REPORTABLE

IN THE HIGH COURT OF DELHI

WRIT PETITION (CIVIL) NO. 2493/2003

Date of decision : 10th November, 2004

Brig Iqbal Singh, VSM(Retd) ... Petitioner
through Mr.Jayant Bhushan, Senior Advocate with Mr.P.C.Khanna,Advocate

VERSUS

Union of India & others .... Respondents
through Ms.Jyoti Singh, Advocate

CORAM:

HON'BLE JUSTICE DR. MUKUNDAKAM SHARMA:
HON'BLE MS. JUSTICE GITA MITTAL.

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J:

1. The present writ petition has been filed by the petitioner impugning inter alia the decision of the respondents placing the petitioner under close arrest/military custody and prayed for issuance of a writ of prohibition against the respondents from taking any disciplinary action against the petitioner after his retirement on 28th February, 2003 with

further directions to the respondents to allow all pensionary benefits as may be available upon his retirement on superannuation.

2. The factual matrix laid before us is narrow. On successful completion of 36 years of unblemished service by the petitioner with the Indian Army, the respondents issued an order dated 24th July, 2002 directing that the petitioner's retirement on superannuation had been ordered with effect from 28th February, 2003.

3. Unfortunately for the petitioner, on 13th March, 2001 the country was subjected to expose with the release of video tapes under the caption “Operation Westend”on the Zee TV Network by a Website named Tehelka.Com, claiming to be engaged in the field of investigative journalism. The released tapes were of the duration of 4 ½ hours. It is contended that as per the website these had been edited from 105 hours of filming. The video tapes purportedly contained footage attributed to be of the petitioner alleging his participation in procurement of defence equipments by undue influence. As serious allegations were leveled against officials in the Defence Ministry as well as six Army officials, the Ministry of Defence vide orders dated 13/14th March, 2001 required the petitioner to give written comments to the contents of the video tapes.

4. It is alleged that based on the same allegations contained in the video tapes the Army Authorities simultaneously ordered a court of inquiry into the matter on 15th March, 2001.

5. The order dated 15th March, 2001, appointing the court of inquiry has been placed before us as Annexure P-2 which reads as hereunder:-

> "A Court of Inquiry will assemble at a place, date and time to be fixed by the Presiding Officer to enquire into allegations of influencing the procurement of defence equipments as made against Army Officers by Tehelka.com on 13th March, 2001. The Court will also investigate the complicity of any other person(s) who might be involved in any way."

6. It was directed in this order that the court of inquiry would also pin point the responsibility and culpability, if any, of the Army Officers/persons involved. It was also directed that the proceedings of the court of inquiry be submitted to the Headquarters of the Western Command by 10th April, 2001.

7. The petitioner states that the terms of reference were subsequently amended vide order dated 16th March, 2001 and again by order dated 18th March, 2001. However the perusal of the order dated 16th March, 2001 would show that the terms of reference remained the same and only para 2 of the order convening order dated 15th March, 2001 were amended.

8. It is an admitted position that Justice K.Venkataswami

Commission of Inquiry under the Commissions of Inquiry Act, 1952 was appointed by the Government of India on 24th March, 2001 for investigation into the Teheleka.com affair. The petitioner was required to participate in the proceedings of Justice K.Venkataswami Commission of Inquiry which proceedings are stated to have commenced in May, 2001.

9. On 9th July, 2001 the petitioner was attached with 1 Armd Div located at Patiala and Major General Aditya Singh, the GOC of 1 Armd Div was nominated to be his Commanding Officer.

10. The petitioner submits that as he was required to participate in the Justice K.Venkataswami Commission of Inquiry at New Delhi, he had objected to his attachment and had submitted a statutory complaint dated 10th July, 2001 to the respondents to restrain the Army Authorities from taking further disciplinary action against him on the basis of the court of inquiry commenced by the respondents.

11. The objections raised by the petitioner in his statutory

complaint, which need a closer look, include the following:-

> "2 . In view of the above stated position, it is respectfully submitted on behalf of my client that the findings of Army Court of Inquiry, at the present stage, cannot be considered to have attained a stage of finality. It is therefore legally not tenable to initiate further disciplinary or administrative action in the matter on the basis of findings and recommendations of the Army Court of Inquiry.
>
> 3. It is also respectfully submitted that by virtue of the implication of Section 3 of the Commissions of Inquiry Act, 1952; it will be legally not admissible to appoint more then one Inquiry to investigate the same charge or allegation by the Government. Since the Central Government has specifically appointed Hon'ble Mr. Justice K. Venkataswami Commission of Inquiry and the Army Court of Inquiry is also subject to final jurisdiction of the Central Government it is legally not tenable to subject the persons including my client to simultaneous and concurrent jurisdiction of both the Inquiries, as it is being presently done. Adjutant General's Branch, Army HQ, vide their letter No. C/6290/270/WC/AG/DV-2 dated 01 June, 2001 had permitted Brig. Iqbal Singh to appear before Justice K. Venkataswami Commission of Inquiry and make statement. Thereafter, there was no basis for them to have continued to take further action on the basis of report of Army Court of Inquiry.
>
> 4. It may be appreciated that he simultaneous and concurrent conduct of proceedings by the two different agencies who are investigating the same subject mater, wherein very complicated questions of Law are involved, if allowed to continue, shall cause legal prejudice to my client. In case of proceedings before the Hon'ble Mr. Justice K. Venkataswami Commission of Inquiry, my client is open to liability of meeting the challenge of issue of

notice under Section 8B of the Commissions of Inquiry Act, 1952. In such an event, it will be open to my client to assail the findings of the Army Court of Inquiry, as per the statutory legal right available to him under Section 8B of the said Act. This legal right of my client will become meaning less, if Army Authorities are allowed to continue o take further action in the matter on the basis of findings of Army Court of Inquiry, at the present stage.

5. It is further submitted that in the present matter large number of civilians, including Senior Politicians nd bureaucrats are also facing the investigation and they are not subject to proceedings based on Army Court ;of Inquiry, & it is for the same cause of action that they are subject to proceedings only before the Hon'ble Mr. Justice K. Venkataswami Commission of Inquiry. Therefore, the action of Army authorities to continue in the matter on the basis of findings of the Army Court of Inquiry and take action in the matter against my client will be discriminatory.

6. In the present case, a very complicated questions of law are involved. The basis of arriving at the findings by the Army Court of Inquiry is solely based on presumptions drawn with the logic that the same are derived from the circumstantial evidence. This position may cause irreparable damage by the actions based on findings of Army Court of Inquiry. In the proceedings before the Army Court of Inquiry, the veracity of Tehelka tapes, which are the basis of allegations and investigations, has not been tested as per provisions of law. It is for situations that a major guide line is given in Manual of Military Law, which reads " certain civil offences, for example complicated frauds, are not suitable for trial by Court Martial and better relegated to the Civil Court,as is a case where intricate questions of law are likely to arise."

> Keeping in-view this guideline, there is no legal justification to progress action against my client on the basis of Army Court of Inquiry, without awaiting the findings of the Hon'ble Justice K. Venkataswami Commission of Inquiry.
>
> 7. In view of the facts and circumstances as above, it is respectfully prayed on behalf of my client that the Central Government/The Chief of Army Staff may issue appropriate order/direction not to take any further action in the matter against my client on the basis of findings of Army Court of Inquiry at this stage, without awaiting the out come proceedings before the Hon'ble Justice K. Venkataswami Commission of Inquiry."

12. Perusal of the foregoing shows that the petitioner himself was objecting to the proceedings to the court of inquiry principally on the ground that the matter involved complicated questions of law, that large number of civilians including senior politicians and bureaucrats were facing the investigation who were not subject to the proceedings under the Army Act and that there was no legal justification to proceed in the matter under the Army Act in view of the pendency of the proceedings under the Commission of Inquiry Act, 1952. Therefore the objections raised were largely relating to complexity of the issues on merits and it was the contention of the petitioner that the civil courts would be the better forum.

13. The petitioner contends that even though the court of inquiry against him was pending, yet an affidavit dated 27th July,

2001 was filed by one Shri S.L.Bunker, working as OSD in the Ministry of Defence before the K. Venkataswami Commission of Inquiry. In para 2 of this affidavit it was deposed as under:-

> "The Army Chief has accepted the recommendations made by the GOC-in-C, Western Command both as regards the setting up of a General Court Martial as well as the administrative action. A chart showing the recommendations made by the Court of Inquiry, the recommendations made by the GOC-in-C, Western Command and the direction given by the Chief of Army Staff is set out herein below:

Recommendations of Court of Inquiry	***Recommendation of GOC-in-C, Western Command***	***Direction of Chief of the Army Staff***
1. Disciplinary action i.e. setting up of General Court Martial (GCM) against: 1. Maj Gen PSK Choudary 2. Brig. Iqbal Singh 3. Col Anil Sehgal 4. Lt. Col BB Sharma	Disciplinary action recommended against: 1. Maj Gen PSK Choudary 2. Brig Iqbal Singh 3. Col Anil Sehgal	Recommendation of GOC-in-C, WC accepted
II. Administrative action against: 1. Maj Gen MS Ahluwalia 2. Maj Gen Satnam Singh	1. Maj Gen MS Ahluwalia (Dismissal) 2. Lt. Col BB Sharma (Dismissal) 3. Maj Gen Satnam Singh (Censure)	Recommendation of GOC-in-C, WC accepted and direction given accordingly

14. The petitioner has contended that he had made a representation dated 7th November, 2001 to the respondents in this behalf.

