PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
MAJOR GENERAL MADAN LAL YADAV [RETD.]

DATE OF JUDGMENT: 22/03/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
AHMAD SAGHIR S. (J)
G.B. PATTANAIK (J)

CITATION:
1996 AIR 1340 1996 SCC (4) 127
JT 1996 (3) 465 1996 SCALE (3)72

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

K. Ramaswamy, J.

This appeal on reference to this Bench raises an interesting question of law. The respondent while working as Major General, Army Ordnance Corps., Southern Command, Pune between December 1, 1982 and July 7, 1985 was in-charge of purchase. The Controller General of Defence Accounts in special audit on the local purchases sanctioned by the respondent prima facie found that respondent had derelicted his duty and action under the Act was initiated against him. At that time, the respondent was attached to College of Military Engineering, Pune and was promoted as Major General. After initiation of the proceedings he was ordered to retire which he had challenged by filing Writ Petition No.3189 of 1986 in the Bombay High Court which stood dismissed on August 29, 1986.

On August 30, 1986, action was initiated against the respondent under Section 123 of the Army Act, 1950 [for short, the 'Act']. He was kept under open arrest from that date onwards and retired from service on August 31, 1986 as Major General. On September 22, 1986, the respondent was issued a chargesheet and recording of the summary evidence commenced on September 25, 1986. The respondent filed habeas corpus petition in this Court under Article 32 of the Constitution on September 26, 1986 and refused to cross-examine witnesses examined at preliminary enquiry between October 20 and 25, 1986. He sought for, and the proceedings were adjourned to November 3, 1986, on the ground that his lawyer from Delhi was to come to Pune for cross-examination of the witnesses. Due to non-availment of the opportunity given to the respondent to cross-examine the witnesses between November 20, 1986 and December 8, 1986, the case was closed for prosecution on November 20, 1986. The respondent sought 14 days' time to prepare his case which was duly

allowed. However, the respondent did not give list of his defence witnesses till November 30, 1986. Consequent upon it, on December 26, 1986, the Controller General of Defence Accounts directed the Controller, Defence Accounts, Southern Command to carry out special audit for the period in question. The respondent had sought permission to go to Delhi in connection with his writ petition which was granted between December 16 and 18, 1986. The writ petition was dismissed by this Court on December 18, 1986 against which he filed special leave petition. On January 3, 1987, the recording of summary evidence against the respondent was concluded. He sought permission to go to Delhi in connection with his special leave petition which was granted between January 12 and February 5, 1987. The summary evidence was considered and GOC in Command, Southern Command submitted his report on February 2, 1987. The special leave petition came to be dismissed by this Court on February 5, 1987. Pursuant thereto, general Court martial [for short, 'GCM'] was ordered on February 24, 1987; the GCM assembled to try the respondent on February 25, 1987. On perusal of the report, it was found that the respondent should be tried for the offence. He was directed to be produced on February 26, 1987 but it transpired that the respondent had escaped lawful military custody on the intervening night of February 15 and 16, 1987. Warrant was issued for his arrest. The respondent voluntarily surrendered on March 1, 1987 and was placed under closed arrest w.e.f. 2130 hours on the said day. The Court-martial assembled on March 2, 1987 but it appears that the respondent had, in the meanwhile, filed writ petition in the Bombay High Court challenging the jurisdiction of the Court-martial to try him. In W.P. No.301 or 1987, invoking the provisions of Section 123 [2] of the Acts the Division Bench had held that the trial of the accused had not commenced within six months of his ceasing to be subject to the Act. The trial by the Court-martial was, therefore, held to be illegal and accordingly writ was issued. Calling in question this order, this appeal has been filed.

