

(2000) 12 DEL CK 0092
In the Delhi High Court
Case No : L.P.A. No. 43 of 1987

N.R. Ajwani

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:

Air Force Act, 1950 — Section 18, 19
Air Force Rules, 1969 — Rule 16
Army Act, 1950 — Section 117(3), 154, 160(4), 165, 18
Army Rules, 1954 — Rule 147A, 17, 23, 23(5), 82(3)
Constitution of India, 1950 — Article 1, 11, 14, 154, 163(1)
Government of India Act, 1919 — Section 96B
Official Secrets Act, 1923 — Section 3, 3(1), 5
Pension Regulations for Army, 1961 — Regulation 22, 3
Railway Establishment Code — Rule 148, 148(3), 149, 149(3)

Citation : (2002) 95 DLT 770

Hon'ble Judges : K. Ramamoorthy, J;Devinder Gupta, J

Bench : Division Bench

Advocate : G.L. Sanghi, A.K. Nigam, Pramod Sehgal, Amrita Sehgal and Arvind Sah, for the Appellant; A.M. Singhvi, Addl. Solicitor General, Rakesh Tikki, Rajiv Shakhdar and Rekha Palli, for the Respondent

Final Decision : Allowed

Judgement

K. Ramamoorthy, J.—The appellants in the Latent Patent Appeals, the petitioner in C.W.P. 3063/95 and the petitioner in C.W.P. 4082/95 have come forward with a grievance that their services have been dispensed with by the respondents on extraneous reasons which cannot be sustained in law. They were all working at one time in 168 Infantry Brigade deployed in the place called Samba, in a border area.

2. Each of the appellants and each of the petitioners has got its own case to relate which requires a careful consideration. At the outset it may be noted that the question to be decided is whether the respondents have established their case against each of the appellants and the petitioners who have approached this

Court.

3. The genesis of the present action was the arrest of Gnr. Aya Singh and Gnr. Sarwan Dass who were alleged to be assisting Pakistan SSI endangering the security of India. They were arrested in the year 1975 on suspicion of their being spies passing on secret information to a neighbouring country.

4. Aya Singh was tried by a General Court Martial in the year 1977 for his absence without leave but not on the ground of espionage. He was sentenced to 7 years" imprisonment besides order of dismissal from service. For reasons best known to the respondents he was granted remission and was reinstated in service in March, 1978.

5. Similarly, Sarwan Dass was in custody since 1976. He was also tried by a General Court Martial and was awarded 7 years" imprisonment and dismissal from service. His sentence was remitted and he was also reinstated in service.

6. At the instance of the above two, Ex. Capt. Rathore (petitioner in C.W.P. 3063/95) and Ex. Capt. A.K. Rana (petitioner in C.W.P. 4082/95) were roped in and were charged with an offence of espionage. Capt. R.S. Rathore was arrested on the 24th of August, 1978. Capt. A.K. Rana was arrested on the 27th of October, 1978.

7. Capt. Kulwant Singh, Major R.K. Midha, Capt. J.S. Yadav, Capt. Arun Sharma, Capt. Vijay Kumar Dewan, Major N.R. Ajwani and Major S.P. Sharma, were arrested on the 23.1.1979.

8. The facts in LPA 4/87 Ex. Major R.K. Midha are to be noticed in the first instance. On 27.9.1963 the appellant was commissioned as Second Lieutenant in Infantry Regiment. Later on he was transferred to Intelligence Corps of the Indian Army. In March, 1976 the appellant was transferred from Nagaland (HQ B Mountain Division) to YOL in Himachal Pradesh (527 Intelligence and Field Security Company and 39 Infantry Division) as Officer Commanding. In the year 1977 the appellant was awarded the Chief of Army Staff Commendation Card. The appellant was directed to conduct a Short Security Cadre for officers and JCO"s of 39 Infantry Division at Samba (9 Punjab) from 4th of November, 1977 to first week of December, 1978. In the year 1978 he was awarded VSM.

9. The appellant was transferred to 641 Field Security Section at Red Fort on 3.7.1978 to work as Officer Commanding.

10. On 26.8.1978 Col. V.P. Gupta (INT) H. Northern Command asked the appellant to send Hav. Ram Swaroop for interrogation. That Hav. was on leave on that day but was summoned from his residence at Gurgaon and was sent to the Interrogation Centre. The Hav. was sent back next day to the Unit of the appellant. On 26.9.1978 under the orders of Col. J.N. Sabharwal, Foreign Liaison Section, DMI Hav. Ram Swaroop was arrested and thereafter he was found dead at the Interrogation Centre which is under the control of the Military Intelligence Directorate on the 30th of September, 1978. On 1.10.1978 the appellant was

informed on phone by Dr. Major (Mrs.) Indira Pahhani of Base Hospital, Delhi Cantonment that the dead body of Hav. Ram Swaroop was brought to the Base Hospital from Interrogation Centre by Capt. Sudhir Talwar on the night of 30th September/1st October, 1978 and the doctor found multiple injuries on the forehead, chest and on the face. The Doctor said that there were 39 injuries on the body of the Hav. The Doctor wanted to know about the next of kin and their address. Col. J.N. Sabharwal directed the appellant not to disclose the facts till final leave was given by Directorate of Military Intelligence which was given after a few hours. Later on, the said Dr. Pahhani confirmed the message in writing to the appellant as he was the Officer Commanding of the said Hav. Dr. Maj. Mathur of the Base Hospital carried out post mortem examination. The letter received from the Base Hospital was filed in the personal case file of the Hav. and duly handed over by the appellant in 641 Field Security Section, Red Fort, Delhi. On 2.10.1978 the body of Hav. was taken over by the Delhi Police from the Base Hospital and second post mortem examination was carried out at Tis Hazari Police Mortuary which also found 39 injuries in the body of Hav. The Delhi Police made enquiries into the case and registered a murder case against some army officials. The police insisted on investigation to be made by the Army Authorities. On the same day, the appellant was directed by Major Solanki of Directorate of Military Intelligence to collect the dead body from the Police Mortuary at Tis Hazari and asked to carry out last rites in the Electric Crematorium without any reference to the relatives of the late Hav. The appellant expressed his inability to do the same as the order was illegal one and the appellant also pointed out that late Hav. was attached to 76 Medium Regimental Centre.

11. Sometimes later. Col. B.K. Bhandari of Directorate of Military Intelligence came to pressurise the appellant to carry out the last rites" of the Hav. in a clandestine manner without informing the relatives of the late Hav. Here again, the appellant refused to comply with the illegal order. After moments later, Col. T.S. Grewal, Deputy Director, Military Intelligence rang up the appellant and ordered that the body of the late Hav. should be collected from the Police Mortuary and everything should be done without the knowledge of his relatives. The appellant was firm and did not agree, Col. Grewal threatened the appellant by stating that if he did not carry out his order the appellant would be implicated in a case and he will be dealt with accordingly.

12. The police subsequently had to inform the next of kin of late Hav. for taking the body from the Tis Hazari Mortuary. The appellant was again confronted with an order by Military Intelligence to send a representative of his Unit along with the JCO from 76 Medium Regiment and ordered that the body should be sent for post mortem to the Base Hospital, Delhi Cantonment. The body was sent to the Base Hospital where for the third time post mortem was carried out and the post mortem this time was also done by Dr. Major Mathur. Dr. Major Mathur informed the appellant that he was put under pressure to declare that the death was due to some drugs having been taken by the deceased as he was a drug addict.

13. Col. T.S. Grewal directed the appellant to depute one JCO and 2 NCOs to accompany the dead body to Gurgaon to ensure that the last rites are performed in their presence and he directed the appellant to inform the Col. about the last rites having been performed even if it was very late in the night. That was done.

14. On the 3rd of October, 1978 the appellant was directed by Col. T.S. Grewal, the then DDMI to send 2 JCO's to the residence of the deceased Hav. to pay a sum of Rs. 500/- to the next of kins so that they may not raise any objection. The appellant had to do this also.

15. In November, 1978 a Court of Inquiry was ordered by HQ, Delhi Area to enquire into the cause of the death of Hav. The Court of Inquiry was presided over by a close relative of Capt. Sudhir Talwar, who was one of the interrogators, who brought the dead body of Ram Swaroop from the Base Hospital and who was involved in the tortuous death of Hav. The appellant was called as a witness. During the course of inquiry the appellant produced the letter received from the Base Hospital wherein the multiple injuries sustained by the late Hav. are mentioned. The Presiding Officer did not take that letter on record as that would bring forth the real cause of the death of the late Hav. The First Court of Inquiry was dissolved as the Military Intelligence Authorities did not get the result which it wanted.

16. In December, 1978 a Second Court of Inquiry was ordered when the appellant was on leave. The appellant was asked to attend the Court of Inquiry in Artillery Unit in Delhi Cantonment. Col. T.S. Grewal, Dy. Director, Military Intelligence called the appellant in his office and directed him to depose before the Court of Inquiry that the late Hav. was a drug edict. Lt. Col. S.C. Jolly, one of the interrogators involved in the murder of Hav. was present in the Artillery Unit and was coercing the appellant to say that the Hav. was drug edict. The appellant stated in his statement that the late Hav. was not a drug edict at all. Again the Court of Inquiry was dissolved.

17. Not being able to get the desired result Military Intelligence Authorities managed to convene a Third Court of Inquiry and the same was held at the Headquarters Western Command, Shimla. Col. J.N. Sabharwal, Foreign Liaison Section, Military Intelligence Directorate, Brig. Amrik Singh, then Commandant Base Hospital, Delhi Cantt. and the appellant and other witnesses were called. On 15.1.1979 Col. J.N. Sabharwal expressed surprise as to how he was included in the list of witnesses and directed him to depose in the Court of Inquiry at Shimla that the late Hav. was a drug edict and the Col. exhorted the appellant that if he did not act as per his order the appellant would have to face the consequences. The appellant flatly refused. The inquiry was to take place after 20th of January, 1979. The appellant had informed HQ Western Command by signal and was making arrangements to go to Shimla to be present there on the 20th of January 1979. Before he could do so, Col. J.N. Sabharwal called the appellant over the phone and told him to defer his move.

18. The result was that on the 23rd of January, 1979 at 13.30 hours the appellant was arrested without charge-sheet and was also not allowed to attend the Third Court of Inquiry which was to commence on 20.1.1979. On the same night the appellant was taken to Udhampur by train, hand-cuffed and blind folded and he was kept in a Solitary Cell without any connection with the outside world for a long time.

19. On 25.4.1979 charge was conveyed to the appellant.

20. Between 12.6.1979 and 16.6.1979 with one holiday in between, the appellant was interrogated. The interrogators did not face the appellant and the interrogation was done through sepoy when the appellant was blind folded. And one can, according to the appellant, visualise the sort of interrogation done by the interrogators of the Directorate of Military Intelligence. It is what is recorded in such a process to be against the appellant and others who are involved in the cases before us.

21. In August, 1979 the appellant was shifted to Jaipur where also he was kept under close arrest.

22. On 31.8.1979 a statutory complaint was made to the Chief of Army Staff but that was not considered at all as there was no response from the Chief of Army Staff to the statutory complaint.

23. On 26.9.1979 Summary of Evidence was ordered against the appellant and a charge-sheet was given to him. The charge-sheet is as under:

"The accused IC-18808 P. Major R.K. Midha of 641 F.S. Section presently attached to 85 Armoured Regiment is charged with:

Army Act.

Section

COMMITTING A CIVIL OFFENCE.

in that he at field during November, 1977 and February, 1978 was involved in espionage activities contrary to Section 3()(e) of Indian Official Secret Act, 1923.

Summary of Evidence to be recorded.

Jaipur.

6. September, 1979.

Sd/-

N.L. Badhwar

Lt. Col.

COMMDT 85 Armed Ragt."

24. A letter enclosing the charge-sheet reads as under:

"Enclosed, please find one copy of charge sheet. Please return the attached receipt duly signed by you.

Encl. 1.

Sd/- N.L. Badhwar

Lt. Col.

O.C."

25. It is to be noticed at this stage itself as it is of immense relevance while considering the whole of the conspectus of events involving the officers who are before us, a statement is alleged to have been recorded from Capt. A.K. Rana on the same day i.e. 26th September, 1979 when Summary of Evidence was ordered and charge-sheet was issued to be appellant. That statement was produced without producing Capt. A.K. Rana, who is alleged to have given the statement. Capt. A.K. Rana was shown as PW1. The appellant wanted production of Capt. A.K. Rana and though he was mentioned as PW1 he was produced on 30.10.1979.

26. In the Summary of Evidence recorded between 9.10.1979 and 29.11.1979, 18 witnesses were examined. None of them stated anything which could be put against the appellant.

27. It is quite un-understandable as to how the officer recording Summary of Evidence could rely on a statement alleged to have been recorded from Capt. A.K. Rana in the absence of the appellant. A perusal of the statement, alleged to have been recorded from Capt. A.K. Rana, would completely betray the Directorate of Military of Intelligence. The alleged statement is stated to have been recorded in the presence of Capt. P.M. Dubey of Military Directorate on the 26th of September, 1979. It is important to notice the relevant fact that in which place it was recorded is not known to anybody. If what is claimed by the Directorate of Military Intelligence is true then one can easily infer that Capt. A.K. Rana was available at the place where the appellant was served with the charge-sheet. And it is not explained as to why he was not examined on that date. So many facts are missing in the chain of events and the whole thing is shrouded in mystery. As a larger issue is involved as the facts which form the basis of the orders passed by the authorities and the decision of the Court Martial, we are constrained to quote what Capt. A.K. Rana is alleged to have given his statement which is alleged to have been recorded in the Summary of Evidence on 30.10.1979:

PW1 IC 23440 H. Capt. A.K: Rana is now made available on 30 October, 1979 at 11.30 Hrs. In 205 Div. Loc Bty. Location C/o 56 RPO for cross examination by IC 18803 Major R.K. Midha as per written plea given by him. Exhibit RX-1 read out to PW1 in the presence of the accused and independent witness 2nd Lt. Michael

Weir. Capt. A.K. Rana has now following to state.

I was posted to 7 Jat Battalion since 23 March, 79 Presently I am Delhi. I was posted to 527 Int. and F.S. Coy From my B.7 Jat and reported to the Unit on 10 December, 75 and stayed until 23 March, 78. On 12 Jan. 75 I had taken over from Capt. R.S. Rathaur as Int. Officer in charge of Int. and F.S. Platoon attached with 168 Infl. Bde. located at Samba and remained with this Platoon till 23 March, 78 when I handed over this Platoon to Capt. Kulwant Singh.