15. We have perused the representation made by the petitioner. It is found that even at this stage the petitioner was

largely aggrieved by the fact that the Military Authorities were not competent to deal with the serious allegations leveled against the petitioner. The petitioner was challenging the jurisdiction of a Court Martial to try offences under the Prevention of Corruption Act. It was again being contended that in view of the complexity of the matter the proper exercise of discretion was to direct trial by the civil courts and not by military courts in the instant case. To support this request, the petitioner had made the allegations of manipulation of the video tapes and the fact that serious forensic evidence was required to fairly deal with the matter. The petitioner made a specific prayer to be given an opportunity to defend himself before Justice K. Venkataswami Commission of Inquiry. It was specifically contended as hereunder:-

> "It may also be appreciated that during the proceedings before the Commission of Inquiry, the Army Court of Inquiry cannot be considered to have reached the stage of finality and any disciplinary action taken against me at this stage will be highly premature as the action at this stage against me will be highly discriminatory and arbitrary."

16. The aforesaid narration has become necessary only to indicate that the case of the petitioner consistently was that the matter was under investigation either by the Court of Inquiry constituted by the Army Act, 1950 or before Justice K.Venkataswami Commission of Inquiry. At every stage the

petitioner contended that the Army Authorities were not possessed with material or allegations to initiate action against him. His challenge to the purported decision as contained in the affidavit dated 27th July, 2001 was that the same was illegal and baseless inasmuch as the Court of Inquiry against him was not complete even and that the civil court was a better forum. Similar representations were made on 21st November, 2001.

17. The petitioner has contended that in September, 2002 his attachment was changed from Armed Division to another formation i.e. HQ 40 Arty Div and Major General Lakhwinder Singh, YSM, GOC HQ 40 Artillery Division was nominated to be his new Commanding officer.

18. The respondents explain this by saying that it became necessary to effect this change of attachment from HQ-1 Armd Div to HQ-40 Arty Div with Major General Lakhvinder Singh, GOC 40 Arty Div being appointed as his Commanding Officer because the GOC 1 Armd Div was already detailed as an officer to record the Summary of Evidence in the case of Major General PSK Chaudhary also connected with the Teheleka.com case.

19. The Court of Inquiry in respect of the petitioner was conducted in terms of Army Rule 180, and the petitioner was given opportunity to cross examine the witnesses. Therefore, Major Lakhvinder Singh the Commanding Officer of the

petitioner exercised the option in term of the proviso to Army Rule 22(1) and dispensed with the procedure provided in sub rule (1) of Army Rule 22.

20. The petitioner has challenged this action on the ground that this was done without application of mind under the directions of the COAS who had already prejudged the issue and had passed directions for the General Court martial of the petitioner as stated here-in-above. He submitted another representation in this behalf dated 30th September, 2002 and also sought authenticated copies of video tapes. The petitioner has also contended that as the court of inquiry was conducted in his presence he was entitled to the complete proceedings thereof.

21. The petitioner has also alleged that his representations were not considered by the competent authorities.

22. Finally vide an order dated 11th December, 2002, Brig. S.S.Gill was detailed as officer to record the summary of evidence against the petitioner in respect of the tentative charge sheet dated 29th September, 2002 issued against the petitioner. The tentative charge sheet dated 29th September, 2002 reads as under:-

> "**TENTATIVE CHARGE SHEET**
>
> The accused IC-26796Y Brigadier Iqbal Singh, Vishisht Seva Medal, Deputy Director General, Procurement and Progressing Organisation, Master General of Ordnance

Branch, Army Headquarters, attached with Quarter Master General Branch, Army Headquarters, attached to Headquarters 40 Artillery Division, an Officer holding a permanent Commission in the Regular Army, is charged with :-

First Charge

Army Action COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, Section 69 BEING A PUBLIC SERVANT, ACCEPTING FOR HIMSELF GRATIFICATION OTHER THAN LEGAL REMUNERATION, AS A MOTIVE FOR DOING AN OFFICIAL ACT IN THE EXERCISE OF HIS OFFICIAL FUNCTIONS, CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT 1988

In that he, at New Delhi, on 05 November 2000, while holding the appointment of Deputy Director General, Procurement and Progressing Organisation in Master General of Ordnance Branch, Army Headquarters, directly accepted for himself from Shri Samuel Mathew, a representative of M/S West End International, a non-existent foreign firm, gratification other than legal remuneration, as a motive, to promote the interests of the said Firm in introduction of their products in the Army.

Second Charge

Army Act COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, Section 69 BEING APUBLIC SERVANT, ACCEPTING FOR HIMSELF GRATIFICATION OTHER THAN LEGAL REMUNERATION, AS A MOTIVE FOR DOING AN OFFICIAL ACT IN THE EXERCISE OF HIS OFFICIAL FUNCTIONS CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT 1988

In that he, at New Delhi, on 05 November 2000, while holding the appointment of Deputy Director General, Procurement and Progressing Organisation in Master General of Ordnance

Branch, Army Headquarters, directly accepted for himself from Shri Samuel Mathew, a representative of Ms. West End International, a non - existent foreign firm, a woman, a gratification other than legal remuneration, as motive, to promote the interests of the said Firm in introduction of their products in the Army.

Third Charge

Army Act	AN ACT PREJUDICAL TO GOOD ORDER AND
Section 63	MILITARY DISCIPLINE

in that he, at New Delhi, on 05 Nov 2000, while holding the appointment of Deputy Director General, Procurement and Progressing Organisation in Master General of Ordnance Branch, Army Headquarters, improperly met Shri Samuel Mathew, a representatives of M/s West End International, a non existent foreign firm, without verifying his antecedents and the products intended to be introduced in the Army by the said Firm.

Fourth Charge

Army Act	AN OMMISSION PREJUCIAL TO GOOD ORDER
Section 63	AND MILITARY DISCIPLINE

in that he,

at the place and date mentioned in the third charge, while holding the appointment of Deputy Director General, Procurement and Progressing Organisation in Master General of Ordnance Branch, Army Headquarters, having met Shri Samuel Mathew, a representatives of M/S West End International, a non existent foreign firm, improperly omitted to report about the proceedings of his meeting to proper military authority."

23. In the meantime the petitioner also submitted a statutory complaint dated 9th December, 2002 to the Minister of

Defence through his counsel. It appears that this representation was returned to the petitioner as according to the respondents the same was without any authority of the petitioner and hence not legally tenable. The representation dated 11th December, 2002 to the Commanding officer of the petitioner was to the same effect. However, in view that the Summary of Evidence against the petitioner was already in progress, no action was taken thereon.

24. The petitioner was to retire from service on superannuation with effect from 28th February, 2003. The respondents therefore took recourse to their power under Section 123 of the Army Act, 1950. The petitioner was directed to be placed under open arrest vide order dated 26th February, 2003 by the respondents in exercise of their power under Section 123 of the Army Act, 1950. It was directed herein that the petitioner was placed under military custody(open arrest) with effect from 28th February, 2003.

25. The petitioner made a strong grievance of his having been placed under military custody vide letters dated 28th February, 2003 and 9th March, 2003. The petitioner was also aggrieved by the fact that despite his superannuation on 28th February, 2003 his retirement benefits were not finalised and he was not being given any pension. Aggrieved by the aforesaid

directions on the part of the respondent, the petitioner filed the present writ petition on 4th April, 2003 seeking the following reliefs:-

> "(a) to declare the detention of the petitioner in military custody (open arrest) in the facts and circumstances of the present case to be not justified and to further restrain the respondents by issue of an order or direction in the form of mandamus from continuing to implement the impugned order dated 26 Feb 2003 issued by respondent No. 4 to the extent of placing the petitioner under military custody (open arrest) and release him from custody accordingly, for which the petitioner gives undertaking that he shall participate in proceedings conducted against him in the aforesaid matter.
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> (b) to direct the respondents to file the proceedings of Court of Inquiry held by Army Authorities in tehelka.com matter before the Hon'ble Court, scrutinise the same and quash the Convening Order dated 15 March 2001 with amendments dated 16 & 18 March 2001 along with the proceedings and findings of the said Army Court of Inquiry.
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> (c) to direct the respondents not to base disciplinary actions against the petitioner on tehelka.com videotapes, which have been held by the Hon'ble Defence Minister and Ministry of Defence to have been tampered and doctored, and further direct the respondent No. 4 to examine the prosecution witnesses for hearing of charge against him as per provisions of Army Rule 22 (1) by giving opportunity of cross-examining the witnesses in the presence ;of the Commanding Officer.
>
> (d) to direct the respondents to file the complete record of proceedings, wherein the respondent No. 2 has passed directions for trial

> of petitioner by General Court Martial, scrutinize the same and quash the said direction which has been passed in violation of provisions of Army Act and Rules and principles of natural justice.
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> (e) to direct the respondents to immediately release pension and pensionary benefits in the form of payment of gratuity, commutation value of pay, leave encashment etc. in favour of the petitioner.
>
> (f) to direct the respondents to allow the petitioner to retain the Govt. married accommodation in his occupation on payment of normal license fee for accommodation, electricity and water etc up to the period of three months from the date once the petitioner ceases to be subject to the Army Act Sec 123 as far as instant disciplinary proceedings are concerned."

26. It is noteworthy that the allegations with regard to the authenticity of the tapes and depositions of witnesses are being relied upon by the petitioner in support of his afore-stated prayers.