It is undisputably clear that the respondent had retired from service on August 31, 1986. He was kept under open arrest from August 26, 1986 and had escaped from lawful military custody on the intervening night of February 15 and 16, 1987 and voluntarily surrendered on March 1, 1987. Though the respondent has pleaded in the High Court that he had gone with prior permission of the authorities, the same has been denied by the officer concerned. The High Court has recorded, as a fact, that the respondent had absconded himself. Section 123 of the Act fastens culpability of the offender who ceased to be subject to the provisions of the Act. Sub-section [1] postulates that where an offence under the Act had been committed by any person while subject to the Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject. Sub section [2] which stands amended by Army Act [Amendment] Act, 37 of 1992, prescribed limitation on such action, at the relevant time, that no such person shall be tried for an offence, unless his trial commences within six months after he had ceased to be subject to the Act. The amended sub-section [2] is not relevant for our purpose since the offence in question was indisputably committed prior to the Amendment came into existence. The proviso and other sub-sections are also not relevant for our purpose.

The question, therefore, is: on which date did the trial of the respondent commence? In other words, whether

the trial of the respondent commenced within six months from the date of his retirement, viz., August 31, 1986? By prescription of six months' limitation under sub-section [2], the trial of the respondent was to commence before February 28, 1987. Consequently, the question, therefore, is: what is the meaning of the words "trial commenced" as used in sub-section [2] of Section 123 and as to when it commences?

It is contended by Shri Malhotra, learned counsel for the appellants, that the word 'commenced' must be understood and considered in the setting and scenario of the operation of relevant provisions of the Act and the rules framed thereunder, viz., the Army Rules, 1954 [for short, the 'Rules']. Their conjoint reading would indicate that the moment the Court martial assembles, takes cognisance of the offence and direct to proceed further, the trial must be deemed to have been commenced, as all the steps from the stage are integrally connected with the trial. When Court martial assembled on February 25, 1987 and found prima facie case against the respondent to proceed with the trial and directed to secure his presence, it was discovered that the respondent had escaped the lawful open military custody and made himself unavailable. Consequently, Court-martial could not proceed with the trial of the respondent until he was arrested and brought before the Court martial or he himself surrendered. Since presence and participation by the respondent in the trial was a condition precedent, due to non-availability of the respondent, the Court martial could not be proceeded with. After re-appearance of the respondent or, March 1, 1987, further steps were taken to conduct the trial by the Court martial. The trial, therefore, was not barred by operation of sub-section [2] of Section 123. Shri Bobde, appearing for the respondent, on the other hand, contended that Section 122 [3] provides for exclusion of time during which the accused avoided arrest after the commission of the offence. Similar provision, preceding amendment to sub-section [2] of Section 123 is not expressly made available on statute. The offence being of criminal nature, having regard to the provisions of Section 123 limitation should strictly be construed, particularly when it involves liberty of the citizen. He argues that the legislature had made a dichotomy of Sections 122 and 123 of the Act. The time during which the accused was not available cannot, therefore, be excluded in computation of six months' period prescribed in sub-section [2] of Section 123.

It is further contended that the trial commenced only when the Court martial assembled, took oath in terms of Rule 45; applied their mind under Rule 41 to proceed further under Rule 43. The oath envisages thus: ".....I will well and truly try the accused before the Court according to the evidence and that I will duly administer justice according to the Army Act without partiality, favour or affection and if any doubt shall arise, then, according to my conscience, the best of my understanding and the customs of war and....". The scheme would indicate that there is a distinction between inquiry and trial and the trial commences only when the Court-martial arraigns the accused on the charge against him under Rule 48 whereby the accused shall be required to plead separately to each charge. Since the above Procedure had not been followed, the trial did not commence. It is further argued that the accused has a valuable right under Rule 48 to object to the charge. If the objection is sustained, the charge is required to be amended under Rule 50. He has also right to object to the members of the Court-martial empanelled. He is also entitled

under Rule 51 to object to the jurisdiction of the Court-martial. Until the Court martial assembles to proceed further, the trial cannot be said to have commenced. The question, therefore, is: as to when the trial commences within the meaning of Section 123 [2]? With a view to appreciate the rival contentions it is necessary to grasp the relevant provision of the Act and the Rules.

