

(2013) 01 DEL CK 0141

In the Delhi High Court

Case No : Writ Petition (C) No. 7208 of 2011

Shrikant Sharma

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 24
Armed Forces Tribunal Act, 2007 — Section 14
Army Rules, 1954 — Rule 2(diii)
Constitution Of India, 1950 — Article 14, 226, 356

Citation : (2013) 198 DLT 237 : (2013) 1 ILR Delhi 709

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : Jyoti Singh with Ms. T.B. Saahila Lamba and Mr. Amandeep Joshi, for the Appellant; Ankur Chibber, for R-1 to 4 and Mr. S.S. Pandey, for R-5, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—Thomas Jefferson said that "Experience has shown, that even under the best forms of government those entrusted with power have, in time, and by slow operations, perverted it into tyranny".

Tyranny points towards arbitrariness. The instant case raises this issue with full force.

The writ petitioner assails the order dated 22nd of September 2011 passed by the Armed Forces Tribunal rejecting O.A. No. 161/2011. By this petition, the petitioner had challenged the legality of the action of the respondents in considering respondent no. 5 of the 1974 batch (who was a review case) in 2009 in the Selection Board No. 1 held on 12th August, 2009 as a solitary case for promotion to the rank of Major General; and the order dated 22nd October, 2010 passed by the Central Government ? respondent no. 1 rejecting the statutory complaint of the petitioner against his non-consideration in the aforesaid

Selection Board. The petitioner had also laid a challenge to the action of the respondents in not considering him in the Special Selection Board scheduled on 28th April, 2011 (subsequently held on 18th August, 2011) for promotion to the rank of Lieutenant General in which the respondent no. 5 has been considered for promotion.

2. The facts giving rise to the instant petition are largely undisputed and are within a narrow compass. To the extent necessary for the purposes of the present consideration and for the purpose of convenience, the issues raised before this Court are being considered in the following heads:-

Factual background

3. The petitioner was commissioned in the Remount Veterinary Corps (RVC) of the Indian Army on the 22nd of November 1976 with the same date of seniority. The respondent no. 5 was commissioned in the RVC in the year, 1974.

4. On 1st November, 2006, the respondent no. 5 was promoted to the rank of brigadier. The petitioner was promoted as brigadier on the 21st of April, 2008 along with the 1976 batch.

5. The Selection Board No. 1 was held for the RVC on the 12th of August 2008 for promotion from the rank of Brigadier to Major General. It appears that the respondent no. 5 was considered by this selection board along with Brigadier M.L. Sharma, also of the same batch as a fresh batch. Brigadier M.L. Sharma was empanelled by the Board but the respondent no. 5 was not empanelled on merits.

6. The writ petitioner contends that consideration of the 1974 batch for the promotion to the rank of Major General was thus over. For the next vacancy, as per the applicable policies, the next available batch had to be granted its first consideration as fresh cases. The respondent no. 5 could have been considered only as a first review case along with such next available batch in the next selection.

7. It is not disputed that in March, 2009 one additional vacancy in the RVC was added for the rank of Major General. Promotion to this vacancy is being strongly contested in the present proceedings.

8. It is undisputed that there was no officer eligible for consideration in the next batch which was the 1975 batch as the only officer of the 1975 had retired in the rank of Colonel on the 29th of February 2008.

For the reason that there was no officer for the 1975 batch, the Selection Board No. 1 for the additional vacancy, should have granted fresh consideration to the officers of the next available fresh batch. Respondent no. 5 could have been considered only with such next Batch as a first review case.

9. The petitioner submits that consequently in the year 2009, the petitioner's 1976 batch became eligible for fresh consideration for appointment to the next

vacancy of Major General in the RVC as the next available batch.

10. The petitioner has submitted that by June, 2009, he had earned the two requisite confidential reports. In October, 2009, he had also completed the 18 months Adequately Exercised (AE) period.

