Before J.S. Narang, J.

G.S. SANDHU, LT. COL.,—*Petitioner*

versus

UNION OF INDIA & OTHERS,—*Respondents*

C.W.P. No. 15418 OF 1998

19th July, 2001

Constitution of India, 1950—Art. 226—Army Rules, 1954—Rls. 177 & 180—Regulations for the Army, 1962—Reg. 518—Court of inquiry against a Lt. Col,—Constitution of—Lack of inherent jurisdiction—Reg. 518 provides that the Presiding Officer should be of a rank higher than the rank of a delinquent official & that the other members of the Assembly should be atleast equivalent to the rank of the delinquent official—Presiding Officer holding the rank of Lt. Col & other members of the rank of Major appointed—The word "wherever possible" appearing in the Regulation cannot be taken as an excuse or handle for not detailing members of the appropriate rank & seniority—Substantial witnesses examined at the back of the petitioner—Opportunity to cross-examine all the witnesses not given to the petitioner—Violation of the mandatory rules—Opportunity to be accorded to the delinquent official should be effective opportunity and not a farce—Writ allowed while quashing the order of convening Court of inquiry, the proceedings and the inquiry recorded by the said Court of Inquiry.

Held, that the Court of inquiry has not been constituted in accordance with law as per the cumulative reading of rule 177 and regulation 518, which leads one to a definite conclusion that while constituting the Court of Inquiry, where the character and military reputation of an officer is likely to be an issue, the Presiding Officer should be of a rank higher than the rank of the delinquent official and that the other members of the assembly of the Court of Inquiry should be at least equivalent to the rank of the delinquent official. Since the Constitution as envisaged under law has not been followed, as such, the convening order dated 30th June, 1996 has not been correctly passed. In addition to the above, the procedure which was required to be followed under rule 180 as contained in the convening order had also not been followed, the inquiry proceedings *in toto* are

not sustainable. It is mandatory to follow the procedure in a situation where Court of inquiry is ordered, the enquiry so held may culminate into passing of an order which may affect the character and military reputation of the delinquent official and especially when the commanding officer has been given the freedom to accept and adopt the enquiry held under rule 180. The rule envisages full opportunity to be granted to the delinquent official and it has been provided under rule 22 that the delinquent official shall have full opportunity to cross-examine any witness and set up his defence accordingly. Since rule 22 has been subjected to proviso wherein it is contained that if inquiry is held under rule 180, the commanding officer may not adopt the procedure as envisaged under sub- rule (1) to Rule 22, it becomes absolutely necessary that the full opportunity by way of giving the opportunity to the delinquent official to cross-examine the witnesses ought to be granted the opportunity has to be given to him for setting up his defence accordingly.

(Para 32)

R.S. RANDHAWA, ADVOCATE,—FOR THE PETITIONER

KAMAL SEHGAL, ADVOCATE—FOR UNION OF INDIA

JUDGMENT

J.S. NARANG, J.

(1) This judgment would dispose of two writ petitions Nos. 12793 and 15418 of 19998 as common question of law and facts are involved in both these cases. Facts are being taken from CWP No. 15418 of 1998.

(2) Petitioner was commissioned in the Army Service on 6th September, 1970 in the Gorkha Regiment of Indian Army. During the course of his service career the petitioner earned promotions to various ranks and the last rank to which the petitioner was promoted is Lieut. Colonel and that the petitioner had never been indicted in respect of his integrity and honesty.

(3) It is in August, 1995 the petitioner was posted as Field Cash Officer, HQ3, Infantry Division. The troops located thereunder are dependent upon the Field Cash Officer in the matters relating to their pay etc. The duties of the Field Cashier are to draw money from

the Government treasury and further distribute it to the representatives of the units/formations according to their demand raised accordingly. Thus, it is obvious that the salary is not disbursed to the individuals in the formations or in the unit but the composite amount demanded is delivered to the representative who is duly authorised to collect for and on behalf of the military personnel posted in the respective units.

(4) On 29th June, 1996, the petitioner in the normal course of his duty had gone to State Bank of India, Leh which is defined as a Government Treasury for drawing the amount for disbursing to the units/formations as aforesaid. In all, nine units/formations had submitted their requests for drawing the money accordingly. The representatives of the units/formations had also reached for collecting their requisitioned amount. One such officer i.e. Captain Deepak Gaur of 15 Rajput Regiment was also present for collecting money for the unit/formations of 102 Infantry Brigade. He was to collect a sum of Rs. 2,18,10,000 as per the requisition. The representatives of the units including Captain Deepak Gaur had been told to be present in the bank premises for collecting the requisitioned amount respectively from the Bank premises itself after the same is drawn by the petitioner. The petitioner drew a total sum of Rs. 4,36,00,000 for disbursement to the various representatives of the units/formations as per the requisitions. Captain Deepak Gaur collected the amount of Rs. 2,18,10,000 after reconciling the same with the requisitioned figure and upon counting, the said amount was kept in a box in which the said amount was to be carried from the premises to the location of the formation. The process, procedure and the practice was duly adhered to and that the bundles of notes of the denomination of Rs. 500 and Rs. 100 were duly noted by the officer concerned and upon due confirmation and verification, the amount total of which came to be Rs. 2,18,10,000 was delivered which in turn was confirmed in token of having receipted. It shall be apposite to notice that as per the averment Captain Deepak Gaur was the first one to receive the payment, meaning thereby, the amount was received by him in the presence of other officers. It is also averred that no officer after collecting the amount was allowed to leave the bank premises till the entire payment had been disbursed to the other officers accordingly. It is after the disbursement of the total amount to the officers as per their requisitions, all of them left the premises along with the requisitioned amount.