The statement read out to me as copies in my hand between the days 3 Aug. 79 and 9 Aug. 79 from my earlier hand written statement which I was compelled to write in Jan. 79 under prolonged torture and duress. This original statement was fed to me entirely by Lt. Col. S.C. Jolly or Major P.S. Solanki, which I cannot recollect today since I was asferffowriteanumberofstatementdictatedbythesetwoofficers.Icopiedthis particular statement under instructions from Lt. Col. S.C. Jolly and Major P.S. Solanki and was specially told not to endorse the date. On this statement of mine. During this period of January, 79 I was made to insert date of 3 Nov. 1978. Subsequently on 26 Sept. 79 I was taken to interrogation centre. Major P.S. Solanki placed the statement before me for putting the date as 26 Sept. 79. On my refusal to do so, I was subjected to all kinds of inhuman acts of torture and was left with no option but to follow his instructions. I was not informed at any stage that this statement is being forwarded to the officer recording summary of evidence in the case of Maj. R.K. Midha.

This statement was neither written nor signed by me in the presence of IC 32523 Capt. P.M. Dubey, as shown therein the exhibit, I, however, identify my signatures which appears in this exhibit.

As regards my written statement covering the facts other than espionage activities as described in paras one and two of the statement are entirely true borne by records available in the Unit. However, regarding the portion of my statement pertaining to our visit to Chalyari post I can recollect that I did visit the said post with Major R.K. Midha, VSM and Mr. B.S. Beniwal, Dy. Commandant 22 BSF and the driver on the platoon army vehicle painted in silver colour. We took tea met the Platoon Detachment deployed there and I remember the Log Book pertaining to observation duties was checked by my Officer Commanding in addition to asking the welfare and any other problems from the detachment boys. We had gone in the afternoon and stayed at the post for 25-30 minutes I am not definite whether the said post was during the period of 2 weeks cadre i.e. 21 November to 3 December, 1977 or some times prior to it. The portion pertaining to espionage activities described during Nov. 77 as given in my statement is totally false, baseless, concocted and fabricated fairly tale. There is no truth, whatsoever in this part of the statement.

As regards para 3 of the statement as far as I remember, my of did go to corps/ command HQ on duty (the nature of which was never disclosed to me) but I am

not sure of the period of this visit. However, I remember distinctly that we never visited any of the posts stated therein the statement during the said period on his return from this duty in Feb. 78 as has been mentioned. I remember that the task of marking Pak DCB alignment on map was entrusted to me and we did meet at Vijaypur and visited our Chamlal Post. It was sometime in February, 77 and NCT in Feb. 1978 as has been mentioned in the statement exhibit. Even during this visit in Feb. 1977 we carried out the marking of Pak DCB from Chamlal Post. We had never gone towards S.M. Pur. The remainder portion of my statement implicating myself Maj R.K. Midha, VSM, Subedar B.S. Budi N.J.C. Sharma and Hav. S.S. Jamwal is totally false, fabricated and fictitious story.

As far as Maj. R.K. Midha, VSM and whatever I know of him he is an officer of immaculate character with unquestionably honesty, integrity, self respect, truthfulness and dexterity. It is a discord between the person and circumstances and tyranny of fate that an officer of his standing, stoical and decorated soldier has falsely been implicated in a heinous crime of espionage.

The above facts and truth have been stated despite the threats of dire consequence which include an inhumane treatment already experienced by me from time to time and even my disposal under some pretext under which was made to write and copy my false statements pertaining to espionage activities. However, I have highlighted the truth, as I cannot resist my unconquerable revulsion to injustice.

I was on annual leave from 2 Nov. to 31 Dec. 77. During the cadre period I was spending my leave at Sambha due to my daughter's education. I used to visit cadre occasionally since the School where my daughter was studying was located in the close proximity of the barrack where cadre was being run. I do not remember the holidays during this cadre.

I had visited Maj. R.K. Midha VSM and Capt. D.S. Chauhan in the officers mess of 9 Punjab during one after noon which I do not recollect now and had a cup of tea with Capt. D.S. Chauhan. On this occasion I had gone in civil painted jeep drive by Hav. S.S. Jamwal. I had met Maj. R.K. Midha outside his room for about 5 minutes. Once again I had gone to 9 Punjab in the morning hours in the Civil Painted Jeep and met Capt. Chauhan only and had breakfast with him. Both these visits were made in connection with some officials problems pertaining to the Platoon for which the Offg. Int. Offr. wanted me to discuss, and sort out since I was in station. On 22 Nov. 77 I had celebrated my daughter's birthday. Maj. R.K. Midha VSM Capt. D.S. Chauhan and Sub B.S. Dudi had attended this party in the new house. Capt. Harish Pal Singh with family had also attended this. The party ended at about 2100 Hrs. or so. I cannot recollect whether Maj. Midha visited my house on any other occasion during the cadre period.

During my stay at Sambha, Maj. R.K. Midha had visited my Platoon location about 3 to 4 times as far as I can recollect at this belated stage. We visited Border Outposts in my Sector about 2 to 3 times. On all these occasions we

never went ahead of prescribed area. Each time we went ahead of Border Outpost area, Protection Party of B.S.F. was invariably taken. The border is demarcated by pillars stones/bricks all along the Indo Pak International border all along, as I know of. It is only possible to mistake the border line during hours of darkness and in the absence of guide/protection party from B.S.F.

Maj R.K. Midha never interrogated any suspect or briefed/debriefed any source in brigade Sector.

He never handed me over any document or place of information or map prejudicial to security under Official Secrets Act for handing over to any suspect or any source Pak or own.

I have never even seen Major R.K. Midha physically crossing Indo-Pak International Border. I have never even seen him anywhere going beyond the prescribed limits of our area of operation.

I had known about existence of Maj. Khan of Pak FIU through information gained by the sources working for us.

28. In February, 1980 the appellant was released.

29. On the same day an order of terminating his services was passed and the same reads as under:

"The President of India in exercise of powers conferred by Army Act, Section 18 and of all other powers enabling in this behalf, is pleased to order that the service of IC-18808-F Major R.K. Midha shall be terminated with effect from the date on which he is relieved of his duties."

30. On 10.5.1982 a Memo was issued imposing a 5% cut in the gratuity payable. The same is as under:

"WHEREAS, Major R.K. Midha (IC-18803) was commissioned in the Indian Army on 27.9.1963, and whereas, his services were terminated by the President with effect from 13.3.1980 u/s 18 of the Army Act, after rendering 16 years (completed) commissioned service.

(2) AND WHEREAS, according to his 16 years (completed) commissioned service, if he had retired in a normal course, he would have been eligible to receive service gratuity of Rs. 13,221/- (Rupees thirteen thousand two hundred and twenty one only) and death-cum-retirement gratuity of Rs. 15,944/- (Rupees fifteen thousand nine hundred and forty four only).

(3) AND WHEREAS, consequent upon termination of his service, grant of retiring (service) gratuity and death-cum-retirement gratuity to him is at the discretion of the President, under Regulations 3 and 22 of the Pension Regulations for the Army Part-I (1961).

(4) AND WHEREAS, having regard to the fact that the services of Major Midha were terminated, the President considers that his services cannot be treated as

satisfactory and as such proposes to impose a cut of 5% in the retiring (service) gratuity and DCRG, under the provision of Regulations 3 and 22 *ibid*.

(5) Now, Therefore, Major Midha is hereby called upon to show cause within 30 days of the receipt of this memorandum by him as to why the action as proposed in para 4 above should not be taken against him. If no Explanation is received within the stipulated period, it will be presumed that the said Major Midha has nothing to say against the proposed action and the case shall be finalised and Government orders issued accordingly without giving any further opportunity to him.

By order and in the name of the President of India."

31. The case of the appellant has been that he had been working in the Army without any blemish whatsoever and recognising his services he was rewarded and he was not involved in any case at any time and a false case had been foisted on him which has resulted in the order at the instance of the Directorate of Military Intelligence Authorities.

32. In the counter affidavit filed on behalf of the Union of India the stand taken is that the order of termination of the services of the appellant is beyond the pale of judicial review.

33. In "Preliminary Objections" it is stated:

"That the impugned order is covered by Article 310 of the Constitution of India, a Section 18 of the Army Act which lay down that every person subject to this Act shall hold office during the pleasure of the President. That being the position, the petitioner being a member of the defense Services in precluded to challenge the impugned order which is not justiciable. Hence the present writ petition is not maintainable.

Moreover Section 18 of the Army Act clearly lays down that every person subject to that Act shall hold office during the pleasure of the President. This Section 18 is enacted Ex. Major contella since Article 310 referred to supra that an officer of defense Services holds office at the pleasure of the President.

It will be significant to mention that no rule or regulation can modify the constitutional provision as embodied in Article 310 of the Constitution which is supreme.

Recently a Division Bench of this Hon"ble High Court is the matter of S.P. Sharma v. Union of India in Civil Writ Petition No. 418/80 wherein similar facts were involved as in the instant case, has been dismissed on 21.4.80 by the Acting Chief Justice Parkash Narain and Justice Sultan Singh wherein their Lordships held that dismissal from service u/s 18 of the Army Act is complementary to Article 310 of the Constitution of India, This means that the officer held the tenure of office during the pleasure of the President.

Even the impugned order per se says that the President in exercise of his powers

conferred by the Constitution and the Army Act Section 18 exercised his power in terminating the service of the petitioner."

34. In the Reply on Merits in paragraph 8 it is stated :

"In reply 8 it was though proper to have recourse to Article 310 read with Section 18 of the Army Act to terminate his service as he was a defense personnel which permits the President to have recourse to these provisions against him in view of his suspicious character which cannot be disclosed as it relates to affairs of the State involving national defense and public security and good neighbourly relations."

35. The argument before the learned Single Judge was that order u/s 18 of the Army Act, 1950 had been passed without any justifiable reasons and it is an order of dismissal on account of misconduct and that is evident from the Memo issued on 10.5.1982. The submission on behalf of the appellant was that on a perusal of the record it could be seen that there is no reason at all to support the order of dismissal in the garb of an order of termination. It was, Therefore, submitted that the order was void and was liable to be set aside and the appellant was entitled to all the consequential benefits.

36. The submission on behalf of the respondents was that u/s 18 of the Army Act, 1950 the President has ample power to issue order of termination and it is akin to the power exercised by the President and Article 310 of the Constitution of India. The argument was that the tenure of service was during the pleasure of the President which is also known as tenure ab Libitum or duret bene placito. On behalf of the respondents reliance was placed on the decision of the Division Bench (Hazara Singh v. Union of India, LPA 94/79 decided on 24.8.1981). The judgment in the connected matter was announced on the same day and the judgment is reported as Hazara Singh v. Union of India and Ors., 1981 (2) SLJ 517.

37. The learned Single Judge, considering the only point without any reference to the records in the case and without dealing with the merits of the case dealing with, only, the scope of Section 18 of the Army Act, 1950, said:

"A similar question arose in the case of "Hazara Singh v. Union of India", L.P.A. (94) of 1975 decided on August 24, 1981 by a Division Bench of this Court. In that case the President passed the Order u/s 18 of the Air Force Act, 1950 dismissing Hazara Singh from service with immediate effect. The main argument addressed was that as Hazara Singh had been dismissed from service, he had a right that a proper enquiry should have been held and opportunity should have been held and opportunity should have been given to him as required by Section 19 of the said Act read with Rule 16 of the Air Force Rules, 1969. The learned Single Judge held that the tenure of Hazara Singh was at the pleasure of the President within the meaning of Article 310(i) of the Constitution of India and, Therefore, the President was empowered to dismiss Hazara Singh without holding an enquiry and neither the Act nor the Rules could put any restraint on

the President's pleasure.

Hazara Singh appealed before a Letters Patent Bench who dismissed the appeal. It was held that the exercise of power under Article 310 is subject to Article 311 and so Article 309 cannot empower or affect the pleasure of the President or the Governor but as in the present case, Hazara Singh was a member of the defense services, Article 311 was inapplicable and, Therefore, the pleasure under Article 310 can be exercised untrammelled by any other provision of the Constitution or the Statute. The Division Bench upheld the decision of the learned Single Judge that the power to put an end to the tenure may be exercised by any of the modes known to law for the purpose and there is no distinction whether the tenure be put to an end by termination or dismissal, because such a power to remove or dismiss is covered in the Presidential pleasure as provided in Article 310."

38. Against the decision of learned Single Judge appeal was filed to Division Bench. In all connected appeal a reference was made to the Full Bench on the following question:

"Whether the order of termination passed by and in the name of the President u/s 18 of the Army Act read with Article 310 of the Constitution invoking the doctrine of pleasure of President be challenged on the ground that it is camouflage and as such is violative of principles of natural justice and the fundamental right guaranteed under Article 14 of the Constitution?"

39. The Full Bench answered the reference on 8th July, 1994 and the decision is reported as Ex. Major N.R. Ajwani and Others Vs. Union of India and Others, . The Full Bench clearly laid down as under :

"In our opinion, the concept of "camouflage" is a facet of judicial review and the Court would lift the veil in all cases where it appears that power is used for collateral purpose under the cloak or garb of innocuous form of an order and determine the true character of the order under challenge.

Under the circumstances, for the afore-mentioned reasons the answer to the reference is that an order u/s 18 of the Army Act read with Article 310 of the Constitution of India invoking the doctrine of pleasure of President is subject to judicial review to ascertain whether the same is exercised lawfully and not vitiated for mala-fides or based on extraneous grounds and that the order can be challenged on the ground that it is a camouflage."

40. The Full Bench had thoroughly examined the position following the decisions of the Supreme Court.

41. The pleasure doctrine was considered by the Supreme Court in The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, . In paragraph 22 the Supreme Court said:

"The discussion yields the following results: (1) In India every person who is a

member of a public service described in Article 310 of the Constitution holds office during the pleasure of the President or the Governor, as the case may be, subject to the express provisions therein. (2) The power to dismiss a public servant at pleasure is outside the scope of Article 154 and, Therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him, only in the manner prescribed by the Constitution. (3) This tenure is subject to the limitations or qualifications mentioned in Article 311 of the Constitution. (4) The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310, as qualified by Article 311(5) The Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 11 thereof. (6) The Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Article 311 of the Constitution; but the said law would be subject to judicial review. (7) If a Statute could be made by Legislatures within the foregoing permissible limits, the rides made by an authority in exercise of the power conferred there under would likewise be efficacious within the said limits."

