

(2009) 10 DEL CK 0032

In the Delhi High Court

Case No : CM 7961 of 2009 in WP (C) No. 6856 of 2008

Major General A.K. Kapur, VSM

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 1, 14
Constitution of India, 1950 — Article 16, 226

Citation : (2009) 163 DLT 606 : (2010) 2 ILR Delhi 387

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Maninder Singh, Viraj R. Datar and Vineet Jhanji, for the Appellant;
A.S. Chandihok, ASG, Sanjeev Sachdeva, Preet Pal Singh, S. Mercy Deborah and
Geetika Panwar, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The petitioner joined the Army on 14.11.1971 and earned his promotions up to the rank of a Major General. The petitioner was considered for promotion to the rank of Lieutenant General in the Army Ordnance Corps (AOC) as per a Special Selection Board held on 05.11.2007.

2. The result of this SSB was however withheld for over almost ten months and the petitioner aggrieved by the same filed WP(C) 6856/2008 praying for the de-classification of the results of the SSB with respect to the petitioner and to grant him promotion to the rank of Lieutenant General with all consequential benefits.

3. On consideration of the writ petition and calling for records, it was found that just prior to the SSB, an FIR was registered by the CBI on 08.10.2007 on the basis of sourced information alleging that the petitioner had amassed assets disproportionate to his known sources of income and a raid was also carried out at the premises of the petitioner. The petitioner claimed that nothing incriminating was found and all the properties were either inherited or acquired from sale of properties which had been inherited. The petitioner claimed to be

belonging to a landed class having assets and had explained all the queries.

4. The case of the petitioner was directed to be treated as one of a deemed DV Ban and thus was not approved by the Appointments Committee of the Cabinet ("ACC" for short). The question which thus arose was whether such a deemed DV Ban would apply to the case of the petitioner. The policy decision for imposition of a DV Ban is dated 04.07.2000 and the relevant provision in Clause 5(a) of the policy reads as under:

5. For imposition of Provisional DV Ban each case is examined by the AG's Branch (DV Dte.) on its merits. Provisional DV Ban is imposed in the under mentioned specific cases:

a) SPE/CBI Cases (Type "C"). When the competent authority accords approval for prosecution of the affected personnel (officers only) by the CBI in civil court, the officer is put under Provisional DV Ban type "C". When the CBI recommends departmental action, the officer will be put under Provisional DV Ban type "D"/"A"/"T", as the case may be, after the competent authority has taken cognizance of the offence and directs appropriate action against the officer.

5. The aforesaid policy was thus examined in the writ petition and it was concluded that the pre-requisite for a DV Ban is where a competent officer accords approval for prosecution of the affected personnel by the CBI. The stage of CBI making any recommendation had not even arisen even though a period of sixteen months had elapsed since the registration of the FIR. It was thus found that the ex facie it was not a case of DV Ban. We also took note of the fact that the SSB had been held after the FIR was registered and yet the SSB in its own wisdom had recommended the case of the petitioner alone for promotion finding nothing adverse in his career profile and finding the other two persons unfit. We found that there could not be any deemed ban as every authority is governed by the law of the land and the norms laid down by itself, so that there is no unfettered discretion in any authority. Thus, once the respondents in their wisdom had framed a policy as to when a DV Ban comes into operation, and that condition not being satisfied, there could not be a bar of DV Ban to the promotion of the petitioner. However, instead of granting the relief of promotion, we considered it appropriate that it was a fit case where the ACC may re-examine the complete matter in terms of what we had observed and take a fresh decision within one month.

6. No decision came to be taken for over three months and ultimately the petitioner filed a contempt petition which was listed on 12.05.2009 and notice was issued returnable on 06.07.2009 giving liberty to the respondents to take a decision in the meantime. The petitioner received a communication dated 10.06.2009 informing him that the petitioner had not been selected for promotion by the SSB held on 05.11.2007 and this stand was also reiterated in the CCP stating that the ACC had examined the matter afresh and approved that the Grading "B" (fit) awarded by the SSB on 05.11.2007 in respect of the

petitioner be changed to Grading "Z" (unfit). This contempt petition was withdrawn on 06.07.2009 and in the meantime, the present application had been filed by the petitioner.

