
(2000) 03 DEL CK 0060

In the Delhi High Court

Case No : CWP. No. 1814 of 1998 and CMs. 3004 and 9919 of 1998

Col Gajraj Singh (Retd.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-03-2000

Acts Referred:

Army Act, 1950 — Section 122, 123

Citation : (2000) 4 AD 665 : (2000) 54 DRJ 765

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Narender Kaushik Capt. Adv, for the Appellant; Ms. Pinky Anand Advocate, for the Respondent

Judgement

A.K. Sikri, J.—Petitioner was commissioned in the Indian Army on 9-6-1968 as Second Lieutenant in Army Service Group. He was promoted from time to time and rose up to the rank of Colonel from which post he retired on 31-5-94. During the period May,1990 to 31-10-1991 petitioner was posted as Commandant 4 Reserve Petroleum Depot, Delhi Cantt. He made local purchase of Hygiene Chemical for supply to various units dependent on the aforesaid depot where petitioner was posted. On 31.10.92 petitioner was transferred to ASC Centre North Gaya, Bihar. In May,1993 after the transfer of the petitioner from 4 Reserve Petroleum Depot, Delhi Cantt. two technical inquiries were conducted into the aforesaid purchases made by the petitioner. It is the case of the petitioner that he was not called to give evidence in the said inquiries nor was found blame worthy on any account. However, on 7-5-94 a high level Staff Court of Inquiry was ordered by Western Command of Army to inquire into the alleged irregularities committed in the aforesaid purchase of Hygiene Chemical. The petitioner was awarded commendation by General Officer. In the English translation of the relevant portion of the said commendation certificate reads as under :

"IC. 19657 Colonel Gajraj Singh while serving in ASC Centre North discharged his

duties impartially and with full dedication and competence. This said service are example to the members of Army and that I hereby commend him for the same.

I also hereby direct that the said contents of commendation be reflected in your service record".

2. Thereafter, the petitioner retired from Indian Army on 31-5-94 with full retirement and beneficiary benefits and started drawing pension w.e.f. 1-6-94. However, the high level Staff Court of Inquiry which was constituted on 7-5-94, assembled on 6-6-94 and on subsequent dates for recording the statement of concerned persons. The petitioner was summoned before the said Inquiry u/s 135 of the Army Act and gave his statement as Witness No.24 on 23.8.94. On 23.8.94 the Court of Inquiry expressed definite opinion against the petitioner stating that the local purchases of Hygiene Chemical made by the petitioner were totally illegal. The said Inquiry had, before forming this opinion, given opportunity to the petitioner under Army Rule 180 identifying him as an accused and he was allowed to cross-examine various witnesses. It appears that on the basis of the opinion dated 23.8.94 expressed by the Inquiry Committee, the pension of the petitioner was stopped w.e.f. 1-10-96. Petitioner filed writ petition being CWP. No.19649/96 in the High Court of Punjab & Haryana at Chandigarh against the aforesaid order and restoration of this pension which was allowed by the said High Court vide order dated 1-5-97 and his pension was restored.

Petitioner had received an invitation from Army Authorities to attend passing out function at the Indian Military Academy which he attended on 7.6.97.

3. Petitioner was arrested by the Civil Police at the behest of Army Authorities on 21.9.97. He preferred Habeas Corpus writ against the aforesaid detention in this Court being Crl. W. 704/97 and on 1.10.97 order was passed by this Court directing release of the petitioner. It was on an undertaking given by the brother of the petitioner, who had filed the writ petition, to the effect that petitioner would appear before the authorities during the recording of summary of evidence. This order was passed subject to the petitioner's right to raise such pleas as may be available to him in law and without prejudice to the rights and contentions of the petitioner. Thereafter, respondents passed order of attachment dated 8.10.97 under the provisions of AI-30/96 attaching the petitioner to COD, Delhi Cantt. till finalisation of disciplinary case against him. Tentative charge-sheet dated 16.1.98 was served upon the petitioner initiating disciplinary proceedings against him invoking Section 123 of the Army Act. The allegations contained in the charges in this charge-sheet relate to the local purchase of Hygiene Chemical which the petitioner made during the period May, 1990 to 31.10.91 while working as Commandant 4 Reserve Petroleum Depot, Delhi Cantt. These charges are framed u/s 52(f) and Section 63 of the Army Act read with Section 25 of the Indian Penal Code. The petitioner has filed this petition challenging the initiation of the said enquiry.

