

(1992) 06 SHI CK 0012

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 63 of 1989

Brigadier S.P.S. Baswani

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-06-1992

Acts Referred:

Army Act, 1950 — Section 121, 122, 80, 83, 84
Army Rules, 1954 — Rule 2(1), 22, 22(2), 22(3), 25
Constitution of India, 1950 — Article 112, 226, 26, 32

Citation : (1993) 1 ShimLC 373

Hon'ble Judges : D.P. Sood, J; Bhawani Singh, J

Bench : Division Bench

Advocate : R.S. Randhawa, R.S. Bajaj and K.D. Sood, for the Appellant; P.L. Sood, for the Respondent

Final Decision : Allowed

Judgement

Bhawani Singh, J.—The Petitioner joined National Defence Academy in July, 1957 and completed the course at the Indian Military Academy on 17th December, 1961 whereupon he was commissioned as a Second Lieutenant in the Armoured Corps of the Indian Army in the Regiment known as the "20 Lancers". After serving in various capacities from time to time, he is holding the rank of a Brigadier. In 1986, he was transferred from Babina to the Armoured Corps Centre and School in Ahmednagar. On 8th December, 1986, two money claims were submitted by him to the Controller of Defence Accounts (Officers) Pune. Through one, he claimed reimbursement of the expenses incurred by him for his transfer from Babina to Ahmednagar and the second claim related to the expenses of an air journey undertaken by him and his family members under the Leave Travel Concession facility during 1986. Through letter of December 17, 1986, the Controller of Defence Accounts (Officers) Pune, asked the Petitioner to furnish appropriate documentary proof by way of railway receipts or air tickets or a certificate from the Airlines in support of these claims (Annexure P-I) Accordingly, the Petitioner resubmitted the claims to the Controller of Defence

Accounts Officers) Pune, on 4th January, 1986. Certain irregularities were found by the Controller of Defence Accounts (Officers) Pune, while processing the permanent duty move claim preferred by the Petitioner. By a letter of 22-1-1987 the Controller of Defence Accounts requested the Vigilance Branch of the Headquarters, Southern Command, Pune, to investigate the matter (Annexure P-2) Through communication of 28-1-1987. Headquarters Southern Command, Pune. requested the Commandant of Armoured Corps Centre and School, Ahmednagar, under whom the Petitioner was serving and who was then the Commanding Officer of the Petitioner and as such the only authority to investigate the matter, to carry out investigation and give his comments and recommendations by 25th February, 1987 (Annexure P-3).

2. At the relevant time, Lt. General G.S. Kler, AVSM, was the Commandant of the Armoured Corps Centre and School He conducted the preliminary investigations into the matter on 29-1-1987 by calling the Petitioner and asking him to tender his explanation. The Petitioner gave oral as well as written explanation. He substantially admitted that the claims submitted by him were incorrect (Annexure P-4). The Petitioner was given a written and verbal warning on 29-1-1987 by the Commanding Officer. By a letter of dated 29-1-1987, Lt. General Kler, AVSM, informed the Petitioner that his claims in respect of permanent duty move and the Leave Travel Concession had been incorrectly prepared and preferred. The Petitioner was warned that such an action on the part of a senior officer was likely to have severe repercussions and may dilute discipline (Annexure P-5).

3. The Petitioner further submits that since he had been administered warning--oral as well as written--by the Commanding Officer, the matter stood concluded under Para 327(d) of the Army Regulations, 1962, hence under this regulation, it was not open to any superior authority to reopen the case against the Petitioner either by instituting disciplinary proceedings or otherwise. Para 327 of the Army Regulations, 1962 says:

327. Reproof.--(a) Reproof may be verbal or in writing or both.

(b) In no circumstances should reproof take the form of insult or abuse It may be strong but should be directed to the actual fault committed and the language used should not be intemperate or offensive A reproof should not be administered in the presence of subordinates unless, for the purpose of making an example, it is necessary that reproof be public.

(c) Warning, a minor censure may take the form of reproof and be administered verbally or in writing to service personnel by the Officer Commanding or by an authority superior in command to the Officer Commanding. A warning will not be recorded in the service documents of the person concerned.

(d) It should be ensured that before administering reproof by way of a warning or otherwise, the competent authority applies its mind to the case and comes to a conclusion that ends of justice would be met by closing the case with reproof.

Once a decision has been arrived at and the case closed by administration of reproof by a competent authority, no superior authority can re-open the case.

4. According to the Petitioner, the matter relating to the Leave Travel Concession claim stood closed as per the verbal directions of the Petitioner's Commanding Officer which is also clear by the statement of Lt. General G.S. Kler, AVSM, as a witness before the Court Martial where he stated on oath that he had awarded verbal as well as written warning to the Petitioner for the Leave Travel Concession claim.

5. However, by notice of 5th March, 1987, the Headquarters, Southern Command, Pune, called upon the Petitioner to show cause as to why administrative action should not be initiated against him for submitting a false claim for permanent duty move from Babina to Ahmed-nagar. At this stage, the Headquarters, Southern Command, Pune, was fully aware of the Petitioner's lapses since they had mentioned that the Petitioner had accepted his guilt vide his statement of dated 29-1-1987 mentioning two claims (Annexure P-7). It is clear from this show-cause notice that the Headquarters Southern Command, Pune, was in the know of both the lapses of the Petitioner. However, the show-cause notice referred to one claim only thereby demonstrating that the matter relating to the Leave Travel Concession claim was closed as it had been appropriately dealt with by the competent authority. Thus, the act of reopening the case in relation to the Leave Travel Concession at this belated stage is an afterthought of the Southern Command. By his reply dated 1st April, 1987, the Petitioner drew attention to his written explanation of 29-1-1987 wherein he had owned the responsibility for the lapses (Annexure P-8) By an order of 18th April, 1987, Lt. General Depinder Singh, General Officer Commanding-in-Chief, Southern Command, directed that a "Severe Displeasure" (to be recorded) against the Petitioner (Annexure P-9). This punishment was accepted by the Petitioner since it was the outcome of the investigations and directions of LtGeneral G.S. Kler, AVSM, of 29-1-1987 when he had specifically told the Petitioner that the case in respect of permanent duty move claim was being forwarded to Headquarters Southern Command. So far as the case relating to the Leave Travel Concession claim was concerned, it had already been disposed of by Lt. General G.S. Kler, AVSM, by his warning dated 29-1-1987. The Petitioner had also requested the Controller of Defence Accounts (Officer) Pune, to treat the claim of the Petitioner relating to Leave Travel Concession as cancelled vide his letter dated 10-7-1987. The Petitioner also demanded the documents from Controller of Defence. Accounts (Officer) Pune under intimation to Armoured Corps Centre and School, Ahmednagar. Accordingly, by a letter of 1st August, 1987, the Headquarters Armoured Corps Centre and School, Ahmednagar, forwarded certain documents in connection with the Leave Travel Concession claim submitted by the Petitioner to the Headquarters Southern Command, Pune for disposal. The Command was requested to dispose of the said claim on the ground that the case against the Petitioner had already been disposed of (Annexure P-10).

