Court No. 1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,

LUCKNOW

ORIGINAL APPLICATION NO. 70 OF 2012

Friday this the 31st day of August, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

No. 13983728 A Nk/DH Pratap Singh
Son of Shri Dault Singh
1 Corps Dental Unit
C/o 56 APO (Mathura)

……Applicant

Ld. Counsel for the Applicant : **Shri D.S. Kauntae, Advocate**

Versus

1. The Union of India, through Secretary,
Ministry of Defence, South Block,
DHQ P.O. New Delhi-110011.

2. The Chief of Army Staff,
Army Headquarters, South Block
DHQ PO New Delhi – 110011.

3. Commanding Officer
Military Hospital, Danapur Cantt.(Bihar)

4. Officer-in-Charge
Records, Army Dental Corps
Lucknow. (UP)

……Respondents

Ld. Counsel for the Respondents : **Shri Amit Sharma, Ld. Counsel for Central Govt.**

ORDER

"Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, and he has claimed the reliefs as under:-

> *"(a) Set aside the proceedings of Summary Court Martial held on 28 and 29 Aug 2008 against the applicant including its findings and sentence, being arbitrary, illegal and unfair.*
>
> *(b) Direct the respondents to erase the sentence of 'Service Reprimand' from the record of service of the applicant with effect from the date it was awarded i.e. w.e.f. 29 Aug 2008.*
>
> *(c) Direct the respondents to restore the seniority of the applicant to its original place and grant all consequent benefits flowing therefrom.*
>
> *(d) Pass any other or further order(s) which this Hon'ble Tribunal considers appropriate in the facts and circumstances of this case."*

2. In this O.A., the applicant has challenged the punishment of severe reprimand inflicted to him by the Summary Court Martial (in short 'SCM'). At the time of admission of this O.A., a question was raised regarding the maintainability of the instant O.A. challenging the order of severe reprimand. The said point was decided vide order dated 12.10.2012. The relevant part of the said order is reproduced as under :

> *"Order dated 12.10.2012*
>
> ***ORDER***
>
> ***"Hon'ble Mr. Justice B.N. Shukla, Member (J)"***
>
> *……..*
>
> *04. The present appeal has been preferred against SCM proceeding which were concluded on 29-8-2008. Section 3(o) of the AFT Act, 2007 deals with "**Service matters**". There is exclusion clause (i) to (iv). In Clause – (v) Summary Court Martial has not been included in "service matters" except where the punishment is of dismissal or imprisonment for more than*

three months. "Summary disposals and trials" has been explained in Section 3(p) of the said Act. Section – 15 deals with jurisdiction, powers and authority in matters of appeal against Court martial wherein this Tribunal has been empowered to exercise jurisdiction in relation to appeal against any order, decision, finding or sentence passed by a Court martial or any matter connected therewith or incidential thereto. In sub-section (2) there is provision for filing appeal in this Tribunal. There is saving clause in sub-section (1). The power of the Tribunal in the matter of appeal is subject to saving clause wherein it is mentioned that "save as otherwise expressly provided in this Act", the Tribunal shall exercise the powers under section 15 of the Act. In the present case the appellant was awarded punishment of severe reprimand and SCM proceedings have been challenged on various grounds. Section – 14 of the Act if read along-with Section 15 of the Act then this Tribunal has been empowered to hear the appeal against any order, decision, finding or sentence passed by a Court martial or any order connected therewith or incidental thereto. Under sub-section (2) of Section – 15 even individual, if aggrieved by an order passed by the Court martial has been authorized to prefer an appeal in the prescribed manner. We are not inclined to accept the contention raised on behalf of the respondents that this Tribunal has no jurisdiction to entertain the appeal filed on behalf of the appellant who has pointed out the grievance against the SCM proceeding and has challenged it before us by filing appeal under section 15 of the AFT Act, 2007.

05. We ***admit the appeal****.*

06. Learned Standing Counsel appearing for the respondents is allowed time to file objection against the memo of appeal.

07. List this case on ***30-11-2012*** *for hearing, on which date relevant record relating to SCM proceeding, shall be produced by the Standing counsel.*

Sd/-x x x x x x *Sd/-x x x x x x*
(Lt. Gen. B.S. Sisodia) *(Justice B.N. Shukla)*
Member (A) *Member (J)"*

3. In this case, learned counsel for the applicant has vehemently argued that the SCM proceedings were barred by time. In reply to the said arguments, learned counsel for the respondents has argued that this point was raised by the applicant on 22.05.2017 before this Tribunal and the Tribunal has given a specific finding that the knowledge should be of the authority who is competent to initiate the disciplinary action. On the basis of this observation in the order, it has been argued that the said finding has become final

and limitation shall run from the date of knowledge to the officer competent to initiate disciplinary action. So the SCM was not barred by time. At this stage, we would like to reproduce the order dated 22.05.2017 which reads as under :

