IN THE ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

TA/167/2009 (Writ Petition (C) no. 4957/95)

Connected with

TA/166/2009 (Writ Petition (C) no. 251/96)

COL K.S.CHAUDHARY (RETD.)
NO.5 EAST NASIRPUR ROAD
NASIRPUR EXTENSION
PALAM COLONY
NEW DELHI-110 045.

THROUGH : SH. ANIL SRIVASTAVA, ADVOCATE

...PETITIONER

VERSUS

1. **UNION OF INDIA**
   THROUGH
   SECRETARY
   MINISTRY OF DEFENCE
   SOUTH BLOCK
   NEW DELHI-110 011.

2. **THE CHIEF OF ARMY STAFF**
   ARMY HEADQUARTER
   DHQ P.O.
   NEW DELHI-110 011.

3. **GENERAL OFFICER COMMANDING IN CHIEF**
   HEAD QUARTER
   CENTRAL COMMAND
   LUCKNOW.

4. AREA COMMANDER
AREA HEAD QUARTER
BAREILLY

5. COMMANDER
HQ MEERUT SUB AREA
MEERUT CANTT. MEERUT.

6. DEPUTY DIRECTOR GENERAL
NATIONAL CADET CORPS UTTAR PRADESH
ASHOKA MARG
LUCKNOW.

7. STATION COMMANDER
STATION HEAD QUARTER
LUCKNOW.

8. COMMANDANT
R.V.C. CENTRE AND SCHOOL
MEERUT CANTT.

THROUGH : SH. ANIL GAUTAM, ADVOCATE
MAJOR AJEEN

...RESPONDENTS

CORAM :

HON'BLE SH. S.S.KULSHRESTHA, MEMBER
HON'BLE SH. S.S.DHILLON, MEMBER

J U D G M E N T
DATE : 01.02.2010

1. Both the petitions are clubbed together as the common question of law and fact are involved and are in between the same parties.

Petition no.TA/167/09 (Civil Writ Petition no.4957/95) shall be leading case. In both the petitions, the prayer has been made for setting aside the directions given vide the order no.112/IV/KSC/RSC/PC/HQ dated 16.12.1999 and subsequent order no.112/4/KSC/RSC/HQ dated 16.12.1995 and order no.112/4/KSC/HQ(II) dated 16.12.1995 (Annexure A) asking the petitioners to be present in the recording of the preliminary investigation or in Summary of Evidence. It is said that the Court of Inquiry was initiated against the petitioner after his retirement but he was not afforded any opportunity to attend the said Court of Inquiry which took place in the month of September 1993. Though the petitioner continued to make the request for permitting him to attend the Court of Inquiry and also to change the place of such inquiry as he was apprehending some threat to his life at Aligarh. The respondents at the earlier occasions convened two Court of inquiries on the same matters composed of different members but he was not given an opportunity to participate in those court of inquiries. Even the proceedings and evidence so recorded, t heir copies were not furnished to him. Those inquiries were completed and the re-examination of the witnesses in the course of investigation or for the Summary of Evidence would be permissible only as per the provisions of Section 145 of Indian Evidence Act and also for that purpose copies of the statement are to be furnished to the petitioner. The respondents were bent upon arresting the petitioner even at the

investigation stage when no material fixing up his culpability was remotely appearing.

2. The petitioner was resisted on behalf of Union of India contending that he is not cooperating in the completion of the Court of Inquiry which was ordered to be initiated de novo. He had abused the process of law by filing the petition and misusing the stay granted by the High Court. There appears no justified reason for the petitioner to contend that Court of Inquiry could not be completed for such a long period when he himself on the strength of stay order was avoiding his appearance. There is no arbitrariness on the part of the respondents which can be the subject matter of prejudice to the petitioner.

3. In order to appreciate the points involved in this case a brief resume of the facts may be made. The petitioner was commanding NCC Group HQ (Gp HQ) Aligarh from 29.06.1989 till he attained the age of superannuation on 31.05.1993. When he took over the command of the Group, it's functioning including the station CSD Canteen was in complete shambles and was virtually at the bottom of fourteen Group HQs of NCC Directorate, U.P. There were also certain problems

pertaining to finances and audit objections. He made all possible efforts to rectify those deficiencies and brought this group to overall second position and also won trophies and appreciation from Directorate. His sincere efforts caused inconvenience to rival groups.

