

**IN THE HIGH COURT OF DELHI AT NEW DELHI****Judgment delivered on: May 28, 2024**

+ W.P.(C) 7541/2023 &amp; CM APPL. 29232/2023

COL. SANDEEP SHARMA

..... Petitioner

Through: Mr. K. C. Mittal and  
Mr. Keshav Poonia, Advs.

versus

UNION OF INDIA &amp; ORS.

..... Respondents

Through: Mr. Harish Vaidyanathan Shankar,  
CGSC with Mr. Srish Kumar Mishra,  
Mr. Alexader Mathai Paikaday,  
Mr. Lakshay Gunawat and  
Mr. Krishnan V., Advs. with  
Major Partho Katyayan**CORAM:****HON'BLE MR. JUSTICE V. KAMESWAR RAO****HON'BLE MR. JUSTICE AMIT BANSAL****J U D G M E N T****V. KAMESWAR RAO, J**

1. This petition has been filed by the petitioner challenging the order dated April 6, 2023 passed by Armed Forces Tribunal ('AFT', for short), Principal Bench, New Delhi in OA No 2864/2021, wherein, in the operative paragraphs it has been held as under:

*"15. The applicant has prayed that the impugned show cause notice, censure order and the letter not granting age waiver to be placed in command criteria appointment be quashed and that the requirement of mandatory 'criteria reports' for*



*consideration for promotion by No 2SB be waived off. Having heard both parties at length, the only issue that is required to adjudicated is whether the Respondents were justified in awarding the censure of 'Displeasure', and denying age waiver for command of an infantry battalion.*

*16. The impugned Censure Order at Annexure A-2 is reproduced below:-*

**CENSURE ORDER OF GENERAL OFFICER  
COMMANDING, 21 CORPS FOR ADMINISTRATIVE  
ACTION IN RESPECT OF IC-53411A COLONEL  
SANDEEP SHARMA, ADDITIONAL OFFICER,  
STATION HEADQUARTERS, JHANSI**

*1. WHEREAS, I have dispassionately considered the reply dated 28 January 2020, submitted by IC-53411A Colonel Sandeep Sharma, Additional Officer, Station Headquarters, Jhansi to the Show Cause Notice dated 10 January 2020, in light of the Summary of Evidence, Court of Inquiry and recommendations of Commanders-in-chain.*

*2. WHEREAS, a Court of Inquiry was convened vide Strategic Forces Command Convening Order dated 22 May 2013, primarily to investigate into the circumstances under which Colonel Sandeep Sharma was involved in irregular acts as alleged by IC-55622F Lieutenant Colonel Sudhish Chander. Subsequently, the said Court of Inquiry was re-assembled vide Convening Order dated 06 June 2014 for compliance of Army Rule 180 in respect of witnesses other than Colonel Sandeep Sharma. Thereafter, the Court of Inquiry proceedings were placed before Commander-in-Chief Strategic Forces Command, who cancelled his earlier directions dated 27 September 2013, issued fresh directions dated 31 August 2014 and ordered Disciplinary Action against the Officer. Accordingly, disciplinary proceedings were initiated, with the recording of Summary of Evidence and Additional Summary of Evidence, whereafter it was directed that the Officer be tried by General Court Martial. However, by the time*



*the recording of Summary of Evidence and Additional Summary of Evidence was completed, the case became time barred under the provisions of Army Act 1950 Section 122. Considering the involvement of Officer in acts pertaining to gross financial irregularities and moral turpitude, it was considered that a case be processed for administrative termination of the Officer's service under provisions of Army Act 1950 Section 19 read with Army Rule 14.*

*3. WHEREAS, Headquarters Southern Command, vide their letter Number D/2482956/DV-2 dated 14 October 2019 Informed that the evidence adduced in the Summary of Evidence and Additional Summary of Evidence does not merit Administrative Termination of service of the Officer for the following reasons;*

*(a) There is no evidence on record which shows that the Officer used more than the authorised railway warrants. No witness or evidence proves that the order to prepare the warrant was given by Colonel Sandeep Sharma and the tickets exchanged for these warrants were used by the Officer.*

*(b) it could not be established that railway warrants issued on fictitious name of Naib Subedar Sandeep Singh were issued at the behest of Colonel Sandeep Sharma or any other person.*

*4. WHEREAS, Headquarters Southern Command vide their letter dated 14 October 2019 directed that suitable Administrative Action be taken against the Officer for the following lapses :-*

*(a) Claiming a sum of Rs 25,700/- (Rupees twenty five thousand seven hundred only) vide Headquarters 71 Task Force letter number 2043/71TF/Accts/ dated 29 September 2012 for temporary duty to Gwalior.*

*(b) Claiming a sum of Rs 18,559/- (Rupees eighteen thousand five hundred fifty nine only) vide Headquarters 71 Task Force letter number 2043/71 TF/Accts/ dated 29 September 2012 for temporary*



*duty to Delhi.*

*(c) Not maintaining correct records with respect to issue of Railway Warrants.*

5. *WHEREAS; a Show Cause Notice dated 10 January 2020 with regard to initiation of administrative action in form of suitable censure for ibid lapses was served upon the Officer. The Officer, in his reply dated 28 January 2020 to the ibid Show Cause Notice, has contended the following:*

*(a) On the matter of the Officers claim of Rs 25,700/- (Rupees twenty five thousand seven hundred only) pertaining to his Temporary Duty to Gwalior, the Officer has brought out that he did not stay in Hotel Sukh Sagar, did not produce any bill for the same and also did not forward any claim for the said bill to PDA (O Pune. The Officer has highlighted that the said bill does not even bear his signatures. On the contrary, it has been emphasised by the Officer that he stayed in Hotel Shelter from 11 August 2012 to 14 August 2012 and has produced photocopy of the bill along with a verification letter from Hotel Shelter endorsing his stay in Hotel Shelter during the said period.*

*(b) On the matter of the Officer forwarding a false claim Rs 18,559/- (Rupees eighteen thousand five hundred fifty only) in respect of his stay in Hotel City Lite, Delhi from 18 July 2012 to 19 July 2012 the Officer has brought out that he made formal entry and had breakfast at Officers Club LOAR, New Delhi and then proceeded to check-in at Hotel City Lite due to unavailability of accommodation at Officers Club LOAR, New Delhi for two days. The Officer has also submitted verification of his stay at the Hotel City Lite as provided by the Hotel authorities.*

*(c) With respect to not maintaining correct records of Railway Warrants, the Officer has brought out that all due procedures were being followed and all*



*checks and balances were in place including regular audits. The Officer has however, accepted his moral responsibility as a Commanding Officer for the wrong/misuse being done at unit level. The Officer has contended that he was being framed by Lieutenant Colonel Sudhish-Chander and has requested competent authority to award right quantum of punishment for being morally wrong.*

*6. WHEREAS; it is evident from the proceedings of the Court of Inquiry that the Officer signed for the claim for Hotel Sukh Sagar and also accepted signing the claim for Hotel Sukh Sagar, but asserted the subject bill to be a 'fraudulent bill\*. Furthermore/ a bill of Rs 6,670/- (Rupees six thousand seventy only) of Air Force Mess, Gwalior for the period 11 August 2012 to 13 August 2012 on the Officer's name has been found on record depicting charges for 'Messing', 'Extra Messing' and 'Accommodation'. JC-351294A Subedar (Regimental Survey Technical) NG Kamblekar who was performing duties of Senior Junior Commission Officer, Gwalior Detachment during said period has also brought out during the Summary of Evidence that the said guest room*

*at Air Force Mess was booked for the Officer. The Junior Commission*

*Officer received the Officer at Air Force Guest Room on 11 August 2012 and the Officer stayed in the Guest Room till 13 August 2012. The mess bill and testimony of witness in the Summary of Evidence establishes that the Officer stayed in Air Force Mess/ Gwalior and for which a false claim was preferred*

*7. WHEREAS, the bills for the stay in Officers' Club LOAR, New Delhi for the period 18 to 19 July 2012 along with the entry made in arrival register of the Officers' Club LOAR/ duly authenticated by the Officer suggests that the Officer stayed in the Officers' Club LOAR for the said period and moved out only on 19 July 2012. However/ the entry made in the register of Hotel*



*City Ute reveals that the Officer stayed there from 18 to 21 July 2012. Considering the reply of the Officer and consistency of his statement that he made an entry at Officers 1 Club LOAR/ had breakfast there and proceeded to Hotel City Ute due to non-availability of accommodation for the desired duration/ in my opinion to be just and fair, the benefit of doubt be given to the Officer in respect of the temporary duty claim to New Delhi.*

*8. WHEREAS, not maintaining correct records with respect to issue of Railway Warrants as Commanding Officer 71 Task Force/ resulted in unaccounted warrant forms during the Officer's command. It has been categorically brought out in the Summary of Evidence that the Officer had neither tiled nor signed the requisition slips for the said warrants and it could also not be established whether the Officer used these warrants for himself and his family. It is however, emphasised that the Officer, as a Commanding Officer, was morally responsible for safe keeping/ correct accounting and lawful utilisation of the warrant forms.*

*9. AND WHEREAS, considering the unblemished long service of the Officer for more than twenty years, the facts related to the temporary duties to Gwalior and New Delhi and the fact that the Officer has accepted his moral responsibility as a Commanding Officer, in my considered view, award of censure in the form of 'Displeasure to the Officer would meet the ends of Justice.*

*10. NOW I THEREFORE direct that censure in the form of Displeasure be conveyed to JC-53411 Colonel Sandeep Sharma, Additional Officer, Station Headquarters, Jhansi for the above mentioned lapses.*

*17. A fine reading of the Censure Order establishes the following:-*

*(a) The Col was convened to investigate the irregularities indulged in by the applicant as alleged by Lt Col Sudhish Chander of the same unit. The Col had to be reassembled for*



