

(2015) 12 DEL CK 0254
In the Delhi High Court
Case No : W.P. (C) 7908/2011

Naresh Dahiya

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 21-12-2015

Acts Referred:

Army Act, 1950 — Section 180, 52(f), 63
Constitution of India, 1950 — Article 226

Citation : (2016) 226 DLT 333

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : S.S. Pandey and H.S. Tiwari, Advocates, for the Appellant; Monika Arora, CGSC, Gaurav Upadhyay and Harsh Ahuja, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Deepa Sharma, J.—The petitioner joined the Indian Army on 15.12.1984 and was promoted to the rank of Major in 2001. He was posted as Officer Commanding (OC), 530, Stores Supplies and Transport Company i.e. SS & TC (GREF), Project HIRAK, located at Bhandara (Maharashtra).

2. In brief, the facts necessary for disposal of the present writ petition are that in April, 2002, the process of auction for disposal of unserviceable vehicles/equipments/plants and other salvage stores lying under the custody of 530, SS & TC (GREF) at Bhandara was initiated by the Chief Engineer, Project HIRAK, he being the competent authority. The auction was scheduled for 09.08.2002. For the said auction, a catalogue showing details of 12 lots containing all class DEE/V/E/P and other salvage stores held with 530, SS & TC (GREF) was prepared and forwarded to HQ (P) HIRAK during the last week of April, 2002. On the basis of cost details of salvage stores in the auction catalogue, the Board of Officers convened by HQ (P), HIRAK determined the MRP. The auction process was completed but on being informed about an irregularity in the auction, the successful bidders were not allowed to collect the salvage stores. The HQ Chief

Engineer, Project HIRAK on 23.08.2002 sent the case to HQ DGBR. A Court of Enquiry (COE) was ordered which found that the residual value of one TATA load Carrier in Lot No. 10, was wrongly entered as Rs. 53,200/- whereas the residual book value was Rs. 1,06,300/- which had the effect of low valuation of MRP and a consequent reduction in the RGP and thus in lowering the highest bid amount. It was also noticed that the signatures of the second highest bidders and other unsuccessful bidders on the bid sheet, in violation of the terms of amended Standard Operating Procedure (SOP) dated 07.02.2002 were not obtained; further signatures of the actual persons against the Sl. No. 32, 33 and 34 of the Gate Money register and caution money register were missing. The Court of Enquiry found the petitioner responsible for such lapses. Disciplinary proceedings were initiated against him and a tentative charge sheet was issued on 29.09.2003 for the offences under Section 52(f) and 63 of the Army Act. Copies of the entire record of the Court of Enquiry was supplied to the petitioner and hearing of charge under Rule 22 of Army Rules, 1954 began on 29.09.2003 in the presence of petitioner where he was given full liberty to cross examine the witnesses and produce defence witnesses. The proceedings under Rule 22 concluded on 15.12.2003 and the Commanding Officer directed recording of summary of evidence. After the recording of summary of evidence, the competent authority decided to summarily try the petitioner and charge sheet was issued to him on 03.10.2004 for offences under Section 52(f) and 63 of the Army Act. During summary trial the petitioner admitted his guilt which was recorded in Form 1 of Appendix A. The petitioner was awarded punishment of reprimand by order dated 06.10.2004. His statutory complaint dated 22.09.2006 was dismissed on 29.01.2010.

3. The petitioner has challenged the orders dated 06.10.2004 and 29.01.2010 in this writ petition on several grounds.

4. We have heard the arguments and have given considerable thought to the rival contentions and arguments.

5. The petitioner challenged the enquiry mainly on two grounds. First, that it is in violation of prescribed procedure, and that there is no evidence against him; that his plea of guilt was obtained on the assurance that the punishment of reprimand would be operative only for three years--allowing it to continue beyond that and denying him his time scale promotion makes the punishment disproportionate to his alleged misconduct. Although not contended in the writ petition but during the course of argument, it was urged that there has been gross violation of Rule 180 of Army Rules 1954 (hereinafter referred to as "the rules"). It is submitted that the Court of Enquiry was neither recorded in his presence nor was he given an opportunity to cross-examine the witnesses. This being the case, the entire proceedings stands vitiated.

