

(2020) 10 AFT CK 0081

In the Armed Forces Tribunal

Case No : Original Application No. 1546 Of 2020

Suresh Gupta

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 23-10-2020

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14
Army Act, 1950 — Section 122
Army Rules, 1954 — Rule 22, 22(1), 23, 177, 180, 180(1)
Regulations For The Army (Revised Edition) 1987 — Regulation 518

Citation : (2020) 10 AFT CK 0081

Hon'ble Judges : Rajendra Menon, J; P.M. Hariz, Member (A)

Bench : Division Bench

Advocate : I.S. Singh, Kirtika Chhatwal, Anil Gautam

Final Decision : Disposed Of

Judgement

1. Invoking the jurisdiction of this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the AFT Act'), this

application has been filed with regard to the reliefs claimed in Para 8, which read as under:

a) Call for the complete record of the case leading to the instant disciplinary proceedings against the Applicant and after perusal thereof

set aside Para 10 of the Movement Order dated 17.09.2020 (Annexure A-1), whereby it has been stated that the disciplinary proceedings

against the Applicant is still pending and that the Applicant shall be required to move at short notice of 48 hours (to face the further

disciplinary proceedings);

b) Call for the complete records of the case leading to the instant disciplinary proceedings against the Applicant and after perusal thereof

set aside the Attachment Order dated 16.07,2019 (Annexure A-2), Convening Order dated 25.10.2017, complete Staff Court of Inquiry

proceedings, the tentative Charge Sheet dated 09.10.2019, the proceedings of Hearing of Charge held against the Applicant under Army

Rule 22, complete proceedings of the Summary of Evidence (including the additional statement), all of which being illegal and without jurisdiction;

c) Direct the Respondents to drop the disciplinary action against the Applicant and relieve the Applicant from all consequences arising out

of the same and further direct the Respondents that no disciplinary action, or any action whatsoever, shall be taken against the Applicant on

the basis of said Court of Inquiry proceedings and Summary of Evidence;

d) Direct the Respondents to issue No Objection Certificate for promotion of the Applicant to the Higher Administrative Grade (HAG) in his

parent service (i.e. Indian Postal Service) for which he already stands selected vide the DPC held in July 2019; and

e) Pass such other order(s) and/or direction(s) as may be deemed appropriate by this Hon'ble Tribunal under the facts and circumstances of the case.

2. The applicant has approached this Tribunal after the impugned order (Annexure A-1) was served upon him on 17.09.2020 and it is his grievance

that the observations made in Para 10 of the aforesaid communication, which reads as under:

10. Disciplinary proceedings are still pending. Attendance of the officer will be required in future at short notice of 48 hours.

is indicative of the fact that after releasing from attachment and after the Court of Inquiry held, the respondents still contemplate taking disciplinary

action against him, which, according to him, is unsustainable, for various reasons, which would be dealt with hereinafter.

3. The applicant is a serving Brigadier belonging to the Corps of Army Postal Service (APS) and it is his contention that an illegal disciplinary

proceeding has been initiated against him based on an illegal Court of Inquiry and the impugned attachment order. It is his case that the Summary of

Evidence was completed on 25.02.2020 and thereafter the impugned Movement Order (Annexure A-1) has been issued on 17. 09.2020 directing him

to move back to his Parent Unit, namely, HQ Eastern Command Kolkata. A Tentative Charge-Sheet was also issued to the applicant on 09.10.2019.

4. It is alleged against the applicant that while posted as Director, APS (Auto 86 Tech) in the office of ADG APS, Army HQ (APS Directorate) and

Respondent No. 6 (Brig M.K. Khan) was posted as Director APS, HQ Western Command. After the demonetisation was ordered by the

Government of India, a process was initiated by 1 CBPO, New Delhi, for carrying out exchange of demonetised currency Notes of Rs.100/- and Rs.