(5) It was in the evening at about 1630 hrs, that Captain Deepak Gaur came to the petitioner and informed that a sum of Rs. 4,00,000 (Rupees four lacs) was found less from the total requisitioned amount and as a result thereof the rechecking at every point was required to be carried out. The figures were reconciled in the bank with the bank officials and the withdrawals and the disbursed amount were found to be absolutely correct and additionally the representatives of other units/formations were also contacted for verifying as to whether any excess payment has been received by any one of them. The answer received was in the negative and everyone confirmed having received the requisitioned amount and nothing more. The matter was formally reported, FIR was lodged with the police which obviously attracted investigations by way of Court of Inquiry. The convening order was passed on 30th June, 1996 vide which Lt. Col. Rakesh Sharma, 3rd Infantry Division (Signal Regiment) was detailed as Presiding Officer along with Major K.S. Minhas and Major Atul Marwaha as the members of the assembly of the Court of Inquiry. The Court of Inquiry was held from 30th June, 1996 to 30th September, 1996. Since the legality of the convening order has also been questioned, it shall be apposite to note the convening order in its entirety, which reads as under :—

CONVENING ORDER

1. A Staff C of I will be convened to investigate into the circumstances under which Rupees four lakhs the public money (Imprest) drawn from Fd Cash Offr. HQ 3 Inf. Div. on 29th June, 1996 by IC-52632-A Capt Deepak Gaur of 16 Rajput for units of HQ 102 Inf Bde was reported to be missing after having drawn the total amount of Rs. 2,18,10,000 from Fd Cash Officer.

2. The composition of the Court will be as under :—

(a) Presiding Officer—2Ic 3 Inf Div. Sing Reft.

(b) Members : 1. One Maj. to be detailed by 3 Inf Div ord. Unit.

e. One Major to be detailed by HQ Ladakh Scouts.

3. The provisions of Army Rule 180 will be complied with while recording the evidence of the witnesses.

4. The Court will carry out the investigations in detail and pin point the responsibilities for the lapses against the defaulting offrs/JCOs.

5. Terms of reference for the Court.

(a) While carrying out the investigation, the Court will specially emphasis on the following points :—

(i) Security of the cash in bank as well as while carrying the cash from Leh to Karu.

(ii) Accounting of the cash by the Offr as well as by the JCO at the bank as well as rear location of 15 Rajput (Karu).

(iii) After having drawn the cash from the bank, where all the veh. had gone before reaching Karu.

(iv) Circumstances for change of cash box.

5. C. of I proceedings duly completed will be submitted to this HQ in septuplicate by 7th July, 1996.

Sd/-
B.S. Mangat, Lt. Col. AAG,
for Col. Admn.

(6) Despite the conclusion of the proceedings by the Court of Inquiry, no order was passed and it was in the year 1998, the petitioner filed CWP 2334 of 1998 before this Court for seeking an end to the agony being caused on account of protracted proceedings which otherwise were not legally sustainable against the petitioner. The petition was got dismissed as withdrawn on 7th August, 1998. It is, thereafter, the present petitions have been filed on the ground that the previous petition having been got dismissed as withdrawn, the respondents have proceeded to direct the attachment of the petitioner to Palampur so that he is not in a position to invoke the jurisdiction of this Court and that the order for being subjected to Court Martial can be communicated accordingly. It is on these apprehensions the present petitions have been filed and that the non compliance of the

proper procedure by the Court of Inquiry and improper composition of Court of Inquiry has also been impugned. It is also stated that the proper procedure as provided under law having not been followed, it shall be absolutely incorrect to subject the petitioner to Court Martial which would send absolutely incorrect signals.

(7) The petitioner has questioned the Court of Inquiry on various grounds such as Court of Inquiry has not been convened by competent authority, as such there is error of inherent jurisdiction; the Court of Inquiry has been constituted in utter violation of Regulation 518 of the Regulations for the Army. The said regulation categorically provides that Presiding Officer will be one who will be senior in rank from the delinquent official and that the other members shall at least be equivalent to the delinquent official; the petitioner is entitled to be given full opportunity as envisaged under Army Rules 180 which says that he shall be given the opportunity to test the statements of the witnesses by subjecting them to cross-examination and also by way of testing the veracity of the documents being used against the delinquent official. The petitioner having not been given the opportunity to cross examine all the witnesses, there is serious non-compliance of the aforesaid Rule, if no such opportunity is granted in accordance with rule 180, the delinquent official is entitled to the opportunity as envisaged under Sub-rule (1) of Rule 22 of the Army Rules. This right has been subjected to the proviso thereunder wherein it is provided that if the opportunity has been granted as envisaged under Rule 180, the Commanding Officer may not grant the opportunity as envisaged under Sub Rule (1) of Rule 22.

