

**(1998) 07 PAT CK 0087**

**In the Patna High Court**

**Case No : Cr.W.J.C. No"s. 225 and 250 251 of 1998**

Sheo Shankar Prasad Singh and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

**Date of Decision : 29-07-1998**

**Acts Referred:**

Army Act, 1950 — Section 122, 123, 37, 52, 63  
Penal Code, 1860 (IPC) — Section 34

**Citation : (1998) 3 BLJR 2174 : (1998) 3 PLJR 163**

**Hon'ble Judges : M.Y. Eqbal, J**

**Bench : Single Bench**

## Judgement

M.Y. Eqbal, J.—In these three writ petitions common question of law and facts are involved and therefore, with the consent of the parties these writ petitions are disposed of by this common order.

2. In Cr. W.J.C. No. 250 of 1998 the petitioner seeks indulgence of this Court for issuance of appropriate writ in the nature of certiorary for quashing the order dated 22.4.1998 purported to have been issued for convening general Court Martial for commencing trial of petitioner for offence alleged to have been committed under Sections 52(f) and 63 of the Army Act read with Section 34 of the Indian Penal Code. A further prayer has been made for appropriate direction to the respondents restraining them from taking steps for commencing the trial. A similar prayer has been made in other two writ petitions being Cr.W.J.C. Nos. 251 and 252 of 1998 for quashing the order by which the respondents purported to convene general Court Martial for commencing trial of the petitioner for the offence alleged to have been committed under the aforesaid sections of the Army Act. Since a very limited question of law is involved in this writ application it would be suffice to state in brief the facts of the case of Cr.W.J.C. No. 250 of 1998.

3. The petitioner's case is that he was appointed in the Army Service in the year 1962 and in January 1995 he was assigned duty of Screening and Selection of

candidates for recruitment in Army. The petitioner was to preside over the Board of Officers and the final authority was Commanding Officer of the Canter who was required to issue formal letter of appointment to candidates after having approved the recommendation of proceeding. Cr. 8.2.95 the proceedings of the Board of Screening and Selection was before the Commandant of the Canter and the Commanding Officer countersigned the proceeding having screened and certified the documents. The petitioner's further case is that the candidature of one of the relatives of the Commandant was rejected by the Board. It is said that the then Commandant ordered for Scrutiny Board for checking up of documents and also ordered for Court of inquiry to investigate the allegations made in an anonymous letter received by the then Commandant. The allegations made in the anonymous letter was general in nature regarding the irregularities in screening and selection. On 2.4.1995 the then Commandant reported all concerned that prima facie irregularities have been detected and report of the Screening Board was submitted before the Commandant. The petitioner further case is that on receipt of the signal from the Commandant ASC, Centre (North), Gaya, the Sub-area Commander ordered for staff Court inquiry with regard to the irregularities in the recruitment. It is said that on 9.5.95 report was submitted and only administrative action was recommended against the petitioner. On 19.8.95 the Sub-Area Commander, Danapur in his letter to GOG M.P. B and O Area recommended disciplinary action against the petitioner and order to that effect was given to the authorities of B.R.C. Danapur. Accordingly, tentative charges were served upon petitioner on 4.1.96 holding prima facie guilty for omission prejudicial to the good order and military reputation. In the meantime petitioner retired from service on 31.1.96. However the Army Authorities invoked Section 123 of the Army Act putting the petitioner under close arrest. It is stated in the writ petition that in February, 1996 petitioner filed Cr.W.J.C. No. 128/96 challenging his illegal detention. However, the petitioner was released from close arrest and put under open arrest. Consequently the writ petition was withdrawn/However, after completing all the formalities the petitioner was served charge-sheet on 23.2.98 and the respondents convene the Court Martial trial. The petitioner seriously objected to the validity, of the proceeding on the ground that the period of commencing of the trial u/s 122 of the Army Act has expired. The contention of the petitioner is that instead of dropping the proceeding as being barred by limitation the respondents by the impugned order dated 22.4.98 decided to commence trial against the petitioner.