*compliance of the statutory provisions of Army Rule 180 with respect to witnesses other than the applicant. Thereafter, the Col was placed before the C-in-C Strategic Forces Command, who then cancelled his earlier directions and issued fresh directions and ordered disciplinary action against the applicant. Disciplinary proceedings were thereafter initiated and by the time the Summary of Evidence (SoE) and additional SoE was completed, the case became time barred as per provisions of AA Sec 122. However, considering the acts of gross financial irregularities and moral turpitude, it was then considered that the case be initiated for the administrative termination of the service of the applicant.*

*(b) HQ Southern Command which dealt with the case concluded that based on the evidence adduced in the SoE and additional SoE, the case did not warrant administrative termination of service and that ends of justice would be met if appropriate administrative action was taken against the applicant for the lapses for making fraudulent temp duty claims for temp duties carried out to Gwalior and Delhi, and for not maintaining correct records with respect to issue of railway warrants in the unit.*

*(c) Accordingly, the impugned SCN dated 10.01.2020 (Annexure A-1) was issued to the applicant. In reply to the SCN, the applicant had given his reasons as mentioned at Para 5 of the Censure Order reproduced above.*

*(d) Based on the explanation provided by the applicant in his reply, the competent authority found the applicant's explanation to be just and fair regarding the temp duty to Delhi and the resultant claim, and thus gave the applicant the benefit of doubt. However, examination of the issue pertaining to the temp duty at Gwalior and resultant claim, the competent authority concluded that the testimony of the witnesses in the SoE clearly established that the applicant had stayed in Air Force Mess Gwalior and had preferred false a claim for staying in a hotel, and therefore held the applicant blame worthy. As regards lack of maintaining correct record of use of railway warrants, resulting in*



*unaccounted warrant forms during the period of command of the applicant, it had been established by the SoE that neither did the applicant file or initiate any requisition slips, nor could it be established whether the applicant had used these warrants for himself and family. However, since the applicant was the CO of the unit, he was held being morally responsible for the safe keeping, correct accounting and lawful utilisation of the warrant forms.*

*(e) Thus, considering the unblemished long service of the applicant, the facts related to the temp duty claims and since the applicant had accepted moral responsibility for the lapses regarding the warrant forms, the competent authority concluded that award of a censure in the form of a 'Displeasure ' would meet the ends of justice.*

*18. Although the applicant has not impugned the CoI/ Additional CoI of the SoE/ Additional SoE, the relevant issues pertaining to the allegations, their investigation and final conclusion are clear from the impugned censure order. We therefore find that the lapses on the part of he applicant have been correctly established, specially in making a fraudulent temp duty claim whilst at Gwalior and also for not ensuring the correct accounting and use of railway warrant forms, the property of the Govt entrusted to his care. The competent authority has also considered the complete evidence adduced in the investigation, the applicant's reply to the SCN and has given the benefit of doubt to the applicant where required. Thus, we have no hesitation in concluding that the investigation of the allegation, and the subsequent administrative action in awarding a censure in the form of a 'Displeasure' by GOC 21 Corps is justified and has no mala fides. We therefore see no reason to interfere in this matter.*

*19. As regards not being granted age waiver and seeking waiver of criteria reports, we uphold the provisions of Para 5 of the policy letter dated 03.12.2010 (Annexure A-18) which stipulates that the upper age of consideration for command in Col's rank will be 44/46 years in Arms/ Services respectively and that in no case shall the age of the officer exceed 46/48 years at the time of physically assuming*



*command. The policy letter also states that waiver to these stipulations of age may be granted by the COAS on a case to case basis on the merits of the case. We find much force in the arguments of the Respondents that the applicant had reached the prescribed upper limit of age in 2017 itself, and that age waiver was not granted due to the impending disciplinary proceedings. We therefore, uphold the action of the Respondents, in not granting age waiver given the circumstances of the case. We also certainly do not find any merit what so ever in the prayer of the applicant that command criteria report waiver be granted for consideration by the Selection Board, since the complete quantified selection process is based on the performance of the officer in the reckonable period which includes substantial weightage to reports earned in criteria appointments. Relevant extracts of MS Branch Policy letter 04502/MS Policy dated 04.01.2011 'CONDUCT OF ELECTION BOARDS BY QUANTIFICATION SYSTEM' are reproduced below :-*

*CR Profile*

*4. The allocation of marks for CR profile is based on the following*

*considerations:-*

*(a) Primacy of CR. Primacy of the CR vis-a-vis other criteria like performance on courses/ honours and awards has been maintained.*

*(b) Comd vis-a-vis other CRs. Greater weightage has been given for Command / Criteria Appts as compared to Staff / Instructional / Extra Regimental Employment. While ensuring greater weightage to criteria reports/ a minimum of 50% of the total weightage for the CRs is allotted to criteria reports earned in present rank.*

*(c) to (e) xxxx*

*Distribution of Marks*



Type of CR	No 3	No 2	No 1 SB	SSB
		SB		
Criteria (Maj / Lt Col)	50	15	-	-
Staff / Instr / Others (Maj / Lt Col)	39	07	-	-
Criteria (Col)	,	45	19	
Staff / Instr / Others (Cols)	-	23	08	02
Criteria (Brig)	-	-	' 46	20
Staff / Instr / Others (Brig)	..	-	18	
Criteria (Maj Gen)				
Others (Maj Gen)		-	-	14
CR Total	89	90	91	92
Courses	04	03	02	01
Honours & Awards (Gallantry Awards only)	02	02	02	02
Quantified Total	95	95	95	95
Value Judgement	05	05	05	05
Grand Total	100	100	100	100

20. We however, take serious note of the fact that the case at hand, which commenced in 2012 was concluded only in 2020, having taken eight long years. We have noticed similar delay in many other cases and therefore direct the Respondents to ensure that the investigation and conduct of disciplinary/ administrative action in such cases are completed expeditiously, and necessary directions are issued once again for expeditious completion of investigation and disciplinary/administrative actions.

21. In view of the above considerations, the OA is dismissed.

22. We direct the Respondents to ensure that the investigation and conduct of disciplinary/ administrative action in such cases are completed expeditiously, and necessary directions are issued once again for expeditious completion of investigation and disciplinary/ administrative actions. This Order be placed before Respondent Nos. 1 and 2 for their attention and necessary action in this regard.

Pronounced in open Court on this 6<sup>th</sup> day of April, 2023.”



2. The facts which can be noted from the record are that the petitioner was commissioned in 1994 into Jammu and Kashmir Rifles ('JKR', for short). He served in various sectors and held challenging appointments including an assignment in a UN Mission. It is stated that in 2010, the petitioner was supposed to assume command of 3 JKR, however, he could not do so, as he was placed in Low Medical Category ('LMC', for short). Thereafter, he was nominated to command '71 Taskforce' ('71 TF', for short), a special unit.

3. It was the case of the petitioner before the AFT that while officers are selected to command TF units on completion of the regular command of a unit, in the petitioner's case, despite he was in LMC and was yet to command a regular infantry battalion, he accepted the challenging assignment. Subsequently, the petitioner was cleared for command by Special Review Medical Board ('SRMB', for short) held on October 12, 2012.

4. It was further stated that in the year 2012 /2013, the petitioner had to face a Court of Inquiry ('COI', for short) due to certain allegations made by another officer of the 71 TF. On completion of the command of 71 TF, the petitioner was posted to SHQ, Jhansi instead of being appointed to command an infantry battalion. Thereafter, the COI re-assembled in 2014 – 2015 and in 2015 the petitioner was attached for disciplinary proceedings. The disciplinary proceedings continued from October, 2015 to July, 2017. During the ongoing and inconclusive disciplinary proceedings, the petitioner filed the OA being 856/2015 before the AFT. During the hearing before the AFT on October 03, 2018, on the assurance of the respondents that no



disciplinary action was contemplated and that the attachment order will be recalled, the petitioner withdrew the aforesaid OA with the liberty to take recourse to law at a later stage, if required.

5. It was the case of the petitioner that despite the respondents' assurance that no disciplinary proceedings are contemplated, the petitioner was issued a Show Cause Notice ('SCN', for short) on January 10, 2020. Consequent to submission of the petitioner's reply to the SCN, a Censure Order ('CO', for short) was awarded to the petitioner by General Officer Commanding ('GOC-21', for short) Corps. on June 01, 2020.

6. It was also his case that consequently, he was considered by the Selection Board Number 2 ('SB No.2', for short) for promotion to the rank of Brigadier. However, the same was deferred, since the petitioner lacked the mandatory criteria reports. Although, the petitioner repeatedly approached the Military's Secretary Branch ('MS Branch', for short) for command of an infantry battalion, he was denied the opportunity on the ground that he was overage to command the regular infantry battalion and his request for age waiver was also declined.

7. On the aspect of consideration of the petitioner for promotion to the rank of Brigadier, it was his case that he has a fundamental right of consideration for promotion and the same has been denied to him on the ground that he lacked criteria reports. Moreover, the petitioner did not have requisite criteria reports only because he was denied the opportunity to command a regular infantry battalion on the ground that the petitioner was overage for command of regular infantry battalion. It was also his case that despite the petitioner's plea for waiver of age



relaxation, he was not granted a waiver. It was also stated that as Censure has been awarded, it would deny him any promotion for the duration when the Censure is in operation. Moreover, though the petitioner had been cleared by the SRMB in October, 2012, still he was not given a command and thereafter, COI and disciplinary proceedings precluded him from being placed in the requisite criteria appointment.

8. It was stated that the respondents have also erred by taking recourse to administrative action in a disciplinary proceeding.

9. It is the submission of Mr. K.C. Mittal, learned counsel appearing for the petitioner before us that grave injustice has been caused to the petitioner as he has been denied promotion to the rank of Brigadier, despite being eligible and medically fit. More so, when the respondents have initiated the COI and recorded the Summary of Evidence ('SoE', for short) for six / seven years.