The petitioner has dealt at length with the affidavit of Sh.S.L.Bunker dated 27th July, 2001 to contend in the writ petition as follows:-

> "9 (vi) On 27th July, 2001, Shri S L Bunker, OSD, in the Ministry of Defence, on behalf of Union of India filed an affidavit before Justice K. Venkataswami Commission of Inquiry to say that the COAS has passed directions for action against the petitioner by General Court Martial. A copy of affidavit dated 27th July 2001 is annexed as Annexure P-6. At this stage the **COAS had no material as per Army Act and Rules before him to pass such an order,**

which is illegal and without jurisdiction. Thus the COAS pre-judged the issue and acted in a biased manner.

xxxxxxx

22. That, the COAS (respondent No.2) in passing direction/order to Court-martial the petitioner has acted in violation of provisions of Army Act and Rules. The respondent No. 2 is a **Superior Military Authority, who could have acted upon in the present matter only after reference was made by the Commanding Officer** for seeking his indulgence as per the procedure under Army Rule 22(3) (b), or Army rule 241(b). In the present case, the Commanding Officer has made no reference to the Superior Military Authority because he has no material before him in the form of record of summary of evidence, which he could have considered and made the required reference as per law.

23. That, the power to order trial under the Army Act and Rules is to be exercised by the competent authority by endorsing the said order on the charge sheet. In the present case the occasion for existence of charge sheet has not arisen. Thereafter the power for trial of delinquent by General Court Martial or District Court Martial has been described in Army Rule 37, which reads as under:-

(Section 37 reproduced)

Under the present facts and circumstances, the respondent no.2 had no material before him to exercise the power and issue direction for disciplinary action against the petitioner by setting of General Court Martial against him, as has been indicated in respondents' affidavit of 27 July 2001 (Annexure-P6).

24. That, in view of the aforesaid circumstances the petitioner has been aggrieved for various reasons described here-in-before, for which he has filed this writ petition amongst other on the following :

GROUNDS

(i) Because, at the time of retirement of the petitioner from service on 28 February, 2003, there was no material on record before the Commanding Officer or any other Superior Military Authority, to frame any "charge(s)" against the petitioner. Therefore, under the provisions of Army Act and Rules, it cannot be said that he petitioner has committed any "offence" under the Army Act, which is a necessary requirement for invoking provision of Army Act Sec 123. As such, no occasion as per law had arisen for the Chief of Army Staff or any superior authority to have passed orders for trial of the petitioner by Court Martial and take him into Military Custody(open arrest)."

27. The respondents filed a detailed counter-affidavit on 8th May, 2003 supporting the legality of their action. It was contended that to the extent the representations of the petitioner deserved to be considered, they were dealt with in accordance with law. It was also contended that the Commanding Officer was justified in dispensing with the examination of the witnesses since provisions of Army Rules 180 were complied with at the court of inquiry and directions were issued for recording of Summary of Evidence against the petitioner. The respondents contend that at every stage the matter was proceeded with after application of mind and that the proceedings carried out by the Commanding Officer were held in compliance of the law and that the issue had not been prejudged either by the Commanding Officer or by any other authority. The respondents have also

submitted that every assistance was rendered by them to enable the petitioner to participate in the proceedings so that his interests are safeguarded.

28. The respondents denied the allegations of the petitioner that Major General Mathew Mammen, AVSM, VSM, who was member of the court of inquiry, had any connection with Samuel Mathew of Teheleka.com or with Teheleka.com. The respondents have also contended that there was no pre-determination of the issue by the Chief of Army Staff. The respondents submit that the court of inquiry was ordered by the Headquarters, Western Command vide case no.0337/3072/DV-2 on 15th March, 2001 and that this Court of Inquiry was finalised only on 14th June, 2001. The competent authority directed disciplinary action against the petitioner and other Army officers thereafter.

29. The respondents defend the invocation of the provisions of Section 123 of the Army Act placing the petitioner in military custody(open arrest) and state that the same was as per the existing rules and regulations in vogue. According to the respondents the petitioner was lodged in the Officers' Mess and was being given all the privileges as are available to an officer of his rank. The respondents submit that close arrest ensures availability of a person subject to the Army Act for any

proceedings under the Army Act. It is further contended that the same assures that the evidence is not tampered with and the witnesses are not influenced. It is stated that the Commanding Officer conducted the hearing of charge under Army Rule 22 exercised discretion under the proviso to Army Rule 22(1) and ordered the recording the Summary of Evidence. It was stated to be in progress at the time of filing of the counter affidavit. The respondents submit that the pensionary benefits of the petitioner would be determined in accordance with the Pension Regulations for the Army, 1961.

30. The respondents submit that all statutory provisions have been complied with and that the writ petition was wholly misconceived. Allegations of discrimination in issuance of the impugned order placing the petitioner under close arrest were misconceived. The instance of Brig. V.K.Nijhawan cited was untenable inasmuch as Brig. Nijhawan was under open arrest and was not released as has been alleged by the petitioner.

31. According to the respondents, however, their action was according to law and that his representations were heard and dealt with at every stage. In this behalf the respondents have placed on record their letter dated 27th March, 2003.

32. The present writ petition was taken up for hearing on 10th April, 2003 when notice to show cause was issued to the

respondents. The purport of the petitioner's contention on 10th April, 2003 would also show that the petitioner was aggrieved principally by the action of the respondents in keeping the petitioner under close arrest. The following order was made by this Court on 10th April, 2003:-

> "CW 2493/02
>
> Issue notice to the respondents to show cause as to why rule nisi be not issued, returnable on 19th of May, 2003.
>
> Ms. Jyoti Singh accepts notice on behalf of the respondents.
>
> CM 4161/03
>
> Mr.Jayant Bhushan appearing for the petitioner has contended that since March, 2001 though the matter has been under investigation, but the petitioner was not taken into military custody while exercising the jurisdiction under Section 101 of the Army Act and simply on his retirement on 28th of February, 2003, impugned order has been issued to keep the petitioner in open house arrest. He further contends that as per the instructions and guidelines of the respondent circulated on 14th of December, 1990 guideline 9 has detailed the effect of scope of Section 123 of the Army Act.
>
> Mr.K.K.Sud, learned ASG, prays for some time to bring the amended guidelines.
>
> Notice.
>
> Ms.Jyoti Singh accepts notice on behalf of the respondents.
>
> Reply be filed within two weeks. Rejoinder within one week thereafter.

Renotify on 19th of May, 2003.

Record be produced on the next date of hearing."

33. Thereafter the matter came to be adjourned from time to time. Alongwith the writ petition the petitioner had filed CM 4161/03 praying for an ad interim order against the respondents restraining them from continuing to implement the impugned order dated 26th February, 2003 and for a further direction for release of the petitioner from military custody(open arrest) with immediate effect. This application was dismissed as not pressed on 19th September, 2003.

34. The officer detailed to record the summary of evidence proceeded to record the same from 11th December, 2002 to 1st October, 2003.

35. During the summary of evidence, the prosecution had examined six witnesses. They were subjected to detailed cross-examination by the petitioner.

36. It is submitted before us that in the meantime, with regard to the submission of the original video tapes for examination by the expert witnesses and their authenticity, the officer recording the Summary of Evidence proceedings directed on 17th March, 2004 to the following effect:-

"accused is informed that since the video tapes produced by prosecution witness no.3 Sh.

> Aniruddha Bahal on 26th December, 2002 do not form part of admissible evidence as already intimated vide letter no.1600/19/IS/A/CF/11 dated 17th April, 2003(Exhibit 'T' refers), no adverse decision would be taken on the basis of these tapes"

37. This directive deals with the matter relating to the copy of the original video tapes and also renders prayer 'C' of the writ petition infructuous.

38. The petitioner claims that he sought production of 19 witnesses in support of his defence in the proceedings for recording of the summary of evidence. So far as the list of 19 witnesses is concerned, the officer recording summary of evidence permitted examination of three witnesses required by the petitioner. With regard to the remaining 16 witnesses, he appears to be dissatisfied with the relevance of those witnesses and on 27th March, 2004 and the officer recording Summary of Evidence directed as under:-

> "Accused is informed that remaining sixteen defence witnesses and documents requested by him for examination are not being provided to him. The accused is further informed that in the absence of examination of said witnesses and documents, no adverse decision would be taken on the proceedings. Hence he should proceed with his statement, if any."

On the request of the petitioner, he was even permitted to recall a prosecution witness for cross examination in addition to the three witnesses listed by him.

39. On 14th May, 2004 the petitioner filed CM 5693/04 for

issuance of directions to the respondents to allow the petitioner to examine 16 defence witnesses and to decide the issue of limitation as per his representation dated 26th April, 2004 before issuance of any order for trial of the petitioner by a General Court Martial. The petitioner was submitting in this application that he has been denied his statutory and constitutional right to examine 16 defence witnesses before the officer recording the Summary of Evidence; that the officer named by the Commanding officer commenced recording of Summary of Evidence as per Army Rule 23 against the petitioner on 11th December, 2002 and that a list of 19 defence witnesses given by the petitioner on 6th August, 2003 was not being permitted to be examined.

40. It is vehemently contended that the witnesses sought to be summoned by the petitioner would have established that the Court Martial of the petitioner was barred by limitation by virtue of Section 122 of the Army Act and that he is gravely prejudiced by the failure to summon the remaining 16 witnesses by the officer recording the summary of evidence.

41. It is also pertinent to mention that there was no allegation made in the writ petition with regard to the recording of the Summary of Evidence. It is also to be noticed here that by this application being CM 5693/04 the petitioner was seeking a

relief wholly beyond his prayers in the writ petition. The petitioner himself was also now contending in this application that he should be given an opportunity to examine his 19 witnesses before decision is taken by the competent authority for trial of the petitioner by court martial. The petitioner was also seeking a direction to the respondents to decide the issue of the trial by court martial now being barred by limitation as per the petitioner's representation dated 26th April, 2004.

42. The petitioner, therefore, was apparently abandoning part of his challenge and was himself admitting that there was no order till now directing trial of the petitioner by court martial in accordance with law. As per the allegations of the petitioner made in CM 5693/04 it was apparent that the matter was at the stage of the recording of Summary of Evidence which admittedly was not complete even on the date of filing the application and that no decision had been taken to direct trial of the petitioner by the General Court Martial.

