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RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO. 2

O.A. No. 255 of 2012

Friday, this the 13th day of May, 2016

"Hon'ble Mr. Justice Devi Prasad Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"

BRIG N.K. MEHTA, VSM (IC-38397F),
S/O LATE G.K. MEHTA, AGED ABOUT 54 YEARS, R/O 3 SWARG MARG, MATHURA CANTT (U.P.)

…. **APPLICANT**

VERSUS

1. UNION OF INDIA THROUGH THE SECRETARY, MINISTRY OF DEFENCE SOUTH BLOCK DHQ PO, NEW DELHI – 110011
2. THE CHIEF OF THE ARMY STAFF INTEGRATED HQ OF MINISTRY OF DEFENCE (ARMY) DHQ PO, NEW DELHI – 110 011
3. THE MILITARY SECRETARY, MILITARY SECRETARY'S BRANCH INTEGRATED HQ OF MINISTRY OF DEFENCE (ARMY) DHQ PO, NEW DELHI – 110 011
4. MAJ GEN PVK MENON, VSM (RETD.), BUNGLOW NO. 86, K K BIRLA LANCE, LODHI ESTATE, LODHI ROAD, NEW DELHI – 110003
5. MAJ GEN R S RATHORE, S/O LATE RAM SINGH, PRESENTLY POSTED AS DEPUTY COMMANDANT AND CHIEF INSTRUCTOR, COLLEGE OF MATERIALS MANAGEMENT, JABALPUR, PRESENTLY AT LUCKNOW

….**RESPONDENTS**

Ld. Counsel appeared for the Applicant	**- Dr. R.K.Anand Senior Advocate** **- Shri V.R. Singh** **-Shri R.Chandra**
Ld. Counsel appeared for the Respondents	**-Shri Ashok Mehta A.S.G, Shri Sunil Sharma C.G.S.C. assisted by Lt. Col Subodh Verma**
Ld Counsel for Respondent No. 5	**- Shri S.S.Rajawat**

-Shri S.S.Pandey

ORDER

(Per Hon'ble Mr Justice Devi Prasad Singh, Judicial Member)

1. We have heard Dr. R.K. Anand, learned Senior Advocate assisted by Shri R.Chandra for the Applicant and Shri S.S.Pandey, assisted by Shri S.S.Rajawat and Shri Sunil Sharma, learned counsel for the respondents. We have also perused the records.

2. The controversy involved in the present Original Application preferred u/s 14 of the A.F.T. Act 2007 is indicative, prima-facie to some extent, of the administrative failure in the mechanism provided for promotional avenues for higher ranks in the Indian Army(Ordnance Corps) on account of omission and commission on the part of the administrative machinery, may be actuated by extraneous reasons, considerations or alike grounds and requires immediate remedial measures on the part of Government of India, Ministry of Defence to keep aloft the moral of Indian Army which is renowned all over the world for its professionalism and commitment to serve the Nation.

I . FACTS

3. The Applicant who happens to be Brigadier in the Indian Army, preferred the present Application for promotion to the rank of Major General assailing the outcome of Selection Board No.1 held on 13/14 Oct 2011 which recommended the name of Respondent no.5 for the post of Major General and one other Selection made by No. 1 Selection Board convened on 25th April

2012 to consider the eligible Brigadiers of Army Ordinance Corps for promotion to the rank of Major General, the result of which was declassified and declared on 20th June 2012. A copy of the impugned order dated 20th June 2012 has been annexed as Annexure No.1 to the Original Application.

4. It may be noted that Army Ordnance Corps (AOC) is responsible for provisioning, receipt, accounting, warehousing, stocking, issue, conditioning, repair, and disposal of all types of Ordnance Stores (Armament, Vehicle spares, Electronic equipment, General Stores and Clothing), Vehicle, Aviation stores and Ammunition.

The logistics function of the Army Ordnance Corps involves the mechanics of provisioning and procuring of all stores required to raise and maintain an efficient and effective fighting army. The aim is to make available all kinds of stores to all units of the Army at the right time, in right quantity, at the right place and right cost.

The inventory range covers every conceivable requirement of the soldier from clothing to weapons, from a needle to a tank and also all munitions except fuel, fodder and medicines.

The inventory management functions involve provisioning, procurement, receipt, accounting, storage, issue, transportation and disposal of all clothing, equipment, weapons, vehicles, ammunition and spares of all kinds.

5. Apart from the aforesaid two selections, where the Applicant has claimed empanelment for promotion to the rank of Major

General, the other grievance articulated is with regard to Annual Confidential Report of the period commencing from Ist Sept 2009 to 22nd June 2010. The Initiating officer, while forwarding the confidential report had not filled in Column No 12 (b) and Column No. 12 (d) of the required format. A copy of the A.C.R. was provided to the Applicant on 13.01.2012. According to the applicant, after receipt of his representation, the unfilled column was filled in with "9" grade, but it does not contain signatures of the Initiating officer. It has been submitted that while working as Commandant, COD Agra from 6th June 2008 to 22nd June 2010, the Applicant had earned two confidential reports, the first covering the period from Ist July 2008 to 30th June 2009 in which the Applicant was graded as outstanding by the Initiating Officer. The second A.C.R was of the period commencing from Ist Sept 2009 to 22nd June 2010, the extracts of latter one was received by the Applicant from Respondent no. 4 vide letter dated 20the June 2010 (Annexure A03). On account of unfilled columns (supra), the extracts duly signed by the Applicant were returned to MS Branch through letter dated 28 Sep 2010 (Annexure A 4 to the OA) though it is submitted by the Applicant that respondents had not informed with regard to outcome of the report regarding unfilled columns but respondents had denied the same. The Applicant received communication vide letter dated 23rd Jan 2012 covering period from Ist July 2009 to 22nd June 2010 from MS Branch that the filled columns were without signatures. According to the Applicant it was done in contravention of the Army order No. 45 of 2001 and the ACR was technically invalid and it was

protested by the Applicant vide representation dated 02.02.2012. It is further submitted that since the corrected A.C.R was not authenticated, it constituted violation of Army order 45 of 2001.

6. It is categorically pleaded and argued by Dr. R.K. Anand counsel for the Applicant that blank ACR was designed with the avowed object of harming the Applicant and though the Applicant was lone contender for 1979 batch, after selection of Respondent No. 5 his case was required to be considered independently and promotion could not have been denied but even then he was not empanelled. It is also submitted that consequent to withdrawal of Applicant from Selection Board held on 13/14.10.2011, he was considered alongwith officers of 1980 batch by No. 1 Selection Board convened on 25.04.2012 but the Applicant was not empanelled. He was considered afresh (withdrawn) case of 1979 batch. It is categorically stated in para 4.9 of the Original Application that the Applicant was not empanelled for promotion by Selection Board No.1 held on 13/14 Oct 2011 though he was required to be considered alone. It is also pleaded that in the absence of any empanelled officers of 1979 batch, there could not have been any bench mark to compare the case of the Applicant. Since the Applicant was lone contender of 1979 batch, he should have been considered independently.

7. The arguments and pleadings of the Applicant have been categorically denied by the Union of India, submitting that unfilled columns were inadvertent clerical error and the defects were later-on made good. It is also submitted that the selection was done in accordance with Para 108 of the Regulations for the Army

1987 (Revised Edition) attended with submission that the respondent no. 5 was selected by No. 1 Selection Board in the meeting convened on 13/14 Oct 2011 and the result was not declared and was kept in sealed covered in view of the judgment of the Apex Court in **Union of India Vs K.B.Jankiraman reported in 1991 (4) SCC 109** and the Army order because of D.V.Ban. It is also submitted that the officers of 1980 batch were considered in April 2012 for promotion and the Applicant was also considered but could not be empanelled being not qualified. It has been submitted by the respondents- Union of India that vacancy of 1979 batch could not be filled up as Brig R.S.Rathore was involved in a disciplinary case and on exoneration he was promoted. With regard to Applicant, in para 9 of the affidavit filed by Union of India, sworn on 30.7.2012 following statement has been made.

> *"9. That 1980 batch of AOC was considered by No 1 Selection Board in Apr 2012 for promotion from Brig to Maj Gen. Based on the calculation of pro-rata vacancy; three vacancies were allocated to Fresh cases, 1980 Batch which included 7 officers. Three officers who were higher in quantified merit have been empanelled after result was approved by the competent authority. It is clarified that Fresh Cases 1980 Batch have not taken the vacancy of 1979 batch and said vacancy is still kept va cant as result of Brig RS Rathore is withheld by the competent authority. By reserving one vacancy, the officer of 1980 Batch empanelled for promotion would suffer even though, vacancy of 1979 batch of AOC has been taken by the said batch. Further, without hearing the empanelled officers of 1980 batch, their interests cannot be jeopardized, more so, when they have not been given the vacancy of 1979 batch of AOC officers. Otherwise, also, the Applicant cannot lay a claim on the vacancy unless he is empanelled. With the existing profile, he has not been found fit*

for empanelment. The Courts have no power to promote any officer as held by the Hon'ble Supreme Court in many cases.

It is also submitted and pleaded by the respondents that in view of catena of decisions of the Apex Court, the Tribunal lacks jurisdiction to usurp the power of Selection Board. In connection with the above submissions, he relied upon following decisions of the Apex Court namely, **Union of India vs Lt Gen R.S. Kadyan, 2000 AIR SCW 2692, Maj Ge IPS Dewan vs Unionf of India and others JT 1995 II) Part 15, SC 654, AVM SL Chabbra, VSM vs Unon of India JT 1993 (3) SC 359, Dalpat Appa Sahib Solunke vs BS Mahajkan JT 19890 (4) 487, Lt Col Amrik Singh Vs Union of India (2001) 10 SC 424 and Maj Surinder Shukla Vs Union of India and others (2008) 2 SCC 649.**

8. On the other hand, learned counsel for the Respondent no 5 namely Shri S.S.Pandey and Shri S.S.Rajawat would submit that things have been manoeuvred to select and promote the Applicant to the rank of Lt Gen and certain officers of the respondents 1 to 3 were hand in gloves to help the Applicant. It is also submitted that without impleading necessary affected party and service tenure of 18 months the applicant could not have been promoted on the post of Lt Gen. The compliance of Principal Bench order was intentionally prolonged by certain persons without taking into confidence the Defence Secretary or Chief of the Army Staff for extraneous reasons and considerations. It is submitted that in the Original Application, applicant had not impleaded respondent no 5 for unforeseen reasons ostensibly to

get an ex parte judgment and even now at this stage though prayer has been made for impleadment and the selection of persons of Selection Board No. 1 held on 25.04.2012 has been challenged but the persons who were selected and result was de-classified by letter dated 20.06.2012 have not been made party though they are affected parties. The persons selected by No. 1 Selection Board on 25.04.2012 are Brigadier SS Lamba, Brigadier R.K.Saiwal and Brigadier L.M.Arora. By not impleading these persons as respondents, the proceedings of No. 1 Selection Board held on 25.04.2012 cannot be set aside or questioned. He also submitted that aggrieved by the order of the Tribunal, a review Application was filed seeking recall of the order dated 30.10.2012 which was allowed by the Tribunal and order dated 30.10.2012 was recalled with the direction to implead the respondent no 5 in the array of the parties as contesting respondent. Even thereafter the Applicant took no step to add respondent no 5 in the array of the parties and rushed to Hon'ble Supreme Court by filing Civil Appeal challenging the order of the Tribunal dated 17.02.2016. Attention has been invited to various materials on record to establish the malicious act on the part of the respondents in granting undue advantage to the Applicant, which we discuss hereinafter.

9. Subject to the aforesaid factual background, the Applicant has claimed following reliefs in the present Original Application.

> *" (I) The Hon'ble "Tribunal may be pleased to direct the respondents to produce the entire record of the proceedings including all relevant files and notings of No. 1 Selection Board held on 13/14 October, 2011 and 25 April, 2012, the annual*

confidential report of the applicant covering from the period from 01/07/2009 to 22/06/2010 initiated by respondent No. 4 and the relevant file of MS Branch dealing with the correspondence of the applicant relating to the impugned annual confidential report for its perusal.

(II) The Hon'ble Tribunal may be pleased to quash the impugned annual confidential report covering period from 01/07/2009 to 22/06/2010, the proceedings of No. 1 Selection Board held on 25 April, 2012 so far it related to the consideration of the applicant for promotion to the rank of major General and the letter dated 20 June 2012 issued by respondent No. 3 (Annexure-A/1).

(III) The Hon'ble Tribunal may be pleased to issue the directions to the respondents to consider the case of the applicant for promotion to the rank of major General afresh without taking into consideration the impugned annual confidential report for the period from 01/07/2009 to 22/06/2010 as a fresh case of 1979 batch as on 13/14 October, 2011 <u>independently without any benchmark and thereafter promote him to the rank of major</u> General w.e.f. 2011 with all consequential benefits including arrears of salary and seniority etc.

(IV) Any other appropriate order or direction which this Hon'ble Tribunal may deem just and proper in the nature and circumstances of the case including cost of the litigation.

10. The present O.A was earlier allowed vide order dated 30th Oct 2012 by a Bench consisting of **Justice B.N.Shukla, Member (J) and Hon Lt Gen R.K.Chabra Member (A).** The Operative portion is reproduced as under :-

"12. Accordingly, we quash the impugned Confidential Report covering the period from 01.07.2009 to 22.06.2010, the proceedings of No. 1 Selection Board held on 25 April 2012 so far as it relates to the consideration of the applicant for promotion to the rank of Major General. We direct the respondents to consider the case of the applicant for promotion to the rank of Major General <u>as a Fresh case of 1979 batch of Army Ordinance Corps independently without any bench-mark. E</u>ntire drill requires to be considered as early as possible preferably within three months from the

date certified copy of order is made available to Ld. Counsel for the respondents, till then one vacancy shall be kept vacant. With this direction the Original Application is disposed of."

11. A review filed by respondent no 5 has been allowed vide order dated 17.02.2016. The decision of the Tribunal passed while exercising jurisdiction of review was subject matter of dispute before Hon'ble the Apex Court in Appeal. Their Lordships of Hon. Supreme Court had not interfered with the order under review (supra) and affirmed it but stopped the maintenance of status quo ante and directed to decide the O.A on merit again within two months. The order passed by Hon'ble Supreme Court in totality is reproduced below.

"Heard.

We see no reason to interfere with the order passed by the Armed Forces Tribunal, Lucknow Bench in so far as the same recalls order dated 30th October, 2012 passed by the Tribunal and restores O.A. No. 255 of 2012 to its original number for deciding the same afresh.

In the facts and circumstances of the cases, however, we see no reason why the Tribunal should have directed restoration of status quo ante especially when the petitioner has already been promoted to the rank of Lieutenant General and his reversion would in no way lead to any immediate benefit to the respondent. We accordingly direct that while the Tribunal shall make an endeavour to hear and dispose off O.A. No. 255 of 2012 expeditiously and as far as possible within a period of two months from today, the direction regarding restoration of status quo ante implying reversion of petitioner to the rank of Brigadier shall remain stayed pending disposal of O.A. No. 255 of 2012.

We make it clear that we have expressed no opinion on the merits of the case or the contentions open to the parties before the Tribunal who shall examine the same uninfluenced by any observations made in the order under challenge.

These appeals are accordingly disposed off in the above terms.

No costs."

12. While allowing the review, the Tribunal had imposed a cost of Rs 25000/- on the Applicant on the ground of concealing material facts.

