

(2001) 07 AP CK 0094

In the Andhra Pradesh High Court

Case No : WA No's. 687 and 688 of 2001

Colonel D.D. Pawar, C-25415-A

APPELLANT

Vs

Commander HQ Andhra Sub-Area, Secunderabad and
another

RESPONDENT

Date of Decision : 03-07-2001

Acts Referred:

Army Act, 1950 — Section 1, 109, 118, 122, 122(1)
Army Rules, 1954 — Rule 14, 177, 178, 179, 180
Companies Act, 1956 — Section 113, 545, 621
Criminal Procedure Code, 1973 (CrPC) — Section 469, 469(1)

Citation : (2001) 5 ALD 56 : (2001) 5 ALT 52

Hon'ble Judges : Satya Brata Sinha, C.J;V.V.S. Rao, J

Bench : Division Bench

Advocate : Mr. K.M. Saxena, for the Appellant; Mr. B. Adinarayana Rao and Mr. M. Ratna Reddy, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—A common question as to the interpretation of Section 122 of the Army Act, 1950 ("the Act" for brevity) falls for consideration in both these appeals and hence they are being disposed of by this common judgment. The appellant in Writ Appeal No.687 of 2001 (hereinafter referred to as the first appellant) is a Colonel in Indian Army whereas the appellant in Writ Appeal No.688 of 2001 (hereinafter referred to as the second appellant) is a Captain. They filed writ petitions being WPNo.3859 of 1999 and 6583 of 1999 respectively challenging the order of the second respondent directing that the officers be tried by General Court Martial in relation to an offence contemplated by the Act. The main contention before the learned single Judge is that the General Court Martial ordered by the second respondent is barred by limitation in terms of Section 122 of the Act. The learned single Judge dismissed both the writ petitions placing reliance on Rule 53 of the Army Rules 1954 (hereinafter called "the Rules"). The common judgment and order of the learned single Judge dated

25-4-2001 is assailed in these writ appeals.

2. The facts of the case as culled out from the pleadings and records placed before us are as follows. The first appellant at the relevant time was Commandant of the Supply Depot 60 ASC Coy, Secunderabad. The second appellant was also posted to 60 Coy, ASC (supply) Type "G", Trimulgherry, Secunderabad. The Commandant of the Supply Depot, Secunderabad was informed by the Local Audit Officer, Secunderabad about certain irregularities in relation to a consignment of 12,000 litres of petrol. The first appellant ordered investigation by Court of Inquiry by Captain Nirbhay Kumar. After receiving report from the first appellant on 31-8-1995 on the same day the first respondent, who is the Commander of Andhra Sub-Area Head Quarters ordered Board of Inquiry on 23-9-1995. The first respondent also ordered Staff Court of Inquiry headed by Colonel P.K.S. Nair who submitted report on 6-1-1996. On 16-1-1996 the first appellant, who was till then commandant of 60 Coy ASC (supply) Type "G", Trimulgherry, Secunderabad was ordered to proceed on attachment duty to Station Head Quarters, Secunderabad. It appears that the report of Court of Inquiry submitted on 6-1-1996 along with the recommendations of the first respondent was placed before the second respondent who on consideration of the Court of Inquiry proceedings and additional statements of officers and others of the 60 ASC Coy came to opinion that facts are inadequate to arrive at a definite conclusion and need further investigation and therefore ordered a fresh Court of Inquiry for further investigation into the matter. The relevant portion from the communication dated 26-2-1996 from the second respondent reads as under:

Opinion of the General Officer Commanding Andhra, Tamil Nadu Karnataka, Kerala and Goa area on the Court of Inquiry proceedings to investigate into the irregularity in FOL accounting by 60 Coy ASC sup type "G" Secunderabad wherein 12000 litres of 87 mt. issued by IOC vide their issue voucher No.1366 dated 13 March, 1995 has not been taken into the ledger charge and HQ Andhra Sub-Area letter No.4202/01/C of I dated 20th February, 1995 containing written statements of various OFFRS/ORS the unit revealing additional facts of the case.