(8) In respect of jurisdiction, it is averred that the petitioner had been attached with HQ N Area at Chandigarh for completion of disciplinary proceedings. It is averred that in pursuant thereto summary of evidence was recorded once all over again in respect of the portion where the summary of evidence had been recorded in third person and not in first person and that this exercise was carried out upon the advice received from the Judicial Branch. Since part of the disciplinary proceedings had been held at Chandigarh, as such, this Court has the jurisdiction to entertain the petition and that the petitioner is entitled to invoke the jurisdiction of this Court under Articles 226/227 of the Constitution of India: the proceedings of Court of Inquiry are also not sustainable on the ground that the same were

recorded by the Presiding Officer singly and not in the assembly of the other officers. In this regard, representation by way of objection had been sent and that categoric question has been put to the witness who was allowed to be cross examined and in reply the witness corroborated the fact that his statement had been recorded in the presence of the Presiding Officer alone; it is averred that if the proceedings of the Court of Inquiry suffers from inherent defect, which is sustainable under law, it shall not be appropriate to subject the petitioner to Court Martial; the procedure provided under Army Rule 22 is a distinct procedure than what is envisaged under Rule 180. The Commanding Officer, who is expected to apply his judicious mind for passing an order subjecting the petitioner to Court martial, should not be asked to rely upon the facts/evidence brought-forth by the Court of Inquiry. It is essential that for passing an order which has the constraints of judicial tinge, the officer so authorised should exercise his discretion independently and dehors of the evidence putforth by the Court of Inquiry, the jurisdiction vests in the Commanding Officer but this power has been diluted by the proviso which cannot be read as an estoppel against the right of the Commanding Officer to elicit independent evidence as envisaged under the aforesaid Rule.

(9) Notice of motion was issued and further proceedings in pursuant to the summary evidence were stayed and thereafter the petition was admitted upon perusal of the record produced by the respondents.

(10) Written statement has been filed by the respondents. In the first instance the jurisdiction of this Court has been questioned on the ground that the petitioner was serving at Leh within the jurisdiction of the Northern Command when the alleged offence took place and that no cause of action or any part thereof has accrued to the petitioner within the territorial jurisdiction of this Court, as such, the petition is not maintainable and, therefore, deserves to be dismissed on this ground alone. It is further averred that the Court of Inquiry has been assembled by the formation commanded and that the order has been duly signed by Assistant Adjutant General for Colonel Administration, a principal staff officer to the General Officer Commanding. The Colonel Administration is also the officer commnading troops of the personnel posted at the Divisional Headquarters. As such, the proper compliance of the requirement as envisaged under

Army Rules 177(3) has been made. Thus, the order convening the Court of Inquiry does not suffer on the count that it has not been passed by the Competent Authority. It has also been averred that the Court of Inquiry examined 16 witnesses including the petitioner and that full opportunity had been accorded to the petitioner for putting up his case (It shall be appropriate to mention here that learned counsel for the respondents disclosed upon instructions and on the basis of the record that six witnesses out of sixteen witnesses were allowed to be cross examined by the petitioner). The petitioner had been directly involved in the process which can be termed fact finding enquiry. Since sufficient compliance of the aforesaid rule has been made, as such, in view of the proviso to Army Rule 22 of Sub Rule (1), it is not incumbent upon the Commanding Officer to adopt the procedure as envisaged under Sub-Rule (1) of rule 22 and that he is entitled to rely upon the facts brought-forth on record by way of documentary as well as oral evidence for the purpose of forming an opinion in passing the order subjecting the petitioner to Court Martial. However, the order has not been passed as yet, as such, it is too early to say as to whether correct or incorrect order has been passed by the Commanding Officer as envisaged under rule 22 of the Army Rules.

(11) It is admitted the petitioner obtained leave from 25th December, 1996 to 15th January, 1997 and thereafter on 24th January, 1997, he was admitted in General Hospital, Leh and was discharged on 12th February, 1997 in low medical category and was granted three weeks sick leave. It was on 24th February, 1997, the petitioner got himself admitted in Military Hospital, Patiala which is nearer to his home town and later on transferred to Command Hospital, Western Command, Chandimandir on 6th March, 1997. The petitioner was placed in low medical category and since the disciplinary proceedings were pending against the petitioner he had been attached in terms of Army Instructions 30/86 to 14 Grenadiers, Palampur which is within the jurisdiction of HQ Northern Command for progressing and finalisation of disciplinary cases pending against him. The order of attachment shifting the petitioner to a unit located at Palampur (HP), has been challenged by way of a separate petition i.e. CWP 12973 of 1998. The said petition came up for hearing before the Motion Bench and that a caveat on behalf of the respondents had been filed. Thus, the respondents were directed to file reply and as an interim measure status quo regarding movement of the petitioner was granted.

The aforesaid petition was also admitted vide order 7th January, 1999 and CWP No. 15418 of 1998 has been ordered to be heard with the aforesaid petition. Since common questions of fact are involved both the petitions are being disposed of by this judgment.

(12) Learned counsel for the respondents has raised the question of jurisdiction in the first instance. It has been contended that the enquiry had commenced at Leh and that the summary of evidence has been recorded at Leh. It is subsequently the petitioner had been admitted to the Hospital at Leh and thereafter was shifted to the Military Hospital at Patiala and then subsequently shifted to Commnad Hospital, Chandimandir. It is on account of his low medical category that he had been admitted in the Command Hospital at Chandimandir and was also attached thereto. It is admitted that the petitioner was subsequently attached to an area known as HQ N Area for the purpose of disciplinary proceedings. It has also been admitted that part of the summary of evidence was recorded at Chandigarh. It has been argued that the inquiry having commenced at Leh and the petitioner having been attached at 14 Grenediers and being a unit within the jurisdiction of Northern Command, the petitioner is not entitled to invoke the extraordinary jurisdiction of this Court. Reliance has been placed upon the judgment of this Court in *Major Mohan Singh* v. *Union of India and others,* CWP No. 5902 decided on 21st December, 1995 and *Gurnam Singh* v. *Union of India (1).*