13. Subject to the aforesaid directions, the matter has been heard again. The parties have submitted their written statements, arguments synopsis and compilation of cases during the course of arguments which are on record.

(II) No. 1 Selection Board convened on 13/14th Oct 2011

14. While assailing the outcome of No. 1 Selection Board convened on 13/14.10.2011, it has been submitted by learned counsel for the Applicant preceded by pleadings on record that Applicant was not considered. However, it is not disputed that there was only one vacancy of Maj Gen against which selection was held of the officers of 1979 batch. The respondents had categorically argued and stated in their affidavits that names of the Applicant as well as respondent no 5 were considered by No. 1 Selection Board in which the respondent no 5 was selected. The name of the Applicant (respondent no.5) was forwarded by the Selection Board by adopting sealed cover procedure on account of pendency of Court of Inquiry in the light of the judgment of Supreme Court in **Union of India Vs K.B.Jankiraman reported**

in 1991 (4) SCC 109. The Ministry of Defence took a decision on 19.04.2012 withholding the name of respondent no. 5 on account of pendency of D.V.Ban. The Ministry of Defence further took a decision that review of grade in respect of Brigadier N.K.Mehta (Applicant) from Z (Unfit) be treated as withdrawn and his case be considered afresh. Strangely enough, it consumed six months to take decision on the recommendation of No.1 Selection Board (supra).

15. On the face of record, the decision of Ministry of Defence seems to be not substantiated legally for three reasons, viz. firstly the result could not be withheld in view of Jankiraman's case and army order but should have been approved and kept in sealed cover. In Jankiraman's case, Hon. Supreme Court ruled that during pendency of enquiry, the result shall be kept in sealed cover and in case, the incumbent stood exonerated in enquiry without punishment, on the said vacancy, he/she shall be appointed or promoted as the case may be. It has been dealt with in preceding paragraphs.

16. The Army order/Policy dated 20.04.2010 also speaks in itself with same terms. A copy of the policy dated 20.04.2010 has been filed with affidavit by respondent no 5.

17. A punctilious reading (supra) on the face of record shows that imposition of DV Ban was not meant to imply blanket denial or debarment for consideration for posting, promotion, premature retirement, release, resignation, deputation, visit to foreign countries or study leave to an officer. The officer's career

management shall be continued to be carried out in normal manner but before giving effect to any proposed change, DV clearance shall be obtained in each case so as to calibrate awarding of service benefits/privileges and imposition of restrictions. It provides that no officers shall be promoted during DV Ban. The result shall be withheld till clearance of DV Ban. The sealed cover procedure shall be adopted and as soon as the officer is exonerated, the sealed cover will be opened, to grant promotion. It means result shall be approved but by keeping in sealed cover it shall be not implemented. On DV clearance, envelope shall be opened, to grant promotion without requiring any further order for approval of recommendation of Selection Board but in the present case it has not been done. The legal position is proposed to be discussed hereinafter.

18. The second illegality seems to be that the case of the applicant of Annual Confidential report though was not the subject matter before Ministry of Defence, there was no representation against the recommendation of the selection held on 13/14.10.2011, but on its own, the Ministry of Defence gave favour to Brigadier N.K.Mehta and ACR entry of the applicant was held to be technically withdrawn with direction to consider afresh. We propose to discuss later-on.

19. The third arbitrariness on the part of Ministry of Defence seems to be that No. 1 Selection Board was held on 13/14.10.2011 but the order on the recommendation of S B No. 1 was passed on 19.04.2012 after inordinate delay. Prima-facie, it appears to be deliberate delay on the part of Ministry of defence

for unforeseen reasons which may be probed. The order dated 19.04.2012 being relevant is reproduced below.

> "Ref: AHQ Note PC No. A/47053/1SB/AOC/MS (X) dated 28.10.2011.
>
> 2. The Competent Authority has approved the recommendations of the Board subject to the following changes:-
>
> (a) award of gracing 'B'(Fit) in respect of IC-38381 Brig RS Rathore be withheld during the pendency of the DV ban and the case be resubmitted, thereafter.
>
> (b) revision of grading in respect of Agenda No 3 Brig NK Mehta from 'Z'(Unfit) to "Withdrawn" and to consider his case afresh after setting aside the assessments of IQ in ACR 09/09-06/10 on technical grounds.
>
> (R.Sunder)
>
> Under Secretary (MS)"

(III) DV BAN

20. Much emphasis has been given by the learned counsel for Union of India as well as by learned counsel for the Applicant that on account of DV Ban, result of respondent no. 5 could not have been declared or even after approval, it should have been placed in sealed cover on account of pending Court of Inquiry. Admittedly, the policy dated 20.04.2010 (In short the "Policy") deals with DV Ban of officers. The introductory observation made in the policy shows that it was issued as an attempt to strike a balance between the career interest of the officers concerned on one hand and organisation interest on the other hand. Para 1 of the policy postulates that DV Ban is imposed only when competent Disciplinary Authority comes to conclusion that prima facie, a case is made out against an officer. Such a situation arises as soon as the Competent Authority applies its mind to the facts and circumstances of the case keeping in view the report of

Court of Inquiry and issues direction for initiation of disciplinary administrative proceedings against the officer on the basis of Court of Inquiry proceedings. Para 8 of the Policy deals with the type of DV Ban and para 8 (c) deals with DV Ban in the case of pendency of disciplinary case. For ready reference, paras 2,3 and paras 8 and 9 being relevant are reproduced below.

> "2. DV Ban is imposed only when the competent disciplinary authority comes to conclusion that prima facie, a case is made out against an officer. Such a situation arises as soon as the competent disciplinary authority applies its mind to the facts and circumstances of the case and issues directions for initiation of disciplinary administrative proceedings against the officer on the basis of C of I proceeding. Imposition of DV Ban therefore has its origin in the decision of the Cdr to initiate disciplinary/administrative action against an officer.
>
> 3. In case, the Show Cause Notice (SCN) has been issued w/o conducting C of I on the basis of documentary evidence, then the DV Ban will be imposed from the date of issue of SCN by the competent authority.

(However, no such notice seemed to be issued to Respondent no. 5 and there appears to be no pleading.)

x x x x x x x x x x x

> 8. The under-mentioned types of DV Ban will be imposed in cases as specified against each:-
>
> (a) **DV Ban Type Á'- Administrative Action Cases.** When the competent authority directs initiation of administrative action which can result in award of an recordable censure the officer will be put on DV Ban type Á'. Since offrs of the level of Div Cdr or equivalent cannot issue recordable censure, offrs facing

administrative action at this level are not placed on DV Ban. By implication the DV Ban will be imposed when dirns to take administrative action are issued by Corps Cdr and above.

(b) **DV Ban Type 'C-I' and 'C-II'**

(i) DV Ban Type 'C-1' (Special Police Establishments/CBI Cases). When the competent authority accords approval for prosecution of the officer by CBI etc in the Civil Court, the officer will be put under DV Ban Type 'C-1'. When the CBI recommends departmental action, initial Ban Type 'C' imposed on the officer will then be converted to appropriate Ban as the case may be.

(ii) DV Ban Type 'C-II' (Prosecution by a Civil/Criminal Court). When cognizance of an offence within the meaning of Sec 2 (1) of CrPC, 1973 is taken by a Criminal/Civil Court after a charge Sheet has been filed or the officer's case is delivered to a Criminal/Civil Court by the competent authority under the provisions of Army Act Section 125 read with CriminalCourts and Courts Martial (Adjustment of Jurisdiction) Rule, 1978 for prosecution in a Court of Law or decision to accord sanction for criminal prosecution has been taken by the competent authority, the officer will be put on DV Ban type Ban 'C'. **In case of cognisable offences under Sec 2 (c) of CrPC of 1973, DV Ban Type 'C' will be imposed if the officer is arrested by the police.**

(c) **DV Ban Type 'D' –Disciplinary Cases**. Where, formal directions are issued by a competent authority to initiate disciplinary action, the officer in respect of whom said disciplinary

action has been directed will be placed on DV Ban Type 'D'.

(d) **DV Ban Type 'T'-Termination of Service under Army Act**. When approval of the COAS has been accorded to a recommendation by an Army Commander for termination of service of an officer under Army Act Section 18 of the Army Act section 19 read in conjunction with Army Rule 14, the officer will be put on DV Ban Type 'T'.

(e) DV Ban Type 'S'- Suspension. Where the suspension of an officer reported to IHQ of MoD (Army) (DV Dte (DV-2) as required vide Para 349 of the Regulations for the Army (Revised Edition 1987) , the officer will be put on DV Ban Type 'S'. This Ban will run 'concurrent' with any other type of Ban i.e. 'C', 'D' or 'T' which may or may not be imposed on the officer in the same case based on the directions of the Competent Authority.

(f) DV Ban Type 'DR'(for Deserters), An officer, being declared a deserter by a Court of Inquiry instituted to look into the circumstances under which an officer is absent without leave, will be placed under Ban Type 'DR'. All existing deserters on Ban Type 'D' will hereafter stand shifted under Ban Type 'DR'.

Scope and Implications of DV Ban

9. DV Ban covers the following service matters:-

(a) All normal postings and Transfers, **(These will not be ordered in cases of DV Ban Type 'S' since an offr is on suspension and cannot perform duties and DV Ban Type 'D'(Since disciplinary proceedings have to be completed).**

(b) Posting to sensitive appointments (to be decided by MS Branch),

(c) Promotions, both to substantive and acting ranks

(d) Premature retirement, release or acceptance of resignation.

(e) Grant of Study Leave.

(f) Nominations on foreign and career courses by selection.

(g) Nominations on foreign assignments/postings.

(h) Honours and Awards.

(i) Pension.

(k) Deputations, including acceptance of assignments form other Government Departments and Establishments.

(l) Visit to Foreign Countries in official or private capacity.

(m) Re-employment or extension of re-employment."

21. A plain reading of the aforesaid provisions with regard to DV Ban shows that the foundation of exercise of such power is the outcome of Court of Inquiry conducted against an officer. Para 3 on the face of the record shows that in case a Show Cause Notice has been issued on the basis of Court of Inquiry or documentary evidence, the DV Ban will be issued and made operative from the date of issue of Show Cause Notice by the competent Authority.

Para 8 (c) (supra) provides that in the matter of disciplinary cases where formal direction is issued by the Competent

Authority to initiate disciplinary action, the officer in respect of whom said disciplinary action has been directed will be placed on DV Ban Type 'D'. The disciplinary action begins in case a case is made out on the basis of Court of Inquiry. Section 177 deals with Court of Inquiry and Section 180 provides that where character of a person is involved, he will be associated with Court of Inquiry with full opportunity of being present throughout, making any statement, giving evidence and to cross examine the witnesses. For ready reference, sections 177 and 180 of the Army Act are reproduced below.

> "177. Power to make rules in respect of prisons and prisoners.-
>
> (a) for the government, management and regulation of military prisons;
> (b) for the appointment, removal and powers of inspectors, visitors, governors and officers thereof;
> (c) for the labour of prisoners undergoing confinement therein, and for enabling persons to earn, by special industry and good conduct, a remission of a portion of their sentence;
> (d) for the safe custody of prisoners and the maintenance of discipline among them and the punishment, by personal correction, restraint or otherwise, of offences committed by prisoners,
> (e) for the application to military prisons of any of the provisions of the Prisons Act, 1894 (9 of 1894), relating to the duties of officers of prisons and the punishment of persons not being prisoners,
> (f) for the admission into any prison, at proper times and subject to proper restrictions, of persons with whom prisoners may desire to communicate, and for the consultation by prisoners under trial with their legal advisers without the presence as far as possible of any third party within hearing distance.
>
> 178. **Restriction of rule-making power in regard to corporal punishments:-** Rules made under section 177 shall not authorise corporal punishment to be inflicted for any offence, nor render the imprisonment more severe than

> it is under the law for the time being in force relating to civil prisons."

22. It is well settled law that Court of Inquiry is only a fact finding body meant to collect material and evidence against an officer against whom some complaints have been received and some material has been found. It is submitted by learned counsel for the respondent no. 5 that on an anonymous complaint received just before No. 1 Selection Board , Court of Inquiry was instituted. (**Vide 1982 Vol 2 SCC 140 Lt Col Prithipal Singh Bedi vs Union of India**)

Admittedly, Court of Inquiry has been set aside by the Principal Bench of Armed Forces Tribunal at Delhi and affirmed by Delhi High Court and Hon'ble Supreme Court.

In the case **of Union of India v K.V.Jankiraman** (supra), Hon'ble Supreme Court held that sealed covered procedure is to be resorted to only after the charge memo or charge sheet is issued which in the present case may be issuance of notice after receipt of the report of Court of Inquiry. For ready reference, relevant portion from the judgement of Union of India v K.V.Jankiraman (1991) 4 SCC relied upon by both sides is reproduced below:-

> "16. On the first question, viz, as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge memo/charge

sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point.".....It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p.196, Para 39).

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2).....

(3).....

(4). The sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before;"

17. There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No.1 should be read to mean that the promotion etc cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge memo/charge sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions."

23. It is strange that No.1 Selection Board was convened on 13/13 Oct 2011 and thereafter the matter lingered on without any valid justification inasmuch as DV Ban was imposed on 6th Jan 2012 and the result was withheld by the Defence Ministry vide order dated 19.04.2012. Needless to say that Court of Inquiry was initiated on the basis of anonymous letter resulting into imposition of DV Ban.

24. Otherwise also, while considering the policy with regard to DV Ban (supra) it cannot be read in piecemeal. In case in view of settled position of law, the policy is read word by word and line

by line, then there appears to be no reasons to hold otherwise than that DV Ban can be imposed only after conclusion of Court of Inquiry and decision of the Competent Authority to the effect that substantial material exists to proceed against the officer concerned. In the present case, it appears, gross injustice has been done by not declaring the result of respondent no 5 inspite of Court of Inquiry having been set aside that too without disciplinary action against respondent no 5. We feel compelled to observe that it was done by the Ministry of Defence either on account of lack of knowledge or on being ill-advised or for some extraneous considerations/reasons.

IV –TWO CONFIDENTIAL REPORTS (C.Rs)

25. Both sides fiercely argued with regard to two Confidential Reports being imperative for grant of promotion. Since selection was held in 2011-2012, the policy dated 26th Sept 2003 seems to be germane for the purpose of present controversy. For ready reference, the policy dated 26th Sept 2003 being relevant is reproduced in entirety.

"ÄE STIPULATIONS: MAJ-GENs AND BRIGs

1. Ref:-
   (a) Appx ; C; to Army HQ/MS Branch policy letter No 04560/1/MS Policy dt 27 Jun 96.
   (b) Army HQ/MS Branch policy letter No 04560/1/MS Policy dt 1 Jul 03.
2. To enable the environment to correctly comprehend the various aspects of AE stipulations for Maj Gens and Brigs, comprehensive guidelines on the subject are given in succeeding paras.

Maj Gens.

3. The min tenure in the rk of Maj Gen, to enable offrs of all Arms/Services (incl Gen Cadre) to be considered by Special Selection Board (SSB) will be 18 months subject to earning two CRs.
4. While executing the above, the following will be ensured in respect of Maj Gens of Gen Cadre:-
   (a) For reasons of op efficiency, tenures will normally be 18-24 months.
   (b) Min two CRs in criteria appt would be necessary for being AE. However, in org interest, an offr may be posted out after a period of 12 months in a criteria appt provided, the offr has earned at least one CR.
   (c) Offrs who do not earn two CRs in criteria appt, due to premature mov in org interest, will have to earn at least one more CR in a non –criteria appt, to be considered by the SSB for further promotion.