500/- during the period from 09.11.2016 to 24.11.2016. It is alleged that the applicant was assigned the role of a Nodal Officer in the monitoring cell

established under the APS Directorate. According to the applicant, he was not involved in the day to day operations, Respondent No. 6 â?" Director

APS, Western Command was the immediate superior Officer In-Charge of all the field post-offices located within his jurisdiction. It is said that the

applicant's role as a Nodal Officer was to issue necessary guidelines and instructions on behalf of the department. He had no independent authority to

pass instructions and directions to the Postal Units. In fact, all necessary instructions and guidance were provided by the departmental authorities.

However, it is alleged against the applicant that he was involved in exchanging Rs.3 Lacs of his own money in an illegal manner and, therefore, a Court

of Inquiry was convened and thereafter Summary of Evidence were recorded as contemplated under the statutory provisions, thereafter based on the

prima facie material that has come on record, a Tentative Charge-Sheet is issued to the applicant, apprehending that a disciplinary proceedings may be

initiated against him, has invoked jurisdiction of this Tribunal challenging the entire action primarily on the following six grounds:

(i) Convening of the Court of Inquiry vide order dated 25.10.2017 is not proper. It is ordered by an incompetent officer, who was not entitled to

convene the Court of Inquiry with regard to the applicant, an officer in the rank of Brig. As the Court of Inquiry is convened by an incompetent

authority, the entire proceedings of Court of Inquiry stand vitiated.

(ii) In the Court of Inquiry conducted, Rule 180 of the Army Rules, 1954 has been violated inasmuch opportunity, as envisaged in the said statutory

provisions, has not been provided to the applicant.

(iii) The charges alleged in the Tentative Charge -Sheet are beyond the time-

frame prescribed for initiating proceedings under Section 122 of the Army Act, 1954.

(iv) 'Hearing of Charge' has been held in total disregard to the procedure contemplated under Army Rule 22.

(v) It is a case where there is no evidence against the applicant and, therefore, no proceedings can be initiated against the applicant; and

(vi) As Respondent No. 6 is an officer, who was promoted to the rank of Brigadier along with the applicant and is a candidate along with the applicant

eligible for promotion to the next rank of 'Major General', malafides in the matter of initiating proceedings are alleged against Respondent No. 6 by

saying that if the applicant is put under the cloud of disciplinary proceedings, Respondent No. 6 will get a marchover the applicant in the matter of promotion.

Accordingly, on the aforesaid grounds, learned counsel for the applicant argued that the entire action initiated by the respondents is unsustainable.

5. As far as the first ground is concerned, it is argued that the Court of Inquiry has to be initiated and conducted in accordance to the requirements of

the statutory provisions, in the Convening Order dated 25.10.2017 (Annexure A -20), available at Page 125 of the petition, the requirement of Army

Rule 177 (Chapter VI), read along with the provisions of Regulation 518 of the Regulations for the Army, 1987 (Revised) (Chapter XII) has not been

followed inasmuch as the Convening Order is issued by an incompetent officer, i.e. GOC of the HQ Delhi Area and not an officer in the rank of

'Major General', who is only competent to convene a Court of Inquiry against an officer in the rank of 'Brigadier' (i.e. the applicant).

6. It is said that the Court of Inquiry proceedings are initiated by an incompetent person, therefore, the statutory provisions have been violated.

Thereafter, it has been argued that in the Court of Inquiry, the requirement of Army Rule 180 has not been followed inasmuch as the applicant was

examined only on 17.02.2018 as Witness No.17 and he was not given any opportunity to be present from the very beginning of the Court of Inquiry,

which, according to the applicant, is in contravention to Army Rule 180. It is also said that two witnesses requested for by the applicant were never

summoned in the Court of Inquiry. Placing reliance on various judgments of the Honble Supreme Court, the Delhi High Court and this Tribunal, an

argument was canvassed before us to say that, if the provisions of Army Rule 180 have been violated, the entire proceedings stood vitiated.