11. In and around July, 2009, the petitioner learnt that the Selection Board No. 1 was being held exclusively for the respondent no. 5 for his appointment as a Major General against the additional vacancy. Immediately thereon, the petitioner lodged his protests by way of written communications dated 18th and 20th July, 2009. The petitioner pointed out his eligibility as well as the fact that he had completed more than 15 months in the present rank/appointment and referred to a precedent when a Brigadier of the RVC with only one year of service had been considered for the rank of Major General during August, 2007 and had been approved. The petitioner sought inclusion of his name in the forthcoming Staff Selection Board no. 1. The petitioner also sought an interview with the Military Secretary which was granted on the 25th of July, 2009. The interview was followed by another representation dated 30th July, 2009 to the Military Secretary.

12. The respondent nos. 1 to 4 held a Selection Board on 12th August, 2009 treating the respondent no. 5 as a fresh case from which the petitioner was excluded from consideration. The respondent no. 5 was considered as a stand alone candidate.

13. Aggrieved thereby, the petitioner addressed a statutory complaint dated 25th August, 2009 complaining against his non-consideration despite eligibility and fitness for consideration as a fresh case of the 1976 batch which was due for consideration by the Selection Board No. 1 for the then existing vacancy of Major General.

14. The respondents passed an order on 16th October, 2009 empanelling the respondent no. 5 and promoting him as a major general without deciding the petitioner's representation for appointment of a fresh Selection Board which would consider the petitioner as a fresh case and the respondent no. 5 as a first review case,

15. More than one year after the making of the statutory complaint of the petitioner, a cryptic order dated 22nd October, 2010 of rejection was passed thereon without dealing with the primary issue urged by the petitioner.

16. So far as the petitioner's non-consideration was concerned, again the order dated 22nd October, 2010 failed to consider the submission of the petitioner with regard to the AE tenure and took up the stand that the petitioner had completed only 15 months of the tenure in August, 2009. In contradiction to para 9 of this order, in para 11, the order of respondent no. 1 referred to the consideration of the respondent no. 5 by the Selection Board No. 1 as a review case.

It is noteworthy that the respondents unequivocally for the first time admitted

that respondent no. 5 was considered as a stand alone first review case, without being considered with any fresh batch. The respondents rendered no explanation as to why the petitioner of the 1976 batch, though available was not granted first consideration.

17. In the meantime, the petitioner makes a grievance that while he was contemplating laying a challenge to the above action as well as the order dated 22nd October, 2010, he learnt that a further Special Selection Board was being scheduled on the 28th of April 2011 for appointments to the rank of Lieutenant General (appointment of DG RVS), for the purpose of again appointing respondent no. 5 to this position. The petitioner submits that in the above background, the promotion of respondent no. 5 as major general was illegal. Furthermore his one ICR as Major General was invalid for promotion to the rank of Lt. General.

18. It is claimed by the petitioner in the writ petition that the Army had put up a proposal, which was approved by the Ministry of Defence, that it would be appropriate to have an accretion of one Major General, i.e. authorized a total of two Major Generals to broaden the selection base for a Lieutenant General in RVC and to prevent any void, should both Major General and Lieutenant General retire in equal succession. The petitioner has contended that the rationale for this was to increase the competition and get the best merit and talent which is the sine qua non of the higher ranks like those of Lieutenant General. It is also categorically averred that during 2010, for selection of higher ranks, the Army had proposed that no single officer would be considered and if only a solitary officer is available, his batch would be clubbed with the next available batch. The petitioner has submitted that this fact has been admitted by the official respondents on affidavits.

A grievance is made that this policy has been completely violated so far as the appointments of respondent no. 5 are concerned. The petitioner submits that the same was on account of vested interests which wanted to favour the respondent no. 5, even though the action was completely illegal.

19. On the 26th of April 2011, the petitioner filed O.A. No. 161/2011 before the Armed Forces Tribunal challenging the aforementioned illegalities. The matter came up for admission before the tribunal on 27th April, 2011 when notice was issued to the respondents which was accepted on their behalf by a counsel appearing on advance notice. The respondent no. 5 was not represented and dasti notice was served upon him. The matter was directed to be listed on 11th May, 2011.