Brigs

5. AE stipulations for Brigs will be as follows:-
   (a) Gen Cadre. Tenure in a criteria appt will normally be 24 months with min two CRs. In Org interest, an offr may be posted out after a period of 12 months in a criteria appt, provided he has earned one CR.
   (b) Arms/Services other than Gen Cadre. Tenure in a criteria appt will normally be 18 months subject to min two CRs.

Promotion in Comd/Staff Appts.

6. Those offrs who are moved from Comd prematurely and have not earned two CRs in Comd, or are posted on promotion to Staff appts, may be considered for further promotion in staff appts only, provided they have earned min two CRs, which could be in criteria/non criteria appts. To be considered for promotion in comd assignments, an offr must have earned min two CRs in criteria appt.
7. This letter supersedes the following policy letters:-
   (a) Appx C to Army HQ, MS Branch policy letter No 04560/1/MS Policy dt 27 Jun 96.
   (b) Army HQ, MS Branch policy letter No 04560/1/MS Policy dt 01 Jul 03.

(Ashok Khosla)
Brig
Dy MS (P,CM & CR)
For Military Secretary"

26. The policy dated 26th Sept 2003 (supra) provides that for the reasons of Departmental efficiency, the tenure shall be 18 to 24 months. It means minimum tenure of 18 months is required for promotion. Clause (b) of para 4 says that minimum two CRS

will be necessary. However in case the officer is posted after a period of 12 months in a criteria appointment, he should have earned at least one CR. The officers who have not earned two CRs have to earn at least one more CR in a non –criteria appointment. It says that in any case two CRs are necessary for the purpose of promotion to the rank of Maj Gen, Clause 5 further envisages that in Army Service, the tenure in a criteria appointment is normally 18 months having minimum two CRs. By using the word "minimum", the policy makers make it mandatory to possess two CRs to make a person eligible for promotion on the post of Maj Gen.

27. Similar proposition is borne out from para 6 of the Policy dated 20.03.2013 which provides that further promotion shall be considered in staff provided an officer has earned minimum two CRs. It further provides that an officer shall be considered for promotion in Comd assignment must have earned minimum two CRs in criteria appointment. In view of instructions issued by the Defence Ministry, once CR was struck down or withdrawn by the respondents, then there appears to be no room for doubt that the Applicant could not have been considered for promotion on the post of Maj Gen. The Applicant has courted trouble for himself by seeking to set aside or withdraw one CR possessing "outstanding Grade 9" in contravention of Army Order 45 of 2001. It is the policy dated 26th Sept 2003 has been further modified by another policy dated 20th March 2013 (supra). It is argued that it has got prospective effect. The submission seems to be loaded with substance. However, the fact remains that policy dated 20th

March 2013 also speaks for two CRs with experience in Comd operations. Rather it gives another chance to the officer who had not earned two CRs to recover by working in Comd operation to complete his AE report.

Attention has been invited to a case of Shri Kant Sharma vs Union of India reported in 2013, Delhi Law Times 237. Delhi High Court accepted that two Confidential reports are necessary but relaxation may be granted in view of Military Secretary letter dated 26th Sept 2003. However, so far as the present case is concerned, seems to be not applicable because of manipulative action of the applicant and the ministerial staff of Defence Ministry, the Applicant does not seem to be entitled to any relaxation or waiver as submitted by Dr. R.K.Anand.

(V) APPLICANT A.C.R ENTRY Ist SEP 2009 TO 22ND JUNE 2010.

28. Dr. R.K. Anand while assailing the conduct of the respondents submitted that the whole A.C.R entry of Ist Sept 2009 to 22nd June 2010 should have been expunged in respect of entry awarded by the Initiating officer. The submission is that the entry of Initiating officer suffers from the vice of arbitrariness and is violative of Army Order No 45 of 2001. In this connection, learned counsel for the Applicant relied upon Paras 10 to 15 of the Army Order No 45 of 2001. On the other hand, Learned counsel for the respondent no. 5 as well as learned counsel for the Union of India submits that since unfilled column of ACR entry (supra) was filled later-on by the Initiating officer, it should not be expunged, Thus, for the interpretation of the provisions

contained in paras 10 to 15 of the Army Order (supra), the paras 10 to 15 are reproduced below.

"Filing and Handling of CRs

10. The CR of an officer is a privileged document. The report is to be treated as 'Confidential' between the officer reported upon and the reporting officer; and therefore, the form will normally be filled in hand. Typing of the report may be resorted to only when the reporting officer either does it himself or takes appropriate action in conformity with its security classification.

11. While filling in the reports, it will be ensured by the reporting officers that a line is drawn across the unused spaces and the same is authenticated. This requirement will also be ensured when the reporting officer does not wish to endorse the CR due to inadequate knowledge, where applicable.

12. The CRs will be submitted in original, through the prescribed channels of reporting to the MS Branch, Army Headquarters. Additional copies of the same will not be made. However, extract of CR may be made under the following circumstances:-

(a) Communication of the extracts under the provisions of Paragraphs 124 of the Army Order.

(b) By MS Branch for seeking clarification.

(c) When a ratee feels aggrieved is communicated to him, under requests for a copy of the relevant authenticating the particular assess

13. Handling of CRs for the purpose of headquarters will be restricted to the following

(a) Command/Corps Headquarters

(b) Divisional/Area Headquarter

(c) Sub Area Headquarters

(d) Category A Establishments/Headquarters (Commanded by Maj Gens and above).

14. At level of unit, brigade headquarters Establishments/installations commanded by Brig or below, the CRS will be handled by the initiating officers and reviewing officers themselves.

15. Erasures, overwriting, use of whitener and paper slips pasted to remove/block the original assessment should be avoided. In case, it becomes absolutely essential to revise the assessment in unavoidable circumstances, the following will be ensured:-

(a) Both original and the revised assessment are legible. A line will, however, be drawn across the original assessment to indicate its invalidity.

(b) Revised assessment will be authenticated with full signatures of the concerned reporting officer (s) and will bear the date of amendment. In case, the assessment is in the open portion, to be communicated to the ratee, the ratee will also authenticate the amendments with full signature and date.

(c) Violation of above provisions may render a complete CR or a part, technically invalid.

(d) The authority for setting aside CR, on technical ground, in accordance with the existing internal assessment procedures, rests only with the MS Branch at Army Headquarters. It is, therefore, important that a CR once initiated, must reach the MS Branch and no intervening headquarter, has the authority to render a CR technically invalid on account of erasures, over-writings and cuttings, and order its re-initiation."

29. A perusal of the aforesaid provisions shows that wherever eraser, overwriting or use of whitener and papers slips pasted to

remove/block the original assessment, it should be signed by the Initiating officer. It does not deal with unfilled column. Admittedly after receipt of representation, the Initiating officer had filled up Column with outstanding entry of '9' which has been objected to by learned counsel for the Applicant on the ground that it has not been signed. Learned counsel for the respondents invited attention to letter dated 22.11.2010 filed with the affidavit dated 28.07.2012 by the respondents. Shri P.V.K.Menon, the Initiating officer, by the aforesaid letter, informed that he had filled up the vacant column 12 (b) and 12 (c) and forwarded the same with the endorsement to Applicant N.K.Mehta. The letter dated 26.11.2010 which is annexed as Annexure R-2 to the affidavit dated 12.07.2012 being relevant is reproduced below.

> *"15051/ACR/ADG OS (TS) 26 Nov 2010*
> *G Vijaya Kumar*
> *Principal Dir*
> *MS Branch (MS-X)*
> *IHQ of MoD (Army)*
> *DHQ PO, New Delhi-110011*
>
> *1. Ref your letter No A/47506/ACR/MS (X) dt 24 No 2010.*
>
> *2. Extracts of CR in respect of IC-38397 Brig N.K.Mehta, VSM, Ex COD Agra covering the period from 01 Sep 09 to 22 Jun 10 is returned here endorsed by the undersigned at para 12 (b) & (d).*
>
> *3. Please ack.*
>
> *((PVK Menon)*
>
> *Maj Gen*
>
> *ADG OS (TS)"*

30. A plain reading of the aforesaid letter indicates that filing of column was duly informed to the Applicant by the Initiating officer but counsel for the Applicant submits that since the column had not been duly signed, it is not known as to who filled the column

and hence the same cannot be relied upon. The question is why the Applicant objected to the outstanding entry with grading of '9' is not comprehensible? Whether he was justified in pressing for expunging the entire entry though the Initiating officer had filled up the relevant column which contained maximum marks of 9 points grading with due communication to the Applicant. Para 41 of the Army Order 45 of 2001 envisages that the C.Rs may be further endorsed by the superior Review Officers (SRO) with the avowed intention to avoid 'one man report'. Paras 41 and 42 being relevant are reproduced below.

> *"41. The purpose of endorsement by SRO is to ensure objectivity of reporting and to avoid óne man report'. Towards this, it should be ensured by the SRO that lower reporting officers endorse CRs as applicable, and render objective assessment on the Ratee. Endorsements on CRs by the SRO would be guided by the following parameters:-*
>
> *(a) Mandatory Endorsements*
>
> *(i) When there is a difference in assessment of lower reporting officers of three or more points in figurative grades for PQs/DPs/QsAP or a difference of two points or more in box grading.*
>
> *(ii) Adverse, Review and Special CRs (other than Special CR called by Army Headquarters for purpose of SBs).*
>
> *(iii) CRs initiated on officers under disciplinary case with permission of the SRO.*
>
> *(iv) Outstanding/Low/Below average assessments.*
>
> *(v) Officers from Artillery/Air Defence Artillery/Engineers/ Signals and Army*

Aviation recommended for General Cadre.

(b) ***Preferable to Avoid 'One Man Report'****.*

When between IO and RO only one person has initiated/endorsed the report (including endorsement of Insufficient Knowledge), SRO should 'preferably endorse the report to avoid 'one man report '.

42. Only three levels of reporting up to SRO will be followed i.e. IO, RO and SRO. Technical/Special to Corps Reporting as applicable vide Part-III of this AO will be complementary to main report of IO/RO/SRO. Where GOsC-in-C Commands desire to endorse the CRs, in respect of any officer under their command, they may do so on a separate sheet. The same will be attached to the CR to follow the SRO's pen picture."

31. A plain reading of the aforesaid provisions shows that the superior officers have right to take different view by their endorsement in regard of channels provided for the purpose within specified period (see- para 43). Para 45 envisages initiation and endorsement by officer other than Brigadier and above ranks dealing with appointments in inter services organisation or on deputation and thus not relevant for the present controversy. Army Order 45 of 2001 empowers the superior officers under the channel of Army to look into the grievances of the officer with regard to ACR entry (supra). Our attention has not been adverted to any provision enabling the Ministry of Defence to enter into picture. Learned Counsel for the respondents admits that Annual Confidential Reports can be expunged or modified by the superior officers or Chief of the

Army staff and not by Government of India. Para 56 speaks with regard to right of Head of Army Services under certain circumstances. That apart, para 58 further empowers Head of Organisation with right to make endorsement in the ACRs of officers of certain ranks and commands. Para 59,60, 61, 63, 64, and 65 also deal with certain contingencies but the same seems to be within the hierarchy of army and not the Government of India. Part –IV of the Army Order 45 of 2001 provides complete picture with regard to initiation, completion, disposal and movement of confidential reports. In para 70, and 71 it is provided that reports will be forwarded to MS Branch within 75 days from the date of initiation and in case delay occurs, it shall assign reason. Para 72 provides that ACRs will be initiated upto 90 days under certain circumstances.

32. Under special circumstances, the ACRs may be initiated for different reasons under paras 80, 81 and 82 and will be enfaced accordingly in terms of Appendix L. Para 93 provides that completion of CR form shall be reported by the officer and under para 97, the reporting officer has been commanded to complete and dispose of CR form. Paras 97 and 98 collectively deal with completion of CR and the same being germane to the controversy are reproduced below for ready reference.

> *"97. It will be obligatory for the entitled IO and the FTO/FSCRO to assess the officer in respective portions, except in the case, where an IO is a civilian, who will not render assessment in DPVs and QsAP and Recommendation for Promotion and Employment. The RO/HTO/HSCRO must make efforts to render an objective assessment to ensure*

that one man reporting is avoided in interest of objectivity of reporting.

98. When a RO, SRO, HTO/HSCRO, HOA/S/Org assess the officer, it will be obligatory for him to render an assessment at all places as applicable in the CR form."

33. Different provisions of the Army order 45 of 2001 deal with action to be taken for deletion of the lost CRs and following action may be taken as envisaged in paras 101, 102, 103 and 104 of the Army order. Paras 105 and 106 deal with the gaps in the CRs and the same being germane to the controversy are reproduced below for ready reference:-

"105. Absence of a CR/NIR for gap periods results in withdrawing of the officers from SBs and panels. Examples of occurrence of gaps are at Appendix C (list is not exhaustive). Gaps are intimated to officers in various manners, i.e. Through Acknowledgement Cards of CRs received at MS Branch, MS Info Net, and before SBs. In addition, the officers can always approach the MS Info Room/Their Controlling Groups at MS Branch to ascertain gaps in CRs.

106. It is the responsibility of the officer to take immediate steps to cover gaps in CRs by rendition of a CR or NIR. The reporting environment should take appropriate steps for expeditious processing of such CRs/NIRs."

34. A plain reading of the provisions of Paras 105 and 106 shows that in the event of gap or unfilled column, the officer shall immediately approach with regard to gaps in CRs and on receipt of representation, the reporting environment shall take appropriate steps for expeditious processing of such CRs or NIR. In view of the aforesaid provisions contained in paras 105 and

106 of the Army order it appears that subsequent filling of column by the Initiating officer (supra) and due communication to the Applicant and the Government in response to the representation submitted for the purpose is justified and lawful. The Government had no right to interfere in the matter except to refer the matter back to the authority in terms of paras 105 and 106 in case they are approached for.

35. In any case it is not proper for the Govt to interfere with the CRs in violation of Army order which has been stipulated to have mandatory force. There is a reason behind it. Confidential Reports are granted objectively keeping in view over all profile of the incumbent as evident from Paras 119, 120, 121, 122, 123 and 124 of the Army Order (supra). Army order 129 provides that confidential reports shall be communicated to the Ratees by post. In exceptional cases, otherwise, it shall be shown to the officers in person and signatures obtained. Army order 130 also deals with, under what circumstances, the extracts of Confidential Reports be communicated to the Ratee. Moreover, it is the appropriate authority of Army who knows the overall profile of its officer, not the Ministry of Defence. Interference by Ministry of Defence in such case shall loosen the command and control of Chief of the Army and shall be fatal. In the absence of statutory mandate, Government of India has no power to interfere with ACR.

36. Learned counsel for the Applicant and learned counsel for the respondents both drew our attention to two judgments of the Bench in O.A. No 202 of 2015 decided on 17.03.2016, Brig.