6. The Petitioner further contends that Lt. General G.S. Kler, AVSM, as Commanding Officer had unhindered power to dismiss the charge or to dispose of the same in any manner in exercise of his discretion under Rule 22 read with Rule 25 of Army Rules. Rule 22 of the Army Rules envisages that:

He may dismiss it, if he considers that the evidence is doubtful or the case is trivial or, in the exercise of his discretion, for any reason, e.g. the good character of the accused.

"8. There is no offence which a C.O. is compelled by the A.A. or A.R. to send before a court martial and each case should be considered on its merits.

7. It was in the exercise of his judicial discretion that Lt. General G.S. Kler, AVSM, did not deem it necessary to refer the case for trial and decided to dispose of the same by award of reproof in the form of warning and censure. The award of censure, as would be evident from the Army Headquarters letter No. 32908/AG/PS1 dated 18th April, 1979 is a mode of disposal of a case (Annexure P-11). Although the controversy relating to these claims had been finally set at rest, however, it was sought to be raised afresh when by a letter of August 30, 1987 the second Respondent sought the permission of Army Headquarters, New Delhi, for the attachment of the Petitioner to Armoured Corps Centre and School, Ahmednagar, in order to face a disciplinary proceeding in connection with Leave Travel Concession claim (Annexure P-12). Consequently, the Petitioner was directed to leave Shimla, where he was at that time posted and report at the Armoured Corps Centre and School, Ahmednagar, to face disciplinary action the Petitioner challenged it through writ petition No. 410 of 1987 in this Court. He stated, inter alia, that since warning had already been administered to him with regard to the claim, initiation of fresh disciplinary proceedings was violative of para 327 of the Army Regulations. On 24th May, 1988, the Division Bench of this Court dismissed the writ petition with the following observations:

We are not inclined to interfere in the matter at the present stage. We refrain ourselves from expressing any opinion on the question whether the order communicated to the Petitioner vide letter dated June 29, 1987 (Annexure P-1) was a final action within the meaning of Clause (d) of Para 327 relating to reproof to an officer or not or whether the Respondents were entitled to proceed against the Petitioner in the matter of the false claim of LTC preferred by the Petitioner after the aforesaid order. We leave the pleas which are being raised by the Petitioner in the present petition in this respect open to him in case some orders adverse to the Petitioner are passed in the proceedings now initiated against him and the Petitioner comes to challenge them later. The petition shall stand dismissed in the aforesaid terms.

8. The Petitioner reported to the Armoured Corps Centre and School at Ahmednagar on 17th June, 1988. There on 25-6-1988, Major General H.N. Hoon, Commandant of the Armoured Corps Centre and School, directed that a summary of evidence be recorded in the disciplinary proceedings against the

Petitioner. By an application dated 5-6-1988 (Annexure P-15), the Petitioner contended that the disciplinary case against him had already been disposed of by Lt. General G.S. Kler, AVSM, who was the Commandant at the relevant time, therefore, a fresh investigation was not admissible against him in law. However, despite this protest, the summary of evidence was recorded and the proceedings were closed on 5-7-1988. Major General H.N. Hoon was under obligation to satisfy himself, before ordering further action against the Petitioner, whether the previous Commanding Officer of the Petitioner, Lt. General G.S. Kler, AVSM, had disposed of the matter or not. Anyhow, the Petitioner demanded holding of preliminary investigation in accordance with Rule 22 of the Army Rules. This Rule enjoins that the Commanding Officer should ascertain the correctness of the allegations before proceeding further in the matter. Notes 4 and 5 appended to Rule 22 of the Army Rules say that:

4. He must also consider whether having regard to the limitation of time prescribed by Army Act Section 122, the accused is liable to be proceeded against.

5. The C.O. must dismiss the charge if there is no evidence of any offence under the Army Act having been committed or if the accused has been previously acquitted or convicted of the alleged offence by any court, military or civil, or has been summarily dealt with under Sections 80, 83, 84 or 85 or the charge has previously been dismissed under Army Act Section 121 or Army Rules, Rule 53(1) (a).

9. Major General H.N. Hoon did not comply with these requirements since he did not call and examine Lt. General G.S. Kler, AVSM, before ordering summary of evidence against the Petitioner. It is mandatory requirement that compliance of Rule 22 in case of other ranks and Rule 25 in case of officers, should be there otherwise it is fatal to the jurisdiction of court martial. Army Order No. 70 of 1984 says that:

Disciplinary process under the Military Law commences with Army Rule 22 which lays down that every charge against a person subject to the Army Act, other than an officer, shall be heard in the presence of accused. The accused shall have full liberty to cross-examine any witness against him. This is a mandatory requirement and its non-observance will vitiate any subsequent disciplinary proceedings. In the case of officers, the rule becomes equally mandatory if the accused officer requires its observance under Army Rule 25.

10. Requirement of the situation was that the matter should have been dropped in view of the disposal of the matter by Lt. General G.S. Kler, AVSM. The Petitioner raised objection before the court martial also, however, it was over-ruled. Note 2 to Army Rule 25 records that:

2. In the case of an officer, as in that of other persons, the charge must come before the C.O. in order that the latter may determine whether it shall be dismissed or the case referred to a superior authority for summary disposal

under Army Act Sections 83 and 84, or for trial by court martial. Under this rule, the C.O. can dispense with a formal and detailed investigation, unless the accused officer demands one it does not preclude the C.O. from calling the officer and investigating the case as he may deem necessary. The officer can only demand formal investigation of his case by the C.O.; he has no right under this rule to demand a court of inquiry.

11. Major General H.N. Hoon had not examined any witness and thus it is clear that he had not heard the charge. The question in response to which the Petitioner had signed that he did not require the charge to be heard in accordance with Rule 2(1), did not preclude the C.O. from calling the witness and investigating the case. The provision does not dispense with the holding of a preliminary inquiry. It terminates the hearing being done in the presence of the concerned officer. As such, no preliminary inquiry was held and further action of the Commanding Officer was wrong, vitiating consequential proceedings and the decision. Secondly, when Lt General G.S. Kler, AVSM, appeared as a witness before the court martial and stated that he had exercised the powers of Commanding Officer and held preliminary investigations in respect of both the claims on 29-1-1987 and also stated that the Petitioner was given verbal as well as written warning, no further proceedings could be initiated since he was the competent authority to exercise the power in that behalf. It could not be reopened in any manner by Major General H.N. Hoon on 25-6-1988 for want of a provision in that behalf. Even though the summary of evidence could not have been validly ordered, yet Lt. General G.S. Kler, AVSM, was called as a defence witness in the course of the summary of evidence proceedings. He deposed that he had disposed of the disciplinary case against the Petitioner in respect of Leave Travel Concession claim by administering a written and verbal warning. He further deposed that he had disposed of the Leave Travel Concession claim with a warning since no money had, in fact, been paid to the Petitioner who had accepted the responsibility at the first available opportunity. The Petitioner submits that it was Lt General G.S. Kler, AVSM, his Commanding Officer at the relevant time who could depose as to the exact position on this aspect and none else and the statement given by Lt. General G.S. Kler, AVSM, supports the plea of the Petitioner (Annexure P-16). The Petitioner moved Civil Writ Petition No. 630 of 1988 and challenged the initiation of court martial proceedings against him alleging that the same were illegal and without jurisdiction. It was disposed of on December 12, 1988 (Annexure P-17) and a direction was given to the first Respondent that the statutory complaint preferred by the Petitioner against the order directing his trial by the General Court Martial be disposed of and the General Court Martial was also asked to entertain and decide the plea of the Petitioner that proceedings against him could not be reinitiated. The Petitioner raised certain objections during the court martial proceedings and one of them was plea-in-bar since the matter had already been disposed of. The General Court Martial accepted the plea and came to the conclusion that plea-in-bar offered by the Petitioner was established (Annexure P-22). The matter was

