2020 INSC 10

CORRECTED

Non-Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 9267 of 2019
(@ Diary No.10621 of 2018)

Union of India & Ors.

.... Appellant(s)

Versus

Ex. No. 3192684 W. Sep. Virendra Kumar

…. Respondent (s)

J U D G M E N T

L. NAGESWARA RAO, J.

1. The order of dismissal of the Respondent was set aside by the judgment of the Armed Forces Tribunal, Regional Bench, Lucknow (hereinafter, *'the Tribunal'*), aggrieved by which this Appeal is filed.

2. The Respondent was enrolled as a Soldier in 20 Jat Firing Team which was attached to the Jat Regimental Centre, Bareilly on 25.02.1999. A firing incident took place at around 8.45 a.m. on 02.10.2004, when the team was practicing firing at the Jat Regimental Centre.

During the incident, Havildar Harpal and the Respondent sustained gunshot injuries. Havildar Harpal succumbed to the bullet injuries and the Respondent was admitted at the hospital due to injuries. A First Information Report was lodged at the Police Station, Sadar Cantonment, Bareilly. A preliminary investigation was initiated by the Staff Court of Inquiry as per the directions of the Station Headquarters, Bareilly which concluded on 25.11.2004. The General Officer Commanding 22 Infantry Division directed:

a) *disciplinary action to be initiated against the Respondent for causing the death of late Havildar Harpal and for attempting to commit suicide.*

b) *to counsel Lt. Rajiv Menon for not implementing the relevant instructions during the conduct of firing practices at the ranges.*

c) *Late Havildar Harpal of 20 Jat Regiment was directed to be treated on bona fide Government duty and his death was held attributable to military service in peace.*

3. The Respondent was kept in close arrest w.e.f. 27.11.2004 and was handed over to 7 Kumaon Regiment under the authority of Headquarters 49 Infantry Brigade. On 28.12.2004, the Respondent was tentatively charged with the murder of Havildar Harpal under Section 302 IPC read with Section 69 of the Army Act, 1950 (for short "the Act") and under Section 64(c) of the Act for attempting to commit suicide. 21 witnesses were examined in the summary of evidence and the Respondent was given an opportunity to cross-examine the witnesses, which he declined. He was given an opportunity to make additional statement, which was also declined. Further opportunity given to him to adduce evidence was also not availed by the Respondent. Summary of evidence concluded on 07.02.2005. Additional summary of evidence was also recorded, which was completed on 03.06.2005. The General Court Martial commenced on 28.11.2005, and the trial was concluded on 16.03.2006. The General Court Martial convicted the Respondent under Section 302 IPC for the murder of Havildar Harpal and for attempting to commit suicide. The Respondent was sentenced to suffer imprisonment for life and to be dismissed from service.

The statutory complaint filed by the Respondent was rejected by the Chief of the Army Staff on 16.03.2007. The validity of the order of the General Court Martial dated 16.03.2006 and the order of the Chief of the Army Staff dated 16.03.2007, rejecting the statutory complaint were assailed before the Tribunal.

4. Though several grounds were taken before the Tribunal to challenge the order of the General Court Martial, the principal contention of the Respondent was non-compliance of Rule 180 of the Rules. The Tribunal decided the petition by adverting to the contention relating to Rule 180. It was held by the Tribunal that Rule 180 provides that a person against whom an inquiry is conducted to be present throughout the inquiry. As there was no doubt that the Respondent was denied permission to be present when statements of witnesses were being recorded before the Court of Inquiry, the Tribunal concluded that the entire trial against the Respondent is vitiated. The Tribunal set aside the order of the Court Martial and remitted the matter for de novo trial from the stage of Court of Inquiry in exercise of its power under Section 16 of the Armed Forces Tribunal Act, 2007.