20. It is noteworthy that the petitioner had laid a substantive challenge to the order dated 22nd October, 2010 and sought its quashing and setting aside. It has been pointed out by Ms. Jyoti Singh, learned Senior Counsel for the petitioner that by a bonafide mistake, the substantial reliefs claimed by the petitioner were mentioned in column no. 9 which was captioned as "Interim Relief, if any, Prayed For" while the interim relief was erroneously mentioned in column no. 8,

captioned as "Relief(s) Sought". It is urged that this mistake was pointed out to the tribunal which, in its order, has correctly treated para 9 of the petitioner as the main relief which had been prayed for as is evident from para 1 of the order dated 22nd September, 2011 (impugned herein). Perusal of the petition before the tribunal and the impugned order substantiates this position. The main prayer made by the petitioner, though set out in para 9 before the Armed Forces Tribunal, may be usefully set down and reads as follows:-

(i) To quash and set aside the order dated 22.10.2010 passed by the Central Govt. on the statutory complaint of the applicant dated 29.08.2009.

(ii) To quash and set aside the proceedings and result of No. 1 Selection Board held in August 2009 excluding the applicant and quash and set aside the consequent promotion of respondent No. 5 to the rank of Major-General.

(iii) To quash and set aside the proposal to hold the scheduled Board of 28.04.2011 for RVC to the rank of Lt. General if the same does not include the applicant.

(iv) To direct the respondent No. 1 to 4 to hold a fresh Board by including the applicant for consideration to the rank of Lt. General and not include the respondent No. 5 in case his promotion to the rank of Major-General itself is found to be bad in law by this Hon"ble Court.

21. The petitioner has stated on affidavit that when the matter was listed on 27th April, 2011, the petitioner had pressed for interim relief to the effect that till the matter is decided, the official respondents should be restrained from holding the Selection Board for the rank of Lieutenant General for RVC. An apprehension was expressed by the petitioner that certain vested interests in the Ministry of Defence were conniving with respondent no. 5 who would ensure that the Board was held despite the respondent no. 5 being ineligible and he was hurriedly promoted to defeat the petitioner's rights. According to the petitioner, the learned counsel for respondent nos. 1 to 4 as well as an officer from the MS Branch (Legal) had assured the tribunal that the scheduled Board would not be held till the next date of hearing. The petitioner complains that the respondents delayed the adjudication and did not file the reply despite the case being listed on 11th May, 2011 on which date the counsel for the official respondents as well as Lieutenant Colonel Maneesh Kumar, Assistant, Military Secretary (Legal), MS Branch had informed the Armed Forces Tribunal that they had decided to defer the Board and an assurance was given that the same would not be held till the matter was pending. The petitioner also relies on oral directions as given by the tribunal. It is urged that therefore, the matter was then adjourned to the 25th of May 2011 and again to the 15th of July 2011. The petitioner has submitted that in view of the assurance given by them to the tribunal, the respondents deferred the Selection Board for the RVC and for this reason the petitioner did not oppose the grant of time.

22. The Military Secretary's Branch addressed a letter dated 18th April, 2011 to

all headquarters and concerned authorities informing that the Special Selection Board and Selection Board No. 1 were scheduled to be held on 28th April, 2011. The list of officers to be considered for promotion to the acting rank of Lieutenant General and Major General by these Boards was given as an appendix to the letter. The list of officers also clearly shows that the first review and final review of the earlier batches were being considered only with the fresh cases.

23. In para 3 of this letter, so far as the RVC is concerned, the respondents gave the details of the batches of officers in the rank of Maj. General in several Arms and Services of Army who were being considered and the vacancy position.

24. It has been contended that in the ordinary course, Selection Boards are normally scheduled in October, 2011 to coincide with the Army Commanders' Conference.

25. To the shock of the petitioner, he learnt in the morning of 19th August, 2011 that a Special Selection Board had been held exclusively for the Remount Veterinary Corps (RVC) on 18th August, 2011 for considering a single officer, that is, the respondent no. 5 as the only Major General of the RVC for appointment to the rank of Lieutenant General. The petitioner points out that for other Arms and Services, as per the practice followed in the Army, the Selection Board was held during October, 2011. These facts are undisputed.