Article 33 of the Constitution empowers the Parliament to modify the fundamental rights enshrined in Part III in their application to the members of the Armed Forces or members of the Forces charged with the maintenance of the public order etc. The Act was made to regulate the governance of the regular Army. Under Section 2 [1] (a), officers shall be subject to the Act wherever they may be. Under Section 3, unless the context otherwise requires "active service" as applied to a person subject to this Act, means the time during which such person is attached to, or forms part of, a force which is engaged in operations against any enemy, or...". "Court-martial" under sub-section [vii] means a court-martial held under the Act. "Military custody" under sub-section [xiii] means the arrest or confinement of a person according to the usages of the service and includes naval or air force custody.

"Offence" has been defined under sub-section [xvii] to mean "any act or omission punishable" under the Act and "includes a civil offence as hereinbefore defined". Chapter IX deals with "arrest and proceedings before trial". Section 101 enables custody of offenders. Under sub-section [1] thereof, any person subject to the Act who is charged with an offence may be taken into military custody. Under subsection [3] thereof, an officer may order into military custody of any "officer", though he may be of a higher rank, engaged in a quarrel, affray or disorder. Chapter X deals with "Court-martial" The details thereof are not material for the purpose of this case since the admitted position is that G.C.M. was ordered against the respondent which is not under challenge. Section 122 deals with "period of limitation for trial" of "any person" subject to the Act. As stated earlier, sub-section [3] thereof make provision for exclusion of time, in computation of the prescribed periods i.e., of 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. Section 123 deals with liability of offenders who cease to be subject to the provisions of the Act. Sub-section [1] thereof envisages that where an offence under the Act had been committed by any person while subject to the Act, and he has ceased to be so subjects he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject In other words, though the officer governed by the provisions of Act ceases to be the person governed by the provisions of the Act, no trial for an offence under the Act shall be proceeded with and no such person shall be tried for an offence unless the trial commences within six months of his ceasing to be subject to the Act.

Chapter V of the Rules relates to investigation of the charge and trial by court martial. Rule 22 deals with hearing of charge. Sub-rule [1] provides the procedure to deal with the charge in the presence of the accused who shall have full liberty to cross-examine any witness examined against him and he may call any witness and make any statement in his defence. Rule 23 provides procedure for taking down the summery of evidence. Rule 24 empowers remand of the accused. Rule 25 prescribes procedure on charge against officer. Rule 26 provides procedure for summary

disposal of the charge against the officers. If delay occasions in postal, under Rule 27, it is required to be reported. Rule 28 deals with framing of charge-sheet containing the details and issue or issues to be tried by a Court-martial. The charge-sheet may contain one charge or several charges. Rule 29 deals with commencement of the charge-sheet. Rule 30 contains contents of the charge. Rule 33 provides procedure for preparation or defence by the accused. Rule 34 enjoins that before the accused is arraigned for an offence, he shall be informed by an officer of every charge for which he is to be tried and also that on his giving the names of the witnesses whom he desire to call in his defence, reasonable steps will be taken for procuring their attendance etc. Rule 35 deals with Joint-trial of several accused persons. Due to military exigencies or on grounds of necessity of discipline Rule 36 empowers the suspension of rules.

In Section 2 of the Rules dealing with General and District Courts-martial, convening the Court martial has been envisaged. Under Rule 38, Court-martial may be adjourned if before arraigning the accused insufficient number of officers of the Court martial are noticed. Rule 39 speaks of disqualification and ineligibility of officers for Court-martial. Rule 40 envisages composition of the GCM Rule 41 prescribes procedure to be followed at trial and constitution of Court-martial which is relevant for the purposes of this Court. The rule reads as under:

> "41. Inquiry be court as to legal constitution. [1] On the court assembling, the order convening the court shall be laid before it together with the charge sheet and the summary of evidence or a true copy thereof, and also the ranks, names, and corps of the officers appointed to serve on the court; and the court shall satisfy itself that it is legally constituted; that is to say-
>
> (a) that, so far as the court can ascertain, the court has been convened in accordance with the provisions of the Act and these rules;
>
> (b) that the court consists of a number of officers, not less than the minimum required by law and, save as mentioned in rule 38, not less than the number detailed;
>
> (c) that each of the officers so assembled is eligible and not disqualified for serving on that court-martial; and
>
> (d) that in the case of general court-martial, the offices are of the required rank.
>
> [2] The court shall, further, if it is a general or district court-martial to which a judge-advocate has been appointed, ascertain that the judge-advocate is duly appointed and is not disqualified for sitting on that court-martial.
>
> [3] The court, if not satisfied with regard to the compliance with

the aforesaid provisions, shall report its opinion to the convening authority, and may adjourn for that purpose.