7. It was then argued that in the matter of 'Hearing of Charges' and framing of tentative charges, Army Rule 22 has been violated, inasmuch as the

mandatory 'Hearing of Charges' was held by the GOC 9 Infantry Division on 11.10.2019 without examining any witness in support of the charges and

he illegally dispensed with the requirement of calling and hearing of the witnesses on the ground that the provisions of Rule 180 have been followed,

however, when compliance of Army Rule 180 itself is not undertaken, as per the statutory provisions, framing of charges without examining any

witness on the charges under Army Rule 22 is illegal.

8. Learned counsel thereafter took us through the period as indicated in the Tentative Charge-Sheet, during which irregularities/misconduct alleged

against the applicant is said to have been committed i.e. between 9th November, 2016 and 24th November, 2016, and argued that for such a belated

act of commission and omission, holding of the Court of Inquiry and initiating disciplinary proceedings are beyond the statutory period of limitation

prescribed under Section 122 of the Army Act, 1950.

9. Learned counsel thereafter took us through some statements and transcript of audio recording, said to have been obtained by the applicant, read

over the allegations made against him with regard to exchanging of an amount of Rs. 3 Lacs and tried to indicate that the allegations are not at all

established, it is a case of no evidence at all, and based on such material collected in the Court of Inquiry, no disciplinary proceedings can be initiated.

10. Finally, on account of the malafides of Respondent No.6 in trying to get the applicant superseded and earn promotion, submissions were made by

referring to Promotion Orders to the rank of 'Brigadier' to say that both were promoted together to the rank of 'Brigadier' and are to be considered

together for promotion to the rank of 'Major General' and, therefore, with malafide intention only to ensure that the applicant is not promoted,

Respondent No.6 has manipulated the entire proceedings against the applicant. Learned counsel, in detail, took us through various aspects of the

matter and the material placed on record in support of the aforesaid contentions and prayed that his OA may be allowed.

11. However, learned counsel for Respondents Nos. 1 to 5, on advance notice,

opposed the aforesaid prayers and argued that, at this stage, when based on the prima facie material collected in the Court of Inquiry, the proceedings of the Court of Inquiry at the pre-investigation stage and, when only a Tentative Charge-Sheet has been issued, interference into the matter is not called for. Learned counsel referred to the contentions advanced on behalf of the applicant and submitted that, at this stage, interfering into the matter by this Tribunal is not called for and in support thereof, placed reliance on a recent judgment dated 07.01.2020 of the Hon'ble Supreme Court in the case of Union of India and Others Vs. Ex. No. 3192684 W. Sep. Virendra Kumar - [(2020) 2 Supreme Court Cases 714], and another judgement dated 15.02.2019 of the Hon'ble Supreme Court in the case of Union of India & Ors. Vs. Lt Colonel Dharamvir Singh [Civil Appeal No. 1714 of 2019] reported in 2019 SCC OnLine 230 to say that in a disciplined force like the Army, when disciplinary action is initiated, pre-emptive exercise of jurisdiction to strike down the proceedings initiated is unwarranted. Learned counsel took pains to take us through various aspects of the matter to demolish the contentions of the applicant and submitted that, at this stage, interference into the matter is not called for.

12. We have heard learned counsel for the parties at length and have also gone through the record.

13. A Court of Inquiry is held in accordance with the requirement of Rule 177 of the Army Rules, 1954 and it is an assembly of officers or Junior

Commissioned Officers for the purpose of prima facie assessing as to whether any case is made out for initiating any proceedings against the officer

concerned. It is not an inquiry in the real sense and it is only the proceedings initiated before taking recourse to the regular process of conducting an

inquiry, particularly through Court Martial. According to the applicant, the first ground as canvassed before us was that the Convening Order issued on

25.10.2017 is passed by an incompetent authority and is in violation of the Regulation 518 of the Regulations for the Army, 1987 (Revised). Regulation

518 under Chapter XII of the Army Regulations lays down the proceedings for conduct of Court of Inquiry and reads as under:

518. Courts of Inquiry And Station Boards.â?" The convening officer is reasonable that a court of Inquiry or station board is composed of

members whose experience and training best fit them to deal with the matter at

issue. The personnel detailed to constitute the Court of

Inquiry or Station Board should have no personnel interest or involvement, direct or indirect, in the subject matter of the investigation. A

court of inquiry may consist of officers only, or of one or more officers together with one or more JCOs, WOs, NCOs as may be desirable.

