

SUPREME COURT OF INDIA

Union of India

Vs.

Col. A.D.Nargolkar

C.A.No.10686 of 2018

(A.K.Sikri and Ashok Bhushan,JJ.,)

24.10.2018

JUDGMENT

A.K.Sikri,J.,

1. Delay condoned. Appeals admitted.

2. These are civil appeals arise out of different orders passed by the Armed Forces Tribunal (AFT), Regional Bench at Mumbai in two different proceedings viz. Transfer Application No. 8 of 2013 and Original Application Nos. 50 and 53 of 2009. However, the parties involved in these appeals are same and there is continuity of events and developments that have taken place giving rise to these proceedings. For these reasons, these appeals are clubbed and heard together, which we intend to decide by this common judgment.

3. The aforesaid proceedings were filed by Col. A.D. Nargolkar (now retired) (hereinafter referred to as the ‘Officer’) who was commissioned in the Army. The other party is Union of India, which would be referred to as UOI. The genesis behind these appeals can be traced by the following factual events:

The Officer was commissioned in the Army in the year 1979 in the Corps of Artillery. He was promoted to the rank of Colonel in due course of time. From August 01, 2006 to May 31, 2007, the Officer was on study leave. On May 21, 2007, he was considered by No. 2 SB during January 2007 as a 1979 Fresh Batch Artillery and was empanelled for promotion to the rank of Brigadier subject to availability of vacancies, continued satisfactory performance and medical fitness.

4. On termination of the study leave on May 31, 2007, the Officer was posted as Additional Officer, HQ 41 Artillery Division. Posting-cum-Pormotion Order was issued during May, 2007 whereby he was required to report at Ferozpur, Punjab on June 27, 2007 as Commander, 7 Artillery Brigade. The Officer requested for posting either at a Field Station or to Aurangabad on the ground of children’s education. On this request, posting of the

Officer for Ferozpur was cancelled and he continued as Additional Officer, HQ 41 Artillery Division.

5. While he was working in that capacity, one Shri D.S. Pundir submitted a written complaint dated July 22, 2007 against the Officer to the Chief of Army Staff. The complaint contained the allegations of stealing affection of brother Officer's wife (wife of Col. V.S. Bhatti, daughter of Shri D.S. Pundir) blackmailing and harrasment. On the said complaint, a Court of inquiry (COI) was ordered vide HQ 41 Artillery Division convening order dated September 14, 2007. As per the UOI, when the Officer came to know about the convening of the COI against him, he went to Panchkula (Haryana) from Pune and tendered a written apology. A written settlement was entered into with Shri D.S. Pundir, the complainant on September 22, 2007. The Officer has its own version about it, which would be stated at the relevant stage. The COI was held and it found the Officer blameworthy for which he was awarded 'Severe Displeasure (Recordable)' by GOC-in-C of Southern Command on June 5, 2008. Award of 'Severe Displeasure (Recordable)' to the Officer was construed as 'drop in performance' resulting in cancellation of his earlier promotion order. As a consequence, the Officer was considered by No.2 Selection Board as Special Review (DIP) case in October, 2008 and was not empanelled for the rank of Brigadier. In the meantime, ACR of the Officer for the year 2007-2008 also became due on September 1, 2008. ACR of the respondent was initiated on October 16, 2008 by Brigadier V.V. Raghavan and reviewed by Major General O.P. Soni in terms of AO No. 45/2001/MS which lays down policy on initiation of ACRs of Army Personnel. The Officer challenged the said ACR by filing Statutory Complaint. The Statutory Complaint was rejected by the Central Government on June 16, 2009 being devoid of merit.