10. He submitted that on the statement of the respondents on October 03, 2018 in OA. No. 856/2015 before the AFT, that the respondents are not contemplating to proceed with the disciplinary proceedings against the petitioner, the OA was withdrawn. In view of this categorical statement, the petitioner ought to have been considered by the respondents for promotion to the rank of Brigadier.

11. He further submitted that if the order dated October 03, 2018 is not taken in its true letter and spirit, the same would render the said order otiose and as such, the respondents would essentially be rewarded for making a statement before the court and then turning a volte-face by denying the petitioner benefits which he was entitled to and the same would result in grave injustice to him.



12. It is his submission that from the statement made by learned counsel for the respondents in the order dated October 03, 2018, it is abundantly clear that the respondents were not contemplating disciplinary proceedings against the petitioner. Therefore, in view of that categorical statement, the SCN, dated January 10, 2023, was liable to be quashed by the AFT. The impugned order of the AFT, thus suffers from error apparent on the face of record and is liable to be set aside.

13. He submitted that the CO dated June 01, 2022, clearly stipulates that the evidence adduced in the SoE / Additional SoE ('ASoE', for short) does not merit administrative termination of services of the petitioner. So also, in para 2(a)(i) and (ii) of the CO, nothing has been found against the petitioner. As such, there was no reason or justification for passing the order of severe displeasure against the petitioner and the same is liable to be quashed.

14. He further submitted that the petitioner after the statement made on October 03, 2020 before the AFT, ought to have been appointed on command criteria so as to enable the SB to consider the case of the petitioner for promotion to the rank of Brigadier. The SCN for Censure was issued malafidely to deprive the petitioner of his legitimate right. The AFT did observe and made a comment in its impugned order regarding the conduct of proceedings for eight long years but did not consider the aspect that the delay was not attributable to the petitioner but to the respondents. Therefore, the petitioner was entitled to waiver of age in terms of the policy of the respondents dated December 03, 2010 ('MS Policy', for short).

15. It is his submission that the petitioner became overage because



of the illegal and arbitrary conduct of the respondents in violation of Rule 180 of the Army Rules, 1954 ('Rules of 1954', for short). The proceedings related to the same got concluded in the first OA vide order dated October 03, 2018. However, despite the same, the respondents did not proceed to promote the Petitioner to the rank of Brigadier.

16. It is his submission that since the petitioner was found medically fit for being posted for criteria command by the SRMB on October 12, 2012, there was no justification on the part of the respondents, to not to propose the appointment of the petitioner for eight long years.

17. He submitted that though the SB in December 2019, deferred the case of the petitioner on account of shortfall in the adequately exercised period in the command criteria appointments the SB held in December, 2020, the result of which was announced on June 02, 2021, the petitioner was again not selected because of the same reason of shortfall in command criteria appointment.

18. It is his submission that the AFT overlooked that the respondents did not take any liberty from the AFT while making a categorical statement on October 03, 2018 to issue the SCN dated January 10, 2020 and pass the CO of displeasure against the petitioner. As such, the impugned order of the AFT is also liable to be set aside.

19. He further submitted that the AFT has failed to consider that in the CO dated June 01, 2020, specifically in para 3, insofar as para 2(b) of the SCN is concerned, it has been categorically mentioned that the same does not merit administrative termination of service of the officer.



Insofar as two hotels' bills are concerned, as mentioned in para 2(a)(i) and (ii) of the CO, the same allegations were also part of the earlier proceedings i.e., the COI and SoE. Therefore, the respondents having made a categorical statement on October 03, 2018 before the AFT to not to proceed with disciplinary action against the petitioner, the evidence before the COI/SoE could not have been taken into consideration for issuing the SCN dated January 10, 2020 and CO dated June 1, 2020.

20. It is his case that the impugned order is liable to be set aside insofar as allegations against Hotel City Lite, Delhi bill is concerned, as the petitioner has not been found at fault. As regards Hotel Sukh Sagar, Gwalior, it seems that the respondents are not aware there is no Hotel Sukh Sagar in Delhi, qua which, even during the course of SoE, the position was completely clear and no blame was found against the petitioner.

21. It is his case that that respondents have made reference to the SoE, wherein, they have admitted that the petitioner had neither filed nor signed the requisition slips for the alleged railway warrants and it also could not be established whether the petitioner used these warrants for himself or his family. Having concluded, the respondents for no reason has stated that *“it is however, emphasize that the officer, as a commanding officer, was morally responsible for safekeeping correct accounting and lawful utilization of the warrant forms”*.

22. He submitted that neither the respondents nor the AFT considered the details furnished by the petitioner with regard to the maintenance of correct records with respect to the issuance of railway



warrants. The details in respect of para 2(b) of the SCN were furnished by the petitioner in his reply to the SCN but neither the respondents nor the AFT considered the same which duly explained the fact that the petitioner had taken all necessary steps in the discharge of his responsibility as Commanding Officer.

23. He further submitted that the AFT has failed to consider that the petitioner had highlighted repeatedly that the copy of the manuscript of the COI was neither provided to the petitioner nor the same was produced in front of the GOC 21 Corps. The authenticated copy of the COI is required to be mandatorily provided to a charged officer as per the respondents' own Policy.

24. He submitted that in December 2009, the petitioner was approved by the competent authority for Col. Rank and fit for command to take over the criteria command for promotion to the Rank of Brigadier. The petitioner at that time was on UN deputation in Congo and as such could not be placed for command immediately. The petitioner returned from Congo, in July 2010. Thereafter, the petitioner was posted to the prestigious Military Attaché to the General Officer Commander In Chief, Northern Command and was to take over criteria command of 3 JKR in January, 2011, at Lalgarh Jattan in Rajasthan. However, the petitioner fell sick in December 2010 and could not be placed for criteria command of the 3 JKR in 2011.

25. It is his case that despite the petitioner being declared fit for command criteria on October 12, 2012, he was not posted for criteria command for nearly 07 months thereafter and was also not informed of any reason for the same. However, on May 22, 2013, the COI



commenced against the petitioner, purported to be because of some complaint lodged on October 17, 2012 by Lt. Col. Sudhish Chander.

26. He submitted that, in fact, Lt. Col. Sudhish Chander was Second In Command (2IC), subordinate to the petitioner, against whom the petitioner had already made verbal complaints to his superiors being his commanding officer.

27. He further submitted that COI was completed on July 26, 2013 and the order to carry out disciplinary proceedings was issued on September 27, 2013. Moreover, the petitioner was not allowed to avail his full rights under Rule 180 of the Rules of 1954. Also, the petitioner was not allowed to call for any witness in defence of his character and military reputation. The petitioner was also not allowed to be present throughout the disciplinary proceedings. In fact, the HQ Southern Command, returned the COI vide letter no. D/240956/DV-2 dated May 8, 2014 to HQ, Strategic Forces Command ('SFCI', for short), for compliance of Rule 180 of the Rules of 1954. As a result, the HQ, SFC reassembled the COI. It is his submission that the respondents again violated the statutory provision of Rule 180 as no defense witnesses were allowed and even documents were also taken on record without the petitioner's presence. Even thereafter, on July 31, 2014 the SFC returned the reassembled COI to HQ, Southern Command with directions for initiating disciplinary proceedings against the petitioner.

28. He submitted that the petitioner having suspected foul play and aggrieved by the blatant violation of Rule 180 wrote to the convening authority and the Presiding Officer. Thereafter, the petitioner was attached for disciplinary proceedings on June 29, 2015. Disciplinary



proceedings against the petitioner under Rule 22 of the Rules of 1954 commenced on October 21, 2015 by issuing a tentative Charge Sheet. Aggrieved by the violation of Rule 180, the petitioner also approached the AFT, *inter alia* pleading quashing of the impugned COI, attachment for disciplinary proceedings and not being posted to criteria command appointment, in OA 856/2015.

29. It is his case that the disciplinary proceedings including a tentative charge sheet was issued on October 19, 2015. The punishment in respect of these charges is provided under the Army Act, 1950 ('Act of 1950', for short). Section 71, in particular Section 71 (i) mentions "severe reprimand or reprimand" as a punishment. He submitted that the petitioner was attached to 31, Artillery Brigade w.e.f. June 29, 2015, till the finalization of the disciplinary proceedings and despite the specific statement having been made before AFT, that the respondents intend to recall the order of attachment, they recalled the attachment only after a long period, i.e., by July 5, 2019. Also, the petitioner was put under 'Discipline and Vigilance Ban Type-D' w.e.f. August 2014 and despite the statement being made before the AFT on October 3, 2018, the ban was not removed but was only changed from Type D to Type A on January 29, 2020.

30. Insofar as, recoding of SoE is concerned, it is the submission of Mr. Mittal that:-

- i) the recording of SoE finished on April 22, 2016;
- ii) After a gap of approximately 9 months, ASoE got commenced w.e.f. January 25, 2017 to March 28, 2017,.
- iii) Additional SoE No. 02 was also conducted w.e.f. May 17,



2017.

31. He further submitted that Rule 184 of the Rules of 1954 was also violated by the respondents by not providing the statements and exhibits from the Copy of the manuscript of the COI. No documents in original were produced by any competent witness who was custodian or signatory of such documents. Even, no witness was made available to the petitioner for cross-examination in his defence.

32. It is his case that no culpability was established in the first SoE as declared by the respondents' letter dated March 16, 2016. Even after commencement of SoE w.e.f. January 25, 2017 to March 28, 2017, vide communication dated March 28, 2017, the Commander 31, Artillery Brigadier, stated that there is no fresh evidence to mandate review of the previous findings.