42. A Constitution Bench of seven Judges had again an occasion to consider the pleasure doctrine in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.,* . The appellant before the Supreme Court Moti Ram was a peon in the North East Frontier Railway purporting to exercise power under Rule 148 of the Railway Establishment Code, the General Manager, North East Frontier Railway, terminated the services and that was challenged, inter alia, on the ground that that Rule was invalid and secondly the order was also invalid. This matter came up before the Constitution Bench wherein the validity of Rules 148(3) and 149(3) which superseded the former was considered by the Supreme Court. The question posed by the Supreme Court was "the question which we have to consider in the present appeal is whether the termination of service of a permanent regular servant under Rule 148(3) or 149(3) amounts to his removal and Article 311(2) of the Constitution. If it is so, the impugned Rules are invalid, if it does not the said Rules are valid." Then the Supreme Court took up the construction of Article 311(2) read in the light of Articles 309 and 310 of the Constitution of India. The argument on behalf of the North East Frontier Railway by the learned Additional Solicitor was that every civil servant holds his office during the pleasure of the President or the Governor, that all civil service was strictly speaking precarious in character. There was no guarantee of any security of tenure, because of the pleasure of the President or the Governor can be exercised at any time against the civil servant. The learned Additional Solicitor General contended that no doubt the pleasure would not be exercised capriciously, unjustly or unfairly, but the existence of the doctrine of pleasure inevitably imposes a stamp of precarious character on the tenure enjoyed by the

civil servant, and so, it was urged whether Rule 148 or Rule 149 was made applicable or not, it would be open to the President or the Governor to terminate the services of any civil servant to whose case Article 310(1) applies. The further argument was that the necessity to construe Article 310(1) and Article 311 in such a manner that the pleasure contemplated by Article 310(1) did not become illusory or completely obliterated.

43. The argument on behalf of the Railway servant was that the pleasure doctrine was controlled by Article 311 and if the argument advanced on behalf of the Union of India was accepted the Article 311 would become otiose. Therefore, the argument was that the pleasure of doctrine would still be there but it had to be exercised in accordance with the requirements of Article 311. The central argument of the learned Additional Solicitor General was Article 310 did not permit of the concept of tenure during good behaviour. Inspire of the Rules of superannuation and the superannuation merely give an indication to the civil servant as to the length of time he may expect to serve but it did not give him any right to continue during the whole of the period. The further argument was that once the pleasure doctrine was invoked that cannot be questioned under Article 311(2) of the Constitution of India. The Supreme Court accepted the challenge of the Rule and Article 14 of the Constitution of India. The theory of pleasure doctrine was not accepted.

44. In *The State of Bihar Vs. Abdul Majid*, , the Supreme Court had noticed the rule of English Law pithily expressed in the Latin phrase "*duranto bene placito*".

45. In *B.K. Sardari Lal Vs. Union of India (UOI) and Others*, , five Judges of the Supreme Court took the view that function of the President exercising pleasure doctrine cannot be delegated or allocated by the President to anyone else reversing the judgment of this Court reported in 1970 Lab IC 76.

46. In *Samsher Singh Vs. State of Punjab and Another*, , a seven Judges Bench of the Supreme Court over-ruling the five Judges judgment in *B.K. Sardari Lal Vs. Union of India (UOI) and Others*, , posited :

"For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointments and removals of persons are made by the President and the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the State in regard to appointment or dismissal is brought against the

Union or the State and not against the President or the Governor."

47. In *Union of India and Another Vs. Tulsiram Patel and Others*, , five Judges Bench of the Supreme Court of India considered the scope of pleasure doctrine and also had observed that reasons must appear on record.

48. Thus, the law laid down by the Supreme Court, on reading of the above cases, is that the respondents can exercise power u/s 18 of the Army Act, 1950 but the respondents are under an obligation to satisfy the Court by producing the necessary materials that the order was justifiable. The learned Single Judge in the impugned judgment dealing with this aspect has said :

"In my view, the satisfaction of the President under Article 310 of the Constitution or u/s 18 of the Act is not the personal satisfaction of the President but the satisfaction of the President to be exercised in accordance with the Constitution. The question has been settled by the Supreme Court in *Samsher Singh Vs. State of Punjab and Another*, . The proposition that the power to dismiss a public servant at pleasure was outside Article 154, so that only the President or the Governor personally could exercise was one of the main questions raised before the Supreme Court. The Supreme Court earlier in *Moti Ram Deka's case* (supra), held that a law could be framed prescribing the procedure by which, and the authority by whom, the pleasure of the President or the Governor could be exercised. The theory that only the President or the Governor could personally exercise the pleasure of dismissing or removing a public servant was repelled. It was held, that the executive functions of the President are to be exercised by virtue of Article 74 with the aid and advice of the Council of Ministers. The President has under Rules or Business prescribed the procedure by which and the authority by whom the pleasure of the President is to be exercised. The exercise of the powers in these cases is by the President and is not open to challenge. The power is not exercised by the Central Government u/s 19. The exercise of the powers u/s 18 is in the manner prescribed by the President."

49. The learned Single Judge, with respect, has not been pleased to appreciate the position of law in its proper perspective. The learned Single Judge, with respect, has assumed that the respondents had acted in accordance with law in issuing the order of termination in terms of Section 18 of the Army Act, 1950.

50. The learned Counsel for the appellant submitted that the order of termination is only a camouflage for the order of dismissal. The respondents had not produced the relevant files to satisfy the Court that they had acted in accordance with law laid down by the Supreme Court. What is produced is the file containing notings. The respondents ought to have produced pre-trial remarks with remarks of Area Commanders with reference to the concerned officers. Case files maintained by the Commanding Officers placing the officers under arrest and subsequent investigations and the base on which Summary of Evidence was ordered, complete record of service of the officers as maintained by the Army

Headquarters to show unsatisfactory service of the officers. Report to the defense Ministry to show whether all the documents were forwarded for proper appreciation. Case files relating to the impugned orders and the Memo dated 10.5.1992 and all the proceedings leading to Court Martial with reference to Capt. A.K. Rana and R.S. Rathore and report by Lt. Gen. K. Chiman Singh, General Officer Commanding, 16 Corps, located at Nagrota, I.B. report cum record of investigation carried on by I.B. What is produced is nothing but a few nothings and they do not show how decisions were arrived at. From the files produced it is clear that the respondents have not been able to show any material evidence against the officers now before this Court.

51. Learned Counsel for the appellant submitted that the respondents constituted three Courts of Inquiry to enquire into the custodial death of Hav. Ram Swaroop. The appellant revealed the facts which was not to the liking of Military Authorities and, Therefore, the decision of the Court of Inquiries was illegal and unauthorised.

52. The case of the respondents was that Capt. A.K. Rana made statements implicating the appellant on 12.7.1979 and on 16.10.1979. But it may be noticed that the appellant was arrested on 23.1.1979. Therefore, one can easily visualise the whole scenario of events leading to the arrest of various officers exercising arbitrary power without any reason and authority of law. The learned Counsel submitted that Capt. Kochhar was acquitted on the evidence of Capt. A.K. Rana before the Court Martial, that a joint investigation team had declared Samba spy case to be a fake one, that all the witnesses examined in the Summary of Evidence did not say a word against the appellant. The learned Additional Solicitor General Dr. A.M. Singhvi submitted that the respondents had considered all the relevant aspects and the decision had been approved by all the authorities including the Prime Minister of India. The learned Additional Solicitor General submitted details showing how the officers were apprehended on the basis of the statements made by the officers themselves. The chart showing the details would read as under:

Sr.	Name of Petitioner	Date of written statement	Date of state-ment given in presence of independent witnesses	No. of summaries made and record signed prior or subsequent to Appellants S of E under Army and others Rule 23(5) or otherwise.
(1)	Ex. Maj S.P. Sharma	22.1.79	12.07.79	24.10.79 27.08.79 12.10.79
(2)	Ex. Capt. V.K. Dewan	23.01.79	12.07.79	24.05.79
(3)	Ex. Maj. R.K. Midha	23.01.79	12.07.79	30.10.79 26.09.79
(4)	Ex. Capt. Arun Sharma	22.01.79	12.07.79	27.10.79 6.08.79
(5)	Ex. Maj. N.R. Ajwani	23.01.79	12.07.79	Capt. A.K. Rana 16.08.79 not examined.
(6)	Ex. Capt. Kulwant Singh	23.01.79	12.07.79	29.10.79 28.09.79
(7)	Ex. Capt. J.S. Yadav	22.01.79	12.07.79	26.10.79 16.08.79
(8)	Ex. Hav. P.P. Singh	23.01.79	12.07.79	23.03.79
(9)	Ex. N.K. Jagdish	02.10.78	12.07.79	23.01.79
(10)	Ex. Hav. Ranjit Singh	28.10.78	12.07.79	24.01.79
(11)	Ex. N.K. Ram Swarup	10.11.78	12.07.79	

24.01.79 Singh (12) Ex. Capt. R.S. Rathore 24.08.78 Petitioner tried by General Court Martial and found guilty based on confession as well as corroborative evidence. No statement on this issue made by Capt. A.K. Rana till then. (13) Ex. Capt. A.K. Rana 27.10.78 Petitioner tried by General Court Martial and found guilty based on confession as well as statement made by Capt. R.S. Rathore implicating himself and the petitioner.

53. The case of the appellant and the cases of other officers are inter connected and intertwined and they all to be looked into as a whole.

54. Before we proceed to turn to facts and legal principles applicable to the cases we have to see the records submitted by the respondents.

55. The respondents had submitted for our perusal four thin files without proper pagination and indexing.

56. From a reading of the files one could see that the proposal had come from the Army Headquarters Directorate of Military Intelligence for termination of services of certain officers u/s 18 of the Army Act, 1950 and that was accepted by the concerned Ministry. The circumstances under which the Directorate Military Intelligence formed the opinion has not been disclosed. A single sheet file has been submitted to show that on 17.12.1980 there was a review of the decision taken earlier and it appears from a note typed out without any signatures of any authority that the very Director of the Military Intelligence who proposed action have been a party to the review meeting. From the records produced no authority can come to any conclusion on the decision to be taken by the authorities concerned for terminating service of the officers. We wanted to satisfy ourselves about the basis on which the action was proposed by the Directorate Military Intelligence. Apparently, the Directorate of Military Intelligence thought that they are not obliged in law to produce any record before the Court and the decision of the Directorate Military Intelligence cannot be scrutinised by this Court.

57. We shall now pass on to the facts in LPA 43/87.

58. According to the appellant, he served in the Indian Army from October, 1964 to March, 1980. In the first instance, he served as an Artillery Officer. In March, 1980 his services were terminated. The charge against him is that he crossed the International Border, met Pakistan Army Officers and passed on the information to the enemy. The basis of the charge was the statement alleged to have been made by Capt. A.K. Rana and as per the statement the appellant met the Pakistan Officers at post Kandwal, which he alleged is not possible since this post is in India and not in Pakistan. According to the appellant in the year 1976 he was working in the Headquarters, Northern Command, Udhampur (J & K) where he conducted a number of trials of Army personnel under Indian Official Secrets Act, 1923. While conducting the trial of one Maj. Gehlotin 1977, the appellant was implicated by Gnr. Aya Singh and Gnr. Sarwan Dass, who were notorious Pakistan spies. And at the time of the trial the appellant felt foul of some senior

Military Intelligence Officers, who were conducting the Courts of Court Martial. In July, 1978 while conducting the trial of Gnr. Om Parkash under the Official Secrets Act the appellant was pressurised by the officers of the Military Intelligence to maneuver to get an oral confession of the accused after his written confession was disallowed by the General Court Martial. The appellant was threatened to do so by the Military Intelligence Officers. At that time. Major Jolly and Capt. Sudhir Talwar of Military Intelligence were produced to prove the oral confession and the appellant expressed the opinion against the admissibility of the said oral confession. In December, 1978 the appellant was transferred to HQ, Southern Command. On 23.1.1979 the appellant was arrested at his residence. No reasons were disclosed. From 12.5.1979 onwards the appellant had been writing to Judge Advocate and also the Chief of the Army Staff complaining that he had been arrested, hand-cuffed, blind-folded and locked up, the only reason being that he has pressed his opinion against the testimony of Maj. S.C. Jolly and Capt. Sudhir Talwar, both interrogators from Military Intelligence Directorate and declined to accede to their request to do something which was illegal. It was through the Directorate of Military Intelligence that his representations were routed through and Therefore nothing happened. On 6.8.1979 the appellant was produced before the Commanding Officer 48 A.D. Regiment and was charged for having crossed into Pak Border and having met Major Khan of Pakistan in the company of Capt. A.K. Rana. After 7 months of detention without any reason, which was totally illegal, the appellant was given a charge-sheet for recording of Summary of Evidence which should have been done within 24 hours under the Army Act, 1950. The Summary of Evidence was recorded by Lt. Col. V.K.K. Nair at Samba and New Delhi between August and September, 1979. Three of the witnesses were examined to show the crossing of border, (1) Major Rana, (2) N/Sub. S.S. Jaunwal, and (3) L/NK Mahabir Sihag. The last one Sepoy Driver Mahabir Sihag was a driver who stated clearly that the allegation against the appellant and Capt. A.K. Rana was false and he was tortured to falsely implicate the appellant and Capt. A.K. Rana and no such incident alleged against them had ever happened. It is stated by the appellant that Mahabir Sihag was later dismissed from service under the Army Rules 17. The witness proceeded to say that his written statement was taken by the interrogators at the Interrogation Cell on 22.6.1979 and not on 22.2.1979 as alleged. Here also, the Military Intelligence Authorities had manipulated the records. Capt. A.K. Rana was not produced and as in the case of R.K. Midha (LPA 4/87) a statement alleged to have been made by Capt. A.K. Rana was produced. The third witness Jaunwal, who gave a statement implicating the appellant, was rewarded when he was released from custody and promoted and then retired. Non-production of Capt. Rana was in gross violation of 23(5) of Army Rules, 1954.

59. After the conclusion of the Summary of Evidence the trial of the appellant by General Court Martial took place on 20.12.1979, the appellant wanted the production of Capt. Rana but he was never produced. The trial was adjourned

sine die which was in violation of Army Rule 82(3) and Army Act 117(3). The order adjourning the Court sine die was passed by the General Officer Commanding, Maharashtra in Gujarat Area Pune and no reasons were assigned.

