
(1998) 12 DEL CK 0009
In the Delhi High Court
Case No : C.W. 1527 OF 1998

Rajendra Singh Kadyan (Lt. General)	Vs	APPELLANT
Union of India and Others		RESPONDENT

Date of Decision : 01-12-1998

Acts Referred:

Citation : (1999) 49 DRJ 394

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Mr. R.K Anand and Mr. Lovkesh Sawhney, Advocat, for the Appellant;
Mr. Santosh Hegde, Solicitor General, Mr. P.P. Malhotra and Mr. Y.D. Nagar, for the Respondent

Judgement

Vijender Jain, J.—Rule.

Writ petition was filed seeking appointment/promotion to the post of Army Commander, Eastern Command from 1.3.1988. Petitioner has contended that he is the senior most officer eligible for appointment to the said post. It was contended by the petitioner that he was compelled to file the petition in order to prevent unnecessary and avoidable aberration with regard to appointment/promotion of senior officers in the Army and keeping in view the long-term interest of the Army and the country so as to avoid politicalisation of crucial posts in the Army. It has been contended that the petitioner had won various meritorious awards. The petitioner commanded a Company in Nagaland and was awarded "Vishist Seva Medal" (VSM) on 26.1.1980 and as a Major General he commanded Assam Rifles, Rashtriya Rifles and BSF in Nagaland and he was successfully able to bring cease fire in 1997 which is still holding. The petitioner was awarded "Ati Vishist Seva Medal" (AVSM) on 26.2.1998 for his operational success and outstanding achievement. Petitioner commanded a Company in the Bangladesh War. Petitioner for his contribution in "Operation Black Thunder" was awarded "The Chief of Army Staff's Commendation" in 1985. It has been contended by the petitioner that he has the requisite staff experience and has

served on the staff of an Infantry Brigade and an Infantry Division in operational appointments and the petitioner from the rank of Lt. Colonel onwards has attained all his select promotions in the first chance through unanimous decisions. Since August, 1997 the petitioner has been in command of the oldest and the most prestigious strike Corps of the Army. It has been contended before this Court by the petitioner that the appointments and promotions to the post of Army Commander/Vice Chief of the Army Staff (in short "VCOAS") are governed by the instructions as contained in the Government of India letter dated 20.10.1986. The controversy revolves around this letter, Therefore, the said letter dated 20.10.1986 is reproduced below :

The Chief of the Army Staff, New Delhi.

Subject: Appointment of Army Commanders/VCOAS

Criteria of selection - Policy.

Sir,

I am directed to say that the President is pleased to lay down the following criteria for the appointment of the Army Commanders/VCOAS:

- (a) The officer should be fit in every respect for such appointment; and
- (b) The officer should have a minimum of two years service left before the retirement age from the date of appointment as Army Commander/VCOAS.
- (c) This will be applicable w.e.f. 1.1.1988.
- (d) As a one time exception, the pay, but not the status of an Army Commander will be given to those General Officers, presently holding the rank of Lt. Gen., who are otherwise found fit to hold the appointment but are not selected because of the revision in the criteria.

Yours faithfully,

Sd/-

(Dhivendra Singh)

Joint Secretary to the Government of India.

2. Aforesaid order came into effect from 1.1.1988. According to the petitioner, the petitioner became eligible to be promoted as Army Commander as and when vacancy arose. Aforesaid instructions were amended by the Government of India vide its letter dated 18.11.1996 which prescribes an additional criteria for appointment to the post of Army Commander namely that the officer should have commanded a Corps for at least one year so as to become eligible for appointment as Army Commander/VCOAS and no waiver in this stipulation is allowed-without prior concurrence of the Government. The petitioner has challenged that the order dated 18.11.1996 has come into effect only to affect

one officer in the entire army, i.e. the petitioner. He has further contended that even otherwise in relation to such stipulation petitioner has been granted a waiver by the government from the stipulation as prescribed by the letter dated 18.11.1996. Government of India vide its order dated 16.3.1998 granted waiver to the petitioner in the following terms:

16(8)/98/D(MS) Government of India Ministry of defense New Delhi, the 16th March, 1998 The Central Government have considered the statutory complaint of Lt. Gen. R.S. Kadyan (IC-13153) Inf. against Govt. decision about "deferred" grading awarded to him in the Oct. 96 Spl Selection Board.

2. After going through the facts of the case and the recommendation of the COAS, it is considered that the arguments furnished by the General officer against the award of "deferred" grading to him are not tenable. The fact that for the period of his stay on deputation at Paris, the officer must have furnished "adverse career certificate" has been taken into consideration and hence it is considered that his late promotions to the higher ranks were in order and were in no way discriminatory, unfair or mala fide against him. However, it is also noted that at the time of giving the "adverse career certificate", the stipulation of 1 year minimum service as Corps Cdr. for promotion to the rank of Army Cdr/VCOAS was not there and hence the officer could not have taken that into account. In the light of the same and to meet the ends of justice, the Central Government in consonance with the prayer of the officer in para 23(b) and the recommendation of the COAS agrees to grant him waiver of 6 months in terms of Ministry of defense letter No. 19(24)/96/D(MS) of 19th Nov., 96 for his consideration for promotion to the rank of Army Cdr/VCOAS.

By Order and in the name of the President

Sd/-

(A.J.S. Sahney)

Director (MS)

3. The petitioner has contended that he was fit in all respects for appointment to the post of Army Commander. Even respondent No. 2 had recorded in his ACR written on or after 27.2.1998 that petitioner was fit in all respects. It is also not disputed that only post to which the petitioner can be promoted to as Army Commander/VCOAS. It has been contended by the petitioner that having found the petitioner fit in all respects on or after 27.2.1998, the petitioner being the senior most Lt. General in the Indian Army ought to have been appointed as Army Commander.

4. Lengthy arguments were addressed with regard to the petitioner's posting as Military Attache in Paris. respondents took the stand that the non-picking up of the rank by the petitioner as Major General and Lt. General, when his promotion was due, has not been effected unfavourably on account of his posting abroad by the respondents. Though, there was force in the arguments of the learned

Counsel for the petitioner, Mr. R.K. Anand, that delay in picking up the rank has prevented the petitioner from gaining further experience and exposure in staff appointment.

5. As a matter of fact, Annexure "C" are the true copies of the correspondence exchanged between the petitioner with Lt. General S.K. Sharma and the message from the Indian Embassy, France, which clearly showed that the petitioner was impressing the respondents for his posting back to India. Petitioner in the letter addressed from Paris to Lt. General S. Padmanabhan, which is at page 48 of the paper book, has desired the respondent to relieve him from his assignment in Paris. There is another letter dated 7.7.1995 from the Indian Ambassador, Paris to the Chief of the Army Staff wherein Indian Ambassador has acknowledged that the extended stay of the petitioner was on account of his fate to the post in Paris. The letter of the Ambassador is reproduced below:

Ranjit Sethi Ambassador AMBASSADE DE L'INDE PARIS Dear General Ji,

I would like to thank you for agreeing so readily to the slight adjustment that I requested in the move from Paris of Brig. Raj Kadyan.

As I mentioned, my request directly to you was a sign of the importance that I attach to some of the tasks Brig. Kadyan has undertaken as Military Attache.

I believe that I should be emphasised that the initiative for the delay in his departure was purely mine, in no way did the officer seek it. Indeed he has been ready to move from Paris for a long time, having repatriated his daughter in July last year in preparation for his move. The extended stay of Brig. Kadyan has been entirely due to his own move being linked to the fate of his post in Paris. As you might know, the abolition of the post, which was intended at the time I arrived in Paris, was unacceptable to me.

You will allow me to add that I have found Brig. Kadyan an out-standing officer and a valuable asset to this Mission at all times.

With kind regards,

Yours sincerely,

Sd/- (Ranjit Sethi)

6. Normally, the "adverse career certificate" is obtained from the officers, who go for foreign assignment. It is the case of the petitioner that no "adverse career certificate" was furnished by him and, Therefore, the posting at Paris ought not to have any adverse impact on the career prospects of the petitioner. However, learned Solicitor General, Mr. Santosh Hegde, appearing for the respondents, categorically stated that his tenure at Paris has got no adverse impact to deny the petitioner his promotion as Army Commander. However, petitioner has contended that while he was posted as Military Attache in Paris, he was considered for the post of Major General on 24/25.4.1992 wherein he was approved for being promoted as Major General and the said decision was

communicated to him on 7.7.1992. However, he was promoted to the post of Major General on 1.9.1995 after the petitioner was repatriated from Paris.

7. The Selection Board for selecting Lt. General met on 21.10.1994, the decision of which was communicated to the petitioner on 21.2.1995. The case of the petitioner was deferred on the ground that "criteria appointment was lacking". Again on 21/22.4.1995 the appointment of the petitioner as Lt. General was deferred on the ground that "not adequately exercised in criteria appointment". Similarly, his case was again deferred on 11/13.10.1995 and on 24/25.4.1996. Although, on 31.10.1996 the petitioner was recommended to be promoted as Lt. General by the Recommending Authority, however, for certain irrelevant consideration and mala fide reasons the case of the petitioner was deferred by the Central Government to accommodate one Major General B.S. Malik who was made a Lt. General.

8. Mr. Anand, learned Counsel appearing for the petitioner, has contended that petitioner's case in the Selection Board held on 30.10.1996 could be deferred for consideration if the material before the Board was not adequate or sufficient whereas in the case of the petitioner there was adequate and sufficient material before the board to enable it to take a decision. Learned Counsel for the petitioner has contended that once a decision was taken by the Selection Board unanimously approving the promotion of the petitioner as Lt. General, Government can only accept the recommendations or reject it but the Government had no power to defer the decision upon the recommendations of the Selection Board. Counsel for the petitioner further contended that the decision of the Central Government to defer the decision on the recommendations of the Selection Board was to benefit and accommodate Major General B.S. Malik. It was argued that the Central Government wanted to delay the consideration of the appointment of the petitioner only to help Major General B.S. Malik because if both the petitioner and Major General B.S. Malik had been promoted, petitioner would have picked up the existing vacancy being senior to Major General B.S. Malik. After selection of the petitioner by the Selection Board as Lt. General, according to the petitioner, his case having been deferred by the Central Government was unprecedented in the history of the Army.