(13) On the other hand, learned counsel for the petitioner has argued that admittedly the inquiry had commenced at Leh but the part of summary of evidence was recorded at Chandigarh and that the petitoner has been attached with N Area for the purpose of accomplishment of discipline. It has been argued that summary of evidence had not been recorded in accordance with the procedure provided under Rules and for making correction in pursuant to the opinion of the Judicial Branch of the Army, perhaps the entire summary of evidence was re-recorded accordingly at Chandigarh. It is further argued that the previous summary of evidence recorded has been taken of from the record as the same had been recorded in third person but presently the evidence was recorded in first person with an endeavour to rectify the mistake and the violation of the Rule having been committed. It is not clear as to under which Rules such procedure

(1) (1995-I) PLR 381

could be adopted and that can the summary of evidence recorded twice? However, if the rectification is accepted it is not the part of summary of evidence but the fact of summary of evidence shall be taken to have been recorded at Chandigarh. Since the proceedings have been held or part thereof have been held at Chandigarh, the cause of action has arisen in favour of the petitioner for the purpose of invoking the extraordinary jurisdiction of this Court. Reliance has been placed on *Navinchandra N. Majithia* v. *State of Maharashtra & Ors(2).* During the course of agruments I had directed,—*vide* order dated 11th May, 2001 which reads as under :—

> "During the course of hearing it has transpired that as to whether the petitioner has been attached to Headquarter N Area for completion of disciplinary proceedings and for carrying certain amendments and corrections in the summary of evidence and that in pursuance to any communication the said exercise was cerried out at Chandigarh. Learned counsel for the petitioner seeks time to file an affidavit to this effect and also place on record the documents in support thereof. He is allowed to do so. Let the affidavit be filed on or before 15th May, 2001 with advance copy to the counsel for the respondents. The counsel for the respondents, if so desired, may file additional affidavit controverting the averments along with documents in support thereof with advance copy to the counsel for the petitioner. It is further directed that the record pertaining to the case of the petitioner as mentioned by the admitting Bench shall also be made available on the date fixed.
>
> Adjourned to 18th May, 2001."

(14) In pursuant to the aforesaid order both the parties have filed affidavits and that a cumulative reading of both the affidavits concludes the fact that the petitioner was attached to 60 Engineer Regiment by the competent authority,—*vide* letter No. 22001/916/DV-3 dated 17th October, 1996, for finalisation of disciplinary action against him. It is also admitted by the respondents that request had been made, which is dated 12th April, 1997, requesting HQ western Command to instruct Command Hospital, Chandigarh to attach the

(2) J.T. 2000 (10) SC 61

officer with HQ "N" Area instead of Station HQ Chandimandir since the petitioner could not be sent back to 60 Engineer Regiment at that time located at Leh in view of his medical category. However, it has been contended that the signal cannot be termed as attachment order of the petitioner to HQ "N" Area for disciplinary purpose and that summary of evidence can legally be recorded at any place under the orders of the Commanding Officer of the accused person. It is further contended that the petitioner was attached to 14 Grenadiers by HQ Northern Command vide their letter No. 22001/926/DV-3 dated 8th August, 1998 which is a proper attachment order but the said attachment order was stayed by this Court vide order dated 21st August, 1998. A reading of the affidavit of Lt. Col. S. Khare of 3 Infantry Division Signal Regiment dated 18th May, 2001 makes things amply clear that (i) the petitioner in the first instance was attached to the Station HQ Chandimandir and that a request was made to the Western Command for attaching the officer with HQ N Area and subsequently such attachment orders must have been passed, otherwise the order for attaching the petitioner to 14 Grenadier by HQ Northern Command could not have been passed and admittedly summary of evidence was recorded at Chandigarh. Thus, subsequently, part of cause of action did arise in favour of the petitioner at Chandigarh.

(15) I have given my thoughtful consideration to the arguments and the facts divulged from the petition and the fair admission on the part of the counsel that summary of evidence was recorded at Chandigarh and the petitioner was attached to "N Area" for the purpose of completion of disciplinary process, thus part of the proceedings did take place within the territorial jurisdiction of this Court, I am of the opinion that the petitioner is entitled to invoke the jurisdiction of this Court under Articles 226/227 of the Constitution of India.

(16) Learned counsel for the petitioner has argued that Court of Inquiry has not been convened by the Competent Authority as envisaged under Army Rule 177 wherein it is specifically provided that the Court of Inquiry shall be assembled by the officer in command of any body of troops whether belonging to one or more corps. It shall be apposite to note the rule which reads as under :—

> 177. **Courts of Inquiry** :-(1) A court of inquiry is an assembly of officers or of officers and junior commissioned officers or warrant officers or non-commissioned officers

directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them.

(2) The court may consist of any number of officers of any rank, or of one or more officers together with one or more junior commissioned officers or warrant officers or non-commissioned officers. The members of court may belong to any branch or department of the service, according to the nature of the investigation.

(3) A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps."

(17) The argument is that the order dated 30th January, 1996, copy Annexure P1 which has been re-produced above is shown to have been passed not by an officer in command of any body of troops, as such the convening order itself is not sustainable and the court of inquiry constituted lacks inherent jurisdiction.

(18) On the other hand, learned counsel for the respondents has argued that the order has been duly signed by the Assistant Adjutant General for Colonel Administration, a principal staff officer to the General Officer Commanding and that the Colonel Administration is also the officer commanding troops of the personnel posted at the Divisional HQ: a specific plea has been taken by way of Preliminary Objection No. 3 which has not been controverted by the petitioner.

(19) Since the averment that Colonel Administration is also the officer commanding troops of the personnel posted at the Divisional HQ has not been denied and additionally it has been averred that the order has been signed by the Adjutant General for Col. Administration, a principal staff of the General Officer Commanding and that the delegation of the authority to the Assistant Adjutant General has also remained uncontroverted. Thus, it can be safely inferred that the order Annexure P1 does not suffer from any impropriety in this regard as envisaged under Army Rule 177(3) *ibid* meanig thereby the order has been passed by the competent authority.

