
(2001) 05 DEL CK 0180
In the Delhi High Court
Case No : C.W.No. 1259 of 2001

Major S.L. Sharma

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-05-2001

Acts Referred:

Army Act, 1950 — Section 122, 122(1), 80, 83, 84
Army Rules, 1954 — Rule 22(2), 53
Criminal Procedure Code, 1973 (CrPC) — Section 164, 473

Citation : (2001) 05 DEL CK 0180

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Mr. R.S. Randhawa, for the Appellant; Ms. Rekha Palli, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Mukundakam Sharma, J.—The issue that was argued and arises for my consideration in this writ petition is whether the proceedings of the General Court Martial instituted against the petitioner are barred by limitation under the provisions of section 122 of the Army Act. The petitioner contends that the action of initiation of his Court Marital is barred being beyond the period of limitation.

2. While the petitioner was serving as a Garrison Engineer at Danapur a complaint was received regarding certain irregularities on the basis of which an enquiry was conducted under order dated 12.8.1993. It was stated in the said order that a Court of Enquiry would assemble to investigate the irregularities, if any, committed by the Garrison Engineer, Danapur in execution of works. Subsequent thereto the Staff Court of Enquiry was ordered and the proceedings of the said Court of Enquiry commenced in April, 1995. The said enquiry was completed in October, 1995. On completion of the said Court of Enquiry the records thereof Along with summary of evidence were forwarded to Deputy JAG, Headquarters Central Command for pre-trial advice. The records of the enquiry

were placed before the Competent Authority on 16.4.1996. On 11.1.1999 action was taken by the Competent Authority and order for convening a General Court Martial was passed. The trial of the General Court Martial was to start on 2.2.1999. In the light of the aforesaid background facts it is stated in the petition that since on 12.8.1993 a Court of Enquiry was ordered to be assembled to investigate the irregularity, if any, committed by the Garrison Engineer in execution of the works the limitation as prescribed u/s 122 would start running from the aforesaid date.

3. Counsel appearing for the petitioner during the course of his submissions submitted that if the period of limitation is computed from the aforesaid date the trial is barred by limitation. He further submitted that the report of the aforesaid enquiry was available at any rate in January, 1994 and even thereafter no action was taken by the respondents till January, 1995 when an order was passed for holding a Staff Court of Enquiry. The report of the said enquiry was also available sometime in October, 1995 and Therefore, it was known to the respondent by the aforesaid time both regarding the nature of the offence committed and also about the identity and name of the person who had committed the alleged offence and if the limitation is computed even from the said date the trial is barred under the provisions of section 122 of the Army Act. He also submitted that the commanding officer is the competent person who is authorised to initiate action in the present case and, Therefore, crucial date from which the limitation would start running is the date of the knowledge of the commanding officer. In support of his contention the learned counsel appearing for the petitioner relied upon the decision of the Supreme Court in Major Radha Krishan Vs. Union of India and Others, and a Division Bench decision of this court in Lt. Col. (TS) H.C. Dhingra Vs. Union of India and others, reported in 1988 (2) DL109.

4. Counsel appearing for the respondents however, submitted that neither it was known to the Competent Authority who is to initiate action that an offence had been committed nor it was known as to who had committed such an offence, if any. According to her the Competent Authority to initiate action had such knowledge, only on 16.4.1986 when the report of the Enquiry was placed before him and Therefore, the period of limitation in terms of section 122 of the Army Act would start running from 16.4.1996 and as action was taken by the respondents for convening the Court Martial was convened for 2.2.1999 the trial is not barred under the provisions of section 122 of the Army Act.

5. She further submitted that a dispute is sought to be raised in the present case as to who actually is the competent person to initiate proceedings and also with regard to the date of knowledge of the Competent Authority to initiate action that an offence had been committed and by whom such offence was committed. According to her disputed questions of facts are involved in the present case this court may not enter into investigation and enquiry of disputed such questions and leave it to the Court Martial where such issues could be appropriately raised and decided. In support of her contention the counsel relied upon the decisions

in Major G.S. Sodhi Vs. Union of India (UOI), and in Delhi Special Police Establishment, New Delhi Vs. Lt. Col. S.K. Loraiya, .

6. In order to appreciate the contention raised, it is necessary to extract below the amended provisions of Section 122 of the Army Act and Rule 53 of the Army Rules which are relevant for the purpose of deciding the present case:

"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 3 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 offence is known to the person aggrieved by the offence or to the authority competent to initiate action whichever is earlier."

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 that 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 u/s 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 the 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.