1. I generally concur with the recommendations of Cdr. Andhra Sub-Area.

2. On consideration of the Court of Inquiry proceedings, and additional statements of offrs and ORs of 60 Coy ASC SUP Type "G" fwd vide HQ Andhra Sub Area Letter No.4232/ 01/C/of I dated 20 February, 1996, I am of the opinion that facts revealed are inadequate to arrive at a definite conclusion and need to be investigated further. In my opinion there is adequate material on record to suggest involvement of IC 25415-A Col. D.D. Pawar ex-Comdt. 60 Coy ASC Sup Type "G" in mishandling/ misappropriation of 12 Kilo Litres, 87 MT Gas amounting to Rs.2,50,000/-(Rupees two lakhs and fifty thousand only, issued by IOC, Sanathnagar on 13th March, 1995.

3. I therefore direct that a fresh Court of Inquiry be convened to further

investigate into.-

(a) The irregularity in accounting or misappropriation of 12,000 litres of 87 MT issued by IOC Sanathnagar, vide their issue voucher No.1366 dated 13th March, 1995.

(b) To establish lapses if any on part of officers, JCOs and ORs of 60 Coy ASC Type "G"0 Secunderabad in this regard.

(c) To investigate and establish lapses in any other case of irregularity of accounting revealed during the course of such investigation.

4. The Court of Inquiry shall be constituted and convened in accordance with the provisions of para 518 regulations for the Army, 1987 revised edition read with Army Rules 180 and 181.

3. In furtherance thereof yet another Court of Inquiry was convened and a report was submitted on 30-9-1996. After receiving the report of the Second Court of Inquiry as well as recommendations of the first respondent, the second respondent by order dated 21-11-1997 ordered penal recovery (under Section 90 of the Act) from the appellants and others. By a subsequent order dated 28-1-1999 and 29-1-1999 which were impugned in the writ petitions, the second respondent ordered that the appellants be tried by General Court Martial. These facts are not denied before us.

4. The learned Counsel for the first appellant Mr. K.M. Saxena and Smt. N. Shoba submit that the General Court Martial is barred by limitation having regard to provisions of Section 122 of the Act. It is also their contention that as per the provisions of Section 122 of the Act. The date of offence or the date of knowledge on which the offence came to light are relevant and as the appellants were attached as early as in January, 1996 the impugned orders were issued in November, 1999 ordering General Court Martial are barred by limitation. It is further submitted that Rule 53 of the rules comes into operation only when the Court martial is constituted legally. In the present case having regard to the language in Section 122 "No trial by Court martial shall be commenced after expiry of period of three years" and therefore the General Court Martial is illegal and hence Rule 53 does not come into operation.

5. Smt. Chayadevi, learned Counsel for the second appellant while adopting the submissions made by other learned Counsel, submits that during Staff Court of Inquiry summary of evidence was recorded as per Rule 22 of the rules and after perusing the summary of evidence the Commandant of the AOC Centre has exonerated the appellant holding that there is no evidence to prove that the officer had intentionally foisted documents to defraud. Therefore, she submits that the Court Martial cannot be allowed to proceed further. It is also her submission that even if the General Court Martial is abated on the ground of limitation, the respondents can still take action against the appellants u/s 19 of the Act read with Rule 14 of the Rules by terminating the services of the

appellants on account of misconduct. Therefore, she submits that having regard to proven facts that the offence allegedly committed in July, 1995 and came to the knowledge of the second respondent in January, 1996, the General Court Martial ordered just be held to be barred by limitation.

