

(1996) 09 DEL CK 0055

In the Delhi High Court

Case No : Civil Writ Appeal No's. 3768 of 1994 and 1137 of 1995

Dhir Singh Chhima

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-09-1996

Acts Referred:

Army Act, 1950 — Section 122

Citation : (1996) 64 DLT 295

Hon'ble Judges : Kripa Shankar Gupta, J;Devinder Gupta, J

Bench : Division Bench

Advocate : R.S. Randhawa and Rak, for the Appellant;

Judgement

Devinder Gupta, J.

(1) -THESE two petitions can conveniently be disposed of by a single order since the same relate to same series of events and raise almost identical questions on different aspects pertaining to the petitioner.

(2) In Civil Writ No. 1137/95, the petitioner has sought a direction for quashing of further proceedings, which are in progress, in pursuance to the issuance of tentative charge sheet (Annexure-P-6) on the ground that further progress in the case against the petitioner is without jurisdiction since charges have become time barred u/s 122 of the Army Act and that the petitioner has ceased to be amenable to the jurisdiction of the Army Act. The ancillary reliefs claimed are to direct the respondents not to compel the petitioner to move to Meerut, in any manner, either to face proceedings or otherwise, since the proceedings against the petitioner have been rendered without jurisdiction.

(3) In the other writ petition (CIVIL WRIT No. 3768/94), the petitioner has sought the quashing of orders (Annexure-P-24) invoking Section 123 of the Army Act, in respect of the petitioner, till finalisation of the summary of evidence and disciplinary case pending against him and the order, which directs that the petitioner be placed under close arrest with effect from 30th August, 1994.

(4) Facts in brief are that the petitioner, on being commissioned as 2nd Lieutenant on 3rd May, 1964 remained posted at various places. He was transferred to Military Farm Meerut on 8th March, 1969 and on 6th December, 1982 was promoted to the rank of Lieutenant Col. From 15th July, 1988 to 15th January, 1992, the petitioner remained posted as Officer-in-Charge at Military Farm Meerut. According to the petitioner, his primary duty was to supervise the works pertaining to production and supply of milk and dairy products to the troops located and dependent upon the said Military Farm, Meerut. On the directions of the Headquarter Central Command (Farms); Military Farm Meerut was required to supply milk to various units located at Roorkee since Military Farm Roorkee had been closed down and only a skeleton staff was retained there. It is alleged that the Manager, R-K.Gupta had been diverting milk, dispatched by the Meerut Farm to Roorkee to Military Farm, Dehradun and was engaged in local purchases, in violation of the instructions on the subject. It is also alleged that correspondence was exchanged in this regard since June 1990 between the petitioner, Dehradun Military Farm and Headquarter Central Command Lucknow.

(5) Milk used to be supplied directly to the troops at Roorkee by Meerut Farm w.e.f. 1st February, 1991. The procedure followed was that fresh pasteurized cow's milk, in sealed cans were sent from Meerut Farm by the Farm Vehicle at 11 p.m. The vehicle used to reach Roorkee Farm at 1 a.m. The milk used to be accepted by the dairy in charge Roorkee Farm, after carrying out proper tests in the presence of the representative of Meerut Farm. On being satisfied with the quality of the milk, the dairy in charge Roorkee used to accept the same and duly sign the A.D. note acknowledging the receipt of the milk. The representative of the Meerut Farm also used to put his signatures on the said acknowledgement receipt. Thereafter, milk used to be distributed to the different units and the vehicle was sent back to Meerut Farm with the cans along with the demand for the next day.

(6) It is alleged that on 13th December, 1991, a consignment of 2000 litres of milk was dispatched from Meerut to Military Farm Roorkee. The same was received in full, after testing, by dairy farm in charge at Roorkee at 1 a.m. on 14th December, 1991. The Manager Military Farm Roorkee, kept 800 litres of milk for consumption at Roorkee and dispatched the balance 1200 litres to Military Farm Dehradun. It is alleged that the said act of the Manager was in violation of the instructions laid down in that behalf. The said consignment of 1200 litres of milk, was sent by Military Farm Roorkee to Military Farm Dehradun through a hired transport at about 3 p.m. on 14th December, 1991 i.e. after about 13 hrs. of receiving of the said consignment from Military Farm Meerut. Military Farm Dehradun rejected the milk on the plea that it curdled on boiling and as such returned the same to Military Farm Roorkee. Both Military Farm Dehradun and Military Farm, Roorkee failed to appreciate the fact that the milk in question was "Home Produce", (Government Property) and not milk bought from outside supplier. The question of rejection and return back to Roorkee and

thereafter to Meerut could not have arisen. It is also stated that Military Farm Dehradun was in a best position to make alternate use of the curdled milk, to minimise the loss suffered, by extracting butter and/or Pander there from, as per the Standing Orders, Military Farm (Dairy Products) 1960, Chapter X, para 109.

(7) Thus according to the petitioner, the admitted position is that out of 2000 litres of milk dispatched on 13th December, 1991 to Military Farm Roorkee and received by them after testing and verification on 14th December, 1991 at la.m., 800 litres of milk was kept at Roorkee and the balance of 1200 litres was sent by Roorkee Military Farm to Military Farm Dehradun, which was returned by Military Farm Dehradun on the ground that the milk got curdled, when it was boiled. There was no complaint regarding 800 litres of milk, which was kept by Roorkee Farm from the same consignment. It is alleged that the petitioner informed the Depot Director (Military Farms) H.Q. Central Command, Lucknow about the incident on 16th December, 1991 and sought for Staff Court of Inquiry, to be convened, to fix responsibility.