> *"Present : Shri D.S. Kauntae, Ld. Counsel for the applicant, and Shri Amit Sharma, Ld. Counsel for the respondents, assisted by Maj Soma John, OIC Legal Cell.*
>
> *A preliminary objection has been raised by the learned counsel for the Applicant to the effect that the case proceeded against the Applicant is barred by limitation in view of the provisions contained in section 122 of the Army Act.*
>
> *The submission of Shri Kauntae appearing for the Applicant is that Major General Shamsher Singh in his statement as PW 2 stated that he had come to know regarding the offence in question through letter of Headquarters Recruiting Zone dated 19.12.2004. He further stated that convening order was passed on 12.03.2005 pursuant to which Court of enquiry was conducted. Final order for disciplinary enquiry was passed on 29.12.2005 by the Commanding officer namely Brigadier S.K.Brijeshwar. In pursuance of the above, the summary Court Martial was held on 29.08.2008.*
>
> *The submission is that PW 2 in his statement has stated that he had come to know of the allegations in question on 29.12.2004 and it is on this count that the case is barred by time On the other hand learned counsel for the respondents submits that it is the commanding officer who is empowered under the Army Act to initiate disciplinary inquiry and in the instant case the Commanding officer was Brigadier S.K.Brijeshwar who had directed for disciplinary inquiry vide order dated 29.12.2005.*
>
> *Undoubtedly, knowledge of Maj General Shamsher Singh does not seem relevant for the purpose of the present controversy since he was not the Commanding officer under section 122 of the Army Act. The Army Act categorically speaks that the knowledge should be of the Authority who is competent to initiate disciplinary action. Undoubtedly Brigadier S.K.Brijeshwar was the commanding officer who was authorized to initiate action against the Applicant and it was Brigadier S.K.Brijeshwar who had passed the order for disciplinary action on 29.12.22005.*
>
> *Learned counsel for the respondents relied upon the decision of Apex Court in Union of India and Ors Vs V.N.Singh 2010 (4) SCR 454, in which the Apex Court held that the date of passing of order by the Commanding officer to initiate disciplinary action shall be the date of knowledge of the authority authorised to take action for the purposes of section 122 of the Army Act.*
>
> *On the other hand, learned counsel for the petitioner placed reliance on a subsequent decision.*

Be that as it may we will record our elaborate finding while deciding the case on merit including the question with regard to limitation.

List this case on 04.07.2017 for further hearing on which date learned counsel for the respondents shall produce the entire original record including the medical signed by the Applicant.

At this stage, learned counsel for the Applicant submits that the Applicant is to retire on Ist June 2017.

In view of the above, it is directed that the retirement of the Applicant shall be subject to further orders passed by the Tribunal. However on the next date, the respondents shall apprise the Tribunal whether any action has been taken against the Medical Officer who issued the fitness certificate of the persons who have allegedly been cleared by the Applicant.

Let a copy of this order be supplied to OIC Legal Cell forthwith in order to enable her to process the same for onward transmission to the authority concerned for compliance.

On the next date, the parties shall submit chart of dates and events and also compilation of cases. "

4. A perusal of the aforesaid order shows that though the point was raised at the time of admission of the O.A., but virtually this question of SCM being barred by time, was left open and it was directed to be decided while deciding the case on merits, including the question with regard to limitation. Since the question of limitation was left open by this Tribunal, therefore, any observation made by the Tribunal would only be an opinion and cannot be treated to be a finding. Therefore, we will deal with the point of limitation on merits.

5. Before proceeding further in the matter, we would like to give a brief description of the facts of this case.

The applicant was enrolled in the Army Dental Corps as Dental Hygienist on 04th May 1991. He worked with complete devotion to duty and honest approach and he was promoted to Naik in due course. The applicant was posted as Dental Hygienist in Military Dental Centre (MDC in short), Danapur w.e.f. 25th August 2002. MDC Danapur was an independent unit and functioned under Command of HQ JOB Sub Area and was not under command of MH Danapur. The name of the applicant was

falsely implicated by some civilian person, who was alleged to have been recruited on a fake Rahdari certificate. It was alleged by that person that the applicant has conducted his medical examination. The case of the applicant is that neither he had conducted the medical examination nor he was officially competent to conduct the medical examination. He has also pleaded that the recruitment medical examination was conducted by the Medical Officer posted with BRO Danapur or in his absence at MH Danapur. Based on the said false allegation, a Court of Inquiry was convened on 12th March 2005 to investigate the role of the applicant in touting activities. However, no worthwhile evidence could be adduced against the applicant in the said Court of Inquiry. Medical documents, alleged to have been prepared by the applicant, were not produced. SCM was conducted on 28th and 29th August 2008 by Col Rajbir Singh. During SCM, two witnesses were examined. PW 1 Lt Col L.M.Kandpal and P.W.2 Maj Gen Shamsher Singh, who have stated as under :

