

A.F.R.  
RESERVED  
Court No.3

**ARMED FORCES TRIBUNAL, REGIONAL LUCKNOW**

**REVIEW APPLICATION No. 19 of 2015**

Wednesday, this the 17th day of February 2016

**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal Anil Chopra, Member (A)**

Major General RS Rathore s/o late Ram Singh, presently posted as Deputy Commandant and Chief Instructor, College of Material Management, Jabalpur (presently at Lucknow).

-----Applicant

Ld. Counsel for the:                      Shri S.S. Rajawat & SS Pandey  
Applicant                                      Advocates.

**In Re:**  
**Original Application No. 255 of 2012**

Brig. N.K. Mehta, VSM (IC-38397F) (Now Maj General)  
Son of Late G.K. Mehta,  
R/O. 3, Swarg Marg, Mathura Cantt, (U.P.)

----- Applicant-respondent

**Vs.**

1. Union of India, through the Secretary, Ministry of Defence, Government of India, New Delhi.
2. The Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), South Block DHQ, Post Office New Delhi.
3. The Military Secretary, Military Secretary's Branch, Integrated Headquarters of Ministry of Defence (Army) South Block. DHQ, Post Office New Delhi.
4. Major General P.V.K. Menon VSM (Retired), Bungalow No. 86, K.K. Birla Lane, Lodhi Estate, Lodhi Road, New Delhi 110 003.

.....Respondents

Ld. Counsel for the:                      Shri Ankur Chhibar & R. Chandra,  
Advocates                                      for respondent No. 1 and Shri Sunil Sharma  
    assisted by Col NK Ohri, MS Branch, IHQ of  
    MoD (Army), New Delhi & Lt Col Subodh Verma,  
    OIC Legal Cell.

**ORDER**

**Per Justice Devi Prasad Singh**

1. This is an application under Section 14 (f) of the Armed Forces Tribunal Act (for short the Act) read with rule 18 of the Armed Forces Tribunal Procedural Rules, 2008 (in short the Rules) for review of order dated 30.10.2012 passed by the Tribunal in O.A. No. 255 of 2012.
2. We have heard Shri S.S. Rajawat, Ld. counsel for the applicant, Shri Ankur Chhibbar, Ld. Counsel for applicant-respondent No. 1 and Shri Sunil Sharma Ld. Counsel for Union of India assisted by OIC Legal Cell.
3. The applicant and applicant-respondent No. 1 belong to the same batch of Army Ordnance Corps (AOC) inducted on 22.12.1979. Both have been serving in the organization for the last 36 years at different places in different capacities. Admittedly, applicant is senior than applicant-respondent No. 1 and was promoted to the rank of Brigadier as part of 1979 batch. Names of both of them came up for consideration for promotion to the rank of Major General on 23.10.2011 by Number 1 Selection Board (No. 1 SB). Admittedly name of the applicant was approved but it appears that on account of adoption of "sealed cover procedure" on account of pendency of court of inquiry, in the light of judgment in the case of **Union**

***of India & ors vs. K.V. Jankiraman & ors***, (1991) 4 SCC 109.

After receipt of recommendation, the Government took a decision to withhold the result by an order dated 28.10.2011. For convenience sake order dated 28.10.2011, copy of which is on record is reproduced in its entirety as under :-

“Ministry of Defence  
D (MS)

Sub : No. 1 Selection Board held on 13-14 Oct 2011—  
AOC

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 grading ‘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 IO in ACR 09/09-06/10 on technical grounds.

Sd/-x x x x x x  
(R. Sunder)  
Under Secretary (MS)  
Tele : 2301 3233

PD MS (X), AHQ  
MOD ID No. 9 (20)/2011-D(MS) dated 19.04.2012”

4. It has been stated by Ld. Counsel for the applicant that criteria for promotion is merit cum seniority against specified vacancy by treating the batch mates which is falling in the zone of consideration based on comparative assessment of profile as envisaged in policy dated 16.05.1987. Comparative merit is assessed keeping the number of vacancies available for placing of officer falling within the zone of consideration and in case no vacancy exists before the date of retirement, it shall be transferred to the batch of next year in terms of policy dated 11.12.1991. It is submitted that an officer granted relief by Court of Tribunal may be promoted if he meets the bench-mark of last approved case and to meet out the contingency, vacancy of next batch may be appropriated to promote such officer notwithstanding vacancy of his batch which has already utilized all available vacancies.