6. Thereafter, the Officer approached the Armed Forces Tribunal (AFT) by filing two Original Applications (OAs). In these OAs, he challenged the award of Severe Displeasure (Recordable) and consequent non-empanellment by filing separate OAs Nos. 50 and 53 of 2009 before AFT, Regional Bench at Mumbai. The AFT dismissed the said OAs being devoid of merits. Dissatisfied with the said dismissal of OAs by AFT, he filed writ petitions bearing Nos. 13360 and 13367 of 2009 before the High Court of Delhi at New Delhi. Insofar as these writ petitions before the Delhi High Court are concerned, vide its order dated July 9, 2012, the High Court quashed the COI proceeding held against the Officer and directed the UOI to promote him to the rank of Brigadier.

7. It may be mentioned at this stage itself that against the said order of the High Court, the UOI filed two Special Leave Petitions in which leave was granted and they were converted into civil appeals. Those civil appeals were finally heard and vide judgment dated March 10, 2014, order of the High Court was set aside and OA Nos. 50 and 53 of 2009 were directed to be heard afresh.

8. As the Officer was also aggrieved by the rejection of his Statutory Complaint against ACR for the period September 1, 2007 to August 31, 2008, he filed another OA No. 15 of 2010 before the AFT, Lucknow Bench. The said OA was subsequently transferred to AFT, Regional Bench, Mumbai and renumbered as TA No. 8/2013.

9. As far as T.A. No. 8 of 2013 of the Officer is concerned, it was heard by AFT, Mumbai and disposed of vide order dated July 4, 2013 holding that 'for all practical purposes, the said ACR has lost all importance and value'. According to the AFT, the question now was only of academic interest and it was not necessary to consider the same on merits. The Officer filed review application seeking review of the aforesaid order emphasising that matter had not become infructuous and it needed to be considered on merits. This review petition was partly allowed by order dated February 18, 2004 by the AFT. In this order, the AFT has directed that the Confidential Report for the year 2007-08 shall not be taken into consideration for the purpose of selection by Review Board. The AFT held that as the Officer was due for consideration for selection to the rank of Brigadier in the Review Board held in February, 2012 and it appears that because of the said ACR of 2007-08, he could not be selected. On that basis, it has directed that his case be reviewed afresh as if it is being taken up in February, 2012 itself without taking into consideration the ACR of 2007-08 and in case the Officer is selected, he would be given all the consequential benefits. The AFT in the impugned order has also made the observations "...in our opinion, the Confidential Report for the year 2007-08 was not written objectively, impartially and fairly as it was influenced by the proceedings of the COI and its results..."

10. The UOI sought leave to appeal. The said order under Section 31 of the Armed Forces Tribunal Act, 2007 has also been rejected by the AFT on March 25, 2014.

11. Against these orders, the UOI has filed its Civil Appeal (arising out of Diary No. 27176 of 2014).

12. This appeal came up for hearing on February 23, 2016 when, during arguments, it was noticed that O.A. Nos. 50 and 53 of 2009 were still pending before the AFT, Regional Bench, Mumbai. In these circumstances, the Court directed the AFT to take up the matter as expeditiously as possible and dispose of the same. Pursuant to these directions, the AFT, Mumbai has decided those OAs vide its order dated May 29, 2017. By the said order, the AFT has dismissed the OAs. Thereafter, by another order dated December 13, 2017, review application of the Officer seeking review of aforesaid order dated May 29, 2017 has also been dismissed. Against these orders, the Officer has filed Civil Appeal (arising out of Diary No. 14505 of 2018). This is how, the appeals of UOI as well as the Officer, have been heard together, having regard to the commonality of the issues involved therein.

13. It may be recapitulated, at this stage, that the Officer had filed three proceedings. First was OA No. 50 of 2009 whereby he claimed promotion to the rank of Brigadier. In the second OA i.e. 53 of 2009, the Officer prayed for quashing of the punishment of 'Severe Displeasure (Recordable)' imposed upon him after holding COI. Third was OA No. 15 of 2010 which was filed before AFT, Lucknow Bench. It was transferred to AFT, Mumbai Bench and renumbered as TA No. 8 of 2013, whereby ACR for the year 2007-08 was challenged. Though, these OAs were filed before the Principal Bench, New Delhi and were dismissed initially, writ petitions filed by the UOI against the said orders of AFT were allowed. The order of the High Court was set aside by this Court and the matters were