referred to the Headquarters Southern Command which refused to accept the judicial verdict of the Court Martial arrived at by the consensus of five senior officers. The second Respondent did not confirm the proceedings (Annexure P-23) and as such, another writ petition was filed in this Court seeking a direction against the reassembly of the Court Martial in the light of Section 121 of the Army Act read with Army Rule 53, Note to Army Rule 22 and para 327 of the Regulations for the Army. A matter once decided could not be reopened in the public interest as well as in view of the contents of letter No. 3/S/61/JAG, dated 29th December, 1964.

12. The further case of the Petitioner is that the Court Martial lacked jurisdiction in deciding the case. Further, this charge-sheet had not been signed by the Commanding Officer of the accused, as required. However, these objections were overruled and the Court Martial proceeded with the matter. The Petitioner was attached for the purpose of these proceedings and was sought to be reverted to the substantive rank of Colonel. However, this Court directed that the rank of the Petitioner would continue to be maintained and the Petitioner is still holding the rank of Brigadier and is posted in active duty. The Court Martial concluded its proceedings and inflicted the following punishment on the Petitioner:

(a) To take rank and precedence as if his appointment as substantive Colonel bore dated the 3rd May, 1988.

(b) To forfeit 9 years past service for the purpose of pension

(c) To be severely reprimanded.

13. The operation of this sentence has been stayed by this Court by an order dated 24-7-1989. The Petitioner has also sought the quashing of Army instructions No. SAI-1/S/74, as amended by corrigenda AI 31/86 as well as orders of 2-9-1987 and 6-6-1988 being arbitrary, harsh, whimsical, illegal and unconstitutional. He has also sought the quashing of the court martial proceedings and the sentence imposed on him by it

14. Respondents Nos. 1 to 3 have filed the reply through Lt. Colonel S.B. Mathur, VSM, Administrative Commandant, Station Headquarters, Shimla. It has been stated that the Petitioner has admitted the two lapses committed by him. It has been deduced that the case of the Petitioner is covered under para 327 of the Regulations for the Army, 1962 on the ground that he has already been proceeded against and punished by Lt. General G.S. Kler, AVSM. According to the Respondents, no such warning or reproof was issued to the Petitioner relating to the charge which is the subject-matter of the General Court Martial proceedings. Letter No. 5340/GSK/DISC-Officers, dated 29th January, 1987 (Annexure P-5) does not close the case since the Petitioner has been informed by Lt. General G.S. Kler, AVSM (Retired), the then Commandant Armoured Corps Centre and School, Ahmednagar, that the explanation rendered by the Petitioner was not convincing and that the matter was referred to the Headquarters, Southern Command Para 327(d) of the Army Regulations, 1962 applies only when a

decision has been arrived at and the case is closed by reproof by the competent authority and it is only then that no superior authority can reopen the case. The issue that was under process related to the claim of permanent duty move and the information as to Leave Travel Concession claim was released by the Petitioner voluntarily in the reply to the show-cause notice dated 1st April, 1987 (Annexure P-8). The Petitioner had only applied and referred to the travelling allowance/dearness allowance claim and at no time mentioned about the Leave Travel Concession claim and in case he had mentioned that he had already been punished/warned by the Commandant, Armoured Corps Centre and School, Ahmednagar, vide letter dated 29th January, 1987 (Annexure P-4), clear mention of the same could have been given by the Petitioner. This indicates that the Leave Travel Concession claim had not been dealt with and closed. Although Lt. General G.S. Kler, AVSM, gave his statement before the General Court Martial that he had taken the disciplinary action against the Petitioner, but no record of it existed. Thus, the Petitioner's contention regarding the disposal of the Leave Travel Concession claim is neither correct nor supported by any document since reference is to travelling allowance/dearness allowance claim and not to Leave Travel Concession claim (See : Annexures P2, P3, P7, R-2, P-8, R-1, P-9 etc. etc.). The lapse relating to Leave Travel Concession claim was under process and had not been decided, as contended by the Petitioner.

15. The further case of the Respondents is that the power of the Commanding Officer under Army Rule 22 is not as wide as the Petitioner has tried to show. The provisions of Army Rule 22 are primarily a part of preliminary investigations during which the Commanding Officer would be well within his right to summarily dispose of minor case against a noncommissioned Officer and below and decide other cases whether or not to proceed further on the available evidence before him. There is no provision in Army Rule 22 which permits an offence to be disposed of by an award of censure. The award of censure is independent of Army Rule 22 and has to be made by following the procedure laid down in Army Headquarters letter No. 32908/AG/DV-1, dated 5th January, 1989 (Annexure R-7). There is nothing on the record to show that Lt. General G.S. Kler, AVSM, (Retired) had either condoned the offence under Army Rule 22 or independently disposed of it by award of censure. The documents mentioned by the Petitioner to sustain his plea of disposing of his case by censure seems to have been prepared as an afterthought. In case Lt. General G.S. Kler had really disposed of the case, the only mode was to condone it. Before condoning the approval of the Chief of the Army Staff was required in accordance with Army Order 288 of 1972 (Annexure R-8). Moreover, he was required to maintain a record of the proceedings in accordance with the provisions of Army Order 70 of 1984 (Annexure R-9). However, no such sanction of the Chief of the Army Staff was ever obtained for condonation of the offence of the Petitioner. These facts go to show that Lt. General G.S. Kler, AVSM, (Retired), did not actually condone the offence of the Petitioner in respect of the Leave Travel Concession claim, as contended by the Petitioner, who probably succeeded in persuading Lt. General

G.S. Kler, AVSM, (Retired) to save him by fabricating evidence in the form of documents which the Petitioner is forwarding in support of his claim. Therefore, the plea that the controversy relating to two claims for permanent duty move and Leave Travel Concession claim had been set at rest is wrong. Filing of Civil Writ Petitions Nos. 410 of 1987 and 630 of 1988 has been admitted.