6. The learned Standing Counsel for the Central Government Sri B. Adinarayana Rao and Sri Ratna Reddy placed reliance on Section 122(1)(c) of the Act to submit that when the Local Audit Officer reported irregularities at 60 Coy, ASC (supply) Type "G", Trimulgherry, Secunderabad, it was not known by whom the offence was committed and the identity of the offender/s came to be known only after receipt of report dated 30-9-1996 of the Second Staff Court of Inquiry, and that it is only in November, 1997 the second respondent could identify the appellants as offenders and therefore the General Court Martial is not barred by limitation. They would submit that the plea of limitation is a mixed question of fact and law and hence under Rule 53 of the Rules it is only the General Court Martial which can entertain a "plea at Bar" of trial on the ground that the period of limitation for trial as laid down in Section 122 of the Act expired. They also submit that for the purpose of Section 122(1)(c) of the Act evidence is required as to when the competent authority specifically identified the offender/s for initiating action u/s 109 of the Act and therefore the writ petition is not a proper remedy to adjudicate the question of limitation u/s 122(1)(c) of the Act.

7. In the context of the rival submissions, the points that arises for consideration in these writ appeals are-

1. What is the scope and true interpretation of Section 122 of the Army Act, 1950?
2. In the facts and circumstances of the case whether the trial against the appellants cannot be commenced after the expiry of a period of three years?
3. To what relief?

In Re Points 1 and 2:

8. It is the submission, on behalf of the appellants, as noticed above that the offence was allegedly committed on 17-7-1995 and therefore after expiry of three years no trial by Court Martial can be commenced. It is also submitted that in any event the first respondent, who is the "person aggrieved" had knowledge of the offence on 16th January, 1996 and therefore the same shall be taken as "the first day on which offence came to the knowledge of the first respondent" for the purpose of limitation of three years. This is refuted by the respondents. The sheet anchor of their argument is that the question of limitation is a mixed question of fact and law and therefore having regard to Rule 53 of the rules the petitioners may offer a plea at Bar of trial on the ground that the period of limitation for trial as laid down in Section 122 of the Act has expired. They also contend that on 26-2-1996 the second respondent though have knowledge of the offence the persons who committed offence were not identified on that day and

the second respondent only ordered a further investigation even against the first appellant into the irregularity in accounting or misappropriation of 12,000 litres of petrol issued by Indian Oil Corporation, Sanathnagar and to establish lapses if any on the part of other officers of 60 Coy. ASC (supply) Type "G". They also submit that what was ordered by the second respondent on 26-2-1996 was Court of Inquiry in accordance with the provisions of paragraph 518 of Regulations of Army, 1987 read with Army Rules 180 and 181. The adjudication of the lis involved in this case at the outset requires examination of the relevant provisions of the Army Act, the Army Rules and the Army Regulations.

9. The Act defines, civil offence as to mean "offence" which is triable by a criminal Court - [Section 3(ii)]. "Offence" means any act or omission punishable under the Act and includes a civil offence -[3 (xvii)]. Chapter VI containing Sections 34 - 70 deals with offences under the Army Act. A bare look at the various provisions in Chapter VI discloses that there are certain offences, which may be termed as "individual offences" which may be committed by a known individual as such. There are certain other offences which may be termed as "group offences". For instance, the offence u/s 34, abandoning a guard post, espionage, harboring enemy etc., the offences u/s 36 like high handed behaviour of using criminal force to a sentry, house breaking in search of plunder in intentional or negligent behaviour occasioning false alarm etc.; the offence u/s 38 dealing with desertion; the offence u/s 39 absence without leave; the offence u/s 40 striking or threatening superior officer; the offences under Sections 41 and 42 dealing with obedience and disobedience etc., are individual offences. The offence u/s 37 deals with mutiny, Section 43 deals with fraudulent enrolment. Section 49 deals with abetment and certain offences u/s 52 like misappropriation of criminal breach of trust. These are not purely individual offences, but they are also group offences.