(20) Learned counsel for the petitioner has also argued that the constitution of the court of inquiry is violative of the statutory and mandatory provisions as contained in Regulation 518 of the "Regulations for the Army." It is specifically provided in the aforesaid Regulation

that when the "character" or "military reputation" of and officer is likely to be a material issue the Presiding Officer of the court of inquiry "wherever possible". will be senior in rank and other members at least equivalent in rank to that officer. This regulation has to be read as an extension to the Army Rule vide which the court of inquiry is ordered to be assembled. It is essential to notice the aforesaid regulation which reads as under :—

> **518. Court of Inquiry And Station Boards** :-The convening officer is responsible that a court of inquiry or station board is composed of members whose experience and training best fit them to deal with the matter at issue. The personnel detailed to constitute the Court of Inquiry or Station Board should have no personal interest or involvement, direct or indirect, in the subject matter of the investigation. A court of inquiry may consist of officers only, or of one or more officers together with one or more JCOs, WOs, NCOs as may be desirable. When the character or military reputation of an officer is likely to be a material issue, the presiding officer of the court of inquiry wherever possible, will be senior in rank and other members at least equivalent in rank to that officer.
>
> When investigating damages to service equipment, the evidence of a technical Officer who is experienced and fully conversant with the technical details of the equipment should be recorded. A station board may consist of any person selected by the convening officer. The members of a mixed civil and military board will take precedence in accordance with any general or special instructions issued by the Central Government. The stationery and forms required by a board will be supplied by the unit which applies for it."

(21) The perusal of Annexure P1,—vide which the Court of inquiry has been assembled shows that Presiding Officer has been appointed holding the rank of Lt. Col. and the other members are of the rank of Major. This assembly of Court of Inquiry is in utter violation of the aforesaid regulation and, therefore, lacks inherent jurisdiction to proceed with the enquiry. In this regard, reference has

been made to a communication addressed by discipline and Vigilance Directorate, Army HQ. Delhi dated 11th August, 1983, copy Annexure P2 issued to HQs of all the five commands. The usage of the words "at least" and "wherever possible" have been specifically explained. It has been elaborated that the word "at least" implies that the members of the court could be senior in rank but in no case junior in rank to the officer whose character and military reputation is involved. Thus, it is absolutely necessary that the officer assembling the Court must exercise his mind and ascertain before hand if the character and military reputation of any officer is likely to be a material issue. The word "wherever possible" cannot be taken as an execuse or handle for not detailing members of the appropriate rank and seniority, there have to be genuine and compelling reasons for not complying with the provisions of these regulations. It has also been further explained that if the character and military reputation of a senior officer becomes an issue for the first time while the proceedings are in progress, the matter should be referred to the officer who assembled the court as to whether the court should continue its proceedings or a fresh court of inquiry would be warranted. It has been further observed in the aforesaid communication that Regulation 518 would be strictly complied with as a rule and that officials of appropriate rank and seniority shall constitute the court of inquiry where the character and military reputation of an officer is likely to be a material issue. It shall be apposite to note the emphasis which has been made upon Regulation 518 of the Regulations for the Army promulgated in the year 1962. The excerpt of the communication Annexure P2 reads as under :—

1. xxxx xxx xxx xx

2. Instances have come to notice that where not only the members of a Court of Inquiry but also its Presiding Officer were junior to the officer whose character and military reputation was involved. In order to obviate recurrence of such cases in future, provisions of para 518 *ibid* are elaborated in this letter.

3. Para 518 of the Regulations for the Army 1962 clearly lays down that when the character or military reputation of an officer is likely to be a material issue, the presiding officer of the court of inquiry, wherever possible, will be

senior in rank and other members at least equivalent in rank to that officer. The word "at least" implies that the members of the court could be senior in rank but in no case junior in rank to the officer whose character and military reputation is involved. Therefore, it is incumbent on the officer assembling the court to exercise his mind and ascertain before hand if the character and military reputation of any officer is likely to be a material issue. The word "wherever possible" cannot be taken as an execuse or handle for not detailing members of the appropriate rank and seniority; there have to be genuine and compelling reasons for not complying with the provision of these regulations.

4. When the character and military reputation of a senior officer becomes an issue for the first time while the proceedings are in progress, the matter should be referred to the officer who assembled the court for him to decide depending upon the facts of individual cases, whether the court should continue its proceedings or a fresh court of inquiry would be warranted. It may be appreciated that where character and reputation of a senior officer is involved, it would be difficult for a junior officer to conduct a purposeful inquiry.

5. The provisions of para 518 as amplified above will be strictly complied with as a rule and every effort will be made to detail on a court of inquiry officers of the appropriate rank and seniortiy where the character and military reputation of an officer is likely to be a material issue."

(22) On the other hand, learned counsel for the respondents has argued that Regulation 518 of the Regulations for the Army, is directory in nature and not mandatory. Thus, the violation thereof if accepted to have been committed but having not caused any prejudice to the petitioner, shall not affect inherent jurisdiction of the court of inquiry and that the proceedings conducted by the said court of inquiry cannot be nullified. Thus, the argument of the learned counsel is not sustainable and that the word "wherever possible" has a wide connotation and if the officer is above the rank or the rank equivalent

to the delinquent official are not available the constitution of such assembly of court of inquiry cannot be impugned on the ground of violation of the aforesaid regulation and that the proceedings conducted by the said Court of Inquiry cannot be vitiated.