60. In October, 1979 Capt. A.K. Rana and Capt. Rathore were examined by Mr. V.K. Kaul, Deputy Director, Intelligence Bureau and five officers and they expressed the view that those two officers were innocent and the whole Samba case was a biggest fraud which they had come across in their career. While the trial of the appellant was kept in abeyance, Capt. A.K. Rana was taken to Jammu to depose against Capt. Kochhar who also was tortured. There also Capt. Rana was tortured to falsely implicate Capt. Kochhar. Capt. Rana gave evidence that Kochhar was innocent and he was tortured for several days by Maj. Jolly and Capt. Sudhir Talwar to give false evidence against Capt. Kochhar. The General Court Martial accepting the evidence of Capt. Rana acquitted Capt. Kochhar and Kochhar is still serving in the Indian Army. The trial of Capt. Kochhar was on 23.1.1980 and the General Court Martial against the appellant was dissolved on 21.9.1980. The dissolution of the Court Martial was totally unauthorised and was illegal. Without completing the record, as stated above, abruptly the impugned order was passed terminating the services of the appellant.

61. In the counter the same point is taken that the impugned order is not subject to judicial review. The respondents had claimed privilege for production of documents.

62. We shall now consider the facts in LPA 139/87.

63. The appellant was commissioned as 2nd Lt. in the Indian Army. He is a Graduate in Engineering. According to the appellant the whole game was started by the Military Intelligence Authorities by getting statements from Gnr. Aya Singh and Gnr. Sarwan Dass, who were arrested and punished and whose conduct was not spurned by the Intelligence Authorities instead they procured statements from those two gunners implicating about 27 officers, 3 junior commissioned officers and 9 non commissioned officers and 11 civilians. And a perusal of the file would bring out the real facts. On 23.1.1979 the appellant was arrested and no reasons were disclosed to him. On 13.4.1979 on oral charge was read out to him. The appellant denied those charges. The appellant sent his objections by his letter dated 15.4.1979. On 1.6.1979 the appellant received a second charge report informing him that he was kept under detention in Military custody for having visited Pakistan for the purpose of passing an information prejudicial to the safety and interest of the State.

64. By letter dated 18.6.1979 the appellant denied all the charges. The appellant made representations and nothing came out of them. On 9.7.1979 the Officer Commanding of the appellant informed him that he would face a Summary of Evidence very shortly. On 10.7.1979 the appellant was apprised about the tentative charges for which the appellant lodged his protest. The appellant made a request to the Army Authorities to record Summary of Evidence. On 8.8.1979

the appellant wrote to the Army Authorities for early recording of the Summary of Evidence. On 29.8.1979 the recording of Summary of Evidence was commenced and it went on till 3.10.1979. 17 prosecution witnesses were examined and none of them said anything against the appellant. Here also, the written statement of Capt. Rana was read out to the appellant. The appellant wanted the production of Capt. Rana for cross-examination. On 14.9.1979 the appellant strongly raised his objections for non-production of Capt. A.K. Rana at the time at the Summary Evidence. The appellant had stated that the concerned authorities assured him that if they found a prima facie case against the appellant then at the stage of trial the appellant would be given an opportunity to cross-examine Capt. A.K. Rana. On 2.10.1979 the appellant requested the Army Authorities to release him as nothing had turned on the Summary of Evidence. On 27.10.1979 Capt. Rana was produced at the time of recording of additional Summary of Evidence as the main prosecution witness, Capt. Rana in unmistakable terms stated that he was made to write on torture and he was not author of any of the statements and he had stated that he was forced to copy from the previous statement between 3.8.1979 to 9.8.1979 in the Interrogation Centre of the Military Intelligence Directorate by torture and threats by Maj. S.C. Jolly and Maj. Prem Solanki. Capt. Rana stated that no dates were put on those papers. Thus, according to the appellant Capt. Rana was made to make statements by Military Intelligence Authorities by using force. On 14.10.1979 the appellant was released. By order dated 11.1.1980 the appellant was dismissed from service. On 15.2.1980 representation was made by the appellant along with others to the Prime Minister of India and Mr. T.R. Rajeshwaran, Director, Intelligence Bureau was asked to enquire into the matter and he gave an opinion that the officers were innocent and have been falsely implicated.

65. The appellant preferred C.W.P. No. 419/80 challenging the order dated 11.1.1980, which was dismissed on 21.4.1980 taking the view that exercise of President's pleasure and dispensing with the services was not subject to judicial review.

66. On 3.3.1980 the order dated 11.1.1980 was converted into an order of termination. The order dated 11.1.1980 reads as under:

"The President of India, the exercise of powers conferred by the Army Act u/s 18 and all other powers enabling in this behalf is pleased to order that IC-23248 Capt. Arun Sharma shall be dismissed from service with effect from the date on which he is relieved of his duties."

67. The Corrigendum issued on 3.3.1980 reads as under:

"It is requested that the necessary amendment may please be carried out in the Government of India, Ministry of defense order No. 22408/292/MI/39/8/ 4/D(AS) dated 11.1.1980 as under:

"For the words"

IC-23248 Capt. Arun Sharma shall be dismissed from service.

"Substitute-

"that the services of IC-23248 Capt. Arun Sharma shall be terminated."

68. Therefore, according to the appellant it is clear that the Directorate of Military Intelligence did not apply its mind to the matter and sought to exercise the power illegally.

69. A Memorandum was issued on 10.5.1982 as in the other cases imposing a 5% cut from Gratuity payable to the appellant.

70. On 25.5.1982 the appellant filed C.W. 1646/82 challenging the orders dated 3.3.1980 and 10.5.1980 and also the earlier order dated 11.1.1980. The learned Single Judge on 22.3.1985 dismissed the writ petition, which is the subject matter of the above L.P.A. The case of the appellant is that he is innocent, there is nothing on record to show anything against him and he has been falsely implicated by the Directorate of Military Authorities and, Therefore, the orders impugned cannot be sustained. The appellant had challenged the order of the learned Single Judge in the light of the view taken by the Full Bench in the case referred to above.

71. The respondents had taken the same stand in this case also.

72. We shall now notice facts in LPA 148/87 Ex. Capt. Kulwant Singh.

73. The appellant was commissioned as a short commissioned officer on 14.6.1969. With effect from June, 1974 he was commissioned as regular officer. According to the appellant, he had a distinguished record of service. The appellant has also stated that on the basis of false statement of Gnr. Aya Singh, Capt. E.S. Rathore was arrested and put under a prolonged torture and forced to implicate himself and several others including Capt. A.K. Rana. Based on the false statement of Capt. R.S. Rathore, Capt. A.K. Rana was arrested and he was also subjected to inhuman torture by the officers of the Military Intelligence Corps and it was made to appear as if Capt. A.K. Rana had given a statement involving the appellant in espionage. On 23.1.1979 the appellant was arrested without disclosing any reasons. On 5.5.1979 the appellant wrote to the General Officer Commanding protesting against his illegal detention. On 4.6.1979 for the first time he was informed that he was kept under detention for having visited Pakistan along with Capt. A.K. Rana during February and April, 1976. On 24.4.1979 the appellant was read out another charge report. The appellant was given a charge report dated 25.9.1979. The charge report did not contain the names of the witnesses nor was the appellant informed about the date of recording of Summary of Evidence against him. On 30.9.1979 the appellant raised his objections to the charge report and requested for the names of the persons who had given statements against him.

74. On 6.10.1979 the officer recording Summary of Evidence read out two earlier

recorded statements alleged to have been given by Capt. A.K. Rana. The appellant wanted the production of Capt. Rana which was refused. On 6.10.1979 five prosecution witnesses were examined in the Summary of Evidence. Capt A.K. Rana was produced on 29.10.1979 and he categorically stated that he did not make any statement and the Military Intelligence Authorities exercised duress and he was tortured and statements were procured from him which were false. On 21.12.1979 Court Martial trial of Maj. N.R. Ajwani started. On 24.12.1979 Capt. A.K. Rana was brought to Deolali to give evidence against Maj Ajwani. At the instance of the prosecution, the Court Martial was adjourned for two days. On 26.12.1979 the Court Martial convened against Maj. Ajwani was adjourned sine die. Capt. A.K. Rana was taken from Deolali to Jammu for being examined against Capt. Kochhar in the Court Martial. On 23.1.1980 the Court Martial against Capt. Kochhar pronounced his order acquitting him and he was directed to be reinstated in service and was still in service.

75. On 25.1.1980, as noticed above, the Court Martial against Maj. Ajwani was dissolved. In the appellant case also no trial took place and as in the other cases, on 1.1.1980 an order of dismissal was passed against the appellant without following the procedure prescribed.

76. On 15.2.1980 the appellant also made a representation to the Prime Minister. An inquiry was conducted by Mr. T.R. Rajeshwar, Director, Intelligence Bureau about which reference is also made.

77. The appellant filed C.W.P. 425/80 challenging the order dated 11.1.1980 dismissing him from service. The said writ petition was dismissed by this Court on 24.1.1980 on the same reasoning that it was not subject to judicial review.

78. On 3.3.1980 as in the earlier case the order of dismissal was converted into an order of termination. Hence also, on 10.5.1982 a Memorandum was issued imposing a 5% cut in the gratuity of the appellant.

79. On 25.5.1982 the appellant filed C.W.P. 1777/82 challenging the order dated 3.3.1980, Memorandum dated 10.5.1982 and also the earlier order dated 11.1.1980. The learned Single Judge dismissed the writ petition on 23.3.1982 on the same grounds that the order was not subject to judicial review. That is how the appellant had come to file the above appeal.

80. It is not necessary to repeat the grounds of challenge and reply by the respondents because they are the same.

81. We shall now notice the facts in LPA 21/88 Ex. Capt. Vijay Kumar Dewan in a brief compass.

82. The appellant was appointed as 2nd Lt. on 9.6.1968. He had been doing good work and his distinguished record of service was recognised. According to the appellant on the basis of the false statement of Gnr. Aya Singh, Capt. Rathore was arrested and he was kept under solitary confinement, tortured and subsequently Capt. A.K. Rana was also arrested and subjected to inhuman

torture by the officers of the Military Intelligence Corps. The appellant was arrested on 23.1.1979 without disclosing any reasons. It was only on 9.5.1979 the appellant was informed that he was being kept under detention and Military custody for visiting Pakistan. On 11.5.1979 the appellant represented to the Chief of Army Staff challenging his illegal detention. On 21.5.1979 Summary of Evidence was directed to be recorded. The appellant was given tentative charge-sheet which was withdrawn subsequently. Summary of Evidence was ordered on 21.5.1979 and was recorded from 22.5.1979 to 16.7.1979. Capt. A.K. Rana, who was produced as a prosecution witness No. 1 as in other cases, made a statement that he was tortured to give false evidence against the appellant. But what was stated by Capt. A.K. Rana was not recorded. The other prosecution witnesses also stated that they were tortured and threatened to give false statement by the officers of Military Intelligence. The serving officers of the Army such as Brig. D.P. Nayar, Deputy GOC 8 Mtn. Division and Lt. Col. N. Babri who were produced as defense witnesses, stated that the appellant had unblemished character and there should be no charge against the appellant. From the Summary of Evidence, according to the appellant, nothing could be said against him. On 15.10.1979 the appellant was released but not reinstated. On 11.1.1980 order of dismissal was passed. The appellant also made a representation on 15.2.1980 and the same result followed as in other cases. The appellant filed C.W.P. 424/80 challenging the order of dismissal dated 11.1.1980. This Court dismissed the writ petition on 21.4.1980 on the ground that the order was not subject to judicial review. On 3.3.1980 the order of dismissal was converted into an order of termination and in the case of the appellant also a Memorandum was issued on 10.5.1982 imposing a cut of 5% in the gratuity payable to the appellant. The appellant filed C.W.P.1647/ 82 challenging the order dated 3.3.1980, Memorandum dated 10.5.1982 and the earlier order dated 11.1.1980.

83. The learned Single Judge dismissed the writ petition along with the other writ petitions by order dated 22.3.1985. The appellant had preferred the above said LPA.

84. It is not necessary to reiterate the grounds which are similar to the other grounds taken in the other cases in the counter filed by the respondents.

85. We shall now notice the facts in LPA 77/93 briefly, filed by Ex. Major S.P. Sharma.

86. The appellant had joined Army as regular officer on 13.6.1963 and had distinguished service in all fields, such as wars and counter insurgencies operation in North East. He had also participated in Indo Pak wars in 1965 and 1971 and was recommended for Gallantry Awards. The appellant was recommended meritorious award of VSM in recognising his services as Brigade Major between the period from 1975 to 1977. The appellant was selected for foreign assignments at Staff College in U.K. (Cambridge) and Nigerian Military Academy. He was appointed as Major Class B Instructor in Officers Wing of Junior Leaders Wing Belgaum. In October, 1978 the appellant was selected to undergo

Senior Command Course at College of Combat, MHOW (MP). On 16.11.1978 the appellant joined that Course at MHOW. On 20.1.1979 the appellant left the College at Combat, MHOW and reached the parent unit.

87. On 23.1.1979 the appellant was arrested Lt. Col. Mahendra Pratap Singh was directed to report Brigade Headquarters along with the appellant for onward visit to Operational Area to brief Maj. Gen. Himmath Singh. Brig. Talwar ordered the Commander to arrest the Operational Area and directed that the appellant shall be arrested blind folded, handcuffed and was handed over to Corps of Military Police at the Headquarters of 26 Inf. Division. The appellant was kept in detention. The appellant was locked in a cell. The representation made by the appellant to the Chief of Army Staff did not have any response.

88. On 14.4.1979 a written charge report was handed over to the appellant. The Intelligence Authorities made a false Press release making it appear as if, what they were doing was right. On 5.6.1979 the second charge report was handed over to the appellant in violation of all the rules. On 27.7.1979 the appellant was orally conveyed tentative charges u/s 63 of the Army Act. On 10.8.1979 two tentative charges recording of Summary of Evidence. On 12.8.1979 at the instance of the appellant, in writing a tentative charge sheet u/s 63 of the Army Act was given to him. As in the other cases, in the appellants case also during Summary of Evidence instead of producing Capt. A.K. Rana, his written statement containing facts which were false, was read over to the appellant which was objected to by the appellant. Later on, on October, 23 and 24, 1979 Capt. A.K. Rana was produced by the prosecution according to Capt. A.K. Rana were false and procured from him under pressure. It transpired from the evidence recorded during the Summary of Evidence that Maj. S.C. Jolly, Maj. R.P. Madan, Maj. Prem Solanki and Capt. Sudhir Talwar were the persons who were mainly responsible for the illegal acts. inspire of this, an order of dismissal passed on 11.1.1980 was handed over to the appellant on 22.1.1980. That order was converted later on into an order of termination of the appellant. A memorandum was also issued on 10.5.1982 imposing an 5% cut in the gratuity payable. The appellant filed a writ petition challenging the orders which was dismissed by the learned Single Judge on 23.5.1985. Hence the LPA by the appellant on the same grounds and respondents had taken the same stand.