10. Chapter X deals with Court Martial. A General Court Martial u/s 118 of the Act have power to try any army person for any offence punishable under the Act and pass any sentence authorised by the Act. u/s 109 a General Court Martial can be convened by Central Government, Chief of Army Staff or by an officer empowered by warrant of Chief of Army Staff. It is not denied before us that the second respondent is empowered by the Chief of Army Staff to be competent authority for convening General Court Martial. Section 121 of the Act reads as under:

121. Prohibition of second trial:--When any person subject to this Act has been acquitted or convicted of an offence by a Court Martial or by a criminal Court, or has been dealt with under any of the Sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a Court Martial or dealt with under the said sections.

11. A bare perusal of the above section shows that in two circumstances second trial is impermissible; first when any person subject to the Act has been acquitted or convicted of an offence by Court Martial or by criminal Court and

secondly and/or when such person has been dealt with under any of the Sections 80, 83, 84 and 85. Sections 80 - 85 appear in Chapter VII, which deals with other punishments. These provisions empower the commanding officer with the previous consent of the Central Government to proceed against a person and award punishments like imprisonment upto for a specified period, extra guard duty, forfeiture of good service and good conduct pay, reprimand etc. Though Section 71 of the Act enumerates the punishments that may be imposed on a person convicted by Court Martial, the same is not the case in respect of punishments under Sections 80 - 85 in which case a Court Martial is not necessary. We are making a reference to these provisions as a question is raised by the second appellant that in view of the orders passed by the Officiating Commandant of AOC Centre exonerating him, the General Court Martial cannot be convened. We would deal with this aspect a little while later.

12. Section 122(1) as it originally existed reads as under:

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.

13. The above provision was amended by the Army (Amendment) Act, 1992 (Central Act No.37 of 1992) and after amendment sub-section (1) reads as under :

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.

14. It is interesting to note that after amendment, sub-section (1) of Section 122 of the Army Act is ipsi sima verba with Section 469 of Code of Criminal Procedure, 1973, which reads as under :

469. Commencement of period of limitation :--The period of limitation, in relation to an offender, 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 identity 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 be computed shall be executed.

15. As held by the Supreme Court in *Major Radha Krishan Vs. Union of India and Others*, , Section 122 of the Army Act is complete code in itself for not only provides in sub-section (1) the period of limitation for trial by Court Martial, but specifies in sub-section (2) thereof the offences in respect of which the limitation clauses would not apply, namely offences contemplated u/s 37 of the Act. Therefore, while construing the provisions of Section 122(1) of the Act, in our considered opinion, we have to necessarily refer to the language of three clauses in Section 122(1). In so doing the cardinal principle of interpretation of statutes is to look to the intention of the Parliament. 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, New Delhi Vs. Lt. Col. S.K. Loraiya*, , was available. In this case, the Supreme Court interpreted Section 122(1) and (3) of the Army Act and laid down the following principle.

.....On a conjoint reading of subsections (1) and (3) of Section 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 subsection (1) of Section 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 again 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.

16. 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.

17. 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 Section 122(1) visualises three different situations of commencement of period of limitation. Section 122(1)(a) of the Act which lays down that the period of limitation commences on the date of offence does not present any difficulty. In one sense this will be related to "individual offence" to which a reference has been made supra, abandoning the post, desertion, misbehaviour etc. Section 122(1)(b) of the Act contemplates that the period of limitation commences on such date when the commission of offence came to be known to the "person aggrieved" or on the first day when such offence came to the knowledge of an authority who is competent to order Court Martial, subject, however, to the rule that the earlier of the two dates shall be the date for reckoning the period of limitation.