9. On 8.3.1997 the petitioner submitted an application to the respondent No.3 Military Secretary seeking review of the Government decision of changing his grading from "approved" to "deferred". This letter dated 8.3.1997 is to the following effect:

From : IC-13153H Maj., Gen. RS Kadyan, VSM Inspector General HQ IGAR (North) C/o 99 APO To : The Military Secretary MS Branch Army Headquarters DHQ PO New Delhi - 11 00 11. (Through Proper Channel)
PROTECTION OF CAREER INTEREST

Sir,

1. I am surprised to learn that I have again been deferred in the Special

Promotion Board held in Oct./Nov., 96. As far as I know, I had met all the laid down criteria for promotion board and cannot understand the grounds based on which I have been deferred. Whatever dispensation had been granted was within the existing rules and based on precedence.

2. This delay will further put off the final decision on my promotion which has already been long delayed for no fault of mine. It is Therefore requested that the decision may please be reviewed.

Yours faithfully,

Sd/-

C/O 99 APO

(RS Kadyan)

8th Mar., 97

10. No reply till date has been received by the petitioner. The petitioner also submitted an application with the same contents to the Chief of Army Staff but no reply was also received from respondent No. 2 as well.

11. On 10.4.1997 petitioner was again considered by Special Selection Board to the post of Lt. General. The petitioner was conveyed decision on 8.7.1997. The grievance of the petitioner did not end here. In the meanwhile, on 18.11.1996 respondent No. 1 issued a letter/instructions stipulating that henceforth an officer to be eligible to become Army Commander/VCOAS should have commanded a Corps for at least one year. This was the first time that such a stipulation had been introduced in the army and made applicable with immediate effect. The petitioner contended that said condition was brought in order to affect the petitioner to ensure that the petitioner became ineligible for promotion/appointment as Army Commander when he became due for it on 1.3.1998 by virtue of his seniority. Aggrieved by the new stipulation of one year experience, petitioner filed statutory complaint dated 5.10.1997 u/s 27 of the Army Act, inter alia, praying for review of the "deferred" grading awarded by the Government in October, 1997 or in the alternative waiver of the stipulation of commanding a Corps for minimum one year as an eligibility criteria for appointment as Army Commander. Government of India vide its decision dated 16.3.1998 has granted waiver of six months to the petitioner for his consideration for promotion to the rank of Army Commander/VCOAS.

12. Mr. Anand has contended that on or about 27.2.1998 ACR of the petitioner was recorded by the Chief of the Army Staff and he was duly found fit for promotion to the next higher rank/appointment. He contended that barely two-three days after the petitioner was recommended for promotion by respondent No. 2 on 2.3.1998, a proposal was mooted by respondent No. 2 for the appointment/promotion of the Army Commander, Eastern Command for filling up the vacancy that arose on 1.3.1998, wherein respondent No. 2 recommended the

name of respondent No. 4 for promotion/appointment to the post of Army Commander, Eastern Command.

13. Petitioner approached this Court on 27.3.1998 on which date while issuing show cause notice this Court on the application for stay made the following order :

"....It is made clear that if any appointment is made to the post of Army Commander (Eastern Command), the same shall be subject to the result of the writ petition....."

14. It seems that aggrieved by this order where stay was not granted by the learned Single Judge of this Court, the petitioner moved the Division Bench of this Court by filing LPA No.149/98 and on the said LPA the following order was passed by the Division Bench on 3.4.1998:

"Before us, it is stated by Mr. Nagar on instructions that the statutory complaint of the appellant has been accepted and the condition imposed by 18.11.1996 letter has been waived and the effect of this is that Command of a Corps requirement is not to be applied to the case of appellant before us.

It is also stated before us that name of the appellant and respondent No. 4 is before the Appointment Committee of Cabinet and the matter is being considered there. It is not disputed that respondent No. 4 is officiating as Army Commander, Easter Command.

We are of the view that in the facts and circumstances of the case, as the writ petition is to come up for hearing on 20.4.1998, till disposal of the writ petition, it would be appropriate that no appointment is made and respondent No. 4 is permitted to continue in an officiating capacity.

With aforesaid observations, we dispose of the appeal.

A copy of this order be given dusty to Counsel for the parties."

15. Thereafter respondent No.1-Union of India went in Special Leave to appeal No. 7285-7287/98 where notice was issued and decision of Division Bench was stayed. Mr. Anand has further contended that for the first time names of more than one officer was considered at the time of making the recommendations for appointment/promotion to the post of Army Commander in the Indian Army. He has further contended that in the past only name of senior most officer was forwarded and recommended for appointment/promotion as Army Commander. He has contended that even the present Chief of Army Staff, Vice Chief of Army Staff and all Army Commanders were similarly promoted/appointed by sending one name, who was the senior most eligible officer when vacancy so arose and in the present case a departure was made from the consistent practice and past precedent solely with a view to favor respondent No. 4. Mr. Anand has also contended that petitioner was senior most eligible officer so there was no reason why the junior officer should be considered and recommended by respondent No.

2.

16. Petitioner further contended that when the statutory complaint was filed by the petitioner, it was respondent No. 2 who had favourably recommended the same to respondent No. 1 and when the said statutory complaint was pending decision, respondent No. 2 ought not to have recommended the name of the respondent No. 4 and, Therefore, the impugned decision dated 25.3.1998 wherein respondent No. 1 was pleased to recommend to the Appointment Committee of the Cabinet the name of respondent No. 4 for promotion/appointment as Army Commander, Eastern Command in supersession of the petitioner was bad in law. The said recommendation was unprecedented and unheard of in the army and was in clear violation of instructions, guide-lines, norms and precedents. The petitioner has contended that the appointment of respondent No. 4 as Army Commander of Eastern Command is mala fide and illegal and that decision is unprecedented and will have a demoralising affect on lower formations of the army. Mr. Anand has further contended that principle of seniority, which has been unfailingly followed by the respondents, has given a go-by and there has not been a single incident where the senior most Lt. General has not been appointed as Army Commander when he was otherwise found fit in all respect.

17. Petitioner is aggrieved as being the first such officer to be superseded for appointment/promotion to the post of Army Commander. Mr. Anand has contended that it is the rule of seniority subject only to fitness which has been consistently, uniformly and invariably followed for promotions to the post of Army Commander and for the first time the respondent has ignored, flouted and contravened the well settled and healthy practice to benefit respondent No. 4. He has contended that the petitioner has a right to be promoted as Army Commander, Eastern Command in preference of anyone and everyone else being the senior most officer fulfilling all the eligibility criteria. Learned Counsel for the petitioner has contended that it was pre-determined and concerted effort for extraneous reasons and considerations to somehow or the other appoint/promote respondent No. 4 in blatant and clear contravention and in complete disregard to the uniform and consistent precedents and norms.

18. Mr. Hegde, learned Counsel appearing for the respondents, has contended that there are 57 posts of Lt. General. 36 belong to General cadre, 11 are Corps Commander, 6 Army Commander and one Vice Chief of the Army Staff. Although, the stand of the respondent is that the petitioner was recommended for promotion to the rank of Lt. General by the Special Selection Board in October, 1996, however, Special Selection Board was only recommendatory body and the final authority had the inherent power to modify, change or repeal the recommendation of the Selection Board.

19. At the outset, learned Solicitor General, Mr. Hegde, has contended that delayed repatriation of the petitioner from Paris to India have not affected the petitioner's case for consideration for appointment as Army Commander. He has

contended that the petitioner could not have been considered for appointment as Army Commander prior to the selection made on 1.3.1998 as the vacancy of Army Commander took place on 1.3.1998 on which date his case was considered appropriately. Mr. Hegde has argued that assuming that the petitioner was appointed as Lt. General in February, 1996, it was essential for him to command a Corps for one year and then he would have been eligible for consideration for the post of Army Commander only in February, 1997. He has contended that during 1997 vacancy for the post of Army Commander arose on 1.4.1997 on retirement of Lt. General S.K. Sharma, GOC-in-C, ARTRAC and the chain vacancy on 1.10.1997 on the retirement of Gen. Roy Chowdhury and for the said two vacancies Lt. General Vs. Oberoi and Lt. General Surjit Singh Sangra were duly considered and appointed as Army Commander who were of 1961 batch and were senior to the petitioner. The next vacancy, which became available, was in March, 1998 on the retirement of Lt. General Ravi Eipe, Eastern Army Commander and for the same, petitioner as well as respondent No. 4 were considered.

20. He has further contended that the petitioner never asked for his repatriation until 11.3.1995 and the letter was not addressed to the proper authority and has referred to the letter dated 12.4.1994, which is at page 45 of the paper book. Mr. Hegde controverted the argument of the petitioner that the petitioner was approved by the Special Selection Board held on 31.10.1996 for the post of Lt. General after he was given waiver and dispensation in the adequately exercised period by the Chief of the Army Staff and has contended that as per para-108 (e) of the Regulations for the Army (Revised Edition), 1987 the Central Government has inherent powers to modify/review/approve with variation or repeal the recommendations of the Selection Board. He has further contended that the Board was only a commendatory authority and it was not necessary that all the recommendations of the board should be accepted by the Appointing Authority. He has further contended that the foundation of the argument of the learned Counsel for the petitioner was erroneous as the letter dated 6.5.1986 only applies to the posts for consideration for promotion to the rank of Lt. Colonel and, as a matter of fact, petitioner is governed by the letter dated 27.6.1996, which lays down the period of criteria appointments in the rank of Major General. The said letter lays down that a Major General has to have a tenure of 18 months in the rank subject to earning two confidential reports. It was further contended that the said letter does not talk of any waiver. The power to grant waiver for inadequately exercised period vests with the Central Government. The Central Government did not agree with the recommendation of the Special Selection Board as the petitioner was not adequately exercised and his second report was not initiated by the Initiating Officer. No fault or mala fide, Therefore, could be attributed with the decision of the Central Government in not agreeing with the recommendations of the Selection Board, Therefore, Mr. Hegde contended that the contention of the petitioner that he ought to have been promoted as Lt. General as per the recommendations of the Selection Board dated 31.10.1996 is devoid of any merit.

