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**(2002) 02 DEL CK 0043**

**In the Delhi High Court**

**Case No : Civil Writ Petition No. 463 of 1998**

R.K. Sareen

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision : 15-02-2002**

**Acts Referred:**

**Citation : (2002) 2 AD 513**

**Hon'ble Judges : Sanjay Kishan Kaul, J**

**Bench : Single Bench**

**Advocate : Rekha Palli, for the Appellant; T.V. George, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

Sanjay Kishan Kaul, J.—The petitioner is aggrieved by his non promotion from a Major to a Lieutenant Colonel and has sought a direction to consider his case for promotion without taking into consideration the impugned ACRs for the years 1991-1992 and 1992-93 as also direction not to take into consideration the impugned severe displeasure.

2. The petitioner has stated in the petition that he was appointed as a Presiding Officer in May 1992 to take over the buildings constructed for Army Aviation Base at Jhansi from civil contractor. It has been alleged that in view of the nature of work involving crores of rupees, the petitioner was pressurised by respondent No. 6 not to reflect his observations in the Board proceedings and since the petitioner refused to delete his observations, the petitioner was harassed by respondent No. 6 who was his commanding officer and also the Reviewing Officer for writing his ACRs.

3. The petitioner vide his letter dated 2nd August, 1992 requested for a personal interview and it is alleged that on the complaint of the petitioner, respondent No. 6 took the ACRs of the petitioner for the year 1991-1992 from Jhansi to Mathura and gave to respondent No. 5 who down graded the ACRs of the petitioner. This action of the respondents is alleged to be contrary to the standing orders without

giving any counselling or warning to the petitioner.

4. The petitioner made a non-statutory complaint aggrieved by the down grading of the ACRs of the petitioner to respondent No. 6 who instead of attending the complaint spoiled the ACRs of the petitioner for the year 1992-1993. Subsequently the statutory complaint dated 22.9.1993 made by the petitioner against his confidential reports for the year 1992-1993 was rejected subject to expunction of the reporting officer's assessment in the confidential reports on the ground of subjectivity.

5. The petitioner admittedly did not challenge or take any further proceedings in this behalf but continued to make requests for an enquiry against respondent No. 6 including vide letter dated 25.5.1994 and ultimately a Court of Enquiry was convened in October 1994 to investigate into the allegations made by the petitioner against respondent No. 6.

6. The inquiry ultimately resulted in the allegations made by the petitioner against respondent No. 6 being found unsubstantiated and the petitioner was awarded severe displeasure.

7. Learned counsel for the petitioner has assailed these ACRs as illegal and contrary to the procedure laid down in the case of U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, . It has been held by the Supreme Court that if the confidential reports amount to down grading it would require a procedure to be followed whereby authority records the reasons for down grading and the change is to be communicated to the employee in the form of advise. Learned counsel for the petitioner further referred to the decision of the Division Bench of this Court in LPA 432/2001 Air Com. K.P. Sreekant v. Union of India decided on 20th December, 2001. The Division Bench while considering the applicability of UP Jal Nigam case (supra) to defense services held that despite the defense service having their own specialities and peculiarities, Up Jal Nigam case (supra) would apply and if there are negative remarks and serious implications, the same would amount to adverse remarks and it should be communicated to person before de-empanelling him.

8. The learned counsel for the petitioner also sought to attack on the decision to award severe displeasure to the petitioner. The main contention advanced by the learned counsel for the petitioner was that AR 180 was not applied to the petitioner in terms whereof it was mandatory to provide full opportunity to the person whose military reputation is likely to be affected by the inquiry and such person should be present throughout. This requirement is stated to be in consonance with the principle of natural justice.

9. Learned counsel for the petitioner sought to rely upon the judgment of the Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, in which the Supreme Court had held that Rule 180 makes it obligatory that whenever a court of inquiry is set up and in the course of inquiry character or military reputation of a person is likely to be affected then such a

person must be given a full opportunity to participate in the proceedings of court of inquiry. The Supreme Court further observed that in the course of such an inquiry there must be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected and 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. Thus Rule 180 was held merely as an enabling provision to ensure such a participation.

10. Learned counsel also referred to the judgment of the Division Bench of Madhya Pradesh High Court in R.P. Shukla and Others Vs. Central Officer Commanding-in-Chief, Lucknow and Others, holding that the Commanding Officer was duty bound to satisfy the procedure under Rule 180 to be followed during the court of inquiry.