89. We shall now note the facts in LPA 86/94 filed by Ex. Capt. J.S. Yadav.

90. The appellant was commissioned in the Indian Army on 12.1.1969 and had a very good record of service. On 22.1.1979 the appellant was arrested without being informed about the charges. He was kept in a dark cell without any basic amenities. On 23.3.1979 charge was issued u/s 69 of the Army Act for having crossed into Pak territory in January, 1978 accompanied by Capt. A.K. Rana. On 27.7.1979 Summary of Evidence commenced 13 witnesses were examined, who said nothing about the appellant crossing the border. On 5.9.1979 as in other cases a written statement alleged to have been made by Capt. A.K. Rana was produced wherein it was stated that Capt. Rana had visited Pakistan along with

the appellant. On 1.10.1979 the first Summary of Evidence was completed. On 26.10.1979 the second Summary of Evidence commenced and Capt. A.K. Rana was produced in defense. In his evidence Capt. A.K. Rana narrated the true facts and stated that the allegations that he and the appellant went to Pakistan are absolutely false. Written statements had been procured from him under torture and pressure. He also stated that the statement implicating appellant A.S. Yadav was copied from an old and false statement which was procured under duress. The appellant also made a mention about the interrogation of Capt. Rana and Capt. Rathore by Sh. V.K. Kaul, Dy. Director, Intelligence Bureau and His team of 5 interrogators for five continuous days in October, 1979 with the help of lie detector gadgets. It is stated that the team declared that Samba case was a big fraud. The fact that on 10.1.1978 when the appellant was alleged to have gone to Pakistan along with Capt. A.K. Rana the appellant was on casual leave and he was in a native village Achina, Distt. Bhiwari, Haryana, which is 400 kms. away from Samba. According to the appellant all relevant provisions of the Army Act and the Rules were violated with impunity and the services of the appellant were terminated by order dated 11.1.1980 without any reasons. The appellant filed writ petition No. 421/80, which was dismissed. And subsequently the order of dismissal was converted into termination. A memorandum was issued on 10.5.1982 imposing a cut of 5% in the gratuity payable to the appellant. There upon, the writ petition was filed. The facts and circumstances under which the appellant was dismissed from service on 11.1.1980 and the order converting the same into an order of termination and the Memorandum issued on 10.5.1982 have to be considered in the light of the facts and circumstances in the case of other officers which are before this Court. The case of the appellant is that the relevant provisions of the Army Act, 1950 and the Army Rules, 1954 had been violated and there is absolutely nothing on record to even suggest that any charge could be sustained against the appellant and the whole basis of the case against all the parties was the information alleged to have been given by Gnr. Aya Singh and Gnr. Sarwan Dass. The appellant has stated that the learned Single Judge had taken the view that the order impugned is not subject to judicial review. It is not necessary to repeat the other facts had the usual stand taken by the respondents in the writ petition. The salient points shall be adverted to presently.

91. We shall now notice the facts in W.W.P. 3063/95 filed by Ex. Capt. R.S. Rathore.

92. The petitioner joined as Sepoy in Dogra Regiment at the time of Chinese aggression discontinuing his B.A. Degree Course at D.A.V. College, Hoshiarpur. The petitioner took part in the Indo Pak war in the year 1965. In the year 1966 he was selected for Commission after successfully completing the competitive test. He received training at the Army Cadet College, Pune and with Indian Military Academy, Dehradun.

93. On 1.12.1969 the petitioner was commissioned as 2nd Lt. in 11 Garhwal

Rifles as Permanent Commissioned Officer. In the year 1971 the petitioner was assigned duty in the rank of Captain. In the year 1974 the petitioner was posted to 527 Intelligence and Field Security Company, Yol as Intelligence Officer. On 13.12.1974 he was attached to HQ 168 Infantry Brigade at Samba in the State of Jammu and Kashmir. He was performing his duties with utmost sincerity and devotion. His work was appreciated by the Headquarters Northern Command.

94. In January, 1976 he was moved to 11 Garhwal Rifles in Mizoram. And in Samba he handed over charge to Capt. A.K. Rana before leaving for Mizoram.

95. In the year 1977 the petitioner was posted to Kamptee (Maharashtra) with his Unit.

96. On 18/19.8.1978 the petitioner was directed to report from Kamptee to Army Headquarters, New Delhi for collecting the identity cards of officers. On arrival he was attached to Delhi Area Officers Mess, Delhi Cantonment.

97. On 24.8.1978 the petitioner was arrested and kept under the control of the Commandant, Rajputana Rifles Centre, Delhi Cantonment. Without being apprised of any charge against him, the petitioner was blindfolded, handcuffed and was taken to torture chambers of the Military Interrogation Centre. According to the petitioner, keeping him under custody was illegal and at times the petitioner was tortured and was made to sign papers on dotted lines. The petitioner was made to involve Capt. A.K. Rana of crossing border with him into Pakistan on 10th/11th January, 1976.

98. Towards the end of 1978 the petitioner was shifted to Nagrota. Maj. Satpati of HQS 16 Corps came to record Summary of Evidence against the petitioner. The petitioner objected to the same on the ground that under Army Rule 23 the Summary of Evidence should be recorded only by his Commanding Officer or such other officers Commanding Officer directs. It is the case of the petitioner that on the night 31.12.1978/1.1.1979 Capt. Sudhir Talwar, Military Intelligence Interrogator came along with Major Satpati and Gnr. Aya Singh, Capt. Suchir Talwar and Gnr. Aya Singh Beat the petitioner, kicked him and forced him to confess before Major Satpati. The petitioner was taken to a separate place and was threatened and exhorted and they warned him that if he did not yield he would be killed. The petitioner was forced to sign blank papers which were used against him in the Summary Evidence. The case of the petitioner is that if the documents produced was made to read as if that he had admitted the guilt, the petitioner state that a perusal of the documents prove the case of the petitioner as there inherent infirmities.

99. On 8/9.1.1979 while he was under custody the petitioner was produced as prosecution witness before General Court Martial against Sepoy Karam Singh who was falsely implicated at the instance of the Military Intelligence Authorities. The petitioner came out with facts before GCM and with the permission of the GCM the petitioner sent representation to the COAS about the way in which he was treated and about the conduct of the authorities in the military Intelligence.

But there was no response. The petitioner also made a representation to the Commanding Officer bringing to his notice how he was treated by the Military Intelligence Authorities. The petitioner has also referred to the fact that the number of officers came to be arrested in January 1979 without any justification whatsoever and there was a scheme to rope in the officers with ulterior motives. On 8.3.1979 the petitioner was permitted to have interview with his wife at Nagrota in the presence of the Commanding Officer, CME Lt. Col. S.S. Sodhi. In March 1979 the petitioner's wife filed a writ of habeas corpus petition in the Supreme Court which was subsequently dismissed having become in fruituous.

100. On 12.4.1979 a General Court Martial was convened against the petitioner under HQ 64 at Nagrota without following the law. On 17.4.1979 the General Court Martial met which was presided over by Brig. A. Keleor. Two charges were framed against the petitioner. First is that the petitioner had informed about ORBT of 20 Infantry Division and 57 Mountain Division in 1967 and this was an offence u/s 69 of the Army Act, 1950 read with Section 3(1)(c) of the Official Secrets Act, 1923. The second charge is the petitioner had passed information about ORBAT of 18 Infantry Division and details of exercises conducted under it in 1977 and this was an offence u/s 69 of the Army Act, 1950 read with Section 3(1)(c) of the Official Secrets Act, 1923. Before General Court Martial Gnr. Aya Singh and Gnr. Sarwan Dass were produced as material witnesses. Besides this, the alleged confession statement dated 31.8.1978 was relied. The confession was sought to be proved by examining some witnesses. On 2.8.1979 the GCM convicted the petitioner to undergo 14 years R.I. on both the charges.

101. It is the case of the petitioner that GCM did not consider the case of the petitioner with reference to the alleged confession. The GCM did not at all take into account the value that could be attached to the evidence of Gnr. Aya Singh and Gnr. Sarwan Dass whose statements cannot at all be considered in the light of their past conduct and persons who have been traitors.

102. It is at this stage we feel that we have to consider the history of Gnr. Aya Singh and Gnr. Sarwan Dass. They were arrested in January 1975 while indulging in espionage activities. When Gnr. Sarwan Dass was being moved out to a place he managed to escape at Jullundur and he sneaked to Pakistan.

103. Gnr. Aya Singh was detained in Jammu and Udhampur. The charge framed against him was that he was absent without leave. There was no charge of espionage activities against him. No higher authority in the Directorate Military Intelligence had taken any serious note of this glaring atrocious act of the concerned authorities in the lower echelons. He was sentenced to 7 years R.I. and that sentence was suspended. It is not known on what ground it was done and why. No Explanation is forthcoming. No records have been placed before us. It is significant to note that he had continued in service till 1983. In the year 1985 Gnr. Aya Singh was arrested by police while entering the territory of India from Pakistan. Sometime later, Gnr. Aya Singh is stated to have been shot dead

while trying to enter into Indian territory. It is only to show the character of that person whose testimony found the basis of conviction of the petitioner by GCM. The petitioner filed Crl. Writ Petition 9/1981 and that was dismissed by this Court on 23.3.1982. The petitioner had filed a Crl. W.P. No. 1577/85 challenging the GCM proceedings.

104. The petitioner had filed SLP challenging the judgment of this Court in Crl.W.P.9/81. The petitioner prayed for the two being heard together and that was not accepted.

105. On 10.2.1986 the SLP was dismissed.

106. On 28.4.1986 Crl.W.P.1577/85 was dismissed in limine by the Supreme Court and the order reads as under:

"We are not satisfied that this is a proper case for calling for the records or for re-opening the matter and hearing it. The writ petition is Therefore dismissed.

Mr. Danil Latifi requests that the records of the case may be preserved at least for one year more so that if they are needed in some proceeding they may be available. The prayer is allowed."

107. In May, 1989 the petitioner was released after serving sentence imposed upon him. The case of the petitioner is that the respondents did not act in accordance with the provisions of the Army Act and the Army Rules and the proceedings of the GCM are void and non est in law. The petitioner was not furnished with the proceedings and the evidence recorded was not furnished to him. The petitioner wanted the respondents to supply the copy of BCM proceedings by his letter dated 14.3.1980. On 15.3.1980 from Headquarters CME signed by Major K.K. Gupta a letter was written to the Superintendent, Central Jail, New Delhi which reads as under:

"The request of Ex. Capt. R.S. Rathaur (IC-28720) who has been committed to your jail on 17th February, 1930 for the supply of a copy of summary of evidence has been turned down by the higher authorities.

Please inform the individual concerned."

108. The accompanying communication from the Army Headquarters to the Superintendent, Central Jail, New Delhi reads as under:

"SUPPLY OF GCM PROCEEDINGS -IC23720 EX.CAPTAIN R.S. RATHUR, 11 GARHWAL RIFLES ATTACHED CEME 16 CORPS.

1. Reference your letter No. ASM/MISC/80/2181 and ASM/MISC/8022161 both dated 14th March 1980.

2. The request of the convict for supply of a copy of GCM proceedings of this trial is under consideration by the Government decision when arrived at will be communicated to him. The convict may please be informed accordingly."

109. On 14.4.1980 in reply to the application dated 31.3.1980 from the petitioner as a convict the Army Headquarters wrote to the Superintendent, Central Jail. The same is as under:

"SUPPLY OF TCM PROCEEDING SIC 23720 CAPT. (SUBS) RANBIR SINGH RATHUR. 11GR ATTACHED. HQ CEME 16 CORPS TPS.

1. Refer to your letter No. ASM/MISC/80/3483 dated 3rd April, 1980 forwarding application dated 31 March, 1980 from the above named convict.

2. The above named convict may be informed that under the provisions of Rule 147/A of the Army Rules, 1954, the Central Government have specified that it is against the interest of the security of State to supply him a copy of the GCM proceedings relating to his trial held on 17 April, 1979. It appears that he is desirous of submitting a past confirmation petition to the Central Government or taking up the case in a Civil Court against the findings and sentence of the General Court Martial. The Government have, Therefore, decided to permit him or his legal adviser to inspect the proceedings subject to the following conditions as specified in Clause (b)(i) and (11) of the provisions of Army Rule 147-A.

(a) The person allowed to inspect the proceedings (i.e. Ex. Captain R.S. Rathaur or his legal adviser) before such examination furnishes and undertaking in writing that he or his legal adviser shall not make copies of the proceedings or any part thereof and that the informations or documents contained in such proceedings shall not be used for any purpose of submitting a petition in accordance with the Army Act or instituting an action in a Court of Law in relation to the findings or sentence of the said Court Martial, and

(b) he or his legal adviser should also furnish at the same time a certificate, that he is aware that he may render himself liable to prosecution under Sections 3 and 5 of the Official Secrets Act, 1923 (19 of 1923) if he commits any act specified in the said section in relation to the documents or information contained in the G.C.M. proceedings.

3. Ex. Captain R.S. Rathaur may please be advised to state whether, subject to the conditions mentioned in para 2(a) and (b) above, he or his legal adviser would like to inspect to GCM proceedings for the preparation of his petition in relation to the findings and sentence of the GCM.

4. In case he or his legal adviser wishes to inspect the GCM proceedings, he may forward to HQ Northern Command an application to that effect along with the requisite undertaking and certificate on receipt of which the time and place where the inspection can be made will be intimated to him by that Headquarters."

110. The sum and substance of the above is that the petitioner was deprived of the copies of proceedings which would have enabled him to challenge the same before this Court. The respondents did not even care to produce the relevant records before this Court. The respondents claimed privilege in LPA 4/87 and subsequently they claimed privilege in all the cases by filing affidavits in

November, 1997 at the conclusion of the arguments in the batch of cases. The respondents submitted that in view of the disposal of the case filed by the petitioner earlier it would not be open for him to re-agitate the matter.

