

(2021) 03 AFT CK 0003

In the Armed Forces Tribunal

Case No : Original Application No. 1998 Of 2020

A.K. Hooda

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 08-03-2021

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14

Citation : (2021) 03 AFT CK 0003

Hon'ble Judges : Rajendra Menon, J;P.M. Hariz, Member (A)

Bench : Division Bench

Advocate : Ayush Puri, Abhishek Singh, Anirudh Bhakru, Vikramjit Banerjee, Anil Gautam

Final Decision : Dismissed

Judgement

1. This Original Application has been filed by the applicant, a serving Lt Gen of the Indian Army, under Section 14 of the Armed Forces Tribunal Act 2007. The applicant is aggrieved by the action of the respondents in selecting and appointing an officer junior to him to the post of Director General Armed Forces Medical Services (DG AFMS).

2. The applicant has assailed the impugned orders of the respondents pertaining to the appointment of MR-04726A Surgeon Vice Admiral (Surg V Adm) Rajat Datta as DGAFMS with effect from 01.01.2021 upon the superannuation of the present DG AFMS MR 04428K Lt Gen Anup Banerji on 31.12.2020 and has made the following prayers:

(a) Set aside the impugned appointment order dated 21.12.2020 issued by Respondent No 3 bearing reference No 18836/SPL PB (A)/DG/2020/ DGAFMS/DG-1(X); and

(b) Issue directions to the Respondent Nos 1 to 3 to appoint the applicant to the post of DG AFMS in accordance with extant policy dated 13.04.2012 bearing ref No 10(6)/2009/ D(Medical).

Facts of the Case:

3. The facts of the case, in brief, are that the applicant is a meritorious serving Lt Gen having served over 38 years in the Indian Army Medical Corps. The applicant is a super specialist in the field of nephrology and is also a fellow of Indian Society of Nephrology. In recognition of his work, he was thrice conferred the Army Commanders Commendation Card and Chief of the Army Staff Commendation Card once. Consequent to his promotion to the rank of Lt Gen, the applicant was initially appointed as the Director General (Org & Pers) on 03.04.2019 and was subsequently appointed as Director General Medical Services (Army) and assumed this appointment on 02.04.2020.

4. On 21.05.2020, the applicant suffered from an acute coronary event (myocardial infarction) and was treated at the Army Hospital R&R, where he underwent an angiography followed by angioplasty. The applicant was then placed in temporary medical category P4 (T-04) for Coronary Artery Disease (ST elevation anterior wall myocardial infarction) post Primary Angioplasty to LAD with two stents and Primary Hypertension, and was granted four weeks sick leave. On completion of the sick leave, the applicant underwent a medical review at the Army Hospital R&R on 23.06.2020 and was recommended to be placed in temporary medical category P3 for a period of 06 months P3(T-24). According to the applicant, this categorisation was not as per the DGAFMS Medical Memorandum No. 185, which recommends a temporary medical category of 03 months - P3(T-12). The applicant states that the cardiologist, who recommended that the applicant be placed in medical category P3(T-24), was a direct subordinate of Surg V Adm Rajat Datta, who then was the Commandant of Army Hospital R&R and has since been appointed as the DGAFMS.

5. On 29.06.2029, the Medical Board held at the Armed Forces Clinic (AFC), New Delhi endorsed the medical category recommended by the cardiologist in Army Hospital R&R (i.e.) P3 (T-24). The applicant alleges that the approval of this Medical Board was, however, not intimated to him. In the meanwhile, the applicant appealed against the reclassification medical board vide his letter AKH/Pers/7/2020 dated 07.07.2020. The relevant portions of the appeal are reproduced below:

1. XX XX XX XX XX XX

2. I wish to bring to your notice my perceived inconsistencies in the said reclassification medical board as follows:

(a) I have been placed in medical category P3(T-24). As per DG memorandum, individuals who have undergone PCI should be placed in medical category P3(T-12). I also wish to state that as per the opinion I am in NY/-IA Class I and have normal LV function. Hence my period of first observation may be reduced to 12 weeks.

(b) The disability has been labelled as 'Not aggravated: I wish to state that the

onset of the disability occurred during "Op Namaste" and hence the issue of aggravation may be reassessed.