remitted back to the AFT for fresh consideration. However, these OAs were marked to Mumbai Bench of AFT where they were renumbered as TA Nos. 5 of 2014 and 6 of 2014. Insofar as third OA, namely, TA No. 8 of 2013 is concerned, the AFT has set aside the adverse ACR of the Officer for the year 2007-08 and directed that the Officer be considered for selection for the rank of Brigadier by the Review Board. Thus, it would, therefore, be appropriate to take note of the reasons given by the AFT in respect of each of the aforesaid matters. OA No. 53 of 2009 (renumbered as TA No. 6 of 2014)

14. Since, challenge laid by the Officer in this OA pertains to imposition of punishment as a result of COI, we take note of the order of AFT in this case, in the first instance. The COI was conducted against the Officer on the basis of a complaint received from one Mr. Pundir who alleged that his daughter married to another Army Officer, namely, Col. Bhatti and she was being harrassed by the Officer who was sending her repeated messages and blackmailing her by demand of money with the threat that if she does not accede to his demands, he will make some photos public. While the COI was in progress, attempts were made by the Director General, Artillery at Army HQ to reach a settlement between the Officer and Mr. Pundir. Some kind of apology was given by the Officer, to buy peace. This document was produced before the COI. The COI ultimately found that the Officer was guilty of harrasing, blackmailing and having improper relationship with the wife of a subordinate Officer. After the show cause notice, punishment of censure in the form of 'Severe Displeasure (Recordable)' was imposed. The Officer had challenged the finding of the COI primarily on two grounds:

- (i) There was a violation of Army Rule 180 in conducting the inquiry inasmuch as 'full opportunity' was not afforded to the Officer, which is the mandate of the said Rule.
- (ii) The COI wrongly relied upon the so-called apology letter of the Officer. He narrated the circumstances under which the said letter was given and also argued that, in any case, it was not an unconditional apology.

15. The AFT repelled both the contentions. It is held that the Officer had admitted his guilt/misconduct by tendering the apology to Mr. Pundir and he was now trying to wriggle out from the same on suspicious grounds. His plea that he was forced to admit his guilt and the apology was not voluntarily, was an afterthought. Insofar as argument of the Officer predicated on the Army Rule 180 is concerned, the AFT has held that the provisions were complied with as the Officer was afforded opportunity to be present throughout and cross-examine the witnesses, to record statement and to examine witnesses in defence. It is further observed by the AFT that the Officer had been issued show cause notice and he had not been able to give any plausible explanation for his behaviour. With the aforesaid findings, TA No. 6 of 2014 is dismissed. OA No. 50 of 2009 (renumbered as TA No. 5 of 2014)

16. Once the AFT held that punishment of 'Severe Displeasure (Recordable)' was awarded to the Officer and it was valid for three years, there was no question of promoting the Officer to the rank of Brigadier during the pendency of the said punishment. On that basis, second OA is also dismissed.

17. Having regard to the aforesaid outcome of the two OAs, insofar as earlier decision of AFT dated February 18, 2014 passed in TA No. 8 of 2013 is concerned, it is rendered infructuous. As mentioned above, in that order, the AFT has directed that the case of the Officer be reconsidered for the purpose of selection by the Review Board without taking into consideration Confidential Report for the year 2007-08. However, the question of reconsideration would depend upon the outcome of appeals by the Officer against the AFT's judgment dated May 29, 2017.

18. In the aforesaid background, it would be apt to first consider the subject matter of O.A. No. 53 of 2009 (renumbered as T.A. No. 6 of 2014) inasmuch as further course of action to be taken in respect of other two OAs would depend upon the outcome of the appeal preferred against the judgment of AFT, Mumbai in this OA.