H.S.Ratnaparkhi vs Union of India. The case of Brig Ratna Parkhi deals with the situation where Initiating officer has communicated to the superior officer his intention for grant of outstanding entry. The superior officer could not give any response immediately but before receiving any response from superior officers, the Initiating officer had downgraded the entry from 9 to 8 without recording any reasons on the same in pen picture. We took the view that once the opinion is formed to award outstanding entry and pen-picture is recorded and communicated to the superior officers then unless a reason is assigned, it cannot be reduced to lower quality point nor box grading can be reduced before receipt of opinion of the superior. The pen picture does not disclose any change of status or ground. Hence reduction to 8 box grading was not held to be justified. The O.A was allowed and entry made on the basis of change opinion of Initiating officer was expunged.

37. The other case relied upon by learned counsel for the Applicant was **OA No 18 of 2012, Brig Ranjit Kumar Bhutani vs Union of India.** This case was decided on 31.03.2016. In the case of Brig Bhutani, Confidential Report contained cutting/overwriting without signatures of Initiating officer. While holding the relevant provisions mandatory, we held that in case the provisions contained in the Army Order 45 of 2001 were not followed, then it would vitiate the action being arbitrary unjust and improper. Hence O.A was allowed and respondents were directed to reconsider the petitioner's case with liberty to proceed in terms of Clause (d) of para 15 of the Army order 45 of 2001. As apparent from the Army order supra, in clause 15 (d), in the

event of cutting or overwriting without signatures, the same may be set aside with the follow-up action of re-initiation. Power has been conferred on Army Headquarters and not on Union of India. It means only Chief of Army Staff or its competent authority has right to re-initiate or expunge the Confidential Reports de novo and not the Government of India.

38. In the present case, the confidential report of the Applicant has been withdrawn suo motu by the Government of India, while considering the case of respondent no 5 for approval to his promotion on the post of Maj Gen in pursuance of selection held on 13/14.10.2011. The Ministry of Defence acted without jurisdiction while passing clause (b) of the order/decision dated 19.04.2012 which commands for revision/reduction of grading in respect of Agenda No 3 and consider the case afresh after setting aside the assessment of Initiating officer in ACR for the period Sept 2009 to June 2010 as technically withdrawn

39. The Ministry of defence acted without jurisdiction while passing clause (b) of the order dated 19.04.2012 in favour of the applicant in disregard of Army order 45 of 2001. The decision taken by the Ministry of defence suffers from want of jurisdiction and it was not taken in observance of Army Order 45 of 2001 and by this reckoning, it is void ab initio and should be ignored.

40. It is well enunciated law that things should be done in the manner as provided by the Act or Statute and not otherwise. **(Vide: Nazir Ahmed vs King Emperor, AIR 1936 PC 253; Deep Chand Versus State of Rajasthan, AIR 1961 SC 1527,**

Patna Improvement Trust Vs Smt Lakshmi Devi and others, AIR 1963 SC 1077' State of U.P. Vs Singhara Singh and other, AIR 1964 SC 358' Barium Chemicals Ltd. Vs Company Law Board AIR 1967 SC 295, (Para 34) Chandra Kishore Jha Vs Mahavir Prasad and others, 1999 (8) SCC 266' Delhi Administration Vs Gurdip Singh Uban and others, 2000 (7) SCC 296' Dhanajay Reddy Vs State of Karnataka, AIR 2001 SC 1512, Commissioner of Income Tax, Mumbai Vs Anjum M.H. Ghaswala and others, 2002 (1) SCC 633' Prabha Shankar Dubey vs State of M.P. AIR 2004 SC 1657, Taylor Vs Taylor, (1876) 1 Ch.D.426' Noika Ram vs State of Himachal Pradesh, AIR 1972 SC 2077' Ramchandra Keshav Adke Vs Govind Joti Chavare and others, AIR 1975SC 915' Chettiam Veettil Ammad and another Vs Taluk Land Board and others, AIR 1979 SC 1573' State of Bihar and others Vs J.A.C Saldanna and others, AIR 1980 SC 326, A.K.Roy and another Vs State of Punjab and others; AIR 1986 SC 2160' State of Mizoram Vs Biakchhawna, 1995 (1) SCC 156).

Accordingly, the Government of India could not have taken any decision setting aside the report of Initiating officer on technical ground as withdrawn case which seems to be in contravention of Army Order 45 of 2001 partly regard being had to paras 105 and 106 reproduced (supra).

VI. COMMUNCATION OF DULY FILLED CR BY INITIATING OFFICER.76

41. We have taken note of the fact that according to the office report by Under Secretary namely, R.Sunder subsequent filling of column (b) and (c) is alleged to be not communicated. The note provides that it was done behind the back of the Applicant but things seem to be otherwise. The letter written by R.Sunder Under Secretary dated 22.03.2012 which is on record, contains a reference of para 15 of the policy 45 of 2001 with the observation that the Ratee declined to sign the CR and further there is no indication whether assessment reported by Initiating officer in the unfilled para 12 (b) and (d) have been authenticated by him with full signatures and date thereby complying with the requirements of para 15 (b). Whole noting seems to be replete with "blow hot-blow cold" and lapses and intentions of the ministerial cadre of Ministry of defence is borne out from such notings and letters. For ready reference, letter dated 22.03.2012 which is in the original record is quoted below.

> "Ministry of Defence
> D (MS)
> Sub: No. 1 Selection Board held on 13-14 Oct 2011-AOC
> Reference: AHQ's note No A/47506/ACR/MS (X) dated 7.3.2012 and A/47053/1 SB/AOC/MS (X) dated 12.3.2012 on the above mentioned subject.
> 2. It is observed that (Agenda No 2) IC-38381 Brig RS Rathore, has been placed under provisional DV Ban Type 'D' on 6.1.2012.
> 3. Insofar as the unfilled paras 12(b) a& 12 (d) of CR 09/09-6/10 in respect of Agenda No. 3, Brig N.K. Mehta, are concerned, it has been stated that the same were duly got filled by the IO on a separate extract of the CR, which is reportedly available in the CRD. A complete set of the correspondence held with the IO, together with the CRD, may please be provided.
> 4. In this context, it would be pertinent to invite attention to para 15 (b) of AO 45 /2001 –MS which provides "Revised assessment will be authenticated with full signatures of the concerned reporting officer(s) and will bear the date of amendment. In case, the assessment is in the open portion, to be communicated to the ratee, the ratee will also

authenticate the amendments with full signature and date". Para (c) of the same para provides "violation of above provisions may render a complete CR or a part technically invalid". While the ratee has reportedly made by the IO in the unfilled paras 12 (b) & (d) have been authenticated by him with full signature and date, thereby complying with the requirement of para 15 (b). Needless to emphasize, failure to meet requirement would render the CR, in question, technically invalid.

5. AHQ have further invited attention to MoD's order dated 4.8.2011 on the Statutory Complaint of Brig (Retd) R.K.Bhutani as also to para 6 (a) of the AFT's judgment in the relevant case. It is seen that para 6 (a) of the order is not relevant in the present case. In the case of Brig Bhutani, it was not established that amendment was carried out subsequently and, therefore, it was observed that no prejudice was caused to the complainant by not putting date under the signatures. However, in the case of Brig Mehta, provisions of para 15 of AO 45/2001/MS have, apparently, been violated by the AHQ. It is, therefore, felt that the ACR 09/09-06/10 is technically invalid.

6. AHQ are requested to examine the recommendations of the Board in the light of the above observation and apprise the MoD of their considered views.

(R.Sunder)
Under Secretary (MS)"

42. The record further shows that the Director (MS) vide letter dated 14.02.2012 defended the Initiating officer pointing out that two columns had been communicated to the officer and fresh extracts of assessment had also been sent to the Ratee vide letter dated 17.01.2012. He submitted that the late communication would not invalidate the CR which was done within jurisdiction (See 105 and 106 of Policy 45 of 2001.)

43. From the materials on record, there appears to be no room for doubt that the Initiating officer had not only filled up the blank columns 12 (b) and 12 (d) but also communicated it to the applicant vide letter dated 17.01.2012 followed by communication of the M/S Branch vide letter dated 20.01.2012.

44. It Is disquieting that inspite of all these communications, the records contain incorrect notings by the Ministerial Cadre of Defence Ministry placing incorrect facts before the then Defence Secretary and the then Minister of Defence which not only amounted to prima facie serious misconduct and was fraught with the consequences of spoiling the career of officers of Ordnance Corps. Whether incorrect noting is planned and deliberate in consultation with higher ups is a matter of investigation.

VII. VACANCY

45. It is not disputed that when Selection by No. 1 Selection Board was held on 13/14 Oct 2011 there existed only one vacancy against which respondent no 5 was selected but could not be promoted inasmuch as result could not be declared because of faulty DV Ban (supra). In case, there was only one vacancy, the pressure could have been exerted for withdrawal of CR of Applicant on someone of ministry on the pretext that injustice had been done to him (Applicant). In the case of **State of U.P. vs Vijai Kumar Misra reported in AIR 2003 SC 4411**, relied upon by the learned counsel for the respondent no 5, Hon'ble Apex Court held that a candidate who did not come within the zone of consideration for the post, could not be compared with the candidate who possessed the prescribed qualification and hence could not be benefited. Hence the Applicant could not be relegated or assigned to 1979 batch when there was only one vacancy. The eligibility qualification provided under the rules is binding and an incumbent who did not possess the prescribed qualification for the post, at the time of submission of application

(In the present case at the time of selection) would not be eligible to be considered for such post. Their Lordships held that over-all assessment of service record of candidate by selection committee is must within the zone of consideration. Another case which is **Union of India Vs Avatar Singh reported in AIR 2001 SC 3598,** Hon'ble Apex Court held that no vacancy could be added in selection process during the course of selection which was not available. Hence no order for promotion or to be considered again can be passed. In Avtar Singh (supra) Hon'ble Apex Court held that to create a vacancy if none exists, and to keep in service until promoted as Maj Gen and actually picks up the rank. Admittedly respondent no 5 belongs to 1979 batch and selection was done for appointment on one vacancy. Hence, no direction can be issued by the Defence Ministry to convene fresh selection Board by withdrawing the CR of the Applicant.

VIII. BENCH MARK/ CRITERIA PROMOTION

46. It is vehemently argued by learned counsel for the Applicant that the earlier order passed by the Tribunal dated 30.10.2012 which has been reviewed is correct and even in the absence of Bench Mark, the Applicant could have been promoted on the post of Maj Gen as well as Lt Gen. Interestingly, while filing Suppl counter affidavit dated 20.04.2016, Union of India averred that no separate vacancy was earmarked for special review case and things were done as per policy dated 29.03.2014 while adjusting the Applicant to subsequent vacancy. It is further stated that order dated 30.10.2012 (supra), passed in Original Application should be considered as same has attained finality and complied

with by the respondents. The prayer made seems to be unusual and passes comprehension inasmuch as that though there was Bench Mark of Respondent no 5 (supra) but it was held that there was no Bench Mark. If it is so, then how promotion could be done to such higher post.

47. In **O.A No 511 of 2011 Maj Gen S.P.Sinha vs Union of India and Ors** decided on 30.03.2012 by Armed Forces Tribunal Delhi, the quintessence of what was held was that there must be some Bench mark to achieve the highest standard of the Army. Similarly under DV Ban of empanelled candidate against vacancy does not give any right for promotion. While approving the order of Principal Bench Armed Forces Tribunal Delhi in Maj Gen S.P.Sinha (supra), the Delhi High Court held as under:

> *"15. In service jurisprudence, for a promotional post, and that to at the top level; and in the instant case, we are concerned with a promotion to the one but top slot in the armed forces i.e the post of a Lt Gen; there must be a bench mark to be achieved which must be of the highest standard and alternatively a comparative merit review. To put it differently, the best standard i.e the highest standard achieved in a batch by a person would be a good bench mark. This would logically mean that if there are two posts and two persons have been empanelled, they must be the two best and this logic would take us to the position that where ex-post facto appraisals have to be done with respect to a person wronged, his assessment by way of appraisal would be on a comparison with the last empanelled candidate."*

48. Apart from the above, the policy dated 04.01.2011 provides that promotion to the next higher post of Maj Gen and above

shall be done keeping in view the Bench Mark i.e merit of last selectee. The Bench Mark means the minimum numerical weighted mean score arrived at for overall grading above which an officer shall be regarded as fit for promotion or empanelment, as the case may be, to the next higher grade. In Cambridge Dictionary, it has been defined as a level of quality that can be used as a standard when comparing other things. In black Law Dictionary, it has been defined as a standard used as a basis for comparison.

49. Apart from Bench Mark, an important question required to be placed on record is the over-all distribution of marks in quantified model. The policy dated 04.01.2011 (Annexure 6) deals with the subject. Para 3 of the policy provides that over-all distribution of marks of quantified system shall be as earlier with modification to the effect that 95 marks will be given for quantified parameters which include confidential reports. Para 5 of the policy deals with distribution of marks with regard to performance aforesaid. Para 7 and Para 8 of the policy relates to marks in lieu of other items. Weightage has been assigned to certain awards under para 10 of the Policy. For ready reference, paras 3,5,6,7,8,9, and 10 of the aforesaid Policy are reproduced below.

> *3. The overall distribution of marks of the Quantified System will remain the same as earlier and are as follows:-*
>
> > *(a) 95 marks will be given for quantified parameters to include confidential reports (CRs), Courses, Honours and awards.*

(b) Five marks are earmarked for Value Judgment (VJ) by the Selection Board (SB) members for aspects that cannot be quantified.

Distribution of Marks:-

5. The revised distribution of marks for various SBs is as under :-

Type of CR	*No 3 SB*	*No 2 SB*	*No 1 SB*	*SSB*
Criterial (Maj/Lt Col)	*50*	*15*	*-*	*-*
Staff/Instr/Others (Maj/Lt Col)	*39*	*07*	*-*	*-*
Criteria (Col)	*-*	*46*	*19*	*04*
Staff/Instr/Others (Cols)	*-*	*23*	*08*	*02*
Criteria (Brig)	*-*	*-*	*46*	*20*
Staff/Instr/Others (Brig)	*-*	*-*	*18*	*06*
Criteria (Maj Gen)	*-*	*-*	*-*	*46*
Others (Maj Gen)	*-*	*-*	*-*	*14*
CR Total	*89*	*90*	*91*	*92*
Courses	*04*	*03*	*02*	*01*
Honours & Awards(Gallantry Awards Only)	*02*		*02*	*02*
Quantified Total	*95*	*95*	*95*	*95*
Value Judgment	*05*	*05*	*05*	*05*
Grand Total	*100*	*100*	*100*	*100*

6. The weightages of courses are based on the category of course i.e. competitive courses, mandatory courses and other courses. Weightages assigned for courses in various SBs are as follows:-

Courses	***No 3 SB***	***No 2 SB***	***No. 1 SB***	***SSB***
JC/Mandatory course	*0.75*	*-*	*-*	*-*
DSSC/TSOC	*1.50*	*0.75*	*0.50*	*0.25*
*SC**	*-*	*0.50*	*0.25*	*-*
HC/LDMC/HACC/0.50xlNHCC	*-*	*0.75*	*0.50*	*0.30*
NDC/0.70xAPPA	*-*	*-*	*0.75*	*0.45*
Other courses	*1.75*	*1*	*-*	*-*
Total	*4*	*3*	*2*	*1*

**0.50 or Q (l) and 0.40 for Q Grading in 2 SB.*
0.25 for Q (l) and 0.20 for Q Grading in 1 SB

*7. <u>DSSC/TSC and JC</u>. Marks for DSSC/TSOC and JC are allowed on a sliding scale based on the grading obtained as given at **Appendix A.***

8. <u>M. Tech</u>. The weightages for M. Tech assigned for various SBs are as follows:-

SBs	***<u>M Tech Through competitive Selection by MT Dte (Cat I)</u>***	***<u>M.Tech other than by Competitive Selection by MT Dte (Incl Advance course) (Cat II)</u>***	***<u>M. Tech while on Study Leave /Others (Cat III)</u>***
No 3 SB	*1.00*	*0.75*	*0.50*
No 2 SB	*0.65*	*0.50*	*0.35*
No 1 SB	*0.30*	*0.20*	*0.15*
SSB	*0.15*	*0.10*	*0.07*

Notes:-

(a) The above are maximum marks for each category. Marks will be awarded based on CGPA/Grading obtained as given at Appendix B.