26. Ms. Jyoti Singh, learned Senior Counsel for the petitioner has contended that this was not a scheduled Selection Board in normal course and had been held in undue haste to frustrate the petitioner's pending petition before the Armed Forces Tribunal. It is further urged that the same was contrary to the assurance given before the tribunal. Learned senior counsel contends that in order to further delay adjudication, even on the next date of hearing on the 14th September 2011, the respondents dishonestly failed to file a reply.

27. In these circumstances, the petitioner filed a miscellaneous application being No. 306/2011 praying for initiating action against the respondents for violating a solemn assurance given before the tribunal and for restraining the official respondents from taking further steps towards approval of the Appointments Committee of the Cabinet (ACC) for declassification of the results. When the application came up before the Tribunal on the 15th September, 2011, the respondents disputed the fact that they had ever given an assurance to the tribunal.

Interestingly, we do not find any denial on record to the petitioner's submission regarding the deferment of the Selection Board for the RVC on record because of such assurance. No reason for the same has also been advanced.

28. The petitioner immediately approached this court by way of W.P. (C) No. 6479/2011 praying for status quo to be maintained in the matter of appointment of the respondent no. 5 as a Lieutenant General and that the government should not process the recommendation of the Special Selection Board held on 18th

August, 2011 during the pendency of the petitioner's petition. The writ petition was listed before the court on 5th September, 2011. This court passed an order preponing the date of hearing to 9th September, 2011 before the Armed Forces Tribunal. The matter was however, not listed on the 9th of September 2011. During the course of hearing before the Armed Forces Tribunal on the 14th September, 2011, the objections noticed hereinabove were raised before the tribunal specially to the effect that it was unprecedented in the Indian Army that a review case was considered in isolation and that the first time aberration was made to favour the respondent no. 5 for extraneous considerations. The tribunal passed an order dated 15th September, 2011 directing the respondents to file an affidavit in the following terms:-

Learned counsel for the respondent Nos. 1 to 4 is directed to file an affidavit that whether there is any convention in the Army that against a single post, one person can be considered when other eligible persons are not available for consideration/review. Secondly, he should also informed whether for such contingency, there is any rule or guidelines and if any clarification has been made by the Ministry of Defence, then the same may be placed on record.

29. At the next hearing before the Tribunal on 22nd September, 2011, the respondents handed over an affidavit dated 22nd September, 2011 wherein the petitioner's stand that in 2009, the respondent no. 5 was a review case of the 1974 batch was confirmed in paras 6 and 7 of the affidavit in the following terms:-

6. That in order to form part of a Batch, "Date of Seniority" is therefore, relevant. Date of Seniority for promotions of every officer is fixed at the time of grant of Permanent Commission. For instance, the Applicant was commissioned on 22 Nov 1976. Accordingly, his Date of Seniority is 22 Nov 1976 and he belongs to "1976 Batch". Respondent No 5 was commissioned on 02 Sep 1974 and his Date of Seniority is 02 Sep 1974 and he belongs to 1974 Batch. In respect of the "Seniority", provisions contained in Army Rule 2(d-iii) and para 69 of the Regulations of the Army (Revised Edition), 1987 are reproduced below:-

Army Rule 2(d-iii) "reckonable commissioned service" means service from the date of permanent commission, or the date-of-seniority for promotion fixed on grant of that commission including any ante date for seniority granted under the rules in force on grant of commission.

69. Reckonable Service for substantive promotion:- "(a) For substantive promotion, service will reckon from the date of an officer's permanent commission, or date of seniority for promotion fixed on grant of that commission, including any ante-date for seniority and promotion granted under the rules in force from time to time. Periods of service forfeited by sentence of court-martial or by summary award under the Army Act will not, however, reckon as service for promotion.

7. It is submitted that unless the Date of Seniority fixed at the time of grant of

Permanent Commission is revised under statutory provisions or instructions, the "Batch" to which an officer belongs, does not change. An officer, who does not get empanelled, does not lose or forfeit seniority, on account of his non-empanelment. He is considered as Review Case along with next fresh batch and if approved, he remains senior to officers of the Fresh Batch. Composition of Branch and Sequence of promotion has accordingly been given in Appendices to the Policy letter dated 11 Dec 1991 (annexure R-3).