19. We may point out at the outset that the arguments of the Officer, who appeared in person, remained the same which were advanced before the AFT as well. He has also filed written submissions on the same lines. His first submission was based on Rule 180 of the Army Rules. According to him, Army Rule 180 is blatantly violated in the Inquiry, vitiating it. The Rule is mandatory and statutory; duly invoked in the Inquiry against him in December, 2007. Use of words 'must' and 'shall' be seen. Onus on Inquiry Officer to give 'full and clear notice' is specific. 'Full opportunity' and not 'Reasonable opportunity' specified; being *pari materia* to Section 8(b) of the Commissions of Inquiry Act, 1952. AFT acknowledged it as mandatory as in *Lt. Col. R.D. Sharma v. UOI* in OA No. 52 of 2013 dated September 12, 2013 by AFT, Chennai.

The Rule reads as follows:

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

20. Explaining his submission based on the aforesaid Rule, the Officer argued that there was a severe *de facto* prejudice caused to him with the Inquiry Officer taking on record the alleged findings of the 'discreet inquiry' by Military Intelligence, that too, behind the back of the Officer. The finding of guilt by the Inquiry Officer is based on the said inquiry report. In addition, the Inquiry Officer had taken six more prejudicial documents, covertly on record, thereby violating Army Rule 180. The Officer went to the extent of alleging that above

violation is not a simple illegality. It amounts to fraud because Inquiry Officer factually and on record, assured him on last day of inquiry that no adverse evidence was in hand, when he factually had this 'Discreet Inquiry' report in his custody on November 10, 2007. He assured that, if so received, he would give 'full opportunity' to him to defend. Post such assurance, Inquiry Officer then covertly took it on record, to indict him, which is a deliberate, planned fraudulent action, abetted by hierarchy.

21. His another submission was that after settlement arrived at between the Officer and the complainant on September 22, 2007, the complainant had withdrawn its complaint. In spite thereof, suo motu cognizance of withdrawal complaint was taken, without notice that Inquiry Officer now was a Judge as well as the Prosecutor. This, according to an Officer, is a serious deviation from a legal procedure and also violative of Army Rule 180. It is argued that this suo motu cognizance is without jurisdiction. That is by resorting to Section 134 of the Army Act which allows taking of judicial notice in Court Martials and not COI.

22. His further submission was that the COI stood vitiated because of the following reasons as well:

(a) Subversion of favourable evidence by Inquiry Officer: It is argued that critical evidence of vindication of the Officer by husband of Mrs. Bhatti is suppressed. In fact, it is converted to read the opposite of what he had deposed. He referred to the following portion from the said deposition:

“Question No. 13: The complaint has certain allegations that Col AD Nargolkar took advantage of his position as Col Adm to lay a calculated trap to blackmail you and Mrs

Neelam Bhatti. Is it true?

Answer No. 13: No he never blackmailed me.

Question No. 14: The complaint states that Col AD Nargolkar has stolen the affections of Mrs Neelam Bhatti.

Is it true?

Answer No. 14: No.

Question No. 15: Do you have any complaints against Col AD Nargolkar?

Answer No. 15: As of now I have no complaints but however in future I am aware of the options open to me.

Question No. 16: Did you ever have any complaints against Col AD Nargolkar?

Answer No. 16: No.

Question No. 17: The court showed Exhibit F to Col VS Bhatti and asked if he recognizes the same and asked him as to when he received it?

Answer No. 17: I received two copies of the note addressed to me one at my unit address and one at my Ive stn. The copy of this had also been sent to Cdr 6(I) Armd Bde who mentioned it to me.

The note addressed to Mrs Neelam Bhatti was received a few days later. No enclosures were received along with both the notes.

Question No. 18: What was your reaction on receiving the notes?

Answer No. 18: I was disturbed on receiving the notes and since it was an anonymous letter, I was disturbed as to who could do it.

Question No. 19: You must have carried out analysis of who would have been these notes. Do you have any enemies who could have done this?

Answer No. 19: I have no enemies.