5. Since respondent No. 1 Major General NK Mehta was not empanelled by No. 1 SB against sole vacancy of Major General he assailed the order of non empanelment with a prayer to be considered for promotion after impinging CR of the period from 01.07.2009 to 22.06.2010 in the O.A. in question. According to applicant's counsel he made prayer in spite of the fact that he was not meeting the bench mark of the present applicant. It is further submitted that an officer is to be adequately exercised (AE) for Brig to Major General (No. 1 SB) on Command Criteria

appointment for 20 months and must have earned two reports as per MS policies dated 26.09.2003 and 20.03.2013. Adequately Exercised appointment is mandatory and according to applicant's counsel, respondent No. 1 does not fulfill this criteria. It is also submitted that while preferring the O.A. this fact was not brought to the notice of the Tribunal by the Union of India as well as Army and also it has not been taken into account by the Tribunal while delivering final verdict.

6. The other submission of applicant's counsel is that the applicant's result was only withheld by the Government (supra) which the applicant-respondent No. 1 and the Army treated it as withdrawn with intention to proceed afresh of 1979 batch though before the passing of impugned order in pursuance to the judgment/order of Principal Bench, Delhi, D.V. Ban was lifted and promotions to post of Major General was approved.

7. Being aggrieved with the continuance of court of inquiry the applicant preferred O.A. No. 88 of 2012 in the Principle Bench Delhi which was allowed by the Tribunal by order dated 29.05.2012, which has been not disputed by the respondents. The court of inquiry as well as Discipline and Vigilance (DV) was quashed by order dated 29.05.2012 and in consequence thereof the applicant moved a representation to declare the result and promote him to the post of Major General. Approval was granted on 23.08.2012. In spite of the fact that applicant's

O.A. was allowed and approval was granted by the Government; the officers of 1980 batch were promoted on 20.06.2012, but the applicant's matter was kept pending. The result was not declared in terms of **Jankiraman's** case (supra). Order of Tribunal and approval (supra) was not brought into the notice of the Tribunal at Lucknow, though at that time matter was pending at Lucknow.

8. Case of applicant-respondent No 1 was again considered as special review fresh case on the order of MOD but since he was found below the applicant on merit, once again applicant-respondent No. 1 was declared unfit and not empanelled for promotion to the post of Major General. The officers of 1980 batch were promoted. Subject to above the applicant-respondent No. 1 filed O.A. in the Tribunal at Lucknow in July 2012 without disclosing the outcome of applicant's case (supra). In the meantime on 21.08.2012 result of applicant was declassified and he was approved as 1979 batch AOC against sole vacancy of Major General being at the top of the merit list. Now next promotional avenue for applicant is post of Lt Gen. Subject to above applicant-respondent No. 1 had preferred Original Application No. 255 of 2012 and claimed the following reliefs:-

*"1) The Hon'ble Tribunal may be pleased to direct the respondents to produce the entire record of the*

*proceedings including all relevant files and noting 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 as 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 Court 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 independently without any benchmark and thereafter promote him to the rank of Major 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."*

9. A perusal of the relief claimed by the applicant-respondent No. 1 shows that he had made prayer not only for the quashing of the Confidential Report covering period from 01.07.2009 to 22.06.2010 but also made a prayer for quashing of the proceeding of No 1 SB held on 25.04.2012 to the extent it relates to consideration of applicant-respondent No. 1. Admittedly there was only one post of Major General against which the applicant was selected by No. 1 SB and the result was withheld by Government in view of **Jankiraman's** case (supra). At the face of record setting aside the result of No 1 SB was adversely affecting applicant's career, more so, when the order has been implemented and the applicant was promoted on the post of Major General after judgment of Principle Bench of the Tribunal at Delhi (supra).

Though the applicant has alleged mala fide on the part of respondent's in delaying implementation of Principal Bench Tribunal's judgment, that too after filing of Execution Case, resulting in loss of almost 10 months, but that aspect of the matter is not necessary to be considered at the stage of disposal of Review Application, being not relevant.