30. With regard to the specific direction given by the Armed Forces Tribunal, the respondents in para 8 of the affidavit stated as follows:-

8. That with respect to the query of the Hon"ble Tribunal, "whether there is any convention in the Army that against a single post, one person can be considered when other eligible persons are not available for consideration/review", it is submitted that in Minor Corps and in higher select ranks in other Arms/services, there have been a number of cases when there is only one officer as a fresh case in a "Batch". As already stated in para 5 above, Para 4 of the policy letter dated 11-12-1991 (Annexure R-3) provides, "Officers are considered for promotion to the select rank batch wise by the appropriate Selection Boards". Accordingly, in case a batch consists of only one officer, he alone is considered for promotion.

It is clearly evident from the above that it is only in the case of fresh consideration of a batch that a single officer could be considered. It was admitted by the respondents that there was no policy permitting a review case to be considered as a stand alone candidate for review consideration.

31. The petitioner had pointed out other instances where no eligible candidate was available in the immediately next batch. In such eventuality, the next available batch was construed as a batch in which an eligible candidate was available, even though it may be several years apart. Such available batch was then considered as the fresh cases for selection. This was not repudiated by the respondents.

32. The Armed Forces Tribunal considered the matter and dismissed the petition by an order dated 22nd September, 2011 holding that the case was a isolated instance where there was a single post available and the respondent no. 5 (of the 1974 batch) alone was eligible. It was held that there was no prohibition for the Selection Board to consider the incumbent and, if found suitable, to promote him. The tribunal was of the view that the petitioner was not eligible for consideration for appointment to the next position. It was of the erroneous view that the contention that the review case has to be considered along with the next available batch so that competitive merit could be seen as otherwise it would facilitate selection of one person against one person was devoid of merit. In this regard, the Armed Forces Tribunal observed as follows:-

5. "It is true that sometimes when there is single vacancy and no competitor is available then Selection Board can certainly consider and if he is suitable then there is no prohibition to promote that incumbent if it is not done, then it will be

a serious violation of Article 14 of the Constitution that unequals have been made equal so as to have a competitive merit consideration. There is no prohibition for the Selection Board, if they find that incumbent is not suitable then they may not select him. To promote person who is eligible to be considered with other persons who are yet to become eligible means denying him his due consideration. This will vitiate the consideration of the incumbent who has already become eligible. We do not find any merit to quash the order of promotion of Respondent No. 5 to the post of Maj. Gen. on the argument of learned counsel for the Petitioner that he should have waited for another batch to be eligible for consideration. In our view the selection of Respondent No. 5 on the post of Maj. Gen. was just and proper and does not suffer from any illegality. It will be open for the Respondents to proceed for consideration of Respondent No. 5 for promotion to the post of Lt. Gen. in accordance with law. "

33. Aggrieved by this order dated 22nd September, 2011, the petitioner has filed the present petition challenging the order and action of the respondents inter alia on the grounds that it is illegal, arbitrary, overlooks the bias in favour of the respondent no. 5 and the malafide intent of the official respondents in showing undue favour to the respondent no. 5 as well as grave injustice to the petitioner; and effects demoralization and discourages meritorious officers in the force. The challenge also rests on the contention that the orders of the respondents are in violation of the admittedly applicable regulations and policies and the order of the Tribunal has completely overlooked this important aspect of the matter.

34. On the 26th of September 2011, the Military Secretary's Branch further informed all authorities that the Govt. have approved the empanelment of V-00341 Maj Gen SS Thakral, RVC as a Fresh Case of the 1975 Batch for promotion to the acting rank of Lt Gen in the RVC.

Scope of Judicial Review

35. Before addressing the challenge raised by the petitioner, it is necessary to understand the parameters of this court's jurisdiction in judicial review of the exercise of administrative discretion by the respondents. It is also necessary to bear in mind that this court is considering a challenge to an order passed by the Armed Forces Tribunal in exercise of its jurisdiction under the Armed Forces Tribunal Act, therefore, exercise of statutory discretion.

In this regard, reference requires to be made to binding judicial pronouncements of the Supreme Court of India which would guide the consideration by the court.