4. Mr. Mihir Kumar Jha, learned Counsel appearing for the petitioner assailed the impugned order passed by the respondents for commencing of the trial as being illegal, arbitrary, capricious and without jurisdiction. According to the learned Counsel the respondents have no authority under the law to commence the trial after the expiry of the period fixed u/s 122 of the Army Act. The learned Counsel then submitted that when a preliminary objection with regard to bar of the trial was raised by the petitioner then it is incumbent upon the respondent authority to decide first the objection with regard to limitation by a reasoned order. The

learned Counsel lastly submitted that the fixation of date by the respondent u/s 122(c) of the said Act is highly arbitrary and unreasonable. Mr. Jha further submitted that the respondent authority is neither passing any order on the objection with regard to limitation nor the respondents are ready to supply the photostat copy of the order. If the objection of the petitioner is rejected, according to the learned Counsel, the petitioner is entitled to know the order that may or might have been passed on the objection with regard to limitation.

5. On the other hand, Mr. K.K. Mandal, learned Counsel appearing for the respondents submitted that the writ petition is wholly misconceived and not maintainable in view of the special provision provided under Rule 53 of the Army Rules where under such plea can be raised effectively and finding be invited. According to the learned Counsel, the petitioner ought to have revoked the said provision for the relief sought. The learned Counsel further submitted that in any view of the matter the commencement of the trial against the petitioner is not barred by limitation as per the provisions contained in Section 122(1)(c) of the Army Act.

6. Having regard to the facts stated by the parties in the affidavit and the argument advanced by the learned Counsel the only question falls for consideration is as to whether if an objection is raised as to the bar of limitation in the commencing of the trial, is it incumbent upon the authorities to pass a reasoned order on the objection regarding limitation before proceeding further for commencing of the trial. Before analysing the question it would be most appropriate to look into the relevant provision of the Army Act namely Section 122 which reads as under:

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)

(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 action 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 any exemplary manner for not less than three years with any portion of the regular Army.

From bare reading of the aforesaid provision it is manifest that no trial by the Court Martial shall be commenced after the expiry of three years. The period of three years, according to this section, commences on the date of offence or where the commission of the offence is not known to the person aggrieved by the offence or to the authority then it will commence from the first day on which such offence comes to the knowledge of such person or authority. It further provides that in a case where it is known by whom, the offence was committed, the period begins to run from 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.

7. The petitioners' contention is that the Commanding Officer who happened to be the Enrolling Officer under the Army Act has come to knowledge about the alleged irregularities while checking up of entire documents on 11.2.95 and counter-signing the same, the limitation for commencing of trial, therefore, expired on 11.2.98.

8. On the other hand the contention of the respondents is that it was not known as to who was person who committed such irregularities and it was only after preliminary inquiry the matter came into light that irregularities were committed by the petitioner. Accordingly, the case of the petitioner and others were recommended for initiating action before the competent authority who by his order dated 9.10.95 agreed with recommendation and directed for initiating action.

9. Be that as it may admittedly the objection with regard to bar of limitation raised by the petitioners by filing objection has not been disposed of by the respondent authority by a reasoned order. The submission of the counsel appearing for the respondent is that since the offence committed by the petitioner falls under Clause (c), Sub-section (1) of Section 122 of the said Act, therefore, the question of passing any separate order does not arise.

10. So far as the period of limitation of trials by court-martial is concerned Section 122 of the Act is a complete code in itself for not only it provides in Sub-section (1) the period of limitation for such trials but specifies in sub-section. (2) Thereof the offences in respect of which the limitation clause would not apply. Since the terms of the above section is absolute and no provision has been made under the Act for extension of time, it is obvious that any trial commenced after the period of limitation will be patently illegal. Such a provision of limitation prescribed under the Act cannot be overridden or circumvented by an

administrative act, done in exercise of powers conferred under the rule as held by the Apex Court in the case of Major Radha Krishan Vs. Union of India and Others, .

11. The Apex Court in the case of Union of India and others Vs. Major General Madan Lal Yadav (Retd.), , has gone in detail interpreting the words "trial commenced" observed:

It would, therefore, clear that trial means act of proving or judicial examination or determination of issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences that the performance of the first Act or steps necessary or essential to proceed with the trial

Their Lordship further observed:

It would be seen from the scheme of the Act and the Rules that constitution of Court martial for trial of an offence under the Act is a precondition for commencement of trial. Members of the Court martial and the Presiding Officer on nomination get jurisdiction to try the person for offence under the Act. On their assembly, the accused has the right to object to the nomination of any or some of the members of the Court martial or even the Presiding Officer. On the objection (s) so raised, it is to be dealt with and thereafter the preliminary report recorded after summary trial and the charge framed would be considered. The charge is required if need be or asked by the accused to be read over and could be objected by the accused and found tenable, to be amended. Thereafter, the accused would be arraigned and in his presence the trial would begin. The accused may plead guilty or not guilty if he pleads guilty, the procedure prescribed under Rule 54 would be followed and if he pleads not guilty, procedure prescribed under Rule 56 is to be followed. Before actual trial begins, oath would be administered to the members of the Court martial, the Judge-Advocate and the staff. The regular trial begins and ends with recording the proceedings either convicting and sentencing or acquitting the accused. Thus two views would be possible while considering as to when the trial commences. The broader view is that the trial commences the moment GCM assembles for proceeding with the trial, consideration of the charge and arraignment of the accused to proceed further with the trial including all preliminaries like objections to the inclusion of the members of the Court martial, reading out the charge/charges, amendment thereof, etc. The narrow view is that trial commences with the actual administration of oath to the members etc. and to the prosecution to examine the witnesses when the accused pleads not guilty. The question then emerges; which of the two views would be consistent with and conducive to a fair trial in accordance with the Act and the Rules?

12. Applying the principles of law laid down by the Apex Court in the facts of the instant case, it prima facie appears that the objection raised by the petitioners as to bar of limitation of commencement of trial has some substance. This is the

reason why the petitioners appeared to have filed Ejection as to bar of limitation and requested the respondent authority to pass order on the said objection as preliminary issue. Learned Counsel appearing for the respondent drawn my attention to Rule 53 of the Army Rule 1954, which ends as follow: - 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; or

(c) 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.

(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 had 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 finding shall be subject to confirmation like any other finding of the Court,

13. Mr K.K. Mandal submitted that according to the rule it is not incumbent upon the authority to pass a separate order on the plea of bar taken by the accused. According to the learned Counsel if the Court finds plea in bar is not proved it shall proceed with the trial and the said finding shall be subject to confirmation like any other finding of the Court, The submission of the learned Counsel does not appear to be in conformity with the affidavit filed on behalf of the respondent. In paragraph 4 of the supplementary affidavit filed on behalf of respondent Nos. 3 to 5 it is stated that the plea in bar was raised on behalf of the petitioner before the learned General Court Martial (GCM) which was considered and it was

found that the plea in bar was not proved and the same was rejected by the learned Court in terms of the Rule 53 of the Army Rules. Admittedly no such order of the G.C.M. rejecting the plea of bar has been communicated to the petitioners, Mr. Jha during the course of argument submitted that although the counsel for the respondent was asked by this Court to produce the order but the same has not been produced.

14. In my opinion, the plea of the respondent that the finding on the objection of bar is to be recorded only when the plea of bar is proved, cannot be accepted in view of the specific provision made in Section 122 of the Army Act. As stated above the provisions of limitation prescribed in the Act cannot be circumvented by administrative act, done in exercise of powers conferred under the rule.

15. But that as it may, when admittedly the plea of bar was taken by the petitioners at the first instance with regard to the validity of the commencement of proceedings and when such objection was rejected by the respondent as stated in the supplementary affidavit, the petitioner accused, as a matter of right, is entitled to a copy of that order. It is well settled that the requirement to record reasons as one of the principles of natural justice which provided exercise of power by administrative authorities. Since the act does not contemplate any exception, plea of respondent that no reason is to be recorded as per the rules, cannot be accepted. As noticed above since the objection taken by the petitioner as to the bar of commencement of trial has been rejected by the respondents, the latter is under boundened duty to supply the copy of the order to the accused petitioner, Which is the grievance made by the petitioner.

16. Having regard to the facts and circumstances of the case and discussions made hereinabove, all these three writ applications are allowed in part and the respondent authorities are directed to supply copies of the order by which the objections of the accused petitioners with regard to plea of bar of the commencement of trial has been rejected. Such order must be supplied to the petitioner within 15 days from the date of receipt of a copy of this order. The respondents are also directed not to precede any further with the trial of the accused persons for a month from the date of receipt of a copy of this order. It is made clear that after the expiry of one month from the date of receipt of a copy of this order or after the expiry of 15 days from the date of supply of copy of the rejection order the respondent authorities shall be entitled to proceed in the trial of the petitioners in accordance with law.