Prosecution 1st witness *:*

"IC-44542K Lt Col LM Kandpal, HQ, DG NCC, New Delhi being duly affirmed is examined by the court. I was serving as a Recruiting officer at HQ Recruiting Zone (B&J) Danapur. On 18 Dec 2004 a Police Inspector from Secunderabad cae to HQ Recruiting Zone Danapur to investigate a case of fake enrolment. He produced Rahdari certificate based on which some candidates reported to 1EME Centre Securnderabad. The Rahdari he had produced had a stamp on my name with a signature. The inspector was informed that neither the stamp nor the signature were mine. Office copy of another Rahdari was shown to him with the actual stamp and my signatures. The DDG Recruiting (B & J) was informed. The inspector then wanted to go to MH Danapur and on his instructions I was also sent. In the office of the CO MH Danapur the civilian who had come with Police Inspector was interrogated by the CO MH. At one point of time the CO spoke the someone on intercom and instructed to fetch the group photograph of the office were he had rung up. As soon as the person entered the office with the photograph he was identified by the civilian as the person who had conducted his medical.

CROSS- EXDAMINED BY THE ACCUSED

Q-2 – Question to the Witness-

IC-44542K Lt Col LM Kandpal you have stated that ob 18 Dec 2004 to the Office of the CO Military Hospital Danapur the civilian Boy who was brought by Sub Inspector Zafar Mehnood of Police Station Bolaram, Secunderabad, had identified the person who had brought the g roup photograph from MDC Danapur as the person who had performed the medical examination. Do you know the civilian?

A2- Answer by the witness-

The civilian brought by the inspector was a case of fraudulent enrolment. He had not been enrolled by me but he did identify you. Since I had not enrolled him I do not know him.

Q3- Question to the Witness-

Did the Sub Inspector from Secunderabad produced any certificate of medical examination to addition to the Rajdari Certificate?

A3- Answer by the Witness-

No he only produced a fake Rahdari certificate.

NO QUESTION BY THE COURT.

Amy Rule 141(2) complied with.

Sd/- Rajbir singh
Colonel
The Court."

Prosecution 2nd witness

"MR-03241L Maj Gen Shemsher Singh, Commandant Command Hospital, Western Command, Chandimandir being duly affirmed is examined by the Court. ***I was serving as Commanding Officer of Military Hospital Danapur.*** *On 18 Dec 2004 between 1200hrs and 1230hrs approximately, Lt Col LM Kandpal of HQ Recruiting Zone (B & J) came to my office and informed me that a Police Sub Inspector has come from Secunderabad with a person under his custody who had been fraudulently enrolled in EME Centre Secunderabad from Danapur. I called Sub Inspector Zafar Mehmood of Police Station Bolaram Secunderabad to my office. Sub Inspector ZafarMehmood informed me that six (06) candidates who had been fraudulently enrolled in EME Centre Secunderabad had been handed over to Bolaram Police station in Secunderabad. One candidate of these six had been brought by him to Danapur to complete the investigations. I called this boy who had been brought by Sub Inspector Zafar Mehmood to my office and enquired from him as to what had transpired at the time of his enrolment. I was told by this candidate thazt he with number of other persons had been brought in morning hours on a holiday for conduct of Medical examination. He referred to a person by the name of "Dubey uncle" who was coordinating the activities of medical examination. This boy also described the lay out of furniture and office articles in Military Dental Centre Danapur where the alleged medical examination had been conducted on him and other candidates. As I had number 13947157F Hav/AA SB Dubey posted to MH Danapur and performing the duties of CHM. I called for*

his photographs from his personal record of service. Hav/AA SB Dubey had proceeded for formalities for release from service and was physically not available in the unit on 13 Dec 2004. This boy who had been brought Secunderabad by Sub Inspector Zafar Mehmood, did not indentify photo of Hav/AA SB Dubey as belonging to "Dubey Uncle" being referred to him earlier. I also called for a group photograph of all personnel posted in Military Dental Centre Danapur which had been clicked during the visit of DGDS. The boy saw the photograph and identified NK/DH Pratap Singh as the person who had conducted the medical examination on him. I therefore called No 13983728A NK/DH Pratap Singh of Military Dental Centre Danapur to come to my office. The candidate who had been brought from Secunderabad saw NK/DH Pratap Singh and identified his as the person who had conducted the medical examination on him in the premises of MDC Danapur. No.13983728A NK/DH Pratap Singh of MDC Danapur was asked by me to tell the truth but he denied any involvement in conduct of medical examination or of any wrong doing. Sub Inspector Zafar Mehmood wanted NK/DH Pratap Singh to be handed over to him for further investigation. As MDC Danapur was an independent unit under control of HQ JOB Sub Area I directed Sub Inspector Zafar Mehmood to go and meet Col 'A' in HQ JOB Sub Area and seek permission from them for the purpose. Lt Col LM Kandpal of HQ Recruiting Zone (B & J), Sub Inspector Zafar Mehmood and the boy under arrest from Bolaram Police Station, Secunderabad were taken sent to HQ JOB Sub Area for further necessary action.