10. A perusal of the order of the Tribunal shows that while adjudicating the controversy the Tribunal has framed two core issues as is evident from para 6 of the impugned order which for convenience sake is reproduced as under :-



*“No 1—Whether the impugned Confidential Report covering the period from 01.07.2009 to 22.06.2010 is totally invalid on the grounds pleaded on behalf of the applicant in O.A. and rejoinder affidavit. If so, its impact qua promotional avenue of the applicant to the rank of Major General?”*

*No 2—whether there was any bench-mark available to compare the case of the applicant with 1979 batch vis-à-vis Brigadier RS Rathore recommended by No 1 Selection Board held on 13-14 October 2011?*

(Emphasis supplied)

11. At the face of record while framing core issue No 2, the Tribunal itself framed an issue to compare the case of the applicant-respondent No. 1 (Brig N.K. Mehta) with 1979 batch vis-à-vis Brig RS Rathore, i.e. the applicant for promotion on recommendation made by No. 1 SB held on 13/14-10.2011. It appears that the Tribunal inadvertently has not taken note of the fact that the applicant should have been impleaded as party/respondent, causing gross injustice in violation of principle of natural justice. At the face of the record applicant-respondent No. 1 committed not only substantial illegality but tried to obtain an order from the Tribunal without impleading the applicant who seems to be necessary party. While finally adjudicating the controversy the Tribunal had not only quashed the Confidential Report covering the period 01.07.2009 to 22.06.2010 but directed the Army/Government to consider case

of applicant-respondent No. 1 as fresh case of 1979 AOC, in spite of the fact that there was only one vacancy against which the applicant was selected. Operative portion of order dated 30.10.2012 passed by the Tribunal in O.A. No 255 of 2012 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 25.04.2012 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 as a Fresh case of 1979 batch of Army Ordnance Corps independently without any bench-mark. Entire 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.”*

12. The Ministry of Defence, Government of India filed Review Application No. 19 of 2012 which was dismissed by the Tribunal re-affirming the impugned order which appears for the reason that the material facts which were concealed by the applicant-respondent No. 1 were not brought to the notice of the Tribunal.

13. Aforesaid relief was granted directing to keep one post of Major General vacant, though by that time in pursuance to

Tribunal's order (Principal Bench) applicant was entitled to hold the solitary post of Major General, leaving no vacancy for applicant-respondent No. 1.

Why Government of India and the Army did not bring into notice of Tribunal the correct fact, is not understandable.

**AGGRIEVED PARTY:**

14. Applicant's counsel as well as counsel for the respondents had submitted written notes and have argued the case. The first objection raised by Ld. Counsel for the respondents is that the applicant is not an aggrieved or necessary party and rightly he was not impleaded in the O.A. preferred by applicant-respondent No. 1. It is submitted that since he was not a party, the review is not maintainable.

15. On the other hand counsel for applicant submits that applicant was a necessary party since on the sole vacancy being senior only the applicant could have been promoted and not the applicant-respondent No. 1 since promotional avenue is considered on the basis of comparative merit of the candidates falling within the zone of consideration and there were only two candidates, i.e. the applicant and the applicant-respondent No. 1 who does not qualify because of only one CR. Thus the applicant was not only necessary party but also an aggrieved party. It is submitted by applicant's counsel that the applicant

in the review application categorically stated that since the applicant is affected by the judgment/order of the Tribunal, the order requires to be reviewed. In counter affidavit dated 08.02.2016 respondent Government has raised the question with regard to two CRs as command report and in turn thereto non eligibility of the applicant-respondent No. 1 but it has not been considered.

16. Hon'ble Supreme Court in the case of ***Jasbhai Motibhai Desai vs Roshan Kumar, Hazi Bashir Ahmad*** reported in **AIR 1976 SC 581** held that expression "aggrieved person" denotes an elastic, and to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. English Courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person".

In the case of ***P. Lal vs Union of India & Ors*** reported in (2003) 3 SCC 393 their Lordship of the Supreme Court have held that a "person aggrieved" means a person who has suffered a legal grievance that is a man who has been wrongfully denied of something or to whom something has been refused wrongfully.

17. Undoubtedly, in case contention of applicant is accepted (which is subject matter of argument on merit) then it may

safely be held that applicant-respondent No. 1 had derived benefit wrongly from the order of the Tribunal, an order which could not have been given.

18. It has been established by law that a person shall be aggrieved by an order or judgment and may be held to be aggrieved if his or her pecuniary interest is directly affected by the adjudication or may be divested from such right. In the present case though it has been stated that no harm will cause to the applicant, but keeping the pyramidal structure of the Army and the fact that there was only one post of Major General, it appears to be correct that the applicant may suffer from further promotional avenue may be affected in case a person not qualified is given benefit/placed in the same zone of consideration with regard to future promotional avenue. Accordingly the applicant seems to be an “aggrieved party” and he has right to prefer review application since order was passed by the Tribunal without impleading the applicant as respondent and in consequence thereof the applicant could not get opportunity to submit his case.