Rule 180 of the Army Rules, 1954

5. The only point considered by the Tribunal is Rule 180 and the effect of non-compliance of the said Rule. It is relevant to re-produce Rule 180 which is as follows:

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

6. Chapter VI of the Army Rules, 1954 deals with the Court of Inquiry. According to Rule 177, a Court of Inquiry is an assembly of officers or junior commissioned officers (JCOs) constituted to collect the evidence. The procedure to be followed by the Court of Inquiry is provided in Rule 179. Rule 180 deals with the procedure for inquiry where the character of a person who is subject to the Act is involved. When an inquiry affects the character or military reputation of a person who is subject to the Act, full opportunity has to be provided to the person throughout the inquiry, of making any statement, of giving any evidence he may wish to make or give, and of cross-examining any evidence. According to Rule 182, the proceedings of a Court of Inquiry, or of any confession, statement, or answer to a question made or given in a Court of Inquiry, shall not be admissible in evidence. However, the proviso to Rule 182 provide that nothing in Rule 182 shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness. It is also necessary to refer to Rule 22 of the Army Rules, 1954 which relates to the hearing of charge which is as follows:

"22. Hearing of Charge. —

(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence: Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with: Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time—

(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial:

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless—
(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or
(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.
(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge.]"

7. On behalf of the Appellant, it was contended that the Court of Inquiry was initiated to unearth the circumstances leading to the death of Havildar Harpal

and to find out who was responsible. At that stage, there was no suspicion about the involvement of the Respondent. The Respondent was examined as witness No.18 and not as an accused. Only during the course of the recording of the statement of the Respondent, a serious doubt was entertained about his involvement in the death of Havildar Harpal. It was contended by the Appellant that full opportunity was given to the Respondent to cross-examine the witnesses and to submit an additional statement in his defence which was declined by the Respondent. It was further contended that there is no complaint made by the Respondent about the violation of Rule 180 and the prejudice that was caused to him at the stage of recording summary of evidence and during the Court Martial. The submission made on behalf of the Appellant was that the Court of Inquiry is only for collection of evidence and any violation of the procedure prescribed under Rule 180 does not vitiate the proceedings of the Court Martial. Moreover, according to the Appellant, the Respondent failed to show any prejudice caused to him by the non-

observance of the procedure provided in Rule 180. As the Respondent was given an opportunity to cross-examine witnesses as provided in Rule 22 and during the Court Martial proceedings which he did not utilize, there is no failure of justice, according to the learned Senior Counsel for the Appellant.

8. The Respondent defended the order of the Tribunal by submitting that collection of evidence by the Court of Inquiry is a crucial stage during which the accused is entitled to be provided with an opportunity as contemplated in Rule 180. Violation of the procedure prescribed in Rule 180 would render the entire proceedings void. It was contended by the learned Senior Counsel for the Respondent that even though the Respondent was initially examined as a witness, there was a requirement of summoning those witnesses whose statements were recorded in his absence and re-examining them after the status of the Respondent changed from a witness to that of an accused.

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

judgments of this Court in which Rule 180 was discussed. The orders by which General Court Martial was convened were challenged by petitions filed under Article 32 of the Constitution of India in ***Lt. Col. Prithi Pal Singh Bedi & Ors.*** v. ***Union of India & Ors.***[1] One of the contentions on behalf of the petitioners therein was that it was obligatory upon the authorities to appoint a Court of Inquiry whenever an inquiry affects the character or military reputation of the persons subject to the Act and, in such an inquiry full opportunity must be afforded to such person of being present throughout the inquiry and making any statement or giving any evidence that he wishes to make and of cross-examining any witnesses. Interpreting Rule 180, this Court held that it cannot be construed to mean that whenever or wherever any inquiry in respect of any person who is subject to the Act is conducted and his character or military reputation is likely to be affected, setting up of a Court of Inquiry is *sine qua non*. However, this Court held as follows:

1 (1982) 3 SCC 140

*"**40.** ... Rule 180 merely makes it obligatory that whenever a Court of enquiry is set up and in the course of enquiry by the Court of enquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of Court of enquiry. Court of enquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a Court of enquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an enquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific enquiry was directed against the person whose character or military reputation is involved. To ensure that such a person whose character or military reputation is likely to be affected by the proceedings of the Court of enquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation, Rule 180 merely makes an enabling provision to ensure such participation."*