(8) During February, 1992, the petitioner was posted out from Military Farm Meerut to Military Farm Directorate, Army Headquarters, New Delhi as Joint Director. On 23rd September, 1992, Commander Meerut Sub Area Meerut Cantt. issued a Convening Order for Staff Court of Inquiry for investigating the circumstances under which 1200 litres cow's milk got curdled and to pinpoint the responsibility for the loss of Government property and to recommend measures to avoid recurrence of such losses in future. In the meanwhile, on 27th November, 1992 the petitioner on promotion was posted as Dd (MF) Eastern Command at Calcutta. Though the Staff Court of Inquiry was duly convened, the petitioner was neither informed about it, nor was co-opted in the proceedings till 8th January, 1993 when he received a questionnaire from the Presiding Officer Staff Court of Inquiry. Since the case was old, the petitioner requested the Presiding Officer of the Court of Inquiry to send copy of certain documents. The petitioner sent paradise reply on 22nd January, 1993. The petitioner had no opportunity to go through the documents asked for by him, since the same were not received by him. As such additional points were also submitted on 13th February, 1993.

(9) It is stated that pursuant to the request made by the Presiding Officer, the petitioner was asked by the Headquarters Eastern Command to be present at the Staff Court of Inquiry. The petitioner accordingly reported at Meerut on 11th March, 1993, when for the first time, it is alleged by the petitioner that he became aware that Court of Inquiry had already examined witnesses. The petitioner was not aware, who those witnesses were and what they had deposed before the Court of Inquiry. The petitioner was, however, asked to cross examine only two witnesses, i.e. Shri Ujagar Singh and Officer-in-Charge Military Farm Dehradun Shri M.P.Konhur. The petitioner has further alleged that the Court of Inquiry was not proceeding in accordance with the terms of reference. The petitioner accordingly submitted a representation on 16th March, 1993. Despite

the fact that there was no reliable and cogent evidence against the petitioner, he was held blameworthy by the Court of Inquiry and on the basis of the result of the Court of Inquiry, the G.O.C. Central Command gave a direction on 19th August, 1993 for taking disciplinary action against the petitioner for the following acts:-

"(i) Dereliction in performance of his duties in that he dispatched 2000 litres of milk to Roorkee and Dehradun on 13/14 Dec.91 at wrong timings with complete disregard to orders of Ddmf Hq Central Command, which resulted in curdling of 1200 litres milk. (ii) Exceeding his authority for local purchase for supplying milk to Roorkee and Dehradun when there was no surplus milk in Meerut. (iii) Irregularities in local purchase of milk, where-in proper procedure for local purchase was not followed. (iv) Lack of proper command and control on personnel under Command of Military Farm Meerut and Military Farm Depot Roorkee and not owning accountability for their failure, inefficiency and indiscipline. (v) Unbecoming conduct for disowning his own responsibility and passing on the blame to his subordinates. (vi) Deliberately suppressing evidence of local purchase of milk, not authorised from Hq Central Command."

(10) It is alleged that the petitioner finding no alternative and in order to protect his right, filed a petition under Article 226 of the Constitution of India in the High Court of Calcutta challenging the validity of the Court of Inquiry on number of grounds. One of the prayers made in the writ petition was to restrain the respondents from interfering with his posting, and submission of the report of the Court of Inquiry. There was a status quo order, which was passed. Circumstances which happened thereafter led to the filing of petition u/s 12 of the Contempt of Courts Act. Ultimately, the Division Bench of the High Court of Calcutta on 26th June, 1994 passed an order declining to interfere with the Court of Inquiry Proceedings stating that as and when Disciplinary Authority are started the petitioner would be at liberty to challenge all the points raised therein. Since the order of attachment, which had in the meanwhile been passed was not under challenge, it was agreed by learned Counsel for the respondent that since Court of Inquiry is over and disciplinary proceedings had been recommended, the proper thing for the respondent would be to make a fresh order of attachment directing the petitioner to be present before the Disciplinary Authority and a statement was made on behalf of the petitioner by his Counsel that as and when disciplinary proceedings are started, the petitioner would remain present before the Court of Inquiry. In view of this statement, writ petition was disposed of by the Division Bench. The petitioner felt aggrieved against the said order of Calcutta High Court and preferred SLP (Civil) No. 11844/94, which was dismissed on 25th July, 1994 with observation that if and when a Court Martial is held against the petitioner, it shall be open to him to raise all such objections as are open to him in law.

(11) It is the petitioner's case that he was moved on temporary duty to 510 Army Base Workshop Meerut through an order passed on 25th June, 1994,

where he reported on 27th June, 1994. The petitioner represented to Commandant 510 Army Base Workshop, Meerut Cantt. on 30th June, 1994 that in view of the order of the Calcutta High Court, a fresh attachment order was required to be issued before hearing the charge against him. As per the movement order, the petitioner had been moved on temporary duty and not on attachment on disciplinary grounds. Since the petitioner was to proceed on retirement with effect from 31st August, 1994, he had applied for 20 days leave from 27th June, 1994 to 16th July, 1994, being a part of annual leave, to sort out his domestic problems but the same was declined on 29th June, 1994. The petitioner prayed that he should be permitted to complete his prerelease medical examination as he was required to proceed on pension with effect from 31st August, 1994. The petitioner was informed on 4th August, 1994 that the Headquarters had not recommended his pre-release medical examination at that stage. On 14th July, 1994, the petitioner requested for four days casual leave since his father was suffering from Cerebral Haemorrhage and right side paralysis followed by fracture of hip bone, but the same was declined. The petitioner again applied for four days casual leave on 22nd July, 1994. The petitioner was informed on 4th August, 1994 that the same had not been recommended.