**NECESSARY PARTY:**

19. The second objection raised by respondent’s counsel is that the applicant is not a necessary party. From the pleadings of the O. A. as well as order passed by the Tribunal, which is

subject matter of review, it is evident that a prayer has been made by applicant-respondent No. 1 and the same has been allowed to the affect that applicant-respondent No. 1 be considered (supra) again without any bench-mark ignoring the fact that a candidate (applicant) was selected and available in view of proceedings of No. 1 SB held on 25.04.2012. The Tribunal has not taken note of the fact that there was only one vacancy against which applicant was selected and result was kept in seal cover in view of the **Jankiraman's** case (supra) and belatedly the applicant was promoted on the post of Major General in compliance of the order of Principle Bench at Delhi. The directions to ignore bench-mark seems to be in violation of policy meant for the purpose which may be discussed hereinafter.

20. There being only one vacancy and respondent being not qualified could not have been promoted to the post of Major General by ignoring the bench-mark, that too in the teeth of applicant's selection on said post. The result was only withheld which means it was kept in suspension in seal cover till completion of court of inquiry (supra). It is well settled law that where a person duly selected by the commission has not been impleaded as respondent though he is necessary party then, in such a case no order adversely affecting such person can be passed behind his back. (vide; **Prabodh Verma Vs. State of**

**U.P. AIR `1985 SC 167; *Ishwar Singh Vs. Kuldeep Singh* 1995 Supp (1 SCC) 179; *Bhagwanti Vs. Subordinate Service Selection Board, Haryana*, 1995 Supp 2 SCC 663; *Central Bank of India Vs. S Satyam*, (1996) 5 SCC 419; *J. Jose Dhanapaul vs. S Thomas*, (1996) 3 SCC 587; *Arun Tiwari vs. Zila Manaswavi Shikshak Sangh*, 1997 AIR SCW 4310; *Azhar Hasan Vs. District Judge Saharanpur*, (1998) 3 SCC 246; *Ram Swarup Vs. SN Maira*, AIR 1999 SC 941; *SL Chandrakishore Singh Vs. State of Manipur*, (1999) 8 SCC 287; *Riazul Usman Gani Vs. District & Sessions Judge Nagpur*, AIR 2000 SC 919; *Nirmala Anand Vs. Advent Corporation (P) Ltd*, AIR 2002 SC 3396; *MP Rajya Sarkari Bank Maryadit Vs. Indian Coffee Workers' Co-operative Society Ltd.*, AIR 2002 SC 3035 *Ram Rao vs. All India Backward Class Bank employees welfare association*, AIR 2004 SC 1459 and *Tridip Kumar Dingal Vs. State of West Bengal* (2009) 1 SCC 768.**

21. In view of above the applicant was necessary party and why he was not impleaded by applicant-respondent No. 1 and the Tribunal could not take note of it is not understandable, more so, when from the core issue framed by the Tribunal and the relief prayed by applicant-respondent No. 1 in the O.A. (supra) at the face of record shows that the Tribunal has considered the subject matter of applicant's selection vis-à-vis

applicant-respondent No. 1 by No. 1 SB and allowed the O.A. against sole vacancy against which the applicant was selected by No. 1 SB. The Government and Army not brought into notice of Tribunal the Principal Bench judgment/order is serious lapse on the part of the respondents.

**CONCEALMENT OF FACTS:**

22. It is not disputed that two columns of the CR were unfilled. Inviting attention of policies dated 26.09.2003 and 20.03.1913 (para 9) it is submitted by applicant's counsel that since one of the report criteria of respondent No. 1 was set aside and since no longer he remains AE, he was not entitled to be empanelled.

23. It is stated that criteria of AE was very well in force in view of policy dated 26.09.2003, a copy of which has been placed on record in affidavit dated 04.01.2016. It is submitted that this fact has been concealed by the respondents from the Tribunal. It is further submitted that the revised extract with regard to two unfilled CR was sent to respondent No. 1 on 26.09.2010, but the respondent had not disclosed it in the O. A. While filing counter affidavit the Government/Army has specifically pleaded this fact in para 2 of the counter affidavit. In the counter affidavit it has also been stated that the applicant has been duly recommended by the Selection Board followed letter of



approval by the competent authority. It has also been stated that DV ban was also lifted. This fact is evident from paras 2 and 3 of the counter affidavit under the head “preliminary objection”, but the Tribunal has failed to take note of the fact that against sole vacancy no order could have been passed in favour of applicant-respondent No. 1 since attention seems to be not invited. The substantial illegality/error seems to be apparent from the face of record. The affidavit was filed on 11.08.2012.