21. Let deal with the arguments advanced by the learned Solicitor General in the light of the notes in the files of respondents which will show that the stand is totally inconsistent with the stand of Army HQrs. There is some force in the argument of the petitioner that his stay in Paris for no fault of his has come in his way. File No. 8(12)/94/D(MS) regarding selection Special Selection Board-Promotion of General Cadre Officers to the rank of Lt. General has been shown to this Court. The Special Selection Board in its meeting held on 21/22.4.1995 considered the cases of 34 officers in the rank of Major General of 1960,1961 and 1962 batches for promotion to the rank of Lt. General in the General Cadre. Petitioner's case was deferred on the following ground:

"He has been Military adviser in the Indian Embassy at Paris since June, 1991. On return to India, he will be promoted to the rank of Maj. Gen. and after being adequately exercised in Command of a Division, he will come up for consideration for promotion to the rank of Lt. Gen."

Same note is signed by the then defense Secretary on 17.6.1996. In the aforesaid file Major General B.S. Malik was given grading "D" which means "unfit". On the note of the defense Secretary dated 21.7.1995 Cabinet Secretary on 21.7.1995 recorded:

"2. The Appointments Committee of the Cabinet has approved the gradings "B" (fit) assigned to Maj. Gen. S.S. Grewal and Maj. Gen. R.P. Nanavatty and "Z" (unfit) to the 10 officers as indicated in Annexure-I. The ACC has also approved the cases of remaining 22 officers as deferred/withdrawn."

Even the note of the defense Secretary dated 16.12.1995 in the aforesaid file shows that the petitioner as well as Major General B.S. Malik were deferred on the ground that they have not adequately exercised in command of a Division. In the Annexure attached with the note of the Cabinet Secretary dated 29.12.1995 again the cases of the petitioner and Major General B.S. Malik were deferred. This is how Mr. G.S. Tiwari, Director Dy MS (X) of respondent in his note dated 28.5.1996 with regard to Major General B.S. Malik for consideration of his promotion as Lt. General has recorded:

"Major General B.S. Malik (Sl. No. 2) Consistency in performance is the key factor to be kept in mind while clearing an officer for promotion. Out of the two reports earned by the General Officer in the rank of Maj. Gen., the first one (07/94 -06/94) is weak with three 7s in PQ/DP. The pen picture given by the IO in this report is also lukewarm. It reads, inter-alia "professionally well qualified, conscientious and dedicated, he has good knowledge at tac level". The last report 07/93 - 06/94 earned by him in the rank of Brig As MA, UK is also weak with three 7s in PQ/DP. Officers of his batch with similar profile have not been cleared for promotion earlier. Hence, the grading of "Z" (unfit) In this case is appropriate which may please be accepted by the Govt. "

The Officiating defense Secretary on 14.6.1996 on the basis of the recommendation of the Special Selection Board held on 24/25.4.1996 granted

grading "Z" (unfit) to Major General B.S. Malik. On the same day a note was sent by the Officiating defense Secretary to the Appointment Committee of Cabinet (in short "ACC") to obtain the approval of the ACC to the proceeding of the Special Selection Board. On 19.7.1996 the ACC approved the grading as recommended by the respondent. As a matter of fact, thereafter the matter was sent to the Military Secretary where Military Secretary again reiterated that the grading "Z" (unfit) was rightly granted to Major General B.S. Malik vide letter dated 13.11.1996 from Military Secretary Branch whereas the petitioner, according to the said note, was recommended grading "fit" and this is how the Military Secretary, i.e. Lt. General M.R. Sharma, has recorded:

"Maj. Gen. R.S. Kadyan (Sl. No. 1)

3. As per Para 77(a) of SAO 3/S/89, MS Branch can call for Special CR to assess an officer's fitness for promotion. Accordingly, Special CRs have been called for in the past in respect of officers of the entire batch or individual officers depending on merit of each case. We had called for the Special CRs of the officers of the entire 1962 batch of General Cadre up to 09/94 before Special Selection Board for this batch was initially held in Oct., 94.

4. As regards Maj. Gen. R.S. Kadyan, his promotion to the rank of Maj. Gen. and placement in Command was delayed in organisational interest. He was retained as MA France even after completion of the 3 years tenure because a protracted debate was on with the MEA on retention or otherwise of a Brig as MA in France and his juniors were promoted and placed in Command before him. On repatriation from Paris, he was made IGAR (N) w.e.f. 3 Sep. 95. As the officer was promoted late due to organisational constraints it is only fair that his career interest are protected by raising a Special CR for the period 1 July 96 to 9 Oct. 96 under Para 77(a) of SAO 3/S/89. The said Special CR was initiated by RO under the provisions of Para 73 of SAO 3/S/89 as Maj. Gen. Kadyan did not have 90 days physical service during that period under the IO, Lt. Gen. S.S. Grewal who was on leave from 12 Aug., 96 to 07 Sep., 96.

5. Maj. Gen. Kadyan had completed 14 months against the prescribed 18 months in the criteria appointment as on 31 Oct., 96 (date of holding Special Selection Board). The shortfall of 4 months in AE period has been waived by the Chief of the Army Staff as was done in the case of a number of other officers. Some of the General Cadre Officers who were given similar dispensation are:

Name of the Officer Shortfall in AE period (a) G.S Brar 3 months 28 days" (b) B.N Kapur 3 months 26 days. (c) R.K Sawhney 3 months 29 days. (d) Gurpreet Singh 4 months. (e) P.K Puri 3 months 4 days. (f) S.C Chopra 3 months 5 days.

6. Thus the officer has been considered and graded by Special Selection Board after following all the laid down procedure.

The aforesaid note is significant to decide the controversy. If the petitioner's promotion was not deferred, he would have become Lt. General in 1996 itself, although Major General B.S. Malik was promoted as Lt. General in spite of

grading "unfit" to him by Special Selection Board. Surprisingly on 23.11.1996 one fine morning defense Secretary recommended that Major General B.S. Malik's grading may be changed and he may be graded "B" (fit) and in the case of the petitioner his grading from "Fit" was recommended to be "deferred" and this is how the defense Secretary has recorded in the note:

"The Gen. Officer has not completed the laid down "Adequately Exercised" period of 18 months. In fact, the two reports which were considered for his promotion cover only a period of 11 months. Though in the past, some officers were given waiver up to 3/4 months on this count but the same was in order to provide opportunity to junior officers approved for promotion. This situation does not exist in his case. The waiver of 7 months in "AE" in any case is not considered in order. The ground furnished by the Army HQrs. that the officer had to overstay in France as Military Attache which led to delay in his promotion has also been examined in the Ministry but the same was not found satisfactory.

In case of reports also, it has been noted that his second report covering period of 3 months was a special report initiated by RO directly as IO was not eligible to write the CR and was on leave. This was also carefully examined and it is considered that we must not give any impression that a special report was not initiated just to favor an officer.

It is Therefore recommended that the grading "B" (C&S) (fit) be revised to "D" (Deferred) in this case. He should be considered on completion of AE."

This note was sent to the Appointment Committee of the Cabinet again and in a hurried manner defense Secretary on 23.11.1996 sent a note to the ACC through the Cabinet Secretary recommending the petitioner to be graded as "Deferred" and Major General B.S. Malik be empanelled to the promotion to the rank of Lt. General as Major General B.S. Malik was to superannuate on 30.11.1996. On 30.11.1996 itself the ACC approved the revised grading and the petitioner was given the revised grading of "Deferred" from "fit". As a matter of fact, it was the defense Minister who recommended that the ACC should reconsider the decision in respect of the grading awarded to Major General B.S. Malik from "Deferred" to the grading "Fit" in his case and how the case was dealt with is an eye opener. The defense Secretary records in para-8 of the note dated 10.1.1997 for Appointment Committee of the Cabinet :

"Since many officers junior to Maj. Gen. B.S. Malik in 1962 batch have been promoted to the rank of Lt. Gen. and a recommendation was made to ACC to revise the grading to "B" (fit) in his case, RM has also approved grant of extension of his service by 3 months, or till the declassification of the result of the special selection board held on 31.10.96, whichever is earlier."

As a matter of fact the three months extension, which was given to Major General B.S. Malik in service was to expire on 28.2.1997 and letter was written by the Additional Secretary, Ministry of defense dated 11.2.1997 that the ACC approval was still awaited in the case of Major General B.S. Malik. However, in

the meanwhile on 24.1.1997 a letter was written from the Cabinet Secretary to the defense Secretary that the ACC has recommended that there was a tendency on the part of some Ministries to continue an officer beyond his/her superannuation in anticipation of ACC approval. Continuing an officer beyond the age of superannuation, without prior approval of the ACC, is a violation of the rules. The ACC has, Therefore, desired that such a tendency on the part of the Ministries should be curbed.