(23) From the perusal of the provisions which confers powers upon the central government for making the regulations does not make the argument of the learned counsel for the respondents sustainable. It is contained under Section 192 of the Army Act, 1950 whereby power to make regulations has been conferred upon the Central Government and that regulations for all or any of the purposes of the Act can be promulgated by the Central Govt. but the scope and ambit has to be distinct from the power which has been conferred upon the Central Government under section 191 for making the rules. The rules and the regulations are required to be published in the gazette as contemplated and provided under sectioin 193 of the Act and additionally the rules and regulations are required to be laid before the parliament as provided under sectioin 193-A of the Act. Thus, it can be safely inferred that the rules and regulations so promulgated have the force of law and would not remain directory and dorment. However, the non-compliance of the same if it does not cause any prejudice to the delinquent official would be required to be seen in each case. In the present case, admittedly, the assembly of court of inquiry shows that Presiding Officer is of the rank equivalent to the rank of the petioner and that the other members of the assembly are admittedly lower in rank. Thus, on the face of it the court of inquiry has not been constituted in accordance with the aforesaid regulation. The communication copy Annexure P2 *vide* which all the five commands had been directed to adhere to Regulation 518 makes matters crystal clear that at the time of constituting the court of inquiry it has to be kept in mind by the office passing such orders that the Presiding Officer shall be of the rank above the rank of delinquent official and that the ρther members shall be at least of the rank equivalent to the rank of the delinquent official. Such Caution has been provided to be adhered to at the time when the character or military reputation of the officer is likely to be a material issue. In the case at hand, a *prima facie* allegation has been levelled that a sum of Rs. 4 lacs was found missing and as a Field Cash Officer it became the prime responsibility of the officer concerned. An enquiry was required to be conducted in this issue directly involving the Field Cash Officer though upon enquiry

no allegation may be found against the officer concerned but admittedly the scope of Court of Inquiry would be obvious upto the rank carried by the Field Cash Officer. Thus, it was incumbent upon the officer, who was required to pass an order as envisaged under army rule 177 for constituting the court of inquiry, that the constitution of Court of Inquiry should be as envisaged under Regulation 518. The purpose and object is obvious that the senior officer may not feel be-littled by the officer junior to the rank of the delinquent official, wherever the scope of enquiry requires the senior officer to be examined or appear before the Court. The apprehension that it would be difficult for a junior officer to conduct a purposeful enquiry is far too obvious and it is for this reason it has been specifically provided that Presiding Officer should be rank senior to the delinquent official and the other officers constituting the Court of Inquiry should be at least equivalent in rank to that officer. The argument that at the time of passing the convening order by the authority concerned, it was not known as to which officer shall be subjected to the court of inquiry, is devoid of any merit as it has been specifically referred that the shortage of amount was observed after the total amount of Rs. 2,18,10,000 having been drawn from the Field Cash Officer. Even otherwise if the scope of enquiry was extended for initiating the enquiry against the Field Cash Officer , it was incumbent upon the Court of Inquiry to have referred the matter to the authority constituting the Court of Inquiry for applying their mind for bringing the change in accordance with the regulation but non of kind seems to have been done as neither it has been pleaded nor it is borne out from the record. Thus, it has been proved beyond any doubt that the convening order has been passed in utter violation of Regulation 518 and which was required to be followed as is evide, communication dated 11th August, 1983, copy Annexure P2. since the constitution of the court of inquiry is not sustainable under law, the Court of Inquiry lacks inherent jurisdiction.

(24) It has been argued by Mr. R.S. Randhawa, learned counsel appearing for the petitioner that the petitioner has not been given full opportunity to defend himself in the enquiry. Substantial number of witnesses have been examined behind his back and that the opportunity to cross examine the said witnesses has not been granted. It has come on record in the statement filed by the respondents that 16 witnesses have been examined by the Court of Inquiry and orally I have been informed by the learned counsel for the respondents that six witnesses

out of the aforesaid total number of witnesses have been allowed to be cross-examined. It is obvious that the opportunity as envisaged under Army Rule 180 has not been accorded to the petitioner. Apart from this, it has been further argued that the enquiry was continued and the statements of the witnesses have been recorded by the Court of inquiry when it was headed by the Presiding Officer alone in the absence of other members of the court of inquiry, such recording of evidence has not been protected by any rule or regulation. This factum has been categorically pointed out to the authorities and a specific question was also asked from the witnesses on the deficiency/legality in the summary of enquiry was sought to be rectified by re-recording of summary of evidence at Chandigarh. It has been further argued that the enquiry having not been conducted in accordance and in compliance of Army Rule 180 and that the statements having not been recorded in the presence of the members of the assembly of court of inquiry though court of inquiry had not been constituted in accordance with law yet the procedure was also not correctly followed by the said court of enquiry. It is settled law that if no proper opportunity is given to the delinquent official in accordance with and in furtherance of army rule 180, the procedure and process adopted in derogation thereof is not sustainable under law. The Court of enquiry having acted in violation of the statutory provisions, no enquiry recorded accordingly would be used or could be relied upon by the commanding officer for passing the order subjecting the petitioner to Court Martial.