10. This Court in ***Major G.S. Sodhi*** v. ***Union of India***[2] rejected the challenge to the Court Martial proceedings while dismissing the Writ Petitions filed under Article 32 of the Constitution. The main grievance of the petitioners in that case was the violation of the procedure prescribed in Rules 22 and 23 of the Army Rules. While recording a finding that there has been substantial compliance of Rules 22 and 23, this Court has held that recording of evidence is only to find out whether there is a *prima facie* case to convene a court-martial. This Court was of the opinion that the object and effect of the Rules should be considered in the context bearing in mind the general principle whether such an incomplete compliance has caused any prejudice to the delinquent officer. However, it was held that if there is any violation of mandatory rules, the benefit of the same should be given to the delinquent officer. The conclusion in that case was that there was no violation of the Rules and in any event no prejudice was caused to the petitioners therein. In ***Union of India & Ors***. v.

2 (1991) 2 SCC 382

Major A. Hussain (IC-14827)[3], this Court while setting aside the judgment of the High Court of Andhra Pradesh upheld the order of conviction of the respondent by the Court Martial. While dealing with the submissions made on Rule 180, this Court relying upon ***Major General Inder Jit Kumar*** v. ***Union of India***[4] held that proceedings before a Court of Inquiry are not adversarial proceedings as the Court of Inquiry is in the nature of a fact-finding enquiry committee. This Court was of the view that it is unnecessary to examine if pre-trial investigation is adequate or not when there is sufficient evidence to sustain conviction by the Court Martial. It was further held that the requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the Court Martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. As the Respondent therein participated in the recording of summary of evidence without raising any objection, the

3 (1998) 1 SCC 537
4 (1997) 9 SCC 1

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

11. In ***Union of India & Ors.*** v. ***Sanjay Jethi & Anr.***[5] the question regarding the bias of members of the Court of Inquiry was decided in favour of the delinquent officer. The interpretation by this Court of Rule 180 is as follows:

> *"53. In a CoI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on CoI. The rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action. Thus understood, the language employed in Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person*

5 (2013) 16 SCC 116

concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that CoI may not always be essential or sine qua non for initiation of a court martial but another spectrum is that once the authority has exercised the power to hold such an inquiry and CoI has recommended for disciplinary action, then the recommendation of CoI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the rule, for the language employed in the said rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of the factual matrix of each case."

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

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

(b) The accused is entitled to full opportunity as provided in Rule 180;

(c) As a final order of conviction is on the basis of a trial by the Court Martial, irregularities at the earlier stages cannot be the basis for setting aside the order passed by the Court Martial;

(d) If the accused raises a ground of non-compliance of Rule 180 during the framing of charge or during the recording of summary of evidence, the authorities have to rectify the defect as compliance of the procedure prescribed in Rule 180 is obligatory.

13. Though there is non-compliance of Rule 180 of the Army Rules in this case as the Respondent was not present during the recording of the statements of witnesses, it is clear from the record that the Respondent did not raise this ground either at the stage of framing of the charge, recording summary of evidence or during the Court Martial proceedings. After a final order was passed by the Court Martial on the basis of a full-fledged trial, it is not open to the Respondent to raise the ground of non-compliance of Rule 180 during the Court of Inquiry proceedings. Therefore, the Tribunal ought not to have remanded the matter back for a *de novo* inquiry from the

stage of Court of Inquiry on the ground of infraction of Rule 180 of the Army Rules.