When the character or military reputation of an officer is likely to be a material issue, the presiding officer of the court of inquiry wherever

possible, will be senior in rank and other members at least equivalent in rank to that officer." [Emphasis supplied]

14. If we take note of the last part of the Regulation, it contemplates that when the character or military reputation of an officer is likely to be a

material issue, the presiding officer of the court of inquiry wherever possible, will be senior in rank and other members at least equivalent in rank to

that officer. Apart from the fact that this is a directory provision as laid down in various judgements, if we take note of the Convening Order

(Annexure A-20) and the tenor and language of the Convening Order, we find that it is not a Court of Inquiry ordered specifically to inquire into the

conduct and military reputation or character of the applicant or any officer in particular. It is a general Convening Order and in Para 2 of the same, it

is indicated that the Court has been constituted to ascertain certain facts with regard to irregularities committed, during the process of withdrawal or

exchange of the currency Notes after the demonetization notification was issued and the facts to be ascertained are not only with regard to the

aforesaid facts but also to fix responsibility of irregularities, recommend measures to be initiated to avoid recurrence of such irregularities in future and

give an opinion. It is, therefore, clear that when the Court of Inquiry was ordered, the GOC of the HQ Delhi Area had no intention, nor was there any

material to accuse the applicant or any other person. It was an inquiry, general in nature, for the purpose of ascertaining of facts and thereafter, fixing

the responsibility for the irregularities. It was in the process of conducting such a general inquiry that the applicant's involvement came to light and

after following the procedures as is contemplated under Rule 22 of the Army Rules, 1954, a Tentative Charge-Sheet issued. That being so, the first

ground of challenge to say that convening of the Court of Inquiry is by an incompetent authority against the applicant is not correct. In fact, the

Convening Order (Annexure A -20) dated 25.10.2017 nowhere indicates or mentions that the Court of Inquiry is constituted for investigation or inquire into the acts of commission and omission or conduct by the applicant. On the contrary, it is a general Court of Inquiry to look into the various aspects of the matter pertaining to the transactions held. Accordingly, when at the time of convening the Court of Inquiry, there was nothing to show that the character or military reputation of a particular officer is to be adversely affected, the contention of the applicant that the Court of Inquiry is convened by an inferior officer cannot be accepted at this stage. That apart, as already indicated hereinabove, Army Regulation 518 as put-forth by the applicant is not a mandatory provision, in fact, the words ""wherever possible"" are indicative of the fact that the provision is directory in nature and if applied to the facts and circumstances of the present case, it, in no way, helps the case of the applicant.

15. Even though the next ground raised pertains to violation of Rule 180 of the Army Rules, 1954 in conducting of Court of Inquiry, we will advert to consider this ground in the end.

16. As far as the third ground with regard to the charges being time-barred is concerned, the period as referred to in the Tentative Charge-Sheet is the period during which the exchange of demonetised currency Notes took place, however, it is a well settled principle of law that it is only when the actual act of commission or omission comes to the notice of the Competent Authority, that the period of limitation for military proceeding starts. The period between 09.11.2016 and 31.12.2016 as mentioned in the Tentative Charge Sheet is the period when the exchange of currency notes took place.

The actual date when the acts of commission or omission came to the knowledge or notice of the Competent Authority will be the relevant date for examining the question of limitation, and, it could be the date when the report of Court of Inquiry was submitted or any other date. All these relevant facts are matters to be determined in the inquiry or trial. That being so, at this stage, merely on the ground that the incident is said to have taken place in November, 2016, no case is made out for quashing the Charge-Sheet on account of the provisions of Section 122 having been breached. This is a pure question of facts which will have to be ascertained when the trial is held and, at this stage, on the aforesaid grounds, we see no reason which

warrants any interference into the matter.