On 25.2.1997 again the defense Secretary wrote to the Cabinet Secretary that the ACC approval be obtained for promotion of Major General B.S. Malik to the rank of Lt. General as he was to retire on 28.2.1997 on extension of three months period. On 26.2.1997 the ACC approved the empanelment of Major General B.S. Malik to the rank of Lt. General. On the other hand, Military Secretary's Brach on 4.3.1997 wrote to the Ministry of defense that Ministry of defense while approving the proceedings of the Special Selection Board for General Cadre held on 31 Oct.,96, have altered the grading in respect of Maj. Gen. R.S. Kadyan, VSM from "B" (fit) to "Deferred" and this is how the letter goes further :

"4. Min. of Def. is requested to intimate the reasons for altering the grading of Special Selection Board in the case of Maj. Gen. RS Kadyan, VSM to "Deferred" before we intimate the result to the General Officer. This will enable us to meet the future requirement about the officer."

Strangely, no reason whatsoever was communicated. On 28.4.1997 the petitioner represented to the second respondent as under:

"2. I submit that no action has so far been taken on my request for review of the grading "Deferred" awarded to me by the Government in the Special Selection Board held on 31st Oct., 96. Nor have any reasons been communicated me for such deferment. It is learnt my name has again been included in the Special Promotion Board held in April, 97, results of which are awaited.

3. After the convening of the Promotion Board in Oct., 96, the Government of India, Ministry of defense, vide their letter No. 19(24)/96/D(MS) dated 18 Nov., 96, have laid down a new stipulation to the effect that to become eligible for appointment as Army Commander/VCOAS, an officer should have commanded a Corps for at least one year. In the normal course, based on merit-cum-age factor and subject to my being found fit for promotion, should be eligible to become an Army Commander on 1 Mar., 98. If I had been deferred in the Oct., 96 Promotion Board, and subject to may having found fit for promotion, I would, in all probability, have been appointed Corps Commander before 28 Feb., 97, thus completing one year in that post before becoming due for promotion to Army Commander on 1 Mar., 98. However, the deferment/delay would make me subject to the new stipulation and will have an adverse effect on my career.

4. Since the delay in my promotion has been caused for reasons beyond my control and for no fault of mine, I earnestly request that in order to protect my

legitimate career interest, I may please be granted a waiver from the stipulation of commanding a Corps for at least one year as laid down vide Government of India letter No. 19(24)/96/D(MS) dated 18 Nov., 96 as and when required."

Again MS Branch on 29.8.1997 wrote to the Ministry in the following terms:

"1. Reference preceding notes.

2. This note pertains to the case of Maj. Gen. R.S. Kadyan, IGAR (N) whose grading was changed to "Deferred" by the Min. of Def. against the "B" (Fit) recommended by the Special Selection Board held on 31 Oct 96. The Min. of Def. vide their ID No. 2438/MS/JS(G)/96 dated 8 Nov., 96 (Flag A) had observed that the officer did not fulfill the tenure criteria for becoming AE and Therefore should be "Deferred". The MS Branch in their comments forwarded vide note No. 36423/GC/SSB/MS(X) dated 13 Nov., 96 (Flag B) had provided detailed justification for the grading of the Special Selection Board as also the particular circumstances obtaining in the instant case. Cases of officers granted similar dispensation were also brought out in the reply.

3. Since the four months waiver granted to Maj. Gen. (now Lt. Gen.) Gurpreet Singh was earlier accepted by Govt. and more than adequate response was made to para 2(I) of Min. of Def. ID No. of 8 Nov., 96, Min. of Def.'s reply vide note 4 ante to our note 3 ante is considered inadequate. Min. of Def. may kindly examine this aspect and give us suitable reasons for the Gen. Officer's "Deferred" grading so that a reply may be given to him."

As a matter of fact, Under Secretary to Ministry of defense has recorded on 6.3.1997 :

"2. Army HQrs. have requested for reasons for altering the grading of Special Selection Board in respect of Maj. Gen. R.S. Kadyan, VSM from "B" (fit) to "deferred" before they intimate the result to the Gen. Officer. They have also stated that the COAS had granted waiver of 4 months and 3 days in AE period in respect of the Gen. Officer who had two Command reports on record. They have further stated that the COAS had granted a similar waiver in cases of so many other officers in the past which was accepted by the Government."

This is how the career prospects of the petitioner has been dealt with at the desk of the Ministry of defense by JS (G) on 13.3.1997:

"We are not answerable to AHQ. We had raised observations on different officers seeking clarification. Encl. 98 A refrs. AHQ's replies were received and considered. Obviously those were not found satisfactory and hence the Board's proceedings were not agreed to in case of Maj. Gen. Kadyan. I do not find any reason to give any further response to AHQ."

Same was reiterated by Under Secretary of the Ministry on 31.3.1997 in the following terms:

"Notes 139 and 140 will recall the case.

Since no response was given to Army HQrds. with reference to their note dated 4.3.97 (enclosure 135A), MS has requested to be apprised of the reasons for revising the grading in respect of Maj. Gen. R.S. Kadyan. A copy of an application received from Maj. Gen. Kadyan has also been placed in the linked file. Maj. Gen. Kadyan, in his application, has requested for review of the decision by the Government.

As approved by defense Secretary in note 140 ante, no reply was considered necessary to Army HQrs. with reference to their note dated 4.3.97. As regards the application filed by Maj. Gen. Kadyan, we have taken a very conscientious decision, keeping in mind the rule position, to revise the grading. Therefore, no review in the Government decision is called for.

It is for orders whether a reply need be sent to the Army Hqrs. or we may simply ask them to apprise the officer of the rule position."

What a way to deal with the file in the Ministry would be seen from the note dated 3.9.1997 prepared by the Under Secretary, which has gone up to the defense Secretary :

"This is regarding approval of Special Selection Board proceedings held in October, 96 in respect of General Cadre officers. Govt. had approved the Board proceedings subject to revision of grading from "B" (Fit) to "D" (Deferred) in respect of Maj. Gen. R.S. Kadyan and "Z" (unfit) to "B" (Fit) in respect of Maj. Gen. B.S. Malik. MS Branch vide their note at encl.135-A and note 3 in the linked file desired to know the reasons for revision of grading in respect of Maj. Gen. R.S. Kadyan. The matter was examined vide notes 136 to 140 ante and with the approval of defense Secretary, it was decided that no formal reply need be sent to Army HQrds and their attention be drawn to para 2(i) of ID Note No. 2438/MS/JS(G)/96, dated 8.11.96 under which observations were made on MS Branch in respect of certain cases including that of Maj. Gen. R.S. Kadyan.

Now After a gap of four months, MS Branch have again raised this issue vide note 5 in the linked file. They have stated that waiver of four months in a similar case of Maj. Gen. (now Lt. Gen. Gurpreet Singh was earlier accepted by the Government and that more than adequate response was made to MOD ID Note dated 8.11.96, MOD reply vide note 4 on their linked file was considered inadequate. They have Therefore requested that this aspect be examined again and suitable reasons be given so that a reply be given to the officer.

We have already examined this issue earlier and there are no justifiable reasons to reopen this case. The General Officer has been considered in the April, 97 Board and graded fit for promotion. There is no need to send a reply to Army HQrs. or to the officer."

22. Mr. Hegde next contended that there are two Circulars which govern the appointment of Corps Commanders and Army Commanders. These Circulars are dated 20.10.1986 and 16.10.1992. Learned Solicitor General contended that

Circular dated 16.10.1992 is complementary to the Circular dated 20.10.1986 since it refers to the mode of appointment of Army Commander and the latter Circular is in the nature of executive instructions which is neither inconsistent with the Circular dated 20.10.1986 nor with any other statutory provisions on the subject and hence has force of law. Mr. Hegde has further contended that the same has been issued while exercising executive powers under Article 53 read with Article 73 of the Constitution. It has been further contended that the latter Circular was followed and 30 Lt. Generals were not appointed as Corps Commanders because of the policy decision dated 16.10.1992 which lays down four years residual service for the appointment of Corps Commanders and, as a matter of fact, the petitioner has also been benefited on account of the said letter/Circular. Mr. Hegde has further contended that if 1986 Circular was to apply, then all the Corps Commanders would be eligible for the post of Army Commander without any reference to seniority inter se and if 1992 Circular is to be applied then two senior most eligible General Officers commanding a Corps would be considered for the post of Army Commander. Learned Solicitor General further contended that both the Circulars if read together in entirety clearly show wherever seniority had to be given weightage if specifically says so and has referred to para-7 (e) of the Circular dated 16.10.1992 in this regard. He has further contended that if the seniority was the only criterion for appointment to the post of Army Commander then appointment committee of Cabinet and Chief of the Army Staff have no role to play and appointment to the rank of Army Commander would be made mechanically without any application of mind and in depth consideration by ACC would be rendered infructuous. Mr. Hegde has further contended that the cases of the petitioner and the respondent No. 4 were considered in entirety by the ACC and ACC selected respondent No. 4 for the appointment of Army Commander.

23. The inconsistency in the arguments of the respondents stems from the fact that it is not only seniority alone of an officer which is important, the words are "senior most officer who is otherwise fit", Therefore, what has to be seen is that officer whose name has been recommended by the Board is also fit in all respect or not.

