioner to do everything as demanded by the complainant, and even tender an apology if it would placate his anger. Even in his comments dated 23rd September, 2007 the petitioner himself has submitted the details of the settlement effected between himself and the complainant. In any case, in view of such a plea taken by the petitioner, it was incumbent on the respondent authorities to have ascertained the veracity of the same by requiring the attendance of the said officer, DG Arty AS Bajwa, or Brig A. Srivastava who was also privy to the settlement, during the COI proceedings. However, since no such measures were taken and by solely relying on call transcripts between the

petitioner and the complainant, it could not be concluded that the petitioner had tendered his apology and effected a settlement in order to avoid legal action. In fact, in his reply dated 14th April, 2007 the petitioner has categorically stated that he is also ready to withdraw the apology so that normal inquiry could take its course. Also, in any case, perusal of the apology does not reveal that any of the other charges have been admitted to by the petitioner. In view of the facts and circumstances, it is not plausible to conclude that since a superior officer was involved in the settlement, who had advised the petitioner to tender the apology, that the petitioner had not informed the Army about the same or that he had stealthily tried to effect a settlement to avoid any legal action being initiated against him. In view of the fact that none of the charges have been proved against the petitioner, it is apparent that the penalty order dated 5th June, 2008 is not sustainable and deserves to be set aside.

67. The learned counsel for the petitioner had also contended that the petitioner is not entitled to raise the pleas and contentions raised in the present petitions on account of similar pleas and contentions raised by the petitioner before Bombay High Court in respect of which no order was passed by the said High Court. The Bombay High Court in Writ Petition no. 5674 of 2008 had passed the following order on 1st August, 2008 which is as under:

Counsel appearing for the respondent states that they have already provided copy and also states that they will provide another copy of the documents within two weeks from today, of the findings of the Court of enquiry proceedings, so far as the Court of enquiry proceedings finds the petitioner guilty of any charge. In view of the statement made nothing survives in this petition. The same is disposed of accordingly.

In another petition filed by the petitioner before the Bombay High Court, the following order was passed which is as under:

1. We have gone through the pleadings in the petition, examine the matter and heard the learned counsel for the parties.
2. Insofar as principles that this court can intervene in the matter by way of judicial review is concerned, it cannot be disputed, but we do not think that this is a fit case where this court should exercise its extra ordinary powers conferred under Article 226 and 227 of the Constitution of India.
3. Further more, the petitioner is not left without remedy. It will be appropriate if the petitioner seeks alternate remedy available to him u/s 27 of the Army Act and Rules.
4. The learned counsel for the petitioner submitted that this will directly affect the prospects of the petitioner and that further he will be loose his promotion to the rank of Brigadier.
5. The learned counsel for the petitioner has tried to impress upon us that the court of enquiry conducted in the matter was biased and that the officer holding the court of enquiry persuaded the complainant not to withdraw his complaint.

6. We do not think that this can be a ground to invoke our extra ordinary jurisdiction as in the statutory complaint/appeal, all these contentions that can be raised.

7. We therefore, dismissed the petition with liberty to the petitioner to see the alternate remedy. Interim orders if any, passed by this court in the matter stands vacated. Petition is dismissed with liberty

Pursuant to liberty granted by the Bombay High Court, the petitioner had filed the petitions before the Armed Forces tribunal. No such plea as has been raised before this Court had been raised before the Tribunal. Though no reply was filed by the respondents, however, from the orders of the Tribunal it is apparent that no such plea had been discussed by the Tribunal. Before this Court also no affidavit has been filed on behalf of the respondents that such a plea was taken before the Tribunal but it had not been dealt with by the Tribunal, though no reply to show cause was filed by the respondents. The learned counsel for the respondents has not been able to explain satisfactorily as to how the petitioners could not raise all the pleas and contentions before the Armed Forces Tribunal when the unconditional liberty was granted to the petitioner by the Bombay High Court while disposing of his petitions. In the circumstances, the plea of the respondents that the pleas and contentions raised by the petitioner in the present petition could not be raised as they had not been adjudicated and declined by the Bombay High Court and after raising them before a Constitution Court, the same could not be raised before AFT, cannot be accepted and the relief sought by the petitioner cannot be denied in the facts and circumstances.

For the forgoing reasons, the Court of Inquiry proceeding initiated against the petitioner is quashed and the order of severe displeasure (recordable) dated 5th June, 2008 awarded to the petitioner is also set aside. Therefore, the writ petitions are allowed and the orders of the Tribunal dismissing the original applications of the petitioners are set aside. The respondents are directed to grant promotion to the petitioner to the rank of Brigadier from the date his juniors were empanelled and were granted the same rank. Needful be done within four weeks. The petitioner shall also be entitled for the consequential benefits including back wages and other benefits, as if he had been promoted and posted as Brigadier after his empanelment in 2007, from the date when petitioner was posted as Brigadier to Cdr. 7 Arty Brigade at Ferozpur (Punjab) in Peace Area. The petitioner is also awarded the costs of Rs.20,000 against the respondents. Costs be paid within four weeks