Sd/- x-x-x-x-x-x

01 Dec 2007

Presiding Officer

(IC-35581F Brig C Prakash)”

23. On this, Inquiry Officer has recorded the following findings which, according to the Officer, are perverse:

“11. Mr. DS Pundir as well as Col VS Bhatti have refused to elaborate on the allegations contained in the complaint. They have either offered no comments or asked the Court to draw its conclusion. Mr. DS Pundir has quoted the agreement settlement for being unable to elaborate on the allegations.

12. Col VS Bhatti, in his settlement refused to confirm or deny the allegations against Col AD Nargolkar. At the same time, he did not state that allegations in the complaint are false. He stated that the circumstances leading to complaint are of very private and delicate nature which can affect the dignity of him and his family.

He has referred to exercising future options against Col AD Nargolkar if the need arose.”

(b) Secret Meeting by Inquiry Officer with Opposite Wintesses, executed on day prior to Inquiry. It was reported to hierarchy by the Officer, but was not acted upon. Submission is that judicial trust, thereby, stands violated by the Inquiry Officer acting in his ex-officio capacity.

(c) Conspiracy: The Officer was not given any Notice in Inquiry, especially in respect of 3rd charge of ‘trying to circumvent law’ by his having given a conditional apology to complainant for complainant to withdraw his complaint; and also Army’s line of thinking that ‘ apology shows a guilty mind’ as it was the most important crutch to hold the Officer guilty. The Officer was never afforded reasonable nor ‘full opportunity’ to rebut competent authority’s line of thinking that apology is ‘mens rea’ and thereby Army Rule 180 violated again.

(d) Officer was never told in Inquiry what exact adverse issues he had to meet. No clear questions were posed i.e. “what do you have to say about (a) stealing affections of Mrs Bhatti or (b) harassing Mr Pundir by calls/SMSs or (c) ‘trying to circumvent Law’ by way of apology/settlement

(e) Convening Order for Inquiry was issued on September 17, 2007 in Pune covertly, behind the back, while the Officer and his wife were called to Delhi by DG, Artillery for apology/settlement from September 18, 2007 to September 23, 2007. Convening Order was supplied to appellant on September 24, 2007 on return to Pune. This was clearly untenable.

(f) Members of Inquiry did not assemble post last day of depositions, for collective application of mind. They signed on the Inquiry Report blindly. Inquiry Report is vitiated thereby.

(g) Competent authority did not consider the exhaustive 250 page reply to Show Cause Notice dated April 14, 2008, when awarding ‘Censure’. This also depicts non-application of mind.

(h) ‘Censure’ itself is an illegal and impermissible penalty as it is not prescribed by law or Army policy. Court Martial was shield away from, to avoid fresh opportunity to cross-examine witnesses.

(i) Complaint authenticated but the contents thereof were not proved in the inquiry. Mr Pundir merely authenticated complaint as a document. He did not prove it’s contents as required in law. *Roop Singh Negi v. Punjab National Bank & Ors¹*. was relied upon.

24. The Officer also referred to the following portion of the judgment in Managing Director, E.C.I.L., Hyderabad v. B. Karunakar (II) on the principle that violation of natural justice principle vitiates enquiry.

25. Mr. Maninder Singh, learned ASG placed strong refutation to the aforesaid submissions of the Officer. He referred to the complaint that was lodged by Mr. Pundir which contained very serious allegations. He pointed out that in the said complaint, it was alleged by Mr. Pundir that he, his wife, his daughter Mrs. Neelam Bhatti and her husband Col. V.S. Bhatti meted out atrocious treatment thereby causing them mental torture, humiliation and harrassment. It was alleged that during the period Officer made amorous advances towards Mrs. Neelam Bhatti, which she resisted. The Officer was a senior Officer of Col. Bhatti. It was further alleged that the Officer thereupon coerced and trapped Mrs. Neelam Bhatti into an improper relationship, thus, stealing the affection of a subordinate Officer’s wife. It was also alleged that the Officer misused his official position as Colonel and laid a calculated trap to blackmail Col. Bhatti and Mrs. Bhatti and subsequently the Officer started sending SMS messages with a view to defame, blackmail and for extortion. In the complaint, it is alleged that the Officer has also threatened to physically harm the complainant and continued calling and sending messages to his daughter i.e. Mrs. Bhatti, impinging on her privacy by allegedly

threatening to expose her by way of incriminating material such as allegedly taken photographs etc. He was alleged to be blackmailing the family by demanding money, failing which he was threatening to make the pictures public.