3. It is requested that the reclassification medical board may be reconsidered in view of the inputs state above

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6. The AFC, on receipt of the above appeal, intimated the concerned section at

DGMS (Army) dealing with the matter that the Recat Medical Board had already been forwarded to DGMS-5(A) for necessary approval and perusal by the competent authority vide their letter dated 30.06.2020 (Annexure A5) and, therefore, the appeal received from the applicant was being forwarded to DGMS-5(A) for their further necessary directions. DGMS-5(A), vide their letter dated 14.07.2020, instructed Base Hospital, New Delhi to hold a fresh Recat Medical Board within two weeks (Annexure A6).

7. The Recat Medical Board was then held at Base Hospital on 18.07.2020 and the Board placed the applicant in Medical Category P3(T-12) with effect from 23.06.2020. The Board proceedings were perused and approved by the competent authority at DGMS (Army) on 20.07.2020 (Annexure A6 page 61 to 65). The Reclassification Board was subsequently held at AFC on 01.10.2020, approved and perused by the competent authority on 05.10.2020, and forwarded by DGMS5A to DGMS-1B and the applicant, vide their letter No 76086/Re-cl/DGMS-5A dated 05.10.20. The applicant was placed in Medical Classification SHAPE-2y with a Disability Profile of P2(P) for two years for both CAD and hypertension.

8. The Special Selection Board for selecting the DGAFMS was held on 23.10.2020. On 05.11.2020, the applicant wrote to the Raksha Mantri (Annexure A8) explaining the circumstances and status of his medical categorisation since May 2020. He also stated that since he had been asked to forward copies of medical opinion and Medical Board proceedings, he apprehended that his medical category and processing of Medical Board may be projected as a disqualifying criteria for the forthcoming selection board for selection of the DGAFMS. He also stated that since DGAFMS was an appointment and not a promotion, the criteria of promotable medical category were irrelevant. He requested a fair analysis of his case so that no injustice was done to him.

9. It is the contention of the applicant that the selection to the post of DGAFMS is on the basis of seniority amongst the three senior most Lt Gens and equivalent medical officers of the three Services in the 'Zone of Consideration' and that the officer must have earned a minimum of one Confidential Report (CR) in the rank of Lt Gen and must satisfy the criteria of seniority cum merit to be included in the 'Zone of Consideration'. It is the applicant's case that though he was the senior most officer in the 'Zone of Consideration' and should have rightly been appointed as the DGAFMS, in the selection process, in complete contravention to MoD Letter No 10(6)/2009/D(Medical) dated 13.04.2012, the respondents selected and appointed a junior officer as DGAFMS. The result was promulgated vide the impugned DGAFMS letter dated 21.12.2020 and Surg V Adm Rajat Datta was appointed as the DGAFMS.

10. While admitting this application, this Tribunal, vide its order dated 24.12.2020, had stated that the applicant had not exhausted his departmental remedies and was, therefore, granted liberty to file a statutory complaint immediately and that the pendency of the matter would not come in the way of

the respondents in deciding it in accordance with law. However, the applicant has not filed a statutory compliant so far.

Arguments by Counsel for the Applicant:

11. Mr. Ayush Puri, learned counsel for the applicant, at the outset, contended that Annexure A1 order dated 21.12.2020 was illegal and improper.

12. The learned counsel for the applicant explained the contents of the MoD Letter No10(6)/2009/ D(Medical) dated 13.04.2012 on 'Procedure for Selection of Director General (Armed Forces Medical Services)' and how the selection and appointment of the DGAMFS was carried out entirely contrary to the provisions of this procedure and that for the first time the senior most was overlooked and a junior appointed as DGAFMS. The letter is reproduced below:

New Delhi, the 17th April, 2012

To

The Chief of Army Staff

The Chief of Naval Staff

The Chief of Air Staff

The Director General Armed Forces Medical Services New Delhi

Subject: Procedure for Selection of Director General (Armed Forces Medical Service)

Sir,

I am directed to say that the procedure to be followed for appointment of Director General, Armed Forces Medical Service (DG, AFM.5) will be as given in the succeeding paragraphs.

2. Composition of Selection Board of DG(AFM5). The composition of the Selection Board for the appointment of DGAFM5 will be as under:

Chairman Chairman Chiefs of Staff Committee

Members The other two Chiefs of Staff

Member Secretary Director General Armed Forces Medical Services

Quorum Not considered necessary.