16. The summary of evidence was ordered in accordance with Army Rule 22 as at no stage was the case disposed of On 25-6-1988, Major General H.N. Hoon. AVSM, investigated the charge under Army Rule 22 and ordered recording of evidence in writing in the presence of two independent witnesses. The Petitioner did not make any statement as is evident from the records of Appendix "A" to Army Order 70 of 1984 (Annexure R-11). It was not considered necessary by Major General H.N. Hoon, AVSM, while holding the proceedings in the presence of two independent witnesses and the Petitioner, to call Lt. General G.S. Kler, AVSM. (Retired) as on 25-6-1988 the Petitioner submitted that he did not require the charge(s) to be heard in accordance with Army Rule 22 as per endorsement made on Appendix "A" to Army Order 70 of 1984 signed by the Petitioner himself. The Petitioner did not demand it. The documents were examined during the investigation by Major General H.N. Hoon, AVSM many times between 1st August, 1987 and 25th June, 1983. It has been admitted that during the summary of evidence, Lt General G.S. Kler, AVSM. (Retired), defence witness, had stated that he had disposed of the case, but no official record of letter No. 5340/GSK/DISC-Officers dated 29-1-1987 (Annexure P 5) is there in the office and the Petitioner did not raise any objection to it during the course of hearing of charges under Rule 22 in the presence of Major General H.N. Hoon, AVSM. Further, document Annexure P-5 does not disclose that the matter was closed in view of his statement that I may point out that I am not convinced by your explanation which is being forwarded to Headquarters, Southern Command. Further, Lt General G.S. Kler, AVSM, (Retired) had not followed the provisions of Army Order 70 of 1984 (Annexure R-9) to investigate and close the case, which shows that no proceedings took place and the statement that the case was closed is an afterthought. The testimony of Lt General G.S. Kler, AVSM, (Retired) before the Court Martial does not inspire confidence since this witness has made false statement about the disposal of Leave Travel Concession claim primarily to help the Petitioner. In these circumstances, the confirming officer had no option but not to confirm the findings of the General Court Martial with respect to the plea-in-bar and this was done in accordance with Army Rule 53(4) and the reassembly of the General Court Martial was consequently ordered and the Petitioner does not suffer on that account.

17. The charge-sheet has been signed by Lt. General Hanut Singh. MVC, the Commanding Officer of the Petitioner. Contentions raised in para 30 of the petition have also been disputed like the challenge to the Army instructions made by the Petitioner. It has also been averred that the judicial decision of the confirming authority cannot be challenged in a writ petition under Article 2 6 of the Constitution of India in view of the limited scope of the writ jurisdiction of

this Court which has also no power of superintendence over Court Martial and army authorities exercising judicial powers and this decision can be challenged only in an appeal. The Court Martial had jurisdiction to try the Petitioner and award him the sentence. There is no legal infirmity in this regard and the contention raised by the Petitioner has no substance. The filing of the writ petition is premature since the trial by the General Court Martial is not yet over because as per Army Rule 71, "confirmation is not complete and the findings and the sentence shall not be held to have been confirmed until they have been promulgated". The sentence awarded by the General Court Martial is just and proper and legally in order. The prayer of the Petitioner for quashing the same is liable to be rejected.

18. In the rejoinder to the reply by Respondents Nos. 1 to 3, it has been stated that Lt. General G.S. Kler AVSM. (Retired), has stated before the Court Martial that he had issued a warning to the Petitioner in regard to the Leave Travel Concession claim which the Respondents unjustifiably construed as a mere performance counselling to the Petitioner. Since the Headquarters had not asked for any information with regard to Leave Travel Concession claim, Lt. General G.S. Kler, AVSM, (Retired) was not required to mention the same in his comments to it. With regard to the non-maintenance of the official record with respect to the disposal of Leave Travel Concession claim, it has been stated that it was not necessary to do so, rather no record is to be maintained of the same being oral, confidential in nature besides being a matter between Commanding Officer and the officer committing the lapse. In any case, in the light of the detailed clarification by Lt. General G.S. Kler, AVSM, (Retired) this issue becomes insignificant. Technical requirements do not destroy "the substantive action of the Commanding Officer. Lt. General G.S. Kler AVSM (Retired), has clearly stated before the Court Martial that he had followed a normal procedure in all cases. It is clear from document Ex P-10 that the Leave Travel Concession claim had been forwarded to the Headquarters, Southern Command, for disposal on the ground that the case against the Petitioner had already been disposed of. The case against the Petitioner had not been condoned as suggested, rather it was disposed of. It is totally wrong and malicious to allege that Lt General G.S. Kler, AVSM (Retired), had been persuaded to fabricate the evidence to help the Petitioner. The Petitioner had mentioned to Major General H.N. Hoon, AVSM, that the case against him had been disposed of (Annexure P-15). Even if the Petitioner had not demanded the holding of preliminary inquiry, it was necessary for Major General H.N. Hoon AVSM. to have ascertained the matter by calling Lt. General G.S. Kler AVSM (Retired). Lt. General G.S. Kler, AVSM, (Retired) has clearly stated that he conducted the preliminary investigations into the case on 29-1-1987. He has been subjected to lengthy cross-examination but the Respondents have failed to elicit anything from him in support of their plea.

19 The Petitioner has also asserted that he had been attached to the Headquarters Tactical Group for all purposes, including discipline therefore, the charge could only be signed by the Commandant, Tactical Group, being his

Commanding Officer, therefore, it could not be signed by the Commanding Officer, Armoured Corps Centre and School Ahmednagar--both being separate independent units. The Petitioner continued to remain attached to this unit since there is no movement order of the Petitioner from Headquarters Tactical Group to Armoured Corps Centre and School, Ahmednagar. The Petitioner has suffered on account of Command influence from the top, otherwise the finding once recorded could be maintained since there was no change in the nature of evidence. The finding on plea-in-bar ought to have been confirmed since it was thoroughly based on fact which was conclusively established by the statement of Lt. General G.S. Kler, AVSM (Retired).

20. A supplementary affidavit has been filed by the Respondents. In it the same question relating to the issuance of warning by Lt. General G.S. Kler AVSM (Retired), has been disputed and it has, inter alia, been stated that the lapse relating to Leave Travel Concession claim was not disposed of. The manner of dealing with the matter by Lt. General G.S. Kler AVSM (Retired) has been termed unconventional and, there fore, made the subject-matter of Court Martial proceedings against the Petitioner.

21. The fourth Respondent has also filed his affidavit. Through it, the jurisdiction of this Court and the locus standi of Smt. Veena Baswani wife of the Petitioner has been challenged. The jurisdiction of the General Court Martial has been maintained and it has been said that the trial could take place and has taken place in accordance with the statutory provisions.

22. In the rejoinder to the supplementary reply of Respondents Nos. 1 to 3, while replying the preliminary objections, it has been stated that the original petition was filed by the Petitioner himself. Since the Petitioner had been posted to a far off place in Eastern Sector in Arunachal Pradesh, it was not possible for him to be physically present here Accordingly, the Petitioner authorised his wife Smt. Veena Baswani through a special power-of-attorney to file the petition. She is fully conversant with the facts of the case, so she could file and pursue the matter on behalf of the Petitioner. As to jurisdiction, it has been stated that High Court can entertain a petition where cause of action or part of cause of action takes place. The Petitioner was posted under the territorial jurisdiction of this Court and the order of attachment was served upon him during this time. It was challenged in this Court by way of a writ petition which was disposed of by giving liberty to the Petitioner to file a fresh petition in case any adverse order was passed against him. Even the order through which the trial of the Petitioner was ordered after the acceptance of his plea-of-bar, was also served upon him at Shimia--within the territorial jurisdiction of this Court It has further been stated that the Respondents had never raised any objection to the jurisdiction of this Court in any of the previous writ petitions and even in this writ petition till the supplementary reply to the fourth amended petition was filed. The objection is thoroughly belated and the Respondents are estopped from raising this objection. On merits, among other things, the question of reversion to

substantive rank during attachment has been raised and assailed since being arbitrary and unnecessary. Lt. General G.S. Kler, AVSM (Retired) has also stated, while giving his evidence before the Court Martial, that the Petitioner had voluntarily given the information relating to the Leave Travel Concession claim while he was being questioned relating to Travelling allowance/dearness allowance claim it has also been submitted that there is no legal requirement to attach an officer for the purposes of disciplinary action. It may not be ordered at all and no reasons have been given why the Petitioner was required to be attached.