33. He further submitted that the SCN as well as the CO are not sustainable in the eyes of law for the following reasons:-

- a) The respondents did not take any liberty from the AFT for taking the administrative action. The respondents made categorical statement without any reservation and were therefore, debarred from initiating further administrative action;
- b) Section 71(i) of the Act of 1950, provides for 'severe reprimand' and having made the categorical statement before the AFT, it was not open for the respondents to initiate the impugned action;
- c) As per Rule 182, proceedings of COI, are not admissible in evidence. As such, the whole basis of SCN and COI is *void*



*ab initio*;

- d) The case of the petitioner is covered by the decision of this Court dated July 09, 2012 in *W.P. (C) 13360/2009* and *13367/2009* titled as “*A.D. Nargolkar v. Union of India & Ors.*” and another Division Bench Judgment of this Court in “*Lt. General S.K. Dahiya v. Union of India and Ors.*” dated August 24, 2007.
- e) In the SCN and CO, the reliance is placed on the bill of Hotel Sukh-Sagar, which the petitioner has neither claimed nor even stayed and was a fraudulent bill furnished by Lt. Col. Sudhish Chander as a photocopy;
- f) The petitioner was not even permitted to be present throughout the COI proceedings as required under Rule 180;
- g) As many as 12 documents were included as exhibits in the COI in the absence of the petitioner, which had a direct bearing on the petitioner’s character and military reputation and were referred as the main evidence to establish culpability of the petitioner. The same is in violation of Para 5 of Appendix B and Para 30 of Ministry of Defense (ADGDV) Policy Letter No. 46440/AG/DV-1(P) dated August 29, 2013. The said policy states that any document which is included as exhibit in the COI will be produced by a competent witness/custodian in original and will be made available to the officer for defence of his character and military reputation. The petitioner was not allowed to cross-examine any such custodian or competent witness who



produced the above-mentioned documents.

- h) The petitioner was not provided the copy of the manuscript of COI of 2013 which should have the signatures of the petitioner and the Presiding Officer on all pages whenever the petitioner was allowed to be present. The same was in violation of Rule 184 (2) and para 46 of the Ministry of Defense (ADGDV) Policy Letter No. 46440/AG/DV-1(P) dated August 29, 2013.
- i) The copy of the COI of 2013, bears no original signatures but only shows "Sd-". Lt. Col. Sudhish Chander as PW-1 appeared on April 2, 2013 (Exhibit XXV) but the proceedings were dated May 22, 2013. This shows that there was some forgery and manipulation done in the COI proceedings of 2013. The copies of COI, 2013 along with all the signatures were not provided. Even during, COI of 2014, there was gross violation of Rule 180.
- j) The petitioner also, did not sign the Rule 180 compliance certificate due to the abovementioned violations during the COI.
- k) The bill of Hotel Sukh Sagar has no signature of the petitioner but was manipulated and submitted by Lt. Col. Sudhish Chander.
- l) The legal basis of the CO, as per policy, is based on the COI, while, COI has no evidentiary value as per Rule 182. The CO itself violates the basic Army Rule position.

34. It is his submission that stay at Hotel Shelter was verified by



the respondents' nominated officer recording the SoE and also the Presiding Officer of COI. This fact has also not been considered by the AFT.

35. He submitted that the petitioner never asked the witness to book the Air Force Guest Room at Gwalior, who did the booking on his own. Moreover, the said witness was threatened by the complainant. Also the Air Force Mess Bill covers only the period of August 11 to 13, 2012, whereas the detention certificate, which was issued by Air Force Station Gwalior, clearly mentions that petitioner was detained till August 14, 2012.

36. He submitted that the petitioner had brought out in the SoE that writing in the register of the Air Force qua Air Force Guest room was not his writing. The Air Force guest room register photocopy obtained by the COI clearly shows that the entry is done at 1000 hrs (AM) but the witness has deposed that he received the petitioner at 1900 hrs on August 11, 2012.

37. It is his case that the impugned SCN has questioned the petitioner for not maintaining the correct record of warrants, whereas, blamed the petitioner for being morally responsible for unaccounted warrants but not appreciated the fact that all requisite actions were taken by the petitioner as Commanding Officer and the unaccounted warrants were conspired by the complainant and also that no investigation against glaring evidence against the complainant was done.

38. He submitted that regarding the award of Censure to Officers, there are three different Orders dated April 23, 2007, March 22, 2016



and August 11, 2017. In 2007 and 2016, 'Severe Displeasure' was made recordable for 3 years and 'Displeasure' as non-recordable, whereas in 2017, 'Displeasure' was recordable for 10 years. Thus, the whole process of proceedings against the petitioner for administrative action is bad in law and suffers from arbitrariness, non-application of mind, over-exercise of power, unreasonableness and against the constitutional spirit.

39. He further submitted that the petitioner became entitled to age waiver for criteria command as per the respondents' policy dated December 3, 2010 [Para 5 (e)] and March 20, 2013 [Para 15 and 17] but was not granted. There are many officers who have commanded at the age of 50 years and beyond, while the petitioner was 49 years of age, when the impugned Censure was awarded.

40. He submitted that the respondents in their reply agreed that Col. P.N. Singh was given command till 50, as he was approved at the age beyond 46 years. On one side, Col. P.N. Singh was promoted for criteria command while he had already crossed the final age while the petitioner has been denied the same. Also, 140 officers, mostly beyond the stipulated age for criteria command were given the opportunity when the Supreme Court had ordered their promotion to Col. rank, well beyond 50 years of age, while the petitioner was singled out for rejection.

41. It is his case that as per respondents' Policy Letter No. 04558/MS dated November 1, 2013, which stipulates in Para 3 that appointments listed under 'widening of command funnel' will purely be utilized for management purposes, the respondents could have given



such appointments for criteria command to the petitioner as all the appointments mentioned under widening of command funnel are tenanted at an age well beyond the stipulated age of criteria command.

42. He submitted that, the respondents had adequate opportunities to post the petitioner for criteria command. The petitioner cleared the SRMB on October 12, 2012, whereas, he was posted to HQ Jhansi on September 13, 2013 after the finalization of COI conducted in July 2013 and the directions were passed in September 2013. Moreover, he was attached at Jhansi for disciplinary proceedings only on June 29, 2015, i.e., after 01 year and 08 months.

43. It is his submission that the recording of SoE terminated on July 24, 2017, while the petitioner had become overage on July 1, 2017, so age waiver could have been granted to him, whereas the respondents took an unprecedented 15 months. Moreover, the respondents took another 15 months and issued the impugned SCN on January 10, 2020. Further, the respondents took another 15 months and vide impugned order dated October 22, 2021, finally denied the age waiver for criteria command to the petitioner. It is therefore, evident that the respondents as an afterthought, in order to cover the long gap of 08 years, awarded the impugned CO of 'Displeasure' to the petitioner, based on which the criteria command was denied.

44. It is his submission that criteria command waiver is granted in certain categories as special cases like in battle casualty cases and comparing with them, the petitioner being innocent also becomes a special case after undergoing ordeal for 09 years deserves a criteria command waiver.



45. He submitted that the petitioner has already earned all the quantified reports which are requisite for the Quantification System of Selection Policy, 2017 for the promotion to the Rank of Brigadier except the criteria command reports.

46. He submitted that the disciplinary proceedings against the petitioner became time barred on September 27, 2016, before which the respondents were aware that no culpability of the petitioner is being established, however, the disciplinary proceedings were continued upto July 25, 2017, till the petitioner became overage on obtaining the age of 46 years on July 01, 2017. Moreover, 'DV Ban Type D', despite the disciplinary proceedings having become time barred on September 27, 2016, was continued till October, 2019, even after declaring on October 03, 2018 before the AFT that no disciplinary proceedings are contemplated against the petitioner.

47. He submitted that the petitioner ought to have been posted by revoking the 'DV Ban' after the proceedings had become time barred on September 27, 2016 to criteria command. Moreover, in October, 2019, also 'DV Ban Type D' was not lifted but only changed to 'DV Ban Type A', when at that time nothing was pending against him. Apparently, this was done to deprive timely posting to criteria command.

48. It is his submission that the petitioner in his reply to SCN against charge of not maintaining correct record of the warrants had clearly brought out with evidence that it was conspiracy of Lt. Col Sudhish Chander. Various facts completely expose the respondents to be in connivance with Lt. Colonel Sudhish Chander, which the



petitioner has also pointed out in reply to SCN, which seems to be the reason for a calculated and well planned conspiracy to deprive the petitioner of his promotion and that the proceedings were not concluded within three years period of limitation as provided under Section 122 of the Act of 1950.

49. He submitted that despite keeping the judgment reserved for more than 10 months, the AFT did not make any endeavour to examine the violation of Rule 180, which was the principal ground. Being a jurisdictional issue, the same was required to be considered as the root of the matter.

50. He further submitted that the respondents on inference and directions on effect of non-compliance of Rule 180, vide their ADGDV Policy Letter No. 46440/AG/DV-1(P) dated December 15, 2000, in Para 19, categorically stated that non-compliance of Rule 180 would vitiate the COI as well as the administrative action taken on basis of such COI. The AFT ought to have decided the legality of the COI but proceeded with the assumption that legality of the COI is not required to be adjudicated when the SCN was based on such COI. Therefore, the impugned order is liable to be set aside on this ground alone.

51. With regard to the COI proceedings being vitiated for non-compliance of Rule 180, Mr. Mittal has relied upon the following judgments:

- (i) ***S.K. Dahiya vs Union of India, Writ Petition (C) No 15526/2006***
- (ii) ***Lt. Col. Pritipal Singh & Ors. Vs. Union of India 1983 CRL. J. 647;***



- (iii) *Major General Inderjeet Singh vs. Union of India & Ors., 1997(9) SCC (1)*
- (iv) *Lt. General Surinder Kumar Sahni vs. Chief of Army Staff & Ors. Writ Petition (C) No 11839/2006*
- (v) *Maj Gen BP S Mander bearing W.P. (C) No. 4393/2007*

52. Reliance has also been placed on the following judgments to seek the prayers as made in the petition:

- i. *Union of India & Ors. vs. Harjeet Singh Sandhu (2001) 5 SCC 593.*
- ii. *Union of India & Ors. vs. A.D. Nargolkar & Ors. 2019(13) SCC 723*

### **SUBMISSIONS ON BEHALF OF THE RESPONDENTS**

53. On the other hand it is the submission of Mr. Harish Vaidyanathan Shankar, learned CGSC appearing on behalf of the respondents that the scope of judicial review under Article 226 against the order passed by any Tribunal is very narrow. The present petition has no ground which requires interference by this Court and therefore, is liable to be dismissed.