"The Director General Armed Forces Medical Services (DG AFM5) will be the convening authority for the ibid Selection Board of DG(AFM5)."

3. Approach Paper. The Office of the DGAFM5 will prepare a detailed Approach Paper for guidance of the respective Service Chiefs bringing out the following aspects:

(a) Policy decisions pertaining to the Selection Board of DGAFMS as laid down in this letter;

(b) Date of likely vacancy

(c) Nominal Roll of Lt Gen (& equivalent) officers in zone of consideration with their inter-se-seniority.

(d) Confirmations that Disciplinary/Vigilance/Administrative actions are not pending/not contemplated are given.

(e) Overall profile of the Lt. Gen (& equivalent) officers, qualifications acquired, recent military Awards and Decorations as well as the exceptional achievements, appointments held in the select grade rank of Brig (& equivalent) and Maj Gen (& equivalent), medical category, disciplinary background etc.

(t) Details regarding any pending statutory complaint & Court cases are given.

(g) Data sheet giving the profile and appointment held of Lt Gen (& equivalent) officers after the rank of Col (& equivalent).

4. Zone of Consideration. Three senior most Lt Can (& equivalent) of Army Medical Corps will be considered by the Selection Board. If certain Gen/Flag/Air officers are retiring before the occurrence of the vacancy, then the zone will be extended by a number of equal to the number of officers who will so retire.

5. Schedule of the Selection Boards. Selection Board for DGAFMS will generally be convened at least four months in advance of occurrence of the anticipated vacancy and the proceedings of the Selection Board be made available to Ministry of Defence at least three months before the anticipated vacancy arises.

6. ACR Criteria. The following will be observed while finalizing the zone of consideration.

a) Must have earned minimum one CR in the rank of Lt. Gen (& equivalent),

b) However, COSC can accord waiver of this requirement if the eligible Gen/Flag/Air Officers have not been able to earn any CR in the present rank because the mandatory period of 90 days for any type of CR to be rendered has not been completed,

c) In such an eventuality, an Executive Report will be raised on such Gen/Flag/Air officers.

d) The pen picture & overall profile of all the Gen/Flag/Air Officers of all available CRs in the rank of Lt Gen (& equivalent) are considered on the basis of seniority-cum-merit.

e) If the senior most eligible Lt Gen (& equivalent) officer is not selected, then the reasons for the same will be recorded in the proceedings giving detailed justification for non-selection.

7. Grading. Once the Lt Gen (& equivalent) officer in the zone of consideration is selected for the appointment of DGA FMS, In order of seniority, the selection process stops. The selected Lt Gen (& equivalent) officer will be graded 'B' and the rest of the Lt Gen (& equivalent) officers in the zone of consideration, junior to the selected Lt Gen (& equivalent) officer, will be graded as 7Vot Considered: In situation of para 6(c) above, the not selected Gen/Flag/Air officer will be graded 7'11.5

8. Number of considerations. Each Lt Gen (& equivalent) officer is entitled to be considered thrice for selection to the appointment of Director General Armed Forces Medical Service.

9. On finalization of the proceedings of the Selection Board for the appointment of DGA EMS, all proceedings of the Board will be forwarded to the Ministry of Defence for obtaining approval of the Appointments Committee of Cabinet.

10. The procedure outlined above will be applicable with immediate effect.

11. This policy will be reviewed after five years.

Yours faithfully,

Sd-

Under Secretary to the Government of India Copy to:

Director General Medical Services(Army)

Director General Medical Services(Navy)

Director General Medical Services(Air)

The learned counsel argued that Paragraph 3 of the above letter was intended to provide a complete guideline to the Selection Board so that no other extraneous considerations were taken into account in the selection process. He further emphasized the centrality of 'Zone of Consideration' as enumerated in Paragraph 4, the process of finalizing the officers for inclusion in the 'Zone of Consideration' as explained in Paragraph 6 and the Grading system explained in Paragraph 7. He then went on to argue that once the Zone of Consideration was finalized, the selection of the DGA FMS has to be then purely based on seniority, especially since Paragraph 6(e) lays down that all aspects are to be considered on the basis of 'seniority-cum-merit' and the fact that Paragraph 7 also mentions that once the officer in the Zone of Consideration is selected for the appointment, in order of seniority, the selection process stops. The Selection Board should, therefore, have selected the applicant as DGA FMS, being the senior most officer in the Zone of Consideration.