23. On June 3, 1992, the Petitioner moved C.M.P. No. 55 of 1992 to place certain documents on the file. The Petitioner states that under para 2(a) of document Annexure-B, he could opt for voluntary retirement in his acting rank of Brigadier. Accordingly, he opted and sent communication No. 12975/SPSB/1, dated 15th March, 1991 (Annexure-C). In return, he received letter No. 193240/6/MS III, dated April 12, 1991 asking the Petitioner to move proper application thereby allowing the option of the Petitioner. This is also clear from para 3 of this communication which says that "in case the said proforma is not filled by you and signed, you will be reverted to the lower substantive rank of Colonel as per para 4 of our letter No. 198340/3/MS-3 (sic), dated 15th February, 1991. Accordingly, the Petitioner submitted the application on April 16, 1991 (Annexure-E)! The retirement order followed. It is No. 3099/3488/MS (X) dated 31st July, 1991 (Annexure-F).

24. The Respondents filed reply to this application. They objected to the filing of some of the documents. As to the issuance of communication No. 29189/II/1960/MS (X). dated 3rd February, 1991, it has been stated that it has been issued in routine to officers who have been denied a substantive rank and the case of the Petitioner has also been considered alongwith another officer inadvertently in view of the ban imposed as per document dated 1-8-1988 (Annexure-RA). It was not taken into consideration by the Military Secretary Branch while issuing the letter in question, otherwise this letter could not/would not have been issued. It has also been stated that the offer made through Annexure-B was inadvertent and it has not been legally accepted and acted upon by the Petitioner and is, therefore, withdrawn and be treated as having never been issued in view of the circumstances explained above. The Petitioner will retire in the rank of Colonel on 30-6-1992 on attaining the age of retirement. The Petitioner cannot and will not be permitted to retire in the acting rank of Brigadier since it does not confer any legal right etc. etc. After referring to the essential pleadings of the parties, we turn to the specific contentions raised and argued before us by the learned Counsel for the parties.

25. Shri R.S. Randhawa, learned Counsel for the Petitioner, raised the following main contentions before us:

(1) The General Court Martial has no jurisdiction to try the Petitioner since the lapse had already been disposed of by his Commanding Officer, Lt. General G.S.

Kler, AVSM (Retired).

(2) The inquiry conducted by Major General H.N. Hoon, AVSM, is not in accordance with Rule 22 read with Rule 25 and all the proceedings, therefore, stand vitiated.

(3) The charge-sheet has not been signed by a competent Commanding Officer, therefore, the Court Martial proceedings are liable to be quashed.

26. Before dealing with these submissions, we would like to deal with the two preliminary objections raised by Sh. R.L. Sood, learned Counsel for the Respondents. The first objection of Sh. R.L. Sood is that this Court lacks territorial jurisdiction to decide the matter since the lapse was committed by the Petitioner while he was posted at Ahmednagar. The Court Martial proceedings were also held at the same place. Similarly, the punishment has also been awarded there. On the other hand, Sh. R.S. Randhawa contended that in view of the facts and circumstances of this case, the objection to the jurisdiction of this Court is thoroughly belated. Moreover, it stands acquiesced by the act and conduct of the Respondents who had not raised the same in the earlier writ petitions. In order to sustain this plea, the learned Counsel referred to 1991 Lab. IC 585 . Damomal Kausomal Raisinghani Vs. Union of India and Others, Damomal Kausomal Raisinghani v. Union of India and Ors. 1989 Lab. IC 2190, D. Ramesh v. The Government of India and Ors. AIR 1971 Mad. 155 ; The Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and Another, Bahrein Petroleum Co. Ltd. v. P.J. Pappu and Anr. We have examined this question. In our opinion, there is no force in this contention. The Respondents did not raise these objections in any of the previous writ petitions, namely, CWPs Nos. 410/87 and 630/88 In the former case, one of the reliefs claimed by the Petitioner was a writ in the nature of prohibition against the Respondents from passing any order of attachment on the ground that the lapse relating to Leave Travel Concession claim had already been disposed of by Lt. General G.S. Kler AVSM (Retired). This is clear from the following order of this Court passed on 24-5-1988:

We have heard Shri Inder Singh for the Petitioner and Shri P.A. Sharma, for the contesting Respondents We have also perused the affidavits exchanged between the parties We are not inclined to interfere in the matter at the present stage. We refrain ourselves from expressing any opinion on the question whether the order communicated to the Petitioner vide letter dated June 29, 1987 (Annexure P-1) was a final action within the meaning of Clause (d) of paragraph 327 relating to reproof to an officer or not or whether the Respondents were entitled to proceed against the Petitioner, in the matter of the false claim of L.T.C. preferred by the Petitioner, after the aforesaid order. We leave the pleas, which are being raised by the Petitioner in the present petition in this respect, open to him in case some orders adverse to the Petitioner are passed in the proceedings now initiated against him and the Petitioner comes to challenge them later.

27. The petition shall stand dismissed in the aforesaid terms.

28. In the latter case, the Petitioner had prayed that the Respondents may not proceed further against him on the basis of the allegation relating to the charge that the Petitioner had made a false claim of Leave Travel Concession. It is important to quote some parts of the order passed on December 12, 1988. They say:

Most of the pleas which have been raised in the present petition are the same which were raised on behalf of the Petitioner in the earlier petition. However, by way of additional circumstances which, according to the Petitioner, enabled him to approach this Court again are the facts that a statement has been made in the summary evidence, recorded earlier, by Lt. General G.S. Kler on July 5, 1988 which shows that the case relating to L.T.C. had also been finally closed against the Petitioner and further that an order constituting a General Court Martial to try the Petitioner has been passed which is an order adverse to the Petitioner.

It has been fairly disclosed by the Petitioner in the present petition that he has made a statutory complaint against the order by which General Court Martial has been constituted against him to try him on the charge aforesaid. The grievance of the Petitioner is that even though the statutory complaint has remained undecided, the Respondents are going ahead with the Court Martial proceedings. The Petitioner has already appeared on December 9, 1988 before the General Court Martial as directed and further proceedings are fixed from December 15, 1988 onwards. Having considered the submissions made on behalf of the Petitioner, we feel that since the Petitioner has admittedly made a statutory complaint against the order directing his trial by the General Court Martial, it is only fair that a decision is taken on the statutory complaint before proceeding ahead with the General Court Martial. In any case, we feel that the interest of justice would be served better if the General Court Martial deals with the plea, if taken, by the Petitioner that the proceedings before the General Court Martial were barred on the ground that the offence for which he is now being tried could not be proceeded with again on account of the bar contained in Rule 53 of the Army Rules, 1954. If the General Court Martial is called upon to record its decision on this plea it should, in our opinion, do it in the first instance. If the decision recorded is against the Petitioner, the General Court Martial shall not proceed against the Petitioner under Rule 53(5) forthwith but shall adjourn the matter for a reasonable time to enable the Petitioner to seek such legal remedies as may be open to him against the decision taken by the General Court Martial on the plea founded upon Rule 53 raised by the Petitioner.