4. In the counter-affidavit filed by the respondents, the respondents have taken

various preliminary objections to the maintainability of this writ petition. It is stated that writ petition is misconceived, vexatious and has been filed for mala fide reasons and extraneous grounds to defeat the departmental enquiry initiated by the respondents against the petitioner. It is further contended that writ petition is pre-mature. It is also stated that petitioner has not come to this Court with clean hands inasmuch as charge-sheet was issued within the time prescribed by the statute and it is the petitioner who intentionally and purposefully avoided the Army and Civil Police authorities for a period of 2 years with the intention to drag the period beyond 3 years as per Section 123 of Army Act 1950. It is stated that provisions of Sections 123 of the Army Act were invoked against the petitioner vide ASC Centre North vide letter No.PC-1102/2/GS/Conf dated 29.9.95. The Petitioner did not receive the registered letter sent to him. Subsequent apprehension by the Army Authorities for a period from 28.9.95 to 21.9.97 was also avoided by him and it is accordingly contended that since the applicant purposefully avoided receipt of registered letter and the apprehension for a period of two years, the above period should be exempt in counting 3 years period of limitation u/s 123(2) of the Army Act. The case law in support of this submission is cited in the counter-affidavit. On merits it is stated that the irregularities in the local purchase of Hygiene Chemicals made by the petitioner were investigated by the Staff Court of Inquiry which was ordered on 7-5-94 and after investigation the Court blamed the petitioner. The General Officer Commanding in Chief Head Quarter, Western Command (Army) ordered disciplinary inquiry and, accordingly, charges were framed which according to the respondents are of serious nature.

5. In the rejoinder-affidavit filed by the petitioner, petitioner has denied the allegations that he ever tried to avoid the receipt of any letter sent to him or his arrest. He says that he was never absconding between September, 1995 to September, 1997 as alleged by the respondents. On the contrary during this period he received his pension through bank. He also attended ceremonial function at I.M.A. on 7.6.97.

6. Respondents filed additional affidavit after filing of the rejoinder affidavit by the petitioner and produced some more documents along with this additional affidavit to which reference can be made at the appropriate stage.

7. Show cause notice was issued in this writ petition and respondents were given time to file counter-affidavit. Even after the two opportunities granted to the respondents, when the counter-affidavit was not filed, this Court on 15-7-98 issued Rule in this writ petition and disciplinary proceedings initiated by the respondents were stayed. Thereafter, counter affidavit was filed on 15.9.98 and on 24.9.98 CM.9918/98 was filed by the respondents for vacation of the stay order. Notice was issued in this application. The petitioner filed reply to this application. On 28.5.99 earlier stay order dated 15.7.98 was modified directing that inquiry proceedings of the Court Martial may go on but no final order shall be passed without the leave of the Court. Thereafter, when the matter came up

for arguments, with the consent of the parties main case itself was taken up for arguments and counsel for both sides were heard in the main writ petition.

8. The dates and events mentioned above are substantially undisputed (only dispute is as to whether petitioner avoided to receive the memos or his arrest or its Department which held the action). As per the chain of events disclosed above, following would be the material dates:

1990-91 Period during which alleged irregularities committed. 1993 Two technical enquiries conducted. 07.05.94 Staff Court of Enquiry constituted. 31.05.94 Petitioner retired from Service. 23.08.94 Court of Enquiry submitted report giving definite opinion against the petitioner. 07.06.97 Petitioner attended Indian Military Academy function. 21.09.97 Petitioner was arrested by Civil Police at the behest of Army Authorities. 01.10.97 Order of his release passed by High Court in CWP. No. 704/97. 08.10.97 Order of Attachment of petitioner passed till finalisation of disciplinary proceedings. 27.01.98 Charge-sheet served invoking Section 123 of Army Act.

9. Before proceeding further, let us first examine the legal position as contained in Sections 122 and 123 of the Army Act. These provisions read as under :

"Sec. 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 from the date of such offence.