111. We shall now pass on to the consideration of facts in C.W.P. 4082/95 filed by Ex. Capt. A.K. Rana.

112. On 1.5.1963 at the time of the Chinese aggression the petitioner joined the Corps of Signals as Signalman Operator Wireless giving up his pre-medical degree in D.A.V. College, Hoshiarpur. In 1965 he played his own role in the Western Sector during Indo Pak war. On 9.5.1966 the petitioner was selected for training in Army Cadet College after completing the test successfully. He was trained in the Army Cadet College, Pune and the Indian Military Academy, Dehradun. On 15.6.1966 the petitioner was commissioned as 2nd Lt. in 7 Jat Regiment on permanent basis. In July, 1969 the petitioner underwent Commando Course. In 1969 to 1974 the petitioner was posted in 7 Jat Regiment in Nagaland State for Counter-Insurgency operations. He was promoted as Captain in July, 1979. On 23.3.1978 the petitioner was posted to his own Unit, 7 Jat Regiment, to Naushera (J & K State) HQ 80 Infantry Brigade from Samba where he was working. On 27.10.1978 the petitioner was arrested at Naushera without disclosing any reasons for the arrest. Between 3.11.1978 to 23.3.1979 the petitioner was kept at Military Intelligence Directorate, Interrogation Centre. The petitioner was forced to make false statement i.e. confessional statements of having crossed the border along with Capt. R.S. Rathore on 10/11.1.1976 and implicating about 52 army personnel and civilians as if they all engaged in espionage activities and subsequently the statements were revised and re-written and the petitioner was forced to sign the same. The petitioner was forced to give false evidence. Col. T.S. Grewal, Dy. Director, M.I. Directorate forced him to give evidence against R.S. Rathore which he declined to do. On 14.7.1979 the petitioner was tortured and forced to write and sign number of false statements authored by Major S.C. Jolly and Major Solanki. On 30.7.1979 the petitioner was again forced to give false evidence by Col. T.S. Grewal against other army personnel. The petitioner was attached to 915 Liaison Unit under the Command of M.I. Directorate Interrogator, Major S.C. Jolly. On 18.10.1979 the petitioner was given charge-sheet. The recording of Summary of Evidence was commenced by Major S.S. Johal, an officer of the Military Intelligence Directorate. The Summary of Evidence was completed in February, 1980 and the petitioner was not allowed to examine defense witnesses. Between 22.10.1979 and 1.11.1979 the petitioner was taken to Jammu under Military escort and was produced in the recording of Summary of Evidence against 11 army personnel who had been roped in through manipulated statements brought into existence by the Military Intelligence Directorate Officers. From 12.11.1979 to 22.11.1979 the petitioner was interviewed/enquired by a Joint Team of civilian officers constituted by the Government to investigate into the matter and it was headed by Mr. V.K. Kaul, IPS, Dy. Director, Intelligence Bureau. The Team found that the whole thing was a made up affair and the charges against the officers were totally unfounded and

false. From 2.12.1979 to 18.12.1979 the petitioner was kept under custody in Ferozepur for recording statement of Hav. P.P. Singh while recording Summary of Evidence against the petitioner. Hav. P.P. Singh in his evidence categorically stated he could not say anything against the petitioner. From 22.12.1979 to 5.1.1980 the petitioner was kept in Military custody in Deolali to give evidence in the GCM convened for the trial of Major N.R. Ajwani. The petitioner finding the move of the Military Intelligence Authorities going beyond limited refused to give evidence against Major N.R. Ajwani. For reasons best known to the Military Intelligence officers the GCM convened against Major N.R. Ajwani was dissolved.

113. From 16.1.1980 to February, 1980 the petitioner was detained to give evidence in GCM convened against Capt. R.K. Kochhar at Jammu. On the basis of the petitioners evidence Capt. R.K. Kochhar was acquitted.

114. It is only thereafter that GCM was convened against the petitioner on 24.4.1980 and it continued till 15.9.1980. 6 charges were framed against him. The main charge, which was the basis of the other charges, was that the petitioner visited along with Capt. R.S. Rathore on the 10th/11th of January, 1976 Pakistan and Gnr. Sarwan Dass received them at the Pakistan Post Kandral and again they visited Pakistan in July, 1977.

115. It may be noticed here that there is absolutely nothing on record to make even an inference in this behalf. Even Post Kandral is not in Pakistan but is a part of Indian territory.

116. On 15.9.1980 the GCM convicted the petitioner and imposed a sentence of 14 years R.I. and cashiering from service. The Officer Commanding, HQ 915 Liaison Unit on 20.9.1980 wrote to the petitioner through his Counsel the following:

"G.C.N.: IC. 2344H Capt. A.K. Rana.

1. The following classified documents were handed over to you for the above trial and on your demand, under the directions and with instructions from higher authorities.

(a) Enclosures forwarded under this letter No. 0915/10/GS/(Int)-5 dated 1 September, 1980.

(b) Our letter No. 0915/10GS(Int)-5 dated 31 August, 1980.

(c) Documents mentioned in para 1 in our letter No. GCM/ANR/PROSE/1 dated 30 August, 1980.

(d) Documents forwarded under para 2 of our letter No. GCM/ANR/PROSE/1 dated 5 August, 1980.

(e) The file containing 122 pages (Statement of Capt. A.K. Rana) in various Summary of Evidence and General Court Martials handed over to him on. August, 1980, under advise from the defense Counsel. Please refer to our letter No. GCM/

ANR/PROSE/1 dated 2 August, 1980.

(f) Statement of Captain A.K. Rana given in the cases of Ex. Hav. R.S. Karki and Ex. Capt. V.K. Dewan. Please refer to our letter No. GCM/ANR/PROSE/1 dated 28 July, 1980.

(g) Copy of summary of Evidence handed over to the accused along with charge sheet to be returned to HQ 915 Liaison Unit.

(h) Notes taken down in the Court by Captain A.K. Rana (In original).

2. You are requested to return the same in original forthwith to Headquarters Delhi Area (A) Under intimation to this unit, and provide a certificate to them that:

(a) The information contained in these documents has not been and will not be communicated to any unauthorized person unless so required by law.

(b) No copies of these documents have been made in hand or by any other means."

117. On 4.10.1980 a reply was taken from the petitioner:

"F.X.N. SIXYDNWBRA.

1. Ref. HQ Delhi Area letter No. 3334/385/A1(ii) dated 3rd October, 1980 shown to the undersigned by Major R.P. Singh of your center.

2. paradise reply to the content and of above mentioned letter is given below.

3. Para 2(a). Docus pertaining to Genr. Sarwan Dass have already been returned please ref. to my letter 23440/-Pers/AKR-22 of 30 Sept. 80 added to HQ. Delhi Area and copy to of 915 Liaison Unit.

4. Para 2(b). Notes taken down by me during the trial running into four volumes have been destroyed in the presence of the following officers at 12.30 Hrs. today and requisite cert is att at appax. A to this letter.

(a) IC 28203 Maj. R.P. Singh.

(b) IC 32504, Capt. A.S. Mann.

5. Copy of HQ. Delhi Area letter under Ref. may please be furnished to me for record."

118. It was made to appear as if the petitioner wrote the above letter and the same was acknowledged by the Major and the terms of acknowledgement would read as under:

"Received three copies of the above letter along with two copies of the certificate as appax. A regarding destruction of rates taken claims Court transaction during G.C.M. trial by Captain A.K. Rana."

119. Not being satisfied with this, the petitioner was made to sign a certificate dated 4.10.1980 which would read as under:

"CERTIFICATE

1. It is certified that all notes taken down by me (Statements of various witnesses and Court transaction during my G.C.M. trial have been destroyed by burning the presence of two independent witnesses on 4 the October, 80. The independent witnesses are:

(a) IC 28203 Major R.P. Singh.

(b) IC 32504 Capt. A.S. Mann.

2. No copies of the aforesaid notes have been prepared by me.

Witnesses.

Destroyed Dy. during in my presence.

Sd/-04/10/1980.

Sd/-1 (IC 28203 Major R.P. Singh)

Raj Rif. Read. Centre Destroyed in my presence.

Sd/-AS. 04.10.1980 Sd/-.

2(IC 32504 Capt. A.I. Mann)

Capt. A.K. Rana

HQ. 915 Liaison Unit.

120. On 22.10.1980 the petitioner filed CrI. W.P. 90/80 in this Court, which was dismissed on 4.6.1981 by a Division Bench of this Court. At page 9 of the judgment the Division Bench observed:

"We may in this connection note as we have mentioned previously that the petitioner came to this Court after the findings by the Court-Martial had been submitted but before the same had been confirmed by the confirming authority."

The Division Bench further observed:

"We may however, hasten to add that as in fact the confirming authority has still to act u/s 154 of the Act, it would, we have no doubt apply its independent mind to the merits of the case in accordance with law, and should not take it that our judgment prevents it from considering the representation on merits."

121. After the judgment was delivered by this Court representation sent by the petitioner u/s 160(4) of the Army Act, 1950 was rejected by the Chief of Army Staff without assigning any reasons.

122. On 31.8.1981 the wife of the petitioner filed SLP (Criminal) 2320/81 in the

Supreme Court of India challenging the judgment in Crl. W.P. 90/80 of this Court, which was dismissed.

123. The petitioner was released on 5.9.1989.

124. According to the petitioner he came to know that some of the Army Officers who were falsely implicated and whose services were dismissed had challenged the same in this Court and a Full Bench of this Court had taken the view that the order of termination was subject to judicial review and the Supreme Court of India by order dated 17.11.1994 had also affirmed the same. According to the petitioner, on 18.11.1994 he saw a news item in the Indian Express about the view taken by this Court. The petitioner had also sent a news item in the Indian Express dated 23.11.1994 about the report by Mr. V.K. Kaul. The petitioner had also seen an article in the Indian Express dated 4.12.1994 written by Mr. T.V. Rajeshwar, IPS Retired, Director, Intelligence Bureau.

125. On 19.12.1994 the petitioner made a representation to the Prime Minister, the defense Secretary and also the Chief of Army Staff for the annulment of the proceedings u/s 165 of the Army Act, 1950.

126. On 17.10.1995 the writ petition was presented in this Court praying for the following reliefs:

"(1) to issue a writ of mandamus and any other appropriate writ, order or direction, inter alia, commanding the respondent Nos. 1 and 2, in accordance with Section 165 of the Army Act, 1950, to annul the proceedings of the General Court Martial affecting the petitioner as they are mala-fide, irrational, unjust and illegal, and there has been failure of justice;

(2) to direct the respondents 1,2 and 5 to take action (including such action to found criminal prosecution) in respect of those responsible for the building up of the false case/cases and for the resulting grave consequences;

(3) to direct the respondents 1, 2 and 5 to remedy and rectify the grave damage, loss and harm caused by them to the petitioner by gross violation of Article 21 of the Constitution of India and to make restitution and reparations for the serious damage and harm to his body, mind, career, property reputation and honor ;

(4) to direct respondent No. 1 to review and revamp the Army Act, 1950 and the Rules framed there under so that they are in conformity with the contemporaneous law of the land and consistent with Human Rights and the dignity of the individuals;

(5) to direct respondent No. 1 to constitute Court of Appeal under justices of the High Court where the findings of Courts martial would be dealt with in respect of cases in which the findings of Court Martial are mala fide or cannot be supported on evidence, or involves a wrong decision on a question of law, or any other ground involving miscarriage of justice;

(6) to direct the respondents 1 and 2 to frame rules (breach of which would be

punishable) regarding handcuffing of arrested Army personnel, their detention in military custody under humane conditions, pending trial, safeguarding against keeping arrested persons incommunicado, and, in solitary confinement pending trial;

(7) to direct that Section 165 Army Act be given teeth against inaction to the part of the Government, COAS, etc.;

(8) to direct that the Judge Advocate General Branch of the defense Services be separated from the other executive branches of the respective services;

(9) to declare Rule 147-A of the Army Rules, providing that copy of proceedings not to be given in certain cases as unconstitutional and ultra virus of Article 14 and Article 21 of the Constitution of India, as this is vocative of the principles of natural justice;

(10) to direct the respondents to produce the record of the case;

(11) to pass any other order or orders which may be deemed fit and proper in the interest of justice of the facts and circumstances of the case; and

(12) to award costs throughout in favor of petitioner."

127. The case of the petitioner is that the entire GCM proceedings are void in law. The facts and circumstances would show that the finding is not based on any evidence. A number of officers had been charge-sheeted and without holding any GCM they were dismissed from service and the orders were late on converted into orders of termination. And at the present moment it is a sheer coincidence that the facts and circumstances culminating in the imposing punishments to the officers and the holding of GCM's had come under one focus and that would show the real picture emerging out of the consideration of the whole of the facts. It is the case of the petitioner that a perusal of the records would show how things started, now the officers were roped in and how without any justification whatsoever in a palpably arbitrary fashion, contrary to the provisions of the Army Act, 1950 and the Army Rules, 1954 the Military Intelligence Authorities had acted and had achieved their object of getting more than 50 officers punished.

128. The above narration at some length became necessary to note the facts in each of the cases. At the end of the journey, as it were, the conspectus of events would pin point the real and crux of the issue. Some of the officers had been furnished with Summary of Evidence. A reading of the Summary of Evidence in those cases would show that no case had been made out against them. With reference to the petitioner in C.W.P. 3063/95 and petitioner in C.W.P. 4082/95, the petitioners therein have been able to give a skeletal facts projecting their case. It may be true or it may not be true. The fact is that they were denuded of even the relevant papers and after the GCM's the Military Authorities would make it appear as if the notes and other copies given to the petitioners were destroyed. When the officers had been completely disarmed, as it were, the law would impose an obligation on the respondents to produce all the records

pertaining to the officers involved in the cases. The cases were heard at length and arguments were advanced by learned Counsel for the petitioners and the appellants covering all aspects. The learned Counsel for the respondents (Additional Solicitor General) pin pointed namely two things; first was that the officers themselves had admitted their guilt; the second was that the records would show that the officers were involved in espionage activities and the orders passed by the respondents are not subject to judicial review.