24. It shall be appropriate to reproduce relevant portion from the policy dated 26.09.2003, to quote:-

*“Promotion on 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 appts,*

*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.”*

*(Emphasis supplied)*

Aforesaid condition has been reiterated in Policy dated 20.03.2013 in Para 5 with fresh opportunity to complete criteria in para-9, to become AE, only then officer shall qualify to be considered for promotion to the rank of Major General. It has not been considered by the Tribunal or not specifically pressed and brought on record by respondents.

25. While passing the impugned order the Tribunal has recorded finding that the result of the applicant was cancelled.

The Tribunal has observed as under :-

*“In the rejoinder affidavit, it is pleaded that Court of Inquiry against Brig Rathore was quashed on technical ground and allegation against him are still intact. Be that as it may, but it is clear that on 25.04.2012 there was D.V. Ban against Brig Rathore. The applicant was considered for promotion to the rank of Major General as Fresh (Withdrawn) case on 25.04.2012 for the lone vacancy of 1979 batch. Till then Brig Rathore was not approved for promotion. His case was kept pending for long and it is submitted on behalf of the applicant that Brig Rathore was involved in a disciplinary case even then respondents awaited for his exoneration as if the vacancy as if the vacancy was reserved for him and that such type of averment from the departmental authorities are unfortunate.”*

26. The Tribunal has committed error apparent on the face of the record while making observation as extracted above. The applicant's Court of Inquiry was quashed and the D.V. Ban was

removed before the passing of impugned order. His matter was pending to be implemented and later on it was implemented. The applicant's case was only withheld, meaning thereby it was suspended for period of court of inquiry. Opinion of the No. 1 SB selecting the applicant was not withdrawn. The finding recorded by the Tribunal; on the face of record seems to be based on facts ignoring the material on record without impleading the applicant as respondent. By necessary implication also the applicant seems to be "necessary party" and no decision could have been taken by the Tribunal in the absence of applicant that too without taking note of the judgment/order of Principal Bench, Delhi.

27. Ld. Counsel for applicant-respondent No. 1 has relied upon the following cases :-

1. ***Jaswant Singh Lamba vs Hariyana Agricultural University & Ors***, (2008) 5 SCC 656;
2. ***A Janardhana vs. Union of India & Ors***, (1983) 3 SCC 601;
3. ***V.P. Shrivastava & Ors vs State of M.P. & Ors***, (1996) 7 SCC 759;
4. ***KK Ajit Babu & Ors vs Union of India & Ors***, (1997) 6 SCC 473; and
5. ***Commissioner of Central Excise Belarapur, Mumbai vs. RDC Concrete (India) Private Ltd.***, (2011) 12 SCC 166;

6. **Rajesh Kagra & Ors vs. State of Madhya Pradesh & Ors** (2010) 12 SCC 139.

28. In the case of **Jaswant Singh Lamba** (supra) the question related to seniority while considering the question with regard to locus standi, Hon'ble Supreme Court held that only because second seniority list was published in the same year and petitioner therein submitted representation it could not be a ground for unsettling the settled position. The judgment seems to be passed on facts and circumstances not applicable in the present case.

29. The case of **A Janardhana** (supra) also relates to seniority where in representative capacity certain persons were impleaded and the Hon'ble Supreme Court held that it is not necessary to implead applicant in person. This case also does not apply to the facts and circumstances of the case on hand.

30. The case of **V.P. Shrivastava** (supra) is matter relating to inter se seniority between direct recruits and ad hoc promotees and relates to determination of seniority of ad hoc promotees. A perusal of para 14 relied upon by Ld. Counsel for the respondents does not seem to be applicable to the present case. In that case the petitioner had not challenged the appointment of promotees and only the procedure provided by the State with regard to determination of seniority was in question.