43. In the meantime it appears that on receipt of the documentation from the Commanding Officers, and consideration of the matter, the convening authority framed a charge sheet dated 18th May, 2004 and directed the petitioner to be tried by a General Court Martial vide orders signed on 19th of May, 2004.

44. The petitioner made a strong grievance before this Court on 26th of May, 2004 in respect of the order dated 19th May, 2004 placing reliance on a letter dated 12th April, 2004 alleging that the Commanding Officer had recommended that the petitioner ought not to be subjected for trial by a court martial.

45. After examining the matter the following order was recorded by this Court on 26th May, 2004:-

> "Learned counsel for the petitioner has contended that at the time of recording of summary of the evidence the petitioner had requested the Commanding Officer that the defence witnesses for whom, he had submitted detailed justification and accepted the liability to defray their cost as desired by the Commanding Officer, were to be provided to him before the matter was considered under Army Rules 22, 23 & 24. He had also requested the Commanding Officer that no adverse decision be taken till all the defence witnesses and documents requested vide his letter dated 15th March, 2004 of the petitioner are examined by him.
>
> We have perused the original record of the proceedings and the summary of evidence in which it has been recorded that "accused is informed that remaining 16 defence witnesses and documents requested by him for examination are not being provided to him. The accused is also informed that in the absence of the examination of the said witnesses and documents, no adverse decision would be taken on the proceedings, hence he should proceed with his additional defence statement, if any."
>
> Mr.Sood, learned ASG appearing for the respondent has contended that the aforesaid note was only in relation to the plea of the limitation of the petitioner as the petitioner has

contended that the Tehlaka tapes came to the knowledge of the authorities as well as to the public on 14th & 15th March, 2001 and it was for no other purposes. Mr.Sood has also contended that the plea of the limitation will also be available to the petitioner before the General Court Martial.

As the matter would require some time to consider the **effect of recording that no adverse decision will be taken by the respondent in the proceedings at the time of recording the summary of evidence as well as the effect of the letter dated 12.4.2004** to the same effect and we are left with no time, there are two alternatives either the respondent themselves should not hold the GCM till the next date of hearing or in the alternative we have to direct the respondent not to hold the GCM till the next date of hearing till we decide the aforesaid issue authoritatively. Mr.Sood expresses his difficulty that limitation may expire and the respondent may be barred from proceedings with General Court Martial. We make it clear that in the event of the aforesaid issue decided against the petitioner, the petitioner will not claim limitation for this period.

Renotify on 26th July, 2004, the date already fixed.

Till the next date of hearing, General Court Martial proceedings be not held."

46. When the matter was listed before us on 26th July, 2004, an adjournment was requested on behalf of the petitioner that a substantive application for amendment of the writ petition would be filed. Accordingly CM 9137/04 praying for amendment of the writ petition was filed which was taken up for consideration alongwith the writ petition on 6th August, 2004.

The petitioner had sought liberty to withdraw CM 5693/04, however reserving the right to rely upon the documents annexed thereto for the purposes of decision on the writ petition. CM 5693/04 was accordingly dismissed as withdrawn on 6th August, 2004.

47. By virtue of CM 9137/04 the petitioner was seeking to contend that he may not be subjected to trial by court martial inasmuch as according to him on 27th March, 2004 the possibility of his trial by General Court Martial had become time barred on the ground of limitation as per Section 122 of the Army Act. It was being contended that it was to support this plea of limitation that the petitioner was seeking to call the persons cited in his list of witnesses. The petitioner was seeking to impugn the failure to take decision on his statutory representation dated 26th April, 2004 whereby he had impugned the respondents' action as being barred in terms of the limitation provided under Section 122 of the Army Act, 1950.

48. Additionally it was contended that the respondent no.5 had taken over the process of this Court and illegally issued charge sheet dated 18th May, 2004 bearing the endorsement of respondent no.4 dated 19th may, 2004 directing trial of the petitioner by General Court Martial.

49. The application seeking amendment of the writ petition

was filed seeking addition of pleas to the afore-stated effect and directing additional prayers to be made in the existing petition. Since the petitioner had been released from military custody(open arrest) after the filing of the writ petition the petitioner was seeking its modification. The petitioner was also seeking to add the respondents 4 & 5 to the existing petition by name as respondents 7 & 8.

50. It is essential to examine the charge sheet dated 18th May, 2004 which was issued to the petitioner. The same reads as hereunder:-

> "**CHARGE SHEET**
>
> The accused, Shri Iqbal Singh, formerly IC-26796Y Brigadier Iqbal Singh, Vishist Seva Medal, Army Headquarters, now attached to Headquarters 40 Artillery Division, and liable to trial by Court Martial under Section 123 of the Army Act, is charged with :
>
> **First Charge - Army Act Section 69**
> COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, BEING A PUBLIC SERVANT, ACCEPTING FOR HIMSELF GRATIFICATION OTHER THAN LEGAL REMUNERATION, AS A MOTIVE FOR DOING AN OFFICIAL ACT IN THE EXERCISE OF HIS OFFICIAL FUNCTIONS, CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT, 1988,
>
> in that he,
>
> at New Delhi, on 05 November 2000, which came to the knowledge of the authority competent to initiate action on 14 Jun 2001, while holding the appointment of Deputy Director General, Procurement and Progressive Organisation in Master General of Ordnance

branch, Army Headquarters, accepted for himself a sum of Rs.50,000/- (Rupees fifty thousand only) from Shri Samuel Mathew, a representatives of M/S West End International, a gratification other than legal remuneration, as a motive to promote the interest of the said firm in the Army.

Second Charge - Army Act Section 45

BEING AN OFFICESR BEHAVING IN A MANNER UNBECOMING HIS POSITION AND THE CHARACTER EXPECTED OF HIM,

in that he,

at New Delhi, on 05 November 2000, which came to the knowledge of the authority competent to initiate action on 14 Jun 2001, while holding the appointment is mentioned in the first charge, met Shri Samuel Mathew, a representative of M/S West End International, at Park Hotel and accepted hospitality of wine and woman offered by him to promote the interests of the said firm in the Army.

Third Charge - Army Act Section 63

AN OMISSION PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE,

in that he,

at New Delhi, on 05 November 2000, which came to the knowledge of the authority competent to initiate action on 14 Jun 2001, while holding the appointment as mentioned in the first charge improperly omitted to comply with the provisions of Chapter XV of the "Instructions on Contact with Foreign Nationals-1987", with regard to his meeting with Lt Col(Retd) VP Sayal and the aforesaid Shri Samuel Mathew."

51. The respondents have stated in the charge sheet that the allegations forming the basis of the charge came to the

knowledge of the authority competent to initiate action on 14th June, 2001.

52. It is noteworthy that incidentally, the court of inquiry had made its report on 14th June, 2001. In the tentative charge sheet on which summary of evidence was recorded four charges were levelled against the petitioner. Whereas the petitioner was being arraigned for trial on the charge sheet dated 18th May, 2004 wherein only three charges were levelled against the petitioner.

53. Perusal of the prayers in the existing writ petition shows that prayers (a) & (b) made by the petitioner stood satisfied and were infructuous. So far as prayer 'c' was concerned, the direction of the officer recording the evidence on 17th March, 2004 decided the matter.

54. In reply to prayer (e) of the petitioner, seeking a direction for release of his pensionary benefits, the respondents had stated that the same would be released in accordance with law. It is apparent that the prayers made in the existing writ petition stood either satisfied or were infructuous.

The assertions made in CM 9137/04 seeking to amend the writ petition were therefore based on a wholly new cause of action, if available, to the petitioner. In our view, the amendment of the existing petition on the facts and to

incorporate the prayers made in the CM 9137/04 cannot be permitted.

55. The entire matter was argued before us on 6th August, 2004. Both parties have addressed arguments not only on CM 9137/04 being the amendment application but on the merits of the matter when judgment was reserved. The petitioner however filed CM 9374/2004 dated 9th August, 2004 which was praying for consideration of the annexures(judgments) annexed with the application for consideration at the time of adjudication as well as supply of the documents placed before the Court on 6th August, 2004. In this view of the matter further opportunity for addressing arguments was given to both the parties on 12th August, 2004. We were called upon to decide the issues raised in the amendment application even on merits and as such have considered the entire matter on the merits of the contentions raised.

56. It has been vehemently contended on behalf of the petitioner that his valuable right to call witnesses granted to him under Army Rule 23 has been violated and his defence severely prejudiced inasmuch he has been denied opportunity to examine the 16 witnesses cited by him. The petitioner contends that the examination of these witness was essential inasmuch as these witnesses would have established that the trial of the petitioner

was barred by limitation.

57. In the context of the facts in the instant case the petitioner is seeking to advance the argument that the limitation had commenced from the date the tapes were broadcast on television. In this behalf, according to the respondents, by virtue of the broadcast, merely commission of some offence was revealed. Accordingly a Court of Inquiry was directed in accordance with the provisions of Army Rule 177 to 182 i.e. under Chapter VI of the Army Rules. The terms of appointment of the court of inquiry required inquiry into allegations of influencing the procurement of defence equipments as made against the Army Officers by Tehelka.com on 13th March, 2001. The Court was required to investigate the complicity of any other person(s) who might been involved in any way.

58. The court of inquiry was concluded on 14th July, 2001. Summary of Evidence was recorded thereafter. Only on its conclusion the respondents have issued the charge sheet dated 18th May, 2004 wherein it is stipulated that it was brought to the notice of the competent authority only on 14th July, 2001 about the commission of the offence and the identity of the offender as being that of the petitioner. This charge sheet has been issued after considering the material on record including the summary of evidence by the convening authority.