(12) It is alleged that the petitioner being highly harassed and in acute mental agony sent a representation on 29th July, 1994, addressed to Commander, Meerut Sub Area. The petitioner sought 15 minute personal interview so that he may be able to explain his most pressing problems. The same was not granted. The petitioner was humiliated, harassed and being in acute mental agony, suffered a heart stroke and was admitted to Military Hospital, Meerut on 11th August, 1994 and was transferred to Command Hospital, Lucknow. After detailed investigation, he was diagnosed as a case of "Angina Pectoris". The petitioner was informed that he was having serious heart ailments and was required to undergo Angiography, Angioplasty and bye-pass surgery. The petitioner was discharged from Command Hospital, Lucknow and was sent to Military Hospital Meerut on 22nd August, 1994 for further necessary action, to take up petitioner's case with the Director General Medical Services for approval and treatment and surgery at Escorts Heart & Research Institute, Delhi and for sanction of loan. Instead of doing so he was discharged on 24th August, 1994. At the time of discharge from Military Hospital, Meerut, the petitioner was not given even two weeks' rest, which is the minimum laid down requirement. The petitioner while at Command Hospital Lucknow, had submitted an application that he may be transferred to Army Hospital, Delhi so that permission of Director General Medical Services at Army Headquarters be pursued expeditiously. The petitioner had also been suffering from primary open angle glaucoma in both eyes.

(13) The petitioner alleged that as per the orders of Calcutta High Court, a fresh attachment order was required to be issued before initiating action against him. The petitioner learnt that the Convening Authority, Headquarters U.P. Area, was

trying to get an attachment order issued in back date. The Commandant 510 Army Base Workshop illegally heard the charge on 26th August, 1994 and ordered summary of evidence in respect of the petitioner to be recorded. The petitioner had a recent heart attack on 11th August, 1994 and having not even recouped from the said attack was kept standing up to 11 p.m. Brig. Rajesh Palta, illegally placed the petitioner under close arrest on 31st August, 1994 by invoking provisions of Section 123 of the Army Act. This order, according to the petitioner, was passed by Brig. Rajesh Palta under the directions of Chief of the Army Staff without himself exercising his discretion, which he was required to exercise in the light of various instructions issued in that behalf. It is the petitioner's case that he had to send his wife away as she could not stay with him at the Officers Mess Accommodation of 510 Army Base Workshop. In this background the petitioner sought various reliefs as prayed for by him in Civil Writ No. 3768/94. The primary relief claimed in the said petition is to quash the two orders Annexure P.24 passed on 31st August, 1994 invoking Section 123 till finalisation of summary of evidence and disciplinary case and for placing him under close arrest.

(14) On an interim application (C.M.930/94) made in the said petition, on 9th September, 1994, an order was passed directing that the petitioner be brought to Delhi Military Hospital and the wife of the petitioner should be brought to see the petitioner at the hospital. On 28th September, 1994, another order was passed that the petitioner would be provided with all necessary medical care, attention and treatment. On 7th October, 1994, further direction was made that the respondents shall ensure that the petitioner gets medical treatment at Escorts Heart Foundation, to which hospital he was referred to by Army specialist (Cardiologist) to undergo angiography/angioplasty. On 17th October, 1994, it was noticed that the petitioner was to be operated upon on that date, accordingly, a direction was made that till the petitioner is released and declared medically fit, no further proceedings be taken against him. On 13th December, 1994, it was noticed that the petitioner was still in Escorts Heart Foundation, Hospital where he had already undergone, by-pass surgery and was stated to be suffering from cerebral malaria.

(15) On 16th December, 1994, it was ordered that as the petitioner had undergone heart surgery and had been advised rest, Therefore, till next date of hearing, the petitioner be not taken out from the jurisdiction of the Court by the Army. He was, however, permitted to go home, if so advised. On 8th February, 1995, it was observed that since charges dated 26th August, 1994 had already been given to the petitioner and after the petitioner had undergone by-pass surgery was convalescing, it was time for him to submit himself to the summary of evidence. Accordingly it was ordered that as and when the Escorts Hospital Authorities would certify that the petitioner is fit to travel and make statements, the petitioner shall submit himself to the summary of evidence at Meerut. Till such time, the army authorities shall not subject him to the summary of evidence procedure. It was also observed that the petitioner shall get himself examined by

the Escorts Hospital once in a month and send the report to the respondents so that the respondents may be able to know the status of the petitioner's health.

(16) On 16th March, 1995, the respondents' Counsel was asked to take instructions as to whether summary of evidence can take place at Delhi. On 23rd March, 1995, it was stated on behalf of the respondents that it was not possible to take summary of evidence at Delhi. Accordingly, it was directed that the petitioner would submit himself for summary of evidence at Meerut. Petitioner's request for taking of summary of evidence at Delhi was turned down.

(17) Since the petitioner was to face the summary of evidence at Meerut, it was ordered on 23rd March, 1995 that when the Military Hospital at Jalandhar Cantt. would certify that the petitioner is in a fit condition to travel to Meerut, the petitioner will submit himself for summary of evidence at Meerut. Further directions were also made on that date as regards medical attendance of the petitioner at Meerut.

