

**Court No.1**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW**

**Transferred Application No. 149 of 2010**

Wednesday, this the 25<sup>th</sup> day of January 2017

**Hon'ble Mr. Justice D.P. Singh, Member (J)**

**Hon'ble Air Marshal Anil Chopra, Member (A)**

Ex No 3192684-W Sep Virendra Kumar S/o Sri Jiley Singh, resident of Vill-Nanu Fatehpur, P.O.-Rasoolpur, District-Meerut (currently lodged in District Jail Meerut) Since shifted to Central Jail Agra.

.....Petitioner

Ld. Counsel for the : **Shri Rohit Kumar, Advocate**  
Petitioner

Versus

1. Union of India, Through, Secretary, Ministry of Defence, South Block, New Delhi.
2. The Chief of the Army Staff, New Delhi-110011.
3. The Commanding Officer, JAT Regimental Centre, Bareilly.
4. The Superintendent, Central Jail, Agra.

...Respondents

Ld. Counsel for the : **Shri G.S. Sikarwar, Central**  
Respondents. **Govt Counsel assisted by**  
**Maj Soma John, OIC, Legal Cell.**

**ORDER (ORAL)**

1. Being aggrieved with the impugned order of dismissal from service on account of General Court Martial dated 16.03.2006 and order dated 16.03.2007 of Chief of the Army Staff rejecting the statutory complaint preferred by the petitioner, the petitioner had filed Civil Writ Petition No 58623 of 2007 in the High Court of Judicature at Allahabad which has been transferred to this Tribunal in pursuance to Section 34 of Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 149 of 2010.
2. We have heard Shri Rohit Kumar, Ld. Counsel for the petitioner and Shri G.S. Sikarwar, Ld. Counsel for the respondents assisted by Maj Soma John, OIC Legal Cell and perused the records.
3. Brief facts borne out from the record and arguments advanced by Ld. Counsel for the parties are that the petitioner was enrolled in the Indian Army as Soldier in JAT Regiment. It is submitted that on 02.10.2004 during Annual Range Classification of JRC Rifle Range Bareilly, firing took place in which one Hav Harpal Singh succumbed to bullet injuries. It is submitted by Ld. Counsel for the petitioner that the petitioner also suffered bullet injury and was provided treatment in hospital. However allegation was raised against the petitioner that he is guilty of culpable homicide not amounting to murder

and through General Court Martial (GCM) he was punished for life imprisonment.

4. On the other hand Shri G.S. Sikarwar, Ld. Counsel for the respondents submitted that the petitioner had killed Hav Harpal Singh and later on attempted to commit suicide.

5. With regard to these allegations the charges were framed and after GCM proceeding in accordance with rules the petitioner was sentenced to life imprisonment.

6. A perusal of petition shows that a number of grounds have been taken by the petitioner which have been argued by Ld. Counsel for the petitioner against conviction and sentence through GCM proceedings. The petitioner preferred statutory petition under Section 164 (2) of the Army Act, 1950 which was rejected by Chief of the Army Staff. Submission is that rejection order of statutory complaint by Chief of the Army Staff is a cryptic order and not sustainable in law. Further argument of Ld. Counsel for the petitioner is that Rule 180 of the Army Rules, 1954 has not been followed hence entire trial vitiates.

7. Since the controversy in question may be decided on the sole ground of non compliance of Army Rule 180 (Supra) we are not dwelling on other grounds in terms of pleading on record.

8. Shri G.S. Sikarwar, Ld. Counsel for the respondents relied upon certificate contained in the Court of Inquiry and pointed out that Rule 180 of Army Rules 1954 was followed. For convenience sake, the certificate is reproduced as under:-

**“PROVISIONS OF AR-180 INVOKED**

1. *Provision of AR-180 has been invoked and explained to No 3192684W Sep Virender Kumar. Statement of witness No 1 to 17 and witness No 19 to 21 has been read out to him and he has been given opportunity to cross-examine any of the above witness.*
2. *However No 3192684W Sep Virender Kumar declines to cross-examine any witness.*
3. *He is given further opportunity of making any additional statement.*
4. *He declines to make any additional statements.*
5. *He is given opportunity to call any defence witness.*
6. *He declines to call any defence witness.*

*Sd/- x x  
(No 3192684W  
Sep Virender Kumar)”*

9. A bare reading of the aforesaid certificate shows that statement of 19 witnesses were recorded and thereafter the statements of witness Nos 19 to 21 were read out to the petitioner with opportunity to cross-examine those witnesses.

10. Rule 180 of the Army Rules, 1954 does not provide only opportunity to cross-examine few witnesses by reading out their statements; rather it wide enough providing that the charged accused shall be permitted to remain present during entire proceeding and after recording statements of witnesses, he/she shall be permitted to cross-examine the witnesses. For convenience sake, Rule 180 of Army the Army Rules, 1954 is reproduced as under:-

**“180. Procedure when character of a person subject to the Act is involved.—** Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule.”