Rule 43 prescribes procedure of trial - challenge and swearing. if the court has satisfied itself that the provisions of Rule 41 and 42 have been complied with, it shall cause the accused to be brought before the court and the prosecutor, who must be a person subject to the Act, shall take his due place in the court. As seen, under Rule 45, oath is to be administered to the members of the Court-martial etc. They are required to swear by Almighty God or affirmation to "well and truly try the accused". Similar oath may be administered to Judge-Advocate and other officers under Rules 46 and 47. Rule 48 speaks of "arraignment of accused". It envisages that "after the members of the Court-martial and other persons are sworn or affirmed as above mentioned, the accused shall be arraigned on the charges against him which shall be read out and, if necessary, translated to him in his mother tongue, and he shall be required to plead separately to each charge. Rule 49 deals with objection by the accused to the charge and Rules 50 allows amendment of the charge, if necessary. Rule 51 gives him right to take a special plea on the jurisdiction of GCM and under Rule 52 he can plead guilty or not guilty. Rule 53 deals with "plea in bar" and Rule 54 with "procedure after plea of guilty". Rule 56 deals with plea of not guilty, application and adduction of evidence by the prosecution. Rule 57 deals with plea of no case and Rule 58 with "close of case for the prosecution and procedure for defence where accused does not call witness". Rule 59 deals with the "defence where the accused calls witnesses" and Rule 60 with "summing up of the case by the judge-advocat". Rule 61 deals with "consideration of finding" and Rule 62 with "forms record and announcement of finding". Rule 63 concerns "procedure on acquittal" and Rule 64 "procedure on conviction". Rule 65 gives power to the Court-martial to impose sentence and Rule 66 deals with recommendation to mercy. Rule 67 deals with "announcement of sentence and signing and transmission of proceedings".

It is true, as rightly contended by Shri Bobde that on administration of oath to the members of the Court-martial, the members swear to try the accused according to the provisions of Act and Rules etc. and to administer justice according to the Act without partiality, favour or affection. Under Rule 44, names of the members of the Court and presiding officer will be read over to the accused. He shall be asked, under Section 130, of his objections, if any, for trial by any officer sitting on the court. Any such objection shall be disposed or according to the Rules. The presence and participation by the accused, therefore, is an indispensable pre-condition. Rule 42 enjoins the court to be satisfied that the requirements of Rule 41 have been complied with. It shall, further, satisfy itself in respect of the charge brought before it and then proceed further. If he pleads "guilty", the procedure contemplated in Rule 54 is to be followed and if he pleads "not guilty", the procedure contemplated in Rule 56 shall be proceeded with and evidence recorded etc.

The words "trial commences" employed in Section 123 [2] shall be required to be understood in the light of the scheme of the Act and the Rules. The question is as to when the trial is said to commence? The word ’trial’ according to Collins English Dictionary means:

"the act or an instance of trying

> or proving; test or experiment... Law. a. the judicial examination of the issues in a civil or criminal cause by a competent tribunal and the determination of these issues in accordance with the law of the land. b. the determination of an accused person's guilt or innocence after hearing evidence for the prosecution and nor the accused and the judicial examination of the issues involved".

According to Ballentine's Law Dictionary [2nd ed.] 'trial' means:

> "an examination before a competent tribunal according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue of fact or law for the purpose of determining the right of the parties, it may be considered a trial"

In Block's Law Dictionary [Sixth Edition] Centennial Edition, the word 'trial' is defined thus:

> "A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction... A judicial examination, in accordance with law of the land, of a cause, either civil or Criminal, of the issues between the parties, whether of law or facts, before a court that has proper jurisdiction".