(18) It was during the pendency of the petition (Civil Writ No. 3768/94) that Civil Writ No. 1137/95 was instituted in this Court on 30th March, 1995. In addition to repeating some of the averments, which were made in Civil Writ No. 37668/94, it is alleged by the petitioner that the tentative charges served upon him on 26th August, 1994 had become time barred. The date of alleged offence is 13/14th December, 1991. As provided in Section 122, trial by Court Martial, after three years from the said date i.e. after 14th December, 1994 is not permissible. Since the petitioner superannuated on 31st August, 1994, six months after the date of retirement, the petitioner ceased to be amenable even to jurisdiction of the Army Act and thus is not amenable to face trial or other proceedings. It is further alleged that offences for which the petitioner is to be proceeded against have become time barred. No proceedings can continue against the petitioner, as is provided in Section 123 of the Army Act, which provide that no trial by Court Martial of any person, subject to the said Act, for any offence shall be commenced after the expiration of a period of three years from the date of such offence. Date of offence in this case being 13/14th December, 1991. The offence had come to the notice immediately on its occurrence. The offence was triable up to 13th December, 1994 by Court Martial and not thereafter. It is also alleged that the petitioner superannuated on 31st August, 1994. Relationship of master and servant, employer and employee ceased to exist w.e.f. 1st September, 1994. The petitioner as such ceased to be amenable to the jurisdiction of Army Act as his subjection under the Army Act was only till the date of his retirement. Extension of jurisdiction can at the most be for a further period of six months, as provided in Section 123(2) of the Act, which period expired on 28th February, 1995. Continuation of trial or proceedings thereafter are without jurisdiction. The petitioner has thus challenged the proceedings against him on the ground that they are without jurisdiction. In addition to the grounds taken, the same are also challenged to be without jurisdiction for the reasons stated in Civil Writ No. 3768/94 that there has been no proper order of attachment. Mere order for

temporary duty does not entitle anyone to assume command over a person. Earlier attachment order became subservient to the order of the High Court of Calcutta passed on 22nd June, 1994. Fresh order of attachment was required to be passed. Unless petitioner was properly attached or posted to 510 Army Base Workshop, the Commanding Officer neither became the proper Commanding Officer, nor could assume jurisdiction over him to hold preliminary investigation.

(19) Both petitions are under contest by respondents. In Civil Writ No. 3768/ 94, the respondents' case is that the orders conveyed through letters Annexure-P-24 dated 31st August, 1994 were passed by the Commandant, 510 Army Base Workshop in his capacity as Commanding Officer. The Army Head Quarter letter dated 9th August, 1994 referred to in Annexure-P-24 is the order of attachment for the purpose of initiation of disciplinary action against the petitioner, issued under the provisions of Army Instruction 30/86. Respondents have also in the reply stated their version as regards supply of milk from Meerut Military Farm. It is stated that orders for the closure of Military Farm Depot Roorkee were issued in January, 1991 with the directions that Military Farm Meerut will undertake supply of milk directly to Units at Roorkee and accounted by Military Farm Meerut. As a sequel to postponement of closure of Military Farm Depot Roorkee, revised orders were issued in October, 1991 that Military Farm Depot Roorkee would start functioning with effect from 21st October, 1991. Military Farm Meerut was told to stop despatches of milk ex-Military Farm Meerut to Roorkee. Clear directions were again issued to stop local purchase of milk at Military Farm Meerut and to meet full requirement of Meerut station out of own Farm reduced milk. It is stated that the action of the Manager, Military Farm Depot Roorkee to dispatch 1200 litres of milk to Military Farm Dehradun to meet their requirement was in line with the directions of appropriate superior authorities. The delay of about 12 hours in despatching milk by Military Farm Depot Roorkee to Military Farm Dehradun, on receipt from Military Farm Meerut, resulting into curdling of milk was because of non-adherence timings to dispatch initially by the petitioner from Meerut, in violation of orders from superior authorities. The milk was not fit for troops consumption, for which it was dispatched, when it reached Military Farm Dehradun, irrespective of whether it was home produced or locally purchased at Meerut. Out of 2000 litres of milk received at Roorkee, 800 litres were promptly consumed, not exposing the milk so as to bacterial activity leading to development of acidity conducive to curdling of milk. It is stated that had the petitioner dispatched the milk to reach Roorkee at about 1500 hours, as intimated by Military Farm Depot Roorkee, the complete quantity of milk would have been consumed promptly.

(20) Respondents allege that the petitioner has not correctly narrated the facts that he was not cooperated with Court of Inquiry proceedings till 22nd January, 1993. It is alleged that Court of Inquiry commenced its proceedings on 13th October, 1992. The presence of the petitioner was requested w.e.f. 1st week of October, 1992 when he was serving in Army Headquarter. He did not turn up. The Court of Inquiry examined as many as 12 witnesses. The petitioner