4. It is next contended that some of the irregularities in the functioning of canteen came to his notice. He stopped counter signing the Canteen accounts ledger and demanded updating of the accounts and reconciling the same with the proceeding properly conducted by Monthly Stock Training Boards (MSTBs) after evaluation. Sufficient time was given to Lt Col. Sudhir Kumar, the then Canteen officer-in-charge (O i/c) for the purpose of reconciling the figures but he did not carry out his instructions. He also came to know that the irregularities are perpetuating from the last 16-17 years resultantly causing financial discrepancies. The CSD debit/credit vouchers were not taken note of, the rates were not revised on the price increase as and when intimated by the CSD. He on such basis sent report requesting the higher authorities to get audit of canteen so that responsibility of the recalcitrants may be fixed. Petitioner was suddenly called to appear as a witness in the Court of Inquiry assembled at NCC Group, Headquarters Aligarh vide NCC HQ Aligarh Letter no.4069/(C)/ 40/Staff/C of 1/CSD/Q dated 13.08.1993. The

petitioner was not in a position to attend the court of inquiry on that date because of his sickness but he is also apprehending danger to his life from two of the officers involved in this matter as they had also threatened him and so desired for the change of place for the purpose of holding court of inquiry.

5. The petition was resisted on behalf of Union of India with the averments that the petitioner was serving with NCC Group HQ Aligarh during June 89 to 31.11.1993 as Group Com. NCC Group HQ, Aligarh. That NCC Group Aligarh was running a station canteen at Aligarh where number of service/Ex-Service Personnel were attached for Canteen facilities. The manpower for running the canteen was drawn from various NCC Units under NCC Group HQ Aligarh. During the period when the petitioner was In-charge of the canteen, the Chartered Accountant who audited the accounts for the period from February 1991 to December 1991 found loss incurred in liquor section of the canteen to the tune of Rs.11,587.80 and the same was also reflected in the Audit Report dated 25.03.1992 and 25.04.1992. M/s.Rasool Singhal & Company, Chartered Accountant auditing the accounts of Station canteen, NCC Aligarh noted the following discrepancies from the period February 1991 to December 1991:

(a) The value of excess issue in stock ledger wholesale price was Rs.10,392.30 (Retail price being Rs.11,587.80) and the value of the short issue in stock ledger at wholesale prices is Rs.1,281.36 (Retail price Rs.1,436.35). Thus the net excess issue at wholesale price was Rs.9,111.03 (Retail price being Rs.10,151.45).

Having noticed the deficiencies the station HQ Mathura ordered the Court of Inquiry vide order no.2010/205/A dated 31.07.1993 based on allegations made by Maj Raghbir Singh (Retd.) and Sh.A.B.Sharma against the petitioner. In the Court of inquiry the following tentative charges were framed against the petitioner:

(i) Sale of liquor on bogus bills and fictitious liquor permit cards by Canteen Staff during July 90 to December 1991 with his concurrence.

(ii) Allowing JC-158805 Sub Ranbir Singh, Canteen JCO during the period July 1990 to December 1990 to keep large amount of sales/proceed cash, ranging between Rs.10,000/- (Rupees Ten Thousand only) to Rs.1,00,000/-(Rupees One Lakh only) as "Cash in Hand" in violation of laid down instructions/Standing Operating procedure on the subject.

(iii) Permitting the sale of liquor on 30 and 31 October 1990, 01 to 13 November, 1990, 97 to 17 Dec., 1990, 25 to 31 December 1990 and 01 to 24 Jan, 1991, the days then full/partial curfew was inforce and sale of liquor was prohibited.

(iv) Not reporting the losses amounting to Rs.11,587.80 (Rupees eleven thousand five hundred eighty seven and paise eighty only) in the Canteen, discovered during the audit of the account, for the period 01 Feb, 91 to 31 Dec, 91, to higher authorities as per SAO 18/S/80 and attempted to suppress the loss.

(v) Indenting liquor to the extent of approximately 16,500 bottles which was far in excess of monthly entitlement of approximately 7,000 bottles and permitting sale of excess liquor on bogus cards for wrongful gains.

(vi) Instigating IC-215723 Lt Col Vijay Suri of USS Gp.HQ Aligarh, NCC/PI/11862Y Lt.Col. BG Raghava of 3 UP Girls Bn NCC and IC-1510 GK Lt Col P.P.Mittal of I UP Engrs. Coy NCC, to earn money by illegal sale of liquor from the station canteen, Aligarh, to civilians by fictitious adjustment in daily sale summaries against bogus cards.

6. The Court of Inquiry could not be completed before the superannuation of the petitioner and so that inquiry was cancelled by the NCC Directorate (UP) vide letter no.A-3203 dated 23.07.1993. The same Court of Inquiry was rescheduled vide Station Headquarter, Mathura convening order no. 2010/205/A dated 31.07.1993 to be presided over by Col T.N.Mehrotra. In the second Court of Inquiry repeatedly summons were sent to the petitioner but he did not appear and resorted to the filing writ petition no.4957/95 on 22.12.1995 and second writ petition no.251/96 on 16.01.1996.