36. On this aspect, reference may usefully be made also to pronouncement of the Supreme Court reported at Jayrajbhai Jayantibhai Patel Vs. Anilbhai Jayantibhai Patel and Others, . In this case, the court was concerned with the legality of a judgment by the High Court by which the election of the appellant as president of the Anand Municipality had been set aside and the respondent no. 1 had been declared as its elected president. The court considered the broad principles of judicial review which have evolved in the field of administrative law

referring to following judicial precedents in the following terms:-

14. In "Council of Civil Service Unions" v. "Minister for the civil Service" (1984) 3 All ER 935 " Lord Diplock enunciated three grounds upon which an administrative action is subject to control by judicial review, viz. (i) illegality (ii) irrationality and (iii) procedural impropriety. While opining that "further development on a case by case basis may not in course of time add further grounds" he added that principle of "proportionality" may be a possible ground for judicial review for adoption in future. Explaining the said three grounds, Lord Diplock said:

By "illegality" he means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it, and whether he has or has not, is a justiciable question; by "irrationality" he means "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it; and by "procedural impropriety" he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are expressly laid down in the legislative instrument by which the tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

15. The principle of "Wednesbury unreasonableness" or irrationality, classified by Lord Diplock as one of the grounds" for intervention in judicial review, was lucidly summarised by Lord Greene M.R. in Associated Provincial Picture Houses Limited v. Wednesbury Corporation, (1948) 1 K.B. 223 " as follows:

The court is entitled to investigate the action of the local authority with a view of seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.

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17. Recently in Rameshwar Prasad and Others Vs. Union of India (UOI) and Another, , wherein a proclamation issued under Article "356" was under challenge, Arijit Pasayat, J. observed thus:

240. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

241. It is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to be subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote.

37. While pointing out the restraints on the exercise of the power of judicial review in *Jayrajibhai Jayantibhai Patel* (supra), the Supreme Court emphasized on the responsibility of the court which should not be undermined by the claim of expertise by the respondents. In this regard, the court relied on authoritative texts which shed light on the present consideration and deserve to be extracted. The same read as follows:-

19. The following passage from Professor Bernard Schwartz's book "Administrative Law (Third Edition)" aptly echo's our thoughts on the scope of judicial review:

Reviewing courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise. Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action: We must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further.

Quoting Judge Leventhal from "*Greater Boston Television Corporation*" v. "FCC" 444 F. 2d 841, 851 (D.C. Cir. 1970), he further says:

...the reviewing court must intervene if it "becomes aware... that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making....

Deducing from the aforementioned precedents and authoritative texts, in *Jayrajibhai Jayantibhai Patel* (supra), the Supreme Court then observed thus:-

18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of

judicial review is limited to the deficiency in the decision-making process and not the decision.

38. The following observations of the Supreme Court in Jayrajbhai Jayantibhai Patel (supra) on the power of the High Court under Article 226 also require to be extracted and it was observed as follows:-

12. Article "226" of the Constitution is designed to ensure that each and every authority in the State, including the State, acts bonafide and within the limits of its power.

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But no uniform rule has been or can be evolved to test the validity of an administrative action or decision because the extent and scope of judicial scrutiny depends upon host of factors, like the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable etc. While appreciating the inherent limitations in exercise of power of judicial review, the judicial quest has been to find and maintain a right and delicate balance between the administrative discretion and the need to remedy alleged unfairness in the exercise of such discretion.

39. In this judgment (Jayrajbhai Jayantibhai Patel (supra), the court also ruled on the legality of the decision of the High Court which having set aside the election of the appellant to declare the respondent no. 1 as the president of the council. Reliance was placed on the celebrated decision of the Supreme Court reported at Tata Cellular Vs. Union of India, , wherein it was observed that judicial restraint has two contemporary manifestations namely, one the ambit of judicial intervention and the other, the scope of the court's ability to quash an administrative decision on its merits. In para 27 of Jayrajbhai Jayantibhai Patel (supra), the Supreme Court reiterated the well settled principle that judicial review is not concerned with reviewing the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. Unless that restriction on the power of the Court is observed, the Court will, as opined in "Chief Constable of the North Wales Police" v. "Evans" (1982) 3 All ER 141" "under the guise of preventing the abuse of power, be itself guilty of usurping power", which was held to be the case in the precedent.