CROSS-EXAMINATION BY THE ACCUSED

Question 4- Question to the witness-

MR-03241L Maj Gen Shamsher Singh, sir, do you know the civilian boy who had been brought by Sub Inspector Zafar Mehmood of Police Station Bolaram, Secunderabad to your office on 18 Dec 2004?

A-4- Answer by the witness-

No I do not know the name of the individual. I met him for the first time on 18 Dec 2004.

Q 5-Question to the witness-

Will you be able to identify him if he is produced in the court?

A5- Answer by the witness-

I may perhaps to be able to identify him.

Q6- Question to the witness-

When the boy informed you that his medical examination was carried out in MDC Danapur, did he produce any document of medical examination or did you ask him for any medical examination document?

A6- Answer by the witness-

He did not have any medical documents at the time. Based on Medical examination a Rahdari certificate would have been issued to him and the individual asked to report to EME Centre Secunderabad. Perusal of the documents would have found them to be fake and on that basis he and five other candidates similarly enrolled would have been handed over at the Police Station Bolaram Secunderabad.

NO QUESTION BY THE COURT.

Amy Rule 141(2) complied with.

Sd/- Rajbir singh
Colonel
The Court."

6. It is submitted that the person, who is alleged to have been examined by the applicant, was not examined in the SCM nor the medical examination documents, alleged to have been conducted by the applicant, were produced. It was a case of no evidence. The applicant pleaded not guilty to the charge, but the SCM held the applicant guilty and awarded the sentence of severe reprimand, which has adversely affected the career of the applicant in his future prospect, promotion and length of service. In the SCM the charge against the applicant was as under :

"CHARGE SHEET

The accused, No 13983728A Naik (Dental Hygienist) Pratap Singh, Military Dental Centre Danapur Cantt, attached with Military Hospital Danapur Cantt, is charged with :-

ARMY ACT SECTION 63 ***VIOLATION OF GOOD ORDER AND ISCIPLINE***

in that he,

at Military Dental Centre Danapur Cantt between Jul 2004 and Nov 2004 while performing the duties of Dental Hygienist at Military Dental Centre Danapur, improperly and without authority conducted medical examination of persons named at Appx A to this charge sheet."

7. The submission of the learned counsel for the applicant is that in the SCM, PW 2 Maj Gen Shamsher Singh, who was the Commanding Officer of the applicant at the alleged time of incident, has stated during SCM that he got the full knowledge of

the incident and also the identity of the applicant on 18th December 2004. He has admitted that Lt Col LM Kandpal, HQ Recruiting Zone, came to his office and informed him that a Police Sub Inspector has come from Secunderabad with a person under his custody who had been fraudulently enrolled in EME Centre, Secunderabad. Thereafter the detail of the steps taken by this witness has been narrated by him in his evidence. It has come in his evidence that the candidate, who had been brought for Secunderabad, saw the photograph of NK/DH Pratap Singh and identified him as the person, who had conducted the medical examination on him in the premises of MDC Danapur. On the strength of this statement of PW2, the submission of the learned counsel for the applicant that the entire incident and the identify of the person involved came to the notice of the applicant on 18.12.2004, but even then the SCM proceedings commenced on 28th August 2008 when the charge was framed. It transpires from perusal of the record that the accused pleaded not guilty of the charge and gave statement in his defence.

8. The submission of the learned counsel for the respondents is that the statement of PW 2, by itself, is not sufficient to fix the date for commencement of the limitation period. The limitation period has to commence from the date when Court of Inquiry gives its finding.. At this juncture, we would like to mention brief findings of the Court of Inquiry, which reads as under :

> *" OPINION OF THE COURT*
>
> *The Court is of the opinion that-*
>
> *(a) Medical exam of fakely enrolled candidates despt by touts from Danapur Cantt to various Trg Centres in early Dec 2004 had been performed at MDC, Danapur Cantt during the pd Jul 2004 and Nov 2004.*
>
> *(b) No.13983728A Nk/DH Pratap Singh of MDC, Danapur Cantt had performed med exam of fakely enrolled candidates at MDC, Danapur Cantt during the pd Jul 2004 and Nov 2004.*

(c) No.4273989M L/Nk Nirbhay Kumar of 9 BIHAR, while on att at MDC, Danapur between Feb 2004 and Dec 2004 had failed to report irregular rtg activity inside MDC Danapur when he was solely responsible for security of MDC premises during non working hours.

(d) No.4273989M L/Nk Nirbhay Kumar has attempted to mislead the Court by giving false statements.