17. As far as the next ground with regard to the violation of Rule 22 (Chapter-V) of Army Rules, 1954 is concerned, it pertains to 'investigation of

charges and trial by Court Martial'. Rule 22 deals with 'Hearing of Charge'. Rule 22 (1) and its proviso read as under:

22. Hearing of Charge.â?"(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence

of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such

statement as may be necessary for his defence:

Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule

180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

[Emphasis supplied]

18. In this case, even though during the hearing of charge, the Commanding Officer did not examine any evidence. It is clear that as the provisions of

Army Rule 180 were said to have been complied with, in the light of the proviso to Army Rule 22(1), in our considered view, the authority has rightly

dispensed with the procedure contemplated in sub-Rule (1) because material collected under Rule 180 was available before the Commanding Officer

(i.e. the Competent Authority) and it was not necessary to follow the detailed procedure contemplated under Army Rule 22(1) and, at this stage, in our

considered view, this ground is also not tenable.

19. The next ground canvassed by the applicant was that there is no evidence available in the matter for initiating any disciplinary proceedings against

the applicant and it is a case of no evidence at all. In our considered view, when only a Court of Inquiry has been conducted and based on the

preliminary material that has come on record, at this pre-investigation stage, a tentative decision is only taken to issue Charge-Sheet and proceed in the

matter. In exercise of its limited jurisdiction under Section 14 of the AFT Act, this Tribunal cannot sit over the decision of the Competent Authority as

if it is exercising appellate jurisdiction. At this stage when only a preliminary, fact-finding inquiry has been conducted and there are sufficient material

to proceed against the applicant and as only an opinion is formed by the

Competent Authority to initiate disciplinary proceedings, we cannot meticulously analyse or scrutinise the evidence, at this stage, and after holding this to be a case of 'No Evidence', quash the proceedings. Various aspects of the evidence were read before us in support of this submission, however, in our considered view, we cannot and should not pre-empt taking of the action on the grounds canvassed. At this stage, we may take note of certain observations made by the Hon'ble Supreme Court in the case of Lt Colonel Dharamvir Singh's case (supra). Hon'ble Supreme Court in the said case, after taking note of the jurisdiction exercised by the Delhi High Court under Article 226 of the Constitution in the matter of quashing a disciplinary proceeding initiated under the Army Act, 1950, on the ground that the provisions of Army Rule 180 have been violated and there is no material on the basis of which disciplinary proceedings could be initiated. Delhi High Court accepted the contention of the petitioner and when the matter travelled to the Hon'ble Supreme Court, Hon'ble Court observed that an army officer, who is subject to the provisions of Army Act, 1950, has to abide by the statutory regulations framed thereunder. If the disciplinary proceeding is sought to be invoked, it is inappropriate for the High Court to take upon itself the task of pre-empting that jurisdiction and take-over to itself, the essential function of determining as to whether or not recourse to disciplinary jurisdiction should be undertaken, it has been held by the Court that this jurisdiction should be left to the Competent Authority and in the matter of exercise of jurisdiction by the High Court, following observations were made by the Honble Supreme Court:

The learned Single Judge should have exercised caution and ought to have been circumspect before he proceeded to stay an order of attachment. Such pre-emptive Judicial strikes are unwarranted. The course of action followed by the Single Judge has serious repercussions for the maintenance of discipline in the Army. Discipline is the essence of the organization and structure of an Armed Force." [Emphasis supplied]

20. In our considered view, if we apply the aforesaid principle to the facts and circumstances of the present case, we would have no iota of doubt that it is not a fit case where we should exercise our jurisdiction, convert ourselves into an appellate authority, evaluate the evidence and martial, thereafter

accept the contention of the applicant. At this stage, when only a prima facie view has been taken and a case of disciplinary inquiry by the department is made out, pre-empting the same by exercising jurisdiction by this Tribunal is not warranted.