Section 16 of the Army Act, 1950

14. In exercise of the power conferred by Section 16 of the Armed Forces Tribunal Act, 2007 an order of remand was made by the Tribunal. Section 16 of the Armed Forces Tribunal Act, 2007 reads as follows:

> *"16. Re-trial. — (1) Except as provided by this Act, where the conviction of a person by court martial for an offence has been quashed, he shall not be liable to be tried again for that offence by a court-martial or by any other Court.*
>
> *(2) The Tribunal shall have the power of quashing a conviction, to make an order authorising the appellant to be retried by court martial, but shall only exercise this power when the appeal against conviction is allowed by reasons only of evidence received or available to be received by the Tribunal under this Act and it appears to the Tribunal that the interests of justice require that an order under this section should be made:*
>
> *Provided that an appellant shall not be retried under this section for an offence other than—*

(a) the offence for which he was convicted by the original court martial and in respect of which his appeal is allowed;

(b) any offence for which he could have been convicted at the original court martial on a charge of the first-mentioned offence;

(c) any offence charged in the alternative in respect of which the court martial recorded no finding in consequence of convicting him of the first-mentioned offence.

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

15. The power conferred on the Tribunal to direct re-trial by the Court Martial is only on the grounds mentioned in Section 16(2). The Tribunal is competent to direct re-trial

only in case of evidence made available to the Tribunal was not produced before the Court Martial and if it appears to the Tribunal that the interests of justice requires a re-trial. The re-trial that was ordered by the Tribunal in this case is on the basis that the procedure prescribed in Rule 180 of the Army Rules has not been followed. The Tribunal does not have jurisdiction to direct re-trial on any other ground except that mentioned in Section 16(2). Non-compliance of Rule 180 cannot be a ground for ordering a re-trial. In addition, the Tribunal has competence only to order re-trial by the Court Martial. There is no power conferred on the Tribunal to direct the matter to be remanded to a stage prior to the Court Martial proceedings. Therefore, we are of the view that the order passed by the Tribunal directing a *de novo* inquiry from the stage of Court of Inquiry requires to be set aside. As the Tribunal has not adjudicated on the merits of the Transfer Application, we set aside the order of the Tribunal and remand the Application back to the Tribunal to be considered on its own merits, without

being influenced by any observation made in this judgment.

16. However, the Respondent shall not be sentenced to any imprisonment in view of his having already undergone the sentence of more than 10 years.

17. The Appeal is accordingly allowed.

.....J.
[L. NAGESWARA RAO]

.....J.
[AJAY RASTOGI]

New Delhi,
January 07, 2020.

Non-Reportable

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J U D G M E N T

L. NAGESWARA RAO, J.

1. The order of dismissal of the Respondent was set aside by the judgment of the Armed Forces Tribunal, Regional Bench, Lucknow (hereinafter, *'the Tribunal'*), aggrieved by which this Appeal is filed.

2. The Respondent was enrolled as a Soldier in 20 Jat Firing Team which was attached to the Jat Regimental Centre, Bareilly on 25.02.1999. A firing incident took

place at around 8.45 a.m. on 02.10.2004, when the team was practicing firing at the Jat Regimental Centre. During the incident, Havildar Harpal and the Respondent sustained gunshot injuries. Havildar Harpal succumbed to the bullet injuries and the Respondent was admitted at the hospital due to injuries. A First Information Report was lodged at the Police Station, Sadar Cantonment, Bareilly. A preliminary investigation was initiated by the Staff Court of Inquiry as per the directions of the Station Headquarters, Bareilly which concluded on 25.11.2004. The General Officer Commanding 22 Infantry Division directed:

a) *disciplinary action to be initiated against the Respondent for causing the death of late Havildar Harpal and for attempting to commit suicide.*
b) *to counsel Lt. Rajiv Menon for not implementing the relevant instructions during the conduct of firing practices at the ranges.*
c) *Late Havildar Harpal of 20 Jat Regiment was directed to be treated on bona fide Government*

duty and his death was held attributable to military service in peace.