6. Reliance was placed on Lt. Gen. Surendra Kumar Sahni Vs. Chief of Army Staff and Others--> . It is urged by the respondents that not only was the contention raised by the petitioner at a very late stage, but also that Rule 180 is inapplicable

in this case since no Court of Enquiry had been ordered into the character or the military reputation of the petitioner to begin with. It is submitted that Court of Enquiry was convened to investigate into the following issues:-

(a) Allegation made by the purchasers vide their letter dated 29 Aug 2002 that 530 SS & TC verbally refused to issue the stores.

(b) Allegation made by Shri Umakant Agnihotri in Lokamat Samachar dt. 22 Aug 2002 as under:

(i) Cost of the sold stores is approx Rs. 60 lacs (Rupees Sixty Lacs) which has been Auctioned only for Rs. 16 lacs (Rupees Sixteen Lacs)

(ii) Publicity of Auction not done as per laid down policy. (iii) Forming of Group by purchasers by paying Rs. 2 Lacs (Rupees Two Lacs) to local bidders.

(iv) Auction has been carried in shift i.e. on 26 July & 09 Aug 2002.

(v) Shiva Sena workers forced the purchasers to leave the issued stores in the premises of 530 SS & TC.

This shows that there was no enquiry into the character or the military reputation of any person. It was purely a fact finding enquiry, and even during the Court of Enquiry, no witness had deposed anything which would have any repercussion on the character, or the military reputation of the petitioner. The petitioner was also aware of this fact and he had acknowledged it in his letter dated 09.09.2003 wherein he stated that "none of the witnesses has pointed any finger on him in the Court of Enquiry proceedings (sic)". It is only on the completion of the Court of Enquiry that the lapses and the officers, including the petitioner responsible for such lapses were identified. It was only on the basis of the fact finding done by the Court of Enquiry that further action was proposed against the petitioner.

7. We have considered the rival contentions. It is a settled principle of law as has been laid down in various pronouncements (Ramesh Mohan (Lt. Col.) Vs. Union of India and Others, ; A.R. Malhotra (Major) Vs. Union of India and Others, and Lt. Gen. Surendra Kumar Sahni Vs. Chief of Army Staff and Others--> , that the proceedings under Rule 180 are in the nature of enquiry and are mandatory in nature when the character or the military reputation of a person against whom, a Court of Enquiry has been proposed is in question. However, in the case of Lt. Colonel Ramesh Mohan (supra), it was clearly held that where the enquiry is to find out as to who has committed an offence or where the manner of committing the offence is not certain, then there can be no question of even thinking that the person concerned is likely to be prosecuted in future and in such cases, there is no requirement of compliance of Section 180 of the Rules, as in such cases, it is merely a fact finding enquiry. In A.R. Malhotra (Major) (supra), the Court held that during a Court of Enquiry which is in the nature of fact finding, if certain facts come on record which one likely to affect the character or military reputation of a person, then in such eventuality, even at that stage, such should be given an opportunity to cross-examine the witnesses

recorded and witnesses desired by him to be cross-examined. The Court summarized the law as under:-

"23. Reading the provisions, it is very clear that it is not contemplated that even when it is not certain to the Commanding Officer as to who has committed the offence or the matter of committing the offence is not certain, yet he has to give audience to the person(s). There is no question of even thinking that the person concerned is likely to be prosecuted in future, should be informed. Only Rule 180 contemplates that if enquiry is conducted, which affects character or Military reputation of a person subject to the Act, full opportunity is to be given. Thus, when it is certain that a particular person has committed a wrong and his act or omission is likely to affect the character or military reputation, then opportunity is to be given.

24. We have discussed the facts in detail. No where name of appellant appears. It is matter of investigation and only on investigation it would be known whether any offence is committed or not and if committed who are the responsible persons for the act or the omission. Therefore, it cannot be said that when court of Inquiry is constituted to collect evidence, the person who is likely to be prosecuted, should be also called at the enquiry proceedings and should be given an opportunity of cross examining the witnesses. In the opinion of this court, it would be beyond the scope of Rule 179 of the Army Rules to permit a person to remain present at the enquiry which is constituted for the purpose of collection of evidence and to make report only. When it is not certain as to who are the person involved, there is no question to invoke Rule 180 of the Army Rules.