11. Learned counsel for the petitioner contended that Rule 180 was not applied as the petitioner was not present when the evidence of witnesses 2 to 6 were recorded and it was only on 21st January 1995 that AR 180 was applied and petitioner was given a copy of the statement of respondent No. 6 recorded three months earlier to enable him to cross-examine the said respondent. It is further stated that even then this statement did not include 44 pages of exhibits tendered by respondent No. 6 though there exhibits were shown to the petitioner. The petitioner has further grievance that he remained present only during the recording of evidence of witness Nos. 7 and 8, both of whom deposed in favor of the petitioner.

12. Learned counsel for the petitioner contended that the show cause notice dated 28.4.1995 was given to the petitioner in contravention of principles of natural justice as neither the finding nor the recommendations of the court of inquiry was given to the petitioner but the petitioner was awarded severe displeasure. It is also stated that the petitioner was totally handicapped to file the reply against the show cause notice without knowing the finding or recommendations of the court of inquiry and referred to the judgment of the Supreme Court in Union of India and others Vs. Mohd. Ramzan Khan, to advance the proposition that in quasi judicial proceedings non supply of adverse material to the employee, but forwarding the material to the authority taking decision on that basis amounts to violation of principle of natural justice and thus violation of Articles 14 and 16 of the Constitution of India.

13. Learned counsel for the petitioner referred to the judgment in the Union of India v. Mohd. Ramzan Khan case (supra) to contend that it was held therein that in case the conclusions are kept away from the delinquent officer and the enquiry officer submits his conclusion with or without recommendations as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. It was held that the report is an adverse material if the inquiry officer records a finding of guilt and proposes punishment so far as the delinquent is concerned.

14. Learned counsel for the petitioner also contended that despite the allegations of bias and malafide made against respondents No. 5 and 6, no affidavit has been filed by them rebutting the allegations and thus on that account also the adverse entries are liable to be quashed in view of the ratio laid down by the Division Bench of this Court in *Rajinder Singh Sehrawat Vs. Union of India and others*, .

15. Learned counsel for the respondent on the other hand has sought to support the decision taken by the respondents and has contended that the Selection Board No. 4 has rightly taken into account the censure of severe displeasure which was based on the finding of the court of inquiry. Learned counsel has contended that Rule 180 of the Army Rules of 1954 been complied with and the letter dated 28.10.1994 sent by the Presiding Officer of the Staff Court of inquiry addressed to the petitioner clearly states that Rule 180 would apply. It is further contended that the statement of the petitioner was duly recorded and 41 documents submitted by the petitioner were taken on record. The petitioner was allowed to cross-examine all witnesses whose statement had any tendency to injure his character or military reputation. The petitioner also cross-examined Col. Madhububhani at length against whom he made the allegations running into over 26 pages and the petitioner was given the statement made by Col. Madhububhani several days in advance. It is stated that Brig. R. Gopal, R. Subhaga were also cross-examined by the petitioner. It is further stated that apart from these none of the witnesses had made any statement likely to affect the character or military reputation of the petitioner and nor did the petitioner ever demanded to cross-examine any of them.

16. Learned counsel for the respondent while referring to the grievance of the petitioner about non supply of documents stated that reading of the court of inquiry itself would show that the petitioner was given ample opportunity to peruse the exhibits. The observations are as under:

"Maj. R.K. Sareen was given ample time to peruse exhibits 17 to 44. In fact, he made copious notes of the same. The statement of Col. M. Madhubbhani duly initiated by him and a Member of the Court was handed over to Maj. R.K. Sareen on 21.1.1995."

17. Learned counsel for the respondent further contended that decision to censure the petitioner for making false allegations against his superior officers was taken after following a separate and independent procedure and after giving due opportunity to the petitioner. It is contended that the ensure was not an ipso facto result of the outcome of the proceedings as the outcome of the Court of inquiry resulted only in the initiation of the censure proceedings where the petitioner was entitled to a fresh opportunity to defend himself in form of a reply to show cause notice. The petitioner was entitled to make statutory complaint which he did make against the same and was disposed of by the Central Government.

18. Learned counsel for the respondent contended that what has to be appreciated is that it was the conduct of respondent No. 6 which was under inquiry by the Court of Inquiry and only evidence or submissions which were likely to affect the character and military reputation of the petitioner would be of relevance to him. Rule 18 is as under:

"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 defense 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 his rule."

19. Insofar as the grievance of the petitioner about the ACRs is concerned, learned counsel for the respondent states that the ACRs were communicated to the petitioner in the first instance and again before considering the petitioner's case by the Selection Board No. 4 and the reporting Officer's assessment set aside by the Central Government and thus the petitioner cannot make any grievance about the same.