We hope that the statutory complaint of the Petitioner shall be disposed of within a month from today. In any case, we direct that in case the General Court Martial does not accept the plea of bar raised by the Petitioner before it, it shall adjourn further proceedings at least for a period of four weeks from the date of the decision, of which a copy shall be made available to the Petitioner within three days of the decision.

With the aforesaid observations, we dispose of the petition finally.

29. It can thus be seen that no objection as to jurisdiction has been taken in these cases. Turning to the present case, we notice that this objection was taken by the Respondents only in the supplementary reply to the fourth amended writ petition the objection is, therefore, belated and is liable to be rejected. The claim of the Petitioner was not adjudicated on merits in Civil Writ Petition No. 410 of 1987 and this Court permitted him to challenge the adverse order that may be passed against him in the proceedings Initiated against him. The proceedings were initiated against the Petitioner and these obviously related to the lapse of Leave Travel Concession claim Likewise, the order of this Court dated December 12, 1988 had permitted the Petitioner to challenge the order of General Court Martial in case the plea in-bar was not accepted. In the present case, the Petitioner has not only challenged the order of attachment hut also the Court Martial proceedings All through, his case has been that the lapse relating to Leave Travel Concession claim had been disposed of by Lt. General G.S. Kler, AVSM (Retired), on 29-1-1987 and the case could not be reopened for trial in view of the bar contained in para 327 of the Army Regulations, 1962. already reproduced in the preceding para of this Judgment. The Petitioner was serving under the jurisdiction of this Court when the order of attachment dated 2-4-1987 was served upon him. But for the order of attachment the trial could not have taken place at Ahmednagar. Even the order through which the trial of the Petitioner was ordered after the acceptance of his plea-of bar was also served upon him at Shimla Similarly, the Petitioner was asked to arrange for his defence counsel in respect of the case pending before the General Court Martial at Ahmednagar and the notice was served upon him at Shimla with respect to the General Court Martial at Ahmednagar (Annexure P-28). Keeping in view the stage to stage developments of this case based on almost same facts, it is hardly possible to uphold the objection of the Respondents.

30. Equally untenable is the second question relating to the locus standi of Mrs. Veena Baswani, wife of the Petitioner, to file the petition. The contention of Shri R.L. Sood is that the grievance of the Petitioner is personal in nature and it could only be agitated by him alone. This petition does not involve any general public interest, therefore. Mrs. Veena Baswani cannot move it on behalf of the Petitioner Civil Writ Petitions Nos. 410 of 1987 and 630 of 1989 were filed by the Petitioner himself. The present petition was also filed by him personally on 23-2-1989. Mrs. Veena Baswani started pursuing the matter from the amended stage of the petition. In answer to the objection, taken at a belated stage, she has stated that since the Petitioner was posted to a far off place in Eastern Sector in Arunachal Pradesh, it was not possible for him to be physically present here. Accordingly, he authorised her, being his wife, through a General power-of-attorney to do so. She is fully conversant with the facts of the case. We have seen the General power-of-attorney in her favour. It is executed on April 11, 1989 at Ahmednagar by the Petitioner in favour of his wife Mrs. Veena Baswani and she has been duly authorised. In any case, she is the wife of the Petitioner and has sufficient loqus-standi to pursue the matter on his behalf.

31. Adverting to the key question in the case, Sh. R.S. Randhawa, learned Counsel for the Petitioner, forcefully contended that the Petitioner has been harassed illegally and unjustifiably, so this Court has wide jurisdiction to interfere and give relief to the Petitioner. The learned Counsel referred to para-9 of AIR 1982 Del 191 R.S. Bhagat v. Union of India, which says:

9. (i) Although the Court-Martial is not a part of judicial system and is not a court in strict sense, it is a Court of its own kind, *sui generis*. It is a combination of jury trial and a trial by a Judge. The proceedings before the Court-Martial are judicial proceedings of the species of criminal proceedings. The Code of Criminal Procedure does not apply. But the Evidence Act applies like civil courts. The duty to act judicially is writ large in the provisions of the Army Act and Army Rules. The Court-Martial proceedings are amenable to writ jurisdiction of the Supreme Court and the High Court. In particular, writ of certiorari can be issued by the Supreme Court under Article 32 and by High Court under Article. 226 of the Constitution. The need for the writ jurisdiction of the Supreme Court and High Courts was explained by Dr. B.R. Ambedkar, in the Constituent Assembly in the following words:

I should, however, like to say this that Clause (2) does not altogether take away the powers of the Supreme Court or the High Courts. The law does not leave a member of the Armed Forces entirely to the mercy of the Tribunal constituted under the particular law. For, notwithstanding Clause (2) of Article 112, it would still be open to the Supreme Court or to the High Court to exercise jurisdiction, if the Court-Martial has exceeded the jurisdiction given to it or the power conferred upon it by the law relating to the Armed Forces. It will be open to the Supreme Court as well as the High Courts to examine the question whether the exercise of jurisdiction is within the ambit of the law which creates or constitutes this Court or Tribunal. Secondly, if the court-martial were to give a finding without any evidence, then again, it will be open to the Supreme Court as well as the High Courts to entertain an appeal in order to find out whether there is evidence.... Similarly, if I may say so, it would be open for a member of the Armed Forces to appeal to the court for the purpose of issuing prerogative writs in order to examine whether the proceedings of the Court-Martial against him are carried on under any law made by the Parliament or whether they were arbitrary in character. This article is a necessary article. It really does not do anything more but gives a statutory recognition to a rule that is prevalent and which is recognised by all superior courts.

32. The Leave Travel Concession case stood disposed of by order dated 29-1-1987 (Annexure P-5) passed by Lt. General G.S. Kler, AVSM (Retired), who was competent to do so being the Commanding Officer of the Petitioner at the relevant time. In that view of the matter, the order of attachment as well as the further proceedings initiated by the Respondents are palpably illegal in view of the ban imposed by para 327 (d) of the Army Regulations, 1962 read with policy contained in letter No. JAG/ARMY HQ-3/S/6/JAG, dated 29th December, 1964