54. He submitted that all the grounds taken by petitioner in his OA No. 2864/2021 were appropriately considered by AFT in light of records submitted by the petitioner himself. Thus, there is no error in the order of AFT under challenge.

55. It is his submission that it is well settled that the Constitutional Courts are not to re-appreciate evidence in judicial review. A three



judges bench of the Supreme Court in a recent judgment i.e., *Deputy General Manager (Appellate Authority) vs. Ajai Kumar Srivastava, (2021) 2 SCC 612*, reiterated the same and held that in judicial review a Constitutional Court can only evaluate the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion

56. He submitted that the Supreme Court in the *Indian Oil Corporation & Ors. v Ajit Kumar Singh & Anr., Civil Appeal No. 3663 of 2023*, further reiterated that a Constitutional Court, while exercising its power of judicial review, cannot decide the case as if the inquiry is still being conducted and inquiry report is being prepared.

57. He further submitted that the petitioner brought to the notice of this Court only the order dated October 03, 2018 passed by the AFT in OA 856/2015. However, the petitioner has conveniently and selectively not brought to the notice of this Court, the order dated September 26, 2018 passed by the AFT, wherein no restriction, as far as administrative action is concerned, has been put by the AFT. Vide the order dated September 26, 2018, it was directed by AFT that '*in case the applicant is proceeded on administrative side, the respondents will be required to follow the process of law*' which, in the instant case, has been complied with as per the policy in vogue.

58. He submitted that the disciplinary proceeding is different from the administrative proceeding and the same is reflected in the orders dated September 26, 2018 and October 03, 2018 passed by AFT. The statement by the respondents before the AFT was qua disciplinary proceeding, and not an administrative proceeding. Therefore, the action



taken in this case was within the ambit of the order of AFT and as per the IHQ MoD, ADG/DV policy letter No 32908/ AG/DV-1 (P) dated August 11, 2017 on the subject matter.

59. It is his submission that consequent to the initial hearing of the charge and recording of SoE, the case was examined at HQ Southern Command in September 2017 and it was seen that the case of the petitioner was already time-barred on September 7, 2016, as the Competent Authority (C-in-C SFC) had the knowledge of the case on September 27, 2013 and thus the period of limitation under Section 122 of the Act of 1950. Notwithstanding this, since the evidence clearly revealed the involvement of the petitioner in making fictitious claims, it was decided to initiate a case for administrative termination of service under Section 19 of the Act of 1950 read with Rule 14 of the Rules of 1954.

60. It is his submission that at the time of offence, the petitioner was the Commanding Officer of the unit 71 TF which is considered to be a crucial unit of the Armed Forces and assigned specific undisclosed task of confidential nature. The role and functioning of each personnel of that unit are expected to be based upon mutual trust, faith and utmost level of integrity and supervision. Being the Commanding Officer of such a nature of unit, the petitioner was morally responsible for the safekeeping, correct accounting and lawful utilization of every document including warrant of forms which he failed to do so.

61. He submitted that based on the allegations, HQ SFC vide convening order No. SFC/C6006/1/MS (ISF) dated May 28, 2012 (2013) ordered a COI to investigate the circumstances under which the



petitioner was involved in the alleged irregular acts. Based on the COI, vide his order dated September 27, 2013, directed that a disciplinary action be initiated against the petitioner for the following acts: -

- a. Misuse of IAFI-1707 Railway warrants, in which he got more than the authorized number of warrants issued in his name and exchanged them for tickets for himself and his family;
- b. With intent to defraud and cause wrongful loss to the Govt, got IAFI-1707 Railway warrants exchanged for himself and his family by impersonating as Subedar Sandeep Sharma/S Sharma/Sandeep Singh/Naib Subedar Sandeep Sharma;
- c. With intent to defraud, forwarded wrong claims to PCDA, Pune;
- d. Submitted fake letters to Railway authorities in support of his claim of non-utilization of IAFI-1707 Railway warrants.

62. It is his case that after inquiry, the evidence on record revealed that the petitioner was blameworthy for the following offences and therefore, the SCN dated January 10, 2020 was issued by the respondents:-

- a. Furnishing two false hotel bills as under: -
  - i. Hotel City Lite, Delhi Bill (8-19 July, 2012). As per the records available, the petitioner stayed at officers' club, LOAR, New Delhi for the said duration.
  - ii. Hotel Sukh Sagar Bill (11-14 August, 2012). As per records available, the petitioner stayed at the Air Force Officers' Mess, Gwalior.
- b. Not maintaining the correct records qua the issue of



Railway Warrants (IAFT-1707) as CO 71 TF, resulting in usage unaccounted warrant forms during his command.

63. He submitted that with regard to the Hotel bill mentioned in Para 2(a)(i) of SCN, the benefit of the doubt was given to the petitioner; however, with regard to hotel bill 2(a)(ii), the petitioner was found blameworthy for preferring a false claim. Based on such conclusion, appropriate action was taken against petitioner which is completely justified and as per the policy. It is clarified that the SCN dated January 10, 2020, inadvertently mentioned Air Force Hotel Mess, Delhi which was a typographical error, whereas in the speaking order, the said aspect was rectified and correct nomenclature was mentioned.

64. He submitted that during the examination of the issue pertaining to the temporary duty at Gwalior and the resultant claim, the competent authority concluded that the testimony of the witnesses in the SoE established that the petitioner had stayed in Air Force Mess, Gwalior and had preferred a false claim for staying in a hotel, and therefore, held the petitioner blameworthy. As regards, the lack of maintaining the correct record of the use of railway warrants, resulting in unaccounted warrant forms during the period of command of the petitioner, it had been established by the SoE that neither did the petitioner's file or SoE concluded that the case of the petitioner warranted administrative termination of service and that ends of justice would be met if appropriate administrative action is taken against the petitioner for the following acts:

- a. the lapses in making fraudulent temporary duty claims for duties carried out at Gwalior and Delhi, and



- b. not maintaining correct records with respect to the issue of railway warrants in the unit.

65. It is his case that the petitioner was screened by the SRMB in 2012 and recommended for Command. While the case was under examination to place the petitioner in Command of a Battalion, allegations of irregularities were levelled against him while he was the Commanding Officer 71 TF. The COI was ordered in October 2013 and 'DV Ban Type D' was imposed w.e.f. August 31, 2014. In October 2019, the DV Status was changed to 'DV A' and as per due process, the petitioner was awarded 'Displeasure' on June 01, 2020.

66. He submitted that the petitioner could not be considered by the SB No.2 as he was not AE Compliant in the Colonel Rank. The petitioner was considered for placement in command on multiple occasions but the same could not materialize on account of factors intrinsic to the petitioner himself, his own health and the disciplinary proceedings against him. Further, as per policy, an officer over 46 years cannot be placed in Command. Whereas, the issue of waiver was considered in light of policies on the subject and the competent authority rejected the request of posting to a command criteria appointment by granting age waiver. As regards not being granted age waiver and seeking waiver of criteria reports, he submitted that Para 5 of the policy letter dated December 03, 2010 stipulates that the upper age of consideration for command in Col's rank is 44/46 years in Arms/ Services, respectively and that in no case can the age of the officer exceed 46/48 years at the time of physically assuming command. The policy letter also states that waiver of age may be granted by the Chief



of Army Staff ('COAS' for short) on a case-to-case basis on the merits of the case. The date of birth of the petitioner is July 01, 1971, and he was, therefore, overage for command in July 2017 itself, since as per the policy, an officer had to be below 46 years of age to assume command of an infantry battalion.

67. He submitted that the provisions of Para 5 (b) of the policy letter dated December 03, 2010 are discretionary powers of the COAS which was to be exercised on the merits of each case and also that, waiver was for granting relaxation of age criteria and not for waiving of the requirement of criteria reports as has been prayed for by the petitioner. In the present petition, the petitioner has alleged that a copy of the manuscript copy of the COI had not been produced and the same was never provided to the petitioner. In this regard, it has been submitted that supply of a Manuscript copy is not mandatory. As per the principles of natural justice and Rule 184, a duly authenticated copy of the COI was provided to the petitioner for preparing his reply to SCN.

68. He also submitted that the present petition is barred by estoppel, principles of Order 2 Rule 2 and acquiescence for the following reasons:-

- a. The petitioner filed the OA No. 856/2015, praying for quashing the entire COI and the attachment order. He also, *inter alia*, specifically prayed for the following: -

*“(b) Call for the records based on which the Respondent No.5 has not issued the order for placing the Applicant on criteria appointment even when the Applicant was already found fit by*



*special medical board on October 12, 2011 based on the mere complaint made by complainant on 17.19.2012 even before conclusion of the illegal Court of Inquiry and thereafter quash the same with further direction to the Respondents to place the Applicant on Criteria appointment.”*

- b. As can be seen, the petitioner had expressly sought for placement in criteria appointment. The petitioner was well aware that till such time, he was under a cloud, he could not be considered for the purpose of criteria appointment;
- c. The OA 856/2015, finally came to be disposed of on October 3, 2018 with the petitioner withdrawing the OA in the AFT;
- d. At the time of withdrawing the OA, the petitioner was aware that he was past the age for being considered for criteria appointment. He never pressed for the said prayer and upon the assurance that no disciplinary action would be taken, he did not thereafter do anything;
- e. The petitioner did not press for the prayer relating to criteria appointment and abandoned the same. The petitioner, *inter alia*, through his Counsel before the AFT made a statement withdrawing the OA thinking that the petitioner would be granted waiver as per policy dated December 3, 2010;
- f. The said statement is completely incorrect and false. If such was the case, the petitioner would have at least asked for it. The OA is also silent regarding this aspect;
- g. Contrary to oral submission, the petitioner never sought any waiver between October 03, 2018 to January 10, 2020 (Date



of SCN for administrative action);

- h. The petitioner had acquiesced and had withdrawn the OA with the knowledge that he would not be considered for criteria appointment. He chose not to take any further remedy post the withdrawal of the OA in 2018 and it is only after the award of “Severe Displeasure” that he chose to raise the issue regarding the criteria appointment. (Ref: *Union of India v. N. Murugesam, 2022 2 SCC 25 paragraph 20 to 25*);
- i. There is a robust mechanism of grievance redressal which is well known in the Armed Forces and the AFT Act only reinforces the same. No representation, leave alone a statutory complaint was made in respect of the prayer for “waiver of criteria reports” till the award of the Censure.