13. Relying on the decision in Lt. General Manomoy Ganguly VSM v. Union of India and others (2018) 18 SCC 83), the learned counsel then stated that the applicant who is the DGMA (Army) is imminently suitable, and an officer of proven merit for being selected as DGA FMS, since the appointment of

DGMS(Army) is the most important of the three DGMS (Army/ Navy/ Airforce) appointments with stringent selection criteria where the suitability of a candidate is assessed on the touchstones of calibre, competence, attributes, skill and experience. He then vehemently argued that the applicant was however not selected since certain irrelevant considerations had crept into the decision making process, and was also contrary to the existing policy guidelines for selection of the DGAFMS.

14. Further relying on the decisions in *B. V. Sivalah and others v. K Addanki Baby and others* (1998) 6 SCC 720 and *Rajendra Kumar Srivastava and others v. Samyut Kshetriya Gramin Bank and others* (2010) 1 SCC 335, the learned counsel argued that it is well settled that there is a difference amongst the principles of 'seniority-cum-merit', 'seniority' and 'merit-cum-seniority'. He emphasised that the principle of seniority-cum-merit laid greater emphasis on seniority, and then reiterated the relevance of seniority-cum-merit in the selection process as given in Paragraph 6(d) of the letter dated 13.04.2012, and the rights that flow from seniority. He further added that if the intention was not to adhere to seniority-cum-merit in the selection procedure of DGAFMS, it should not have found a mention in the letter.

15. Explaining the medical episode of the applicant in May 20 and the subsequent medical categorisation, the learned counsel emphasised the aspect that contrary to the guidelines given in Medical Memorandum 185, the applicant was recommended to be placed in medical category P3(T-24) instead of P3(T-12). This had forced the applicant to file an appeal against the Medical Board conducted at AFC, New Delhi, and the authorities then ordered a fresh Re-categorisation Medical Board at the Base Hospital, New Delhi. Arguing the matter further, the learned counsel added that the applicant's medical category was, in fact, no cause for not being selected as there were no disciplinary/ administrative observations against him. Moreover, even if he was to be not selected, this should have been done prior to his inclusion in the zone of consideration. Having been included in the Zone of Consideration and being the senior most, the applicant had not been selected based completely on extraneous grounds.

Arguments by Counsel for the Respondents:

16. Mr. Banerjee, learned Additional Solicitor General justifying the action taken by the respondents in not selecting and appointing the applicant for the post of Director General Armed Forces Medical Services (DG AFMS), at the outset, contended that there was no illegality or irregularity in the impugned order, therefore, the O.A is not maintainable.

17. The learned ASG stated that the selection of the DGAFMS is governed by the MoD Letter No 10(6)/2009/ D(Medical) dated 13.04.2012 on 'Procedure for Selection of Director General (Armed Forces Medical Services)' and then elaborated on the salient aspects of the procedure. Since the post of DGAFMS was due to fall vacant on 01.01.2021, the Special Selection Board was convened

on 23.10.2020.

Once the Board concluded its proceedings, the complete proceedings were forwarded to MoD (first respondent) for approval by the competent authority, the Appointments Committee of the Cabinet (ACC). The selection procedure, as given in the letter of 13.04.2012²¹ was diligently adhered to and that the applicant had completely misinterpreted the rules. Moreover, while the Selection Board was only a recommending authority, the proceedings had been vetted, upheld and approved at the MoD first and finally by the ACC.

18. The Board considered the following officers for the post of DGAFMS. The officers at serial (a) and (d) were due to retire before the vacancy accrued and thus the zone of consideration consisted of the three senior most officers at serial (b), (c) and (e):

- (a) Air Mshl Mahendra Singh Butola, PHS.
- (b) Lt Gen Ashok Kumar Hooda, PHS.
- (c) Surg V Adm Rajat Datta, AVSM, SMIVSM, PHS.
- (d) Lt Gen Navdeep Singh Lamba, PHS.
- (e) Lt Gen Joy Chatterjee, VSM