26. Argument of the learned ASG was that the aforesaid behaviour of an Army Officer qua junior's wife is treated as reprehensible and deprecable in the Army discipline. Obviously, therefore, when such a complaint was received, it became a disciplinary case according to law applicable to army personnel. It was, for this reason, that COI was constituted and, therefore, the Officer cannot impute unnecessary motives in taking disciplinary action against him and a decision to initiate such action was based on the allegations contained in the said complaint.

27. Mr. Maninder Singh further submitted that all the arguments raised by the Officer are of no consequence as the findings of the Inquiry Officer were based on the admission of guilt by the Officer, which according to him, is the most important aspect of the case and the Officer is trying to sidetrack the same. Submission was that the Officer was not coerced to admit his guilt and rather it was his voluntary act. Even otherwise, provisions of Army Rule 180 were complied with. Before taking action, show cause notice was also issued to him on March 7, 2007 to which he had submitted his detailed reply on April 14, 2007 which was duly considered and it was decided to award punishment of 'Severe Displeasure (Recordable)' having regard to the serious nature of misconduct. He submitted that request of the Officer to reassemble the inquiry was totally uncalled for and, therefore, rightly rejected. The learned ASG referred to various passages from the order of the AFT wherein the contentions of the Officer have been rejected and supported the reasoning given by the AFT.

28. In a case like this, before we proceed to discuss the contentions raised by the Officer and reply thereto by the ASG, it is necessary to go into the circumstances under which the so-called settlement took place between the Officer and Mr. Pundir and the nature of apology written by him. The Officer had received a legal notice from Mr. Pundir on August 2, 2007 alleging harrasment/mental torture etc., unwarranted telephone calls to him as well as his family members. The Officer had denied these allegations. According to him, on an earlier occasion when this issue was raised up by Mr. Pundir, he suggested restraint, considering the advance age and health of Mr. Pundir who is well known to him and thereafter Mr. Pundir tendered an apology in February, 2007. However, when the promotion of the Officer was declared, Mr. Pundir flared up the issue again by sending legal notice dated August 2, 2007. On September 3, 2007, the complainant had forwarded this complaint to the army authorities. On receipt of this complaint, a 'discreet inquiry' was ordered and because of this reason, promotion of the Officer was withheld, pending discipline and vigilance clearance which is mandatory for according such promotion. When such a discreet inquiry was going on, simultaneously there were some talks of settlement between Mr. Pundir and the Officer. Version of the Officer is that some talks took place between Mr. Pundir and Director General of Artillery on September 11, 2007. According to him, Lt. Gen. A.S. Bajwa advised the Officer and his wife to meet the complainant and his wife to iron out the differences. He also advised the Officer to tender a simple apology to the complainant to satisfy his ego. The meeting, thus, took place at Panchkula on September 22,

2007. The Officer has further stated that a day before i.e. on September 21, 2007, the Director General, Artillery had almost ordered him to give unconditional apology. The Officer has further alleged that though he refused to sign the initial draft prepared by the complainant which was damaging, finally it was agreed that the Officer gives a conditional apology on which the complaint would be withdrawn.

29. At this stage, without going into the respective versions which led to writing of the apology letter by the Officer on September 22, 2007, it may be necessary to reproduce the language of apology letter:

LETTER OF APOLOGY

1. I, IC 38032M Col AD Nargolkar resident of E-8/12, Salunke Vihar, Kondhwa, Pune 411048 (Maharashtra) do hereby apologize to Mr DS Pundir resident of Village Khangesra, PO Kot, Distt Panchkula 134118 (Haryana) if it has caused him harassment and mental agony.