20. Learned counsel further contended that the is not entitled to a finding and opinion/recommendation of the court of enquiry as per Army Rule 184 and hence there is no violation of principles of natural justice.

"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 defense 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."

21. Learned counsel for the respondent also made reference to the case of Major General Inderjit Kumar Vs. Union of India (UOI) and Others, , to contend that Rule 184 of the Army Rules entitles the person who is tried by a Court Martial to copies of such statements and documents contained in the proceedings of a Court of Inquiry as are relevant to his prosecution or defense at his trial but there is no provision for supplying the accused with a copy of the report of Court of Inquiry. This is so as the Court of Inquiry and participation in Court of Inquiry is at a stage prior to the trial by the Court Martial. Thus it was held that principle

of natural justice are not attracted to such preliminary enquiry but Army Rule 180 gives adequate opportunity to the person affected even at the stage of Court of Inquiry.

22. I have heard the learned counsel for the parties. It is apparent from the counter affidavit that the petitioner who belong to 1978 Batch was considered on three occasions for the post of Lt. Colonel by Selection Board No. 4. The first consideration was in February 1996, the first review in February 1997 and the final review in February 1998. On all three occasions he was found to be unfit. This finding of the petitioner being unfit has to be appreciated taking into consideration that the army organisation is like a pyramid with less room at the top. It is also relevant to note that on the petitioner's statutory complaint the Reviewing Officer's entire report in the ACRs for the year 1992-93 were set aside on 4.6.1995 and thus expunction was on record during consideration of the case of the petitioner. In view of the expunction from the ACRs already having taken place the question of application of the ratio in *UP Jal Nigam (supra)* would not arise. *UP Jal Nigam (supra)* only stipulates that if there is step down in grading, then reasons should be recorded for such down grading on the personal file of the officer concerned and to inform him of the change in the form of advice. In *Air Com. K.P. Sreekant's case (supra)* the Division Bench of this Court was concerned with the negative remarks in the ACRs which were in fact adverse remarks and had serious implications that ought to have been communicated. In view of this position the grievance made by the petitioner in respect of the ACRs in question cannot be sustained.

23. The second aspect in the present petition arises from the inquiry which was initiated against respondent No. 6 on the complaints of the petitioner. It has to be appreciated that the enquiry was against respondent No. 6. There is a force in the submission of the learned counsel for the respondent that it is not an enquiry against the conduct of the petitioner but against the conduct of respondent No. 6 and thus a different principle would apply. To the extent that the same would have an effect on the petitioner, the necessary material was liable to be provided to the petitioner and was in fact was so provided. The petitioner was informed by the letter of Presiding Officer of the Staff Court of Enquiry dated 28.10.1994 that Rule 180 would apply with regard to the petitioner and the documents were made available to the petitioner and the petitioner was granted ample opportunity to cross examine all the witnesses whose statement had a tendency to injure his character or military reputation. If a statement was to affect or injure the reputation of respondent No. 6, it would be respondent No. 6 who would be aggrieved by the same. As already noted above, the petitioner cross examined various witnesses which ran into numerous pages. Insofar as the witnesses who did not make any statement likely to affect the character or military reputation of the petitioner, there was no occasion for the petitioner to cross examine nor was it demanded.

24. It is apparent from the ratio of the judgment including Major General Inder

Jit case (supra) that the petitioner is not entitled to the findings and opinion/ recommendations of the Court of Inquiry as per Army Rule 184 and insofar as the applicability of Rule 180 is concerned, the same has been duly applied and complied with. The petitioner is thus not entitled to the reliefs prayed for in the petition as the same is without any merit.

25. After the conclusion of the inquiry against respondent No. 6 it was found that the allegations made against respondent No. 6 by the petitioner were not sustainable and action was proceeded against the petitioner for making fake allegations against his superior officer. This was done by following an independent procedure. It was not as if a censure against the petitioner was based merely on the proceedings of the Court of Inquiry. The finding of the Court of Inquiry in fact resulted initiation of proceedings for censure whereby the petitioner was entitled to full opportunity to defense himself and in fact was issued a show cause notice providing a fresh opportunity to the petitioner to put forth his case. The petitioner sent a reply to the show cause notice and after due consideration the censure order was passed against the petitioner. His statutory complaint was rejected vide order dated 23.11.1997.

26. I am of the considered view that the respondent cannot with the rules and regulations under the Army Act and the rules framed there under.

27. In view of the aforesaid findings, the petition is without any merit and is dismissed leaving the parties to bear their own costs.