7. It is strenuously argued by the learned counsel for the petitioner that the first Court of inquiry was dropped against the petitioner construing it to be fractured one. Thereafter necessity was felt for passing the fresh convening order no.2010/205/A dated 31.07.1993 whereby Col T.N.Mehrotra was appointed to be Presiding Officer. It is said that the order dated 31.07.1993 was not in accordance with the provisions of law. If something was deficient in recording of the court of inquiry, the respondents could at the most invoke the provisions of Army Rule 179 (5). By quashing the earlier statement recorded in the course of Court of Inquiry was not within the powers of the authority passing fresh

convening order for the same. Army Rule 179, however, does not in any way effect the power of the convening authority to direct further recording of the evidence but nothing could be pointed out from the side of the respondents that the Authority is free to set aside any part of the statement when the earlier inquiry was incomplete or frustrated one. He ought to have passed the order for proceeding further from the stage when the so called fractured Court of Inquiry was left. In the circumstances which were posed by the respondents it could only be possible to continue with the inquiry from that very stage and additional witnesses ought to have been recorded. In this background when the petitioner was asked to face fresh court of inquiry, he had legitimate cause to challenge the order of the Convening of fresh Court of inquiry before the High Court. There appears to be no intention on the part of the petitioner to thwart the progress of the Court of Inquiry. Alternatively it is submitted that if it is considered that it was the discretion of the competent authority to have initiated the Court of Inquiry he ought to has considered the request for the change of venue of the court of inquiry as he was apprehending some danger to his life. He had also expressed his willingness to face the Court of Inquiry but no useful purpose is going to be served as the trial of the alleged offence would be barred by limitation. In that regard it has also been mentioned that the so called embezzlement/offence relates to the year 1991. At that time the period of limitation was three years from the

date of such offence. In that context Section 122 which was applicable at the relevant time may be extracted here 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 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).....***

8. As per report of the Chartered Accountant the so called shortcomings/embezzlement/defalcation referred to the period from February 1991 to December 1991. The period of limitation of three years has already been expired before filing of this writ petitions by the petitioner. However much emphasis has been laid from the side of Union of India that the period of limitation is to be construed under the Army

Act Section 122 as amended by Act 37 of 1992 whereby the words "from the date of such offence" have been substituted "from the date when the identity of offender is known to the authority competent to initiate action". This amended provision would not have retrospective effect as the alleged offence had taken place before to the promulgation of this amended provision. The matter with regard to attaching retrospectively to the amendment provisions/amendment in the statute came for consideration before the apex court in the case of ***Gurbachan Singh Vs. Satpal Singh and Ors. JT 1989 (4) SC 38 : 1990 (1) SCC 445,*** the court was called upon to consider whether Section 113A of the Evidence Act that created a presumption as to abetment of a suicide by a married woman would operate retrospectively or prospectively. The court held that:

> ***The provisions of the said Section do not create any new offence and as such it does not create any substantial right but it is merely a matter of procedure of evidence and as such it is retrospective and will be applicable to this case. It is profitable to refer in this connection to Halsbury's Laws of England, Fourth Edition, Volume 44 page 570 wherein it has been stated that :***
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> ***"The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie***

prospective and retrospective effect is not to be given to them unless, by express words or necessary implications, it appears that this was the intention of the legislature....”

It has also been stated in the said volume of Halsbury’s Laws of England at page 574 that :

“The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.”

The amended provisions of Section 122 of Army Act are in the nature of substantive law and would not have retrospective effect.

9. The amendment in the limitation clause would be prospective and the case of the petitioner is to be examined in the context of the unamended provisions of Section 122 of Army Act. This bar of limitation goes at the root of the matter and when it is appearing to be barred by limitation, no useful purpose would be served if the petitioner is compelled to attend the Court of Inquiry and then at the final stage to drop the prosecution on the point of limitation. In the case of ***Nohar Lal Verma***

Vs. District Cooperative Central Bank Limited, Jagdalpur, (2008) 14 SCC Pg.452 the Hon'ble Supreme Court observed as under:

> ***Sub Section (1) of Section 3 of the Limitation Act, 1963 reads as under:***
>
> ***"Bar of limitation-(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence."***
>
> ***Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. <u>In other words, even in absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation.</u>***

10. The court of inquiry which are still pending against the petitioner and there is nothing on record to attribute that such delay has occurred on account of the petitioner and further the question of filing the writ petitions have no relevance as they were brought only after the expiration of period of limitation. In the given circumstances the

prolongation of court of inquiry would be of no use except to cause harassment to the petitioner.

11. ***Consequently both the petitions i.e. TA/167/09 and TA/166/09 are allowed and the order no.112/4/KSC/RSC/PC/HQ dated 16.12.1995 (Annexure A) and subsequently order no. 112/4/KSC/ RSC/HQ dated 16 December 1995 and order no.112/4/KSC/HQ (II) dated 16 December 1995 are set aside.***

S.S.DHILLON
(Member)

S.S.KULSHRESHTA
(Member)

PRONOUNCED IN OPEN COURT
ON 01st FEBRUARY, 2010