21. As far as the allegation of malafide on the part of Respondent No. 6 is concerned, in our considered view, except for contending that the applicant and Respondent No. 6 are batch-mates, promoted to the rank of Brigadier on the same day and Respondent No. 6 has been instrumental in initiation of action against the applicant involving him only because he wanted to somehow stall the promotion of the applicant for his advantage, nothing cogent in nature based on which the aforesaid contention has been made is brought on record. Action has been taken by the GOC of the area concerned and based on the prima facie evidence collected in the Court of Inquiry, therefore, in the absence of there being any substantial material to prove malafides against Respondent No. 6, at this stage, we are not inclined to interfere into the matter on the basis of assumptions and presumptions canvassed by the applicant in this regard.

22. Finally, we may take note of the objections raised with regard to non-compliance with Army Rule 180. In this regard, Hon'ble Supreme Court has dealt with the issue, particularly the issue of Army Rule 180 in the conduct of Court of Inquiry. It has been observed by the Hon'ble Supreme Court in the case of Ex Sep Virendra Kumar (supra), that the proceedings of Court of Inquiry are in the nature of a fact-finding inquiry conducted at a preinvestigation stage and the accused is entitled to participate in the proceedings fully. Hon'ble Supreme Court has held that no final orders are passed based on such Court of Inquiry. Final order is passed on the basis of a trial conducted in a regular Court Martial and, therefore, irregularities at the earlier stage cannot be the basis for setting aside the orders passed by the Court Martial. It has been observed by the Hon'ble Supreme Court that when non-compliance with Army Rule 180 is raised by the accused during the framing of charge or during recording of Summary of Evidence, authorities have to rectify the defects and compliance of Army Rule 180 is obligatory. Facts of each case are to be evaluated based on non-compliance alleged and thereafter, a decision taken. Hon'ble Supreme Court in the aforesaid judgement in Para 9 took note of its earlier judgments

passed in the case of Prithi Pat Singh Bedi Vs. Union of India -(1982) 3 SCC 140 and in the case of Union of India Vs. Sanjay Jethi - (2012) 16 SCC

116 and in Paras 9, 10 and 11, discussed the principle in the following manner:

9. This Court had occasion to consider the scope of Rule 180 and it is necessary to take note of the judgments of this Court in which

Rule 180 was discussed. The orders by which General Court Martial was convened were challenged by petitions filed under Article 32 of the

Constitution of India in Lt. Col. Prithi Pal Singh Bedi v. Union of India & Ors. One of the contentions on behalf of the petitioners therein was

that it was obligatory upon the authorities to appoint a Court of Inquiry whenever an inquiry affects the character or military reputation of

the persons subject to the Act and, in such an inquiry full opportunity must be afforded to such person of being present throughout the

inquiry and making any statement or giving any evidence that he wishes to make and of cross-examining any witnesses. Interpreting Rule

180, this Court held that it cannot be construed to mean that whenever or wherever any inquiry in respect of any person who is subject to the

Act is conducted and his character or military reputation is likely to be affected, setting up of a Court of Inquiry is sine qua non. However,

this Court held as follows:

40 Rule 180 merely makes it obligatory that whenever a Court of enquiry is set up and in the course of enquiry by the Court of enquiry

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 enquiry. Court of enquiry by its very nature is likely to examine certain issues generally concerning a situation or

persons. Where collective fine is desired to be imposed, a Court of enquiry may generally examine the shortfall to ascertain how many

persons are responsible. In the course of such an enquiry 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 enquiry 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 enquiry 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.