thereafter was called as a witness, but before that a questionnaire was sent to him through letter dated 8th January, 1993. Examination of witnesses by Court of Inquiry was in a chronological order and the petitioner was examined accordingly. The questionnaire sent to the petitioner was in consonance with the procedure prescribed in law. It is stated that in order to be fair to the petitioner, provision of Army Rule 180 was invoked. The petitioner appeared before the Court of Inquiry and availed his rights under Army Rule, 180. The petitioner did cross examine many witnesses including Shri R.K. Gupta, Mr. M.P. Konhur and Shri Jit Ram. Respondents have denied that the petitioner was asked or allowed to cross examine only two witnesses. It is stated that the Court of Inquiry on examining 12 witnesses and perusing numerous documentary evidence came to the conclusion that the petitioner had committed numerous irregularities and was blameworthy. It is alleged that hearing of charge under Army Rule 22 was held by an officer discharging the duties of Commanding Officer on 26th August, 1994. Initially, an attachment order was issued by Army Headquarter on 9th May, 1994. Disciplinary proceedings commenced only after receipt of fresh attachment order dated 9th August, 1994, as per alleged that hearing of charge under Army Rule 22 was held by an officer discharging the duties of Commanding Officer on 26th August, 1994. Initially, an attachment order was issued by Army Headquarter on 9th May, 1994. Disciplinary proceedings commenced only after receipt of fresh attachment order dated 9th August, 1994, as per observations made by the Calcutta High Court in its order. "The respondents have also assigned the reasons in rejecting his application for grant of leave. It is stated that the petitioner was away from his Unit. His leave application was returned. Medical Release Board completed its proceedings before the date of retirement as per existing rules and regulations. Before the petitioner could retire. Section 123 was invoked to continue his subjectivity to Army Act, in order to finalise the disciplinary action. The request of the petitioner to grant leave was forwarded to the Competent Authority, who did not recommend the same. The respondents have stated that the petitioner asked for an interview, which was granted on 9th August, 1994. The petitioner reported at 510 Army Base Workshop on 27th June, 1994. Since then he was given no duty. He was required to be present in office during working hours. All facilities were provided to the petitioner. It is stated that the hearing of charges was correctly held as per Army Rule 22 only after receipt of fresh attachment order. The respondents have denied that there is any violation therein.

(21) The contest by respondents to Civil Writ No. 1137/95 is on the ground that the petitioner was subject to Army Act till 31st August, 1994 when he relinquished his commission on superannuation with a liability for being tried up to the period of three years after retirement for any offence committed during his service time, in accordance with the provisions of Section 122 of the Army Act. It is stated that the petitioner was ordered to be attached with 510 Army Base Workshop for proceeding with his disciplinary case as early as 21st October, 1993, but he actually reported on 24th June, 1994. From 21st October, 1993 till

24th June, 1994, the petitioner took shelter of his ill health and evaded the legal proceedings against him on one pretext or the other. Even on reporting on attachment on 24th June, 1994, the petitioner did not make himself available for proceedings with investigation. He was admitted to hospital for 11 days during July, 1994, 14 days during August, 1994 and from 13th September, 1994 onwards, he was either in hospital or convalescing till he was declared medically fit by the duly constituted Medical Board on 17th July, 1995. The Court has been quite considerate towards his ill health and ordered for providing the best possible treatment till he was declared medically fit to travel and make statement at the summoning of evidence. It was thereafter obligatory on the part of the petitioner to have honoured the directions of the High Court of Delhi and presented himself at Meerut for investigations at least on 18th July, 1995 but with a view to cause further delay, he even appealed against the verdict of the medical Board.

(22) In this back ground learned Counsel for the parties were heard at length, who have made their respective submissions.

(23) Legality and validity of inquiry proceedings need not be considered by us at this stage in view of the observations of Supreme Court in its order dated 22nd June, 1994, though learned Counsel for the parties did make their respective submissions on that also. The Supreme Court, while disposing of petitioner's SLP against an order passed by the Calcutta High Court on 22nd June, 1994 observed that if an when Court Martial is held against the petitioner, it shall be open for him to raise all such objections as are open to him in law. In view of this observation of Supreme Court the points, which remain for consideration would be whether the offence can be said to have become barred due to limitation as provided in Section 122 of the Army Act or whether in view of provisions of Section 123 of the Act, it can be said that the petitioner has ceased to become amenable to the jurisdiction of the Army Act or whether the order passed on 31st August, 1994 invoking provisions of Section 123 of the Act is vitiated for the reasons alleged in the petition.

(24) Though the provisions of Sections 122 and 123 of the Army Act stand amended by virtue of Army (Amendment) Act, 1992 (Act No. 37 of 1992) there is no dispute amongst parties that since the offence is prior to the date of amendment, the unamended provisions of Sections 122 and 123 would be applicable to the instant case. Section 122 of the Army Act deals with and prescribes the period of limitation for trial by a Court Martial and prior to its amendment was worded 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. (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 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, shall be excluded. (4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently 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."

(25) A bare reading of Section 122 of the Act makes it clear that this provision is a complete Code in itself for not only it provides in Sub-section (1) the limitation period for trial to be three years from the date of such offence but Sub-section (2) thereof provides that limitation would not apply in certain eventualities. The Supreme Court in Major Radha Krishan Vs. Union of India and Others, has held that terms of Section 122 are absolute and no provision has been made under the Act for extension of time like Section 473 of the Criminal Procedure Code and that any trial commenced after the period of limitation will be patently illegal. Period of limitation prescribed under the Army Act cannot be overridden or circumvented by an administrative act, in exercise of the powers conferred under the Rules.

(26) Section 123 of the Army Act deals with the liability of offender, who ceases to be subject to Act and prior to its amendment was in the following words :

"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 six months 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 (imprisonment for life) 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."

(27) SUB-SECTION (1) of Section 123 as it stood prior to amendment envisaged that where an offence under this Act had been committed by any person while subject to this Act and he had 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. In other words, though the officer governed by the provisions of the Act ceases to be so governed by the provisions of the Act, on

his retirement, no trial for an offence under the Act shall be proceeded with and no such person shall be tried for an offence under the provisions of the Act unless his trial commences within a period of six months after he had ceased to be subject to the Act.