(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Section 37.

(3) In the computation of the period of time mentioned in subsection (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest, after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrollment shall be commenced if the person in question, not being an officer, has subsequent to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army.

Sec. 123 Liability of offender who ceases to be subject to Act. (1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such person shall be tried for an offence, unless his trial commences within three years after he had ceased to be subject to this Act:

Provided that nothing contained in this sub-section shall apply to the trial of any

such person for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court-martial.

(3) When a person subject to this Act is sentenced by a court martial to transportation or imprisonment, this Act shall apply to him during the term of his sentence, though he is cashiered or dismissed from the regular Army, or has otherwise ceased to be subject to this Act, and he may be kept, removed, imprisoned and punished as if he continued to be subject to this Act.

(4) When a person subject to this Act is sentenced by a court martial to death, this Act shall apply to him till the sentence is carried out".

10. Section 122 deals with situation where a person is still subject to the Army Act and prescribes limitation period for trial by court-martial by putting an embargo on such trial (on the commencing of the such trial) after a period of three years from the date of such offence.

On the other hand Section 123 deals with the trial of a person in respect of an offence which he committed when he was subject to the Army Act but action is sought to be initiated when he has ceased to be subject to Army Act. Sub-Section 2 of Section 123 maintains that trial has to commence within a period of three years after a person ceases to be subject to Army Act and if it is not done within this stipulated period, person cannot be tried for an offence thereafter. This provision has come up for interpretation in various cases and both the parties cited case law in support of their respective arguments.

11. On the basis of aforesaid two provisions, Mr. Kaushik, learned counsel for the petitioner argued that in the case of the petitioner provisions of Section 122 as well as Section 123 of the Army Act applied and the action was time barred from the point of view of both these Sections. Insofar as applicability of Section 122 of the Army Act is concerned, his submission was that the alleged offence is of the period 1990-91 and, Therefore, action could not be taken against him after the expiry of three years from the commission of the alleged offence. He submitted that Section 122 uses the expression "no trial by Court Martial" after the expiration of a period of three years from the date of such offence. According to him trial starts only when the Court Martial is convened and not when Court of Enquiry was held. Court Martial could be convened only after charge sheet dated 27.1.98 served upon the petitioner which is much beyond three years from the commission of alleged offence. In support of his contention he relied upon the following judgments:

1. Major Radha Krishan Vs. Union of India & Ors., 1996 (2) SLR 650.
2. Lt. Col. Jagga Singh Vs. Union of India & Anr., 1996 (2) SLR 167.
3. Lt.Col.(T.S.) H.C. Dhingra Vs. Union of India, 1989 RLR 101.

His alternate submission was that even as per Section 123 of the Army Act, the

trial was barred. Inasmuch as petitioner retired from service on 31.5.94 and the charge-sheet was served upon him invoking Section 123 of the Army Act only on 27.1.98 which was admittedly much after the expiry of 3 years of his retirement when he had ceased to be subject to Army Act.

12. As against the aforesaid submissions of the petitioner it was argued by Ms. Pinky Anand, learned counsel appearing for the respondents that the period of limitation of three years u/s 122 has to be counted from the date when the identity of the accused who committed the particular offence becomes known/is established. It was submitted that in this case Court of Enquiry was ordered on 7.5.94 and since the petitioner was identified only on 3.12.94 the disciplinary action was ordered on that date and, Therefore, it cannot be said that the action was barred u/s 122 of the Act. It was submitted that before this date no action could be taken as it was not known as to who has committed the offence and unless identity is established action could not be taken against a particular person. However, when the identity was known and action was sought to be taken, the petitioner avoided his arrest and taking of the action by the respondents. Counsel relied upon additional affidavit filed in May, 1999 and the documents annexed along with the said affidavit on the basis of which, it is submitted that vide letter dated 28.9.95, provisions of Army Act were invoked against the petitioner and he was directed to report to Commander Headquarters 35 Infantry Brigade by 10.10.95. However, the said letter sent to the petitioner by registered post was received back undelivered. In the circumstances, respondents approached District Magistrate, Bhivani (Haryana) to arrange delivery of the invokement order to the petitioner which was earlier returned undelivered/unaccepted. Again the letter could not be delivered as petitioner was not at his residence and his wife refused to receive the letter. Thereafter, facts regarding the arrest of the petitioner on 21.9.97 and development which took place thereafter are mentioned. On the basis of these facts, it is contended that since it is the petitioner who was absconding or avoiding arrest all this period, said period has to be excluded while computing the period of limitation of these years and, therefore, action taken was within time. In support the counsel referred to paras 3 to 5 of the additional affidavit, which read as under :