7. It may be noticed that the petitioner was also served with a convening order dated 06.06.2009 for convening a court of enquiry for violation of instructions contained in SAO 3/S/98 to the extent that the petitioner failed to give intimation to the Army in respect of certain HUF properties which formed part of the properties in respect of which the investigation was being carried out by the CBI. In this behalf, information had been sought from the petitioner on 31.03.2009 vide a letter of the even date (wrongly mentioned as 31.03.2008) which was replied to by the petitioner on 07.04.2009. The stand of the petitioner was that the properties mentioned in the letter had been acquired by the HUF of which he was the karta. The HUF had been formed from 1987 onwards with a separate PAN number and that as per SAO 3/S/98 there was no requirement of filing the details of HUF property. These properties were in any case known to the headquarters since October, 2007 when the FIR was registered and in pursuance to a communication of the Western Command dated 30.04.2008, the petitioner had even communicated his HUF assets vide letter dated 30.05.2008. One of the properties stated to have been acquired by the adult son of the petitioner was stated to have been gifted to him by his grandparents at the time of his attaining majority and the son was an independent tax payer filing separate returns for three years prior to the said letter.

8. The present application has been filed seeking a clarification/modification of the Order dated 19.02.2009 by which the writ petition was disposed of to the extent that the ACC should re-examine the matter relating to the promotion of the petitioner without in any manner being influenced by the registration of the FIR by the CBI and directly in accordance with the policy decision dated 04.07.2000 and to quash the decision taken by the ACC purportedly under directions of this Court. A further relief was sought clarifying that the order dated 09.06.2009 passed by the ACC holding the petitioner as "unfit" giving him Grading "Z" is contrary to the settled legal position.

9. The respondents have filed a reply. We had called for the relevant records including the notes sent to the ACC and have examined the same.

10. The objection of the respondents at the threshold is that once the fresh order had been passed by the ACC, the same is really a fresh cause of action and if the petitioner has any grievance, he must challenge the order by filing a separate petition. On the other hand, learned senior counsel for the petitioner has contended that if the order dated 19.02.2009 has not been implemented in its letter and spirit keeping in mind the observations of the Court then the petitioner cannot be made to file petitions again and again over what was the original cause of action.

11. We may note that intent and purport of our order dated 19.02.2009, to our

mind, was quite clear. The case of the petitioner had been recommended by the SSB though the final competent authority is the ACC. The reason for non grant of promotion to the petitioner was the pendency of the FIR in respect of which no charge sheet had been filed for sixteen months and even thereafter till the present proceedings through the present application began. The only reason was the concept of deemed DV Ban introduced and we were categorical in our opinion that there can be no such deemed DV Ban when the policy decision dated 04.07.2000 provided for a provisional DV Ban only when the CBI recommends the case for departmental action. Thus the pre-requisite was such a recommendation of the CBI did not exist. Thus, it is keeping in mind the policy decision and our interpretation of the policy decision that the matter had to be re-considered by the ACC. If such a reconsideration has actually taken place and still the ACC has deemed it appropriate not to promote the petitioner and once again it is the same cause as was prior to our judgment dated 19.02.2009 then we can certainly issue directions in the present application. We are thus examining whether the re-examination of the case of the petitioner is in terms of our directions dated 19.02.2009. Our order dated 19.02.2009 was not challenged any further and was accepted by the respondents.

12. A perusal of the record shows that it is once again the FIR registered against the petitioner on 08.10.2007 which has formed the basis of the decision of the ACC. The notes recorded prior to the matter being forwarded to the ACC and the note sending the matter to the ACC leaves no manner of doubt in this behalf.

13. The respondents being conscious of the fact that there can no deemed DV Ban and that the policy decision relating to the provisional DV Ban could not come to their aid recommending that the grading of the petitioner be changed to Grade "Z" (unfit) instead of Grade "B" (fit). The performance of an officer is judged by the SSB. The performance of the petitioner was found to be good enough to recommend him for promotion while others were not found fit for promotion. The ACC having the last word is dependent on other factors which may be taken into account. These other factors is once again the same FIR which cannot come in the way of promotion of the petitioner as there was no recommendation of the CBI on the date the decision as taken once again by the ACC on 09.06.2009. The note for consideration of the ACC records all the facts and once again states that since a clean chit had not been given to the petitioner and final outcome of the investigation is awaited, the petitioner should not be promoted. In fact, it notes that "only referring the matter to ACC will serve the purpose of the Department". This thus shows that what was sought to be done was a mere formality by achieving the same objective by once again following an illegal route. The note also shows that the first aspect raised is of immovable properties possessed by the petitioner as also some moveable assets. The complete period of service of petitioner is being looked into which runs into 36 years. The properties held in the name of the HUF are stated to be in contravention of the SAO 3/S/98 and thus it is stated that the same warrants a disciplinary action. In respect of this Army Order, it would be useful to refer to