3. The Respondent was kept in close arrest w.e.f. 27.11.2004 and was handed over to 7 Kumaon Regiment under the authority of Headquarters 49 Infantry Brigade. On 28.12.2004, the Respondent was tentatively charged with the murder of Havildar Harpal under Section 302 IPC read with Section 69 of the Army Act, 1950 (for short "the Act") and under Section 64(c) of the Act for attempting to commit suicide. 21 witnesses were examined in the summary of evidence and the Respondent was given an opportunity to cross-examine the witnesses, which he declined. He was given an opportunity to make additional statement, which was also declined. Further opportunity given to him to adduce evidence was also not availed by the Respondent. Summary of evidence concluded on 07.02.2005. Additional summary of evidence was also recorded, which was completed on 03.06.2005. The General Court Martial commenced on 28.11.2005, and the trial was concluded on 16.03.2006. The General Court Martial convicted the Respondent under Section 302 IPC for

the murder of Havildar Harpal and for attempting to commit suicide. The Respondent was sentenced to suffer imprisonment for life and to be dismissed from service. The statutory complaint filed by the Respondent was rejected by the Chief of the Army Staff on 16.03.2007. The validity of the order of the General Court Martial dated 16.03.2006 and the order of the Chief of the Army Staff dated 16.03.2007, rejecting the statutory complaint were assailed before the Tribunal.

4. Though several grounds were taken before the Tribunal to challenge the order of the General Court Martial, the principal contention of the Respondent was non-compliance of Rule 180 of the Rules. The Tribunal decided the petition by adverting to the contention relating to Rule 180. It was held by the Tribunal that Rule 180 provides that a person against whom an inquiry is conducted to be present throughout the inquiry. As there was no doubt that the Respondent was denied permission to be present when statements of witnesses were being recorded before the Court of Inquiry, the Tribunal concluded that the entire trial against the Respondent is vitiated. The Tribunal set aside the order of the Court Martial and remitted the matter for

de novo trial from the stage of Court of Inquiry in exercise of its power under Section 16 of the Armed Forces Tribunal Act, 2007.

Rule 180 of the Army Rules, 1954

5. The only point considered by the Tribunal is Rule 180 and the effect of non-compliance of the said Rule. It is relevant to re-produce Rule 180 which is as follows:

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

previously notified receives notice of and fully understands his rights, under this rule."

6. Chapter VI of the Army Rules, 1954 deals with the Court of Inquiry. According to Rule 177, a Court of Inquiry is an assembly of officers or junior commissioned officers (JCOs) constituted to collect the evidence. The procedure to be followed by the Court of Inquiry is provided in Rule 179. Rule 180 deals with the procedure for inquiry where the character of a person who is subject to the Act is involved. When an inquiry affects the character or military reputation of a person who is subject to the Act, full opportunity has to be provided to the person throughout the inquiry, of making any statement, of giving any evidence he may wish to make or give, and of cross-examining any evidence. According to Rule 182, the proceedings of a Court of Inquiry, or of any confession, statement, or answer to a question made or given in a Court of Inquiry, shall not be admissible in evidence. However, the proviso to Rule 182 provide that nothing in Rule 182 shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness. It

is also necessary to refer to Rule 22 of the Army Rules, 1954 which relates to the hearing of charge which is as follows:

> *"22. Hearing of Charge. —*
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> *(1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence: Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).*
> *(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with: Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.*

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time—

(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial:

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless—

(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on

the basis of the evidence so taken as well as the investigation of the original charge.]"

7. On behalf of the Appellant, it was contended that the Court of Inquiry was initiated to unearth the circumstances leading to the death of Havildar Harpal and to find out who was responsible. At that stage, there was no suspicion about the involvement of the Respondent. The Respondent was examined as witness No.18 and not as an accused. Only during the course of the recording of the statement of the Respondent, a serious doubt was entertained about his involvement in the death of Havildar Harpal. It was contended by the Appellant that full opportunity was given to the Respondent to cross-examine the witnesses and to submit an additional statement in his defence which was declined by the Respondent. It was further contended that there is no complaint made by the Respondent about the violation of Rule 180 and the prejudice that was caused to him at the stage of recording summary of evidence and during the Court Martial. The submission made on behalf of the Appellant was that the Court of

Inquiry is only for collection of evidence and any violation of the procedure prescribed under Rule 180 does not vitiate the proceedings of the Court Martial. Moreover, according to the Appellant, the Respondent failed to show any prejudice caused to him by the non-observance of the procedure provided in Rule 180. As the Respondent was given an opportunity to cross-examine witnesses as provided in Rule 22 and during the Court Martial proceedings which he did not utilize, there is no failure of justice, according to the learned Senior Counsel for the Appellant.