59. The petitioner contends that he was entitled to lead his defence and examine the 16 witnesses sought by him in order to support his plea of limitation to the effect that no trial of the petitioner could have been conducted as the same was barred in law under Section 122.

60. At this juncture it becomes necessary to examine the nature and scope of the proceedings conducted by Court of Inquiry under Chapter VI of the Army Rules. The same is conducted under the provisions of Army Rules 177 to 184. Upon examination of the judicial pronouncements, the position in law can be appropriately summarised as hereunder:-

(i) A Court of inquiry is intended for investigating circumstances under which irregularities occur and for fixing responsibility. It is primarily a fact finding body to collect evidence and make a report thereon. It is set up whenever an incident occurs of which the true and correct position is to be ascertained at the pre-charge level contemplated by law. Conducting of a Court of Inquiry prior to a direction to hold a trial or Court Martial is not a sine qua non whenever or wherever in any inquiry in respect of person such to the Army Act his character or military reputation is likely to be effected. (Re: AIR 1982 SC 1413 entitled Lt. Col.Prithipal Singh Bedi Vs. UOI.

(ii) Court of Inquiry has been held to be akin to a preliminary enquiry in civil proceedings. Its procedings are not admissible in evidence subject to the exceptions mentioned in Army Rule 182 (Re: Lt. Col. G.S.Dima Vs. UOI 1987 Labour Industrial Cases 1264) (Gau).

(iii) Proceedings of the Court of Inquiry are not adverserial and are not part of pre trial investigation. (Re: 1998(1) SC 537 (para 19) entitled UOI Vs. Major A. Hussain;

1997 (9) SCC 1 entitled Major Gen. Inderjit Kumar Vs. UOI.

(iv) Principles of natural justice are not applicable during Court of Inquiry though adequate protection to an army official is given by Army Rule 180. (Re 1997(9) SCC 1 entitled Major General Inderjit Kumar Vs. UOI.

(v) There is no mandatory requirement of supply of copy of a Court of Inquiry to a person who may be arraigned for trial (Re: 1998(1) SCC 537(para 19) Union of India Vs. Major A.Hussain; 1997(9) SCC page 1 (Head Note A) para 8 Major General Inderjit Kumar Vs. UOI.

61. After receipt of the report of court of inquiry the commanding officer is required to comply with Army Rule 22 and may direct recording of a summary of evidence in compliance with Army Rule 23 to 25.

It is noteworthy that the Army Act, 1950 was amended pursuant to the Amendment Act 37 of 1992. Sec 22 saw material amendments which become evident from the following comparison:-

Section 22(1) Prior to amendment	*Section 22(1) subsequent to amendment*
22. Hearing of Charge---(1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence. (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, in his discretion he is satisfied that the charge ought not to be proceeded with.	**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**

Section 22(1) Prior to amendment	*Section 22(1) subsequent to amendment*
	dispense with the procedure in sub-rule (1). (2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with: Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec.120 without reference to superior authority as specified therein.

The word 'charge' appearing in Army Rule 22(1) has been held to mean nothing more than a mere “accusation”. It does not amount to a charge as contained in a charge sheet. (Re:1983 Crl.L.J 1059 Head Note F(para 35) entitled Gian Chand vs. UOI).

62. The respondents had also issued the procedure governing hearing of charge under Army Rule 22 by the Commanding Officer was set out by the respondents in Army Orders 70/84. Subsequent to the statutory amendment the respondents canceled Army Order 70/84 and substituted the same by Army Order 24/94 which reads as under:-

> “A.O.24/94 Discipline: Hearing of a charge by the Commanding Officer
>
> 1.Disciplinary process under the Military Law commences with Army Rule 22 which lays down that every charge against a person subject to the Army 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. This is a mandatory requirement and its non-observance will vitiate any subsequent disciplinary proceedings. However, where the charge against the accused arises as a result of investigation by a Court of Inquiry,wherein the provisions of Army Rule 180 have been complied with in respect of that accused, the Commanding Officer may dispense with the procedure as prescribed in Army Rule 22(1) in so far as it relates to calling and hearing of the witnesses. It may be noted that even in such cases the commanding officer shall read out and explain the charge(s) to the accused and make appropriate orders on conclusion of the hearing.

2. It is, therefore, incumbent on all Commanding Officers processing a disciplinary case to ensure that “Hearing of the Charge” enjoined by Army Rule 22 is scrupulously held in each and every case and the provisions of the ibid Rule are complied with in letter and spirit.

3. It may be clarified that the charge at this stage is a 'Tentative' charge which may be modified after the hearing or during the procedure described in Army Rule 22(3)(c) or during examination after completion of the procedure under the said sub Rule, depending on the evidence adduced, under Army Rule 22(4). It is, however, not necessary at this stage to hear all possible prosecution/defence witnesses provided that CO has heard sufficient evidence in support/disproof of the charge(s). As a matter of abundant caution, it would be desirable to have one or two independent witnesses during the hearing of the charge(s).

4. After the procedure laid down in Army Rule 22 has been duly followed, other steps as provided in Army Rules 23 and 24, shall be

> complied with in letter and spirit. In order to ensure that there is no omission or laxity in the strict compliance of the procedure laid down in the Army Rules, the form given in Appendix 'A' to this Army Order shall be duly completed by the Commanding Officer and kept on record in all cases.
>
> 5. A copy of this Army Order will be kept in the Unit Court Martial Box.
>
> 6. AO 70/84 is hereby cancelled."

63. The manner in which the record of proceedings is to be recorded by the Commanding Officer under Army Rule 22 is provided in Appendix 'A' to Army Order 24/94.

64. The original record of the proceeding in the instant case has been produced before us and were perused. We find that the petitioner has confirmed that calling and hearing of witnesses in terms of proviso to Army Rule 22(1) have been dispensed with, since provisions of Army Rule 180 had been complied with at the Court of Inquiry. The Court of Inquiry was recorded in the presence of the petitioner and he was afforded opportunity to cross-examine the witnesses. Therefore, the decision of the Commanding Officer to exercise his discretion & dispense with compliance with Army Rule 22 cannot be challenged.

65. The status of the summary of evidence is that of an investigation conducted prior to a criminal trial. Army Rule 37 mandates consideration of the evidence and satisfaction of the

convening authority prior to direction to conduct a trial of a person subject to Army Act for offences thereunder by Court Martial.

66. The summary of evidence recorded under Army Rule 23 to 25 can be compared to the stage of investigation by an investigating officer in a criminal trial.

67. The trial commences only when a General Court Martial assembles to consider the charges and examines whether the Court Martial would proceed with the trial. The preceding preliminary investigation is only part of investigation to see whether a charge could be framed and placed before the competent authority to constitute a General Court Martial. It was so held in AIR 1996 SC 1340 (para 21 & 24) entitled UOI Vs. Major General Madan Lal Yadav.

68. Therefore, the recording of summary evidence amounts to conducting the preliminary investigation prior to the direction to conduct a trial.

It has been held by the Supreme Court that the requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not necessarily invalidate the Court Martial unless the accused is prejudiced or any mandatory provision violated. It is only such procedural defects as are vital and substantial which would effect a

subsequent trial. This was so held in the judgment reported at 1998(1) SCC 537 (paras 18 and 23) entitled UOI vs. Major A.Hussain; 1991(2) SCC 382 entitled Major G.S.Sodhi Vs. UOI; and AIR 1982 SC 1413 entitled Col. Pritipal Singh Bedi Vs. UOI. In the instant case the writ petition was filed before even such stage.

69. As per statutory scheme, the summary of evidence is recorded at a stage prior to the convening of a Court Martial. Therefore, a plea that a trial by court martial is barred by limitation cannot fall for consideration before an officer recording the summary of evidence inasmuch as the summary of evidence is concerned with investigation into the tentative charges leveled against the person against whom the summary of evidence is being recorded. The evidence recorded has to be considered by the competent authority under Section 109 of the Army Act read with Army Rule 37 who may or may not direct that the court martial is to be convened.

70. The petitioner contends that he was entitled to lead his defence and examine the 16 witnesses sought by him in order to support his plea of limitation to the effect that no trial of the petitioner could have been conducted as the same was barred in law under Section 122 of the Army Act.

71. In this behalf, it is necessary to examine the statutory

provisions governing the law of limitation as applicable to trials by Court Martial and the manner in which such objections can be raised. Limitation has been provided by the legislature under Section 122 of the Act. Prior to an amendment effected in the statute in 1992, the statute had another prohibition. It would be useful to place the statute prior and subsequent to the amendment along side so as to appreciate the valuable amendments deemed fit by the legislature:-

Section 122(1) prior to amendment	**Section 122(1) subsequent to amendment**
122.Period of limitation for trial--- (1) Except as provided by sub-section (2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three yars from the date of such offence.	**122. Period of limitation for trial---** (1) Except as provided by sub-section(2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence--- (a) on the date of the offence; or (b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or (c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.

72. Coming to the main plea advanced before us that the trial by General Court Martial of the petitioner was barred by limitation, it is necessary to consider the scheme of the enactment.

73. After the amendment, Section 122(1) of the Army Act is *ipsi sima verba* with Section 469 of the Code of Criminal Procedure, 1973 which reads as hereunder:-

> **"469. Commencement of the period of limitation---**(1) The period of limitation, in relation to an offence, shall commence,---
>
> (a) on the date of the offence; or
>
> (b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or
>
> (c) where it is not known by whom the offence was committed, the first day on which the identify of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.
>
> (2) In computing the said period, the day from which such period is to b computed shall be excluded."