129. It has now become absolutely necessary to notice the records produced by the respondents. When once the learned Additional Solicitor General submitted that though the respondents had claimed privilege they had no objection to place all the records for the perusal of this Court to satisfy whether the respondents had acted in accordance with law. It is a little disturbing to note that respondents instead of producing the relevant records pertaining to the officers involved in the cases had just produced three flaps. No numbers are given. One flap contains three sheets. The first sheet is mentioned as Index sheet. Index sheet itself mentions that there is only one page in the file. The other sheet contains a note which states that all the cases have been thoroughly reviewed at Army Headquarters. The other sheet shows that the matter was discussed in a meeting held in the Home Secretary's Room on 1.10.1980.

130. The next flap is empty. The same note, as found in the earlier flap, is found pinned on to the flap itself. In the third flap there are 15 sheets. The first sheet is typed as Index Sheet. It states that "this file contains a total of 12 pages". When there are 14 sheets besides the Index sheet and in some sheets both sides are typed. Therefore, the flap contains 12 pages is not accurate. These sheets also do not give us any relevant material to form an opinion about the action taken by the respondents. Therefore, the irresistible conclusion is that the respondents have suppressed the material records from this Court and are not willing to part with or produce the same for perusal of this Court. It cannot be pretended by the respondents that there are no other files available with them except the three flaps produced before this Court, as in the written notes submitted by the learned Additional Solicitor General reference is made to file Nos. 9, 10, 18, 1, 2 and pages of the files are also given in the written notes, some files containing more than 600 pages.

131. A perusal of the counter affidavit filed by the respondents in all the cases give us an impression that the respondents have withheld material facts and the counter affidavits do not contain any facts at all worth mentioning.

132. The learned Additional solicitor General for the respondents submitted a long line of cases for the proposition that this Court sitting under Article 226 of the Constitution of India cannot be invited to adjudicate on the points raised by the officers as if this Court is sitting in appeal over the orders passed by the respondents.

133. We shall now refer to each of the cases cited by the learned Additional

Solicitor General.

134. In *Major Diwan Singh v. Union of India and Ors.*, 1973 All India Services Law Journal 173, the learned Single Judge of this Court dealt with the order passed by the Government of India dismissing the writ petitioner from service. The petitioner was furnished with the charge-sheet clearly mentioning the charges and he was given opportunity to meet those charges. The learned Single Judge dismissed the writ petition holding that in passing the impugned order the executive power of the President had been exercised and argument that the pleasure of the President did not extent dismiss the services of the petitioner had no force. The learned Judge took the view that the exercise of power under Article 310 of the Constitution of India or u/s 18 of the Army Act, 1950 would fall within the ambit of Article 53 read with 77 of the Constitution of India. In the light of the exposition of law by the Supreme Court in the various cases we do not feel inclined to agree with the view taken by the learned Single Judge.

135. In *Wg. Commander L.C. Stephen v. Union of India*, 1973 All India Services Law Journal 866, which is also a case decided by the learned Single Judge of this Court wherein the learned Single Judge took the view that in exercising power under Article the President has to exercise it personally and the learned Single Judge following the decision by the Supreme Court in *B.K. Sardari Lal Vs. Union of India (UOI) and Others*, , held that as the impugned order was passed without any reference to the President it was invalid. The decision of the Supreme Court in *Sardari Lal's* case had subsequently been over-ruled by the Supreme Court. We do not find any ratio laid down by the learned Single Judge which could be applied to the facts in the instant case.

136. In *Satyavir Singh and Others Vs. Union of India (UOI) and Others*, , the Supreme Court dealt with the scope of Clause (b) of second proviso to Article 311(2) of the Constitution of India. The appellants before the Supreme Court were employed in Research and Analysis Wing (RAW), Cabinet Sectt., Government of India and they were dismissed from service. Here the Supreme Court followed the dictum laid down in *Tulsi Ram Patel's* case (supra).

137. In *L.I.C. of India v. Escorts Ltd.* AIR 1986 SC 1416, the Supreme Court had to deal with the point relating to the right of a Life Insurance Corporation of India to deal with the transfer of shares. Therefore, this case also is not of any help in deciding the points raised in the instant cases.

138. *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, , the Supreme Court held that the order of the President of India retiring an officer compulsorily cannot be challenged on the ground that he had not been afforded full opportunity of showing cause against the action sought to be taken against him. The Supreme Court took the view that compulsory retirement would not amount dismissal or removal and, Therefore, would not attract the provisions of Article 1 of the Constitution of India. We fail to see any relevance of this case to the point involved in the instant batch of cases.

139. In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , the Supreme Court was invited to decide the question whether the order impugned would amount to reduction in rank. Therefore, this case also is not of any relevance.

140. In *Madho Singh Daulat Singh Vs. State of Bombay and Others*, , the Bombay High Court held that in order to enable an employer to take disciplinary action against his servant it is not a condition precedent that the misconduct on the part of the servant himself arise within his employment and not outside his employment. This case also is not at all relevant for the purpose of the present discussion.

141. In *Shyam Lal Sharma v. Union of India*, : [1987]1SCR898 , Supreme Court simply dismissed the review petition and we do not find anything useful for the present purpose.

142. In *Union of India (UOI) Vs. Ram Chand Beli Ram*, , the Punjab High Court took the view that a Military Personnel cannot file a suit challenging the order discharging him from service. This case also does not in any way help the respondents.

143. In *AIR 1937 31 (Privy Council)* , the Privy Council dealing with the scope of Section 96-B of the Government of India Act, 1919 took the view that redressal was not obtainable by Courts for action and the suit filed by the public servant was not competent because the servant was holding the post at the pleasure of the Crown. We do not find any justification in citing this case when we are governed by the provisions of the Constitution and the pleasure doctrine under Article 310 could be exercised by the Executive only in accordance with the parameters laid down by the Supreme Court.

144. In *Motising Chhagasing Vaghela Vs. S.D. Mehta*, , the question was whether the Department Inquiry could be continued when the public servant was acquitted in criminal proceedings. The Gujarat High Court took the view that department proceedings could be continued. This case also is not relevant for the present discussion.

145. In *Leaman v. The King*, (1920) 3 KB 663, the petitioner before the King's Bench Division was working in British Army. He claimed pay for Military service rendered by him to the Crown. The answer was that he did not have any right at all to make any claim before the Court. Acton, J. took the view that he had not established any right. This case has absolutely no application to the facts of the cases now dealt with by us and we do not hesitate to reject the argument on the strength of this decision that the Government of India could pass any order dealing with the service of Military Personnel and that cannot be subject to judicial review.

146. In *Kynaston v. Altony God*, (1933) 49 TLR 300, the Court of appeal took the view that no engagement between the Crown and any of military or naval officers in respect of services present or past can be enforced in a Court of Law.

We find no substance on the argument on the basis of this decision.

147. In *Denning v. The Secretary of State for India in Council*, (1920) 37 TLR 138 Ballhache of the King's Bench Division took the view that a Crown servant against whom no misconduct is alleged could be dismissed at pleasure without notice. This case also is not at all relevant.

148. In *J.M. Ajwani v Union of India*, 1967 SLR 471, the appellant was member of the Military Engineering Service. Disciplinary action was taken against him on the basis of admission made by him which he did not dispute. In paragraph 11 of the judgment the Supreme Court noticed the following facts:

"It is true the inquiry was not hold strictly in accordance with the terms contained in Rules 6 and 8 of the Army Instructions. But as observed in the minutes made by the Commander Works Engineer, at no stage in his evidence did the appellant deny the charges against him, nor did he attempt to refute the evidence which was based on his own admissions before the Court of Inquiry and the assertion made by the appellant that he was "treated as an approver" was not borne out by any record and could not be accepted as correct. The Chief Engineer was of the opinion that the appellant was asking for cross-examination of the witnesses" in order to delay the completion of the inquiry". In view of the District Judge the Army Instructions did not provide for a personal hearing and since the appellant had admitted his guilt and had not denied the truth of his statements no prejudice was caused to him because he was not given a personal hearing. The High Court also agreed with this view."

149. In this view the Supreme Court agreed with the view taken by the High Court that there was no violation of the rules of natural justice. We fail to see how this case would help the respondents.

150. *Deokinandan Prasad Vs. The State of Bihar and Others*, , the Supreme Court held that the right of public servant to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. The Supreme Court also held that the right to receive pension is property under Article 19(1)(f) and is not saved by Article 19(5).

151. In *Hazara Singh v. Chief of Air Staff*, 1982 (1) SLR 521, a Division Bench of this Court had to consider the question whether in spite of order of dismissal pension could be forfeited. The Division Bench dismissed the writ petition rejecting the argument challenging the order of dismissal on the premise that the order was passed in exercise of Presidential pleasure under Article 310(1) of the Constitution of India and u/s 18 of the Air Force Act but with reference to right to pension the Division Bench took the view that the petitioner was entitled to pension on the ground that the order passed by the President forfeiting the pension lacked the authority of law. In view of the law laid down by the Supreme Court in *Tulsi Ram Patel's* case we need not deal this case in detail.

152. As a constitutional issue the justifiability of an action by Executive

Government was decided by a Constitution Bench of the Supreme Court consisting of 9 Hon"ble Judges in S.R. Bommai and others Vs. Union of India and others etc. etc., . The Constitution Bench accepted the view taken by the Supreme Court in State of Rajasthan and Others Vs. Union of India and Others, , were the Constitution Bench of 5 Hon"ble Judges approved the proposition that it shall be open to a citizen to challenge the action of the President exercising power under Article 356 on the ground that the exercise of power was mala fide or was on irrelevant ground.

153. From an analysis of the decisions of the Supreme Court on the scope of judicial review we are of the view that it is hard to contemplate that the Parliament had left the Executive Government the subjective processes, both in respect of formation of the opinion to terminate the services u/s 18 of the Army Act, 1950 and also the existence of the circumstances on which the order is to be founded. We are of the view that the Supreme Court has categorically laid down that the basic principle is that the Government has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating the part played by the concerned officer. These (sic) or otherwise of the material cannot be questioned. But the inference (sic) such material or materials is certainly open to judicial review. When that is so, the position where there are no materials placed before Court would be a fortiori. In Tulsi Ram Patel's case (supra), the Constitution Bench of the Supreme Court consisting of 5 Hon"ble Judges expatiating on the scope of Clause (c) in the second proviso to Article 311(2) said:

"We now turn to the last clause of the second proviso to Article 311(2), namely, Clause (c). Though its exclusionary operation on the safeguards provided in Article 311(2) is the same as those of the other two clauses, it is very different in content from them. While under Clause (b) the satisfaction is to be of Disciplinary Authority, under Clause (c) it is to be of the President or the Governor of a State, as the case may be. Further, while under Clause (b) the satisfaction has to be with respect to whether it is not reasonably practicable to hold the inquiry, under Clause (c) it is to be with respect to whether it will not be expedient in the interest of the security of the State to hold the inquiry. Thus, in one case the test is of reasonable practicability of holding the inquiry, in the other case it is of the expediency of holding the inquiry. While Clause (b) expressly requires that the reason for dispensing with the inquiry should be recorded in writing, Clause (c) does not so require it, either expressly or impliedly. The expressions "Law and order", "public order" and "security of the State" have been used in different Acts. Situations which affect "public order" are graver than those which affect "law and order" and situations which affect "security of the State" are graver than those which affect "public order". Thus, of those situations those which affect "security of the State" does not mean security of the entire country or a whole State. It includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State

secrets or information relating to defense production or similar matters being passed on to other countries, whether inimical or not to our country, or by secret links with terrorists. It is difficult to enumerate the various ways in which security of the State can be affected. The way in which security of the state is affected may be either open or clandestine. Amongst the more obvious acts which affect the security of the State would be disaffection in the Armed Forces or para-military forces. Disaffection in any of these forces is likely to spread, for disaffected or dissatisfied members of these forces spread such dissatisfaction and disaffection among other members of the force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination and disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but is a matter affecting vitally the security of the State. In this respect, the police force stands very much on the same footing as a military or a para-military force for it is charged with the duty of ensuring and maintaining law and order and public order, and breaches of discipline and acts of disobedience and insubordination on the part of the members of the military or para-military forces. How important the proper discharge of their duties by members of these forces and the maintenance of discipline among them is considered can be seen from Article 33 of the Constitution. Prior to the Constitution (Fiftieth Amendment) Act, 1984, Article 33 provided as follows:

"33. Power to Parliament to modify the rights conferred by this Part in their application to forces. -Parliament may by law determine to what extent any of the rights conferred by this part shall, in their application to the members of the Armed Forces or the forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

By the Constitution (Fiftieth Amendment) Act, 1984, this Article was substituted. By the substituted Article the scope of the Parliament's power to so restrict or abrogate the application of any of the Fundamental Rights is made wider. The substituted Article 33 reads as follows:

"33. Power of Parliament to modify the rights conferred by this Part in their application to forces, etc.-Parliament may, by law, determine to what extent any of the rights conferred by this part shall, in their application to, -

- (a) the members of the Armed Forces; or
- (b) the members of the forces charged with the maintenance of public order; or
- (c) persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or
- (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any force, bureau or organization referred to in Clauses (a) to (c), be restricted or abrogated so as to ensure the proper

discharge of their duties and the maintenance of discipline among them."

Thus, the discharge of their duties by the members of these forces and the maintenance of the discipline amongst them is considered of such vital importance to the country that in order to ensure this the Constitution has conferred power upon Parliament to restrict or abrogate any of the Fundamental Rights their application to them.

The question under Clause (c), however, is not whether the security of the State has been affected or not, for the expression used in Clause (c) is "in the interest of the security of the State". The interest of the security of the State may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under Clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Article 311(2). The satisfaction of the President or Governor must, Therefore, be with respect to the expediency or in expediency of holding an inquiry in the interest of the security of the State. The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient; disadvantageous in the circumstances, unadvisable impolitic". The same dictionary defines "expedient" as meaning inter alia "advantageous; fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term "expedient" as meaning inter alia "characterized by suitability, practicality, and efficiency in achieving a particular need; fit, proper, or advantageous under the circumstances". It must be borne in mind that the satisfaction required by Clause (c) is of the Constitutional Head of the whole country or of the State. Under Article 74(1) of the Constitution, the satisfaction of the President would be arrived at with the aid and advice of his Council of Ministers with the Prime Minister as the Head and in the case of a state by reason of the provisions of Article 163(1) by the Governor acting with the aid and advice of his Council of Minister with the Chief Minister as the Head. Whenever, Therefore, the President or the Governor in the constitutional sense is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under Clause (c). The satisfaction so reached by the President or the Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the particular source from which the information was received would no more be available to the Government.