69. It is his case that administrative action is permissible even if disciplinary action is barred by time under Section 122 of the Act of 1950. This he says so, because of the following reasons:-

- i. The Supreme Court in the case of *Chief of Army Staff and Others vs Major Dharam Pal Kukrety, [(1985) 2 SCC 142]* and other similar judgments, has held that even if disciplinary action is time barred, it does not preclude the Army from taking administrative action. The same is on an interpretation of Rule 14 of the Rules of 1954;
- ii. In the present case, the petitioner has been held guilty of charges relating to moral turpitude and thus has been awarded ‘Displeasure’ only;
- iii. The petitioner is a senior officer who has been held to be guilty



of behaviour which has financial implications. The petitioner has also admitted to his moral responsibility for not performing his duty properly;

- iv. There is no challenge to the COI / Additional COI / the SoE/ A SoE and the lapses on the part of the petitioner are established. The same has been held by AFT in its conclusion;
- v. There is no allegation of malafides in respect of the delay.

70. It is his submission that the petitioner was not sent for criteria appointment due to following applicable policies:

- i. The relevant policy in the present case is MS Policy dated December 03, 2010. The petitioner has not alleged any malafides in the exercise of the said policy;
- ii. Para 4 of MS Policy specifies the medical category for command. When the petitioner was first entitled to be considered for criteria appointment, he was not meeting the aforesaid criteria;
- iii. In the absence of the petitioner's availability due to his medical categorisation, subsequent posting/ planning for other officers was required to be carried out as per policies. Importance of Medical Categorisation for various appointments and for promotions has been held to be an important facet peculiar to Armed Forces. He has relied upon AFT order *dated November 3, 2023 in OA 919/2023 – Maj Gen Ashok Kumar vs UoI & Ors.*, wherein the importance of medical criteria has been duly



recognized;

- iv. Moreover, the *Civil Appeal (Diary) Number 51049/2023* filed against the said order was dismissed by the Supreme Court vide order dated December 14, 2023;
- v. Para 5 of MS Policy specifies the upper age limit for command. The upper age limit is not merely a number but is prescribed as an essential element to maintain a fit, robust and mentally-physically workforce in the fighting arms like that of petitioner. Moreover, there is no waiver of age criteria;
- vi. The petitioner was born on July 1, 1971 and was 46 years old on July 1, 2017. The case does not suffer from any undue delay on part of the respondents processing the disciplinary case of the petitioner. The LMC category of the petitioner is not attributable to the organization;
- vii. Also, waiver is not a right: Para 5(e) specifies waiver on case-to-case basis and the case of the petitioner was duly considered. However, for factors of medical and discipline no waiver was granted.

71. He submitted that the award of 'severe reprimand' is justified and not excessive for the following reasons:-

- i. The petitioner has made a composite prayer and seeks the setting aside of the 'Severe Reprimand'. The award of 'Severe Reprimand' has been made after following all the relevant procedures in this respect. There is no infirmity in the procedure. The award of a penalty/ punishment in



the nature of 'Severe Reprimand' or any punishment is the prerogative of the Armed Forces;

- ii. The petitioner has admitted to his responsibility and there is no infirmity in the passing of the 'Severe displeasure'. Serving Officers have to set a much higher standard and the same is also emphasised in the Judgment of the Supreme Court in *Charanjit Lamba vs Commanding Officer, Southern Command & Ors., (2010) 11 SCC 314*.

72. He submitted that the petitioner was unable to be promoted due to lack of criteria reports in the following manner:-

- i. The petitioner was considered by the SB No.2 for promotion to the rank of Brigadier as per the details given below and which were deferred since he was not meeting the requisite / adequate requirements: -

Look	Month	Result
Fresh	Dec 2019	Deferred
Fresh (Deferred/Withdrawn)	July 2020	Deferred
Fresh (Deferred/Withdrawn)	Dec 2020	Deferred

- ii. The policy is applicable uniformly to all officers of Indian Army. The petitioner was also well aware of the policies on the subject and did not contest the same until the filing of OA in 2021;
- iii. The petitioner could not be considered for the SB No.2, as he was not AE compliant in the Colonel Rank. The petitioner was considered for placement in command on multiple occasions but these could not materialize on account of factors intrinsic to the



petitioner himself, his own health and the disciplinary proceedings against him. Further, as per policy, an officer over 46 years cannot be placed in command. It is further submitted that the issue of waiver was considered in light of policies on the subject and the Competent Authority rejected the request of posting to a Command Criteria appointment by granting age waiver;

- iv. In the last seven years till November 2023, a total of 195 officers were deferred in SB No.2. The same is an incidence of service and any age waiver to a medical category officer with an established disciplinary aspect will prejudice the functional efficacy of the Indian Army and pose cadre management issues, especially in light of the *Ajay Vikram Singh Committee* report wherein a medically fit and younger profile was considered an essential feature in the Indian Army for operational efficiency.

73. Hence on the aforesaid submissions, he has sought dismissal of the present petition.

### **ANALYSIS**

74. Having heard the learned counsel for the parties and perused the record, it is noted that the petitioner was declared as LMC in the year 2010. Subsequently, he was cleared by SRMB held on October 10, 2012. After seven months, a COI was constituted due to certain allegations made by another Officer of 71 TF against the petitioner. Later, disciplinary proceedings were initiated against the petitioner. These proceedings became the subject matter of a challenge by the petitioner before the AFT in OA No. 856/2015. The plea of the



petitioner was that the same are in violation of Rule 180 of the Rules of 1954. During the pendency of the OA, it was represented by the respondents that no disciplinary action is contemplated against the petitioner on the allegations made by another Officer working in 71 TF. So, in that sense, the disciplinary proceedings initiated against the petitioner were dropped.

75. The submission of Mr. Mittal is primarily that the respondents, in view of the submission made before the AFT, could not have initiated even administrative action against the petitioner in respect of the same allegations made by the Officer. According to Mr. Mittal, contrary to the submission made by the respondents before the AFT, which resulted in withdrawal of the OA by the petitioner, the respondents by initiating administrative action imposed the penalty of Censure leading to severe reprimand, which is completely illegal.

76. Suffice to state, we have already referred to the findings of the AFT in paragraph 17 of the impugned order. In this regard, we may also reproduce the order dated October 03, 2018 passed by the AFT in OA No. 856/2015 as under:-

*“1. Learned counsel for the respondents has stated that respondents are not contemplating to proceedings from disciplinary point of view against the applicant, grounds of appeal and as a necessary point, they intend to recall order of attachment dated June 29, 2015.*

*2. Learned counsel for the applicant has very fairly stated that in the light of the statement made by learned counsel for the respondents, he does not press his application for the present so far as the relief 'A' is concerned with liberty to approach the Tribunal*



*challenging any action of the respondents which may be passed subsequent thereto. So far as prayer 'B' is concerned, he intends to take such recourse as available to him at any later point of time in case he still feels aggrieved. Accordingly, IA is dismissed as withdrawn.”*

77. At this stage, we may also reproduce the order dated September 26, 2018, of the AFT as under:-

*“ Learned counsel for the respondents has very fairly stated that decision has been taken by the respondents not to proceed against the applicant from disciplinary point of view.*

*2. Our attention has been drawn to the first order dated 21.10.2015 wherein it has been specifically stated that the proceedings against the applicant will continue. However, no final order shall be passed against the applicant.*

*3. In view of the statement made by the counsel for the respondents, we are prima facie of the view that the present application does not survive any more. In case the applicant is proceeded on the administrative side, the respondents will be required to follow the process as of law and it shall be open to the applicant to come to the Tribunal, if he so feels aggrieved by such an action at an appropriate stage.*

*4. Learned counsel for the applicant seeks time to obtain instructions as to whether the applicant would like to continue with the present proceedings or not.*

*5. List on 03.10.2018.*

*6. In the meantime, status quo be maintained.”*

78. So, from the perusal of the aforementioned orders passed in O.A. 856/2015, it is clear that though it was the stand of the respondents that they do not intend to proceed against the petitioner from disciplinary point of view, they have not said, no other action



shall be taken against the petitioner. In fact, it was the understanding of the petitioner also as is clear from the order dated September 26, 2018, that in case, the petitioner is proceeded on the administrative side, the petitioner shall be within his right to approach the AFT, if he so feels aggrieved from such an action at an appropriate stage. In that sense, it appears though the respondents decided not to take any disciplinary action against the petitioner, they were contemplating an administrative action. In fact, the respondents have taken the administrative action by issuing the SCN dated January 10, 2020.

79. The petitioner had not approached the AFT on the issuance of SCN dated January 10, 2020, but had submitted reply to the same, which resulted in the impugned order, dated June 1, 2020, which has been challenged before the AFT.

80. So, the challenge of the petitioner that the respondents cannot initiate any administrative action cannot be accepted, more so, when policy order dated August 11, 2017, vide Para 6 states the following:

*6. Cases which are not of a minor nature and yet do not involve moral turpitude, fraud, theft, dishonesty, financial irregularity or misappropriation, and where trial by a Court Martial is not practicable being time barred or is inexpedient due to other reasons, may if found appropriate, be forwarded to · Integrated HQ of MoD (Army), Adjutant General's Branch, D&V Dte at the discretion of the GOC-in-C for consideration of the award of censure by the COAS/Government.*

81. Further, we find from the perusal of the O.A. and also the writ petition, no substantial ground has been raised by the petitioner to



contend that in law the respondents could not have initiated administrative action after the passing of the order dated October 03, 2018.