74. The Supreme Court in the judgment reported at AIR 1996 SC 2004 entitled Radha Kishan Vs. UOI has held that the Army Act is a complete Code in itself. It not only provides that the period of limitation for trial by Court Martial but also provides under sub-Section (2) of Section 122 such offences in respect of which the limitation clause would not apply.

75. Section 122(1)(a) of the Act lays down that the period of limitation commences on the date of the offence. This presents no difficulty in its application inasmuch as both the offence and offender are deemed to be known and identity and knowledge thereof is attributable to the authority competent to initiate action. Section 122(1)(b) of the Act contemplates that the period

of limitation commences on such date when the commission of the offence came to be known to the “person aggrieved” or on the first date when such offence came to the knowledge of an authority who is competent to order the Court Martial, subject, however to the rule that the earlier of the two dates shall be the date for reckoning the period of limitation.

76. The expression 'person aggrieved' has been considered by the Supreme Court of India in the case entitled Registrar of Companies Vs. Rajshri Sugar & Chemicals Limited reported at 2000(6) SCC 133.

77. It was held by the Supreme Court that where a misconduct is said to have been committed, the officer in command is required to take action for charges and trial by the Court Martial as per Section 1 and Chapter V of the Rules or order Court of Inquiry. Placing reliance on an earlier decision of the Supreme Court rendered in Delhi Special Police Establishment Vs. S.K.Loraiya reported in AIR 1972 SC 2548, it was held that it is for the Court Martial to decide the issue of limitation and it alone has the jurisdiction to entertain upon the inquiry in the case.

78. This issue fell for consideration before a learned Single Judge of the High Court of Andhra Pradesh in a judgment reported at 2001(5) ALT 52 entitled Col. D.D.Pawar and another

Vs. Commander Head Quarter Andhra pradesh sub-area, Secundrabad and others. The judgment rendered by the learned Single Judge was impugned before the Division Bench of the High Court of Andhra Pradesh in Writ Appeal nos. 687 & 688 of 2001 and it was held as hereunder:-

> "It is also well settled that the Parliament or the Legislature is presumed to be in the know of the things, including the statute law that existed prior to such amendment and but also the binding law that was declared by the competent court of record. By the time 1992 amendment was introduced the Supreme Court decision in Delhi Special Police Establishment vs. S.K.Loraiya was available. In this case, the Supreme Court interpreted Sections 122(1) and (3) of the Army Act and laid down the following principle.
>
> > "....On a conjoint reading of sub-ss.(1) and (3) of S.122, it is evident that the Court Martial and not the ordinary criminal court has got jurisdiction to decide the issue of limitation. There is nothing on record before us to indicate that the respondent had not been evading after commission of the offence. As the Court Martial has initial jurisdiction to enter upon the enquiry in the case, it alone is competent to decide whether it retains jurisdiction to try the respondent in spite of sub-s(1) of S.122. The issue of limitation is a part of the trial before it. If the Court Martial finds that the respondent cannot be tried on account of the expiry of three years from the date of the commission of the offence, he cannot go scot free. Section 127 of the Army Act provides that when a person is convicted or acquitted by a Court martial, he may, with the

> previous sanction of the Central Government, be tried against by an ordinary criminal court for the same offence or on the same facts. So it would be open to the Central Government to proceed against the respondent after the Court martial has recorded a finding that it cannot try him on account of the expiry of three years from the date of the commission of the offence.
>
> (emphasis supplied)

In the light of the law laid down by the Supreme Court in Loraiya's case(supra) we agree with the observations made by the learned Single Judge that it is not desirable for this Court to embark upon any further in the matter. However, as the learned counsel for appellants and respondents have made elaborate submissions we only propose to deal with the question of law as to interpretation of Section 122(1) of the Act after amendment Act 37 of 1992 and also deal with the related submissions.

Section 122(1) lays down that no trial by Court Martial of any person subject to Army Act for any offence shall be commenced after the expiration of a period of three years. The second part of sub-section 122(1) visualises three different situations of commencement of period.

Applying the test laid down in Rajshree Sugar case, we need to examine question as to who is the "person aggrieved"for the purpose of Section 122(1)(b) of the Act. When any misconduct or offence is alleged to have been committed the Officer in Command is required to take action for investigation of charges and trial by the Court Martial as per Section 1 Chapter V of the Rules or order Court of Inquiry under Section 2 Chapter VI of Rules. Section 1 of the Chapter V deals with such investigation Rule 22 of the Rules provides that the Commanding Officer

> has to hear the charged army person, record summary of evidence and after completing the investigation if the Commanding officer is of the opinion that the charged ought to be proceeded with, he may refer the case to the proper superior authority or take such other action as contemplated in Rule 122(3). Under Rules 177 to 185 Court of Inquiry may be assembled by Officer in Command of anybody of troops. Chapter XII of the Defence Service Regulations or Regulations of the Army also deal with Court of Inquiry. In this context we may also refer to Chapter II of Army Regulations, which deals with the powers and duties of General Officer Commanding in Chief Core Commander, Divisional Commander, Area Commander and independent Sub Area Commander. The duties functions and responsibilities of the Independent Sub Area Commander are analogous to those of Area Commander which are provided in Regulations 16 Command, discipline and administration in his area are the responsibilities of the Area Commander or independent Sub Area Commander as the case may be."

79. The principles of law laid down above were considered by this Court in the judgment reported at 2002(64) DRJ 379 entitled V.N.Singh (Lt. Col.) Vs. Union of India and others. Inasmuch as the court was examining the finding and sentence of the court martial and the petitioner had already been held to be guilty, there was no possibility for that petitioner to have recourse to the plea in bar in accordance with Army Rule 53. Though it was held that it is the jurisdiction of the Court Martial to examine a plea in bar, however in view of the fact the Division Bench was concerned with the finding and sentence of the Court

Martial after trial, the Court examined the plea raised.

80. It is, therefore, settled law that the period of limitation starts from the date of knowledge of the offence and the identity of the offender. Law of limitation in the context of Court Martial proceedings being in the nature of a criminal trial necessarily has to be interpreted strictly.

However examining the spirit, intendment and purpose of the Army Act, 1950 and the rules framed thereunder, statutory power and procedure has also to be strictly construed to the extent that rights of person subject to Army Officers are curtailed by statutory provisions. In this context the Courts have negated even reading applicability of principles of natural justice into the provisions of the Army Act, 1950. In the judgment reported at 1990(4) SCC 593 entitled S.N.Mukherjee Vs. Union of India while considering the applicability of the rules of natural justice and requirement of recording reasons by the authorities exercising powers under Section 164 of the Army Act 1950 it was observed as hereunder:-

> "39. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in

> view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework where under jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi judicial functions the legislature,while conferring the said power, may feel that it passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative procedure Act, 1946 of USA and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case."

Therefore, the provisions of the Army Act 1950 brook no deviation and the provisions have to be strictly complied with.

81. The plea of a trial being barred by limitation goes to the root of the jurisdiction of the Court Martial. The statute has provided a valuable protection with regard to jurisdictional pleas to persons facing Court Martials. The statute also provides the

stage at which the objection is to be taken and the manner in which it is to be proceeded. The same is to be found in Army Rule 53 which reads as hereunder:-

> "**53. Plea in bar---** (1) The accused, at the time of his general plea of "Guilty"or "Not Guilty" to a charge for an offence, may offer a plea in bar of trial on the ground that---
> (a) he has been previously convicted or acquitted of the offence by a competent criminal court or by a court-martial, or has been dealt with summarily under sections 80, 83, 84 and 85, as the case may be, for the offence, or that a charge in respect of the offence has been dismissed as provided in sub-rule (2) of rule 22 or
>
> (b) the offence has been pardoned or condoned by competent military authority;
>
> **(c) the period of limitation for trial as laid down in section 122 has expired.**
>
> **(2) If he offers such plea in bar, the court shall record it as well as his general plea, and if it considers that any fact or facts stated by him are sufficient to support the plea in bar, it shall receive any evidence offered, and hear any address made by or on behalf of the accused and the prosecutor in reference to the plea.**
>
> (3) If the court finds that the plea in bar is proved, it shall record its finding and notify it to the confirming authority, and shall either adjourn, or if there is any other charge against the accused, whether in the same or in a different charge-sheet,which is not affected by the plea in bar, may proceed to the trial of the accused on that charge.
>
> (4) If the finding that the plea in bar is proved is not confirmed, the court may be re-assembled

> by the confirming authority, and proceed as if the plea has been found not proved.
>
> (5) If the court finds that the plea in bar is not proved, it shall proceed with the trial, and the said findings shall be subject to confirmation like any other finding of the court."

82. Army Rule 53(1)(c) did not exist on the statute book and has been introduced by the amendment to the rules on 6th December, 1993. The legislature, in its wisdom has, therefore, taken into consideration that the limitation for trial laid down in Section 122 is a question of fact and law and goes to the root of the matter i.e. amounts to questioning the very jurisdiction of subjecting a person to trial by Court Martial. Consequently, Army Rule 53(2)(4) provides that **as soon as such a plea in bar to the trial is offered, the Court Martial shall receive any evidence offered in support of the plea** and also hear any address made on behalf of the accused and the prosecutor in reference to such plea.

83. After receipt of the report the court of inquiry and recording of the summary of evidence, the competent authority had directed that the petitioner be tried by the General Court Martial. The stage of recording of the general plea on behalf of the petitioner as well as a plea in bar to the jurisdiction of the Court Martial on account of the trial being barred by limitation or otherwise has yet to come. It is at this stage that the

petitioner would plead the bar to trial of limitation, if available, and lead such evidence in accordance with law as is permissible. It has been so held even in the judicial pronouncements cited therefore by which we are bound.