In Webster's Comprehensive Dictionary International Edition, at page 1339, the word 'trial' is defined thus:

> "....The examination, before a tribunal having assigned jurisdiction, of the facts or law involved in ail issue in order to determine that issue. A former method of determining guilt or innocence by subjecting the accused to physical tests of endurance, as by ordeal or by combat with his accuser... In the process of being tried or tested... Made or performed in the course of trying or testing...".

The word 'commence' is defined in Collins English Dictionary to mean "to start or begin; come or cause to come into being, operation etc." In Black's Law Dictionary it is defined to mean :

> "to initiate by performing the first act or step. To begin, institute or start Civil action in most jurisdictions is commenced by filing a complaint with the court.... Criminal action is commenced within statute of limitations at time preliminary complaint or information is filed

> with magistrate in good faith and a warrant issued thereon... A criminal prosecution is "commenced" [1] when information is laid before magistrate charging commission of crime, and a warrant of arrest is issued, or [2] when grand jury has returned an indictment".

In the "Words and Phrases" [Permanent Edition] Vol.42A, at page 171, under the head "Commencement", it is stated that ".4 'trial' commences at least from the time when work of empanelling of a jury begins".

It would, therefore, be clear that trial means act of proving or judicial examination or determination of the 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 with performance of the first act or steps necessary or essential to proceed with trial.

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 pre-condition 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 trammed 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 should 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 the 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?

It is true that the legislature has made a distinction between Section 122 [3] and Section 123 [2]. While in the former, power to exclude time taken in specified contingencies is given, in the little, no such provision is made for exclusion of the time since the accused will be kept under detention after he ceased to be governed by the Act. It is equally settled law that penal provisions would be construed strictly. As posed earlier, which of the two views broader or narrow - would subserve the object are

purpose of the Act is the question We are of the considered view that from a conpectus of the scheme or the Act and Rules the broader view appears to be more conducive to and consistent with the scheme of the Act and the Rules. As soon as GCM assembles the members are charged with the duty to examine the charge/charges framed in summary trial to give an opportunity to the accused to exercise his right to object to the empanelment of member/members of the GCM to amend the charge and the right to plead guilty or not guilty. These procedural steps are integral and inseparable parts of trial. If the accused pleads guilty further trial by adducing evidence by the prosecution is obviated. The need for adduction of evidence arises only where the accused pleads "not guilty". In that situation, the members are required to take oath or affirmation according to Rule 45. It is to remember that the members get right power and duty to try an accused only on appointment and the same ends with the close of the particular case. Therefore, Rule 45 insists on administration of oath in the prescribed manner. For a judicial officer the act of appointment gives power to try the offender under Criminal Procedure Code; warrant of appointment by the President of India and the oath taken as per the form prescribed in Schedule III of the Constitution empowers the High Court/Supreme Court Judges to hear the petition or appeals. For them, need to take oath on each occasion of trial or hearing is obviated. Therefore, the occasion to take oath as per the procedure for GCM and the right of the member of the GCM arises with their empanelment GCM and they get power to try the accused the moment they assemble and commence examination of the case, i.e., charge-sheet and the record. The trial, therefore, must be deemed to have commenced the moment the GCM assembles and examination of the charge is undertaken.

Our view gets fortified by two decisions of this Court in Harish Chandra Baijapi & Anr. v Triloki Singh & Anr. [AIR 1957 SC 444] wherein the question was: as to when the trial begins in an election dispute under the provisions of the Representation of the People Act, 1951? The respondents had filed election petitions against the appellant under Section 81 of that Act alleging that the appellant had committed number of corrupt practices and the respondents prayed for declaration that the appellant’s election was void. After trial, the election was set aside against which the appeal came to be filed ultimately in this Court. One of the questions was: whether the particulars of the corrupt practices and amendment therefore is vaild in law and whether they are maintainable in appeal? In that context, the question arose: as to when the trial began? It was contended therein that the order amending pleadings under Order 6 Rule 17, CPC was not part of the trial and, therefore, it could not be subject of consideration in appeal. Considering the above question, this Court held that:

> "Taking the first contention, the point for decision is as to what the word ’trial’ in s.90(2) means. According to the appellants, it must be understood in a limited sense, as meaning the final hearing of the petition, consisting of examination of witnesses, filing documents and addressing arguments. According to the respondent, it connotes the entire proceedings before the Tribunal from the time

that the petition is transferred to it under s.86 of the Act until the pronouncement of the award. While the word 'trial' standing by itself is susceptible of both the narrow and the wider senses indicated above, the question is, what meaning attaches to it in s.90(2), and to decide that, we must have regard to the context and the setting of the enactment. Now, the provisions of the Act leave us in no doubt as to in what sense the word is used in s.90(2). It occurs in Chapter III which is headed "Trial of election petitions". Section 86(4) provides that if during the course of the trial any member of a Tribunal is unable to perform his functions, the Election Commission is to appoint another members, and thereupon the trial is to be continued. This provision must apply to retirement or relinquishment by a member, even before the hearing commences and the expression "during the course of trial" must therefore include the stages prior to the hearing. Section 88 again provides that the trial is to be held at such places as the Election Commission may appoint. The trial here must necessarily include the matters preliminary to the hearing such as the settlement of issues, issuing direction and the like. After the petition is transferred to the Election Tribunal under s.86, various steps have to be taken before the stage can be set for hearing it. The respondent has to file his written statement, issues have to be settled. If 'trial' for the purpose of s.90(2) is to be interpreted as meaning only the hearing, then what is the provision of law under which the Tribunals to call for written statements and settle issues? Section 90(4) enacts that when an election petition does not comply with the provisions s.81, s.83 or s.117, the Tribunal may dismiss it. But if it does not dismiss it, it must necessarily have the powers to order rectification of the defects arising by reason of non-compliance with the requirements of s.81, s.83 or s.117. That not being a power expressly conferred on it under s.92 can only be sought under s. 90(2), and resort to that section can be had only if trial is understood as including proceedings

prior to hearing. Section 92 enacts that the Tribunal shall have powers in respect of various matters which are vested in 3 court under the Civil Procedure Code when trying a suit, and among the matters set out therein are discovery and inspection, enforcing attendance of witnesses and compelling the production of documents, which clearly do not form part of the hearing but precede it. In our opinion, the provisions of Chapter III read as a whole, clearly show that 'trial' is used as meaning the entire proceedings before the Tribunal from the time when the petition is transferred to it under s.86 until the pronouncement of the award."

In Om Prabha Jain v. Gian Chand & Anr. [AIR 1959 SC 837], it was held that the word "trial" clearly means entire proceedings before tribunal from the reference to it by the Election Commission to the conclusion. This Court found no reason to attribute a restricted meaning to the word 'trial' in Section 98 of the Representation of the People Act, 1951.

In the light of the above discussion, we hold that the trial commences the moment GCM assembles to consider the charge and examines whether they would proceed with the trial. The preceding preliminary investigation is only part of the process of investigation to find whether a charge could be framed and placed before the competent authority to constitute GCM. On February 25, 1987, the GCM assembled and recorded the proceedings as under:

"Trial of Shri Yadava, Madan Lal formerly IC-5122N Lt. Gen [Substantive Maj Gen] Yadava Madan Lal of Army Ordnance Corps. School Jabalpur, attached to National Defence Academy, Khadakwasla.

The order convening the court, the charge-sheet and the summary of evidence are laid before the court.

The court satisfy themselves as provided by Army Rules 41 and 42.

I have satisfied myself, that no Court of Inquiry was held respect the matters forming the subject or the charge before this court martial.

At this stage, the court observe that the Prosecutor and the Defending Officer have taken their respective places but the accused is not present before the court. The Prosecutor submits that the accused Shri Madan Lal Yadava formerly Lt Gen [Substantive Maj Gen] Madan Lal Yadava of Army Ordnance Corps School, Jabalpur retired from service with effect from 31 August 86 [AN]. He has been

subjected to the provisions of Section 123 of the AA with effect from the same date and put under open arrest with effect from 1200 h on 30 August 1986. According to a note dated 15 February 1987, found in his room the accused had proceeded to Bombay to engage a suitable counsel. Though he had stated therein that he would keep the Comdt, NDA Khadakwasla informed about his whereabouts, they are not yet known. Vigorous efforts are being made to trace him out and produce him before the Court. In view of this he requests that the Court be adjourned till 1100 h 26 February 1987.