8. The Respondent defended the order of the Tribunal by submitting that collection of evidence by the Court of Inquiry is a crucial stage during which the accused is entitled to be provided with an opportunity as contemplated in Rule 180. Violation of the procedure prescribed in Rule 180 would render the entire proceedings void. It was contended by the learned Senior Counsel for the Respondent that even though the Respondent was initially examined as a witness, there was a requirement of summoning those witnesses whose

statements were recorded in his absence and re-examining them after the status of the Respondent changed from a witness to that of an accused.

9. This Court had occasion to consider the scope of Rule 180 and it is necessary to take note of the judgments of this Court in which Rule 180 was discussed. The orders by which General Court Martial was convened were challenged by petitions filed under Article 32 of the Constitution of India in ***Lt. Col. Prithi Pal Singh Bedi & Ors.*** v. ***Union of India & Ors.***[6] One of the contentions on behalf of the petitioners therein was that it was obligatory upon the authorities to appoint a Court of Inquiry whenever an inquiry affects the character or military reputation of the persons subject to the Act and, in such an inquiry full opportunity must be afforded to such person of being present throughout the inquiry and making any statement or giving any evidence that he wishes to make and of cross-examining any witnesses. Interpreting Rule 180, this Court held that it cannot be construed to mean that whenever or wherever any

6 (1982) 3 SCC 140

inquiry in respect of any person who is subject to the Act is conducted and his character or military reputation is likely to be affected, setting up of a Court of Inquiry is *sine qua non*. However, this Court held as follows:

> *"**40.** ... Rule 180 merely makes it obligatory that whenever a Court of enquiry is set up and in the course of enquiry by the Court of enquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of Court of enquiry. Court of enquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a Court of enquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an enquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific enquiry was directed against the person whose character or military reputation is involved. To ensure that such a person whose character or military reputation is likely to be affected by the proceedings of the Court of*

enquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation, Rule 180 merely makes an enabling provision to ensure such participation."

10. This Court in ***Major G.S. Sodhi*** v. ***Union of India***[7] rejected the challenge to the Court Martial proceedings while dismissing the Writ Petitions filed under Article 32 of the Constitution. The main grievance of the petitioners in that case was the violation of the procedure prescribed in Rules 22 and 23 of the Army Rules. While recording a finding that there has been substantial compliance of Rules 22 and 23, this Court has held that recording of evidence is only to find out whether there is a *prima facie* case to convene a court-martial. This Court was of the opinion that the object and effect of the Rules should be considered in the context bearing in mind the general principle whether such an incomplete compliance has caused any prejudice to the delinquent officer. However, it was held that if there is any violation of mandatory rules, the benefit of the same should be given to the delinquent officer. The

7 (1991) 2 SCC 382

conclusion in that case was that there was no violation of the Rules and in any event no prejudice was caused to the petitioners therein. In ***Union of India & Ors.*** v. ***Major A. Hussain (IC-14827)***[8], this Court while setting aside the judgment of the High Court of Andhra Pradesh upheld the order of conviction of the respondent by the Court Martial. While dealing with the submissions made on Rule 180, this Court relying upon ***Major General Inder Jit Kumar*** v. ***Union of India***[9] held that proceedings before a Court of Inquiry are not adversarial proceedings as the Court of Inquiry is in the nature of a fact-finding enquiry committee. This Court was of the view that it is unnecessary to examine if pre-trial investigation is adequate or not when there is sufficient evidence to sustain conviction by the Court Martial. It was further held that the requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the Court Martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. As the

8 (1998) 1 SCC 537
9 (1997) 9 SCC 1

Respondent therein participated in the recording of summary of evidence without raising any objection, the submission regarding violation of principles of natural justice at an earlier stage was rejected by this Court.