"3. That Court of Enquiry vide document dated 7 May, 1994 to investigate local purchase of Hygiene Chemicals by 4 RPD Delhi Cantt for the year 1992-93 by Hq. Western Command, Army vide convening order no.54818/XIII/Q1(B).

4. That w.e.f 31 May, 1994 (A/N), IC-19657 Col. Gajraj Singh retired from Service. In terms of Army Act, Section 123(i) petitioner can be tried under Army Act if his trial began within a period 3 years from his date of retirement i.e. up to 31 May, 97 provided he is not absconding avoiding arrest/obtained injunction/stay from the Court (Army Act 123(2) refers.

5. That General officer commanding-in-Chief Western Command, erected to take disciplinary action against Co. (Retd.) Gajraj Singh vide order No. 54818/XIII/Q1 (B) dated 3 December, 1994".

13. Let me examine the case first from the point of view of provisions contained in Section 122 of the Army Act. In fact it may be stated that the respondents in the additional affidavit have not clarified the position from the angle of Section 122 of the Army Act and the position is explained keeping in view only Section 123 of the Army Act. There is no doubt that the trial is commenced much after the lapse of three years period from the date of alleged offence as the period of alleged offence is 1990-91. Section 122 of the Army Act clearly stipulates that no trial by Court Martial can commence after the expiration of period of "three years from the date of such offence".

Therefore, if the date of alleged offence is to be treated as starting point, the trial is clearly barred. Once this is the factual position, the legal consequence thereof is that the respondents are not permitted to hold any trial at this stage. This is well established proposition in series of cases.

14. In the case of Lt.Col. (T.S.) H.C. Dhingra (supra) DB of this Court interpreted Section 122(1) in the following manner:

"In any event, in our view, Sec. 122(1) of the Act is an absolute statutory bar. It spells out legislative policy in clear terms: "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 from the date of such offence." It is a prohibitory provision. No provision has been made for extension of the time prescribed by it. The power of the authorities under the Act to try any person for any offence, except as provided by subsection (2) is restricted by this statutory provision. This provision is not consensual. Its operation does not depend upon volition, will or consent of any one. Its operation cannot be waived. It is impermissible for any of the authorities under the Act to do away with the mandate of this provision. Its terms are not negotiable. In this respect, we do not agree with the view expressed by Wad, J. in Major Harbhajan Singh's case".

15. Again in the case of Major Radha Krishan (Supra) the Supreme Court approved the view taken by Division Bench of this Court in Dhingra's case (Supra) and observed as under :

9. The matter can be viewed from another angle also. So far as period of limitation of trials by Court Martial is concerned Section 122 of the Act is a complete Code in itself for not only it provides in its sub-section (1) the period of limitation for such trials but specifies in sub-section (2) thereof the offences in respect of which the limitation clause would not apply. Since the terms of the above section are absolute and no provision has been made under the Act for extension of time - like Section 478 Criminal Procedure Code-it is obvious that any trial commenced after the period of limitation will be patently illegal. Such provisions of limitation prescribed under the Act cannot be overridden or circumvented by an administrative act, done in exercise of powers conferred under a Rule. Mr. Ramachandran was, Therefore, fully justified in urging that power under Rule 14 of the Army Rules could not be exercised in a manner which

would get over the bar of limitation laid down in the Act and that if Rule 14 was to be interpreted to give such power it would clearly be ultra vires. We are Therefore in complete agreement with the observations made by the Delhi High Court in H.C. Dhingra's case (supra) that in purported exercise of administrative power under Rule 14, in respect of allegations of misconduct triable by Court Martial, the authorities cannot override the statutory bar of the sub-section(1) of Section 122 of the Act for no administrative act or fiat can discard, destroy or annul a statutory provision".