2. I understand that Mr DS Pundir is withdrawing his complaint from Army and Civil authorities on my undertaking and assurance of no interference in his personal life and cause future harassment/threatening. On my failure to abide by this letter of apology and the compromise letter, Mr DS Pundir shall have the liberty to initiate a fresh complaint against me on the same cause of action.

3. I am liable for a disciplinary action from Army authorities as well as from Civil authorities in case I ever violate my undertaking of no communication, contact or interference of any sort in the personal life of Mr. D.S. Pundir.

4. I am giving this letter of apology on my own free will and without any pressure of any kind from anyone. I will not go back on my undertaking and will not seek any kind of compensation or claim at a later stage.

5. I am signing this document in the presence of my wife Mrs Rohini Nargolkar and witness Mr Rajeev Anand :

a. Mrs. Rohini Nargolkar Signature

b. Mr Rajeev Anand Signature

6. The above letter of apology has been read and understood by me and it has been prepared on my instructions which are true and correct. I understand to abide by the above undertakings.

The witness and my wife Mrs. Rohini Nargolkar have signed in my presence.”

30. Significantly, when the complainant received summons to appear before the COI even thereafter he sent another letter dated November 1, 2007 reiterating his earlier position and

stated that said letter dated November 1, 2007 be treated as his statement and 'it is reiterated that the matter may kindly be treated as closed from my end'.

31. Notwithstanding the above, the army authorities decided to proceed with the COI. The circumstances in which matter was settled between the Officer and the complainant, that too with the intervention of a very senior Officer Lt. Gen. A.S. Bajwa, it could have been given a quietus by the respondents. However, at the same time, it can also be observed that the respondents authorities were not bound by the settlement which took place between the Officer and the complainant. Since, it was thought that allegations were serious in nature and a discreet inquiry had also been held into the matter which also pointed out that prima facie there was some substance in those allegations, the army authorities were not precluded from proceeding with COI to find the truthfulness in the said allegations.

32. Having said that, it was for the respondents to prove the allegations. Burden was upon the authority to discharge initial onus as it had levelled the charges against the Officer. We have gone through the findings of COI which are placed on record. These findings categorically mention that insofar as Mr. Pundir is concerned, he had withdrawn his complaint by specifically stating that he did not want to pursue the same. The report also records that he did not depose in support of the allegations contained in his complaint. There is no other witness which was produced before the COI to prove those allegations. In fact, the COI report records as under:

“11. Mr. DS Pundir as well as Col VS Bhatti have refused to elaborate on the allegations contained in the complaint. They have either offered no comments or asked the Court to draw its conclusion. Mr. DS Pundir has quoted the agreement settlement for being unable to elaborate on the allegations.

12. Col VS Bhatti, in his settlement refused to confirm or deny the allegations against Col AD Nargolkar. At the same time, he did not state that allegations in the complaint are false. He stated that the circumstances leading to complaint are of very private and delicate nature which can affect the dignity of him and his family. He has referred to exercising future options against Col AD Nargolkar if the need arose.”

33. Notwithstanding the same, the COI has come to the findings that allegations in the complaint stood proved. It has based its findings by taking into consideration the following two aspects:

(a) The Officer has given an unconditional apology on September 22, 2007 to Mr. Pundir expressing regret over his action if they had caused him trouble and harassment and promising not to interfere directly or indirectly in the personal life of Mr. Pundir and his family members.

(b) The allegations in the complaint lodged by the complainant were not contested by the Officer during the proceedings of the COI. In this behalf, the report records as under:

“13. The allegations in the complaint lodged by Mr. D.S. Pundir have not been contested by Col AD Nargolkar during the proceedings of the COI despite the effect of the allegations on his character and military reputation and a chance to cross examine both Mr. D.S. Pundir and Col. V.S. Bhatti under provisions of Army Rule 180. In his statement to the court and answers given to various questions asked by the Court, Col AD Nargolkar has cited technicalities that the complaint is not being pursued and is presently non existent.”