(e) The following civilians have been involved in touting at Danapur:-

(i) Amit (Ram Naresh), with Mob Phone 9431452588.
(ii) Vishnu Yadav, S/o Balraj Yadav, Vill-Barhata, PS&PO Pipiganj, Dist Gorakhpur (UP).
(iii) Akhilesh (alias Manney) S/o Dayanand Yadav, Vill-Hafiznagar, PS Gulharhiyan, Dist Gorakhpur (UP).
(iv) Kalim, S/o Tawarak, Vill-Hafiznagar, PS Gulharhiyan, Dist Gorakhpur(UP).

(f) SOP on security of MDC, Danapur should be formulated.

PRESIDING OFFR: Sd/- IC32735X Lt Col Raghvendra Singh
MEMBER Sd/- IC 54738A Lt Col Bharat Joshi."

9. Learned counsel for the respondents has tried to distinguish between the date of knowledge and the date of actionable knowledge to initiate action. It is argued on behalf of the respondents that the actionable knowledge of the incident must be taken to be the knowledge to the person, who was competent to pass order for initiating the SCM proceedings. It is submitted that the order for convening the SCM proceedings was passed by Brig SK Vijeshwer, who has passed the convening order on 29.12.2005 and after this order, the SCM commenced on 29.08.2008 i.e. within three years from the date of said convening order.

10. Now the sole point to be considered to resolve the controversy involved in this case is as to what would the date on which the period of limitation shall commence.

11. On this point, we would like to mention Section 122 of the Army Act, which reads as under :

> ***"122. <u>Period of limitation for trial</u>.***— *(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 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 sec*-37.
>
> *(3) In the computation of the period of time mentioned in sub-section (1), time spent by such person as a prisoner of war, or in enemy territory, or in adding 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."*

12. On behalf of the respondents, our attention has been drawn towards Army Order No.01086/122/AG/DV-1(P) dated 12th April 2001, which describes as to when the period of limitation shall run, has been clarified. It has also commented on the point of relevance of Court of Inquiry. Para 10 of this Army Order is relevant in this case, which reads as under "

> "*10. <u>Period of limitation reckons from the moment there is knowledge</u>. The expression "first day on which such offence (or the identity of the offender) comes to the knowledge" employed in Sec 122, would appear to imply that the period of limitation must reckon from the earliest date of which the requisite knowledge was acquired by the aggrieved person or the authority competent to initiate action. The period of limitation, therefore, must be deemed*

to reckon from the moment there is knowledge and not from any hypothetical point on the assumption of knowledge. The said expression cannot be equated with the first date on which the alleged offence ought to have come to the knowledge of the person/authority concerned had he been diligent or had not delayed making the inquiry. No hard and fast rule or a mathematical preposition can be laid down for establishing the fact as to when does the competent authority come to know of the commission of the offence is known to the said authority from the date of the commission of the offence and there is no requirement of an investigation of further investigation in the matter for this purpose, the period of limitation would, undoubtedly, commence from such date itself. Indeed, the problem arises when there is a need to establish either the identity of the offender or the commission of the offence or both by the competent authority to initiate action, by way a C of I or any other investigative method. In such cases, to obviate, Indl interpretations, and for the sake of uniformity, the date of knowledge (s) of the C of I or such other investigation in regard to commission of the offence (s) by the delinquent (prospective accused). If the authority concerned does not agree with the findings (s) of the Court etc, which has prima established the commission of the offence and the identity of the offender, and consequently requires/directs further investigation, the period of limitation can not be said to have commenced as the competent authority is not yet sure of either the commission."

13. Apart from it, in Para 9 of this Army Order, the relevance of Court of Inquiry has also been discussed, which reads as under:

"*9. **Relevance of Court of Inquiry**. The holding of the C of I, the dates its commencement completion of finalization by a competent authority, peruse, have no direct bearing on the period of limitation, which, as mentioned above, would begin to run from the moment there is requisite knowledge on part of the person aggrieved or authority competent to initiate action. The various dates and details pertaining to the C of I, held in a given case, would be relevant only to the extent to which these may help in determination of the date of which requisite knowledge was acquired. Holding of a C of I being a sine-qua-non for a disciplinary action under the Army Act, the very purpose of*

holding it usually, is either to determine nature of the offence, if any committed or to establish the identity of the offender in complicated cases."

14. Per contra, learned counsel for the applicant has argued that even according to this Army Order, the date of commencement of the period of limitation, would be the first date when the offence and the identity of the person involved, came to the knowledge of the authority competent to initiate action. On this point, he has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **Union of India & Others vs VN Singh** (2010) 5 SCC 579, wherein the Hon'ble Apex Court held in Paras 28, 29 and 35 as under :

"28. Section 122 is a complete Code in itself so far as the period of limitation is concerned 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 Section is in absolute terms 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. The question of limitation to be determined under Section 122 of the Act is not purely a question of law. It is a mixed question of fact and law and therefore in exercise of Writ Jurisdiction under Article 226 of the Constitution, ordinarily the High Court will not interfere with the findings of court Martial on question of limitation decided under Section 122 of the Army Act.