The Defending Officer, IC-6727F Maj Gen Yadav Yitendra Kumar, who is present in the court submits in reply that he too had had no opportunity to get in touch with the accused and as such has no information regarding whereabouts of the accused".

"Advice by the Judge Advocate

Gentlemen, you have heard the submission made by the Prosecutor with regard to the absence of the accused as also reply of the learned Defending Officer. The Prosecutor has given the detailed circumstances in which the accused had escaped from military custody. He further submitted before you that vigorous efforts were being made to secure his presence before you to stand the trial and to this effect, prayed for the adjournment of the Court until 1100 h on 26 Feb 87. In view of the foresaid submission made by the Prosecutor, I advise you to consider granting him suitable adjournment to secure the presence of the accused. The Court decide to adjourn until 1100 h 26th Feb 1987. The above decision is announced in the court".

On February 26, 1987 when it again assembled, the GCM was informed by the prosecutor that despite their diligent steps taken to have the accused traced and produced before the court they were unable to do that and a request for adjourning the proceedings to the next day was made and the defence counsel also had expressed his inability to know the whereabouts of the respondent. On advice by the Judge-Advocate, the court adjourned the case to February 27, 1987. Similarly, the case was adjourned to February 28, 1987 on which date when it assembled, the proceedings were recorded as under:

"At 1000 h on 28 February 1987, Court re-assemble, pursuant to the adjournment; present the same members and the Judge-Advocate as on 27 February, 1987.

The Court observe that the accused is still not present before the court.

The Prosecutor submits that despite the best efforts including taking help from the various civil agencies to locate the accused he has not yet been able to find out his whereabouts and as such unable to produce him before the court. It is, however, earnestly hoped that he would be able to get some clue about his whereabouts by 01 March 1987. In that event he would be able to produce him before the court on 02 March 1987. He therefore, prays that an adjournment until 1000 h 02 March 1987 be granted. He further gives an undertaking that he will seek no further adjournment on this account and if he is not in a position to produce the accused by that dates will seek sine die adjournment of the Court.

The learned Defending Officer submits that he too has so far no information about the accused.

Advice by the Judge Advocate

Gentlemen, you have heard the submissions of the Prosecutor and the learned Defending Officer. The Prosecutor submitted before you that he would be in a position to produce the accused on 02 March 1987 and that he would not seek any further adjournment of the Court on this account in case he failed to secure his presence on or before that date. In the interest of the justice, you may therefore, consider granting him yet another adjournment to help secure the presence of the accused .

The Court decide to adjourn until 0900 h on 2 March 1987."

Accordingly, on March 2, 1987 when the court re-assembled the accused was present, the charge was handed over to him and he asked for adjournment for 15 days and on advice it was adjourned to March 18, 1987 on which day the respondent informed the court of his filing the writ petition and the assurance given by the counsel appearing for the appellants in the High Court not to proceed with the trial. Accordingly, it was adjourned pending Writ Petition No.301 of 1987, the subject of this appeal. It would thus be clear that the respondent having escaped from the open military detention caused adjournment of the trial beyond February 28, 1987 to secure the presence and arrangement of the respondent at the trial by GCM.

Our conclusion further gets fortified by the scheme of the trial of a criminal case under the Code of Criminal Procedure, 1973, viz., Chapter XIV "Conditions requisite for initiation of proceedings" containing Sections 190 to 210, Chapter XVIII containing Sections 225 to 235 and dealing

with "trial before a Court of Sessions" pursuant to committal order under Section 209 and in Chapter XIX "trial of warrant-cases by Magistrates" containing Sections 238 to 250 etc. It is settled law that under the said Code trial commences the moment cognizance of the offence is taken and process is issued to the accused for his appearance etc. Equally, at a Sessions trial, the court considers the committal order under Section 209 by the Magistrate and proceeds further. It takes cognizance of the offence from that stage and proceeds with the trial. The trial begins with the taking of the cognizance of the offence and taking further steps to conduct the trial.