11. In ***Union of India & Ors.*** v. ***Sanjay Jethi & Anr.***[10] the question regarding the bias of members of the Court of Inquiry was decided in favour of the delinquent officer. The interpretation by this Court of Rule 180 is as follows:

> *"53. In a CoI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on CoI. The rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action. Thus understood, the language employed in Rule 180*

10 (2013) 16 SCC 116

lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that CoI may not always be essential or sine qua non for initiation of a court martial but another spectrum is that once the authority has exercised the power to hold such an inquiry and CoI has recommended for disciplinary action, then the recommendation of CoI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the rule, for the language employed in the said rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of the factual matrix of each case."

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

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

(b) The accused is entitled to full opportunity as provided in Rule 180;

(c) As a final order of conviction is on the basis of a trial by the Court Martial, irregularities at the earlier stages cannot be the basis for setting aside the order passed by the Court Martial;

(d) If the accused raises a ground of non-compliance of Rule 180 during the framing of charge or during the recording of summary of evidence, the authorities have to rectify the defect as compliance of the procedure prescribed in Rule 180 is obligatory.

13. Though there is non-compliance of Rule 180 of the Army Rules in this case as the Respondent was not present during the recording of the statements of witnesses, it is clear from the record that the Respondent did not raise this ground either at the stage of framing of the charge, recording summary of evidence or during the Court Martial proceedings. After a final order was passed by the Court Martial on the basis of a full-fledged trial, it is not open to the Respondent to raise the ground of non-compliance of Rule 180 during the Court of Inquiry

proceedings. Therefore, the Tribunal ought not to have remanded the matter back for a *de novo* inquiry from the stage of Court of Inquiry on the ground of infraction of Rule 180 of the Army Rules.

Section 16 of the Army Act, 1950

14. In exercise of the power conferred by Section 16 of the Armed Forces Tribunal Act, 2007 an order of remand was made by the Tribunal. Section 16 of the Armed Forces Tribunal Act, 2007 reads as follows:

> *"16. Re-trial. — (1) Except as provided by this Act, where the conviction of a person by court martial for an offence has been quashed, he shall not be liable to be tried again for that offence by a court-martial or by any other Court.*
>
> *(2) The Tribunal shall have the power of quashing a conviction, to make an order authorising the appellant to be retried by court martial, but shall only exercise this power when the appeal against conviction is allowed by reasons only of evidence received or available to be received by the Tribunal under this Act and it appears to the Tribunal that the interests of justice require that an order under this section should be made:*

Provided that an appellant shall not be retried under this section for an offence other than—

(a) the offence for which he was convicted by the original court martial and in respect of which his appeal is allowed;

(b) any offence for which he could have been convicted at the original court martial on a charge of the first-mentioned offence;

(c) any offence charged in the alternative in respect of which the court martial recorded no finding in consequence of convicting him of the first-mentioned offence.

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

15. The power conferred on the Tribunal to direct re-trial by the Court Martial is only on the grounds mentioned in

Section 16(2). The Tribunal is competent to direct re-trial only in case of evidence made available to the Tribunal was not produced before the Court Martial and if it appears to the Tribunal that the interests of justice requires a re-trial. The re-trial that was ordered by the Tribunal in this case is on the basis that the procedure prescribed in Rule 180 of the Army Rules has not been followed. The Tribunal does not have jurisdiction to direct re-trial on any other ground except that mentioned in Section 16(2). Non-compliance of Rule 180 cannot be a ground for ordering a re-trial. In addition, the Tribunal has competence only to order re-trial by the Court Martial. There is no power conferred on the Tribunal to direct the matter to be remanded to a stage prior to the Court Martial proceedings. Therefore, we are of the view that the order passed by the Tribunal directing a *de novo* inquiry from the stage of Court of Inquiry requires to be set aside. As the Tribunal has not adjudicated on the merits of the Transfer Application, we set aside the order of the Tribunal and remand the Application back to the Tribunal to be considered on its own merits, without

being influenced by any observation made in this judgment.

16. The Appeal is accordingly allowed.

.....J.
[L. NAGESWARA RAO]

.....J.
[AJAY RASTOGI]

New Delhi,
January 07, 2020.