31. The case of ***K.K Ajit Babu & Ors*** relates to question of locus standi wherein order 47 CPC has been dealt with decision of Central Administrative Tribunal (CAT) was challenged. The Hon'ble Supreme Court allowed the review holding that unless order is reviewed or appealed against, shall attain finality. In the absence of any statutory provision no review can be filed. The facts of the case of ***KK Ajit Babu & Ors*** (supra) is not applicable in the present case.

32. In the case of ***Mahanagar Telephone Nigam Limited vs. State of Maharashtra & ors***, (2013) 9 SC C 92, the controversy before the Hon'ble Supreme Court was that in case a person does not approach the Court clean hand, then whether some relief may be granted to him? Their Lordships of Hon'ble Supreme Court held that a person who has not approached the Court with clean hands concealing material shall not be entitled to any relief from the Court.

**FRAUD:**

33. In ***Dalip Singh vs. State of U.P.***,(2010) 2 SCC 114, 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.”*

34. 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 dtd 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 fact, the appellant succeeded in persuading the High Court and this Court to 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 prudence. 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*

35. In view of above, we sum up the material concealment of facts (fraud) apparent on the face of record by either side (applicant-respondent No. 1 as well as the Ministry of Defence, as follows:

(i) There is only one post of Major General. The applicant was selected by No 1 SB as officer of 1979 batch but the implementation was withheld in view of **Jankiraman's** case (supra) by the Government. The respondent Army as well as the Government of India treated the result in view of **Jankiraman's** case (supra) as cancelled one and incorrectly placed material before the Tribunal;

(ii) Since there is only one post of Major General, hence in view of judgment/order of Principle Bench Tribunal Delhi which was implemented in pursuance of order of Tribunal in execution case vide approval dated 23.08.2012 no order could have been passed by the Tribunal on 30.10.2012 against lone vacancy of Major General for which applicant's promotion was already approved. The Army as well as the officers of Government of India, prima facie, seems to have acted in collusion by not apprising the Tribunal with the development which took place with regard to applicant's selection. Being one post of Major General, applicant-



respondent No. 1 could not have been promoted on said post. There is serious miscarriage of justice and concealment of fact on the part of the respondents.

(iii) The policy dated 26.09.2003 as well as policy dated 20.03.2013 both require for two CRs (supra). The Government of India/Army in their affidavit dated 08.02.2016 admitted the requirement of two CRs. In the absence of two criteria report no order could have been passed by the Tribunal in violation of the policies (supra) to consider for promotion of applicant-respondent No. 1. For the reasons best known to the Government of India and the Army, the Tribunal was not informed regarding setting aside of one Confidential Report, which prima facie makes ineligible the applicant-respondent No. 1 for promotion to the post of Major General. Prima facie there appears to be concealment on the part of applicant-respondent No. 1 in not bringing into notice of the Tribunal with regard to setting aside one Confidential Report. Being left with only one criteria report against the requirement of two CRs for applicant-respondent No. 1 could not have been considered for promotion for empanelment.

(iv) The Tribunal directed the respondents to consider the case of the applicant-respondent No. 1 for

promotion to the rank of Major General as a fresh case of 1979 batch of AOC which apparently seems to be against the policy. Once the applicant was selected and only the result was withheld keeping in view the pending court of inquiry finding at the face of record is not only erroneous but suffers from substantial illegality.

The Tribunal failed to take note that the applicant-respondent No. 1 was found unfit in Sep 2012 and special review date back to Oct 2011 wherein the applicant was over and above applicant-respondent No. 1. Relevant date for consideration was Oct 2011 and not Apr 2012 as held by the Tribunal, more so when the applicant's case was already approved after setting aside court of inquiry and lifting of DV ban and after approval for promotion of applicant no order could have been passed by the Tribunal to consider applicant-respondent No. 1.

(v) There was only one vacancy of the post of Major General hence no order could have been passed to consider for promotion of applicant-respondent No. 1 in view of settled proposition of law.

(vi) Neither applicant-respondent No. 1 nor other respondents placed on the record the judgment/order of

Principal Bench Delhi dated 29.05.2012 and approval of applicant dated 23.08.2012.

36. At the face of record there appears to be collusive act on the part of respondents in not inviting Tribunal's attention to material facts on record as well as concealing material development and the facts goes to the core of issue. In the case of **Mahanagar Telephone Nigam Ltd** (supra) relied by Ld. Counsel for the respondents their Lordships of the Supreme Court have declined to condone delay on account of concealment of fact.