The Selection Board unanimously rejected the applicant and recommended Surg V Adm Rajat Datta to the post of DGAFMS. Necessary justification for not selecting the applicant, who was the senior most officer, was endorsed in the Board proceedings in conformity with Paragraph 6(e) of the letter dated 13.04.2012. The Board had, inter alia, pointed out that 'claiming to be under additional stress the officer has sought attributability of a lifestyle disease in the anti COVID scenario which does not behove well for an officer who aspires to head the Medical Services. The board has looked into the records of the disposal of the cases of post MI and found that the medical category P3(T-12) has not been given to anyone in the past. Knowing the rules, the General Officer as a custodian of all rules has twisted the same to make himself suitable for the appointment of DGAFMS. Hence, he is not considered the ideal person to head the AFMS and his conduct is against the spirit of the Armed Forces'. The recommendations of the Board were upheld and approved by the competent authority at the MoD, and then forwarded to the ACC for approval. The approval of the Appointments Committee, appointing Surg V Adm Rajat Datta as DGAFMS was intimated by the Secretariat of the ACC vide their Note No. 12/52/2020-EO (SM-II) dated 18.12.2020. Thus the selection of DGAFMS has been done entirely in conformity to MoD letter dated 13.04.2012.

19. Referring to the averment of the applicant that he should have been selected to the appointment of DGAFMS, the Counsel stated that it is a well-settled legal position that no government officer has vested rights to appointment to any post. The applicant was in the zone of consideration for the selection to the post of

DGAFMS and was not selected by the Selection Board for the reasons and justification submitted by the Board in their proceedings. It was reiterated that the board proceedings were upheld and approved by the Hon'ble RM and subsequently also approved by the Appointments Committee of the Cabinet. Thus, no injustice had been done to the applicant.

20. The learned counsel also vehemently denied the applicant's claim that his medical categorisation of P3 (T-24), on return from sick leave, was not as per the medical memorandum and stated that the review of cases at Army Hospital R&R for the last two years, indicates that all patients who were diagnosed with myocardial infarction and primary angioplasty were given the medical category of P3 (T -24), except in the cases where the patient had died before the classification, or were are proceeding on superannuation. He further added that the opinion rendered by the cardiologist was the opinion of a specialist as per the procedure being followed in such cases for the past several years. It is also relevant that the applicant had not impleaded Surg V Adm Rajat Datta who was a necessary party since his appointment as DGAFMS had been questioned and personal allegations had been levelled against him in as much as the opinion of the cardiologist has been questioned on the grounds that he was serving under him.

21. The learned counsel then added that the applicant had subsequently appealed against the reclassification medical board held at AFC, New Delhi on 29.06.2020 without getting an approved/perused copy of the medical board and that this was against the laid down procedure in Paragraph 48 of AO 9/2011. He further said that it was also important to note that all Army hospitals, including the Base Hospital, where the fresh Medical Board of the applicant was held based on directions from his own organisation, as well the office of ADGMS (IS, II, PS) who decides issues pertaining to medical classification are all under the DGMS(Army), the post held by the applicant.

22. Referring to the applicant's letter to the Hon'ble Raksha Mantri, the learned counsel stated that the letter was settled at the level of the Hon'ble Raksha Mantri without granting any relief to the applicant. Further, it was also pertinent to note that the applicant had approached the Hon'ble Raksha Mantri directly instead of following due procedure to seek redress of grievances.

23. Relying on the decision of the Hon'ble Supreme Court in *Union of India and others v. Col Ran Singh Dudee* (2018) 8 SCC 53, the learned counsel added that it was not the function of the court to hear appeals over the decisions of a selection committee and that there were limited grounds on which it can interfere. As such, there were no grounds for any interference by the Court in the selection of the DGAFMS as there were no illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection. While considering cases where the assessment and analysis made by Selection Boards were directly put in question, the Hon'ble Supreme Court quoted the following:

23.1. In *Dalpat Abasaheb Solunke v. B.S. Mahajan* (1990) 1 SCC 305 this Court observed: (SCC pp.309-10, para 12) 1112...It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be Interfered with only on limited grounds, such as Illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc.'

While concluding the arguments, the learned counsel stated that the selection of the DGAFMS was conducted as per the guidelines given in the letter dated 13.04.2012 and that though the applicant was in the zone of consideration for the selection to the post of DGAFMS and was the senior most officer, he was not selected by the Selection Board for the reasons and justification endorsed by the Board in their Proceedings. And that the board proceedings were upheld and approved by the Hon'ble Raksha Mantri and thereafter by the Appointments Committee of the Cabinet.