84. It is a settled principle of law that where the statute mandates a particular thing to be done in a particular manner, it must necessarily be done in such manner or not at all. (Re: AIR 1936 PC 253 Nazir Ahmed Vs Emperor; JT 1993(3) SC 238 Shiv Kumar Chadha Vs. MCD); AIR 1975 SC 915 entitled Ram Chandre Adke Vs. Govind; 2001(4) SCC 9 entitled Dhananjaya Reddy Vs. State of Karnataka.

85. In the instant case the statute lays down the method and manner in which plea of bar of jurisdiction on account of limitation is to be taken and the statute itself provides the procedure to be followed by the Court Martial when such a plea is taken. That stage for the petitioner is yet to arrive in the instant case. The plea at the face of it requires evidence. The petitioner cannot pre-empt either the stage or the adjudication by the authority, tribunal or forum, statutorily created for adjudication of such a plea by virtue of taking recourse to the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

86. The statute has conferred the jurisdiction upon the

General Court Martial to adjudicate upon and decide its jurisdiction under Section 53 of the Army Act, 1950.

87. We have dealt at length with the allegations of the petitioner with regard to the fact that there was no material for initiation of disciplinary action of Court Martial against him in his representation and even in the writ petition. The petitioner was vehemently denying all the allegations levelled against him and was disputing the authenticity of the tapes. In these circumstances, it was thought fit by the respondents to call for the report of a Court of Inquiry and thereafter directed recording of Summary of Evidence.

88. We may point out here that in the instant case the respondents have framed the charge specifically attributing a specific date of knowledge of the offence and offender to the competent authority. It is trite to say that the burden of proving the same would thereupon be upon the prosecution in accordance with settled criminal jurisprudence. In view of the special procedure prescribed for trial by court martial, the petitioner would have an opportunity to raise objection at the stage of raising a plea in Bar. Even if the plea is not taken by the petitioner, in view of the frame of the charge, the respondents would have to prove every element of the charge including such date of knowledge beyond reasonable doubt and

the defence would have its opportunity to rebut the same. This would obviously include the date of knowledge of the offence and the identity of the offender.

89. The officer conducting the summary of evidence was of the view that evidence of only three out of the nineteen of the witnesses demanded by the petitioner were relevant to the tentative charges on which a summary of evidence was being recorded.

We do not agree with the petitioner that such a decision by the officer recording a summary of evidence can in the instant case be subjected to judicial scrutiny at this stage.

In any case, these witnesses have been cited admittedly in support of a plea in bar to the trial on account of limitation. On the own showing of the petitioner, such plea before the officer recording the summary of evidence was premature. Statute provides the stage and manner in which such plea has to be raised.

We have held that the occasion for a person arraigned to stand trial to take the plea in bar would arise before a Court Martial. In the case of the petitioner, such stage is yet to come.

90. The original record relating to the correspondence as well as the record relating to convening of the Court Martial has been produced before us and carefully perused.

91. We find that after conclusion of the summary of evidence, the Commanding Officer of the petitioner addressed a letter to the Headquarters dated 12th April, 2004 which read as hereunder:-

> " 1.Ref your HQ letter no.1451/3/WC/IBS/A1 dt 23 Oct 03 and telecon with DJAG your HQ dt 08 Apr 04.
>
> 2. **Pre-trial docus in respect of IC-26796Y Brig Iqbal Singh, VSM(Retd) are re-submitted** herewith as per details given in the application for Court Martial (in lieu of IAFD-937) for pre-trial advise please.
>
> 3. There appears to be no conclusive evidence in so far as the First and Second charges against the Accused are concerned. In so far as the Third and Fourth charges are concerned, **whereas they appear to be serious omissions**, however dealing with them administratively can also be an **option** so as to close the case expeditiously.
>
> 4. As regards the tapes are concerned, it has been brought out by the Officer recording the S of E that as they are copies of copies and hence not admissible as evidence under Indian Evidence Act Sec 62 and 63, and to that extent we have to await the forensic report as and when it comes. Evidence so deduced can be acted upon at that stg as otherwise the case will get delayed/time barred."
>
> (emphasis supplied)

92. It is evident that the Commanding Officer considered the omissions to be serious. While submitting his views, an option for expeditious adjudication has been suggested. Along with this letter he had enclosed forms for constitution of the

Court martial in Form IAFD, all dated 12th April, 2004, forwarding along with the Court of Inquiry report, report under Section 22 of the Act, tentative charge sheet, summary of evidence, documentary exhibits etc. as well as the additional summary of evidence to the competent authority. In any case, the letter dated 12th April, 2004 relied upon by the petitioner reproduced above cannot be read in isolation or devoid of the position in law. The commanding officer's communication has to be examined in the light of the rest of the documentation sent under his signatures.

In these circumstances, the contention on behalf of the petitioner that the Commanding Officer was of the firm view that the case was not a fit case for convening a Court Martial has to be rejected.

93. The power to convene a Court Martial is derived by an authority from the provisions of Section 109 of the Army Act read with Army Rule 37. Delegation is to be by issuance of an appropriate warrant. The only jurisdiction vested in the Commanding Officer was to refer the case to a superior officer for consideration for further action. The Commanding Officer in the instant case had referred the matter in accordance with Army Rule 24 in forwarding form IAFD to the Corps Commander for exercise of his jurisdiction under Section 109 and Army Rule

37. It is not disputed that the Corps Commander was legally competent and had the jurisdiction to convene a Court Martial in respect of the petitioner.

94. Upon receipt of the letter dated 12th April, 2004 as well as the form IAFD and the enclosures from the Commanding Officer, the convening authority i.e. Corps Commander took legal advise from the Deputy Judge Advocate General. Such advise was received by him on 7th May, 2004. After considering the material on record, the charge sheet was prepared and the trial by General Court Martial of the petitioner ordered vide orders dated 19th May, 2004.

95. So far as the submissions on behalf of the petitioner based on the recommendations of the Commanding Officer dated 12th April, 2004 are concerned, we may appropriately refer to the law laid down by the Supreme Court in AIR 1997 SC 2085 entitled Major General Inderjit Singh Vs. UOI. In this case the Commanding Officer recommended framing of charge under a particular statutory provision. The Chief of the Army Staff, upon advise from the Deputy Judge Advocate General, framed a charge under other statutory provisions as well. This was held to be valid exercise of power.

96. For this reason as well, the direction to try the petitioner by General Court Martial issued by the Corps

Commander in the instant case cannot be faulted.

In the judgment dated 23rd March, 2004 in Civil Appeal 1883/2004 entitled UOI vs. Gurnam Singh, it has been held by the Supreme Court of India that Army Rule 37 does not contemplate that the Officer who actually convened the Court Martial would himself be satisfied that the charges framed against the delinquent person are within the Army Act and the evidence justifies trial. Such satisfaction can be entered by an officer empowered by virtue of the warrant under Section 109 of the Army Act. It was also held that even the successor of an officer so recording a satisfaction is competent to convene the Court Martial.

In 1999(4) SCC 577 entitled UOI Vs. Harish Chander Goswami, the Supreme Court it was held that the satisfaction of the convening authority under Army Rule 37 alone is sufficient.

97. It is pertinent to note that there is no dispute before us and the parties are at ad idem on the issue that the competent authority vested with the power to convene a Court Martial acting under Section 109 read with Army Rule 37 can over ride any reference made by the Commanding Officer under Army Rule 24.

Even assuming that the letter dated 12th April, 2004 of the Commanding Officer did amount to an opinion that no court

martial ought to be convened against the petitioner, there can be no dispute that the convening authority, acting under Section 109 of Army Act and Army Rule 37, had the power to over ride any such view taken by the Commanding officer and as such the decision to direct trial of the petitioner that the General Court Martial cannot be faulted.

98. The petitioner, in prayer (d), had sought a direction to the respondents to file the record of the proceedings wherein respondent no.2 had allegedly passed directions for the petitioner's trial by General Court Martial, based on the affidavit of Sh.S.L.Bunker before Justice Venkataswami Commission. This prayer was in direct conflict with the categorical assertions of the petitioner set out above that there was no material for proceeding against the petitioner and that no direction had actually been made directing convening of a General Court Martial inasmuch as the matter was pending for recording of Court of Inquiry and later the Summary of Evidence proceedings.

We have also noticed here-in-above that the petitioner took a different posture when the respondents issued the charge sheet in May 2004, abandoning this plea.

In any case no such decision of the Chief of the Army Staff or any other person is forthcoming on the record produced

before us. The respondents have themselves admitted that information of the offences was received by the competent authority on 14.7.2001. This appears to be from the report of the court of inquiry which submitted its report on this date. Based thereon hearing of the charge under Army Rule 22 was undertaken by the Commanding Officer. The record in relation to this hearing has been produced. Summary of evidence was directed to be recorded thereupon. Even the respondents in the counter affidavit have stated that based on the directions on the court of inquiry by the competent authority disciplinary action has been initiated.

99. The petitioner has placed reliance upon the affidavit dated 27th July, 2001 stated to have been filed by the Central Government before Justice Venkataswami Commission of Inquiry stating that the entire issue was pre-mediated and pre-determined and the entire proceedings were an eyewash. At the same time it was the contention of the petitioner himself in the writ petition as set out above that the respondents have no material before them before taking any decision as alleged in the affidavit filed by the Government before the Commission.

100. We have given our thoughtful consideration to the entire material laid before us and submissions made by both sides. We have not been able to find any decision on the record

placed before us with regard to any decision having been taken to convene the Court Martial prior to 19th May, 2004. The basis of the affidavit filed by the commission or its correctness is not the subject matter of the present writ petition. The contention of the petitioner is that the respondents had prejudged the issue.