37. From the material on record (supra) it seems to be a case of commission of fraud and respondents have failed to place correct material before the Tribunal for the reason best known to them. Process of law seems to have been abused for extraneous reasons.

38. Hon'ble Supreme Court in the case of **Ram Chandra Singh vs. Savitri Devi** 2003 (8) SCC 319 held that concealment of fact or misrepresentation of fact amounts to fraudulent act and is nullity in law. In the case of **K Dalmia vs. Delhi Administration**, AIR 1962 SCC 1821 Hon'ble Supreme Court has held that if the intention with which a false document is made is to be concealed a fraudulent or dishonest act which has been previously completed, the intention could not be other

than an intention to commit the fraud. In the case of ***State of Maharashtra vs. Budhikota Subbarao (Dr)***, (1993) 2 SCC 567 Hon'ble Supreme Court has held that fraud is misrepresentation by one who is aware that it was untrue with an intention to mislead the other who may act upon it to his prejudice and to the advantage of the representer. Affect of fraud on any proceeding or transaction is that it becomes a nullity.

39. Even a solemn proceeding stands vitiated if it is activated by fraud. In the case of ***S.P. Chengalavaraya Naidu vs. Jagannath*** (1994) 1 SCC 1 Supreme Court had held that a fraud is an act of deliberate deception with the design of securing something by taking undue advantage of another. In ***Baburao Dagdu Paralkar vs. State of Maharashtra*** (2005) 7 SCC 605 Hon'ble Supreme Court has held that by fraud meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other, is immaterial.

40. In ***V Papayya Shastry vs. Government of AP*** (2007) 4 SCC 221 Hon'ble Supreme Court has held that the judgment, decree or order obtained by plain fraud on the court, tribunal or authority is a nullity and non est in the eyes of law. Such a judgment decree or order passed by the first court or by the final court is to be treated as nullity by every court, superior or

inferior. It can be challenged in any court at any time, in appeal, revision, and writ or even in collateral proceedings.

41. In view of **A V Papayya Shastry's** case (supra) while adjudicating the controversy involved in the review the Tribunal has got right to record a finding with regard to commission of fraud and nullify the impugned order dated 30.10.2012 and direct to maintain status quo ante. No person how so high may be, should be permitted to enjoy office acquired by commission of fraud even for a day.

42. Much emphasis has been given by Ld. Counsel for the respondents with regard to power of review with submission that power of review may not be exercised as appellate forum. In **Thungabhadra Industries Ltd. Vs. Government of Andhra Pradesh represented by the Dy. Commissioner of Commercial Taxes Anantapur**, AIR 1964 SCC 1372, the Hon'ble Supreme Court has held as under :-

*“A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained*

*about it, a clear case of error apparent on the face of record would be made out.”*

43. While considering the twin grounds with regard to power of review the Supreme Court has held that the first and foremost requirement of entertaining a review application is that the order, review of which is sought (a) suffers from any error apparent on the face of the record; and (b) permitting the order to stand will lead to failure to justice (vide **Rajendra Kumar vs. Rambhai**, AIR 2003 SC 2095; **Green View Tea and Industries vs. Collector, Golaghat, Assam**, (2004) 4 SCC 122 and **Des Raj vs. Union of India**, (2004) 7 SCC 753.

In the present case there is not only error apparent on face of record, but if permitted to stand it shall lead to failure of justice.

44. Ld. Counsel for the applicant has relied upon the following cases:-

1. **Shiv Dev Singh & Ors vs. State of Punjab & ors**, AIR 1963;
2. **S Nagraj & Ors vs. State of Karnataka & Ors**, 1993 SCC (4) Suppl. 595;
3. **Smt Rajpati Devi vs. Ram Sewak Singh & Ors** AIR 2005 SC 595;
4. **BCCI & Anr Vs. Netaji Cricket Club & ors**, AIR 2005 SC 595;

5. ***Union of India vs. Sube Ram and ors***, 1979 (9) SCC 69.

45. In the case of ***Shiv Dev Singh & Ors*** (supra) Hon'ble Supreme Court has held that court in its inherent power may prevent miscarriage of justice or to correct grave and palpable errors committed by it which affected the interest of person who were not made parties before it to the proceedings.

In ***S Nagraj & Ors*** (supra) Hon'ble Supreme Court has held that court can review its order if it is satisfied that it is necessary to do so for the sake of justice.

In ***Smt Rajpati Devi*** (supra) their Lordships have held that where the court has failed to consider statement of pivotal witnesses, it can review its order.