10. This Court in Major G.S. Sodhi v. Union of India rejected the challenge to the Court Martial proceedings while dismissing the Writ

Petitions filed under Article 32 of the Constitution. The main grievance of the petitioners in that case was the violation of the procedure

prescribed in Rules 22 and 23 of the Army Rules. While recording a finding that there has been substantial compliance of Rules 22 and 23,

this Court has held that recording of evidence is only to find out whether there is a prima facie case to convene a court-martial. This Court

was of the opinion that the object and effect of the Rules should be considered in the context bearing in mind the general principle whether

such an incomplete compliance has caused any prejudice to the delinquent officer. However, it was held that if there is any violation of

mandatory rules, the benefit of the same should be given to the delinquent officer. The conclusion in that case was that there was no violation

of the Rules and in any event no prejudice was caused to the petitioners therein. In Union of India v. Major A. Hussain, this Court while

setting aside the judgment of the High Court of Andhra Pradesh upheld the order of conviction of the respondent by the Court Martial. While

dealing with the submissions made on Rule 180, this Court relying upon Inderjit Kumar v. Union of India held that proceedings before a

Court of Inquiry are not adversarial proceedings as the Court of Inquiry is in the nature of a fact-finding enquiry committee.

This Court was of the view that it is unnecessary to examine if pre-trial investigation is adequate or not when there is sufficient evidence to

sustain conviction by the Court Martial. It was further held that the requirement of proper and adequate investigation is not jurisdictional

and any violation thereof does not invalidate the Court Martial unless it is shown that the accused has been prejudiced or a mandatory

provision has been violated. As the Respondent therein participated in the recording of summary of evidence without raising any objection,

the submission regarding violation of principles of natural justice at an earlier stage was rejected by this Court.

11. In *Union of India v. Sanjay Jethi*, the question regarding the bias of members of the Court of Inquiry was decided in favour of the

delinquent officer. The interpretation by this Court of Rule 180 is as follows:

53. In a Col participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative.

The participation has to be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that

Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on Col. The rule provides for

procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a

position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action.

Thus understood, the language employed in Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities

to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most

importantly, nothing should take place behind his back. It is one thing to say that Col may not always be essential or sine qua non for

initiation of a court martial but another spectrum is that once the authority has exercised the power to hold such an inquiry and Col has

recommended for disciplinary action, then the recommendation of Col is subject to judicial review. While exercising the power of judicial

review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the rule, for the language

employed in the said rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it

to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the

touchstone of the factual matrix of each case.

And finally, in Para 12, the principles culled out from the judgments have been crystalised in the following manner:

12. A close scrutiny of the above judgments would indicate that:

(a) The proceedings of a Court of Inquiry are in the nature of a fact-finding inquiry conducted at a pre- investigation stage;

- (b) The accused is entitled to full opportunity as provided in Rule 180;
- (c) As a final order of conviction is on the basis of a trial by the Court Martial, Irregularities at the earlier stages cannot be the basis for setting aside the order passed by the Court Martial;
- (d) If the accused raises a ground of noncompliance of Rule 180 during the framing of charge or during the recording of summary of evidence, the authorities have to rectify the defect as compliance of the procedure prescribed in Rule 180 is obligatory.

23. If we analyse the case in hand in the backdrop of the aforesaid provisions and if we scrutinise the complaint of the applicant in this regard, we find

that the complaint of the applicant before us is two-fold. First contention of the applicant is that in the Court of Inquiry, the applicant was examined for

the first time as Witness No. 17 only on 17.02.2018 and before that he was never permitted to participate in the Court of Inquiry. However,

surprisingly, the applicant is silent with regard to what happened after he participated on 17.02.2018, except for saying that he requested to examine two

witnesses, which was not exceeded to. He does not say anything as to how the requirement of Army Rule 180 has been breached. As we have

already detailed hereinabove, the present Court of Inquiry was not a specific Court of Inquiry with regard to evaluating or investigating the conduct,

character and reputation or allegation of the commission and omission by a particular officer. It was a general Court of Inquiry to look into various

aspects of the matter and give its finding(s) and, therefore, if the applicant was not called at the initial stage but he was called as Witness No. 17, after

certain witnesses were examined, merely on that ground we cannot say that the proceedings of the Court of Inquiry stood vitiated. The applicant has

not brought on record any specific material to canvass as to how and in what manner, he says, that the Court of Inquiry was vitiated. In our

considered view, at this stage, based on the material that the applicant has produced before us in a pre-trial fact-finding inquiry i.e. at the stage of pre-

investigation, we see no reason to interfere into the matter. It is because these issues can be considered at a later stage when the applicant will get all

opportunities to canvass all the contentions. At this stage, on the ground of breach of Army Rule 180, as canvassed by the applicant, and in the

backdrop of the law laid down in Ex Sep Virendra Kumar's case (supra), we do

not deem it appropriate to interfere into the matter as specific

instances of breach of Army Rule 180 have not been pleaded or proved in the facts and circumstances of the present case.