18. The words "person aggrieved" is not defined in the Act. In Registrar of Companies Vs. Rajshree Sugar and Chemicals Ltd. and Others, , the Supreme Court considered the phrase "person aggrieved" used in Section 469(1) (b) of Cr.PC in the context of offence allegedly committed by a Company u/s 113 of the Companies Act, 1956. Having regard to Section 621 of the Companies Act, which inter alia empowers the Registrar of Companies to file complaint against the company the Supreme Court held as under:

The phrase "person aggrieved" has not been defined in the Code. However, as far as offences under the Companies Act are concerned, the words must be understood and construed in the context of Section 621 of the Act. If the words "person aggrieved" are read to mean only "the person affected" by the failure of the company to transfer the shares or allot the shares, then the only "person aggrieved" would be the transferee or the allottee, as the case may be. u/s 621 of the Act, no Court can take cognizance of an offence against the Companies Act except on the complaint of a shareholder, the Registrar or the person duly authorised by the Central Government. Where the transferee or allottee is not an existing shareholder of the company, if the words "person aggrieved" are read in such a limited manner, it would mean that Section 469(1)(b) of the Code would be entirely inapplicable to offences u/s 113 of the Act. There is, in any event, no justification to interpret the words "person aggrieved" as used in Section 469(1) (b) restrictively particularly when, as in this case, the statute creating the offence provides for the initiation of the prosecution only on the complaint of particular persons. Having regard to the clear language of Section 621 of the Act, we have no manner of doubt that the appellant would be a "person aggrieved"

within the meaning of Section 469(1)(b) of the Code in respect of offence (except those u/s 545) against the Companies Act.

19. 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 u/s 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, the 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 Regulation 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.

20. It is not in dispute that the first appellant himself was the Officer in Command of 60 ASC Coy, Secunderabad and in fact he himself ordered the first Court of Inquiry on 25-7-1995. After receiving the report the first respondent who is the independent Sub-Area Commander ordered Second Court of Inquiry and then submitted his recommendations to the second respondent who is the Area Commander. These facts are not denied. As the Commandant of 60 ASC Coy, Secunderabad the first appellant is also a "person aggrieved", but having regard to the provisions of Rule 22 and Rule 177, it is only the first respondent who is the person aggrieved because he alone would have ordered a Staff Court of Inquiry in respect of the first appellant who is of the rank of Colonel. Therefore, the phrase "person aggrieved" appearing in Section 122(1)(b) would be either the first appellant or the first respondent depending on the rank of the officer who is being dealt with. Be that as it may, admittedly the first respondent came to know of the offence on 31-8-1995 and the report was sent to the first respondent vide letter dated 20-2-1996. Therefore, for the purpose of Section 122(1)(b) the date on which the period of limitation commences is 31-8-1995. We must however hasten to add that is not the end of the matter. As on 31-8-1995 the first respondent or as on 22-2-1996 the second respondent were only aware of the commission of offence and on that day the identification of the offender/s was not clear. Therefore, Section 122(1)(a) or Section 122(1)(b) are not of any avail to the appellants.

21. The submission of the learned Standing Counsel for the Central Government is that as per Section 122(1)(c) governs the situation and till November, 1997, the identity of the offender/s was not known to either the first respondent or the second respondent and therefore the General Court Martial is not by limitation. As observed earlier whether the identity of the offender/s was known either to the first respondent (person aggrieved) or the second respondent (competent authority for the purpose of Section 109) is subject to evidence. We must say that except the orders of the second respondent dated 26-2-1996 ordering further investigation into the irregularity in accounting or misappropriation at 60 Coy ASC (supply) Type "G", Trimulgherry, Secunderabad, no material is available before us to record any definite finding. Nonetheless, on reading of the orders/opinion of the second respondent dated 26-2-1996 and the orders dated 21-11-1996 prima facie we are of the opinion that identity of the offender/s was not known to the competent authority by 26-2-1996. In any event this matter has to be decided after adducing necessary and relevant evidence without least influenced by our observations in this judgment.