the averments made by the petitioner in the application in reference to the letter dated 31.03.2009 and his interpretation of SAO 3/S/98. The relevant paras are as under:

7. Furthermore, the petitioner has thereafter has also been served with a Convening Order dated 06.06.2009 wherein the Court of Inquiry has been convened for violation of instructions contained in SAO 3/S/98 by the petitioner to the extent that he has failed to give intimation to the Army in respect of the certain HUF properties which form part of the properties investigation in respect of which is apparently being carried out by the CBI.

True copy of the Convening Order dated 06.06.2009 is annexed hereto and marked as Annexure C-4.

8. In this respect the Petitioner was called upon by a communication dated 31.03.2009 to give details of properties returns in respect of the said properties. The petitioner had duly replied to the aforesaid communication by his letter dated 07.04.2009 wherein the correct position as per the Army instructions as also the factual position regarding all the properties were setup, despite which, reasons which are obvious a Court of Inquiry has been convened against the petitioner.

True copy of the communication dated 31.03.2009 and reply dated 07.04.2009 are annexed hereto and collectively marked as Annexure C-5 (Colly).

14. In reply to the aforesaid averments, the respondents have set out as under:

7 & 8 contents of these paras are matter of records.

15. Annexure C-5 referred to in the application of the petitioner is the letter dated 31.03.2008 (the date should have actually been 31.03.2009) whereby the petitioner was asked to give details of the property returns in respect of the properties mentioned therein. The reply is dated 07.04.2009 annexed to the application, which is also Annexure C-5. The relevant portion of which reads as under:

2. It is submitted that I have filed all the property returns required to be filed by me as per the SAO 3/S/98. The properties mentioned in the letter under reference (except Srl (a) (iv)) have been acquired by a Hindu Undivided Family (HUF) of which I am only the karta. The HUF is named "Anand Kumar Kapur". This HUF is an independent financial entity as per the laws of the State with its own assets, income, expenditure and accounting/taxation status. The HUF was legitimately formed in 1987 from the assets inherited from the HUF of my father, after approval of the Taxation authorities. A separate PAN No. was duly allotted to it. Since 1987, I have filed separate annual income and Wealth Tax Returns as karta of the HUF. The Tax Returns in which these properties have been reflected have been assessed, accepted and found in order, year to year, by the competent authority, viz., Govt. of India, Ministry of Finance (IT Division).

3. In this regard, I would like to draw your kindly attention to the following provisions of the said SAO.

a) Para 2. "All ranks are required to report the acquisition or disposal of the property..., except those transactions which are conducted by the family members exclusively out of their own earnings and possessions." The HUF properties are except as the transactions are from its own possessions and earnings.

b) Para 7 (c) Family members means a person "wholly dependent on him". The HUF is not dependent on me in any way whatsoever. Therefore, its assets cannot be linked to me as an Individual.

c) Para 14 (c) As regards property under Hindu Undivided Family, "transactions of immovable/movable property from individual ownership to "Hindu Undivided Family" or vice versa... are required to be reported." I confirm that none of these transactions were conducted between me as an individual and the HUF and therefore were not required to be reported under the SAO.

4. The property at Srl 2 (a) (iv) was acquired by my adult son from gifts bequeathed to him by his grandparents at the time of his attaining majority. He is an independent tax payer and has reported the subject property in his Income Tax Returns for the last three years.

5. I submit that in terms of Para 2 and 14(c) of SAO 3/S/98, I was not required to intimate my HUF properties, as explained above, However, I would like to mention that information of the HUF assets is known to the IHQ of MOD (Army) since October, 2007 as these properties form part of the FIR dated 10 Oct 2007. Also, in response to HQ South Western Comd letter No. 47232/7/AI (DV-2) dated 30 Apr 2008, I communicated my HUF assets vide my letter of even No. dated 30 May 2008, enclosing copies of the PAN card and IT & Wealth Tax returns of the HUF. I also explained the origin and nature of my inherited and HUF assets in para 5 of the letter. Thus, the fact of my holding these properties as part of a HUF has been known. No observations was raised by any authority since October 2007/May 2008.