To the same effect is the judgment of this Court in the case of Lt. Col. Jagga Singh Vs. Union of India & Anr., 1996 (2) SLR 167 (Supra).

16. There is no dispute up to this stage. As per the legal position explained in the aforesaid judgments on the interpretation of Section 122 of the Army Act. However, learned counsel for the respondents argued that the limitation period is to be counted from the date of identity of the accused who committed the particular offence becomes known/is established and viewed from this angle the commencement of trial is not barred u/s 122 of the Army Act. It was further argued that the petitioner was at fault in not allowing the trial to commence earlier and he avoided his participation on one ground or the other and, Therefore, he could not take advantage of his own wrong and viewed from this angle the trial commenced within a period of three years and could not be treated as time barred. In support of her submission counsel relied upon the judgment of Supreme Court in the case of Union of India and others Vs. Major General Madan Lal Yadav (Retd.), and secondly in the case of Lt. Col. (T.S.) H.C. Dhingra Vs. Union of India, 1989 RLR 101 and lastly in the case of Col. Dhir Singh Chhina Vs. Union of India and others 1996 MLJ 70 Del.

Thus the questions which need to be determined are:

1. Whether three years period is to be counted from the date of offence or from the date when the identity of the accused is established?
2. Whether the trial could not commence because of the fault of the petitioner and this period is to be excluded while computing the period of limitation?

17. As already pointed out above, Section 122 of the Army Act stipulates that "no trial by Court Martial can commence after the expiration of a period of three years from the date of such offence". The reference of three years period of limitation is to the date of offence and not to the date on which the identity is established. Moreover, in this particular case in May, 1993 two technical enquiries were conducted into the purchases made by the petitioner during the period 1990-91 but nothing was found against the petitioner and on the contrary he was given commendation certificate. If the respondents take time in convening the Court of Inquiry and on the basis of such Court of Inquiry, the identity of the petitioner as accused is established, counting the period of limitation from the said date would amount to giving benefit to the respondents of their own act of delay in initiating such Court of Inquiry. Position would have been different if

despite best efforts and after taking all reasonable steps, identity could not have been established earlier. It is not the case here. Therefore, the arguments of the respondents that three years period should be counted only from 23.8.94 or from 3.12.94 when disciplinary action was ordered, cannot be accepted. Even if one has to take into consideration the date when the identity of the petitioner was established i.e. 23.8.94 when Court of Inquiry submitted its report, the three years period expired on 23.8.97. However, till that date trial had not commenced. It may be stated that as per Rules 22 and 23 of the Army Rules, trial would be treated as commenced only when General Court Martial is convened and not before that. Admittedly, no General Court Martial was convened till that date and even the charge-sheet was issued only on 27.1.98.

18. Insofar as exclusion of period from 1995-97 in computing the period of limitation is concerned, the view I have taken above make this argument of the respondents virtually irrelevant. However, on the facts of this case, I am forced to decide this aspect against the respondents. There is no quarrel with the proposition of law that as per the judgment cited by the respondents, it is established principle that if it becomes difficult to proceed with the trial because of the act of a person, the Court will be entitled to take notice of those facts since no man can take advantage of his own wrong and thus the bar of the period of limitation cannot be put forward by the said person because of whose absence trial could not proceed.

19. Division Bench judgment of this Court in Col. Dhir Singh Chhina's case (Supra) throws light on the comparison between Section 122 and 123 of the Army Act and gives the circumstances under which the period can be excluded in computing three years period for the purpose of Section 122 of the Act. In fact judgments of the Supreme Court both in the cases of Major Radha Krishan (Supra) and Major General Madan Lal Yadav (Supra) are considered and relied upon. As far as power to exclude time taken in specified contingencies is concerned, Division Bench noted that such contingencies are provided in Section 122(3) but no such provision is made for exclusion of time in sub-Section-2 of Section 123 since the accused will be kept in detention after he ceased to be governed by the Act. Thereafter, the Court noticed the facts of that case as per which Court of Enquiry was constituted and proceedings had been finalised and on the receipt of Court of Enquiry directions were issued for taking disciplinary action and orders were passed asking the petitioner to report at Meerut for the purpose of investigation . However, thereafter further proceedings could not take place primarily due to the fact that the petitioner approached the High Court of Calcutta and filed various proceedings and obtained stay orders which remained in operation from time to time. This position is summed up by the Division Bench in the aforesaid judgment in para-38 which reads as under :