29. Section 122 of the Army Act in substance prescribes that no trial by Court Martial of any person subject to the provisions of the Act for any offence shall be commenced after the expiration of a period of three years. It further explains as to when period of three years shall commence. It provides that the period of three years shall commence on the date of the offence or 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.

35. It is relevant to notice that the contents of the letter dated May 27, 1993 written by Brigadier K.S.Bharucha to Major General ASC Headquarter Western Command do not mention at all, the respondent as the person who had committed the irregularities except for a reference that there had been certain procedural lapses on the part of 4RPD. The

said letter was addressed by Brigadier K.S.Bharucha apparently with a view to closing the case in total disregard to the facts and the circumstances emerging from the case. This fact has been observed by the GOC-in-C Western Command who while giving direction to initiate administrative action against Major General K.S.Bharucha ordered initiation of departmental inquiry against the respondent. Even the reference to ACR of the respondent written by Major General Suhag only mentions that the respondent had failed to monitor the local purchase of Hygiene and Chemicals but there is no mention therein that the respondent was himself responsible for the irregularities found to have been committed in the purchase of Hygiene and Chemicals. It was only after the detailed investigation by Staff Court of Inquiry that the irregularities committed by the respondent and his role in the purchase of Hygiene and Chemicals came to light. was only after the detailed investigation by Staff Court of Inquiry that the irregularities committed by the respondent and his role in the purchase of Hygiene and Chemicals came to light."

15. Reliance has also been placed on the pronouncement of the Hon'ble Apex Court in the case of **Rajvir Singh vs. Secretary, Ministry of Defence & Others** (2012) 3 SCC 167), wherein the Hon'ble Apex Court in Paras 26 and 27 has observed as under:

"26. In both the cases, the authority competent to initiate action against the delinquent officer had passed the direction for taking action against the delinquent officer on the same day it came to know about the commission of the offence and the identity of the offender. Hence, in both cases, at some places, the date of knowledge and date of the direction to initiate action against the delinquent officer are used interchangeably and that is the reason for the Tribunal to misinterpret the decision to mean that the period of limitation would commence from the date of direction to initiate action against the delinquent officer.

27. The Tribunal is also incorrect in observing that on May 7, 2007, GOC-in-C, CC had formed only a tentative opinion about the appellant because on that date he made the recommendation to the Integrated HQ for investigation into the act of omission/commission in respect of Major General S.P. Sinha and any other higher authority, including the appellant. It is noted above that the recommendation of the GOC-in-C, CC to the Integrated HQ was only in regard to Major General S.P. Sinha. So far as the culpability of the appellant is concerned, he had already formed the opinion on the basis of the report of the Court of Inquiry and the recommendation of the GOC, MB Area. Moreover, when the Integrated HQ vide its letter of

February 19, 2008 pointed out that the appellant was indicted by the Court of Inquiry ordered by him and in his case it was for him to "append directions", there was no further material before the GOC-in-C, CC in connection with the appellant."

16. Reliance has also been placed of the pronouncement of Hon'ble the Apex Court in the case of **JS Sekhon vs. Union of India & Others** (2010) 11 SCC 586), wherein Hon'ble Apex Court in Paras 19 and 20 has observed as under :

"19. *In our considered opinion, the expression `person aggrieved by the offence' is irrelevant in the facts and circumstances of the present case and what is relevant is the `knowledge of the authority competent to initiate action'. The aforesaid acts were committed against the Government and not a natural person. In the facts of the present case no single person can be said to be aggrieved person individually due to the act of defrauding the Army. What is applicable to the facts of the case is the expression when it comes to the knowledge of the competent authority to initiate action.*

20. In coming to the aforesaid conclusion, we are fortified by a recent decision of this Court in Union of India and Others Vs. V.N. Singh reported in (2010) 5 SCC 579 wherein it was held thus:-

32....It is only the natural persons who can be hurt, angry, upset or wronged or maltreated, etc. If a government organisation is treated to be an aggrieved person then the second part of Section 122(1)(b) i.e. "when it comes to the knowledge of the competent authority to initiate action" will never come into play as the commission of offence will always be in the knowledge of the authority who is a part of the organisation and who may not be the authority competent to initiate the action. A meaningful reading of the provisions of Section 122(1)(b) makes it absolutely clear that in the case of a government organisation, it will be the date of knowledge of the authority competent to initiate the action, which will determine the question of limitation."