(b) The above marks will be applicable for all Arms/Services.

(c) In case the Offr has done DSSC/TSPC and M Tech/Advance course, the better of the two aggregates will be awarded.

(d) Advance courses will not form part of other courses in No. 3 SB and No.2 SB.

<u>Honours and Awards (H&A)</u>

*9. Gallantry Awards (**Mention-in-Despatches and above**) have been given maximum of two marks, which will be applicable for two SBs after the award. Thereafter the Gallantry awards shall be value judged by subsequent SBs. The Distinguished Service awards will be Value Judged for all SBs.*

10. The weightages assigned for gallantry awards are as follows:

Ser No	***Type of Award***	***Marks***
(a)	*PVC*	*2.00*
(b)	*AC*	*1.75*
(c)	*MVC*	*1.25*
(d)	*KC*	*1.2*
(e)	*Vr C*	*0.9*
(f)	*SC*	*0.8*
(g)	*SM(G)*	*0.5*
(h)	*Mention-in-Despatches*	*0.3*

Value Judgement

11. Five marks have been earmarked for Value Judgment by Selection Board. The selection parameters that cannot be quantified will be considered by the Selection Board members for Value Judgment as given in succeeding paragraphs.

12. Performance

*(a) Operational experience / Babble Performance Reports (**OP PAWAN, OP MEGHDOOT, OP VIJAY (KARGIL)/ or Subsequent Operations in future)** throughout the career.*

(b) Consistency in overall performance.

(c) Service in difficult field areas and in relatively challenging environments.

13. Potential Suitability for being employed in higher ranks.

14. Recommendations for Promotion. Officers should have been consistently recommended for promotion to the next rank.

15. Honours and Awards. Distinguished Service Awards will be value judged based on the achievement for which the award is earned, service at which earned and appointment held. Gallantry Awards after being given weightage in two SBs will be value judged by subsequent SBs.

16. Special Achievements. Any special achievements e.g. in sports, adventure activity, grant of civil awards etc. will be highlighted for award of Value Judgment marks.

17. Disciplinary / Administrative Awards: While assessing officers with disciplinary backgrounds, the gravity and nature of the offence and the service level at which the offence was committed will be taken into consideration. Irrespective of the position in the merit list, officers with the following will not be recommended for promotion:-

(a) Cases involving moral turpitude, gross negligence, acts of cowardice or un-officer like behavior which reflects on the moral fibre of an officer.

(b) Negative Character Traits.

(d) Poor performance in combat and operational situations.

18. Week Remarks. The weaknesses reflected in CRs. Course reports and other documents filed in CRD will be value Judged.

Review

19. The revised Quantified Model for Selection Boards will be reviewed after a period of five years from Implementation. This policy supersedes all earlier policies on the Conduct of Selection Boards by Quantification System.

50. Keeping in view the aforesaid break-up of marks, 46 marks have been provided for criteria report on the post of Brigadier. It means that in case one report is expunged as is the case of the Applicant, then he will have more marks than respondent no 5 but in case both reports retained, then he shall be lower in merit for the purposes of selection on the post of Lt Gen. That is why, it

appears that all efforts have been made in connivance with the subordinates of Ministry of Defence by the Applicant to withdraw the Confidential Report inspite of the fact that gap was already filled up within jurisdiction in accordance with Rules (supra).

IX. BENEFICIARIES OF UNFILLED COLUMN/GAP

51. Shri Ashok Mehta Additional Solicitor General conceded that in case one CR is struck down on ground of unfilled column or gap, then the applicant shall be beneficiary on the ground of increased quality point marks in merit which is his luck. This fact is also evident from the grading in the proceedings of Selection Board produced before the Tribunal. He further submits that it is a blessing in disguise. On account of fault of Initiating Officer, the Applicant has been benefitted and selected for the post of Maj Gen and later-on for the post of Lt Gen. Since one Confidential Report was expunged in pursuance of earlier judgment which amounts to increasing quality point merits of the Applicant, in such situation whether the gap/unfilled column (supra) is deliberate and intentional or inadvertent is a question which requires thorough investigation? Why inspite of letter of the Initiating officer informing that gap/unfilled column has been filled up by him with both '9's (supra) the Applicant pressed for expunging of one confidential Report. The record shows that the Applicant sent letters dated 21.01.2012, and 02.02.2012 and met the Military Secretary personally on 23.03.2012 in pursuance of representation dated 09.03.2012 , pursuing expunction of one CR entry on account of unfilled column. In consequence of personal

meeting with Military Secretary, Applicant wrote a letter dated 26.03.2012 informing that Military Secretary granted interview on 23.03.2012 and certain issues were considered. The relevant portion from the letter dated 26.03.2012 with regard to issues which fell under discussion on 23.03.2012 as contained in para 2 of the letter is reproduced below.

> *"2. During interview with MS the undersigned brought out following issues relating to his ACR covering the period 01 July 2009 to 22 Jun 2010.*
>
> *(a) That the impugned ACR of the officer is null and void and technically invalid for all purposes as the procedure laid down in AO 45 of 2001/MS for initiation of the CR has been contravened.*
>
> *(b) That the IO filled up incomplete ACR but left blanks in two important qualities in the columns of "Personal and Demonstrated Performance" (Part II-Para 12 (b) and Para 12 (d) refers).*
>
> *(c) That in the extract of the said CR fwd to the officer, the note at bottom of page 3 was blank and not filled with details of Registered letter No & date of fwd the extract.*
>
> *(d) That despite incomplete assessment in Para 12 of Part II of the ACR, the IO assessed overall grading in the box column "8"marks.*
>
> *(e) (e) That immediately on communication of the incomplete assessment, the officer made an endorsement on the extract received from IO highlighting the fact that Para 12 (b) and Para 12 (d) were blank and had not been filled by IO. The said extracts*

were returned to MS (X), IHQ of MoD (Army) under info of IO.

(f) That numerous requests of the officer for intimating to him the action taken by the MS Branch with respect to the impugned CR, no communication was received by the officer on this count.

(g) In the meanwhile, the officer was also considered by No 1 SB, evidently, taking into account the said CR."

52. Plain reading of issues discussed between the Applicant and the Military Secretary at the face of record shows that the letter dated 23.03.2012 sent to Smt Archana Rai by Applicant Brig N.K.Mehta does not discuss that unfilled column has been filled up in terms of Paras 105 and 106 of the Army order 45 of 2001 and overlooked and not taken into account at all. Whether it was deliberate and intentional or inadvertent may be inferred. Even in Para 3 of the letter dated 26.03.2012 while pointing out anomalies in Confidential Report received on 23.01.2012, the letter of Initiating officer and M.S. Branch (supra) was not taken into account alongwith provisions contained in Paras 105 and 106 of the Army order 45 of 2001.

53. Instead of sorting the problems in the light of paras 105 and 106, whole issue, it seems was diverted to para 15 of the Army Order (supra) though it was not applicable. In the present case, since it does not relate to interpolation, or correction of Confidential report, but relates to unfilled column, para 15 of the Army order was unavailing. Subject to aforesaid efforts, Shri P.K.Patnaik on behalf of Military Secretary informed the Applicant vide letter dated 20.04.2012 (Annexure 14) that the Applicant's

case had been withdrawn from No. 1 Selection Board held on 13/14 Oct 2011 although without giving any reason for withdrawal.

54. In view of the above, it may not be ruled out that unfilled column of the confidential report of the period from 01 July 2009 to 22 June 2010 may be inferred as intentional to extend the benefits keeping one CR on record. Such inference may not be ruled out , more so, when Applicant tried his best to expunge the entire CR with outstanding grading of '9' for the period from 01 July 2009 to 22 June 2010 so that he may avail higher quality point mark than respondent no 5.

55. The whole exercise was done in contravention of Paras 105 and 106 of the Army order 45 of 2001. We are constrained to observe that selection and appointment to the higher post in pyramidcal structure of the Army should not be made betting in Race Course against the tradition and advice of Army by ignoring relevant provisions or keeping silent to the mal-practices in the matter of promotion and appointment to the higher post. It shall be very unfortunate and disadvantageous to the moral of India Army and send wrong message to the entire Armed Forces and may detract them from zeal and spirit to sacrifice their lives for Nation.

X. Selection 2012

56. In view of order dated 28th Oct 2011 passed by the Ministry of Defence with follow up order dated 24.04.2012 passed by Under Secretary Shri R.Sunder, selection against 1980 batch was held on 12 and 13 April 2013 as evident from the Headquarter

letter dated 05.04.2013 filed as Annexure 21, the Applicant's case was also considered in view letter of Ministry of Defence dated 19.04.2012 as quoted supra.

57. It appears that inspite of aforesaid intendment of Ministry of Defence, the No. 1 Selection Board sticks to rules and the Applicant could not be selected for the post of Maj Gen. It may be noted that on 13/14 April 2012 when selection was held, the letter of Initiating officer Major Gen PVK Menon dated 26.03.2010 filed as Annexure 19 was already on record.

XI. Opinion of Additional Solicitor General of India.

58. The decision of the Selection Board seems to be lawful, just and proper. Thereafter the Applicant preferred the present O.A and claimed the relief (supra). The petition was allowed without considering the contents of counter affidavit filed by the respondents and also without impleading the respondent no. 5. On the face of record, our predecessors of Armed Forces Tribunal, Regional Bench Lucknow failed to take into account the pleadings on record and contents of the counter affidavit filed by the respondents. It was specifically brought on record that the respondent no 5 should be impleaded as a party including the selectees of 2012 Selection Board (supra) but without giving heed to the specific pleadings on record, the O.A was allowed. A lot of things has been said by the learned counsel for the respondents but we refrain from dwelling on all these things since the already order has been set aside and recalled in review petition, affirmed by Hon'ble Supreme Court.

59. However, Dr. R.K.Anand submits that there was no option for the Govt of India except to comply with the order of the Tribunal in view of the opinion of the then Additional Solicitor General Shri P.P.Malhotra. The opinion being relevant is reproduced below.

> *"Sub: OA No. 255/2012 in Brig NK Mehta Vs UOI & Ors.*
>
> *The whole issue is whether the Tribunal was right in directing the Selection Board to consider the case of Brig. N.K.Mehta without bench-mark. It is pointed out that the case of Brig. Rathore was not approved on 25th April, 2012 when the case of Brig. Mehta was considered and therefore, the bench-mark of Brig Rathore could not be considered. It is also pointed out that as far as Brig. Rathore is concerned, his case was approved only on 23rd of August, 2012. Thus there was no available bench mark on 25th of April 2012 and the view of the Ministry appears to be that in the past also there have been cases wherein bench-mark which has not been approved was not considered. In view of this clear stand of the Ministry filing of the appeal is not advisable. I wish this fine distinction of the approval of the candidate by the competent Authority much latter and therefore non existence of the bench mark on 25th April, 2012 when the case of Brig. Mehta was considered should have been brought to my notice earlier as has been highlighted now."*

60. Since reliance has been placed on the opinion of the Additional Solicitor General of India, it becomes incumbent on us to look into it. The Additional Solicitor General has not taken pains that the judgment and order dated 30th Oct 2012 of this Tribunal was passed without taking into account the objection filed in the counter affidavit that the respondent no 5 as well as three selected persons namely, Brigadier SS Lamba, Brigadier

R.K.Saiwal and Brigadier L.M.Arora were not impleaded as parties. Objection was raised regarding cancellation of one CR by the Government and the objection with regard to consideration of withdrawal of one CR. However learned Additional Solicitor General had not taken note of the ratio flowing from **Union of India vs Janakraman's** case with regard to sealed cover procedure as well as Army Order (supra) particularly paras 105 and 106. On the face of the record, opinion given with regard to Bench mark is in contravention of the opinion of Supreme Court's case in **Jankiraman's case** and the Army order and other decisions. The opinion of ASG, Shri PP Malhotra relied upon by Dr R.K.Anand on the face of record is misconceived and is unavailing. It appears that Additional Solicitor General has given another conflicting opinion on 26.04.2013, while affirming the order of Tribunal, which had been reviewed later-on (supra), without applying mind, causing gross injustice to the Government office by giving incorrect advice not to file appeal against the order which has been recalled in review (supra).

XII. CONCEALMENT OF FACTS

61. In the O.A, the affidavits filed by the Applicant as well as the list of dates and events, the Applicant tried to conceal the material facts. He has not invited attention to Paras 105 and 106 of the Army Order 45 of 2001 which is relevant and enabled the Applicant to submit representation against unfilled entry. The Applicant had also erroneously diverted the whole issue, may be with the tacit support of certain persons of Ministry of Defence, to Rule 15 of the Army order 45 of 2001 more so when it is not the

case of eraser, over-writing, use of whitener or paper slips pasted to remove or block the original assessment. The Court, Tribunal or Authority cannot travel beyond the contents contained in para 15 of the Army Order (supra) Issue of gap or unfilled column is entirely different than the issue of eraser, over-writing, use of whitener, paper slips pasted to remove or block the original assessment. It is further unfortunate that the Government of India, Ministry of Defence speaks in tune with the Applicant's representation and claims, though he should have represented his case in terms of paras 105 and 106 of the Army Order to fill up the unfilled column which was rightly done by the Initiating officer with due communication to the Applicant vide letter dated 26.11.2010. The letter dated 26.11.2010 is within jurisdiction and in tune with the Army Order 45 of 2010 which cannot be ignored for any reason whatsoever more so when it has been settled that the provisions contained in the Army order regulates the service conditions in the matter of ACRs and has got mandatory force as stated supra. The Applicant has not impleaded the respondent no 5 in Original Application but also not impleaded the three officers who were selected in April 2012 namely, Brigadier SS Lamba, Brigadier R.K.Saiwal and Brigadier L.M.Arora. If we go by interpretation jurisprudence, while interpreting a provision, meaning should be assigned to each and every word and punctuation and no words should be excluded or ignored while considering a provision.

62. In view of the above, no addition or subtraction may be done from para 15 of the Army Order 45 of 2001. Hence it does

not cover case of gap or unfilled columns. Provisions contained in paras 105 and 106 are the only provisions which deal with controversy in question and not para 15 of the Army order, which has not been invoked by the Applicant or the respondents.

XIII. NON JOINDER OF NECESSARY PARTY.

63. One of the objection raised by the Union of India in their affidavits (supra) is that the Applicant has not impleaded the affected persons as party who were selected by Selection Board No. 1 on 13/14 Oct 2011. Admittedly, three persons namely Brig. S.S.Lamba, Brig. S.K.Saiwal, and Brig. L.M.Arora were selected and whose names were approved for promotion to the rank of Acting Maj General by the impugned order dated 20th June 2012. One of the reliefs claimed in O.A by the Applicant is that being aggrieved that the selection held on 13/14 Oct 2011 as well as on 25th April 2012, he had prayed for quashing of the proceedings of No.1 Selection Board approved for promotion by the impugned order dated 25.04.2012 to the extent it related to Applicant. No order or decision can be taken with regard to outcome of selection done by No 1 Selection Board on 25.04.2012 without impleading the persons who were already selected.