22. Before considering the next aspect of the matter we may summarise our conclusions thus far:--

(i) For the purpose of Section 122 of the I Army Act if the offender is known either to the person aggrieved or to the competent authority, the date of offence is relevant for reckoning the period of limitation;

(ii) If the commission of offence is not initially known to the person aggrieved or the competent authority the first date on which either of them come to know of the offence/offender is the date for the commencement of limitation;

(iii) Though the offence is in the knowledge of the person aggrieved or the competent authority but identity of the offender/s is not known the date on which the identity of the offender/ s is known definitely is the date for the purpose of commencement of limitation; and

(iv) "Person aggrieved" in the context of the provisions of the Army Act and Army Rules mean the person who is the competent to order Court of Inquiry at the first instance as per Rule 177 of the Army Rules and paragraphs 516 to 529 contained in Chapter XII of the Army Regulations or Officer competent to order investigation under Rule 22 of the rules. Person aggrieved would also mean the Commanding Officer, who is competent to impose punishments as contemplated under Chapter VII of the Act otherwise than after conviction by Court Martial.

23. We may passingly observe that the law of limitation in criminal jurisprudence should be interpreted strictly. As the criminal justice system necessarily interferes or encroaches upon the human rights and fundamental rights guaranteed under Part HI of the Constitution of India as well as Protection of Human Rights Act, 1993, textual interpretation must lean in favour of the accused/offender. Sri K.M. Saxena, learned Counsel for the first appellant pressed this settled principle of interpretation of statutes and urged that when

once general Court Martial is convened illegally and improperly beyond the period of limitation, Rule 53 of the rules cannot be pressed into service by the Centre Government/Army to defeat the case of the appellants before this Court. We will consider this aspects presently.

24. Sub-section (1) of Section 191 of the Act empowers the Central Government, to make rules for the purpose of carrying out the effect of the provisions of the Act. Sub-section (2) of Section 191 of the Act enumerates some of the subjects in respect of which the Central Government may make rules. Clauses (e) to (j) of subsection (2) of Section 191 deal with Court Martial. The Central Government has promulgated rules in exercise of their power u/s 191 of the Act called Army Rules, 1954. Chapter V of the rules, as noticed above deals with "investigation of charges" and "trial by Court Martial". Section 1, Chapter V deals with investigation of charges and remand for trial that is preliminary stage like the Court of Inquiry and Section 2 of the rules deals with General Court Martial. Rules 37 to 105 provide for an elaborate procedure for convening, constitution and procedure of Court Martial. A feeble attempt was made placing reliance on Rule 37 that before convening the general Court Martial the second respondent did not record his objective satisfaction that the charges be tried by the Court Martial. For the reasons mentioned infra, we do not propose to deal with this point in this case. But that as it may, the rules provide for a preliminary stage whereunder the accused Army Officer at the time of general plea of guilty or not guilty (Rules 52) is entitled to offer a "plea in Bar of trial" on three grounds. Rule 53 is extracted 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.

25. Be it noted that clause (c) of sub-rule (1) of Rule 53 was substituted by amendment vide S.R.O 17 (E) dated 6-12-1993, presumably after Section 122(1) was amended by Act No. 37 of 1992. The rule enables the accused to object to general Court Martial on the following grounds : (a) that the accused was previously convicted or acquitted of the offence by competent criminal Court or by Court Martial or has been dealt summarily under Sections 80, 83 84 and 85 of the Act or that a charge in respect of the offence has been dismissed as provided in sub-rule (2) of Rule 22; (b) that the offence has been pardoned or condoned by a competent military authority and (c) that the trial by Court Martial is barred by limitation as per Section 122 of the Act. Sub-rules (2) to (5) of Rule 53 provide for steps to be taken by the Court Martial when the accused offers plea in Bar. As per sub-rule (3) if the plea in Bar of trial on any of the grounds mentioned hereinabove is proved, the Court shall record its finding and notify it to the confirming authority, who may pass appropriate orders in accordance with Rule 70 of the rules or reserve confirmation for superior authority.