24. Even according to the note of the Cabinet Secretary dated 27.3.1998 in File No. 6/7/98-CS(A) regarding appointment of Army Commander, Eastern Command, which was sent to the Prime Minister for approval, has mentioned only three criterion for appointment of GOC-in-C/VCOAS, i.e. (i) The Officers should be fit in every respect for such appointment; (ii) He should have a minimum of two years service left before the retirement age from the date of appointment as the Army Commander/VCOAS; and (iii) He should have successfully commanded a Corps for at least one year. The Cabinet Secretary while sending the profile of the petitioner to the Prime Minister, has stated that the petitioner is the senior most officer who meets the requirement of residual service of two years, but he has not commanded the Corps for at least one year and on his submission of a statutory complaint to the Government, requesting

for waiver in this requirement, the Raksha Mantri, on the recommendation of the Chief of the Army Staff, has granted a waiver of six months and, thus, he has also become eligible for appointment as Army Commander. Thereafter while sending the profiles of the two senior most officers, it has been mentioned with regard to the petitioner in the said note:

"Lt. Gen. R.S. Kadyan-He was commissioned in the Rajputana Rifles regiment of the Infantry in June, 1962 and has held various Command, Staff and Instructional appointments. He picked up the rank of Lt. Gen on 24th September, 1997 and started functioning as regular Corps Commander. The General Officer has a balance exposure in Command, Staff and Instructional appointments. However, his Staff experience in senior ranks from Brig. onwards is only limited to that of Military Attachee. He has no experience of working in Northern Command and Army Headquarters. Since 1980 he has worked for about 4 years in field areas. It also appears from his records that he did not participate in 1962,1965 operations. In his report of 1971, when he participates in the operations, there are some advisory remarks both by the IO and RO as below :

".....should be bold and aggressive in operationsshould lead his men personally to difficult objectives." (remarks by IO).

".....his performance as a Rifle Coy Commander in the recent operations has been satisfactory though not up to the expected level."

(remarks by RO).

"The overall profile of the officer especially in senior ranks has been clearly above average. All the Reporting Officers gave him above average ratings with sprinkling of outstanding ratings.

As regards CI operations, the officer has handled the same as IG North, Assam Rifles, but he has not had experience of commanding a regular Army Division. His experience as Corps Commander is also limited. He is a graduate of Staff College and has also done higher command courses. He is recipient of Chief's Commendation, VSM-and AVSM. He is medical category SHAPE-1."

25. With regard to the profile of respondent No. 4, the same note stated that:

"Lt. Gen. HRS Kalkat-He was Commissioner in Maratha Light Infantry in June, 1962. He became Lt. Gen in Feb., 1996 and since then he is commanding 33 Corps in the Eastern sector. The general officer has rich experience in Command and Staff appointments. He has worked both in Eastern and Northern Commands including high altitude areas. Since 1982 he has worked for about 4 years in remote field areas in the Eastern sector, especially the border areas with China. He has also held important Staff assignments in Military Operations, Infantry and Staff Duties, Directorates in the Army Headquarters. His Instructional experience is, however, limited to junior ranks only and he has practically no experience of CI Operations.

The officer did not participate in 1962 and 1965 Operations. His report of 1971, the year in which operations took place is quite laudatory. The overall profile of the officer, especially in senior ranks has been clearly above average. All reporting officers have given him above average ratings with sprinkling of outstanding ratings. He is a graduate of Staff College and has also done Senior Commands and NDC Courses. He is also a recipient of AVSM. He is medical category SHAPE-1."

26. Para-5 of the aforesaid note is relevant, which reads as under :

"5. The Chief of the Army Staff is of the view, which has been shared by the Ministry of defense also, that between the two officers, Lt.Gen HRS Kalkat appears to have an edge insofar as experience in the main task of the army is concerned. Though Lt. Gen Kadyan is senior but his 1971 report is clearly inferior to that of Lt. Gen HRS Kalkat and also contains some advisory remarks. Lt. Gen Kalkat's Commands of Brigade, Division and Corps have also been in difficult areas for longer periods and his staff experience is also rich. Ministry of defense has also stated that as regards the awards, there is no direct nexus between the awards and the promotion."

27. On the basis of the aforesaid note, which was approved by the Raksha Mantri, the dossiers of the two officers were placed before the Prime Minister, who has accorded the approval for appointment of respondent No. 4, however, with the rider that Ministry of defense should bear in mind the Civil Writ Petition No.15297/98 (CWP No.1527/98) pending in Delhi High Court. Even the order of appointment of respondent No. 4 appointing respondent No. 4 as Army Commander was subject to the result of the writ petition.

28. As a matter of fact, a note dated 3.3.1998 in File No. A/45751/98/ARMY CDR/MS(X) was sent by the Joint Secretary, Ministry of defense, forwarding for approval the appointment of respondent No. 4 as Army Commander, the Minister of defense has noted on the said note that on the one hand, the Chief of the Army Staff has recommended on the statutory complaint of the petitioner for giving a waiver of six months of commanding a Corps and on the other hand he has sent recommendation of appointing respondent No. 4 as Army Commander. It was further stated in the said note by the defense Minister that normally, senior most officers, who are otherwise fit, are made Army Commanders. It is not understood as to on the one hand Chief of the Army Staff wants to give waiver of six months to the petitioner, how he has sent recommendation of depriving the petitioner from the post of Army Commander. Whether any other officer on the basis of his experience was denied the post of Army Commander in the past.

29. In the note of Cabinet Secretary dated 27.3.1998, it has also been mentioned as follows:

"I have given careful thought to the matter. In the normal course supersession at this level should take place only when it is unavoidable. However, since Lt.Gen

RS Kadyan is not only short of adequate experience of commanding the Corps but his report of 1971 also does not speak very highly of him; this Therefore tilts the balance in favor of Lt. Gen HRS Kalkat, though he is marginally junior inter-se. I am, Therefore, inclined to support the proposal made by the Ministry of defense for the appointment of Lt. Gen HRS Kalkat as the GOC-IN-C, Eastern Command on promotion. The COAS has made this proposal, approved by the defense Minister. In view of the urgency involved, I request the Prime Minister to approve the proposal. Approval of the Home Minister in ACC would be obtained ex-post-facto."

It looks somewhat strange as to without taking into consideration the note of the defense Minister dated 5.4.1988 wherein the then defense Minister had already made a note that on the one hand six months waiver has been granted in the adequately exercised period on the statutory complaint of the petitioner and normally senior most officer, who otherwise fulfills other eligibility criterion, is made the Army Commander and in view of the fact that Chief of the Army Staff has recommended waiver of six months in adequately exercised period of the petitioner then on what basis the petitioner should be denied from being promoted as Army Commander, the note of the Cabinet Secretary has taken into consideration some advisory remarks pertaining to 1971 regarding petitioner. How the note of the Cabinet Secretary could discuss the comparative merit of both the officers. It was some thing which had no precedent in the history of Indian Army. From the perusal of the files of the respondent it can be seen that never before a senior most officer, who was otherwise fit, was compared with other officer. This was in total disregard of past practice and precedent.

The cases as have been mentioned were of senior general officers namely Lt. General I.G. Khanna, Maya Dass and G.L. Bakshi, who missed promotion to the rank of Army Commander on comparative merit and weak profile. The note of the Joint Secretary (G) itself admits that in these cases there was no recommendation for promotion on account of their C.Rs. However, I will deal with their cases separately.

From the records produced by the respondents, it is evident that in past only name of senior most Lt. General was considered for promotion to the rank of Army Commander, in the vacancy caused due to the retirement of Lt. General Surinder Nath, a note was sent by the then Chief of the Army Staff dated 4.4.1995 wherein it has been mentioned that :

"A statement showing the eligibility of the General Officers in order of their seniority, up to the point of retirement of Lt. Gen Surinder Nath, PVSM, AVSM, ADC, VCOAS is placed opposite. It will be seen from the statement that Lt. Gen. V.P Malik, AVSM, Commandant defense Services Staff College Wellington will be the senior most eligible General Officer for the Army Commander's appointment on 1 July 95 in terms of two years residual service. Since Lt. Gen. V.P. Malik, AVSM has earned clear recommendations for promotion as Army Commander/VCOAS and has an Above Average career profile, I am of the opinion that there is

no need to analyze career profiles of other officers junior to him and are eligible for consideration for the appointment of Army Commander/VCOAS in terms of residual service."

In the case of Lt. General K.L.D'Souza at the time of appointment to the post of GOC-IN-C, Army Training Command after promotion of Lt. General S. Roy Chowdhury as Chief of the Army Staff on 22.11.1994, two senior most officers were considered for promotion namely Lt. General K.L. D'Souza and Lt. General S.K. Sharma. Lt. General S.K. Sharma was recommended for promotion/appointment as GOC-IN-C, ARTRAC. The reason for not appointing Lt. General K.L. D'Souza was that he was placed in low medical category.

Even on earlier occasion when on account of retirement of Lt. General F.N. Bilimoria, PVSM, GOC-IN-C Central Command, who retired on 30.6.1991, two senior most officers were considered namely Lt. General Vijai Singh and Lt. General DSR Sahni. It was recommended that if Army Training Command is not sanctioned then Lt. General Vijai Singh who was the senior most of the two, be appointed as GOC-IN-C, Central Command. Similarly, at the time of retirement of Lt. General V.K. Sood, Vice-Chief of the Army Staff, the post of Vice Chief of the Army Staff was required to be filled by respondent and two senior most officers, i.e. Lt. General Y.N. Sharma and Lt. General R. Sharma, were recommended and the service records of both the officers had been consistently above average and this is how it has been dealt with by the Chief of the Army Staff :

"It will be seen from the above that both the officers are suitably qualified and have the necessary potential to become Army Commanders backed by excellent career and performance profile. However, being the senior of the two and fit in all respects to become Army Commander, I recommend Lt. Gen. Y.N. Sharma, AVSM, VSM for the appointment of Army Commander."

30. The petitioner has contended that Major General B.S. Malik was given the promotion on 28.2.1997 and if that would not have been done, the petitioner being the senior most officer at that point of time would have been promoted in the vacancy which went to Lt. General B.S. Malik. The case of the petitioner is that his case was deferred only to accommodate Lt. General B.S. Malik in spite of the case of the petitioner being recommended by the Chief of the Army Staff as well as Selection Board and mischief was done by the Ministry which resulted in petitioner having less time in his exposure as Corps Commander. From the perusal of the records of the respondent I find that Lt. Generals Jameel Mahmood, S.K. Sharma, Roychowdhry, Arun Gautum etc. became Army Commanders even though they had less experience of commanding a Corps. I find force in the argument of the petitioner that comparative merit was not the requirement to be applied by the respondent and the general officers meeting the requirement of Army letter dated 20.10.1986 were promoted as Army Commanders on the basis of the seniority.