(25) It has been further argued that application of rule 180 is mandatory and not directory. It is a legal right which is conferred upon the delinquent official by virtue of rule 180 which confers the right to cross examine the witness. It becomes imperative to grant such opportunity on account of the amendment which has been carried out in the Army Rule 22 wherein the Commanding officer is required to proceed as per sub rule (1) of rule 22 but on account of proviso which states that if the compliance of rule 180 has been made, the Commanding Officer may not proceed to follow sub rule (1) of the said rule. There has been no application of mind as to whether the right as envisaged under Article 180 has been granted to the delinquent official or not whereas on the face of it there has been flagrant violation of rule 180. It is the admitted fact by the respondents that 16 witnesses were examined out of which six were allowed to be cross examined. Reliance has been placed upon the Division Bench Judgment

of J & K High Court wherein it has been held that compliance with Army Rule 180 is imperative and non compliance would amount to violation of Article 14 of the Constitution. Reference has also been made to the dicta laid down by the Apex Court in *Lt. Col. Pirthi Pal Singh Bedi* v. *Union of India and others(3)* and further the principle enunciated by the Jammu and Kashmir High Court in re: *Vinayak Daultatrao Nalawade* v. *Core Commander Lt. Gen. G.O.C. HQ. 15 Corps,(4)*. It shall be apposite to notice the dicta of the Apex Court in *Lt. Col. Pirthi Pal Singh Bedi's* case (supra) excerpt of which reads as under :—

> " .... rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the Courts of inquiry. Rule 180 cannot be construed to mean that whenever or wherever in any inquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up a Court of Inquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a Court of inquiry is set up and in the course of inquiry by the Court of inquiry character or military reputation of a person is likely to be affected then such a must must be given a full opportunity to participate in the proceedings of Court of inquiry. Court of Inquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a Court of inquiry may generally examine the shortfall to ascertain how many person are responsible. In the course of such an inquiry there may be distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific inquiry was directed against the person whose character or military reputation is likely to be affected by the proceedings of the Court of inquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation. Rule 180 merely makes an enabling provision to ensure such participation
> ...."

(3) AIR 1982 SC 1413
(4) 1987 Lab. IC 860

(26) In *Vinayak Daultatrao Nalawade's* case (supra), it was held as under :—

> The court of Inquiry has given its opinion and that opinion is based on the sham inquiry which is held *ultra vires* of R. 180 and Art. 14 of the Constitution. That opinion is considered by the respondent and he has agreed with it. On the basis of his order, charge sheet is framed against the petitioner which has been reproduced herein above. The basis of all this certainly is the proceedings of the Court of Inquiry and its findings. If the basis is removed as has been done in this case, the order of respondent No. 1 as also the charge sheet must fall to the ground because both are based on the opinion of the court of Inquiry. There was no occasion for the respondent to direct enquiry if he would not have agreed with the opinion of the Court of Inquiry. His agreeing with the opinion of the Court of Inquiry has resulted in framing of the charge sheet against the petitoner. So it is opinion of the court of Inquiry on which is grounded the subsequent order of the respondent and the charge sheet framed against the petitioner. In the absence of the opinion of the court of inquiry neither order impugned would have amenated nor charge sheet would have been framed. Therefore, anything grounded on the opinion of the Court of Inquiry will be only accretion of the findings of the court of Inquiry as it has no independent origin of its own. Since the inquiry proceedings as also proceedings of court in Inquiry have been held to be unconstitutional and bad, therefore the order of the respondent as also the charge sheet framed against the petitioner are liable to be quashed and we have no hesitation to quash the same."

(27) On the other hand, learned counsel for the respondents Shri Kamal Sehgal, has argued that the petitioner had been accorded appropriate opportunity as he was allowed to cross examine the effective witnesses and by and large he has been able to elicit the answers to the situations of which he was doubtful. The answers spelt out are to be appraised by the appropriate authority for comming to correct

conclusion be it against the petitioner or in his favour. The rule in question is not mandatory as only fact finding enquiry has been held and if prima facie opinion is to be formed, it is not necessary to make meticulous compliance of the rules. So far as Commanding Officer is concerned he has to act on formal opinion for passing an order as envisaged under the rules and it has been left to his discretion to make the basis the fact finding enquiry held by the Court of inquiry for coming to the conclusion in passing the order for subjecting the delinquent official to Court Martial or to recommend his discharge accordingly. If he is not satisfied with the facts which are elicited by the court of inquiry he may call for further corroboration as envisaged under rule 22 of the Army Rules. Thus, it is pre-mature to question the status of the enquiry made by the court of inquiry.

(28) Learned counsel for the respondents has placed reliance upon the judgment rendered in *Lt. Col. G.S. Dhillon* v. *Union of India,(5).* It has been held that Regulation 518 is not mandatory and that emphasis has been made on the word "wherever possible" and composition of the Court as promulgated by virtue of Rule 177 is not illegal and, therefore, cannot be termed as violative of Regulation 518. The *dicta* of the Apex Court in *Capt. Virendra Kumar* v. *Union of India, (6)* has been distinguished. I am afraid it was not brought to the notice of their lordships that the regulations had been promulgated by virtue of statutory provision and that the rules and regulations so promulgated were required to be placed before the parliament as envisaged under Section 193-A of the Act and additionally the communication issued by the Directorate of Vigilance, copy Annexure P2 perhaps was also not brought to the notice of their lordships. In view of my discussion hereabove and the reference to the statutory provisions under which the rules and regulations have been promulgated and the mannerism in which it has been mandated by the Director of Vigilance, to be followed by all the five commands. I am in respectful disagreement with the aforesaid judgment. However, their lordships of the Supreme Court have categorically observed that the Army Act and the rules and regulations and instructions thereunder govern the fate of Commissioned Officers including those of emergency commission like the appellant in the case before their lordships . . . . . .Their lordships of the Supreme Court did not accept the

(5) 1987 Lab IC 1264 (Gauhati High Court)
(6) 1981 Lab IC 433 (SC)

view taken by the High Court that the instructions issued thereunder do not have statutory status. It has also been further observed that the instructions issued acquired the statutory status and are, therefore, mandatorily applicable. In the case at hand the reference is being made to the regulations and not instructions issued thereunder, however Annexure P2 is categoric instruction and in furtherance of the application of Regulations 518. Thus, it is obvious that the rules and regulations which have been promulgated by Government of India by virtue of the statutory provisions and which are required to be laid before the Parliament in pursuant to the statutory regulations, acquired the mandatory status.