25. It is required to be noted that so far as Rule 180 is concerned, if there is no specific allegation, then one may not be knowing about a person who is responsible for act or omission. It is in view of this, it appears that the provision has been made in later part of Rule 180, which reads as under:-

180. 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.

26. It is required to be noted that the Act and the Rules laid down the object and procedure of the Court of Inquiry. This is the only mode of ascertainment of fact at the pre-charge level contemplated by the law. The Commanding Officer has no authority to record a finding of fact. It is well known that the investigation is only preliminary step and information is being gathered on evidence, if there is sufficient material, the charge is to be laid. The court, at the state of trying the officer, is not concerned as to in what manner, the case was investigated. This is known that where a statutory remedy is provided, the court should be loath not to interfere in the order of authorities to whom special jurisdiction has been conferred by statute.

27. The matter is at the state of investigation. Only after collection of evidences, a decision could be taken whether prima facie case has been made out against a

person or not. When the matter is at the stage of investigation of the purpose of finding out as to whether crime is committed or not and if committed, by whom, then in such a case, accused has no right to participate. It is in this back ground the case is required to be considered."

8. In the present case it is clear from the convening order of the Court of Enquiry that the enquiry was aimed at finding out of the lapses in the auction, the reasons and the persons responsible for the same. The Court of Enquiry therefore was a fact finding enquiry and not an enquiry affecting the character or military reputation of the petitioner. Even during the entire Court of Enquiry, no evidence affecting the character or military reputation of the petitioner had come on record. This fact itself is acknowledged by the petitioner in his letter dated 09.09.2003. There is, therefore, no violation of Rule 180 in this case.

9. The petitioner has claimed that he was not given the statutory time envisaged in Rule 34 for preparing his defence. The plea of the respondents is that he was given due opportunity to produce his defence and though the petitioner had initially sought time to examine six witnesses, he later on dropped the witnesses and pleaded guilty of charges in the summary trial, hence there was no violation. These facts clearly show that after record of evidence, before the trial could begin, the petitioner had pleaded guilty of the charges and during the recording of evidence he had refused to examine his listed six witnesses. Hence there could not have been any violation.

10. The petitioner further contended that the Commanding Officer under Rule 22 of Army Rules, 1954 acted in violation of said rule as he should have dismissed the charges when there was no evidence on record against the petitioner but instead he, referred the matter to the higher authorities and continued the hearing under the orders of such higher authorities. It is argued by the learned counsel for respondents that this argument of the petitioner also has no force because Rule 22(3) (6) authorizes the Commanding Officer to seek the opinion of higher authority. In view of rule 22(3) (6), the argument of the petitioner is not tenable. The petitioner also claims the violation of Rule 182 contending that the evidence recorded during Court of Enquiry was used by Enquiry Officer. There is, however, nothing on record to show that the proceeding of the Court of Enquiry has been used as evidence against the petitioner since he was held guilty on his admission of guilt. The petitioner has also claimed the violation of Rule 26 on the ground that his plea of guilt does not bear his signatures. Learned counsel for the respondent has denied the violation of any Rule in recording plea of guilt during the summary trial proceedings and argued that it was done in terms of the prescribed procedure and the plea of the petitioner's guilt was recorded in form 1 of Appendix A of the Rules. It is apparent from the record and arguments addressed before this Court that the petitioner did not at any stage urge that he did not plead guilty, but rather admitted that he had pleaded guilty. He, however, has qualified his admission by saying that he did so on some assurance by respondents. Appurtenant to these circumstances, it cannot be said that the

petitioner's plea of guilt was wrongly recorded.