(28) In *Union of India and Others v. Major General Madan Lal Yadav*, 1996 (3) Supreme 191, the Supreme Court held that the Legislature has made a distinction between Section 122(3) and Section 123(2) of the Army Act. The power to exclude time taken in specified contingencies is 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 under detention after he ceased to be governed by the Act.

(29) While Sub-section (2) of Section 122 says that no trial by Court Martial of any person, subject to the Act, for any offence, shall be commenced after the expiry of the period of three years from the date of the offence. Sub-section (2) of Section 123 says that no person shall be tried for an offence, unless his trial commences within a period of six months after he had ceased to be subject to the said Act.

(30) Offence in the instant case is stated to have taken place on 13/14th December, 1991 and admittedly period of three years would expire on 13/14th December, 1994. On the interpretation of the term "the date of commencement of the trial", in *Major General Madan Lal Yadav's* case (supra), the Court held that the trial commences the moment the G.C.M. assembles and examination of the charge is undertaken on the question whether they would proceed with the trial. The preceding preliminary investigation is only a part of the process of investigation to find whether a charge could be framed and placed before the Competent Authority to constitute G.C.M. Admittedly in the instant case on the ratio of the decision in *Major General Madan Lal Yadav's* case (supra), it has to be held that the trial has not yet commenced.

(31) Chapter V of the Army Rules relate to the investigation of charges and trial by Court Martial. Rule 22 deals with the hearing of charge and Sub-rule (1) provides that 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 defense. Rule 23 provides procedure for taking down the summary of evidence. Admittedly, the stage in the instant case as on 25th August, 1994 was that of hearing of the charge within the meaning of Rule 22. The case has not yet even reached the second stage of taking down summary of evidence. Even hearing of the charge had to take place in the presence of the accused, who would have got an opportunity to cross examine any witness against him and he would be at liberty to call any witnesses and make any statement in his defense.

(32) Court of Inquiry was constituted pursuant to the order passed on 23rd

September, 1992, which finalised its proceedings. On receipt of report of Court of Inquiry, directions were issued on 19th August, 1993 by the GOC-in-C, Central Command, partly agreeing with the recommendations of the General Officer Commanding Uttar Pradesh Area, for taking disciplinary action against the petitioner for the alleged acts of omission and commission. On 9th September, 1993, Quarter Master General, Army Headquarter while agreeing with the recommendations of GOC-in-C. Central Command issued orders and pursuant thereto on 21st October, 1993, an order was passed asking the petitioner to report at 510 Army Base Workshop at Meerut for the purpose of investigation. It was a preliminary stage, namely, procedure prior to Rule 22 of Army rules.

(33) It was on 21st October, 1993 that the petitioner was ordered to move to Meerut for investigation. After the said date and before 2nd November, 1993, the petitioner preferred writ petition before the High Court of Calcutta and it was on 2nd November, 1993 that the Calcutta High Court passed an order of maintenance of status quo till 12th November, 1993. On 12th November, 1993 the case was not heard. It was on 19th November, 1993 that the petitioner moved an application for initiating proceedings under the Contempt of Courts Act against the respondents. Status quo was directed to be maintained on 19th November, 1993," which order remained in operation till 22nd June, 1994, when Division Bench of High Court of Calcutta upheld the appeal preferred by respondents and directed the respondents to issue fresh order of attachment directing the petitioner to remain present before the Disciplinary Authority. Against this order the petitioner preferred SLP in the Supreme Court, which was dismissed on 25th June, 1994. It was only on 27th June, 1994 that the petitioner reported to the Disciplinary Authority at Meerut. No proceedings could take place thereafter also since the petitioner remained hospitalized from 1st July, 1994 to 11th July, 1994 and from 11th August, 1994 to 25th August, 1994. It was on 26th August, 1994 that as per the provisions of Army Rule 22 hearing of charges commenced. The following tentative charge sheet (Annexure-P-6 in Civil Writ 1137/95) was served on the petitioner :

"First charge Neglecting To Obey AA Sec. 42(e) Departmental Orders in that he, at Meerut on 13/14 night Dec-91, as Oic Military farm Meerut, when directed by Ddmf Hq Central Command, vide Singal No. Q.3633 dated 11 December 91, to dispatch milk as per timing given by Military Farm Depot, Roorkee, failed to do so. Second Charge An Omission Prejudicial Aa Section 63 To Good Order And Military Discipline in that he, at Meerut, during Dec. 91, as Oic Military Farm, Meerut while supplying milk to Military Farm, Depot Roorkee failed to exercise proper command and control on functioning of Military Farm, Meerut and Military Farm Depot, Roorkee and personnel under his command 3rd Charge An Act Prejudicial To Aa Section 63 Good Order And Military Discipline in that he, at Meerut during December 91, as Oic Military Farm, Meerut while supplying milk to Military Farm Depot, Roorkee did not own accountability for the failure or lapse of the subordinate at Military Farm, Meerut and Military Farm Depot, Roorkee and their inefficiency and indiscipline. 4th Charge An Act Prejudicial To Aa Section 63

