

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**COURT NO. 1 (List A)****T.A. No. 1451 of 2010****Wednesday, this the 18th day of January, 2017****"Hon'ble Mr. Justice D.P.Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"**

No. 15466885A Ex Lance Dafedar Anil Kumar Son of Sri
 Nawal Singh Resident of Village Sadharansar PO : Nangal
 District: Saharanpur (UP) **Petitioner**

Versus

1. Union of India Through Secretary Ministry of Defence
New Delhi -110011
2. Chief of the Army Staff Through Additional Adjutant
General (DV) South Block New Delhi - 110011
3. Officer in Charge Records Armoured Corps
Ahmadnagar, (Maharashtra).**Respondents**

**Ld. Counsel appeared
For the Petitioner****- Col(Retd) Ashok Kumar
& Shri Rohit Kumar
Advocate****Ld. Counsel appeared
for the Respondents****- Dr. Shesh Narain Pandey,
Sr.Central Govt. Counsel.**

Order (Oral)

1. The Petitioner had initially filed O.A before the Principal Bench, Armed Forces Tribunal, at Delhi being aggrieved by the order of dismissal from service dated in pursuance of Court Martial Proceedings wherefrom it was transferred for being heard to this Tribunal. On receipt in this Tribunal, the Application was registered as T.A. No 1451 of 2010.

2. The facts of the case in nut-shell are that the Petitioner was enrolled in the regular Army on 28.12.1994 and served the Army as such for 13 years, nine months and 10 days. In the course of service while posted at Hisar, he was charged for offences under Army Act 69 read with Section 354 of the I.P.C. The charges were framed on 22.09.2008 which being relevant are quoted below.

" 1. Intoxication

In that he, at 1200 hrs on 22 Mar 2008, while on magazine guard as guard commander duty was intoxicated.

2. Absented himself without leave

In that he, at magazine guard, as guard commander, absented himself form place of

duty without leave from 1230 hrs on 22 Mar 2008 to 1530 hrs on 22 Mar 2008.

3. An Act Prejudicial to Good Order and Military Discipline

In that he, at approx 1300 hrs on 22 Mar 2008 visited family quarters of 46 Armed Regt when orders were passed that no individual staying in the lines will visit the family quarters without prior permission.

4. Committing a civil offence that is to say using criminal force to a woman with intent to outrage her modesty contrary to section 354 of the Indian Penal Code.

In that he, at Quarter no)-52/13 at Blue Bull Complex in Hisar Cantt on 22 Mar 2008 at approx 1300 hrs used criminal force on Mrs Meera Kumari wife of No 15476390F ALD Subodh Kumar of 46 Armed Regt, by squeezing her breast and kissing her on both cheeks, neck and lips, with intent to outrage her modesty."

3. As a result of Court of Inquiry, the Petitioner was visited with the following punishments.

"(a) to be reduced from Lance Dafedar to Sepoy.

(b) to suffer two moths RI in civil prison,

(c) to be dismissed from service."

4. We have heard learned counsel for the Petitioner as also learned counsel for the respondents assisted by OIC Legal Cell.

5. The controversy involved in this case lends itself to disposal on short question of law and therefore, we refrain from entering into the merits of the case on other aspects.

6. The crux of submission advanced by learned counsel for the Petitioner is that the Court of Inquiry was conducted in the absence of the Petitioner except on one occasion, when his statement was recorded and it is thereafter that the finding was recorded by the Presiding officer. The above are the facts on which is founded the Court of Inquiry. In the above context, it is submitted by learned counsel for the Petitioner that the court of Inquiry was held in utter violation of Rule 180 of the Army Rule, 1954. Rule 180 of the Army Rule 1954 being relevant is reproduced below for ready reference.

"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 produced any witnesses in defence of 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."

7. A perusal of the proceeding of Court of Inquiry on record crystallises that the witnesses were examined by the presiding officer of Court of Inquiry but it does not seem that at the time of recording of statements of the witnesses, the Petitioner was present or was afforded opportunity to cross examine any of the witnesses. The fact finds reinforcement from the statements of the witnesses which do not bear signatures of the Petitioner. If it is so, it constitutes a serious defect in the conduct of Court of Inquiry. It finds support from a catena of decisions of the Apex Court including the case of **Lt Col Prithi Pal Singh Bedi and Ors vs Union of India and Ors reported in AIR 1982 SC 1413**. Para 45 in so far as it is relevant is abstracted below.

"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. But it cannot be used to say that whenever in any other inquiry or an inquiry before a commanding officer under rule 22 or a convening officer under rule 37 of the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior inquiry by the court of inquiry is sine qua non. Therefore, the contention being without merits must be negatived.

8. The other cases relied upon by learned counsel for the respondents are **AIR 1996 MP 233 and 2014 (1) SCJ 28**. We have gone through the judgments of the above cases which also echo the law laid down by the Apex Court in **Lt Col Prithi Pal Singh Bedi Vs Union of India** (supra).

9. Reverting to the facts of the case, the pleadings contained in Para 3 of the T.A have not been replied either in affirmation or denial in Para 5 of the counter affidavit. The only reply given by the deponent of the counter affidavit is to the effect that "**It is a matter of record.**" The reply given is laconic and evasive and constrains us to observe that such evasive reply seems to be not permissible and fair on the part of the respondents. They should have come up with specific

reply keeping in view the averments contained in the T.A. The entire record was in possession of the respondents and they should have given specific reply. We feel called to say that procedure under the Armed Forces Tribunal is that the cases are decided like summary proceeding and adjudication is done on the basis of affidavits exchanged between the parties. The respondents have not come forward with specific reply vis a vis the specific pleadings made in Para 3 of the T.A. It is an attempt perilously close to an attempt of concealing the material facts while filing reply. The counsel for the respondents or for matter of that, the OIC Legal Cell who assist the counsel for the respondents are also officers of the Court and ought to have come with clean hands or else it may lead the Court to draw an adverse inference.

10. As a result of foregoing discussion, we have no alternative but to infer that the procedure contained in Rule 180 of the Army Rules 1954 has not been observed in compliance while conducting Court of Inquiry and thus, the O.A is liable to be allowed.

11. In the above conspectus, the T.A is allowed and the impugned SCM dated 06.10.2008 and order 20.08.2009 dismissing the Petitioner from service are

set aside studded with all consequential benefits. In case, the Petitioner has still left with some period to serve in the Army, he shall be reinstated in service with continuity attended with other consequential benefits. However, looking to the serious nature of allegations, we are not inclined to grant any back-wages for the period of eight years, he was out of service. Needless to say, the Petitioner shall be entitled to full Pensionary benefits upon completion of service in the Army.

(Air Marshal Anil Chopra)

(Justice D.P. Singh)

Member (A)

Member (J)

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