17. Reliance has also been placed on the pronouncement of Hon'ble Delhi High Court in the case of **VK Anand vs. Union of India & Others** (163 (2009) Delhi Law Times 380), wherein Hon'ble Delhi High Court, after considering several case laws, has observed in Paras 23 and 24 as under:

"23. The distinctions sought to be drawn between knowledge and "actionable knowledge" does not help extend limitation. Section 122 does not talk of "actionable knowledge" but "knowledge". Even if the holding of the Court of Inquiry prior to convening a GCM is considered to be mandatory, the steps taken to translate the knowledge into "actionable knowledge" are expected to be taken within the period of limitation that has already begun to run from 30th March 1999. Consequently it is not necessary to examine whether it was mandatory for the Court of Inquiry to have first concluded its proceedings before the competent authority could be said to have had actionable knowledge in regard to the offence and the identity of the offender. It was argued that the holding of the Court of Inquiry was a step protective of the Petitioner and that the Respondents were being extra cautious before arraigning the Petitioner before the GCM. While that may be true, that step cannot suspend the limitation for the commencement of the trial by GCM which begins to run from the date of the "knowledge" of the offence first by the competent authority.

24. In the considered view of this Court Section 122 which is a penal W.P.(C) No.1210 of 2003 page 15 of 19 provision admits of a strict construction. The said penal provision prescribes a period of limitation for commencement of trial by GCM. If one were to draw an analogy with the general criminal law, for computing the period of limitation for the purposes of Section 468 CrPC, it is not the date of the charge sheet which is reckoned. Section 122 is a virtual reproduction of Section 469 CrPC. When an FIR is registered and both the commission of the offence and the name of the offender are known, that would be reckoned as a date on which the limitation is said to commence since it was certainly within the knowledge of the police officer in question. Perhaps it is only after investigation that the police is confident that the person named in the FIR is the person likely to have committed the offence. There is a whole process that has to be undertaken before a charge sheet is finally signed by the Investigating Officer and filed in Court. These processes might take some time but cannot suspend the period of limitation which has already begun to run in terms of Section 468 CrPC. As pointed out by the Supreme Court in Radha Krishan, inasmuch as there is no provision in the Army Act corresponding to Section 473 CrPC, there is no possibility of extension of the period of limitation. In V.N.Singh (Lt.Col) v.Union of India 2002 (64) DRJ 379 it was observed: "Law of limitation in the context of court martial proceedings must be interpreted strictly. The criminal justice system necessarily interferes or encroaches upon the fundamental rights guaranteed under Part III of the Constitution of India, and thus, in case of doubt or dispute, the interpretation must lean in favour of the accused."

18. Thus, in the instant case, the incident is alleged to have taken place between the months of July 2004 to November 2004 when the applicant is alleged to have conducted the medical examination of some of the fake recruits. However, as per the statement of PW 2 recorded during the SCM proceedings, the entire incident and the identity of the accused came to his knowledge on 18th December 2004. Admittedly, the SCM and the convening order was passed on 29.12.2005 and the SCM was convened on 28/29.08.2008. PW 2 Maj Gen Shamsher singh has also stated that he was the Commanding Officer of M.H. Danapur.

19. In the facts of the instant case, the convening order was passed by Brig SK Vijeshwer, who had directed for disciplinary action against the applicant on 29.12.2005. Admittedly on 29.12.2005 Brig SK Vijeshwer was the Brigade Commander. The submission of the learned counsel for the applicant is that PW2 Maj Gen Shamsher Singh has stated in his evidence that he was the Commanding Officer of M.H. Danapur and he was competent to order the discharge of the applicant, but the applicant himself has pleaded in Para 4.2 of O.A. that MDH Danapur was an independent unit and functioned under command of HQ JOB Sub Area and not under the command of M.H. Danapur (PW2). Thus, according to the own statement of the applicant, PW 2 Maj Gen Shamsher singh was not the Commanding Officer of the applicant and, therefore, was not competent to initiate disciplinary action against the applicant. As per Section 112 of the Army Act, the authorities, who are competent to convene the Summary Court Martial, has been defined. Sec. 112 of the Army Act reads as under :

> ***"112. Power to convene a summary general court martial-***
> *The following authorities shall have power to convene a summary general court-martial name-*
>
> *(a) an officer empowered in this behalf by an order of the Central government or of the (Chief of the Army Staff);*

> *(b) on active service, the officer commanding the forces in the field, or any officer empowered by him in this behalf;*
>
> *(c) an officer commanding any detached portion of the regular Army on active service when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence should be tried by a general court-martial."*

Thus, PW 2 Maj Gen Shamsher singh was not competent to initiate disciplinary action against the applicant.