64. It is not disputed that the selection for the post of Maj Gen and Lt Gen is selection on merit where comparative assessment is done from the overall profile of the officers whose names are considered for promotional avenue which has not been denied by Dr. R.K.Anand learned counsel for the Applicant. It is well settled law that where a selection is done on the basis of seniority cum

merit, then subject to fulfilling of Bench Mark previously fixed, the promotion is based on seniority. The requirement of assessment of comparative merit in the event of fulfilling of Bench Marks is not done subject to assessment of materials on record in accordance with rules to the extent the candidate possessed the minimum necessary merits. Hon Apex Court held that describing the minimum qualifying marks to ascertain the minimum merit necessary for discharging the function of higher post is not violative of the concept of promotion by seniority cum merit **(See- AIR 2010 SC 699 Rajan Kumar Srivastav vs Samyukta Chhetriya Gramin Bank and Ors.)**

65. However, where the selection is done exclusively on merit, then comparative assessments of the candidates are done on overall profile of the candidates in accordance with rules. The merit of the candidate can play dominant role in the selection process vide decision of the Apex Court in **B.V.SSiavaiah v K Addanki Babu reported in (1998) 6 SCC i**n which the Supreme Court has held as under:-

> "9. The principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. In the context of Rule 5(2) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 which prescribed that "selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority" Mathew, J. In Union of India v Mohan Lal Capoor has said: (SCC p.856, para 37)

> ”For inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if itis not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale.

Similarly, Beg J (as the learned Chief Justice then was) has said: (SCC p.851, para 22)

> *“22. Thus, we think that the correct view, in conformity with the plain meaning of words used in the relevant Rules, is that the ‘entrance’ or ‘inclusion’ test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor.”*

66. In view of the above, the impugned selection and the order as contained in Annexure 1 without impleading the selected persons, O.A. is not maintainable. Hon. Apex Court in the case of **Surendra Shukla Vs Union of India reported in (2008) 2SCC 649** has held as under:-

> “11. Considering the comparative batch merit, if the Selection Board did not recommend the name of of the appellant for promotion to the rank of Colonel which appears to have been approved by the Chief of Army Staff, it is not for the court exercising power of judicial review to enter into the merit of the decision. The Selection Board was constituted by senior officers presided over by an officer of the rank of Lt General,. It has been contended before us that the Selection Board was not even aware of the identity of the candidates considered by them because only in the member data sheet all the informations of the candidates required to be considered by the Selection Board are stated, but the identity of the officers is not disclosed. The appellant

moreover did not allege any mala fide against the members of the Selection Board. What impelled the Selection Board not to recommend his case but the names of other two officers is not known.

12. The said Col A.P.S. Panwar and Col V.K.Sinha were furthermore not impleaded as parties in the writ petition. In their absence, the writ petition could not have been effectively adjudicated upon.

13. In Union of India v Lt Gen Rajendra Singh kadyan it was held (SCC p. 715, para 29)

> *"29.....It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government."*

The said views have been reiterated in Amrik Singh v Union of India."

67. Aforesaid position of law has been reiterated and affirmed by Hon'ble Supreme Court vide:- **AIR 1985 SC 167, Prabodh Verma Vs State of U.P. ; 1995 (sup) 1 SCC 179, Ishwar Singh vs Kuldeep Singh; AIR 2002 SC 3396, Nirmala Anand vs Advent Corp. Pvt Ltd, 2009 (1) SCC 768, Tridip Kumar Dingal vs State of West Bengal.**

In view of the above, the O.A seems to be bad in law because of non-joinder of necessary parties, hence not maintainable.

XIV- MINISTRY OF DEFENCE

68. One peculiar fact of the present case is that the Ministry of Defence does not agree with the validity of the Annual

Confidential Report of the period Sept 2009 to June 2010. On the other hand, the record shows that the Army was not agreeable with the opinion of the Ministry of Defence for the reasons discussed hereinabove. It appears that the Applicant and the Ministry of Defence were in active touch and diverted the whole issue with regard to A.C.R, to Rule 15 ignoring the other provisions of the Army Order 45 of 2001 discussed hereinabove. The Ministry of Defence as held (supra), lacks jurisdiction to interfere with the Annual Confidential Reports in view of the provisions contained in Army order 45 of 2001. The Defence Secretary as well as the then Defence Minister had signed the record approving for withdrawal of the Applicant with regard to ACR of the period Sept 2009 to June 2010. The record further shows that the Defence Secretary and the then Defence Minister had signed without assigning reason or even without noting their agreement with the Note put up by the subordinate authorities. The whole note as placed from the stage of Under Secretary was approved by the Higher ones and duly signed by the then Secretary and the then Defence Minister.

69. It appears that prima facie, the entire things were managed at lower level and duly acknowledged and approved by the then Defence Secretary and the then Defence Minister for the reasons best known to them. It shall always be appropriate that before approving or disapproving an order of subordinate in terms of noting, the Defence Secretary should go through it and while recording approval, must satisfy himself with the ministerial noting under him. In absence of such precautions, it is of a

common knowledge that the subordinates/underlings may exploit the situation to the disadvantage of the good reputation of the department which paves way for corrupt practices to grow in each administrative system. Apart from the above, the record does not evince that at any stage, any opinion was sought from the Experts in the field of laws on the subject. In the absence of opinion of the Experts/JAG Branch in the field of law, firstly, the staffs exploit the situation in league with the incumbents whose cases are lingering consideration. It is one of the reasons of rampant corruption creeping in our system. Be that as it may, as we have noted above, the opinion of the Additional Solicitor General seems to be an opinion without application of mind and without taking into account the Army order 45 of 2001 in its entirety.

70. The case of respondent no 5 remained un-acted upon even after four months of the judgment of the Principal Bench of the Armed Forces Tribunal for the obvious reasons. The entire efforts of Ministry of Defence particularly at lower level seemed to be to extend the benefit to the Applicant spoiling the career of Respondent no 5. It is an unfortunate affair reflecting upon the working and seems to be the pivotal reason for different scams which the Ministry of Defence is confronting from the dawn of Independence ostensibly on account of prevalence of Babudom.

71. The Under Secretary namely R.Sunder in his note dated 07.03.2012 analysed the grading of respondent no 5 as 92.143. In 1978 batch, cut-off mark was 90.436.of Brig Kulveer Singh. Shri N.K.Mehta was at Sl No 4 and according the office note, he

moved to Sl No 2 after reversal of moderation and quantified total marks had gone up from 90.405 to 90.861 but could not be selected because there was only one vacancy. The office note further shows that according to it, vacant column had been filled up with point '9' but not shown to ratee in utter disregard of communication of MS Branch (supra). The note further recites that since signatures of N.K. Mehta were not obtained, it is technically invalid. All this was done ignoring the letter dated 28.03.2010 of MS Branch read with Regulations 105 and 106 of the Army Order 45 of 2001.

72. The office report further shows that J.S (G) was not in agreement with note. The Defence Secretary asked AHQ to reconsider the proposal vide note dated 12th March 2013. On 22 March 2013, it was referred to AHQ to reconsider the case of Brig R.S.Rathore. On 14.4.2012 by relying upon para 15 of the Army Order, the Defence Secretary noted its disagreement in view of para 15 of the Army Order 45 of 2001. Inspite of the fact that changed grading had been communicated to the Applicant by the Initiating officer. Vide note dated 14.04.2012, the Defence Minister was advised to set aside the revised grading of Initiating officer to MS Branch as technically withdrawn and the awarded CRs were restored. Thus, it is the approval of the Defence Minister which seems to be based on Ministerial noting. The matter was kept pending by the respondents 1 to 4. One other feature from official noting seems to be that Board proceeding approval was preceded by a complaint which led to court of Inquiry. All these things were done inspite of the fact that

Initiating Officer wrote a letter dated 26.11.2010 communicating that the columns left blank had been filed up with outstanding grading of '9' which was duly communicated by R.B.Asthana, Director MS to the Applicant vide his letter dated 17.01.2012. The manner in which Ministry of Defence interfered with the matter of ACRs that too without authority under Army Order 45 of 2001 that too while considering the recommendations of No.1 Selection Board making whole machinery to tilt towards the Applicant Brig M.K.Mehta. We feel constrained to draw an inference that things were pre-decided and managed.

73. It is worthy of notice that the copy of the extracts of Annual Confidential Reports (supra) was sent on 26.11.2010 and the opinion of the M.S Branch was that there was full compliance with the provisions of Para 15 (b) of the Army Order 45 of 2001. The record further shows that during selection process, the Army moderated the case of the Applicant and placed him at Sl No 4 but on account of interference by the Defence Ministry, he was again placed at Sl No 2 position after the reversal of moderation done by the Army. How and in what capacity the Ministry of Defence interfered with, is not comprehensible. The record also shows that against the stand of the Army, the Ministry of Defence had expunged the ACR as apparent from the office note dated 04.04.2012 scripted by under Secretary R.Sunder. Though Col N.K.Ohri while placing the record for perusal, emphasised its confidentiality but we feel that prima facie things have been managed and may be cause of some corrupt practices, hence in the interest of justice, it is necessary to bring on record the

relevant portion of the noting dated 04.04.2012 scripted by Under Secretary R.Sunder. Paras 5,6,7,8, 9,10,11,12,13 and 14 of the note being germane for just decision of the case, are reproduced below.

> 5. Grading awarded by the No 1 Selection Board have been analysed in the Ministry from the details of weighted averages given in 'Quantified System', value judgment marks and record profiles contained in the MDSs of the officers.
>
> 6. The Board has considered 3 Fresh cases of 1979 batch, 4 First Review case of 1978 batch and 1 Final Review case of 1977 batch. Out of these, 1 officer has been graded 'B'(Fit) and 7 officers 'Z'(Unfit). It could be seen from the merit list that the cut-off mark in the present Arm for 1979 Batch is 92.143 (Agenda No 2 Brig RS Rathore). In keeping with the cut-off, the grading of 'B'(Fit) awarded by the Board generally appears to be in order.
>
> 7. The Board has also considered 2 First Review cases of 1977 batch and graded them 'Z' (Unfit). As per policy, the total marks obtained by these officers have been compared with the marks obtained by the approved cases of 1978 batch and it is seen that the cut-off marks in that batch was 90.436 (Brig Kulbir Singh, Agenda No 6) (**Statement-I)**. Both the officers recommended 'Z' (Unfit) have obtained lower marks than the cut-off. Board's recommendation appear to be in order.
>
> 8. On persual of CR dossier of the officers, it was observed that in the case of Brig NK Mehta (Agenda No. 3) the MS Branch had moderated ACR 09/09-06/10. The moderation carried out by MS Branch in the present case appeared unjustified and a deliberate attempt by the AHQ to stall the officers empanelment. Following discussions with Defence Secretary on the issue of moderation, AHQ have furnished details regarding the impact of moderations on the recommendations made by the SB held on 13-14 Oct 2011 in

respect of various Arms/Services. Statement indicating the impact of moderations on the recommendations of the No. 1 SB – AOC may be seen at Flag 'A'. **It could be seen that Brig NK Mehta who is presently at No. 4 position in the merit moved to No. 2 position after reversal of moderations.** Insofar as quantified total marks are concerned, the same goes up from 90.405 to 90.861. While the officer's position in inter-se-merit changes from 4th to 2nd, this will not lead to any change in the final recommendations as there is only one vacancy and the officer recommended by the Board has total quantified marks of 92.143.

9. Further on perusal of the CR Dossier of Brig NK Mehta, it was observed that in CR 09/09 to 06/10, the IO had left Para 12(b) and 12 (d) blank. The blanks remained in place while the assessments were initially shown to the ratee by the IO. Brig NK Mehta had made an observation to this effect while endorsing the assessment of IO in the seen portion and also informed MS Branch vide his letter dated 28.09.2010. Further, in the internal assessment sheet, it had been recorded by Addl MS (B) on 15.11.2010 that "there are some vacant column by IO", MS had also recorded on 23.11.2010, "IO to endorse vacant columns". However, while examining the Board proceedings/MDS of the officer, it was observed that the blank columns have been filled with 9 points. The freshly incorporated figures have neither been endorsed by the IO nor by the ratee. It was felt that the ACR should, apparently, be treated as technically invalid, thereby necessitating fresh calculation of quantified marks.

10. It was also observed that Agenda No. 2 IC-38381 Brig RS Rathore has been placed under provisional DV Ban Type 'D' on 6.1.2012. Accordingly, AHQ were requested vide **encl 20-A** to re-examine the recommendations of the Board in the light of the above observations and apprise the MOD of their considered views.

11. AHQ have vide **Encl 21-A** clarified with reference to the technical validity of the CR 09/09 to 06/10 that the officer also sought an interview with the MS on this subject which was granted to him on 23 Mar 2012. After hearing the submissions of the officer, MS directed that the case be examined afresh. Consequently, the case of validity of the CR was examined de-novo and during the examination, it emerged that extracts of the CR after filling para 12 (b) and 12 (d) were not only sent to MS Branch by the IO under a covering note signed by Maj Gen PVK Menon (IO) but a copy of this covering note was also endorsed to the Ratee alongwith a copy of the fresh extracts with column 12 (b) and 12 (d) duly filled in with a direction to him to append his signatures and send his acknowledged extract copy to MS (X). This was done by the IO on 26 Nov 2010 after received an intimation from the MS Branch. Copy of the covering letter under which the extract was sent to the MS Branch is available in the CRD. Since a copy of fresh extract was sent to the ratee on 26 Nov 2010, MS Branch feels that there is full compliance of the requirement of Para 15 (b) of the AO 45/2001/MS. Another copy of the extracts was also sent to the officer by the MS Branch in Jan 2010 when the officer belatedly informed the AHQ that he has not heard anything about the status of the CR. MS Branch feels that the officer appears to have wilfully suppressed the fact of having received the fresh extracts from the IO in Nov 10. MS Branch further adds that MS (Legal) and MS (CR Policy) have been consulted with regard to validity of CR and they are of the view that CR is technically valid.

12. As regards IC-38381 Brig RS Rathore's placement under the provisions of DV Ban Type 'D', it has been submitted that provisional DV Ban does not make an officer ineligible for consideration for promotion or for consequent empanelment. If the Competent Authority finally approves the recommendations of the Selection Board, the same will be withheld during the pendency of the ban as required by the rules and further appropriate action taken on lifting of the ban. If the officer is

convicted then the same will amount to ‘drop in performance’ and his case will be dealt with accordingly. On the other hand, in case he is exonerated, the actual promotion will be subject to the officer being clear from DV angle when promotion becomes due.

13. In view of the explanation given by AHQ on the issue of DV Ban against Brig RS Rathore it appears that the recommendations of the Board in respect of the officer would be processed. However, the justification given by AHQ towards treating the ACR of Brig Mehta as technically valid is not convincing. As per the laid down policy, the revised assessments should have been countersigned by the IO as well as the ratee. Even if we accept the reason given by AHQ that Brig Mehta declined to countersign the revised assessments, the ACR in question appears technically invalid for want of countersignature of the IO. The issue needs to be examined in detail before a decision is taken on the validity of the ACR. As it would take time to examine the issue, it would be appropriate to withdraw the case from the present board and consider the other recommendations of the Board. So long as the Board recommendations are pending in the MoD, AHQ would not be able to hold the next Board despite availability of vacancies.