Good Order And Military Discipline in that he, at Meerut during December 91, as Oic Military Farm, Meerut while supplying milk to Military Farm Depot, Roorkee did not own his responsibility for the failure on his part and passed on the blame to his subordinate. Fifth charge Neglecting To Obey Aa Section 42(e) Departmental Orders in that he, at Meerut between August 91 to October 91, as Oic Military Farm, Meerut, did not observe departmental procedures as laid down vide Hq Central Command letter No. 680101/2/Genl/Farms dated 7th June, 86 for local purchase of milk. 6th Charge An Act Prejudicial To Aa Section 63 Good Order And Military Discipline in that he, at Meerut, between August 91 to October 91, as Oic Military Farm, Meerut exceeded his authority laid down vide Hq Central Cod letter No. 660413/ Closure/Roorkee/E/MF-2 dated 17 January 91 to purchase milk for supply- ing to Roorkee and Dehradun when there was no surplus milk in Military Farm, Meerut. 7th Charge An Act Prejudicial To Aa Sec.63 Good Order And Military Discipline in that he, at Meerut, between August 91 to October 91, as Oic Military Farm, Meerut deliberately suppressed evidence of local purchase of milk not duly authorised by Hq Central Command."

Prior to the serving of this tentative charge sheet, fresh orders of attachment could be passed only on 9th August, 1994, though initial order of attachment was stated to have been passed on 9th May, 1993. The hearing of charge under Rule 22 commenced on 26th August, 1994, when as per the stand taken by the respondents, fresh order of attachment was passed on 9th August, 1994 pursuant to the directions of the Calcutta High Court.

(34) Under the orders passed on 9th September, 1994 by this Court in Civil Writ No. 3768/94, the petitioner was directed to be brought to Delhi Military Hospital for his treatment. On 17th October, 1994, it was directed that no further proceedings will take place against the petitioner till the petitioner is released and declared medically fit. There is no dispute that from 13th September, 1994 to 16th July, 1995, the petitioner was either in hospital or convalescing under medical advice. On 8th February, 1995, it was observed that time has arrived when the petitioner should submit himself for summary of evidence, accordingly it was ordered that as and when Escort Hospital would certify that the petitioner is fit to travel and make statement the petitioner shall submit himself to summary of evidence at Meerut and that the Army Authorities shall not compel him to submit himself to summary of evidence procedure before that. This order was further modified subsequently on 23rd March, 1995 as follows :

"In order dated 16.3.1995 we had recorded that the respondents" Counsel wanted to seek instructions as to whether the Summary of Evidence could take place at Delhi. Learned Counsel for the respondents has submitted today that carious problems may arise to have the summary of evidence to be taken at Delhi, particularly as the Army Command itself is different. In the circumstances, we do not think that it is a fit case where we should permit the Summary of Evidence to take place in Delhi. Now the question is as to when the petitioner be made to face the Summary of Evidence at Meerut. In our order

dated 8.2.1995 we have stated that as and when the Escorts Hospital authorities certify that the petitioner could travel and make statement, the petitioner should submit himself for Summary of Evidence at Meerut. Instead, we modify the said direction by stating that as and when the Military Hospital at Jalandhar Cantt. certifies that the petitioner is in a fit condition to travel and make a statement at Meerut, the petitioner will submit himself to the Summary of Evidence at Meerut. The petitioner will have himself examined at the Military Hospital, Jalandhar Cantt. on the 1st and 15th day of every month, and the first of such examination shall take place on 3.4.1995, and the second examination will be on 15.4.1995. In case, the Military Hospital at Jalandhar is of the opinion that when the petitioner is at Meerut for the aforesaid purpose he might require any particular medical attention, then the respondents will make necessary medical arrangements for the petitioner at Meerut. The application is disposed of. A copy of this order be given dusty to the learned Counsel for the parties."

(35) The petitioner ultimately was declared fit to travel and make statement before the Disciplinary Authority at Meerut on 17th July, 1995 by the Military Hospital, Jalandhar. Still feeling aggrieved, the petitioner appealed against the said order of the Medical Board. The appeal was rejected on 29th July, 1995.

(36) In Civil Writ No. 1137/95 the petitioner had filed an application (C.M.6441 / 95), on which an order was passed on 31st July, 1995 staying the operation of the movement order Annexure-P-6. Though the petitioner was declared to be fit by Military Hospital Jalandhar, he did not report and submit himself to face Summary of Evidence at Meerut and obtained further orders from the Court.

(37) In the circumstances aforementioned, 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 12 days in the month of July, 1994 and for 14 days in August, 1994. He was present 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 not 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 Civil WRIT1137/95 is in operation till date.

(38) Trial of the petitioner in terms of the decision in Major General Madan Lal Yadav 's case (supra) has not yet commenced and as noticed in Radha Kishan's case (supra) there is complete bar for commencement of trial after the expiry of

the period of three years limitation, as provided in Section 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 month. The Legislature had made a distinction between Section 122(3) and Section 122(2) 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 period of limitation cannot be put forward by the said person because of whose absence the trial could not proceed.

(39) 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 was 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 further orders, which were passed in CW.No. 3768/94 on 17th October, 1994, 15th October, 1994 and 15th February, 1995 and in CIVIL WRIT 1137/95 that till date the trial could not commence. In these circumstances, it will not be unreasonable to invoke the maxim *nullus commodum COMPERE potest de in juria 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 Lal 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 finds support of another maxim *frustra legis auxilium quaerit qui in legem committit*, which was explained to signify that if a man be bound to appear on a certain day and before that date the obligee put him in prison, the bond is void and the principle that "he who 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 the extent of "undoing the advantage gained where that can be done and not to the extent of

taking away a right previously possessed". 40. 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 petitioner in that case prevented the trial that was being proceeded with in accordance with law and held that the maxim nullus commodum capere potest de injuria sua propria would squarely apply since he having done the wrong cannot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent G.C.M.