Pleas to this effect were made by the petitioner in paras 21 to 22 of the writ petition. The counter affidavit on behalf of the respondents dated May 2003 has been deposed and swornby Major Devendra Singh, Deputy Assistant Adjutant General (Legal), Army Headquarters on the basis of official records. In reply to paras 21 and 22 it has been deposed as under:-

> "Paras 21 & 22. The contents of para 21 & 22 are denied being false and baseless. On finalisation of the Court of Inquiry, disciplinary action was directed agaist the involved Army officers including the petitioner by the competent authority. Provisions of Army Rule 22 were complied with by the Commanding officer & he ordered recording of Summary of Evidence which is still in progress. **Till date, the case is under investigation and no decision has been taken to convene General Court martial in respect of the petitioner. The COAS at no stage gave orders to try the petitioner by the General Court Martial. Therefore, there is no merit in this contention of the petitioner. Such a decision, if at all it would be, it can be taken after the conclusion of on going Summary of Evidence and its consideration under Army Rule 24**."

101. In this behalf there is no dispute that the Court of

Inquiry submitted its report on 14th July, 2001 which report is the basis of information to the Commanding Officer. It is an admitted case that the Court of Inquiry was convened under Army Rule 177 to Army Rule 180 and also a Summary of Evidence was ordered to be directed against the petitioner under Army rules 23 to 24. The Commanding Officer has referred the matter in terms of Army Rule 24 and even made his submissions which have been relied upon by the petitioner in the letter dated 12th April, 2004. The proceedings under Army Rule 22 were held on 30th September, 2002 and the summary of evidence recorded from 30th September, 2002, 11th December, 2002 to 1st October, 2003.

102. We have not been able to find any material to support the plea taken by the petitioner that there was any previous decision or direction of the Chief of the Army Staff to hold the trial of the petitioner by a General Court Martial in the instant case. There is nothing in the record produced before us to this effect. The petitioner had also abandoned his challenge and the issues narrowed down to those noted in the orders of this Court dated 26th May, 2004. As such, we are unable to uphold the pleas of the petitioner.

103. In any case the petitioner will be afforded an opportunity to challenge, the action of the respondents and

conduct the cross-examination of the prosecution witnesses in this behalf before the General Court Martial. In case of such challenge the Court Martial shall decide the issue strictly in accordance with law uninfluenced by observations made by us as well as views, if any, of any authority.

104. The learned senior counsel appearing for the petitioner has placed reliance on several judicial pronouncements. It has been vehemently contended that in view of the law laid down in 1992(24) DRJ 125 entitled Lal Dafedar Lakshman Vs., UOI the action of the respondent in the instant case cannot be sustained. This judgment was rendered in the light of the mandate of Section 122 of the Army Act and Army Rule 53 prior to their amendment.

In view of the substantial changes effected to the statute, the judgment would not apply to the matter in issue before us.

105. Reliance has been placed on behalf of the petitioner on para 5 of the judgment reported at AIR 1985 SC 703 entitled Chief of Army Staff Vs. Dharam Pal to urge that where the order to try by General Court Martial is without jurisdiction, then there would be no warrant for exposing the petitioner to the prolonged trial by General Court Martial.

We have carefully considered the judgment cited. In

view of the statute as it exists after the amendment, we have held that the stage for taking an objection relating to the jurisdiction of the Court Martial to proceed with the trial by virtue of the bar of limitation is at the stage of recording of the general plea in bar and further that such plea has to be raised before a General Court Martial itself.

Such a stage in the instant case has yet to come. Limitation being a question of law and fact, necessitates evidence to be recorded. This is more so in the instant case where the change incorporates a specific date of knowledge.

106. On behalf of the petitioner, another judgment reported at MIMJ 2003 SC 146 entitled Union of India and others Vs. Dev Singh has been cited. This decision also does not support the case of the petitioner inasmuch as, in this case the officer was not permitted to cross-examine the witnesses produced by the prosecution. There is no such allegation in the instant case.

107. Learned senior counsel for the petitioner has also challenged the charge sheet in the instant case and submitted that in view of the law laid down in 1997(4) SLR 165 entitled Subedar Kashmira Singh Vs. Govt. of India and others, the charge sheet has suffered from fatal errors and the trial could not be proceeded with for this reason.

We are unable to agree with the proposition sought to

be urged by the learned senior counsel for the petitioner inasmuch as the statute and rules framed thereunder provide the specific stage at which such an objection has to be taken before the Court Martial itself. In the decision rendered in Subedar Kashmira Singh's case(supra), the court was examining the verdict rendered by the court martial and its proceedings. In any case in hand, the trial is yet to commence.

108. The respondents have referred to the decision rendered by one of us (Dr.Justice Mukundakam Sharma) dated 2nd May, 2001 in CW 1259/99 entitled Major S.L.Sharma Vs. UOI wherein a similar plea raised before the writ court was rejected giving liberty to the petitioner to raise the issue of limitation before the Court Martial which was required to enter upon the inquiry in accordance with law.

109. So far as the issue of non-decision of the various complaints made by the petitioner is concerned, Section 26 & 27 of the Army Act 1950 provide remedies to aggrieved persons against decisions taken by the authorities against them. Section 27 of the Army Act confers a right of redressal to any officers who deems himself wrong by his Commanding Officer or any superior officer who on due application made to such Commanding Officer does not receive redressal to which he considers himself entitled. Such officer is given the right to

make a complaint to the Central Government in such manner as may from time to time be specified by the proper authority.

110. It is to be mentioned that protracted petitioning/ representations to the authorities results in deviation from the main matter in hand. Such petitioning, as well as litigation and stay orders are devices adopted to create situations for withholding commencement of trials. It is noticed that after creating situations for delayed commencement of trial, persons have pleaded the bar of limitation to the trial by General Court Martial.

111. In such situations, the Apex Court has held that no man can take advantage of his own wrong and that the delinquent officer having himself created a situation withholding commencement of trial is estopped from pleading the bar of limitation and the trial commenced on vacating of judicial order of restraint on the court martial shall be a valid trial. It was so held in the judgments reported at (2001) 5 SCC 593 para 40 entitled Union of India Vs. Harjit Singh Sandhu and 1996(4) SCC 127 entitled UOI Vs. Maj Gen Madan Lal Yadav(Retd.)

112. The respondents have brought to our notice a circular bearing no.62736/AG/DV-1 dated 21st December, 1990 wherein the Army Authorities have considered the issue of representations/complaints being made in respect of disciplinary

proceedings. Vide this letter the authorities have directed as hereunder:-

> "1. It has come to the notice of this Headquarters that with a view to stall disciplinary proceedings, a number of Army personnel submit statutory complaints under the provisions of Army Act, Sections 26 and 27 at various stages of such disciplinary proceedings. The matter has been examined carefully at this Headquarters in consultation with Ministry of Law and it has been ruled that complaints under Sections 26 and 27 of the Army Act are not entertainable pertaining to the court martial and disciplinary matters after cognizance of offence has been taken and disciplinary proceedings commenced. Adequate remedies are already available with regard to such proceedings under Army Act Section 161, Section 179 and Army Rule 33.
>
> 2. Suitable instructions to the units/ formations under your command may, accordingly, be issued."

113. The respondents have taken the stand that such representations as were permissible in law and by virtue of the aforesaid circular have been dealt with and orders thereon stand duly communicated to the petitioner. In view of the foregoing, we find that the statutory scheme provides valuable safeguards to the petitioner in respect of every stage of the proceedings. The petitioner was afforded an opportunity to cross-examine witnesses at the Court of Inquiry as well as at the time of recording of summary of evidence. The applicable statute and rules framed thereunder provide valuable remedies to the

petitioner. In case the petitioner is aggrieved by any order passed by the Court Martial, the petitioner has a right to petition the confirming authority by a petition under Section 164(1) of the Army Act, 1950. Such confirming authority is required to take all steps to satisfy itself to the correctness, legality or propriety of the order passed or to the regularity of the proceedings to which the order relates.

114. For this reason the petitioner cannot be heard to contend that he is being prejudiced on account of failure on the part of the respondents to pass orders on every communication made by him as was noticed in the letter dated 21st December, 1990. More so, in the instant case, the petitioner is making representations even relating to matters on which statutory provisions have laid out the procedure.

115. In view of the aforesaid discussion, the writ petition and the applications are misconceived and are hereby dismissed. The petitioner will be at liberty to raise the pleas with regard to the trial being barred under Section 122 of the Army Act, 1950 before the General Court Martial in accordance with the elaborate procedure laid down thereunder. In the event of the petitioner raising such plea in bar or any other issues, the same shall be decided by the General Court Martial in accordance with law uninfluenced by any observations or views expressed herein.

116. We may also advert to the prayer made in the application for supply of documents produced before us. The relevant documents relied upon have been extracted here-in-above and detailed reference made to the original records produced before us.

117. In view of the order of this Court dated 26th May, 2004, it will not be open for the petitioner to rely upon the period from 26th May, 2004 till pronouncement of the present judgment in support of his plea of the trial being barred by limitation.

118. We may add a note of caution at the end. Undoubtedly this case has received tremendous attention in view of the nature of allegations as well as the status of the personalities involved. The legislature has provided adequate safeguards for protecting the rights of a person who has been arraigned to stand trial by Court Martial. We expect the Army Authorities to abide with and to ensure that valuable rights of the petitioner are not compromised or jeopardised in any manner and he is given adequate opportunity to defend himself in accordance with law, uninfluenced by the stature of the personalities involved or the publicity generated in the matter.

Ordered accordingly.

GITA MITTAL

JUDGE

November 10, 2004 DR.MUKUNDAKAM SHARMA
JK JUDGE