31. Fitness in every respect coupled with seniority is the criteria of appointment

to the post of Army Commander. Even the basis on which Lt. Generals I.J. Khanna, Maya Dass and G.L. Bakshi were superseded, was on the ground that these three general officers were not recommended for their promotion in the ACRs and they did not meet the criterion laid down in the letter dated 20.10.1986. The case of the petitioner was different as he was recommended in the ACR for promotion. The question is whether the respondents can go into the question of comparative merit to the post of Army Commander when the petitioner's career profile, experience, positive recommendation in the ACR makes him fully fit for holding the post of Army Commander, any other consideration which has gone in the process of denying that right to the petitioner, is not justifiable if the petitioner was eligible in terms of policy of the respondent dated 20.10.1986. More so, in view of the fact that respondents themselves have favourably considered the representation of the petitioner and granted a waiver by six months. Whether the petitioner stayed in Paris for a duration longer, cannot be used against the petitioner and same has not been used against the petitioner according to the stand of the respondents. As a matter of fact, the petitioner has placed on record his representation to the Army authorities that after expiry of three years he should have been repatriated and if he would have been repatriated after a period of three years, the petitioner would have gained additional exposure as Major General and then as Lt. General. As a matter of fact, the noting on the file that the petitioner gave willingness certificate is not correct from the perusal of the records. The petitioner while working-at Paris had worked directly under the control of Military intelligence and his communication and correspondence dated 12.4.1994 and 11.3.1995, which are at pages 45 and 48 respectively of the paper book, have completely not been considered.

32. I find some force in the argument of the learned Counsel for the petitioner that because of the forced over stay in Paris on account of public interest, as emphasised by the Indian Ambassador in the letter to the respondent the petitioner cannot be blamed for the same.

33. Let me now deal with the statutory complaint of the petitioner dated 5.10.1997 as most of points, which have been raised in the petition were taken up in the aforesaid statutory complaint by the petitioner. The statutory complaint was examined by the respondent and taking into consideration the totality of circumstances, it was suggested by the MS Branch of the respondent to the Chief of the Army Staff that the petitioner was not responsible for his extended tenure in Paris. It was further commented by the said MS Branch in para-19 of the Comments on the statutory complaint of the petitioner that the petitioner was recommended "B" Fit grading by Special Selection Board held on 31.10.1996. Ministry of defense, however, revised grading to "deferred". In para-20 of the said Comments, it was also admitted by the respondents that Ministry of defense had accepted the similar waivers granted to the officers of 1962 batch and it was for the first time that Ministry of defense questioned and did not agree to the waiver in adequately exercised period granted by the Competent Authority. In

para-21 of the said Comments on the statutory complaint, it was again admitted that the petitioner was considered by special selection board held in April, 1997 and the petitioner was approved for the rank of Lt. General on 8.7.1997. However, the petitioner could not be granted local rank because of stay for promotion of General Cadre officers to the rank of Lt. General imposed by High Court of Delhi in the case of Major General H.S. Bagga Vs. Union of India and Others and on the vacation of the stay the General officer was granted local rank of Lt. General on 24.9.1997 and acting rank of Lt. General on 1.10.1997.

34. It has been further admitted by the respondent in its Comments on the statutory complaint of the petitioner that it was the Ministry of defense which has revised the grading "B" Fit, recommended by the special selection board unilaterally, to "deferred". In para-23 of the said Comments, it has been specifically mentioned that petitioner could have been posted as GOC 15 or 16 Corps in early 1997. Then in the same paragraph, it has been mentioned that four other officers namely General S. Roychowdhury, Lt. General J. Mahmood, Lt. General A.K. Gautam and Lt. General S.K. Sharma, were considered and appointed as Army Commanders with less than a year tenure as Corps Commanders. This is how the Military Secretary (MS) Branch summarised:

"Hence, prima facie it appears that the delay in repatriation has been caused due to organizational constraints and not by individual requirement. Subsequent events of his promotion to the rank of Maj. Gen. and consideration for the next promotion and placement were all affected by this inordinate delay, thus bringing him now under the debar clause.

Keeping in view, it will be unfair and a total denial of natural justice, if the Gen. Offr. is not considered for promotion to the appt. of Army Cdr, by excluding him under the clause of MOD letter No. 19(24)/96/D(MS) dt. 18 Nov., 96. The denial of consideration will tantamount to double punishment by the organisation to an individual for no fault of his own, the "raison d'etre" being delayed repatriation from France.

For promotion to the rank of Lt. Gen. Offr. is required to command a Div or equivalent for a period of 18 months and earn 2 reports there from. MS however is empowered to grant waiver in the tenure. The 1962 batch of Gen. Cadre to which the complainant belongs, was considered for promotion to the rank of Lt. Gen. in Oct., 94, Apr., 95, Oct., 96 and Apr., 97, as number of offrs., were large and all were not "Adequately Exercised" together. As the complainant took over the criteria appointment in the rank of Maj. Gen. on 3 Sep., 95, he was not AE and his case was successively deferred till Apr., 96 by the SSB. For SSB held on 31 Oct., 96 the Gen. Offr. had a shortfall of 4 months 3 days in tenure. Under the existing policy MS granted waiver and the Gen. Offr. was duly considered by the SSB. Because of the organizational requirement, most of the officers of 1962 batch were considered after they had done a tenure of about 15 months and in one case even 14 months. Similar waivers were given to the Officers. of other batches of Gen. Cadre and supporting arms and services. Ministry of defense had

always accepted the waivers granted by MS. Some of the comparable waivers earlier granted are mentioned below :

Name of the Offr. Batch Shortfall in AE Period (a) GS Brar, GC 1961 3 months 28 days (b) BN Kapur, GC 1961 3 " 26 " (c) RK Sawhney, GC 1961 3 " 29 " (d) Gurpreet Singh GC 1962 4 " (d) PK Puri, GC 1962 3 " 4 " (e) SC Chopra, SC 1962 3 " 5 " (f) MPS Bhandari 1961 4 " 6 " Arty (for staff bd) (g) PS Modak, Sigs 1961 4 " (for Staff Bd)

On the basis of consideration given in Oct., 96, the complainant was recommended "B" Fit grading by the Special Selection Board. Maj. Gen. B.S.Malik who was also considered in the Board as Special Review (Fresh) case was recommended Z (unfit) grading. While processing the Selection Board proceedings, MOD inter-alia raised observation on waiver of period to the complainant which was adequately explained by citing the precedent cases also. MOD, however, revised the grading "Fit" to "deferred" in case of the complainant without assigning any reasons and that of Maj. Gen. BS Malik from Z (unfit) to B (Fit). The Gen. Offr. was subsequently considered in Apr., 97 and was approved as "Fit" for promotion to the rank of Lt. Gen. in July, 97.

It is also pertinent to bring out that law of equity suggests that all Offrs. of one batch should be subjected to same terms and conditions of service. Keeping this aspect in mind any change of policy should provide in-built career protection by the management in terms of a lead time. This was done when MOD issued letter No. 18684/JS(P&W)/86 dated 20 Oct., 86-the provisions of this letter were made applicable w.e.f. 1 Jan., 88. Also to cater for the cases of Offrs. who were being affected, a provision of pay protection was provided vide Para 1 (d) of the letter. However, in the MOD letter No. 19(24)/96/d(MS) dated 18 Nov., 96 no such provision except for grant of waiver with the concurrence of the Govt. has been provided. This clause of grant of waiver with the concurrence of the Govt. is a restrictive clause and "ipso-facto" unfortunately applies only to Lt. Gen. R.S. Kadyan, VSM, in 1962 batch, due to his inordinately delayed placement in command of a Corps. If the criteria as laid down in Nov. 96 letter had a lead time as done in the 20 Oct., 86 letter, the Gen. Offr. would have been considered for appointment of GOC-IN-C, without any incumbrances.....

It is also seen that in recent past prior issue of MOD letter No. 19 (24)/96/D (MS) dated 18 Nov., 96, following Gen. Offrs. with less than one year as Corps Commander were promoted as Army Cdrs:

Tenure as Period covered by CR Corps Cdr. when considered for (in months) Army Cdr. (a) Gen. S. Roychowdhury, 10-1/ Not known since PVSM CRD with MOD. (b) Lt. Gen. Jameel 7-1/2 4 months Mahmood, UYSM (c) Lt. Gen. A Gautam, 8-1/2 5 months & 10 days PVSM (d) Lt. Gen. S.K. Sharma, 11 5 months PVSM, AVSM

In view of the above detailed examination of the case, CAB is of the view that Lt. Gen. R.S. Kadyan, VSM, be granted waiver of six months in tenure of GOC 1

Corps and considered for the appointment of GOC-IN-C, Eastern Command as the Gen. Offr. is not completing AE criteria due to:

- "(a) Delayed repatriation from France resulting in_
- (b) Delayed placement on criteria appointment in the rank of Maj. Gen.
- (c) Delayed consideration for promotion to the rank of Lt. Gen. and
- (d) Revision of "FIT" grading to "Deferred", which resulted in
- (e) Further delay in consideration, approval and placement as GOC Corps, and
- (f) Application of new clause vide MOD letter of 18 Nov. 96, the provisions of which only exclude him in 1962 batch vis-a-vis his batch mates.

All the above events were beyond the control of the complainant and were basically caused by the administrative constraints of the organisation. Hence, the Gen. Offr. deserves the benefit of grant of waiver in terms of natural justice and equal rights, clause of the law."