(41) Had the petitioner not obtained specific order from Calcutta High Court, due to which no proceedings could take place and had the petitioner not obtained further orders against the respondent from this Court not to proceed against him, we are of the firm view that proceedings might have reached a stage when trial, if it was necessary, could have proceeded. The stage when order dated 2nd November, 1993 was passed was that of procedure under Rule 22 of the Army Rules, where after taking out of Summary of Evidence was the stage, which also remained stayed by the orders passed by this Court from time to time on applications moved in that behalf by the petitioner and due to the two orders passed on 8th February, 1995 and 23rd March, 1995. The petitioner did not make himself available because of those orders. Another principle, which may safely be applied to the facts of the case would be *Actus Curia eminent gravabit* - namely an act of the Court, prejudices none might have reached a stage when trial, if it was necessary, could have proceeded. The stage when order dated 2nd November, 1993 was passed was that of procedure under Rule 22 of the Army Rules, where after taking out of Summary of Evidence was the stage, which also remained stayed by the orders passed by this Court from time to time on applications moved in that behalf by the petitioner and due to the two orders passed on 8th February, 1995 and 23rd March, 1995. The petitioner did not make himself available because of those orders. Another principle, which may safely be applied to the facts of the case would be *Actus Curia neminem gravabit* - namely an act of the Court, prejudices none.

(42) On the application of the aforementioned principles, it is not possible to conclude that the bar of three years, as provided in Section 122 of the Army Act, would apply to the facts and circumstances of the case since it was the petitioner, who prevented the proceedings from taking place and the respondents will be entitled to exclude the period from 2nd November, 1993 till date and for the same reason the limitation bar, as contained in Section 123 would also not apply.

(43) The petitioner has also challenged the act of respondents in invoking the provisions of Section 123 of the Army Act contending that circumstances did not warrant the invoking of the provisions. Since by virtue of the order passed by the Court, now the petitioner has been directed to make himself available and keeping in view the facts and circumstances of the case, as noticed above, we are of the view that the order was rightly passed by the respondents 4 and 5 attaching the petitioner, when respondent No. 5 found that petitioner was not making himself available during investigation and it was due to his acts that on 2nd November, 1993, proceedings during investigation stage were stalled. Under instructions (Annexure-P.28), which are at page 72, the circumstances under which Army Act, Section 123 can be invoked are stated :

"3. Army Act, Section 123 is invoked where an offence under the Army Act had been committed by any person while subject to the Army Act and he has thereafter ceased to be so subject by virtue of his being retired, discharged or released. The said person may be taken into military custody, tried and punished for such offence as if he continued to be subject to the Army Act. However, as per Sub-section 2 of the *ibid* Section, no such person can, except in the case of certain specified offences, be tried by a Court Martial unless his trial commences within 6 months after he had ceased to be subject to the Army Act. 4. The provision of Army Act 123 can, Therefore, be invoked in the following circumstances to finalise disciplinary cases : (a) where a person subject to the Army Act has committed an offence while in service but before any disciplinary action is initiated against him, he becomes due for retirement, discharge or release. (b) where such a person commits an offence while in service and disciplinary action has commenced, but before he could be tried and punished, the individual becomes due for retirement or release. Judiciousness of Invoking Army Act, Section 123 5. Army Act, Section 123 may be invoked in respect of service persons alleged to have committed serious offences which warrant a sentence of dismissal or above. When Army Act 123 is thus invoked, the offender will invariably be placed under close arrest."

An order was passed on 21st October, 1993 and when the petitioner filed writ petition, the Court observed that fresh order deserves to be passed. It was on 31st August, 1994 that order Annexure P.24 was passed by Brig. Rajesh Palta, the Commandant 510 Army Base Workshop, Meerut stating :

"As you to retire on 31st August, , (A.N), I hereby invoke Army Act Section 123 in your respect till finalisation of Summary of Evidence and discipline case pending against you."

(44) The contention on behalf of the petitioner that discretion of respondent No. 5 was influenced by the decision from the Army Hq. has no force and cannot be accepted. The order annexure-P-24 in its first para only makes a reference to the letter of Adjutant's Branch dated 9th August, 1994 but it does not say that invoking of provision of Section 123 of the Act is on instructions. The order says "I hereby invoke.....". Obviously the Commandant had to exercise his

own discretion of invoking of Section 123 in the light of the instructions in that behalf, which he did. He need not have passed an elaborate order. In case in his order some reference was made to a communication dated 9th August, 1994 inviting his attention to the circumstances of the case and the need of invoking the provisions of Section 123 of Army Act and it was pursuant to said reference that the discretion was exercised, it cannot be said that the discretion was not his own or it was that of Army HQ. The Army instructions aforementioned have to be so read in the background of the circumstances which the petitioner created by his own act by filing writ petition in the High Court of Calcutta. There obviously was no option left with respondent No. 5 but to pass appropriate order.

(45) Civil Writ Petition No. 1137/95 as also Civil Petition No. 3768/94 are thus liable to be dismissed. Ordered accordingly.

(46) Consequently, it is directed that the petitioner will make himself available at Meerut for the purposes of recording of his. evidence, where after proceedings will take place in accordance with law, as expeditiously as possible. All interim orders passed are hereby vacated.