82. So, this Court proceeds to answer the issue as whether from the only allegation on which the CO leading to severe reprimand was passed, that the petitioner has furnished false hotel bill of Hotel Sukh Sagar, Delhi (Sic. Gwalior), for the period, August 11-14, 2012, when it is established that the petitioner stayed at Air Force Mess, Gwalior, the respondents were justified to take administrative action against the petitioner.

83. We may, at this stage state that there appears to be a typographical error in the SCN as the above allegation primarily pertains to a period when the petitioner was posted on a temporary duty at Gwalior and not Delhi. This, we say so as the bills of Hotel Sukh Sagar and even the Air Force Mess produced before us, are that of Sukh Sagar, Gwalior and Air Force Mess, Gwalior.

84. Having said that, to answer the issue, it is necessary to reproduce the finding of the competent authority in the impugned order dated June 01, 2020, qua the allegations of fraudulent bill submitted by the petitioner during his temporary stay at Gwalior, in paragraph 6 thereof, as under for ready reference:-

“6. WHEREAS, it is evident from the proceedings of the Court of Inquiry that the Officer signed for the claim for Hotel Sukh Sagar and also accepted signing the claim for Hotel Sukh Sagar, but asserted the subject bill to be a 'fraudulent bill. Furthermore, a bill of Rs :[6,670/- (Rupees six thousand seventy only) of Air Force Mess, Gwalior for the period 11 August 2012



*to 13 August 2012 on the Officer's name has been found on record depicting charges for 'Messing', 'Extra messing' and 'Accommodation'. JC-351294A Subedar (Regimental Survey Technical) NG Kamblekar who was performing duties of Senior Junior Commission Officer, Gwalior Detachment during said period has also brought out during the Summary of Evidence that the said guest room at Air Force Mess was booked for the Officer. The Junior Commission Officer received the Officer at Air Force Guest room on 11 AUGUST 2012 and the Officer stayed in the Guest till 13 August 2012. The mess bill and testimony of witness in the summary of Evidence establishes that the Officer stayed at Air Force Mess, Gwalior and for which a false claim was prepared."*

(emphasis supplied)

85. Whereas, the defence of the petitioner in respect of the aforesaid charge is the following:-

5. *WHEREAS, a Show Cause Notice dated 10 January 2020 with regard to initiation of administrative action in form of suitable censure for ibid lapses was served upon the Officer. The Officer, in his reply dated 28 January 2020 to the ibid Show Cause Notice, has contended the following:-*

*(a) On the matter of the Officer's claim of Re 25,700/- (Rupees twenty five thousand seven hundred only) pertaining to his Temporary Duty to Gwalior. The Officer has brought out that he did not stay in Hotel Sukh Sagar, did not produce any bill for the same and also did not forward any claim for the said bill to PCDA (O) Pune. The Officer has highlighted that the said bill does not even bear his signatures. On the contrary, it has been emphasised by the Officer that he stayed in Hotel Shelter from 11 August 2012 to 14 August 2012*



*and has produced photocopy of the bill alongwith a verification letter from Hotel Shelter endorsing his stay in Hotel Shelter during the sar sar period.”*

86. Before we refer to the submissions made by Mr. Mittal in this regard, we may highlight the finding of the AFT in respect of the aforesaid charge which we have reproduced in paragraph 1 above. In paragraph 17 (d) of the impugned order, the AFT has held in respect of allegations pertaining to temporary duty at Gwalior, the competent authority concluded that the testimony of witnesses in SoE clearly established that the petitioner had stayed in Air Force Mess, Gwalior and preferred a false claim of staying in a Hotel and therefore, held the petitioner blameworthy.

87. Suffice to state that the SCN issued to the petitioner is primarily on the basis of evidence which came on record in the COI proceedings. Though three allegations were made in the SCN, two allegations are in respect of (1) false hotel bills of Hotel City Lite, Delhi for the period July 18/19, 2012 and (2) the manipulation of railway warrants, which were not proved against the petitioner. What was stated to have been proved against the petitioner is that he submitted false bill in respect of Hotel Sukh Sagar, Gwalior though mentioned Delhi. But we find the case of the petitioner is that he stayed at Hotel Shelter, Gwalior, as per the certificate issued by the said hotel. Unfortunately, neither there is any finding in the CO, nor there is a finding of the AFT, in that respect. So, based on the bill of the Hotel Sukh Sagar, Gwalior, without dealing with pleas of the petitioner that (1) he did not stay in Hotel Sukh Sagar,



Gwalior; (2) he neither produced any bill of the same nor forwarded any claim for the said bill and (3) the bill of Hotel Sukh Sagar, Gwalior, does not bear his signatures, the respondents could not have, held that the said allegation stood proved against the petitioner and passed the CO.

88. That apart, it is also the plea of Mr. Mittal that there is violation of Rule 180 of the Rules of 1954, compliance of which according to him is a mandatory requirement, by highlighting the following factors:

- a. Not even a single defence witness was permitted during the COI in 2013 and during re-assembled COI in 2014;
- b. The petitioner was not kept present throughout the COIs;
- c. The petitioner was not allowed to cross-examine all the witnesses;
- d. The petitioner was not allowed to make any statement in his defence against the document taken as glaring evidence of his wrong doings;
- e. A large number of documents quoted as key documents / evidence against the petitioner were included in the COI without being presented by a witness in the absence of the petitioner,
- f. The aforesaid aspects were brought to the notice of the convening authority vide representation dated July 25, 2014, but no action was taken.



89. Mr. Mittal's plea is also that there is a violation of Rule 182 of the Rules of 1954 by stating that respondents while passing the impugned CO have relied upon the proceedings of COI, which is not permissible in law.

90. The stand of the respondents before the AFT on the aforesaid two aspects is that after convening of COI, it was ensured that all pages of COI were signed by the petitioner. The petitioner was given full liberty to make a statement or give any evidence he wishes to make or give and of cross-examining any witness, whose evidence, in his opinion affected his character of military reputation and producing any witness in defence of his character of military reputation.

91. It was also their stand that the petitioner had submitted a list of defence witnesses to be examined by him. However, the court after considering the clear documentary evidence received from the Office of Chief Commercial Manager confirming the utilization of the warrants and examination of his statements where these witnesses have been referred, was of the opinion that the witnesses sought to be produced pertains to issues and subject matter which are not relevant to the terms of reference of the COI.

92. It was also stated that all documents (exhibits) which were brought before the COI were mostly primary evidence and whereas any secondary evidence used in the proceedings has been tendered by the prosecution witness as per Section 65 of the Indian Evidence Act, 1872.

93. In respect of Army Rule 182, it is stated that the same is applicable to court-martial / disciplinary proceedings and in the instant



case no disciplinary proceedings have been initiated. Therefore, non-applicability of Rule 182 is without merit. Moreover, the action taken in the case was an administrative action which is not governed by strict rules of evidence, but based on preponderance of evidence.

94. Before we deal with the submissions, it is necessary to highlight the communication written by the HQ, Southern Command, Pune to HQ, SFC dated May 8, 2014, the relevant portion thereof is reproduced as under:

*“2. On perusal of the C of I proceedings alongwith directions of the Commander-in-Chief, SFC. It is observed that Commander-in-chief, SFC has directed discp action against Col Sandeep Sharma and adm action against Maj. Piyush Jain, Sub/Clk (PA) Jaraid John. Nb/Sub Jageshwar an Illegible Ghanshyam Pandey for he misconduct/lapses attributed against them. At the commencement of the C of I, Army Rule 180 was invoked against Col. Sandeep Sharma. Though at the closure of the C of I i.e. after recording the statement of Col Sandeep Sharma, it is not discernible from the C of I proceedings whether Army Rule 180 was invoked on the other four delinquents. In view of the present judicial and legal position, non-compliance of Army Rule 180 against an indl on whom either discp or adm action has been taken will vitiate the complete discp/adm action. Therefore, the following remedial measures are advised:-*

*(a) The directions of the Commander-in-chief, SFC may be set aside.*

*(b) An addl. C of I may be convened for compliance of Army Rule 180 against the other four delinquents under Army Rule 180 against the other four delinquents under Army Rule 179 (5)*

*(c) As a cautionary measure, a certificate to the effect that Col Sandeep Shanna declined to call witnesses in his defence, including witness as to character, duly signed by the Presiding Offr. Other members of the C of I and the delinquent offr may be att with the addl. C of I proceedings.*



*(d) Fresh finding and opinion of the court to be recorded in the Addl. C of I which should supplement the previous findings and opinion and nor replace them.*

*(e) Thereafter, the Commander-in-chief, SFC to issue fresh directions on the C of I proceedings incl the addl C of I.”*

(emphasis supplied)

95. From the aforesaid it is clear that at least with regard to first COI, 2013, the authority has clearly stated that it is not discernible from the COI proceedings, whether Rule 180 has been invoked. What is important is, the five remedial measures advised by HQ, Southern Command, Pune in paragraph 2 thereof, which states that 1) the directions of the Commander in Chief, SFC, may be set aside; 2) an additional COI may be convened for compliance of Army Rule, 180; 3) certificate needs to be obtained from the petitioner that he declined to call witnesses in his defence, including witnesses as to his character, duly signed by the presiding officer; 4) fresh finding and opinion of the court to be recorded in the Addl. COI, which should supplement the previous findings and opinion and not replace them and 5) the Commander-in-chief, SFC to issue fresh directions on the COI, proceedings including the additional COI.