Consideration:

24. Having carefully considered the rival arguments of the learned counsel for the parties, we find that the primary issue before us is, whether the applicant was unfairly and illegally denied selection by the respondents by taking action in a manner that was in contravention to existing policies on conduct of the Special Selection Board and approval of result by the approving authority, and whether there were any mala fide in not selecting the applicant.

25. We have perused the records on file pertaining to the selection of the DGAFMS submitted in Court by the first respondent after the final hearing on 15.02.2021. It is on record that the treatment at Army Hospital (R&R); that the applicant had placed himself in a favourable medical category by twisting rules; that as per records of past two years from Army Hospital (R&R), all patients diagnosed with similar disease have been placed in medical cat P3(T- 24) and not P3(T-12); that the applicant had laid claim to attributability in an anti-Covid scenario and that all of these did not behove well for an officer aspiring to head the Medical Services and that his conduct was against the spirit of the Armed Forces and therefore not the ideal person the head the AFMS. The Board Proceedings were then approved by the Hon'ble Raksha Mantri and forwarded to the ACC for their approval. The ACC approved the selection of Surg V Adm Rajat Data vide their Note No 12/52/2020-E0(SM-II) dated 18.12.2020.

28. Relying on the decisions in *B. V. Sivalah* (supra) and *Rajendra Kumar Srivastava* (supra), the learned counsel had reiterated the relevance of seniority-cum-merit in the selection process of the DGAFMS and then argued that the Respondents had transgressed their mandate by not adhering to the principle of

'seniority-cum-merit'. It has been the case of the applicant that once having been included in the zone of consideration, the selection should have been exclusively on the principle of 'seniority-cum-merit' and that he has not been selected based on extraneous grounds.

29. The case at hand is entirely different from the cases relied upon by the learned counsel for the applicant. The cases referred to dealt with promotion rules to the appointment of Area Manager/ Senior Manager in the Regional Rural Banks based on the Regional Rural Banks (Appointment & Promotion of Officers and Other employees) Rules 1988, wherein there was a difference of interpretation of the principle of seniority-cum-merit which was the sole criteria for promotion. In the case at hand, the executive order has elaborated the process of selection, a portion of which is based on seniority-cum-merit. Thus, in selecting the DGAFMS, this notion is entirely misplaced and there is a need to elaborate on it.

30. Just as statutes are required to be interpreted, often there is a similar requirement of interpreting executive rules and policies. Such interpretations too are done in a similar manner as the interpretation of statutes. The Golden Rule of Statute Interpretation says that to start with we shall go by the literal rule, however, if the interpretation given through the literal rule leads to some or any kind of ambiguity, injustice, inconvenience, hardship, inequity, then in all such events the literal meaning shall be discarded and interpretation shall be done in such a manner that the purpose of the legislation is fulfilled. The literal rule follows the concept of interpreting the natural meaning of the words used in the statute. But if interpreting natural meaning leads to any sought of repugnance, absurdity or hardship, then the court must modify the meaning to the extent of injustice or absurdity caused and no further to prevent the consequence. This rule suggests that the consequences and effects of interpretation deserve a lot more important because they are the clues of the true meaning| of the words used by the legislature and its intention. At times, while applying this rule, the interpretation done may entirely be opposite of the literal rule, but it shall be justified because of the golden rule. The presumption here is that the legislature does not intend certain objects. Thus, any such interpretation which leads to unintended objects shall be rejected.

31. Therefore, in the case of the MoD letter dated 13.04.2020, the intention of the Executive is that once various records of eligible officers are examined as per the guidelines given and are placed in the zone of consideration, the Selection Board will then examine each candidate in the order of seniority. The process entails selecting/ rejecting an officer in the order of seniority. Thus, if the first senior most officer is selected, the process ends there. However, if the first senior most officer is not selected, the Selection Board will then consider the next officer 'in the order of seniority', and if found fit, the selection process ends there. The procedure stipulates that in such eventualities, the reasons for rejecting an officer must be endorsed by the Selection Board.