11. In the present case there appears no room of doubt that the petitioner’s reputation and conduct was very well involved, hence he was entitled to remain present during course of Court of Inquiry and denial of such presence with opportunity to cross-examine the witnesses whenever recorded vitiates the trial in view of law settled by Hon’ble Supreme Court in the Apex Court decisions of:

- (i) (1997) 9 SCC 1, **Major Gen Inder Jit Kumar vs. Union of India and others;**
- (ii) (2001) 5 SCC 593, **Union of India and others vs. Harjeet Singh Sandhu,** and
- (iii) AIR 1982 SC 1413, **Lt Col Prithi Pal Singh Bedi vs. Union of India and others.**

12 In the case of **Lt Col Prithi Pal Singh Bedi** (supra), their Lordships of the Apex Court have held:

*“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 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 negated.”*

13. In view of settled proposition of law (supra), on account of non-compliance of provision of Rule 180 (supra), the whole trial vitiates. Needless to say that Court of Inquiry is a fact finding inquiry, but under Rule 182 of Army Rules, 1954, it may be used to contradict statement in the light of power conferred by Section

45 of the Evidence Act. For convenience sake, Rule 182 of Army Rules, 1954 is reproduced below:

***“182. Proceeding of court of inquiry not admissible in evidence.— The proceedings of a court of inquiry, or any confession, statement, or answer to a question, made or given at a court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for willfully giving false evidence before that court;***

*Provided that nothing in this rule shall prevent the proceeding from being used by the prosecution or the defence for the purpose of cross-examining any witness.”*

14. Under the proviso contained in Rule 182 (supra), statements recorded during course of Court of Inquiry may be used for the purpose of cross-examining any of the witness, i.e. to contradict the statement recorded during Court Martial proceedings, all subsequent proceedings vitiate on account of non-compliance of statutory mandate contained in Rule 180 (supra).

15. Ld. Counsel for the respondents assisted by OIC Legal Cell submits that since controversy relates to culpable homicide not amounting to murder of own colleague by petitioner, it shall be appropriate that the Tribunal may permit for re-trial of the controversy in question. The provision contained in Section 16 of the Armed Forces Tribunal Act, 2007 (in short, AFT Act, 2007) deals with powers of the Tribunal to direct for re-trial. Though subsection (1) of Section 16 of the AFT Act, 2007 provides that a

person acquitted by the Tribunal shall not be liable for re-trial for that offence by Court Martial or by any other Court, but subsection (2) empowers the Tribunal, for reasons to be recorded, to direct for re-trial for the ends of justice. For convenience sake, Section 16 of the AFT Act, 2007 is reproduced as under:

**“16. Re-Trial.-** (1) *Except as provided by this Act, where the conviction of a person by court-martial for an offence has been quashed, he shall not be liable to be tried again for that offence by a court-martial or by any other Court.*

(2) *The Tribunal shall have the power of quashing a conviction, to make an order authorizing the appellant to be retried by court-martial, but shall only exercise this power when the appeal against conviction is allowed by reasons only of evidence received or available to be received by the Tribunal under this Act and it appears to the Tribunal that the interest of justice require that an order under this section should be made:*

*Provided that an appellant shall not be retired under this section for an offence other than-*

- (a) *the offence for which he was convicted by the original court-martial and in respect of which his appeal is allowed;*
- (b) *any offence for which he could have been convicted at the original court-martial on a charge of the first-mentioned offence;*
- (c) *any offence charged in the alternative in respect of which the court-martial recorded no finding in consequence of convicting him of the first-mentioned offence.*

(3) *A person who is to be retired under this section for an offence shall, if the Tribunal or the Supreme Court so directs, whether or not such person is being tried or retried on one or more of the original charges, no fresh investigation or other action shall be taken under the relevant provision of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), as the case may be, or rules and regulations made thereunder, in*

*relation to the said charge or charges on which he is to be retried”.*

16. In the present case, merely on technical grounds, i.e. on account of flaw in the Court of Inquiry proceeding on account of non-compliance of Rule 180 (supra), the Transferred Petition has been allowed. Since Court of Inquiry goes to the root of the matter, no further hearing is required. So far as setting aside the impugned order is concerned, clause (b) of sub-section (2) of Section 16 of the AFT Act, 2007 provides that for any offence for which accused could have been convicted at the original Court Martial proceeding, it may be a ground to remand the matter for re-trial.

17. Ld. Counsel for the respondents argued that even if Rule 180 of Army Rules, 1954 has not been complied with, since Rule 22 of the Army Rules, 1954 has been followed, it shall not vitiate the trial, but we are of the view that in view of Apex Court judgments, which are binding under Article 141 of the Constitution of India, such arguments are not sustainable.

18. Keeping the factual matrix on record that the petitioner has been charged for broad day light culpable homicide not amounting to murder of his own colleague (supra), it shall not be appropriate to set him free without completing lawful trial merely on technical ground, i.e. defect in the Court of Inquiry. Court of Inquiry is the beginning of the trial and the evidence recorded during Summery of Evidence and General Court Martial could not come for

appreciation of the Tribunal only because of technical flaw. The ends of justice require that the trial should proceed de novo from the stage of Court of Inquiry so as to secure the ends of justice.

19. In view of above, it is a fit case where exceptional power conferred on the Tribunal by Section 16 of the AFT Act, 2007 may be exercised and the matter may be remanded for re-trial in accordance with rules.

20. Accordingly, Transferred Petition deserves to be allowed with all consequential benefits. So far as payment of arrears of salary is concerned, it shall not be paid and will be subject to outcome of the result of findings recorded after re-trial. However, the petitioner shall be restored in service.

21. The Transferred Petition is accordingly **allowed**. Impugned orders dated 16.03.2006 and 16.03.2007 are hereby set aside with all consequential benefits, but without back wages payment of which shall be subject to outcome of re-trial.

22. The petitioner shall be released from jail forthwith.

23. Let the re-trial be concluded within a period of six months in accordance with rules. Meanwhile the petitioner shall be restored in service forthwith.

No order as to costs.

Copy of the order be supplied to Ld. Counsel for the parties on payment of usual charges within three days.

**(Air Marshal Anil Chopra)**  
**Member (A)**

anb

**(Justice D.P. Singh)**  
**Member (J)**