16. The stand of the petitioner thus categorically is that in terms of SAO 3/S/98 the HUF properties are exempt as there are no transactions inter se the HUF and the petitioner. This position is not even disputed by the respondents. Further, the CBI has not given any conclusion at the time when the matter was sought to be decided by the ACC.

17. The noting shows that another aspect sought to be raised, possibly as a red herring, is that the Delhi Police had arrested the petitioner in the case registered u/s 61/1/14 of the Excise Act for being in possession of 44 bottles of liquor of foreign make at his residence and the case was likely to be concluded very soon. This aspect was in existence even at the stage of the earlier consideration as it is pursuance to the same search carried out on 08.10.2007 by the CBI. The bottles

of liquor were actually recovered from the residence of the mother of the petitioner at Sainik Farms, New Delhi and the petitioner's mother had made a statement to the police that the bottles belonged to her and were being collected over the years for the celebration connected with her grandson. Despite this fact, the ACC was sought to be given an impression as if these bottles were recovered from the residence of the petitioner though the petitioner was not residing at Sainik Farms. Not only that, the proceedings against the petitioner in respect of this case, on the charge sheet being filed only on 16.03.2009, were stayed by an order dated 14.07.2009 and it is State which has been taken time since then.

18. As to what should be the approach of the authorities in such matters is clarified by a judgment of the Supreme Court in *Coal India Ltd. and Others Vs. Saroj Kumar Mishra*, . In the facts of the case, a person employed with a government company had a vigilance case pending against him, but had not been placed under suspension. His juniors were being promoted though he was not promoted and during the pendency of the writ petition, charge sheet was filed and the disciplinary proceedings were held and employee was awarded the punishment of reduction of pay. The High Court allowed the writ petition directing promotion of the officer with effect from the date when his juniors were promoted. The Supreme Court dismissed the SLP of the employer concluding that merely on the ground of pendency of a vigilance case against the employee, he could not be deprived of his promotion. The relevant office memorandum was interpreted to imply that an employee should not be harassed or deprived from getting the benefit of DPC for an indefinitely prolonged period on the ground of pendency of such an inquiry especially when at the relevant date the competent authority had not arrived at any decision in terms of the circulars and that a charge sheet was likely to be issued. It was observed in para 22 of the judgment that a departmental proceeding is ordinarily said to be initiated only when a charge sheet is issued.

19. In the present case also the office memorandum is quite clear and the object is that mere pendency of a vigilance case would not come in the way of promotion of an officer. It is only when the recommendation is received from the CBI in terms of the office memorandum dated 04.07.2000 that the provisional DV Ban would come into operation. The object of this office memorandum is also to prevent harassment to an officer by mere pendency of a vigilance case. The CBI enquiry had produced no results till the relevant date and despite waiting for a period of ten months no recommendation having been made by the CBI, the petitioner approached the Court. The decision in the writ petition was rendered on 19.02.2009 till which time 16 months had elapsed and there was still no recommendation of the CBI. The reconsideration of the case of the petitioner by the ACC was on 09.06.2009 and even by that time also there was no recommendation of the CBI. The petitioner is retiring on 30.11.2009 and thus the very opportunity of the petitioner to earn his ranks is sought to be defeated. We are conscious of the fact that an element of greater probity would be involved specially keeping in mind that the petitioner is working at a senior position in the

Army.

20. We had emphasized in para 7 of our judgment dated 19.02.2009 that no amount of subsequent monetary compensation is a substitute for holding the rank. The privilege to wear the uniform and the rank is only of the armed services, paramilitary services or police and it is the aim of any officer to hold the highest rank and wear the same on his shoulder.

21. Another important aspect brought to our notice is that throughout this period the petitioner has kept the position of MGAOC (Major General Army Ordnance Corps), HQ, South Western Command, Jaipur and is involved with procurement and distribution of all ordnance items for the South West Command. This position is not even disputed by the respondents. The petitioner thus is occupying an important position as a Major General and the Army in its wisdom has deemed it appropriate to keep him in that position taking into consideration his past records. The Army has found no reason till that date to really take any action against the petitioner and even the convening order dated 06.06.2009 has not proceeded any further.