(Annexure P-24) being followed by the Respondents and the Respondents have also not stated that this policy is not being followed. Shri R.L. Sood, on the other hand, disputed this claim. According to the learned Counsel, this lapse was never decided by Lt General G.S. Kler, AVSM (Retired), as contended. The so called warning (Annexure P-5) has been created at a much later stage by Lt. General G.S. Kler, AVSM (Retired), Commanding Officer of the Petitioner, in order to save him from the initiation of inquiry relating to these lapses. He submitted that many communications, including Annexures R-4, R-5 and R-16, did not make any mention about the disposal of the LTC claim of the Petitioner. So, in case it had been decided, as contended, that should have been pointed out by Lt. General G.S. Kler, AVSM (Retired) or the Petitioner. We have examined this question carefully with reference to the available material with us. In our considered opinion, there is great merit in the plea of the Petitioner. The Petitioner submitted two claims on 8-12-1986 the first was regarding permanent duty move claim from Babina to Abmednagar (TA/DA claim) and the other was Leave Travel Concession claim--air travel from Pune to Delhi and back with family (LTC) claim. These claims were submitted to the Controller of Defence Accounts (Officers) (Shortly, CDA(O), Pune). Through communication dated 17-12-1986 (Annexure P-1), (CDA)(O), Pune, pointed out certain deficiencies in these claims and sought certain supporting documents. The Petitioner resubmitted the claims on 4-1-1987. Through communication No. T/B/105711, dated 22-1-1987, CDA(O), Pune, forwarded the copy of TA/DA claim alongwith supporting vouchers to Headquarters, Southern Command, Pune, for investigation. In this, there is clear reference to the letter dated 17-12-1986 (Annexure P-1) which mentions both the claims of the Petitioner. Further, this communication is stated to have been received on 28-1-1987, as is apparent from letter No. B/6601/003/127/DB-II (Annexure P-3). Paras 1 and 2 of Annexure PJ disclose that the matter with respect to TA/DA claim only was sought to be investigated and comments/recommendations had been called by February 25, 1987. This means that Lt. General G.S. Kler, AVSM (Retired), who was the Commanding Officer of the Petitioner, who was aware of both the lapses on the part of the Petitioner before 29-1-1987. Then, on the same date, the Petitioner has given a written explanation (Annexure P-4). In it, he refers to letter No. 12975/Acts, dated 4-1-1987 on which date the Petitioner had resubmitted both the claims--TA/DA claim and LTC claim therefore, he has given explanation about both of them. In the last para of this explanation, he says: "the above faults are totally due to my negligence and casualness." By communication No. 4340/GSK/Dsc./Officers dated 29-1-1987 (Annexure P-5). Lt. General G.S. Kler, AVSM (Retired), says that through the letter from Headquarters Southern Command, enclosing the photostat copies of the Petitioner's claim forwarded to CDA(O), he had noticed that the Petitioner had preferred two claims with respect to permanent duty move and Leave Travel Concession. It was apparent from the claims that these had been incorrectly and wrongly preferred. After holding the claims as such, the Petitioner has been given a warning and it has also been said that since he was not convinced by the explanation, he was forwarding the same to Headquarters Southern Command.

33. Now, the question is whether the Petitioner has been warned for both the lapses? The answer is in the negative. In our opinion, the warning pertains to the lapse relating to Leave Travel Concession claim since he could not have dealt with the lapse relating to TA/DA claim since the Headquarters, Southern Command, had asked him to investigate the matter and forward his comments/recommendations. Superior authority being seized of the matter, Lt General G.S. Kler, AVSM (Retired) had accordingly sent the lapse relating to TA/DA claim to the Headquarters, Southern Command, Pune, on February 28, 1987. The show-cause notice dated March 5, 1987 (Annexure P-7) was issued to the Petitioner. Part 3 of this notice refers to the statement of the Petitioner dated 29-1-1987 accepting the guilt of preferring false claim and on this basis, an administrative action was directed to be taken against him by the General Officer Commanding-in-Chief, Southern Command. The Petitioner's reply is dated April 1, 1987 (Annexure P-8) and the order of punishment passed in this case for this lapse is contained in the order of April 18, 1987 (Annexure P-9). This is the culmination of the lapse relating to TA/DA claim only.

34. The question then arises whether the lapse relating to the Leave Travel Concession claim stood closed by the order of Lt. General G.S. Kler, AVSM (Retired) dated 29-1-1987. We answer this question in the affirmative. We record our reasons for this conclusion to set-aside the allegations raised with vehemence by the learned Counsel for the Respondents.

35. We have already noticed that Lt. General G.S. Kler, AVSM (Retired) had come to know about both these lapses not only from the communications already discussed above, but also from the statement/explanation of the Petitioner. It has not been disputed by the parties that Lt General G.S. Kler, AVSM (Retired), was the Commanding Officer of the Petitioner and he could take cognizance of the matter in accordance with the provisions of Rules 22 and 25. If we look at these Rules, it is clear that the Commanding Officer has wide powers. He can deal with a case himself or can refer the same to the higher authorities. He can dismiss the case as trivial or he may not take cognizance of it in his discretion. The objection that he should have looked into the matter elaborately is, in our opinion, not a mandatory requirement, more especially when the Petitioner had admitted the faults. No further inquiry was needed. The Commanding Officer could show his displeasure either orally or in writing or both there and then without postponing the matter any further and he did so except in the case relating to TA/DA claim which he rightly referred to the Headquarters, Southern Command, which was seized of the matter and he had been required to investigate and send his comments to it. The combined reading of Rule 22(2) with para 327 of the Army Regulations, 1962 and detailed policy contained in letter dated 29-12-1964 (Annexure P-28), give wide powers to the Commanding Officer to deal with a complaint/allegation against an officer, with which he did not want to proceed with. In that case, he may dismiss a charge. If, in his discretion, he is satisfied that the charge ought not to be proceeded with, he may still indicate his displeasure at the conduct of the accused (Annexure P-24). It

says that:

...In case of officers no such procedure is ordinarily necessary and the Commanding Officer may follow any procedure (Army Rule 25 refers). The Commanding Officer may then take a decision under Army Rule 22(2) or under Army Rule 22(3). If he refers the case to the superior authority under Army Rule 22(3)(b) such authority will have similar powers....

36. Further, para-3 states "I may point out that the word charge here does not mean a formal charge but an allegation of having committed an offence. A case can be disposed of even under the Code of Criminal Procedure without framing a formal charge." In para-4, it has been stated that:

The award of displeasure in our opinion, therefore, in the circumstances under consideration amounts to a judicial decision under Army Rule 22(2)--later portion--and is a dismissal of the charge where even though there is evidence that an offence has been committed, a competent authority is satisfied that the charge ought not to be proceeded with.... This peculiarity arises because of the peculiar conditions of service in the Army. The charge having been dismissed the accused is not liable to be tried because of the provisions of Army Act Section 121, Army Rule 53(1)(a) and the general provisions of res judicata....

37. Finally, it has been explained to be a warning and not a punishment. It can only be termed to be a displeasure.

38. The grievance that this document has been created to help the Petitioner is thoroughly baseless. Lt. General G.S. Kler, AVSM (Retired), is an officer of the rank of Lt. General. He was the Commandant, Armoured Corps Centre and School, Ahmednagar. He was also the Commanding Officer of the Petitioner. Although he found the charge with respect to Leave Travel Concession to be of trivial nature, since money had not passed to the Petitioner, he administered a warning to the Petitioner. According to para 327, he was not required to keep such documents in the service record of the officer concerned, which would mean that in case a displeasure has been shown to an officer of such a high rank, this was also to be kept secret from others as well. Obviously, it was not to form part of the official files in the normal course. Further, he had no motive to rescue the Petitioner and create this document, that too at a later stage, as contended.