7. The provisions of Section 122 which are quoted above are the amended provisions, which came into force prior to the receipt of the complaint which is dated 23.6.1993 in respect of offences committed during the relevant period and Therefore, the aforesaid amended provisions are applicable in the present case. A plain reading of the aforesaid provisions would indicate that section 122(b) & (c) are in the nature of exception to section 122(a). Although it could be said that certain irregularities were committed sometime in between the period from 1991 to 1994 however, as of that date no specific knowledge that an offence had been committed and by whom the same was committed was derived by the competent authority. The only knowledge was that certain irregularities had been committed by the petitioner and, Therefore, an enquiry was ordered to ascertain the circumstances under which such irregularities were committed. After the report of the enquiry was received sometime in 1994 a Staff Court of Enquiry was ordered on 25.1.1995. A reference to the terms of the said reference would also indicate that the same was ordered to investigate the circumstances under which certain irregularities were committed by the Garrison Engineer, Danapur, namely the petitioner. The said enquiry was completed in October, 1995 and the records of the same were placed before the Competent Authority only on 16.4.1996. Therefore, if the knowledge of the Competent Authority to initiate action namely the respondent No. 3 is computed from the said date the trial prima facie cannot be said to be barred u/s 122 of the Army Act.

8. It was stated by the counsel for the petitioner that not only the respondent No. 3 before whom the records were placed on 16.4.1996 as the competent authority but even the commanding officer is also the Competent Authority to initiate action against the petitioner under the Army Act and Rules framed there under. In my considered opinion, such matters are disputed questions of fact which cannot be decided in the writ petition. In order to decide such questions investigation has to be made by the Court to all the facts collected by the respondents against the petitioner as to who is actually the competent authority in the instant case to initiate action against the petitioner and the date on which he derived such knowledge within the meaning of Section 122 of the Army Act read with Rule 53 of the Rules. Such issues involving disputed questions could be appropriately raised before the Court Martial also which has initial jurisdiction to enter upon the enquiry in the case. The said Court Martial is competent to decide whether it retains jurisdiction to try the petitioner in spite of the provisions of sub-section (1) of section 122 of the Army Act.

9. At this stage reference could also be appropriately made to the provisions of Rule 53 of the Army Rules, which are extracted. The provision of Rule 53 of the Army Rules gives a liberty to the accused at the time of his general plea of

"guilty" or "not guilty" to a charge for an offence, to raise a plea in bar of trial on the ground that the time which has elapsed between the commission of the offence and the commencement of the trial is more than three years, and the limit of time for trial is not extended u/s 122. In the event of an accused offering such a plea in bar, the Court Martial has to 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. It is also provided that if the Court finds that the plea in bar is proved it shall record its findings and notify it to the confirming authority. Therefore, an elaborate procedure is prescribed under the provisions of the Army Act and the Rules framed there under giving an option to a person to raise a plea in bar of limitation before the Court Martial and Therefore, such plea is to be raised and decided at that forum, for the concerned person would also have opportunity to challenge any adverse order thereto before the appellate authority and even in this court at a later stage.

10. In Delhi Special Police Establishment case (supra) it was held by the Supreme Court that the issue of limitation is a part of the trial before it and that if the court martial finds that the respondent cannot be tried on account of the expiry of 3 years from the date of the commission of the offence, the petitioner may not go scot free. Since the aforesaid issue of limitation could be appropriately raised and effectively decided by the Court Martial who has the initial jurisdiction to enter upon such an enquiry relating to jurisdiction to try the petitioner in spite of sub-section (1) of Section 122 of the Army Act, I see no reason why this court should enter into an investigation/enquiry upon the disputed questions of fact at this stage. I am of the considered opinion that in facts and circumstances of the case it would be most appropriate leave the petitioner to raise the same before the Court Martial at the initial stage in terms of the ratio of the decision in Delhi Special Police Establishment (supra).

11. In the case of Sanjeev Kumar Gupta and others Vs. Registrar of Companies, (1990) 2 Comp LJ 70 a Single Judge of this court held that even if it is assumed that a complaint is barred u/s 164 of the Criminal Procedure Code still the complaint could show to the trial court u/s 473 Cr.P.C. that the complaints should be entertained and the delay made in filing the complaints could be condoned. It was held in the said decision that a plea of the nature regarding bar of limitation should be taken first before the trial court and it is only when some order is made adverse to the petitioner on the said plea the same could be challenged before the Appellate Court or before the High Court.

12. The decisions relied upon by the counsel appearing for the petitioner are distinctly distinguishable on facts. In Maj. Radha Krishan's case (supra) what came up for consideration before the Supreme Court was came up for consideration before the Supreme Court was the provisions of Section 19 of the Army Act read with Rule 14 of the Army Rules. In that context the Supreme

court in the said decision and the occasion to deal with the provisions of Section 122 of the Army Act also but what was considered was the unamended provisions of 122 and not the amended provisions with which I am concerned in this writ petition. Similar is the case before the Division Bench of this Court on which reliance was placed by the counsel for the petitioner. In the said decision also the unamended provision of Section 122 were the relevant provisions and, Therefore, in the said decisions are not applicable to the facts of the present case.

13. In the light of the aforesaid discussions, I am of the considered opinion that this writ petition cannot be entertained at this stage. The petition accordingly stands dismissed with a liberty to the petitioner to raise the aforesaid issue of limitation before the Court Martial and in the event of raising the aforesaid issue before the Court Martial the same shall be decided by entering upon an enquiry in respect of the same. A decision shall be rendered by the Court Martial in the event of raising of such a plea of limitation without being in any manner influenced by any of the observations or views expressed on the question of limitation herein, which are only tentative opinions.