20. Thus, in the instant case, PW 2 Maj Gen Shamsher Singh was not the Brigade Commander of the HQ JOB, so he was not competent to initiate disciplinary action. Thus, on this point, the submission of the learned counsel for the applicant has no substance that the period of limitation shall run from the date when PW 2 acquired knowledge of the incident and also about the identity of the accused. PW 2 has nowhere stated that he gave this information to Brig Commander HQ JOB. What transpires from perusal of the record is that Brig SK Vijeshwer passed the order to initiate disciplinary action on 29.12.2005 on the strength of the report of Court of Inquiry. Keeping in view of the aforementioned case laws, it is the knowledge of the offence and the person responsible for the offence, when given to the officer competent to initiate disciplinary action, is relevant for computation of the period of limitation. In the instant case, it was only after the Court of Inquiry, the identity of the applicant was informed to the competent authority and accordingly, the order to convene the disciplinary action was passed. Thus, we do not find any substance in the submission of the learned counsel for the applicant that the SCM is barred by time.

21. Admittedly in the SCM, two witnesses have been examined i.e. PW 1 Lt Col LM Kandpal and PW 2 Maj Gen Shamsher Singh. The allegation against the applicant is that he had conducted the medical examination of a fake recruit. It is surprising that neither the said fake person was examined as a

witness, who could have identified the applicant nor the said medical examination report, alleged to have been prepared by the applicant, was brought before any authority at any point of time, including the SCM. During SCM specific question was asked by the applicant in his cross-examination whether any document of medical examination was produced by the civilian boy or did this witness ask him for any medical examination document. In reply to this question, PW 2 has given the following statement :

> *"He did not have any medical documents at the time. Based on Medical examination a Rahdari certificate would have been issued to him and the individual asked to report to EME Centre Secunderabad. Perusal of the documents would have found them to be fake and on that basis he and five other candidates similarly enrolled would have been handed over at the Police Station Bolaram Secunderabad."*

This statement of PW 2 is only on the basis of his own presumptions.

22. The applicant in his defence has given the following statement:

> *"The civilian boy who was brought from Secunderabad by Sub Inspector Zafar Mehmood be produced in court and questioned in detail and identified by Maj Gen Shamsher Singh. I have been identified by only one candidate whereas the charge sheet lists 14 candidates. I wish to know where the other 13 candidates names were obtained. The civilian boy brought from Secunderabad has not mentioned the date of the medical examination nor has any other witness mentioned the date of medical examination."*

23. Thus, from the evidence it is clear that the medical examination report, alleged to have been prepared by the applicant, was not on record even the date of such alleged medical examination was known. The case is that on the basis of such fake report, Rahdari certificate was issued. It has nowhere come in evidence that any officer competent to issue Rahdari certificate, has issued the Rahdari certificate. When the persons involved in the recruitment racket, were capable of forging the Rajdari certificate, then there was absolutely no occasion for them to get the medical examination of the fake recruit

conducted. It is pertinent to mention here that admittedly the applicant was neither the medical officer nor, in any manner, he was competent to conduct the medical examination. Thus, virtually there was no evidence to connect the applicant with the offence. Simply because the said fake recruit stated before PW 2 Maj Gen Shamsher Singh that he is the person, who had conducted his medical examination, no absolute reliance can be placed on such identification. We have also noted that in the original Court of Inquiry, the recruit had given a statement on the identity of the applicant as the person who appears like the person, who conducted the medical examination, however, the recruit also indirectly expressed doubts on the identify by further adding in his statement that the applicant looks heavier than the person who conducted the medical examination and also the face of the person who had actually conducted the medical examination was a leaner face than the applicant. Thus, we do not find that the charge against the applicant was proved. There was virtually no evidence against the applicant to connect the applicant with the offence, hence the findings of the SCM are not sustainable in law. Accordingly, the SCM deserves to be set aside.

24. Thus, we hereby hold the finding of SCM to hold the applicant guilty, was patently incorrect. Therefore, the punishment inflicted by the SCM on the applicant is absolutely unsustainable.

25. Accordingly, this O.A. deserves to be allowed and is hereby **allowed.** The sentence of severe reprimand inflicted on the applicant is set aside and shall stand omitted from the service records of the applicant.

26. We find that the applicant has suffered a lot due to this allegation of touting and his biggest loss has been his missing the promotion to Havildar rank which is a time bound promotion.

27. Considering that the applicant has not been promoted to the rank of Havilder which is a time scale promotion, primarily because of this allegation which could not be proved, therefore, in the interest of substantial justice, we direct the respondents to grant him notional Havildar rank in the last five years of his service i.e. 01st June 2010. He is also to be treated to be notionally in service on extension for next two years i.e. from 31st May 2015 to 31st May 2017 as a Havildar. He shall get full salary and allowances for notional service.

28. The applicant shall be paid full arrears of his Havildar service w.e.f. 01st June 2010. His new pension shall be recalculated w.e.f. 31.05.2017. However, the applicant will not be eligible for any other relief.

The respondents are directed to comply with this order within a period of four months from today. Default will invite an interest of 8% p.a. till the date of actual payment.

The application, if any, pending for disposal, shall be treated to have been disposed of.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: August , 2018.
PKG