11. It is further urged by the petitioner that he could not have been punished even on his admission of guilt because there was no evidence on record against him and also, that his plea of guilt was motivated by assurance given. The plea of respondent, on the other hand, is that the particular document (auction catalogue and bid sheet) itself proves the charges against the petitioner. As per SOP, it was the primary duty of the petitioner to prepare the auction catalogue as per store. Counsel for the respondent also reiterates that the plea of guilt was voluntary, and no assurance of any nature as asserted by the petitioner was given. The first charge relates to the noting of book value of auction item TATA Load Carrier as Rs. 2,81,056/- while its actual book value was Rs. 446832/- and residual value as Rs. 53,200/- while it should have been Rs. 1,06,300/- which led to fixation of MRP at low value and consequently reduction in RGP which led to lower rate of bidding amount. The second charge relates to an omission prejudicial to good order and military discipline which relates to not obtaining the signatures of the second highest bidder and any other unsuccessful bidder as witness on the bid sheet as per SOP of DGBR dated 21st February, 2002. There is no dispute that in the auction catalogue the book value and residential value of Tata Load Carrier in lot No. 10 was not in terms of the actual record available with project HIRAK of which the petitioner was the officer-in-command. The only issue is if it was the responsibility of the petitioner to prepare the said catalogue. The said auction was to be conducted as per the procedure prescribed in SOP dated 07.02.2002. Rule 7 of the said SOP bears a duty on the project in-charge to prepare six copies of the auction catalogue. Thus, the petitioner being in-charge of the Project HIRAK had to prepare six copies of the catalogue. It was thus his duty to mention all the details of store in the catalogue. Under valuing the residual value and book value of TATA Load Carrier in lot No. 10, as Rs. 53,200/- and Rs. 281056/- respectively led to wrong determination of MRP by the Board constituted for that purpose, which resulted into fixation of lower RGP and consequently lowering the bidding amount. Clause 8 of SOP prescribes the manner in which 6 copies of the catalogue are required to be distributed. Copies 1, 2 and 3 had to be retained by the Project Headquarter and copy no. 4 be sent to the auctioneer for publicity and copy no. 5 was to be handed over to the Presiding Officer of the Auction Supervisory Board and Copy no. 6 was to be sent to HQ DGBR with endorsement of guide/reserve price and this was required to be retained in safe custody of officer concerned in HQ DGBR. The procedure further requires that the CE Project should then tally each and every item on ground to put his endorsement on all the three copies i.e. Copy No. 1,2 and 3. Copy No. 1, thereafter, was required to be forwarded to HQ DGBR and Copy No. 2 to be retained by CE of the Project and Copy No. 3 is required to be handed over to the Stockholder. The SOP clearly places primary responsibility on the petitioner to prepare the catalogue and then distribute it. Being In-charge of the Project, it was his duty to ensure that all details of the stores were mentioned in the Catalogue properly. He could not absolve his responsibility on the plea that

others who had checked the catalogue should have noticed it and corrected it. As regard the second charge, the record shows that the signature of second highest bidder and one unsuccessful bidder were missing on bidding sheet. Thus the plea that there is no iota of evidence to frame charge is not sustainable.

12. The contention of the petitioner that he had pleaded guilty on the assurance that the punishment of reprimand would remain operative only for three years also does not find support from any material on record. This contention therefore is also not tenable.

13. The other plea raised by the learned counsel for the petitioner is that, allowing the punishment of reprimand to be used against him even for denying him his time scale promotion to the rank of Colonel, makes it unduly harsh and disproportionate in the light of the fact that no loss of exchequer had occurred to the Government of India or to any other person and that during the hearing of the charge proceedings before the Commanding Officer, the witnesses had only narrated the auction procedure and none of them had made any incriminating statement against him. That except the petitioner, no action was taken against any other personnel involved in the auction, despite the fact that Court of Enquiry proceedings found others responsible as well. He stated that even it was for the reason that the Commanding Officer did not find any case against him, that he sought the opinion of senior officer. It is also urged that he had in his statement in the Court of Enquiry clearly stated that it was just a clerical/typographical mistake by which book value and residual value of Tata Load Carrier was recorded at lower side, which fact stands corroborated that in the catalogue the book value and residual value of some other articles were shown on higher side. The learned counsel for the petitioner has brought out attention to a letter dated 01.10.2003 written by Commanding Officer during hearing on charges under Rule 22 and has relied on para 7 of the letter. The same is extracted as under:-

"7. Taking an overall view of the whole case, especially after listening to the prosecution witnesses who have pleaded complete ignorance of commission of the offences alleged in the charges, as listed in Appx "A", I am in doubt that I can take any further action based on the hearing of charge meaning thereby, that no case exists against the offr. However, considering the admission of the offr. in the C of I in his answer to question No. 1, recorded on Page 25 therein that it may have been a clerical mistake, the case could be disposed off by adm action at your level or as deemed fit by you, in respect of charge 1. In respect of other two charges there are procedural lapses of trivial nature and can also be disposed off by adm action."