(29) I have given my thoughtful consideration to the respective arguments of the learned counsel for the parties. In view of the observation of the Apex Court and the interpretation given by the J&K High Court, I am in respectful agreement that the rule in question is mandatory, as such, it was incumbent upon the court of inquiry to have given the full opportunity to the delinquent official for cross examining the witnesses to elicit the situation and the character of the witnesses deposing against him. The order which is to be passed by the commanding officer may not be a judicial order in so many words yet has to be exercised as quasi judicial discretion for coming to a conclusion as to whether the delinquent official should be subjected to Court Martial or not. Thus, it is mandatory that the delinquent official should be given ample opportunity to clarify his conduct especially when the character and military reputation of the officer is likely to be materially affected and is at issue. The factum of shortage of money is required to be determined and *prima facie* case be made out as to at what place shortage has occurred. It shall be apposite to note the language of Army rule 180 as also rule 22 of the Army rules, which read as under :—

> 180. Procedure when character of a person subject to the Act is involved—
>
> Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity

must be afforded to such person of being present throughout the inquiry and of making any statement, and if 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. 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 notices of and fully understands his rights, under this rule."

xxx xxx xxx

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 Section 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 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 an 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 then 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.

(30) A perusal of the aforesaid provisions makes one come to a conclusion that the opportunity to be accorded to the delinquent official should be effective opportunity and not a farce. I have also perused unamended provisions of rule 22 wherein the officers had not been included nor the proviso had been incorporated but subsequently upon amendment the word "person" has been used and the proviso has been provided so that the provision is made comprehensively applicable. By way of providing proviso to rule 22 the enquiry conducted under Article 180 acquires statutory colour as the Commanding officer has been given the freedom to rely upon the said investigation and

is entitled to dispense with the procedure provided under sub rule (1) of rule 22. A perusal of rule 22 shows that the accused has been given full liberty to cross examine any witnesses against him and he has been given the right to call such witness and make such statement as may be necessary for his defence. In both the provisions the words have been used "full opportunity", meaning thereby that opportunity in extenso has to be granted to the delinquent official. Admittedly, the petitioner, in the case at hand has not been given the opportunity to cross examine all the witnesses, as such, the procedure as provided under Article 180 has not been meticulously followed.

(31) However, I refrain myself to go into the question as to what is the effect in case the Court of inquiry records the summary of evidence in third person and proceeds to re-record in first person and takes of the previous evidence from the record. Since I am holding that the procedure as envisaged under rule 180 has not been followed and I have also held above that the Court of Inquiry has not been constituted in accordance with the regulation applicable mandatorily, I refrain to refer to the record in this regard and decline to give any finding on this issue. The record which has been taken for reference has been returned to the learned counsel for the respondent accordingly.

(32) In view of the above, I hold that the Court of inquiry has not been constituted in accordance with law as per the cumulative reading of rule 177 and regulation 518, which leads one to a definite conclusion that while constituting the Court of Inquiry, where the character and military reputation of an officer is likely to be an issue, the Presiding Officer should be of a rank higher than the rank of the delinquent official and that the other members of the assembly of the Court of Inquiry should be at least equivalent to the rank of the delinquent official. Since the constitution as envisaged under law has not been followed, as such, the convening order dated 30th June, 1996 Annexer P1, has not been correctly passed. In addition to the above, the procedure which was required to be followed under rule 180 as contained in the convening order had also not been followed, the inquiry proceedings in toto are not sustainable. It is mandatory to follow the procedure in a situation where Court of Inquiry is ordered, the enquiry so held may culminate into passing of an order which may

affect the character and military reputation of the delinquent official and especially when the Commanding Officer has been given the freedom to accept and adopt the enquiry held under rule 180. The rule envisages full opportunity to be granted to the delinquent official and it has been provided under rule 22 that the delinquent official shall have full opportunity to cross examine any witness and set up his defence accordingly. Since rule 22 has been subjected to proviso wherein it is contained that if inquiry is held under rule 180, the Commanding Officer may not adopt the procedure as envisaged under sub rule (1) to rule 22, it becomes absolutely necessary that the full opportunity by way of giving the opportunity to the delinquent official to cross examine the witnesses ought to be granted and the opportunity has to be given to him for setting up his defence accordingly.

(33) The petition is allowed and the order of convening Court of Inquiry, copy Annexure P1 having been passed in violation of the mandatory rules, is quashed and the proceedings and the process and the inquiry recorded by the said Court of Inquiry are also quashed on account of lack of inherent jurisdiction of Court of Inquiry and not having followed the procedure as envisaged under the rules. It is observed that during the pendency of the petition further proceedings had been stayed and the attachment of the petitioner to palampur for being subjected to disciplinary proceedings had also been stayed, resultantly, the period which has been consumed in this process shall not be read/taken in favour of the Petitioner or against the respondents. The respondents shall be at liberty to proceed in accordance with law from the stage of constituting the Court of Inquiry if the respondents deem it proper to proceed against the petitioner. If such order is to be passed, it shall not be taken as commencement of the proceedings but it shall be in furtherance of the proceedings commenced earlier meaning thereby it shall not fall within the mischief of section 122 of the Act. The respendents shall also be at liberty to pass an order of attachment *qua* the petitioner in accordance with law. No order as to costs.

R.N.R.