40. We may note that the Supreme Court had held that the presiding officer conducting the election had ignored a relevant factor and failure to do so offended against procedural propriety which made his decision in going ahead with the election meeting perverse and irrational, a facet of unreasonableness, warranting interference under Article 226 of the Constitution of India, therefore, setting aside the election of the appellant was justified. However, declaration of the respondent no. 1 as an elected candidate was beyond the permissible scope of judicial review.

41. The Supreme Court had occasion to consider the scope of judicial review by the Supreme Court in *Indian Railway Construction Co. Ltd. Vs. Ajay Kumar*, also. As in the present case, the Supreme Court was concerned with service jurisprudence. The court was concerned with a challenge to the action of the disciplinary authority dispensing with a disciplinary inquiry under the Indian Railway Construction Company Limited (Conduct, Discipline and Appeal) Rules, 1981 and imposition of punishment of dismissal. The court was called upon to consider an objection as to whether there was any scope for judicial review of the disciplinary authority's order dispensing with the inquiry. On the issue of scope of judicial interference in matters of administrative decision, the court referred to the principles laid down in its prior decisions and laid down binding principles which shed valuable light on the consideration by this court in the following terms:-

13. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See *State of U.P. and Ors. v. Renuagar Power Co. and Ors.* "AIR 1988 SC 173. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts *ultra vires*.

14. The present trend of judicial opinion is to restrict the doctrine of immunity

from judicial review to those class of cases which relate to deployment of troupes, entering into international treaties etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality" the second "Irrationality", and the third "procedure impropriety". These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service" 1984 (3) All. ER. 935, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See Commissioner of Income Tax, Bombay and Others Vs. Mahindra and Mahindra Limited and Others, .

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15. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above. like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

16. The famous case commonly known as "The Wednesbury's case" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

17. Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in" Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation" It reads as follows:

... It is true that discretion must be exercised reasonably. Now what does what mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority..... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.

Lord Greene also observed (KB p. 260)

... it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. "It is not what the court considers unreasonable.... " The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another.

(Emphasis supplied)

42. In *State of U.P. and Another Vs. Johri Mal*, , the Supreme Court also made the following observations and summation on the scope and extent of power of judicial review of the High Court contained in Article 226 of the Constitution of India in the following terms:-

"28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the supreme lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put, is:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn Vs. State of Illinois*, 1876 (94) US (SR) 113).

43. In (2008) 8 SCC 606, *Centre for Public Interest Litigation & Anr. v. Union of India & Ors.*, while referring to the inherent limitations in the exercise of power of judicial review into administrative action, the court was concerned with a challenge to the award of a contract on the ground that the same was done

arbitrarily for collateral considerations and was actuated by malafide. The court referred to the following observations of the Supreme Court in the prior judgment in Tata Cellular Vs. Union of India, :-

21. "While considering the allegations levelled against the acceptance of the impugned contract, we may usefully refer to the observations of this Court in the case of Tata Cellular Vs. Union of India,] which are as follows:

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal, the court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the court cannot substitute its own decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the court would interfere. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The duty of the court is thus to confine itself to the question of legality. Its concern should be:

- (1) Whether a decision-making authority exceeded its powers?
- (2) committed an error of law;
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached or,
- (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

(iii) "Procedural impropriety."

44. The scope of the high court's power under Article 226 of the Constitution to

undertake judicial review of exercise of statutory and administrative discretion and action thus have been succinctly laid down by the Supreme Court. This court must confine its consideration within these parameters and norms.

45. At this stage, given the challenge in the present reference also requires to be made to the extent to which the high court can examine the factual matrix to base its evaluation and conclusions in compliance with the aforementioned principles on judicial review. On the nature of the inquiry by the reviewing court, in *Indian Railway Construction Co. Ltd. Vs. Ajay Kumar*, , the Supreme Court observed as follows:-

18. Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

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21. These principles have been noted in aforesaid terms in *Union of India and another Vs. G. Ganayutham (Dead) by LRs.*, . In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself.