34. The aforesaid approach is clearly against the basic canons of procedural fairness. It is also contrary to the principle of natural justice and the provisions of Army Rule 180. When Mr. Pundir or Col. V.S. Bhatti did not support the allegations before the COI, question of cross-examining them on these aspects did not arise at all. Moreover, the aforesaid approach depicts that COI, on mere allegations in the complaint, proceeded with the supposition that these allegations stand proved and onus was upon the Officer to prove his innocence. That cannot be countenanced.

35. In the aforesaid backdrop, the only question is as to whether allegations could be treated as proved on the basis of apology letter dated September 22, 2007.

36. First of all, this apology is not given by the Officer before the COI during the proceedings conducted by it. It was given to the complainant. In any case, this aspect can be ignored as the complainant had sent the copies of this apology letter to all the authorities including COI and, more importantly, the Officer has accepted having signed the said settlement. Therefore, it is an admitted document. However, the Officer had given his own version and circumstances in which the said letter was given. As already mentioned above, the circumstances do suggest that it was done to buy piece and give quietus to the matter, that too, with the intervention of a very senior Officer. The circumstances which are narrated by the Officer which led to giving the aforesaid letter have not been rebutted as neither the complainant nor Col. Bhatti or any other person came forward to give a different version of the circumstances which led to the said settlement between the Officer and the complainant. Insofar as letter of apology is concerned, it does not anywhere accepts the allegations of the complaint. It simply says that ‘do hereby apologises to Mr. D.S. Pundir resident of Village Khangesra, PO Kot, Distt Panchkula 134118 (Haryana) if it has caused him harassment and mental agony’.

37. On the circumstances in which this settlement took place and apology given, there is an unrebutted version of the Officer only, on the record. Once that is to be kept in mind, it is not an unconditional apology. On the contrary, a particular pharascology was agreed upon, which was to the satisfaction of both the parties. In this background, it becomes important that the Officer has apologised ‘if’ it had caused the complainant harassment and mental agony. Thus, it was not an unconditional apology. The Officer only meant that if his purported acts had adversely affected the complainant and his family members, he was apologising the same. Secondly, and more importantly, this letter of apology was given on the understanding that the complainant would be withdrawing his complaint. That is specifically mentioned in Para 2. Of course, the Officer also gave an assurance that there

would not be any interference in the complainant's personal life and the Officer would not cause future harassment/threatening. However, it is important to note that it is further mentioned that on his failure to abide by the aforesaid undertaking, Mr. Pundir would be free to initiate 'fresh complaint' against the Officer on the same cause of action. Again, no doubt, this letter of apology states that it is given by the Officer out of his free will and without any pressure. However, it is also a matter of record that this meeting between the Officer and the complainant could be fructified with the good offices of Director General, Artillery A.S. Bajwa who had persuaded the Officer to give such an apology and bring the things acuitius. Not only that, the complainant acted upon the aforesaid understanding as he sent communication dated October 2, 2007 to the official that in view of the letter written by the Officer, the complainant was withdrawing his complaint. He specifically wrote that he had taken humanitarian approach thinking about family of the Officer and also the fact that the Officer was in the promotion list and, therefore, from his side, the matter 'stands cleared and my presence in the COI is no longer required/necessary'.

38. The cumulative effect of all the aforesaid factors including the circumstances in which the said letter of apology was given, it is difficult to term it as unconditional apology on which finding of guilt could have been returned against the Officer.

39. To top it all, while giving the aforesaid findings, COI has referred to the 'discreet inquiry' which had found the allegations to be correct. At the same time, this discreet inquiry was not proved before the COI. We fail to understand as to how it could become the basis of findings of the COI when no opportunity was given to the Officer to meet the same.

40. For the aforesaid reasons, we come to a conclusion that the COI failed to adhere to the procedure laid down in Army Rule 180; it's 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)'.

41. 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.

42. Insofar as appeal of the UOI is concerned, it does not survive and is, thus, disposed of as such.