24. That apart, merely because the request of the applicant to call for witnesses was not exceeded to, as pleaded in the application, we are not inclined

to interfere into the matter at this pre-investigation stage. Moreover, before concluding, we may also take note of an objection raised by the

respondents with regard to the conduct of the applicant in raising all these grounds much after the Court of Inquiry was concluded, and the reports

submitted and the act on the part of the applicant in challenging the Court of Inquiry only when the impugned Movement Order has been issued on

17.09.2020. Learned counsel for the respondents had argued that the applicant is aggrieved by the Movement Order and not by the proceedings of the

Court of Inquiry or the Tentative Charge-Sheet issued because if he was aggrieved by the same, he should have invoked the jurisdiction of this

Tribunal at an early date.

25. From the facts that have come on record, we find that the process of demonetisation took place between 09.11.2016 and 24.11.2016. Certain

inspections and proceedings were held in the matter and on receipt of the complaint after preliminary inspection of records etc. between January and

July, 2017, certain investigations were going from 12.02.2017 upto October, 2017. When the Staff Court of Inquiry was convened by the HQ Delhi

HQ Area on 25.10.2017, the same was held between 09.11.2017 and 30.05.2018. Thereafter, on 16.07.2019, based on the proceedings of Court of

Inquiry, the applicant was attached to HQ 9 Infantry (Meerut) by an Attachment Order passed for the purpose of taking disciplinary action against

him. This would be the first day when the applicant came to know that disciplinary action may be initiated against him. He did not challenge the Court

of Inquiry at that stage of attachment for the purpose of taking disciplinary action. Thereafter, between 09.10.2019 and 11.10.2019, Hearing of

Charges under Army Rule 22 was held and the applicant was issued Tentative Charge-Sheet putting out allegations against him.

26. The applicant did not challenge the proceedings in October, 2019, except that he requested for providing the grounds on which Tentative Charge-

Sheet was issued. Thereafter, Summary of Evidence was recorded from

5.12.2019 to 25.02.2020. At this stage also, the applicant did not challenge the action. It was only after seven months on 17.09.2020, when the impugned Movement Order was issued sending back the applicant to his Parent Unit, when he invoked the jurisdiction of this Tribunal on 19.10.2020 by filing the present petition.

27. Learned counsel for the respondents, by referring to these dates, had pointed out that the act of the applicant in challenging the action in the manner, as is done, is nothing but an act of pre-empt the proceedings only because now he has been attached. It is stated that on this ground also, interference into the matter by this Tribunal is not called for. We do find some force in the above contention also. However, for the reasons already recorded hereinabove by us, we are of the considered view, in the facts and circumstances of the case, no indulgence into the matter by this Tribunal at this stage of the proceedings is called for.

28. We may clarify that all the evaluations done, reasons recorded and the analyses of arguments made by us are only prima facie assessment done by us and they are not final or conclusive in any manner whatsoever. It has been done only to evaluate as to whether interference at this preliminary stage in the matter is called for.

29. That being so, we direct that all the grounds raised by the applicant in this application are open and can be considered, at an appropriate stage, if required in the matter of ventilating his grievances in future and the finding recorded in this order will not adversely affect the applicant nor will it cause any prejudice to the applicant as we have recorded the finding only to satisfy ourselves in the matter of invoking our jurisdiction at the admission stage only.

30. In view of the above, we dispose of the matter at this stage leaving all the questions open to be considered at a future date, if so required.