On the recommendations of the Additional DG CAB, this is how the Chief of the Army Staff recorded a note on 6.1.1998:

1. I have perused the Statutory Complaint 5 Oct., 97 against supersession in respect of IC-13153 H Lt. Gen. R.S. Kadyan, VSM, Inf, and examined the same against his overall profile and other relevant documents.

2. After consideration of all aspects of the complaint had having examined it against all documents and happenings, I am of the opinion that the Gen. Offr. would have been considered for the appointment of Army Cdr/VCOAS in normal circumstance had he not been inordinately delayed in being placed on present criteria appointment. On detailed examination I find that delay caused was due to circumstances well beyond the control of the Gen. Offr. and were primarily due to administrative constrains of the organisation. I also find that new clause of tenure of one year as a Corps Cdr. affects only the Gen. Offr. vis-a-vis his batch mates basically due to delayed placement.

3. In view of the above, I recommend that redress be granted to the Gen. Offr. by way of granting 6 months AE waiver to him for consideration for promotion to the appointment of Army Cdr/VCOAS for a vacancy occurring on 1 Mar., 98."

35. Having taken all the issues into consideration, can the respondents take a stand, which is totally contrary to the recommendations of the Chief of the Army Staff as well as the Ministry of defense themselves?

36. Ultimately the respondent on 16.3.1998 has granted waiver to the petitioner, which order I have reproduced above. The controversy, which has arisen, can be shortened if we see the basic criterion for promotion to the rank of Army Commander. The requirement is that the senior most Lt. General, who is fit in all respects, be made Army Commander. During the course of hearing, C.R. Dossiers

of the petitioner was shown. It also makes an interesting reading. On 8.2.1998 GOC-IN-C Central Command, who was the I.O. of the petitioner wrote as follows :

"A smart, trim newly promoted Lt. Gen. who has commanded his Corps with competence. Professionally sound and aware he has perceptive outlook. Kadian understands fluid situations and takes appropriate actions - keeps well abreast of developments. Is creative in conceptualisation and resolution. Socially pleasant and a good mixer."

The Reviewing Officer, who was the Chief of the Army Staff himself, on 27.2.1998 records:

"A smart officer with all soldierly traits. Is straight forward and goes by the work. Establishes good rapport with subordinate and peers. Professionally competent, he is systematic, goes into details, and is aware of the politico-military environment. Kadyan has handled Corps well so far."

The foremost important part of this Dossiers is Part-III under the heading "Employment and Fitness for Promotion", which is to be written by Initiating Officer and the columns are "(a) Do you consider him fit in every way to hold his present rank?" The recording is "Yes"; and (b) Do you consider him fit for promotion to the next higher rank/appointment?". Again the answer is "Yes". This was so recorded by the GOC-IN-C Central Command on 8.2.1998 in the Dossier. On 27.2.1998, the Chief of the Army Staff has found the petitioner fit in every way to hold his present rank as well as found him fit for promotion to the next higher rank/appointment. How the Chief of the Army Staff can recommends the name of respondent No. 4 on 2.3.1998? The Cabinet Secretary's note dated 27.3.1998 has laid down three criterion, i.e. (i) The Officer should be fit in every respect for such appointment; (ii) He should have a minimum of two years service left before the retirement age from the date of appointment as the Army Commander/VCOAS; and (iii) He should have successfully commanded a Corps for at least one year. Once the respondents themselves have followed the aforesaid criterion laid down for the promotion or appointment of Army Commander, petitioner being found fit in every respect on 27.2.1998; had a minimum of two years service left before the retirement age from the date of appointment as Army Commander; and have commanded a Corps for one year in view of the waiver granted by the Government of India itself, the selection on comparative merit was not on the basis of the criterion laid down for such appointment by the respondent.

37. From the plain Dictionary meaning of word "Fit", one has to see as to what is the requirement for promotion to the post of Army Commander. As per the criteria the officer should be senior most as well as fit in all respects. Whether word "Fit" would encompass in its fold a liberal construction so as to include comparative merit. Word "Fit" has been given the following meaning:

Oxford : Suitable or suited for, well adapted for, good enough for, in good health, in very good physical condition and ready for energetic right etc.

Websters's : Suited to a particular end, good enough, proper, right, competent, in good physical condition, leathy, etc. Chambers : Suitable, in suitable condition, of suitable ability, convenient, befitting, well trained and ready, in good condition, success in fitting etc.

38. From the aforesaid definitions, it can be seen that fitness does not amount comparison between two persons. Fit in all respects takes into consideration fitness vis-a-vis his personality, physical ability, mental agility and thoughtfulness. Can the respondent give another meaning to "fit" so as to include comparative merit or seniority-cum-merit. Supreme Court had the occasion to deal with the expression "Corps" in Rule 40 of the Army Rules. In Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, Court held:

"What is positively desired is that for the composition of a General Court Martial, one must strive to secure services of officers of different corps or departments and what must be eschewed is its being composed exclusively of officers of corps or departments to which the delinquent officer belongs. If a restricted meaning is given to the expression "corps" the rule becomes workable. If wider meaning is given so as to substitute "army corps" for "corps" it would be wholly unworkable because officers will have to be summoned from another command altogether. Thus, if "army corps" is taken to mean the same thing as "corps" and if the accused belongs to a certain army corps all officers belonging to various divisions under the same army corps, to all brigades under all the divisions of the same army corps, to all battalions under all brigades of the same army corps, and to all companies under all battalions of the same army corps will be disqualified because they do not belong to the different corps and are likely to be stigmatised as officers exclusively belonging to the same corps. A vertical movement starting from the bottom which is indicated by reference to battalion and regiment in Sub-rule (3) of Rule 187 clearly indicates that the lowest formation in the battalion or the regiment is corps over and above those specifically designated as corps under Rule 187 (1). Therefore, it clearly transpires that the expression "corps" in Rule 40 must be given the same meaning as set out in Sub-rule (3) of Rule 187 and it would mean that every battalion in the infantry and every regiment in the cavalry would by itself be corps."

The Supreme Court held that Corps in Rule 40 of the Army Rules must be given the same meaning as set out in Rule 187(3) of the Army Rules. I do not find any force in the contention of the respondent that the second special report specially called for by the Army Headquarters on the eve of Selection Board was initiated by the Reporting Officer as the I.O. was not available under whom the petitioner had not completed even 90 days of physical service. There is force in the averment of the petitioner that the grading "D", i.e. "deferred", in his case was altered to benefit and accommodate another Major General (now Lt. General) B.S. Malik. As a matter of fact, grading "Fit" made by the Selection Board from the perusal of the files submitted by the respondent was never changed to

grading "deferred" in the case of any other officer. As a matter of fact, no favor was shown to the petitioner by calling for special ACR as in terms of para-77 of the SAO 3 of 1989 special reports are called in routine. Para-63 of the said Instructions for Rendition of Confidential Reports for Officers, 1989, inter alia, makes a provision that in the event reports become due in case of officer reported upon has completed 90 days physical service under the Initiating Officer, the report can be initiated by the Reviewing Officer with the permission of the Superior Reviewing Officer. Para-16 of Part-II-Initiation and Endorsement of Confidential Reports of the Special Army Order, i.e. SAO 3/S/89-Instructions for rendering confidential reports on officers states as under :

"Minimum Qualifying Service for Initiation of CRs

16. The Officer reported upon must have physically served under the officer initiating a CR mentioned at Para 6 of this order for at least 90 days during the period covered by that report. The physical service of 90 days need not be continuous. Any temporary absence due to leave or temporary duty up to a maximum of ten days at a time, either of the Initiating Officer or of the officer reported upon, will reckon towards the physical service."

Para-73 of the said Instructions (SAO3/S/89) is relevant and is reproduced as under :

"Initiation of an ACR or ICR by the RO

73. If an IO is unable to initiate an ACR or an ICR which is otherwise due, the report will be initiated by the RO provided the rates has rendered 90 days physical service under him. However, if the IO is posted out and unable to initiate an ICR, NO ICR will be initiated by the RO. Approval for initiation of an ACR or ICR by RO will be accorded by the SRO (or officiating incumbent)."

39. It is the case of the petitioner that the petitioner has commanded the Division for more than 90 days and Initiating Officer had gone away on leave and, Therefore, with the permission of the Superior Reviewing Officer, the Reviewing Officer initiated his ACR. As a matter of fact, Lt. General R.K. Sahni and Gurpreet Singh were given similar dispensation and no objection was raised by the respondents. As a matter of fact, petitioner was awarded "AVSM" for outstanding operational duties performed in Nagaland in the rank of Major General and the aforesaid input was not available at the time when internal file assessment was drawn up.

40. The whole case revolves around as to whether in terms of criteria mentioned for promotion as Army Commander, the criteria is seniority-cum-fitness or merit-cum-seniority. Supreme Court in State of Mysore and Another Vs. Syed Mahmood and Others, , while interpreting Rule 4(3)(b) of the Mysore State Civil Services General Recruitments Rules, 1957, which required promotion to be made by selection on the basis of seniority-cum-merit observed:

"the rule required promotion to be made by selection on the basis of "seniority

subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion."

If the aforesaid rule is strict rule of promotion of seniority coupled with fitness then promotion is a matter of course. While interpreting rule regarding seniority-cum-merit, Supreme Court had the occasion to deal with in B.V. Sivaiah & Ors. etc. Vs. K. Addanki Babu & Ors. etc. Civil Appeal No. 3798 of 1996 decided on 17.7.1998 and this is how the Supreme Court has answered:

"We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

In the case before me, the criteria is not seniority-cum-merit but "seniority-cum-fitness", Therefore, what is obligatory is that the promotion is automatic. Seniority-cum-fitness is not synonymous with seniority-cum-merit. Fitness is referable only to materials available in the service records. Any other material, which was taken into consideration, is extraneous where seniority-cum-fitness is the yard-stick in promotion. If the incumbent is otherwise fit, having been so adjudged and commented upon in the ACR as discussed by me earlier on 27.2.1998, holding him totally fit in all respects, how the petitioner can be denied his right of promotion to the rank of Army Commander is not conceivable. The dilution of standards or criterion hitherto applied to the case of a petitioner would erode the credibility and morale of the armed forces. Army officers that too at the level of Army Commanders must not feel that any action of the respondents is discriminatory or mala fide that will be having demoralising effect on the armed forces and same will be against national interest.