22. We are thus of the considered view that there was no impediment whatsoever for the promotion of the petitioner and the ACC ought to have promoted the petitioner once there was no other material as noted above by us, was on record. The structuring of the note suggests that a wrong impression was sought to be conveyed to the ACC that the grading of the petitioner had been made unfit which could not be so made when the only material available was not sufficient to impose the provisional DV Ban as per the policy decision. There cannot be a pick and choose in this behalf by treating different officers differently and the whole object of having a uniform policy decision is sought to be defeated. The decision of the ACC dated 09.06.2009 is thus completely contrary to our directions contained in the Order dated 19.02.2009 and it appears to be only to complete the formality and thus we are of the view that the appropriate directions can be issued on the application of the petitioner.

23. The next question to be considered by us is as to what relief ought to be granted to the petitioner.

24. Learned senior counsel for the petitioner prayed that the case of the petitioner should not once again be sent to the ACC but that the petitioner should be promoted and there is precedent for this and in fact he contended that if subsequently something is found after the relevant date, nothing precludes the respondents from taking appropriate action in accordance with law, but the right of promotion of the petitioner cannot be defeated which has to be considered as per the relevant norms on the relevant date.

25. Learned Counsel referred to the judgment of the Supreme Court in H.L. Trehan and Others Vs. Union of India (UOI) and Others, to emphasize that the approach adopted in the present case by the respondents was only to somehow achieve their objective and such an approach of the respondent is not unusual as

observed in the said judgment. In the said judgment observations were made to the effect that "it is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."

26. An important judgment of the Supreme Court in *Badrinath Vs. Government of Tamil Nadu and Others*, was cited in support of the case of the petitioner. The question of relief to be granted was considered by the Supreme Court in the said judgment in the context of the plea of the respondents that the Supreme Court could neither issue a mandamus to promote the appellant to super timescale nor to assess his grading.

27. The Supreme Court found that the case was an exceptional one as it had serious overtones of legal bias. If it was proved that the assessment was mala fide or found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, then the powers of judicial review under Article 226 of the Constitution are not foreclosed. The assessment of merits made by the authorities was liable to be scrutinized by the courts within the narrow *Wednesbury* principles or on the grounds of mala fides. The following important principles were summarized.

1) Under Article 16 of the Constitution, right to be "considered" for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence.

2) Courts will not interfere with assessment made by Departmental Promotion Committees unless the aggrieved officer established that the non-promotion was bad according to *Wednesbury* principles or it was mala fides.

28. The Supreme Court thereafter proceeded to record that the power of the Court to mould the relief in the interests of justice in extraordinary cases cannot be doubted and the Constitution of India designedly used wide language in Article 226 to enable the Courts to "reach justice wherever found necessary" and to "mould the reliefs to meet peculiar and complicated requirements of this country". In para 89, it was observed that court may indirectly indicate the particular manner in which the discretion has to be exercised by the authorities and where it was not so done, it was the fit case requiring the issuance of a mandamus.

29. A reference has also been made to the observations of the Division Bench in *Kanwarjit Singh v. AIR India International* DRJ 1992 (24) (DB). The observations of Martin B. in *Mayor of Rochester v. Regina* 1858 1 B & P 1024, 1032, 1034 were cited with approval. The observations are as under:

But, were there no authority upon the subject, we should be prepared upon principle to affirm the judgment of the Court of Queen's Bench. That Court has

power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment, and ought to be used when the law has provided no specific remedy and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute. Comyn's Digest. Mandamus (A) Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction it can be made applicable.

The High Court thereafter proceeded to state as follows:

The principle enunciated in Mayor of Rochester's case has been approved and followed not only in subsequent cases in England but by our own Supreme Court as well and why not? After all it enables the High Court "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country." (See: Hochtief Gammon Vs. State of Orissa and Others, In Halsbury's Laws of England, Fourth Edition Volume I, paragraph 89, the purpose of an order of mandamus is neatly summed up as "to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient beneficial and effectual."