39. Lt General G.S. Kler, AVSM (Retired), has been examined at two stages. He gave his statement when summary of evidence was recorded on July 5, 1988. He has explained the case thoroughly well. He also produced photostat copy of the letter of warning also (Annexure P.S) It has been stated by him that he had closed the case relating to Leave Travel Concession claim and only the case relating to TA/DA claim was being pursued He had administered verbal as well as written reproof to the Petitioner and closed the case in accordance with Army Headquarters letter No. 32908/AG/TB/I, dated 30th August, 1980.

40. Similarly, in his statement before the Court Martial, he has cleared all the

questions in controversy and has reiterated that it was the lapse relating to Leave Travel Concession claim that was closed by him on January 29, 1987 (Annexure P-S). He did not forward the order of warning (Annexure P-S) to higher authority since it was neither required nor it was necessary as the Headquarters, Southern Command, was only seized of the case relating to TA/DA claim. He has stated that the observations "I may point out that I am not convinced by your explanation which is being forwarded to the Headquarters, Southern Command" were in respect of the TA/DA claim which he forwarded to the Headquarters, Southern Command. To the question why he did not maintain any office record of the same, he explains that it was not mandatory to do so. The letter of warning was between him and the Petitioner and he did not have to inform his Deputy Commandant or his Principal "A" Staff Officer. To the question that this letter had not been issued to the Petitioner, he emphatically says that the same is genuine. This was, according to Lt. General G.S. Kler, AVSM (Retired), not an exceptional case but the normal practice he had been following in all the cases. To the question why he had disposed of the case on 29-1-1987 itself, he has stated that thereafter he had certain commitments.

41. We have considered seriously the relevant pleadings, oral as well as written submissions pertaining to them. Our conclusion, as we have said, is that the lapse of the Petitioner relating to Leave Travel Concession claim had been decided by Lt. General G.S. Kler, AVSM (Retired) as per warning order of 29-1-1987 (Annexure P-5). Simply because Lt. General G.S. Kler, AVSM (Retired) or the Petitioner did not make mention of the disposal of the LTC claim in reply to the communications referred to by the learned Counsel for the Respondents, that does not mean that the case was not so decided, particularly when neither the pleadings nor any record in the shape of office notings indicate that the correspondence with respect to LTC claim so given by the office of the Commandant, had been put up or either shown to Lt General G.S. Kler, AVSM (Retired) by either of his subordinates. Alternatively, we see no reason to conclude that he ought to have made mention of it in view of Rule 22(2) read with Para 327, as already discussed above. Further, most of these communications pertain to the correspondence between the offices of the CDA(O) and Accounts Officer of the Commandant, Armoured Corps, Centre and School, Ahmednagar, Pune. It is to be noted that the movement order of the Petitioner had been issued by the concerned authorities on February 5, 1987 and the Petitioner had moved out of the place from 5th February, 1987 as per the order referred to above. Therefore, the matter could not be effectively answered by the office of the Commandant, Armoured Corps Centre and School, Ahmednagar, in respect of the LTC claim after that date. Otherwise also, the letter dated August 1, 1987 (Annexure P-10) is a complete answer to the contentions raised by the learned Counsel for the Respondents in that behalf. This letter clearly indicates that the case pertaining to LTC claim stood already disposed of. In other words, this fact was within the knowledge of one and all for and on behalf of the Respondents. In view of the aforesaid conclusions, the

subsequent proceedings initiated by the Respondents are absolutely illegal in view of the plea-in-bar raised by the Petitioner at the earliest opportunity. They are, therefore, quashed. Similarly, the punishment proposed by General Court Martial is quashed and set-aside. The Respondents are restrained from promulgating the same. In view of our aforesaid conclusion, the second question is also answered accordingly and it is not necessary to decide the third question.

42. Now, the only contention left for consideration is the case sought to be set-up through C.M.P. No. 855 of 1992. Two questions were raised in it. It was contended by Sh. R.S. Randhawa, learned Counsel for the Petitioner, that in case this Court decides the first question in favour of the Petitioner, the consequence is that the Petitioner remains Acting Brigadier (Substantive Colonel), In view of the communication No. 29189/II/1960/MS (X). dated 8th February, 1991 (Annexure-B), the Petitioner having been denied the substantive rank of Brigadier is entitled to be retired as Acting Brigadier in view of the option exercised by him under para 2 (a) of this communication, thus preventing his reversion to the substantive rank of Colonel as envisaged under para 4 of the same communication. The offer of the Petitioner, exercised through communication No. 12975/SP/SB-1, dated March 15, 1991 (Ann-exure-C), has been accepted as is clear from communication No. 193240/6/MS-M dated April 12. 1991. He, therefore, ought to be retired as Acting Brigadier with all benefits available to him at that level, subject to the outcome of the challenge that may be lodged against the non-grant of substantive promotion as Brigadier, Shri Randhawa coo-tends. The Respondents, on the other band, say that the case of the Petitioner has been wrongly considered along with Acting Brigadier Manjit Singh mentioned in communication No. 29189/11/1960/MS/X dated February 8, 1991 (Annexure-B) since there was a ban order (Annexure-RA) against his consideration for promotion and the order has been passed inadvertently by the Military Secretary Branch without taking into consideration the ban in question. It was also contended that the Petitioner has been attached for the purpose of disciplinary proceedings and will remain attached till the order of sentence is promulgated. The submissions raised by the Respondents are thoroughly misconceived and fallacious. The order of attachment is purely administrative in nature. By it, a person is attached with another Unit or Command in order to facilitate the inquiry against him. The consequence of it is the reversion of the person to the substantive rank. This has been stayed in the case of the Petitioner. During attachment he remained acting Brigadier. After the conclusion of the inquiry, the Petitioner was posted as Deputy General Officer Commanding, 22 Mountain Division in the same rank which post he holds till date. While deciding C.M.P. No. 236 of 1989, moved by the Petitioner, the Respondents did not allege that the Petitioner remained under attachment and could not be given posting order. As a matter of fact, no objection was raised by the Respondents. It is relevant to refer to the order passed on 3-10-1989 in C.M.P. No. 236 of 1989:

The Petitioner has as per C.M.P. No. 920 of 1989 brought to the notice of this Court that the Court Martial proceedings had been concluded and what remains

to be done is only its confirmation or non-confirmation by the Chief or Army Staff. The Petitioner, therefore, prays for an order directing his posting in his present rank. Shri P.A. Sharma appearing for the Respondents has no objection in passing an order directing his posting provided his presence is not required at the present station of his attachment for the purpose of Court Martial. This submission is recorded and a direction is issued for posting of the Petitioner, if his posting is not required at the present station for the purpose of Court Martial.

43. It cannot be said that the Military Secretary Branch did not apply its mind to the facts of the case before passing the above order (Annexure-B) alongwith the case of Acting Brigadier Manjit Singh. In view of the discussion aforesaid, the Petitioner retires as Acting Brigadier (Colonel substantive) at the age of 52. Accordingly, the order of attachment is ineffectual in the present case and does not affect the Petitioner in any way. He will retire as Acting Brigadier and we direct accordingly. We have not, nor we should be understood to have examined and decided the promotion of the Petitioner to substantive rank of Brigadier. He may, if he so chooses, agitate the matter separately.

44. The writ petition is allowed in the aforesaid terms. The Respondents will pay Rs. 3,000 by way of costs to the Petitioner.