The reasons for the satisfaction reached by the President or Governor under Clause (c) cannot, Therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public.

In the case of Clause (b) of the second proviso, Clause (3) of Article 311 makes the decision of the Disciplinary Authority that it was not reasonably practicable to hold the inquiry final. There is no such clause in Article 311 with respect to the satisfaction reached by the President or the Governor under Clause (c) of the second proviso. There are two reasons for this. There can be no departmental appeal or other departmental remedy against the satisfaction reached by the President or the Governor; and so far as the Court's power of judicial review is concerned, the Court cannot sit in judgment over State policy or the wisdom or otherwise of such policy. The Court equally cannot be the Judge of expediency or in expediency. Given a known situation, it is not for the Court to decide whether it was expedient or inexpedient in the circumstances of the case to dispense with the inquiry. The satisfaction reached by the President or Governor under Clause (c) is subjective satisfaction and, Therefore, would not be a fit matter for judicial review. Relying upon the observations of Bhagwati, J., in *State of Rajasthan and Others Vs. Union of India and Others*, ; it was submitted that the power of judicial view is not excluded where the satisfaction of the President or the Governor has been reached mala fide or is based on wholly extraneous or irrelevant grounds because in such a case, in law there would be no satisfaction of the President or the Governor at all. It is unnecessary to decide this question because in the matters under Clause (c) before us, all the materials, including the advice tendered by the Council of Ministers, have been produced and they clearly show that in those cases the satisfaction of the Governor was neither reached mala fide nor was it based on any extraneous or irrelevant ground.

It was further submitted that what is required by Clause (c) is that the holding of the inquiry should not be expedient in the interest of the security of the State and not the actual conduct of Government servant which would be the subject-matter of the inquiry. This submission is correct so far as it goes but what it overlooks is that in an inquiry into acts affecting the interest of the security of the State, several matters not fit or proper to be made public, including the source of information involving a Government servant in such acts, would be disclosed and thus in cases such as these an inquiry into acts prejudicial to the interest of the security of the State would prejudice the interest of the security of the State as much as those acts would."

154. The Supreme Court noticed that if the Government had claimed privilege that has to be considered by the Court, if the Court directs the Government to produce the material the Government is bound to do so. In the instant case, as we have noticed above, the learned Additional Solicitor General on instructions submitted that the respondents would produce the record but the records produced before us show nothing. The principle laid down in *Tulsi Ram Patel's* case was followed by the Supreme Court in *Satyavir Singh and Others Vs. Union*

of India (UOI) and Others, .

155. The learned Senior Counsel Mr. G.L. Sanghi appearing for the appellants in Latent Patent Appeals cited a number of decisions to show that the appellants have established a case of mala fides against the respondents, that the order of dismissal was punitive and not termination simplicitor. The learned Senior Counsel brought to our notice a few decisions with reference to the duty of the Government to produce documents. It is not necessary to deal with this point since the respondents have produced, according to them the entire records thereby seeking to justify their action. Learned Senior Counsel also brought to our notice some decisions on the doctrine of bias and on the scope of jurisdiction of this Court under Article 226 of the Constitution of India. Full Bench of this Court has already rendered decision, Therefore, in the light of the above discussion, we don't think it expedient to expatiate any further.

156. In the light of the legal position posited by the Supreme Court of India, we are clearly of the view that the respondents have not placed before us any materials justifying the action.

157. The learned Counsel for the petitioners in the two writ petitions Mr. V.K. Shali referred to number of authorities but they don't have any bearing on the points to be decided in the instant cases and we, Therefore, deem it not necessary to refer to the facts in each of the cases.

158. A sketchy inadvertence to facts already noted events which would constitute a back drop as it were for the proper of the core point in the Latent Patent Appeals and the writ petitions would help us.

159. The case of the Ex. Major R.K. Midha, LPA 4/87 is that he was asked to give evidence in favor of Military Intelligence Directorate in respect of unnatural death of Hav. Ram Swaroop. He was arrested on 23.1.1979. Capt. A.K. Rana was produced to give evidence against him but would not say anything. We have perused the Summary of Evidence of 18 witnesses which is from 153 of the Paper Book. Court Martial was dissolved.

160. The appellant in LPA 43/87 Ex. Major Ajwani was arrested on 23.1.1979. Here also, Capt. A.K. Rana was sought to be produced. Court Martial was dissolved.

161. The appellant in LPA 139/87 Ex. Capt. Arun Sharma was arrested on 23.1.1979. The evidence of Capt. A.K. Rana was sought to be recorded in Summary of Evidence by producing only the statement already recorded. That was objected to. On 14.10.1979 the appellant was released. On 27.10.1979 Capt. A.K. Rana was produced and he deposed to facts. No further proceedings were taken. Order of dismissal was passed on 11.1.1980. It was converted into order of termination on 3.3.1980.

162. The appellant in LPA 148/87 Kulwant Singh was arrested on 23.1.1979. Here also, the same attempt to place on record the statement already recorded

from Capt. A.K. Rana was sought to be made part of Summary of Evidence. When it was objected to, he was produced on 29.10.1979. Then further proceedings were not taken. There was no Court Martial. Order of dismissal was passed on 11.1.1980. The appellant was released on 21.9.1980 when the order dated 11.1.1980 was served on him. The order was converted into order of termination.

163. The appellant in LPA 21/88 Ex. Capt. V.K. Dewan was arrested on 23.1.1979. Here also, with reference to the statement of Capt. A.K. Rana same procedure was sought to be adopted as in the other cases. There was no Court Martial. Order of dismissal was passed on 11.1.1980 which was subsequently converted into an order of termination.

164. The appellant in LPA 77/93 is Capt. S.P. Sharma. He was arrested on 23.1.1979. Here also, the same thing happened in respect to the already recorded statement of Capt. A.K. Rana. 27 prosecution witnesses were examined in the Summary of Evidence. None of them supported the case of the prosecution. Nothing further was done. Abruptly order of dismissal was passed on 11.1.1980, which was converted into order of termination on 3.3.1980.

165. The appellant in LPA 86/94 Ex. Capt. J.S. Yadav was arrested on 22.1.1979. Here also, at the time of Summary of Evidence Capt. A.K. Rana's already recorded statement was sought to be let in. Capt. Rana when examined exposed the case of the Military Intelligence Directorate. No Court Martial was convened. Order of dismissal was passed on 11.1.1980 which was converted into order of termination on 3.3.1980

166. It is in the above backdrop the case of the petitioner in CWP3063/95 (Capt. R.S. Rathore) and that of the petitioner in C.W.P. 4082/95 (Ex. Capt. A.K. Rana) has to be considered. Throughout, the evidence of these two Captains was sought to be relied on. GCM was convened and they were conducted and it is at that time when they were in custody they were forced to give evidence against the other officers mentioned above. These two were forced to give evidence against the other officers mentioned above. These two were convicted by GCM in August, 1979. Therefore, it is in the above context the entire case has to be approached.

167. The respondents think that they are the law unto themselves and whatever they say must be accepted as the last word in the matter.

168. The whole of the bundle of facts in the instant batch of cases would appear to be a pot boiler to project the image of the Military Intelligence Directorate, leaving us at the end with a cliff hanger without any iota of materials to form an opinion about the involvement of the appellants and the petitioner. They have chosen not to produce the entire records without realizing their constitutional obligation. Just to make an apology they have produced some flaps as if they constitute all the records in the case. In a system where rule of law reigns supreme, the department of the respondents cannot at all the records in the

case. In a system where rule of law reigns supreme, the deportment of the respondents cannot at all be tolerated. Justice Holmes of the Supreme Court of the United States of America speaking for the Supreme Court in *Wisconsin v. Illinois*, 281 US 179;

"The State "Must yield to an authority that is paramount to the State"."

169. At this juncture, it is relevant to recall what the Supreme Court of the U.S. has said expatiating on the supremacy of law. The Supreme Court said in *United States v. United Mine Workers*, 330 US 258:

" The historic phrase "a Government of laws and not of men" epitomizes the distinguishing charter of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A Government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of Government may be challenged by an appeal to law, as finally pronounced by this Court. Even this court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, What this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment."

"But from their own experience and their deep reading in history, the founders knew that law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised . "Civilization involves subjection of force to reason, and the agency of this subjection is law. (Pound, *the Future of Law* (1973) 47 Y.L.J. 1 The conception of a Government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations to private interest may reasonably be expected to be as free impartial, and independent as the lot of humanity will admit, So strongly were the framers of the Constitution bent on securing a reign of law that they were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige, No one, no matter how exalted his public office or how righteous his private motive, can be judged in his own case, That is what Courts are for."

170. The Supreme Court in *A.R. Antulay Vs. R.S. Nayak and Another*, :

"No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the hand-maids of justice and not the mistress of the justice. Ex

debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

171. The submission on behalf of the respondents was that the adjudication had reached finality. We are quite unable to accept. If that is so, the consideration of the point of justifiability by the Full Bench would not have been necessary. Even so, as Lord Atkin said finality is a good thing, but justice is better (1933) Ind App 60 AIR 1933 208 (Privy Council) .

172. Some of the officers in the Intelligence Directorate at the relevant time apparently thought that they could manipulate the needle of suspicion against any of the officers they has chosen to make complaint of espionage had miserably failed to follow the law. They were not aware of the principle that "to seek to be wiser than law, it is said, is the very thing by good laws forbidden". It is in this context the ratio laid down by the Full Bench of this Court is to be appreciated. When we are governed by rule of law of the powers that we are expected to be exercised have to be in accordance with law. It is good sense and good law.

173. We had to go through all the papers submitted before us and after perusal of the same we bestowed our anxious thoughts over the same in the light of settled principles of law as brought out in the decisions of the Supreme Court. But for the fact, by sheer co-incidence all the cases came to be argued before us we would in the normal course of events would not have been inclined to consider the case put forth on behalf of the officers, in case finality had been reached on an adjudication by this court on facts after the perusal of the records maintained by the respondents in respect of the concerned officers. That has not been done. Not only now, on the earlier occasions also, the respondents had not taken care, totally ignoring their constitutional duty to this court, to produce the relevant records. It may be mentioned at this stage again for laying emphasis that in the written notes reference has been made to the file numbers and the pages.

174. As we have noticed above, what is produced does not disclose any facts. If any material worth mentioning have been found in the files we would not certainly interfere to annul the proceedings. Section 165 of the Army Act, 1950 empowers the concerned authority to annul the proceedings and the same reads as under:

"Annulment of proceedings.- The Central Government [the Chief of the Army Staff] or any prescribed officer may annul the proceedings of by Court-martial on the ground that they are illegal or unjust."

175. The Parliament in its wisdom while not granting the Army personnel the full vigor of the effect of Part III of the Constitution has taken care, in case of gross miscarriage of justice, power of annulment of the proceedings. When the Parliament has vested the concerned authority to annul the proceedings, this

Court sitting under Article 226 of the Constitution of India can certainly consider the aspect in the light of that specific statutory provisions.

176. We are dealing with matters pertaining to the year 1975 onwards. All the events has happened between 1975 and 1980, just in a period of five years. Therefore, it does not require, if the concerned authority is earnest in looking into the records and analyze them in the light of the law governing the matter. The respondents tried to play the cards very close to their chest, as it were, have not allowed any light being thrown on the issue to be decided. Without the records, no Court can come to any definite conclusion on the disputes between the officers and the respondents. 5 be, that the charge of espionage is a serious one, but that does not absolve the respondents from maintaining the records and showing the same to the Court. The respondents pegged their case at their power to terminate the service of Army personnel without any materials on record asserting that the power of judicial review in the circumstances is out of bonds of this Court. The whole premise is contrary to the basic structure of the Constitution. If all the documents had been produced and of they would show the satisfaction was neither reached mala fide nor was it based on any extraneous or irrelevant grounds we would not go into the question of expediency. It is clear that the respondents had not acted in accordance with the clear intentment and the purpose of the power conferred on the Government u/s 18 of the Army Act, 1950. Time was when REX was LEX. We now seek to say LEX is REX. It is axiomatic no authority is above law and no man is above law. law reigns supreme and that is the constitutional mandate in this country. The Military Intelligence Directorate cannot under the parameters fixed under the Constitution and under the provisions of the Army Act, 1950 and Army Rules, 1954 assume the role of a Prosecutor and a Judge of its own cause. And that precisely what has happened in this case. And that is the reason why, in the interests of justice, we felt that we will be failing in our duty under the Constitution if we do not go deep into the matter and consider whether there is any ring of truth in the case of the respondents against the officer. We are of the view that the respondents have failed miserably to show that they had acted in accordance with law in initiating proceedings against the officers, holding Summary of Evidence against the officers, holding GCM"s against the officers, concluding it in two cases only and convicting them and that too without any shred of evidence. In other cases, on Realizing that they were likely to be acquitted like the GCM"s were dissolved and proceedings were dropped. Without any basis, without any reason and without assigning any causes the services of the officers were dispensed with. We are clearly of the view that all the proceedings taken against the officers are completely void in law and all the proceedings are liable to the annulled.

177. On a consideration of all the facts and circumstances we are of the view that there is no other conclusion possible except to say that the orders which are the subject matter of the writ petitions in the Latent Patent Appeals are merely camouflage and orders have passed for extraneous reasons under the clock of

innocuous form of orders of termination. To give an air on verisimilitude the respondents had hold the Court Martial proceedings which are wholly void.

178. Accordingly, we declare that the proceedings initiated against the petitioners in the two writ petitions are void in law and the orders passed against the other officers, the appellants in LPA's are vitiated being without any material and being camouflage. Having dropped the idea not to conclude Court Martial proceedings knowing fully well that the officers were likely to be acquitted, without producing relevant record before the concerned authority orders of termination were passed flouting all norms. The appellants in the LPA's and the petitioners in the two writ petitions are entitled to all the consequential benefits. We also hereby declare that the orders passed against the appellants in the LPA's are void in law and the conviction and sentence by the GCM's against the writ petitioners are void in law. Consequently, the judgments of the learned Single Judge which are subject matter in Latent Patent Appeals are set aside and the writ petitions in those cases are allowed and the Latent Patent Appeals stand allowed and the two writ petitions also stand allowed. All the writ petitions stand allowed to the above extent indicated and other reliefs prayed for cannot be considered by this Court and it is for the law makers to attend to the same. There shall be no order as to costs.

179. The respondents shall grant consequential reliefs to all the officers including all monetary benefits within a period of four months from today.