In ***BCCI & Anr*** (supra) it has been held that while exercising jurisdiction of review court has got right to consider subsequent events to rectify its own mistake.

***Union of India vs. Sube Ram and ors*** (supra) the Lordships held that subsequent judgment affecting jurisdiction is open for review.

**FINDING:**

46. There appears to be no room of doubt that the impugned order of tribunal suffers from error apparent on the face of record and requires to be review under Order 47 Rule-1 CPC

read with rule 18 of the Armed Forces Tribunal Procedural Rules, 2008, in nut shell, for the following reasons:-

- (i) There is material concealment of facts with regard to service carrier of respondent No.1 as well as policies dealing with promotional avenue (supra);
- (ii) The core issues framed by the Tribunal (supra) shows that the case with regard to applicant Major General R.S. Rathore selection as No. 1, 1979 batch vis-à-vis case of respondent No. 1 was comparatively assessed by the Tribunal and was adjudicated. Why the applicant was not made a party is not understandable.
- (iii) Relief claimed by the applicant and order passed by the Tribunal at the face of the record relates to No. 1 SB and Special Board affecting the applicant's right with regard to further promotional avenue on the post of Lt General, more so, when there was only one post of Major General for next promotional avenue. The applicant was the only available qualified candidate since there was only one post. There is miscarriage of justice while allowing O.A. No. 255 of 2012 by order dated 30.10.2012; and



- (iv) The Government of India as well as the Army had not brought into notice of the Tribunal that much before the delivery of impugned judgment/ order, the applicant was approved for promotion to the sole post of Major General and no second person could have been selected in view of only one sanctioned vacancy. There appears to be deliberate attempt on the part of certain persons to create disturbance in the way of applicant by commission of fraud.
- (v) Applicant's O. A. was decided by the Principal Bench Delhi (Tribunal) on 29.05.2012 and his promotion was approved on 23.08.2012 to fill up sole vacancy of Major General. But this material factual position was not brought on record, though the impugned order was passed 30.10.2012.

47. Since the impugned order seems to be outcome of fraud (concealment of material facts) hence it is liable to be recalled in view of settled proposition of law (supra) and may not stand even for a moment causing miscarriage of justice. And once the impugned order goes, 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 impugned order of this Tribunal.

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 of the teachers whose initial appointment was not in accordance with rules and not qualified for the post.

48. It shall be appropriate to reproduce observations of Hon'ble Supreme Court in the case of **A.V. Papayya Sastry** (supra) before concluding the present order, to reproduce :-

*“22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, Tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior, it can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings”.*

*23. In the leading case of **Lazarus Estates Ltd. V. Beasley** (1956 1 All ER 341) Lord Denning observed; (All ER p. 345 C).*

*“No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud”.*

*“25. It has been said : fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent)”.*

*“38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of a plaintiff appellant which is upheld by all the court including the final court. Let us also think of a case where this Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also get attracted. All orders passed by the Court/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any Court or authority to review, recall or reconsider the order.*

*“39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order can not be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principles of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a*

*nullity, whether by the Court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior.*

49. While parting with the case, we feel that corruption has crept in every system of the country and pray to Almighty to impart justice and help the country to recognize merit of the persons serving Nation instead of extraneous considerations.

50. In view of above, the Review Application is allowed with cost which is quantified to Rs. 25,000 (Rupees twenty five thousand) which shall be deposited by respondent no. 1 within three months in the Registry of Armed Forces Tribunal, Regional Bench, Lucknow and be remitted to AFT Bar Association. Order dated 30.10.2012 passed in O.A. No. 255 of 2012 is recalled. The O.A. is restored to its original number. The applicant shall be impleaded as respondent in the O.A. and may file counter affidavit within four weeks. Two weeks time thereafter is allowed to file rejoinder affidavit. The case shall be listed for peremptory hearing.

Since from material on record, there appears to be concealment of material facts, respondent No. 1, prima facie, seems to be not eligible for promotion even to the rank of Major General, we direct the respondents to maintain status quo ante forthwith.

51. Let the O.A. be listed for final hearing on 30.03.2016 peremptorily.

52. Let a copy of this order be sent to Secretary, Ministry of Defence, New Delhi and Chief of the Army Staff within three days for compliance and necessary action.

53. Review allowed accordingly.

**(Air Marshall Anil Chopra)**  
**Member (A)**

anb

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