38. "In the circumstances afore-mentioned, it has to be held that further proceedings could not take place primarily due to the operation of the stay orders obtained from time to time by the petitioner. During the period when stay

orders were not in force, it was the petitioner who intentionally avoided and did make himself unavailable before the authorities. Due to the orders passed by the Calcutta High Court on the petitioner's application and the subsequent proceedings taken thereon, the petitioner did not report at Meerut till 27th June, 1994. From 27th June, 1994 to 12th September, 1994 the petitioner was in hospital for 11 days in the month of July, 1994 and for 14 days in August, 1994. He was resented with the unit only for 53 days. During this period and from 13th September, 1994 to 16th July, 1995 mostly he reported sick, pending his permanent treatment for by-pass surgery and was at constructively available for investigation. When the petitioner was declared fit to travel and make statement before the disciplinary authority at Meerut, on 17th July, 1995, by Military Hospital Jalandhar, the petitioner appealed against the decision of the Medical board, which was rejected on 29th July, 1995. The order of stay passed on 31st July, 1995 in CW.1137/95 is in operation till date".

20. Thereafter, the Court restated the law in para-39 in the following words:

39. "Trial of the petitioner in terms of the decision in Major General Madanlal Yadav's case (supra) has not yet commenced and as noticed in Radha Kishan's case (supra) there is complete bar or commencement of trial after the expiry of the period of three years limitation, as provided in Sec 122. As per sub-section (3) of Section 122 in the computing of the period of limitation mentioned in sub-Section (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest, after the commission of the offence is liable to be excluded. There is no provision in section 123. When a person had been avoiding arrest, after commission of the offence, for exclusion of that period in computation the period of six months. The legislature had made a distinction between Section 122(3) and Section 122(2) (sic) to exclude time, which specifically provides for certain contingencies but in the latter, no such provision is made for exclusion of the time. The Court, however, in Major General Madan Lal Yadav's case (Supra) held that when it becomes difficult to proceed with the trial because of the act of the person, the court will be entitled to take notice of those facts, since no man can take advantage of his own wrong and thus the bar of the period of limitation cannot be put forward by the said person because of whose absence the trial could not proceed".

21. Applying the aforesaid Principle of Law the Division Bench held that the trial was neither barred u/s 122 nor u/s 123 as it is the petitioner who prevented the holding of trial. Discussion in this respect is found in paras 40 and 41.

The said paras 40 and 41 read as under :

40. "In the instant case, for computing three years period of limitation, as provided in sub-section (1) of Section 122, the period during which the petitioner has been avoiding his arrest will be liable to be excluded, as provided in sub-section (3) of Section 122. The question that would arise will be that whether in facts and circumstances it can be said that the petitioner has been trying to

avoid his arrest. The answer obviously has to be in affirmative. It because of the petitioner approaching Calcutta High Court and his filing Civil Writ Petitions No. 3768/94 and 1137/95 in this Court and because of the various orders obtained by the petitioner from time to time, firstly of maintenance of status quo, which order remained virtually in operation from 2nd November,1993 till 22nd June,1994 and the urther orders, which were passed in CW No. 3768/94 on 17th October,1994, the October,1994 and 15th February,1995 and in CW.1137/95 that till date the trial could not commence. In these circumstances, it will not be unreasonable to invoke the maxim nullus commodum capere potest de injuria sua propria, (meaning no man can take advantage of his own wrong) and to apply the same, which was also applied by the Apex Court in Major General Madan-al Yadav's case (supra). The maxim that no man can take advantage of his own wrong is based on elementary principles and is fully recognised in Courts of law and of equity. Reasonableness of the rule being manifest, its applicability has to be seen in the facts and circumstances of each case. Elaborating the said maxim, the Supreme Court also observed that the said maxim also inds support of another maxim frustra legis auxilium quorit qui in legem committit, which was explained to signify that if a man be bound to appear on a certain day before that date the obligee put him in prison, the bond is void and the principle that "he ho prevents a thing from being done shall not avail himself of the non-performance he has occasioned" and "a wrong doer ought not to be permitted to make a profit out of his own wrong". The maxim that no man can take advantage of his own wrong applies to he extent of "undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed .

41. "As on 2nd November,1993, when the first order was passed by the Calcutta High Court, it is the admitted position on behalf of the petitioner also that neither the charges had become barred u/s 122 of the Act nor the bar, as provided in Section 123 could be availed of by him. The petitioner superannuated on 31st August,1994 and admittedly charges would become barred on 13/14th December,1994. It was the petitioner, who prevented further proceedings to be taken and thus it will not be open for the petitioner to raise the plea of limitation because of the circumstances, which were due to his own creation. In Major General Madan Lal Yadav's case (supra), in para-20 of the judgment the Court observed that the petitioner in that case prevented the trial that was being proceeded with in accordance with law and held that the maxim nullus commodum capera potest de injuria sua propria would squarely apply since he having done the wrong annot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent G.C.M".

22. As is clear from the aforesaid, it was held that trial u/s 122 was not barred because as on 2.11.93 when the first order was passed by Calcutta High Court, charge had not become barred u/s 122 of the Army Act and the Army Authorities could not proceed against the petitioner in view of stay orders obtained from Calcutta High Court and, Therefore, this period had to be excluded for the

purpose of Section 122 of the Act. However, in the present case the allegations of the respondents regarding petitioner's avoiding participation in the investigation relate to the period 1995-97. In fact even here the respondents have failed to demonstrate that it is the petitioner who is avoiding participation in the investigation. As noticed above, reference is made only to one letter which was sent but allegedly was not received by the petitioner. This letter is dated 29.9.95. What happened after that letter till 1997 when the petitioner was arrested on 21.9.97 is not at all explained and it is not stated what steps were taken by the respondents. It is also not mentioned anywhere as to how the petitioner avoided his arrest etc. On the other hand petitioner was sent invitation for attending Indian Military Academy function, which he attended on 7.6.97. Therefore, it cannot be said that petitioner was absconding as also it cannot be said that it is the petitioner who was instrumental in not allowing the Army Authorities to proceed against him.

23. As noticed above, in various judgments, this Court as well as Supreme Court has held that Section 122 is a complete code in itself so far as it provides period for limitation for trial. How the period is to be computed is also mentioned. As per sub-Section-3 of Section 122 and it is only when time is spent by a person as a prisoner of war, or in enemy territory, or in evading arrest, after the commission of the offence, that such period is to be excluded. Admittedly, no such contingencies took place till the retirement of the petitioner. Offence is of the year 1990-91 and three years period is to be counted from "date of such offence". It nowhere states that three years period is to be counted only from the date when the identity is established. Moreover, this was the oral submission raised during the course of arguments only relying upon paras 3 to 5 of the additional affidavit which are already reproduced above. A perusal thereof shows that it is not the case of the respondents that prior to 3.12.97 identity of the petitioner could not be established. What it states only is that Court of Enquiry was ordered on 7.5.94 and disciplinary action was ordered against petitioner on 3.12.94. In fact in para-4 there is a reference to Section 123(1) of the Army Act and, Therefore, paras 3 to 5 deal with the contention regarding Section 123 of the Army Act and not Section 122 of the Army Act. Thus provisions of Section 122 clearly become applicable in the instant case inasmuch as the alleged offence is of the period October, 1991 and, Therefore, three years period expired in October, 1994. The trial is also barred u/s 123 of the Army Act as much as it was not commenced within three years of the retirement of the petitioner.

Thus the initiation of trial against the petitioner is clearly barred under the provisions of Section 122 as well as Section 123 of the Army Act. This writ petition is, accordingly, allowed. Rule is made absolute. Order dated 8.10.97 attaching the petitioner to COD, Delhi Cantt as well as charge-sheet dated 16.1.98 and proceedings against the petitioner initiated under Rule 22 of the Army Rule are hereby quashed.

24. There shall be no orders as to costs.