26. The grounds to offer a plea in Bar of trial at (a) and (b) above do not present any difficulty as they are easily verifiable, matters from the record. It is, however, not possible for the Court Martial to record finding on the plea in Bar on the ground of limitation u/s 122(1)(c) unless proper evidence is recorded by the said Court Martial. During the course of arguments on 21-6-2001 when the matter was partly heard by this Bench having regard to the facts that the general Court Martial of the appellants is commencing on 23-6-2001 we have passed the following order on 21-6-2001 :

Although we have heard the learned Counsel for the appellant due to shortage of time the arguments of Mr. B. Adinarayana Rao and Mr. Rama Reddy could not be completed.

Let the Court Martial proceedings against Col. D.D. Pawar may continue without prejudice to his rights and contentions in this appeal and same shall be subject to result of this appeal. However, it is placed on record that Mr. B. Adinarayana Rao states Col. D.D. Pawar shall not be taken into custody. However, there cannot be any doubt that he shall remain present during Court Martial proceedings.

27. It is now reported that the first appellant Colonel D.D. Pawar has offered plea

in Bar of trial on the ground of limitation as laid down in Section 122 of the Act. Therefore, as observed earlier, it is not proper for this Court to decide such plea in Bar of trial on the ground of limitation. The general Court Martial may decide the issue and pass appropriate orders expeditiously. The submission of Sri Saxena that Rule 53 which enables the accused to offer plea in Bar of trial on the ground of limitation is available only to a case where the general Court Martial is convened within the period of limitation and not otherwise, in our considered opinion, is misconceived. As per the rules the plea in Bar of trial can only be taken up only when the General Court Martial is convened. In a case where the respondents and military officials plead that though the offence was known but the identity of the offender was established subsequently the convening of Court Martial cannot be held to be illegal as contravening Section 122 of the Act. In any event, the issue whether the identity of offenders was known to the first respondent or the second respondent on 16-1-1996 or 26-2-1996 or 21-11-1997 is a question of fact which can only be decided on the basis of proper evidence that may be let in the proceedings before the proper authorities. Therefore, we reject the contention of the learned Counsel for the appellants. Point Nos.1 and 2 are answered accordingly.

In Re Point No.3:

28. Smt. Chayadevi has placed reliance on confidential comments and recommendations addressed by Colonel R.K. Gupta, Officiating Commandant of AOC Centre on the disciplinary case of Captain Sukhjinder Singh (second appellant) and submits that in view of the clear observations that there is no evidence against the second appellant, the general Court Martial is not permissible. We are afraid we cannot agree with the submission. Under Rule 53(1) of the rules one of the grounds for offering plea in Bar of trial is that the accused has been previously convicted or acquitted or that he has been dealt with summarily under Sections 80, 83, 84, 85 of the Act or a charge against such accused has been dismissed under Rule 22(2) of the rules. We have referred to the provisions of Sections 80 - 85 as also Rule 22(2) of the Rules. When a punishment is imposed under Sections 80 - 85 by competent authority otherwise than on a conviction by Court Martial it is a ground for pleading limitation. Similarly, after Court of Inquiry report is placed before the competent authority under Rule 22(2) of the rules the Commanding Officer may dismiss the charge under Rule 22(2) or refer the case to proper superior military authority under Rule 22(3)(b). The facts presented before us would show that when the offence was reported, the first appellant himself ordered Court of Inquiry and later a second Court of Inquiry was ordered by the second respondent against both the first appellant and the second appellant. No order in evidence of the fact that the second appellant was summarily dealt with under Sections 80 - 85 or the charge was dismissed under Rule 22(2) has been placed before us. A reading of the comments and recommendations by commandant of AOC Centre does not show that in what context and under what authority the same was communicated by Col. R.K. Gupta, AOC Centre, Secunderabad. We are convinced that it is not an

order dismissing the charge against the second appellant under Rule 22(2) of the Rules nor is it a document evidencing summary proceedings under Sections 80 - 85 against the second appellant. Therefore, we reject the submissions of the learned Counsel for the second appellant giving liberty to raise the question before the general Court Martial.

29. In the result, the writ appeal fail and subject to the observations made herein above the writ appeals are dismissed, without any order as to costs.