96. So it follows, surely in the first COI, i.e., COI, 2013, Rule 180 was not complied with. Now, what is to be seen is, whether in the subsequent COI, i.e., COI- 2014 / re-assembled COI, Rule 180 has been complied with by the respondents.

97. Suffice to state, the COI, 2014, reassembled on June 6, 2014, whereas a letter was written by the petitioner on July 21, 2014 to the



Presiding Officer, HQ, SFC, wherein in paragraph 2, it has been stated as under:

*“2. During the ongoing court of inquiry proceedings, I have requested for certain witness in my defense, which have not been called and I have been asked to sign the compliance cert of AR 180. I wish to submit that I agreed to the fact that AR 180 was invoked against me and I was apprised of my rights under the AR 180. However, I am unable to certify that AR 180 has been fully complied in my case due to following reasons:-*

*(a) My request for witnesses essential in my defense have not been made available to me.*

*(b) I have reasonable apprehension that the C of I has annexed various docus in the annexure having bearing on my character and mil reputation but neither I have not been given any opportunity to go through the content of such docus nor such documents have been taken on record by calling relevant witnesses competent to produce the same whom I could have cross examined in true spirit of Rule 180 thereby affecting my basic right as secured by Rule 180 which unequivocally provides that I can call for additional documents/witness, cross examine relevant witnesses or may make additional statements based on such documents or cross examine the witness on such documents.”*

98. From the perusal of paragraph 2 reproduced above, it can be seen that the petitioner has highlighted that he has reasonable apprehension that the re-assembled COI, has annexed various documents having bearing on his character and military reputation but neither the petitioner has been given any opportunity to go through the contents of such documents nor such documents have been taken on record by calling relevant witnesses competent to produce the same for



him to cross-examine them as per the spirit of Rule 180. In other words, the petitioner had highlighted that he has been denied the right to cross-examination during the COI and as such, the same has violated Rule 180 of Rules of 1954.

99. The stand of the respondents in this regard, as noted by us in paragraph 92 above is that all the documents which were brought before the COI were mostly primary evidence and whereas any secondary evidence used in the proceedings has been tendered by the prosecution witnesses under Section 65 of the Indian Evidence Act, 1872.

100. Suffice to state, this stand of the respondents proves the case of the petitioner that the documents which were produced by the respondents as prosecution documents were produced not through the officers who were to produce those documents, but through a certificate under Section 65 of the Indian Evidence Act, which resulted in denial of cross-examination to the petitioner.

101. That apart, it is not clear from the record, whether the petitioner was indeed allowed to produce his defence witnesses. In this regard, we may state that we have noted the stand of the respondents in paragraph 91 above, wherein they have accepted that though the petitioner had submitted a list of defence witnesses to be examined by him, the COI, after considering the documentary evidence received from the office of Chief Commercial Manager confirming the utilization of warrants and examination of his statements, where the witnesses have been referred, was of the view that the witnesses, which were to be examined by the petitioner, pertain to the issues and subject



matter, which are not relevant to the terms of reference of COI. The same clearly denotes that the petitioner was not allowed to produce his defence witnesses.

102. So it follows, the CO dated June 1, 2020, which was passed on the basis of SCN, relying on the COI proceedings, (which is evident from paragraph 6 thereof,) wherein, the petitioner was not allowed to produce the defence witnesses, we are of the view, that the same is bad in law as the evidence adduced during the COI proceedings, could not have been relied upon by the respondents for the purpose of initiating an administrative action against the petitioner, as per Rule 182 of the Rules of 1954.

103. In fact, we may note that it is the policy of the respondents that non-compliance of Rule 180 not only vitiates the COI but also vitiates the subsequent administrative action taken on the basis of such COI. The relevant paragraph of the aforesaid policy dated December 15, 2000, is reproduced as under:-

*19. A careful examination of the matter in entirety clearly shows that violation of RA para 518 and non-compliance of AR 180 are two distinct issues. Violation of Para 518 would not mean non-compliance of AR 180 and would not vitiate the C of I proceedings and subsequent action taken on the basis of such a C of I. It is only the non-compliance of AR 180 which would vitiate the C of I proceedings and particularly the subsequent adm action taken on the basis of such a C of I, although it would invariably make no dent on the disciplinary action.*

(emphasis supplied)



104. In fact, the intent of Rule 182 is clear that the proceedings of a COI, is not admissible in evidence against a person subject to the Act of 1950. Hence, the respondents are not justified in relying upon the COIs proceedings to even initiate the administrative action against the petitioner.

105. The plea of Mr. Vaidyanathan in this regard that Rule 182 is only applicable to court- martial / disciplinary proceedings and not to an administrative action is unmerited for the reason that no such distinction has been made under Rule 182, which we reproduce as under:-

***"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 proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness."*

106. In this regard, we may rely upon the judgment of the Supreme Court in the case of ***Union of India v. A.D. Nargolkar and Anr., (2019) 13 SCC 738***, wherein in paragraphs 23 and 26, it has been held as under:

*"23. Rule 182 provides that the proceedings of a CoI or any statement given at a CoI shall not be admissible in evidence against the person subject to the Act.*



However, the issue of effect or applicability of the aforesaid provision has neither been agitated nor been considered by the High Court or the Tribunal.

26. In view of the above, we set aside the judgment of the Delhi High Court dated 9-7-2012, passed in A.D. Nargolkar v. Union of India [A.D. Nargolkar v. Union of India, 2012 SCC OnLine Del 3484] as well the judgment and order of the Principal Bench of the Tribunal dated 30-9-2009 in A.D. Nargolkar v. Union of India [A.D. Nargolkar v. Union of India, 2009 SCC OnLine AFT 30] and remand the case to AFT (Bombay Bench) for de novo hearing.”

(emphasis supplied)

107. Reliance may also be placed on the judgment of the Supreme Court in the case of **Union of India v. Col. A.D. Nargolkar and Ors. (2019) 13 SCC 723**, wherein in paragraphs 39 and 40, it has been held as under:

“39. For the aforesaid reasons, we come to a conclusion that the CoI failed to adhere to the procedure laid down in Army Rule 180; its findings are based on the material which could not be relied upon without its formal proof (like the allegations in the complaint or the report of discreet inquiry); and there is a violation of principle of natural justice. We, thus, allow the appeals of the Officer and set aside the impugned judgment of the AFT and also the punishment of “Severe Displeasure (Recordable)”.

40. As a consequence, insofar as promotion of the Officer to the post of Brigadier is concerned, he would be entitled to the same as the Officer was found fit for the said promotion but it was withheld only because of the contemplation and subsequently his promotion was ultimately denied during the



pendency of CoI. Once this stigma stands removed, the Officer becomes entitled to get his rank of Brigadier for which he was empanelled by the respondents themselves. The orders shall accordingly be issued giving the Officer promotion to the rank of Brigadier from the date he was entitled thereto. Since, he has retired in the meantime, the Officer shall be entitled to the arrears of salary to the post of Brigadier. He will be treated as retired as Brigadier and, therefore, shall be entitled to terminal benefits as Brigadier including his pension. Arrears of salary and pension shall be worked out within a period of three months and given to the Officer.”

(emphasis supplied)

108. Having said that, the question now needs to be answered is whether the respondents were justified in not promoting the petitioner to the post of Brigadier. Though, the case of the petitioner is that he should have been considered for promotion to the post of Brigadier in October 2012, i.e., immediately when he was declared fit by SRMB, it may be stated here that the petitioner had not approached any forum seeking promotion immediately thereafter. Therefore, it is too late in the day for the petitioner to seek promotion w.e.f. 2012. So, the question should be whether the petitioner is entitled to be considered for promotion w.e.f. from the period when the disciplinary proceedings were in progress / pending. The answer to the same is, if the COI proceedings were justified, the petitioner would not be entitled to be considered for promotion to the post of Brigadier. But the fact remains that the disciplinary proceedings were dropped by the respondents being time barred. Even the administrative action initiated on the allegations based on the COI proceedings, we have held, the same to be



vitiated being in violation of Rules 180 and 182 of the Rules of 1954. So, the petitioner has to be considered for promotion to the post of Brigadier as if there was / is no impediment for such consideration.

109. It is the plea of the respondents that since the petitioner has not been appointed for command criteria, he cannot be promoted to the post of Brigadier. Though such a stand looks appealing on a first blush, but Mr. Mittal has pointed out that in the eventuality, an officer is not appointed for command criteria because of being age barred, power exists with the COAS to grant age waiver for being considered for promotion to the post Brigadier.

110. In view of the fact that the provision of age waiver is available with the COAS, as it is evident from paragraph 5 (e) of the MS Policy dated December 03, 2010, which we reproduce as under, we direct that the COAS shall consider the case of the petitioner for grant of age waiver in the facts of this case, as we have come to the conclusion that there is nothing adverse against the petitioner for being considered for promotion to the post of Brigadier:

*(e) Waiver to the above stipulations may be granted by the COAS on a case to case basis, based on merits of the case.*

111. If the COAS is of the view that the age waiver is required to be granted, then further action shall be taken as per law i.e., the case of the petitioner shall be considered for promotion to the post of Brigadier from the date he was declared fit by the SRMB. In this regard, the respondents are also directed to pass a reasoned order.

112. If in the eventuality, the COAS is of the view that age waiver



cannot be granted, then the respondents shall still consider the case of the petitioner for promotion effective from the date he was found fit by SRMB, overlooking the requirement of command criteria as there has been a precedent pursuant to the orders of the Supreme Court of which reference has been made in paragraph 40 above

113. The above exercise for the same shall be carried out within a period of 12 weeks from today. In view of our conclusion / findings above, the impugned order of AFT dated April 6, 2023 in OA 2864/2021 is set aside. The fact that administrative action stands vitiated, we also set aside the CO dated June 1, 2020.

114. The writ petition is disposed in above terms. Pending application (if any) is dismissed as infructuous. No Costs.

**V. KAMESWAR RAO, J**

**AMIT BANSAL, J**

**MAY 28, 2024***/aky/jg*