14. It is argued that thereafter too no fresh evidence emerged. It is submitted that the petitioner was penalized solely on the basis of his admission of guilt, while it was purely a typographical/clerical error. It is submitted that the omission to obtain the signatures of the second highest bidder and other unsuccessful bidder, on bidding sheet was not a deliberate act and was due to

oversight and that no one benefitted or suffered due to this lapse and even during hearing of charged CO recognized this fact that it was a trivial matter and in the light of these facts denial of his time scale promotion is a very harsh punishment. It is prayed that the order of reprimand should not be allowed to remain operative for the rest of his service tenure resulting into denial of his time scale promotion.

15. It is a settled proposition of law that the courts, under Article 226 of the Constitution of India can review an administrative order. However, the Courts cannot question the decision made by any authority but can only assess whether while reaching said decision, the prescribed procedure has been duly followed or not and whether the principles of natural justice have been observed. However, the Courts also retain the power of judicial review vis-à-vis the penalty imposed where the facts and circumstances of the case demonstrates that such order is unduly harsh or shockingly disproportionate. The courts can either substitute a penalty or send the matter back to the authorities for reconsideration and imposition of appropriate penalty. (B.C. Chaturvedi Vs. Union of India and others, . The question of proportionality in awarding punishment under the Army Act was in issue before the Supreme Court in Ranjit Thakur Vs. Union of India (UOI) and Others, and the Court has observed as under:-

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court- martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

16. The penalty can be said to be shockingly disproportionate if it is not commensurate with the facts and circumstances of the case i.e. where no reasonable man would have, in the given circumstances of the case, imposed such a penalty. Although the Supreme Court has highlighted through its various pronouncements that such power is to be exercised by the Court sparingly it has also allowed the Court to use such powers in appropriate cases where the Court feels that as a consequence to that penalty, the delinquent has been put to a disadvantage of a nature which certainly was not contemplated while imposing such penalty, given the nature of the charges and other circumstances of the case. In the present case, although the petitioner had pleaded guilty of the charges but the fact remains that even the commanding officer hearing the charges under Rule 22, was ultimately of the opinion, as is clear from para 7 of his letter dated 1.10.2003 that the charges leveled against the petitioner were of trivial nature and could be handled administratively. It is also a fact that while in

the catalogue the book value and residual value of TATA Load Carrier was shown at lower side, the book value and residual value of certain other articles were shown at higher side. There is no evidence on record which could show that the petitioner had deliberately mentioned the book value and residual value of TATA Load Carrier in the catalogue with an intention to cause any benefit to himself or any other person. In such circumstances, while the punishment of reprimand in itself is not disproportionate to the act of omission and commission on the part of petitioner, its consequent effect of denial of time scale promotion to the petitioner certainly operates in disproportionate and unduly harsh manner. This is especially because except for this incident, the petitioner had never been punished for any misconduct during his entire service tenure. It is also a fact that in view of the AV Commission Report, the petitioner who was a Major was promoted to the rank of Lt. Colonel despite this punishment, but was denied his time scale promotion to the rank of Colonel on account of the punishment. It is also clear from the record that the respondents kept the statutory complaint of the petitioner pending for about four years and during this period had denied the time scale promotion to the petitioner. This was an unwarranted act on the part of the respondent.

17. In view of the circumstances of this case and the above discussion, we are of the opinion that the order of punishment of reprimand operates in an unduly harsh manner and shocks the conscience of this Court when used by the respondents for denying the time scale promotion to the petitioner. We accordingly direct the respondents to ignore the order of reprimand while considering the case of the petitioner for his time scale promotion to the post of Colonel. He shall be considered for the said promotion if he is otherwise eligible. The writ petition is allowed in the above terms with no order as to costs.