41. Mr. Hegde has contended that in the change of criteria on the basis of Circular/letter of the respondent No. 3 dated 16.10.1992, the petitioner is not entitled for promotion and Court ordinarily should not interfere relating to the cases of promotion in the armed force and in support of his contentions, has relied upon Union of India and others Vs. S.L. Dutta and another, . The Court in Union of India & Others Vs. S.L. Dutta and Another's case (supra) did not interfere with the change of policy as there was merely a chance, of promotion of Air Vice Marshal in the Navigation Stream, to be affected by the change of said policy. As far as post of Air Marshal opened to the Air Vice Marshal in the said Stream was concerned, their right or eligibility to be considered for promotion still remained and hence Court held that there was no change in their conditions

of service. Another contention was raised by the respondent that if at all the petitioner has suffered then compensation would vindicate his stand and in this connection has cited Lt. Col. K.D. Gupta Vs. Union of India (UOI) and Others, . The authority cited by the respondent Lt. Col. K.D. Vs. Union of India & Others was a case based on contempt petition and hence has no applicability to the facts and circumstances of this case.

42. Mr. Hegde also contended that the change in the policy pursuant to the letter of 16.10.1992 was not illegal and even the departmental instructions providing certain yard-sticks and criterion in addition to what was provided in 1986 is applicable to the petitioner. In his contentions, he has cited the case of Lt. Genl. R.K. Anand Vs. Union of India and another, . The authority cited by the respondent i.e. Lt. Genl. R.K. Anand Vs. Union of India & Anr. (supra) is also of no help to the respondent as Mr. Hegde has admitted at the bar that the revised stipulation pursuant to letter dated 16.10.1992 did not have the approval of the Ministry of defense. As a matter of fact, respondent has taken shifting stands on said letter at the first instance, it was stated that the file was missing and when Mr. Hegde came on the scene, he fairly conceded that this additional stipulation for appointment to the post of Army Commander as per letter dated 16.10.1992 was neither referred to the Ministry of defense nor any approval there from was obtained in terms of transaction of business rules. Even in Lt. Genl. R.K. Anand Vs. Union of India & Anr.'s case (supra) the Court did not quash the policy as it came to the conclusion that the communication therein dated 9.9.1986 had received the concurrence of the concerned Ministry. It was held:

".....we inspected the department file and found that the matter was referred to the Ministry of defense and had received the approval of the Prime Minister. In view of the same it is not possible to accede to the submission of the appellant that the letter of 9th September, 1986 is merely a departmental communication and cannot be raised to the pedestal of an executive instruction under Art.162 of the Constitution....."

43. In the instant case, in view of the fact that no such concurrence was received from the Ministry of defense nor circular/letter dated 16.10.1992 has been agreed redefining the parameters for promotion to the post of Army Commander, it can be said that it was a policy decision adversely affecting the rights of the petitioner. It will be germane to the controversy that even the note of the Cabinet Secretary as well as of the Ministry regarding the parameters for promotion to the post of Army Commander has not mentioned the additional clause of sending names of two senior eligible officers in terms of 16.10.1992, Therefore, it can be safely said that same has not been taken into consideration at all.

44. The only question before me is whether post of Army Commander which became available on 1.3.1998 on the retirement of Lt. General Ravi Eipe wherein the petitioner and respondent No. 4 were considered whether the appointment of respondent No. 4 as Army Commander in spite of petitioner being admittedly

senior to respondent No. 4 was justified. The argument advanced by the respondent that Circular dated 16.10.1992 was complementary to the Circular dated 20.10.1986 does not inspire any confidence. As I have already stated that, that letter neither had the approval of the Ministry of defense nor was ever put before Ministry in terms of transaction of business rules and by no stretch of imagination, it can be said that it was issued under Article 73 of the Constitution. This purported clause, which has been introduced vide letter dated 16.10.1992, even does not find mention in the note of the Cabinet Secretary sent to the Prime Minister for appointment to the post of Army Commander wherein the petitioner and respondent No. 4 were considered.

45. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when superior civil servants are enabled to move up as rapidly the promotion ladder under the said rules, which in the present case is seniority-cum-fitness and as vacancies occur and the selection is made on the basis of known criterion. It eliminates favouritism and the system is transparent so as to infuse confidence among all the ranks in the army and is devoid of suspicion. The whole rationale of the principle of seniority-cum-fitness is that seniority should determine the order in which an officer of a particular grade should be considered for promotion. Those considered unfit may be passed over. This means the seniority-cum-fitness principle and what it implies is that the senior person unless unfit should get the promotion automatically. Under this principle seniority ought to have been given preponderating weight.

46. Thus, it is seen that appointment of Army Commander is a selection grade appointment to be filled from eligible Corps Commander or those who have Commanded Corps. Prior to 1986 Corps Commanders subject to positive recommendation in their C.Rs. became Army Commanders. In 1986 a criteria of 1two years residual service was introduced for their becoming Army Commanders subject to their being fit in every respect. General officers meeting the said criteria were promoted in the order of their seniority. Seniority was ignored in the case of non-recommendation in the C.Rs. One year command of a Corps was added to the criteria prescribed in 1986 letter vide November, 1996 letter which also stipulated waiver by the Competent Authority. Any other criterion for such appointment would amount to hostile discrimination which would be vocative of Articles 14 and 16 of the Constitution of India. As I have discussed earlier the letter dated 16.10.1992 of the Army Headquarters cannot be invoked in the aid of respondent as the same is not statutory in nature. I find considerable force from the perusal of the files of the respondents that prior to October, 1992 senior most eligible officers were always appointed as Army Commanders if he was otherwise fit. After the petitioner was found suitable for appointment as Army Commander and graded fit for promotion in terms of the C.Rs. of the petitioner and the requirement of minimum merit having been met the petitioner ought to have been promoted on the basis of admitted seniority. The ACR form for Lt. General does not contain numerical grading which is the

case up to the rank of Major General. The evaluation of the rating in the ACR of the Lt. General is indicated by simple "Yes" or "No" in respect of an officer's fitness for next promotion on the basis of the proforma, there is no scope for argument that comparative merit among eligible officers is a yard stick for promotion to the post of Army Commander. The criteria for promotion to the rank of Army Commander is thus based upon the criteria laid down in the Ministry of defense letters dated 20.10.1986 and 18.11.1996. Even if the perusal of the record of the respondent and seeing the career profiles of the petitioner and respondent No. 4 both being eligible, fit and equal in merit, it cannot be said that petitioner could have been superseded in view of respondent No. 4's longer tenure as Corps Commander as length of tenure as Corps Commander was not a laid down criteria in terms of the criteria stipulated in the letters of 20.10.1986 and 18.11.1996 for promotion to the post of Army Commander. The note of the Cabinet Secretary in which he has comparatively discussed the ACRs of 1971 of the petitioner amounts to importing a non-existence criteria after the petitioner was found fit in all respects in the ACR on the basis of which he was to be promoted to the next higher rank. The minimum tenure of one year as Corps Commander in terms of letter of the Government of India dated 18.11.1996 has also been met by the petitioner on account of the grant of waiver by the Government. From the perusal of the files of the respondent I find force in the arguments of the petitioner that the delay in the decision on the statutory complaint submitted by the petitioner on 5.10.1997 also created hindrance for his next promotion. The post of the Army Commander fell vacant on 1.3.1998 and the statutory complaint of the petitioner was decided on 16.3.1998. There is considerable force in the arguments of the learned Counsel for the petitioner that the prayer to seek review of "deferment" grading awarded by the Selection Board held on 31.10.1996, respondent rejected the prayer vide their letter dated 16.3.1998 on the pretext that the petitioner must have furnished adverse career certificate. From the files of the respondent it is not found that how a note was put up that petitioner has given willingness certificate as no such certificate was produced by the respondent. I think this mistake was committed on account of a note written by the Joint Secretary on supposition that the petitioner might have submitted an adverse career certificate. One thing surprised this Court that the way the respondent filed the counter affidavit submitting therein that the Lt. General I.J. Khanna, Maya Dass and G.L. Bakshi though senior most were overlooked on the basis of comparative merit. From the perusal of the files of these officers it is manifestly clear that those officers were overlooked on account of their C.Rs. as Corps Commanders, Therefore, they did not fulfill the fitness criteria and were not eligible for promotion to the post of Army Commander.

47. Thus, I hold that the "deferment" grading in October, 1996 of the Selection Board has also adversely affected the petitioner. It has direct bearing on his exposure to command a Corps. Letter dated 18.11.1996 laying down that henceforth an officer to become eligible to be an Army Commander, should have commanded a Corps for at least one year and its applicability from the date of

issue unlike in the past when letter which was issued in the year 1986 was made operative in 1988 has only affected the petitioner as has be discussed by me in detail in the preceding paragraphs. 48. For the reasons stated above, I have no hesitation in quashing the appointment of respondent No.4 as Army Commander, Eastern Command. I, Therefore, allow the writ petition and quash the appointment of respondent No. 4 as Army Commander, Eastern Command. A writ of mandamus is also issued to the respondents to appoint the petitioner as Army Commander forthwith as he is admittedly the senior most Lt. General in the Army and has been found fit in terms of his A.C.R. Rule is made absolute.

There will be no order as to costs.