Even if narrow interpretation is plausible, on the facts in this case, we have no hesitation to conclude that the trial began on February 25, 1987 on which date the Court-martial assembled, considered the charge and the prosecution undertook to produce the respondent who was found escaped from the open detention, before the Court. It is an admitted position that GCM assembled on February 25, 1987. On consideration of the charge, the proceedings were adjourned from day to day till the respondent appeared on March 2, 1987. It is obvious that the respondent had avoided trial to see that the trial would not get commenced. Under the scheme of the Act and the Rules, presence of the accused is a pre-condition for commencement of trial. In his absence and until his presence was secured, it became difficult, may impossible, to proceed with the trial of the respondent-accused. In this behalf, the maxim nullus commodum capere potest de injuria sua propria- meaning no man can take advantage of his own wrong - squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123 [2]. In Broom's Legal Maximum [10th Edn.] at page 191 it is stated "it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim frustra legis auxilium quoerit qui in legem committit. He relies on Perry v. Fitzhowe [8 Q.B. 757]. At page 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void. At page 193, it is stated that "it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At page 195, it is further stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong". At page 199 it is observed that "the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed".

The Division Bench of the High Court has recorded the finding that the respondent has absconded from open military detention. From the narration of the facts it is clear that the respondent was bent upon protracting preliminary investigation. Ultimately, when the GCM was constituted, he had challenged his detention order. When he was unsuccessful and the trial was to begin he escaped the detention to frustrate the commencement of the trial and pleaded bar of limitation on and from March 1, 1987. The respondent having

escaped from lawful military custody and prevented the trial from being proceeded with in accordance with law, the maxim nullus commodum capere potest de injuria sua propria squarely applies to the case and he having done the wrong, cannot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent GCM. Therefore, even on the narrow interpretation, we hold that continuation of trial from March 2, 1987 which commenced on February 25, 1987 is not a bar and it is a valid trial.

It is next contended that trial of the respondent at this distance of time is not justiciable. In support of this contention, reliance is placed by Shri Bobde on Devi Lal & Anr. v. The State of Rajasthan [(1971) 3 SCC 471] wherein the High Court had confirmed the conviction under Section 302 read with Section 34, IPC and sentence for imprisonment for life. This Court found that the prosecution had not proved as to which of the two persons had opened the fire as found by the Sessions Court and the distinction between Section 149 and 34, IPC was not clearly noticed by the Sessions Court and the High Court. When retrial was sought for by the prosecution, this Court rejected the contention on the ground that retrial at such a belated stage was not justifiable. The ratio has no application to the facts in this case. Therein, the trial was proceeded with and when the accused was convicted by the Sessions Court and confirmed by the High Court, this Court found that the prosecution had not established the case in accordance with law and had not proved the guilt beyond reasonable doubt. Under those circumstances, this Court had rightly declined to order retrial. But the ratio does not fit into the facts of this case. It is seen that the respondent had frustrated the trial by escaping from detention and reappeared after the limitation for trial of the offence was barred. Therefore, acceptance of the contentions would amount to putting a premium on avoidance.

We find ourselves unable to agree with the view expressed by the Assam High Court in Gulab Nath Singh v. The Chief of the Army Staff [1974 Assam LR 260].

It is next contended that since the respondent had surrendered himself, trial could be conducted by GCM at Delhi. We find no equity in this behalf. The witnesses are at Pune; records are at Pune, and the offence has taken place at Pune. Therefore, the GCM should be conducted at Pune. We find no justification in shifting the trial to Delhi.

The appeal is accordingly allowed. The judgment of the High Court is set aside. The writ petition stands dismissed. The appellants are at liberty to secure the presence of the respondent; it would be open to the respondent to surrender himself to closed military detention; and the respondent would keep him in detention and conduct the trial as expeditiously as possible.