The answer being in what has been noticed above, we, in exercise of our jurisdiction under Article 226 shall never shy away from issuing a writ of mandamus or a writ in the nature of mandamus when arbitrariness and perversion are writ large and brought out clearly. The Supreme Court makes it clear in Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, , in the following words:

There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly

and lawfully exercised its discretion.

This is one such fit and proper case and thus calls for from this Court an order which the respondent Corporation should itself have passed in proper and lawful exercise of its authority. We direct the respondent Corporation to appoint forthwith the petitioner to the post of Assistant Flight Purser. The petitioner shall also be entitled to costs of this petition. Costs quantified at Rs. 1000/-.

30. In Shri A.K. Jain Vs. Municipal Corporation of Delhi, the aspect of authorities being directed to deal with a matter in terms of specific directions was considered and it was concluded that though normally the courts would not substitute their own conclusion on the decision but the method and manner and the cavalier fashion in the decision arrived at by the respondents was based on no material was totally irrational and therefore directions were issued for appointment of the petitioner to a post.

31. On the other hand, learned ASG submitted that at best the matter should be referred back to the ACC.

32. We have given our deep thought to the matter, conscious of the fact that the authorities, must have leeway to appoint an appropriate officer especially to such senior posts and yet such discretion must be circumscribed by relevant policy decisions. The policy makers were conscious of balancing the interest of the administration and having fit and honest officers to perform the task as against the possibility of any undue harassment to an officer. It is in this context that the provisional DV ban was incorporated in a policy decision dated 04.07.2000. Thus, the authorities in their wisdom deemed it appropriate that mere pendency of a vigilance case would not come in the way of promotion of an officer. The respondents despite being conscious of such a policy decision sought to introduce something totally alien as a deemed DV Ban. This was frowned upon by us in our order dated 19.02.2009 and we had made it quite clear that unless there was any other impediment, the pendency of the FIR would not come in the way of the petitioner. The judgment was accepted by the respondents. However, the intent remained the same that despite the SSB having found the petitioner to be the fittest person to be appointed to the post, the recommendation of the SSB should be given effect to if there was no other impediment in the way of the petitioner. Thus, the petitioner having been found fit was sought to be converted to unfit once again only on the ground of pendency of the FIR even though no recommendation from CBI had been received till that date. As a red herring, the aspect of liquor case was sought to be introduced, which we have already explained, has been stayed by the competent court apart from the fact that the liquor was found in the separate residence of the mother of the petitioner. She owned to it and stated that the reason for collecting the same over a period of time was for a celebration for her grandson. The approach of the respondent is apparent from the note for consideration of the ACC where it is observed that only referring the matter to ACC would serve the purpose of the Department. Therefore, an eye wash was sought to be carried out.

33. If the petitioner had been promoted, nothing precluded the respondents at the appropriate stage to take action against him. The Army authorities have deemed fit that during all this period of time when the petitioner had not been promoted, he continues to occupy the most important post i.e. Major General Army Ordnance Corps (MGAOC), HQ, South Western Command, Jaipur and the petitioner is dealing with purchases. Thus, the petitioner had been found fit to perform important duties dealing with financial ramifications and yet promotion has been denied to him. The origin of all this is what is stated to be sourced information received just prior to the petitioner being considered for promotion by the SSB. We do feel that this is one of the exceptional cases which fall within the category of cases as mentioned in *Badrinath v. Government of Tamil Nadu and Ors*'s case (*supra*) where there is a clear case of legal bias against the petitioner, who is sought to be denied promotion on one count or the other though none of the counts can come in the way of his promotion. Once we are of the view that this is one of those rare cases as referred in para 41 of *Badrinath v. Government of Tamil Nadu and Ors*'s case (*supra*), we should not hesitate in giving the relief to the petitioner as prayed for by learned senior counsel for the petitioner that the petitioner should be treated as having been promoted to the post of Lieutenant General with all consequential benefits and a mandamus is accordingly issued. We, however, make it clear that nothing observed here still prevents the respondents from taking any action against the petitioner in accordance with law hereafter on account of any subsequent development including any subsequent conduct of the petitioner, if such a course is permissible as per law including the policy decisions of the respondents.

34. Needful be done within 15 days of the pronouncement of the order as the petitioner is running against time.

35. The application is allowed in the aforesaid terms with costs of Rs. 10,000/-