14. All officers except Brig RS Rathore are clear from DV angle.

15. Approval of RM may be solicited to the following:-

(a) award of granting ‘B’ (Fit) to IC-38381 Brig RS Rathore, AOC as recommended by the No 1 SB and to withhold the result during the pendency of the ban as required under the rules.

(b) revision of grading in the case of Agenda No 3 Brig NK Mehta from and ‘Z’ (Unfit) to “Withdrawn” and to consider his case afresh after a final decision is taken on the technical validity of the assessments of IO in ACR 09/09-06/10.

(c) award of grading 'Z' (Unfit) to 8 other officers as recommended by the Board.

Sd/- x x x x x x

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74. It would crystallize from the office note that the opinion of Under Secretary (supra) has been broadly affirmed by the over-lings of the hierarchy and the ACR of the period Sept 2009 to June 2010 was declared technically invalid and withdrawn by the Ministry of Defence though not empowered to do so. The interest evinced by the Ministry of Defence particularly at the ministerial level in today's atmosphere is understandable. Inference may be drawn that all this has been done to prop up the case of the Applicant actuated by improper/oblique motive. It is strange that Army also failed to take notice, though Army defended its action but so far interpretation of the Army order 45 of 2001 is concerned, Army also failed to take notice of paras 105 and 106 of the Army order 45 of 2001 (supra). This constrains us to observe that the Ministry of Defence should take urgent efforts to tone up the working of its office and take measures to introduce the system of seeking advice from the Experts in the field of law before taking such decision which goes to the root of the career of the Army Forces Personnel. The record shows that it took almost four months to finalise the matter and Ministry of Defence approved the record only on 16.08.2012. The precious time of the officers was wasted.

75. We must not be oblivious of the fact as known to all and also as observed by the Apex Court in catena of cases that because of pyramidcal structure in Army, there is stiff competition with regard to promotional avenue. It is to be borne in mind that the Army officers, who strain every nerve to secure the boundaries of the Nation, should not be made to feel fleeced by denying them their dues in the matter of promotion to next higher posts. To rephrase it, the sweat they have shed for the cause of the Nation should not go waste by denying promotion avenues. Any negligence, corrupt practices at the end of underling shall frustrate the officers of the Army. Looking to the vantage position of Army, the Ministry of Defence occupies, should not work like an ordinary Government office where bureaucracy rules the roost and acts as eminence grises.

XV. CASE LAWS

76. Dr. R.K.Anand assisted by Shri V.R.Singh vehemently argued that Applicant would suffer for no fault of his part. This argument seems to be misconceived for the reasons discussed hereinabove.

Learned Counsel for the applicants relied upon a case of **State Bank of India vs Kashi Nath Kher reported in (1996) Vol 8 SCC 762** in which Hon'ble Supreme Court held that no step was taken by the competent authority comply with direction given by the Court and the Executive Committee. Secondly, officers who were otherwise eligible and entitled to be considered for promotion but made ineligible for no fault on their part, it

necessitates to relieve hardship to such officers due to inaction or skilful manoeuvring at circle level. The case seems to be not applicable for the reasons that in the present case, skilful manoeuvring has been employed by the Applicant himself being hand in glove with the ministerial staff of Ministry of Defence.

77. In the case of **Ashok Kumar Uppal vs State of J & K reported in (1998) SCC 179**, Hon'ble Supreme Court held that power of relaxation vests in Government in pursuance of the provisions contained in Rules made under Article 309 of the constitution having corresponding provisions as contained in Section 124 of the constitution of J & K. There is no dispute over it but case in hand being based on different facts and circumstances, it does not apply to the present controversy.

In the case reported in **2010 SCC On Line AFT 305 delivered by Principal Bench Delh**i, it is held that where junior has been promoted superseding the senior of the Rank of Naib Subedar, it is held that where there are two streams then both the streams of personnel could be simultaneously considered for the said post of Subedar irrespective of number of ACRs earned as Naib Subedar. It is further held that authority concerned is under a fiduciary duty to promote a person where vacancy is available. This case also being based on different facts and circumstances, is unavailing to the present case and cannot be imported for application to the facts of the present case.

78. In the case of **Ashok Kumar vs Union of India decided by Delhi High Court reported in MANU /DE/277/209** the

question of power to relax the conditions has been considered and it has been held that in appropriate cases, where necessary arises, conditions contained in the Rules be relaxed by exercise of powers in terms of statutory provisions. This case also cannot be imported for application to the facts of the present case, being based on facts and circumstances different from the present case.

In the case **of Uttam Dixit, decided on 30.5.2014 in OA No 1447 of 2011,** Delhi High Court impressed upon subjectivity in assessing the performance of an army individual appreciating the sufficient checks and balances provided for in the process of recording ACRs. There is no dispute over this proposition of law.

ARTICLE 14

79. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right ot equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution **(See; National Legal Services Authority v Union of India, (2014) 5 SCC 438).**

80. The underlying object of article 14 is to secure to all persons, citizens or non-citizens, the quality of status and opportunity referred to in the preamble to our constitution. The language of article 14 is couched in negative terms and is in form, an admonition addressed to the State. It does not directly purport

to confer any right on any person as some of the other articles e.g. article 19, do. However, after the judgment of Supreme Court in **E.P.Royappa v State of Tamil Nadu, AIR 1974 SC 555,** the arbitrariness doctrine was introduced which dropped a pedantic approach towards equality and held the mere existence of arbitrariness as violative of article 14, however equal in its treatment.

Building upon his opinion delivered in Royappa's case (supra), Bhagwati J, held in **Maneka Gandhi v Union of India , AIR 1978 SC 597** as under:

> *"The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades article 14 like a brooding omnipresence and the procedure contemplated by article 21 must answer the test of reasonableness in order to be in conformity with article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive."*

81. As is evident from the above, the expressions 'arbitrariness' and unreasonableness have been used interchangeably and in fact, one has been defined in terms of the other**. In Sharma Transport v government of Andhra Pradesh, 2001 AIR SCW 4958,** the Supreme Court has observed thus:

> *"25.In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means" in an unreasonable manner, as fixed or done capriciously or at pleasure without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."*

82. Treating unequal as equals would be violative of articles 14 and 16 (1) **(Vide" State of Karnata v Umadevi, (2006) 4 SCC 1: U.P.Power Corporation Ltd v Ayodhya Prasad Mishra, (2008) 10 SCC 139" and Adkhil bhartiya Upbhokta Congress vs State of Madhya Pradesh, (2011) 5 SCC 29' Secretary to Government, School Education Department Chennai v Thiru R.Govindaswamy, (2014) 3 SCALE 34.**

83. Our Constitution inheres Liberal and substantive democracy with rule of law as an important and fundamental pillar. It is its own internal morality based on dignity and equality of all human beings. The rule of law demands protection of individual human rights in which includes the right to life and right to livelihood .(Vide (2014) 5 SCC 438 National Legal Service Authority vs Union of India).

In **Subramanium Swami Vs Director CBI and another (2014) 8, SCC 682**, while interpreting Article 14 of the Constitution of India, its ambit and scope, Their Lordships of Supreme Court held that arbitrariness is an antithesis of Rule of Law and State action must be just, fair, extending due lawful right to all concerned. The Supreme Court culled out different principles in the case of **Subramanium Swami (supra)** in tune with Article 14 of the constitution of India.

XVI. MALICE IN LAW

84. In case, a person, who inflicts injury upon another person in contravention of law is not allowed to say he did so with innocence, he may be guilty of malice in law. (Vide 1976 (3) SCC

334, ***The Regional Manager vs.Pawan Kumar Dubey*** (paras 13, 14 and 15), **2001 SCC (1) 182*,Kumao Mandal Vikash Nigam Ltd.vs. Girija Shanker Pant.***

85. For convenience sake para 13, 14 & 15 of***Pawan Kumar's*** case (supra) are reproduced as under:-

> *13. This Court's judgment in Sughar Singh's case (supra) shows that it was only following the law on Article 311 (2) of the Constitution as laid down repeatedly earlier by this Court. It specifically referred to the following cases: Purshotam Lal Dhingra Vs. The Union of India (1); State of Punjab & Anr. V. Sukh Rai Bhadur (2); State of Orissa V. Ram Narayan Das (3); B.C. Lacy V. State of Bihar (4); Jagdish Mitter V. Union of India (5); A.G. Benjamin V. Union of India (6); Ram Gopal Chaturvedi V. State of Madhya Pradesh (7); Union of India V. Gajendra Singh (8); Divisional Personnel Officer V. Raghavendrachar (supra); Union of India V. Jaswan Ram (9); Madhav V. State of Mysore (10); State of Bombay V. Abraham (supra). In Sughar Singh's case, this Court summarised the propositions of law deducible from the cases mentioned above; and, while considering the applicability of some of the propositions of law to the facts of the case, it did observe that, on the face of it, the action against Sughar Singh did not appear to be punitive. Nevertheless, on a total consideration of all the facts, including the admission in the High Court before Verma, C.J., by the Standing Counsel appearing on behalf of the State, that the reversion order could not be explained except as a result of the adverse entry made two years earlier, it had finally applied the ratio decidendi of the State of Bihar & Ors. V. Shiva Shukshuk Mishra (11), where this Court had affirmed the opinion of the High Court, on facts, that the "reversion was not in the usual*

course or for administrative reasons but it was after the finding on an enquiry about some complaint against the plantiff and by way of punishment to him". On this view of the case, it was not really necessary for this Court to consider whether the reversion of Sughar Singh was contrary to the provisions of Article 16 also. Nevertheless, this Court held there, alternatively, after referring to State of Mysore V. P.P. Kulkarni (19); that the action taken against Sughar Singh also resulted in a violation of the provisions of Articles 14 and 16 of the Constitution. It seems to us to be clear, after examining the record of Sughar Singh's case (supra), that what weighed with this Court was not only that there was a sufficient "element of punishment" in reverting Sughar Singh: for a supposed wrong done, from which the order of reversion could not be divorced, so that Article 311 (2) had to be complied with, but, there was also enough of an impropriety and unreasonableness in the action taken against Sughar Singh, solely for a very stale reason, which had become logically quite disconnected, to make out a case of "malice in law" even if it was not a case of "malice in fact". If an authority acts on what are, justly and logically viewed, extraneous sounds, it would be such a case. All these aspects of the case were kept in view by this Court when it recorded the conclusion: "In this view of the matter, we have no doubt that the order was passed by way of punishment, though all outward indicia show the order to be a mere order of reversion. Even if it were not so, we have no doubt that the order would be liable to be quashed on the ground of contravention of Articles 14 and 16 of the Constitution".

14. We do not think that Sughar Singh's case, in any way, conflicts with what has been laid down by this Court previously on Article 311 (2) of the Constitution or Article 16 of the Constitution. We would, however, like to

emphasize that, before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one Government servant' and another, similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". As we have explained, acting on a legally extraneous or obviously misconceived ground of action would be a case of "malice in law". Orders of reversion passed as a result of administrative exigencies, without any suggestion of malice in law or in fact, are unaffected by Sughar Singh's case (supra). They are not vitiated merely because some other Government servants juniors in the substantive rank, have not been reverted.

15. This Court has held in S.C. Anand V. Union of India (1) that no question of applying Articles 14 or 16 could arise where a termination of service takes place in terms of a contract of service. Again, in Champaklal Chiman Lal Shah (supra), this Court held that the motive behind an order of termination of service, in accordance with the terms of a contract, would not be really relevant even if an enquiry had been held to decide whether proceedings under Article 311 (2) should be instituted or the services of a Government servant terminated in terms of his contract. ChampaklalChimanlal Shah's case (supra) was not one in which any question of mala fides arose. Protection of Article 16 was claimed there on the ground that Rule 5, providing for termination of services of temporary servants, was itself hit by Article 16. Such a contention was repelled. On the other hand, Kulkarni's case (supra), relied upon in Sughar Singh's case (supra), was one in which "misuse of power" or detournament de puvoir" (as it is called in French Administrative law), had been proved. Another term for such use of power for an improper object is "malice in law".

XVII. SUMMARISED FINDINGS

86. In view of the above, the summarised findings are as under:

(i) Selection of Respondent no 5 by SB No 1 in the month of Oct 2011, was on account of DV Ban in sealed cover at belated stage without formal approval was in violation of **Union of India vs KV Jankiraman's case** (supra) and the policy dated 26th Sept 2003. The Applicant was rightly not selected on the ground of lower profile and merit by SB No 1 in April 2012.

(ii) No selection could be done without Bench Mark and two ACRs. Hence the earlier order passed by the Tribunal dated 30th Oct 2012 was passed un unfounded facts and in ignorance of mandatory provisions by commission of fraud on the part of the Applicant and hence it was recalled by order dated 17.02.2016 while exercising jurisdiction of review and affirmed by Hon Supreme Court (supra). It becomes non-est and prayer made by the respondents that since it has been given effect to, it may be permitted to continue in operation, shall be a travesty of justice where a person cannot be permitted to be benefited by fraudulent act that too as a member of the great patriotic body , that is, Indian Army.

(iii) In view of the policy in vogue, the DV Ban could have been imposed only keeping in view the finding of Court of Inquiry and not otherwise. During pendency of Court of Inquiry, DV Ban could not have been imposed in view of the

policy mentioned for the present (supra). Hence, the matter of the respondent no 5 prima facie seems to have been delayed in ignorance of law or deliberately on false notion.

(iv) Provisions with regard to two CRs is mandatory in nature and it cannot be flouted by Army except for reasons mentioned in the policy itself by a reasoned order. Communication by the Initiating Officer and later-on by MS Branch with regard to revised CR of the period beginning from Ist Sept 2009 to 22 June 2010 granting outstanding grading of '9'by filling column or gap was perfectly in accordance with law in tune with para 105 and 106 of the Army order 45 of 2001. The Ministry of Defence committed serious illegality while turning down the stand taken by the Army.

(v) Opinion of Addl solicitor General relied upon by the Applicant is not correct and is flawed one as stated (supra).

(vi) Because of the unfilled column, it was the applicant who had been benefited and prima facie for that reason, he tried and succeeded in getting it technically withdrawn with the active assistance of ministerial staff of Ministry of Defence. The whole action suffers from malice in law and perhaps also malafide exercise of power by fraud at different junctures. The Bench Mark and Criteria mentioned for promotion under the policy cannot be flouted in the matter of selection and promotion.

(vii) Material facts/things have been concealed while preferring O.A by the Applicant necessary parties have not been impleaded (supra).

(viii) No parity or waiver can be granted to the Applicant being not eligible for consideration. The present O.A No 255 of 2012 is not sustainable for non-joinder of necessary parties inasmuch as the Applicant had not impleaded three officers selected in No 2 Selection Board held in April 2012.

(ix) The Applicant is not entitled for reliefs claimed inasmuch as inspite of interim order passed by the Tribunal, the Ministry of Defence has neither referred it nor observed it in deference while promoting the Applicant upto the post of Lt Gen. It is disquieting and unfortunate. Interim order merges into final order and hence Applicant is liable to be reverted back to the original post.