32. The Executive has certainly not intended this to be a mechanical process, wherein once the officers are listed in the zone of consideration in the order of seniority, the senior most is automatically selected. If indeed that was intended, it did not require a selection board consisting of the three Service Chiefs to undertake the selection of the officer who is required to head the medical services of the three Services. So the principle of 'seniority-cum-merit' here entails, first, the examination of merit of possible candidates and promulgating the zone of consideration consisting of the three senior most qualifying officers. Should any of the officers included in this list superannuate prior to the accrual of the vacancy, additional names are accordingly included. Next, the three eligible and available officers in the list are now considered for selection in the order of seniority, as has been done in this case too.

33. Moreover, while seniority has its role and benefits, that alone cannot be the sole criteria in selection to such important appointments as observed by the Hon'ble Supreme Court in the case of Lt. Gen, Ravi Dastane Avsm Vsm v. Union of India and others (2019) 4 SCC 747:

".... may be a relevant consideration: seniority brings with it experience of organisation, experience in handling situations and experience in perspective and planning. The post, however, remains a selection post. In making appointments to such crucial posts which carry enormous functional responsibilities bearing on the defence needs of the Armed Forces and ultimately of the nation, a range of relevant considerations can be borne in mind. It would not be appropriate in the course of judicial review to confine the appointing authority to a narrow range of considerations. The appointing authority is- best suited to determine who among the officers in the rank of Lieutenant General is suited for appointment against a vacancy,..1:

34. The next issue that merits consideration is whether due process has been followed or not. From the examination of the records, it is firmly established that the process in reaching the decision has been observed correctly as laid down in the letter of 13.04.2012. On the limit of judicial review, the Hon'ble Supreme Court in the case of Union of India and others v, Lt Gen Rajendra Singh Kadyan and another (2000) 6 SCC 698, observed as under:

Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the moral of the entire force. May be one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is 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 has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether 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 jurisdiction.

The learned counsel for the applicant had argued vehemently that the applicant was not selected on extraneous grounds. However, he has not advanced any credible evidence to substantiate and prove it. It is well settled that it is very easy to allege 'mala fide' but very difficult to prove it. Therefore, there is a difference between 'made' and 'made out'. One can very comfortably make allegations but whether those allegations are made out or not, the burden is heavily on the person who alleges it. The allegations of mala fides are often easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility, as held by the Hon'ble Supreme Court in the case of *E. P. Royappa v. State of Tamil Nadu and another* (1974) 4 SCC 3, while examining alleged mala fide in ordering the transfer of the acting Chief Secretary. The Hon'ble Supreme Court observed in paragraph 92 that:

...The only question before us is whether the action taken by the respondents includes any component of mala fides whether hostility and mala fides against the petitioner were the operational cause of the transfer of the petitioner from the post of Chief Secretary. Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof to be taken of all available inputs encompassing the overall profile of the officer. Thus the Selection Board was well within its mandate for taking cognisance of the officer's conduct in misusing rules and seeking personal benefits, thus finding him unsuitable to hold the appointment of DGAFMS.

35. In the result, we find that there exists a robust procedure for selecting the DGAFMS and that the complete process of selection was conducted as per this policy with no mala fide on part of the Selection Board. Keeping in view that the process was to select a senior officer to head the medical services of all the three Services, it was incumbent on them to select the most suitable officer as per the laid down procedure. In doing this, the Selection Board was justified in taking due cognisance of the fact that the applicant while being the custodian of all rules and their correct implementation, had twisted the rules to his benefit. Moreover, he had sought attributability to a life style disease on the pretext of having to function in a COVID environment; both of which does not behove well for an officer who aspires to head the Medical Services. In the case of *Lt. Gen. Rajendra Singh Kadyan* (supra), in the context of selecting an Army Commander in the Indian Army, the Hon'ble Supreme Court observed thus: Of course,

considering the nature of rigorous standards adopted in the matter of selection of officers from the stage of Lt. Colonel onwards upto the stage of Lt. General in the usual course it may be that the senior most officer is selected as the Army Commander. But that does not debar the Chief of the Army Staff or the Union of India in making the selection of any other person for good reasons who fulfils the necessary criteria.

36. Resultantly, the O.A fails and is dismissed. No order as to costs.

The Tribunal Officer shall return the original records produced by the first respondent.

Pronounced in Court on this the 8th day of March, 2021.