(x) It is strange that No.1 Selection Board was convened on 13/13 Oct 2011 and thereafter the matter lingered on without any valid justification inasmuch as DV Ban was imposed on 6th Jan 2012 and the result was withheld by the Defence Ministry vide order dated 19.04.2012. Needless to say that Court of Inquiry was initiated on the basis of anonymous letter resulting into imposition of DV Ban.

XVIII. HUMBLE SUGGESTIONS

87. With profound respect we would like to suggest as under:-

(a) The Ministry of Defence should further tone up its working so that the officers of the Armed Forces who have not been called, should not be allowed access to the Ministerial staff or officers.

(b) The meeting of regular Army personnel who are out of Headquarters with the Ministerial staff or officers of the Defence Ministry should be restricted by appropriate measures. Before a meeting for personal matter to the Ministerial staff or officers of the Defence Ministry, prior permission should be obtained from the Defence Secretary or appropriate officers.

(c) The country is facing number of scams in defence procurement which deal purchase of items and with this view in mind, special care should be taken for selecting and appointing officers and staff in the Ordnance corps.

(d) All decisions taken by the Selection Board may be screened by a Committee consisting of persons/experts in law with impeccable character.

(e) JAG Branch of Army must be activated and engraved with knowledge of law to avoid such travesty of justice otherwise it shall be opening gallery to sleeper cells of foreign Intelligence.

(f) Government of India particularly, Ministry of Defence should also retain or engage studious advocates who are well versed in respective Discipline of Law possessing impeccable character, firmness in decision making and

giving of opinion having devotion to their professional ethics. Otherwise country may suffer with setbacks detrimental to the interest of the whole country.

88. Promotions are not only matter of higher perks and salary but it is a matter of craze amongst the youth to serve the Nation with Stars. It confers honour on the officers and gives a chance to work hard to achieve with their full might. In the case of **H.M.Singh vs Union of India reported in (2014) Vol 2 UPLBEC p.866,** Hon'ble Supreme Court visualised the importance of promotional avenue and showed its deep concern to the fraud in selection process in the Army in the following words.:-

> "It would be a sad day if the armed forces decline to give effect to the legitimate expectations of the highest ranked armed forces personnel. Specially, when, blame for delay in such consideration, rests squarely on the shoulders of the authorities themselves. This would lead to individual resentment, bitterness, displeasure and indignation. This could also undoubtedly lead to, outrage at the highest level of the armed forces. Surely, extension of service, for the purpose granted to the appellant, would most definitely fall within the realm of Rule 16 A of the Army Rules, unless of course, individual resentment, bitterness, displeasure and indignation, of army personnel at the highest level is of no concern to the authorities. Or alternatively, the authorities would like to risk outrage at the highest level, rather than doing justice to a deserving officer. Reliance on Rule 16A to deprive the appellant of promotion, to our mind, is just a lame excuse...."

89. It is relevant to bring on record that in **Kargil War** broadly, it were the officers who at the cost of their lives, saved the honour of the country when the whole Nation was awe-struck and reeling under deep mental pain and agony. According to the

report available, the total casualties of Indian Army were 527 and 1363 wounded. The officers, who are sacrificing their lives for the honour of the Nation, in case not given their due right with regard to their promotional avenues, it shall have a demoralising effect on them and the backbone of Indian Army shall lose its spine. According to a statement given by the Defence Minister, Army is facing acute shortage of officers numbering 8671 excluding the Medical and Dental Corps and Military Nursing Services. Similarly, Indian Navy is also suffering from shortage of officers numbering 1267. It may not be because of stringent selection criteria pursued with high degree of risks as told by Defence Minister in Parliament. It is for the reasons that in case many of our officers sacrificed their lives in Kargil War, then it cannot be said that it is because of stringent selection criteria or perceived high degree of risks involved in the service that Armed Forces are facing shortage of officers. The brave hearts of Indian Youth do not take care of perceived high degree of risks as stated in Rajya Sabha by Defence Minister but it is because of their concern whether their due rights with regard to promotional avenues shall be conferred on them fairly or not. In our view, one case is enough to spread like wild fire amongst our brave hearts to dissuade them from joining the army as officer, barring exceptions.

90. It is vehemently argued by Shri Ashok Mehta, Additional Solicitor General, Union of India that the Government is not interested either in the Applicant or in the respondent no 5. This argument does not seem to be in good taste. The Government must evince interest to save the honour of honest, upright and

dedicated officers who are serving the Nation upto their full capacity

91. We express our feelings quoting the Couplet of Maharrishi Arvind from the famous treatise of Holiness "Savitri".

> "On the bare peak where self is alone with Nought
> And life has no sense and love no place to stand
> She must plead her case upon extinctions verge
> In the world death cave uphold life's helpless claim
> And vindicate her right to be and love
> And old account of suffering exhaust
> Strike out from time the soul's long compound debt.

92. Subject to aforesaid observations and findings recorded by us, we converge to the conclusion that the Original Application is devoid of merit and is liable to be dismissed with costs.

XIX. COST.

93. Whether in the present case, exemplary cost should be imposed on the Applicant in view of the material concealment of facts and also by Respondents 1 to 4 for the reason that with the active connivance of both, the whole system failed to maintain the probity and standard of selection process. It is shocking to us that all these things have been done inspite of stand taken by the Army with regard to ineligibility of the Applicant.

94. Hon'ble Supreme Court in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others,*** (2011) 8 SCC 249 has given emphasis to compensate the litigants who have been forced to enter litigation. This view has further been

rendered by Hon'ble Supreme Court in the case reported in ***A. Shanmugam V. Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others,*** (2012) 6 SCC 430. In the case of ***A. Shanmugam*** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. ***Indian Council for Enviro-Legal Action V. Union of India,*** *(2011) 8 SCC 161;*
2. ***Ram Krishna Verma V. State of U.P***., (1992) 2 SCC 620;
3. ***Kavita Trehan V. Balsara Hygiene Products Ltd***. (1994) 5 SCC 380;
4. ***Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.,*** (1999) 2 SCC 325;
5. ***Padmawati V. Harijan Sewak Sangh,*** (2008) 154 DLT 411;
6. ***South Eastern Coalfields Ltd. V. State of M.P.,*** (2003) 8 SCC 648;
7. ***Safar Khan V. Board of Revenue***, 1984 (supp) SCC 505;
8. ***Ramrameshwari Devi and others*** (supra).

95. In the case of ***South Eastern Coalfields Ltd*** (supra), the apex Court while dealing with the question held as under :

> *"28. ...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be*

countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation".

96. In the case of ***Amarjeet Singh V. Devi Ratan***, (2010) 1 SCC 417 the Supreme Court held as under :-

"17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been field. The maxim actus curiae neminem gravabit, which means the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party involving the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court".

97. The question of award of cost is meant to compensate a party, who has been compelled to enter litigation unnecessarily for no fault on its part. The purpose is not only to compensate a litigant but also to administer caution to the authorities to work in a just and fair manner in accordance to law. The case of

Ramrameshwari ***Devi and others*** (supra) rules that if the party, who is litigating, is to be compensated.

98. In the case of ***Centre for Public Interest Litigation and others V. Union of India and others***, (2012) 3 SCC 1, the Hon'ble Supreme Court after reckoning with the entire facts and circumstances and keeping in view the public interest, while allowing the petition, directed the respondents No 2, 3 and 9 to pay a cost of Rs. 5 crores each and further directed respondents No 4, 6, 7 and 10 to pay a cost of Rs. 50 lakhs each, out of which 50% was payable to the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants and the remaining 50% was directed to be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

99. In the case reported in ***National Textile Corporation (Uttar Pradesh) Limited V. Bhim Sen Gupta and others,*** (2013) 7 SCC 416 the Hon'ble Supreme Court took note of the fact that the Textile Corporation has not placed the correct facts before the Court and so the contempt petition was dismissed and the cost was quantified at Rs 50,000/-.

XX. RELIEFS

100. The question cropped up whether in view of arguments advanced by learned Additional Solicitor General, and pleadings contained in the counter affidavit that since in pursuance of the order of Recall under review, promotion has been given to the Applicant, it should not be upended and relief may be granted

accordingly. We feel that it would send a wrong signal not only to entire Armed Forces but also to the Country which look upon judiciary with a gleam of hope that justice would be dispensed even-if Heaven falls. In connection with it, we may refer to the case of **Dalip Singh vs State of U.P. reported in (2010) 2 SCC 114** in which the Hon'ble Supreme Court considered the question whether relief should be denied to the appellant who did not state correct facts in the application filed before the prescribed Authority and who did not approach the High Court with clean hands. After making reference to some of the precedents, it was observed:

> *"9.....while exercising discretionary and equitable jurisdiction under Article 136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. If the appellant has not come forward with clean hand, has not candidly disclosed all the facts that he is aware of and he intends to delay the proceedings, then the Court will not non-suit him on the ground of contumacious conduct*."

101. In ***Oswal Fats and Oils Ltd vs. Commr (Admn),*** (20P10) 4 SCCF 728 relief was denied to the appellant by making the following observations (SCC pp.738-39 paras 10-20)

> *"19. It is quite intriguing and surprising that the lease agreement was not brought to the notice of the Additional Commissioner and the learned Single Judge of the High Court and neither of them was apprised of the fact that the appellant had taken 27.95 acres land on ease from the Government by unequivocally conceding that it had purchased excess land in violation of Section 154(1) of the Act and the same vested in the State Government. In the*

list of dates and the memo of special leave petition filed in this Court also there is no mention of lease agreement dated 15.10.1994. This shows that the appellant has not approached the Court with clean hands. The withholding of the lease agreement from the Additional Commissioner, the High Court and this Court appears to be a part of the strategy adopted by the appellant to keep the quasi-judicial and judicial forums including this Court in dark about the nature of its possession over the excess land and make them believe that it has been subjected to unfair treatment. If the factum of execution of lease agreements and its contents were disclosed to the Additional Commissioner, he would have definitely incorporated the same in the order dated 30.5.2001. In that event, the High Court or for that reason this Court would have none suited the appellant at the threshold. However, by concealing a material face, the appellant succeeded in persuading the High Court and this Court top entertain adventurous litigation instituted by it and pass interim orders. If either of the courts had been apprised of the fact that by virtue of lease deed dated 15.10.1994, the appellant has succeeded in securing temporary legitimacy for its possession over excess land, then there would have been no occasion for the High Court to entertain the writ petition or the special leave petition.

20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, it is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/ suppressing any material fact within his knowledge or which he could have known by exercising diligence expected for a person of ordinary produce. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of

justice, the court not only has the right but a duty to deny relief to such person"

102. Since the applicant had not approached the Tribunal with clean hand (concealment of material facts), hence no relief may be granted and the applicant may not stand even for a moment causing miscarriage of justice. And once the O.A. stands dismissed, in view of law settled by Hon'ble Supreme Court in catena of cases (supra) as well as in the case reported in ***H.V. Pardasani vs. Union of India,*** AIR 1985 SC 781, ***Government of Maharashtra vs. Deokar's Distillery,*** AIR 2003 SC 1216, ***Amarjeet Singh vs. Devi Ratan,*** (2010) 1 SCC 417, and ***A.V. Papayya Sastry*** (supra), all the subsequent order, decision or action shall stand vitiated resulting in restoration of status quo ante with regard to appointments, selection or promotion done in pursuance of order dated 30.10.2012 order of this Tribunal which has already been recalled (supra).

In the case of ***Mohd Sartaj & Anr vs. State of U.P.,*** 2006 (2) SCC 315, Hon'ble Supreme Court upheld the judgment of High Court to dismiss after fourteen years the petition of the teachers whose initial appointment was not in accordance with rules and not qualified for the post.

103. As fraud has already been discussed by us in the judgment and order dated 17.02.2016 rendered in the Review Application No. 19 of 2015, we refrain from reiterating discussions on the point all over again.

104. Hon'ble Supreme Court in its eloquent words remarked that the History of mankind has been one of the conquest over the

inevitable. The resignation to fate has never been an accepted philosophy of human life. Challenges have to be made to make human life more meaningful. This is how Constitutional Philosophy behind Article 21 of the Constitution has been evolved by the Indian Courts for a long period of time **(Vide (2014) 6 SCC 36 (para 23) S.Raja Sekaran vs Union of India).**

105. Accepting the arguments of Additional Solicitor General or the OIC Legal Cell shall amount to induct fatalism in the Law of service jurisprudence which shall result in disastrous consequences and hence not sustainable.

106. In view of the above, we are not in agreement with the arguments advanced by learned counsel for Union of India as well as submissions made by OIC Legal Cell inasmuch as the benefit derived by commission of fraud substantially is not permissible in law and must go in the same way.

107. In view of the above, we feel that imposition of an amount of Rs 5 lakhs (Five Lakhs) on the Applicant and Rs. fifty lakhs on the respondents 1 to 3 would meet the ends of justice and give strong message to stem recurrence of such events. Needless to say that it is such type of incidents and lack of probity in the system which paves way for sleeper cells of the foreign countries to be activated to enter and manage the Defence Purchases and derive benefits of kick-backs. The Ordnance Corps requires officers of highest integrity interspersed with morality in life and firmness of decision padded out with the flavour of patriotism.

The cost shall be remitted to Army Central Welfare Fund to serve the NCO and other ranks for their beneficial schemes.

108. Army men slog away on duty ungrudgingly in a disciplined manner. Sobber for country may reduce, in case injustice is done to members or officers of Army personnel in the matter of promotion and appointment.

109. While parting with the present case, since controversy relates to unfair decision in the Ministry of Defence, suggestions have been given to tone up administration, it shall be appropriate if a copy of the present order is sent to the Higher-ups for their edifications and also for compliance.

110. It is clarified that since keeping in view that the persons associated with the present controversy against whom observations have been made in the body of this judgment have not been heard, in case Government takes a decision to prosecute them or take some disciplinary action in accordance with law, then it may be done with due enquiry in accordance with law.

111. In view of the above, present Original Application is decided as under:-

ORDER

(i) Reliefs claimed by the Applicant lacks merit and do not commend us to be granted and are accordingly rejected.

(ii) Present order shall take immediate effect. It shall be open to the Government to hold an enquiry and proceed in accordance

with law against the persons who are responsible for unfair practice in the Ministry of Defence or in the Army as the case may be.

(iii) The cost is quantified at Rs 5 lakhs (Five lakhs) payable by the Applicant and Rs. 50,00,000/- (fifty lakhs) payable by respondents 1 to 3. The said amount shall be deposited with the Registrar of the Tribunal within two months which shall be remitted to the Army Central Welfare Fund for the welfare of Army personnel as set out in the body of this order.

(vi) The cost shall be recoverable after due enquiry from the salary/pension of the persons who are held accountable for entire episode keeping in view of the observations made in the body of the order.

It is directed that a copy of the order be sent to the office of Prime Minister, Office of the Defence Minister and also to the Defence Secretary expeditiously, say, within 3 days for being placed before them for perusal and consequential action in terms of observation made in the body of the judgment, being sensitive question relating to Army.

The confidential records shall be handed over to OIC Legal Cell in sealed cover by the Registry of the Tribunal.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

MH/-

RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO. 2

O.A. No. 255 of 2012

Friday, this the 13th day of May, 2016

"Hon'ble Mr. Justice Devi Prasad Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"

BRIG N.K. MEHTA……Applicant

Versus

Union of India and others……..Respondents

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(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

MH/-