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23. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. while he indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide (SIC) the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (See" *S. Pratap Singh Vs. The State of Punjab*, . It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in *E.P. Royappa Vs. State of Tamil Nadu* and Another, , Courts would be slow to draw dubious inferences from

incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.

46. In *State of U.P. and Another Vs. Johri Mal*, , the court was concerned with the challenge to the refusal of authorities to renew the tenure or appointment of a public prosecutor u/s 24 of the code of Criminal Procedure and provisions of the Legal Remembrancer's Manual. Placing reliance on Wade's Administrative Law 8th Edition (p.p. 33 to 35), the court emphasized the distinction between the right of appeal and exercise of the power of judicial review. It was observed that judicial review or the exercise of the court's inherent power was essential to determine whether the challenged action is lawful or not and to award suitable relief. For this, no statutory authority was necessary; the court was simply performing its ordinary functions in order to enforce the law. So far as the power of the court undertaking judicial review to appreciate the finding of facts is concerned, the following observations of the court in paras 30, 32 and 33 are relevant and read as follows:-

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

In a Division Bench pronounce of this court reported at *Alan Dick and Company Ltd. Vs. Union of India (UOI) and Others*, , the court was considering a challenge to the award of contract by accepting a bid referring to the aforementioned principles on which administrative action could be challenged. It was observed that courts have been slow to interfere in the matters relating to administrative functions unless they are convinced that the impugned decision is illegal, irrational or lacks fairness in procedure. It was further observed that while

exercising the power of judicial review, the court is more concerned with the decision making process rather than the merit of the decision itself. The court observed that while scrutinizing the decision making process, "it becomes inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety". It was also emphasized that in judicial review, the court is mainly concerned with the legality of the action under challenge.

These are the parameters within which this court would examine the present challenge laid down by the petitioner. It is therefore well settled that this court in exercise of its power under Article 226 of the Constitution of India would examine the factual matrix to adjudicate upon the several grounds urged by the petitioner.

Applicable Rules and Policy

47. Before examining the challenge, given the rank and positions involved and the serious allegations of the petitioner, it is essential to notice the applicable rules and relevant policies of the official respondents. In this regard, reliance on the following has been placed before this court:-

(i) Policy dated 22nd August, 1986.

(ii) Policy dated 6th of May 1987 with regard to assessment for appointment.

(iii) Policy dated 11th December, 1991.

(iv) Para 70 of the Defence Service Regulations read with policy dated 7th October, 2002.

(v) MS Branch letter dated 20th March, 2001.

48. To facilitate adjudication, the relevant extract of the above documents deserves to be considered in extenso which are extracted hereafter:

(i) The policy dated 22nd August, 1986:-

9. Officers who are not approved are given First and Final Reviews as required and if approved, their seniority is re-adjusted with one/two batches junior to their own batch, but they remain senior to officers of the fresh batch. Officers are considered with a cut off report as applicable to their batch and Review cases are considered with an additional report over and above these with which they had already been considered and not placed in an acceptable grade.

Para 9 of the policy of 1986 thus shows that the officers who are not approved are given first and final review and if approved, their seniorities are readjusted with 1st or 2nd batches junior to their own batch.

(ii) The policy dated 11th December, 1991:-

SEQUENCE OF SELECTION TO SELECT RANKS

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2. Consequent to introduction of the "Two Stream" concept, certain doubts have been expressed from time to time on the following aspects:-

(a) The concept of "Batch".

(b) Sequence of promotion within a "Batch".

(c) Sequence of promotion within a "Batch" with application of the "Two Stream" concept.

3. This letter seeks to clarify the above doubts in the succeeding paragraphs.

4. Officers are considered for promotion to select ranks batch wise by the appropriate Selection Boards. A "Batch" for consideration for promotion to select ranks is defined as "all officers who reckon seniority in a particular calendar year".

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5. Every officer is given three chances for consideration for promotion. If an officer is not approved for promotion during the first consideration, he loses one year of seniority and slides into the batch of the next year. In the eventuality of his not being approved for promotion even in the second consideration, he loses one more year of seniority and slides further into the next batch. Thereafter, the officer is considered for promotion for the last time and if he is not approved even in the third chance, he is not given any further consideration and is regarded as a finally superseded officer. An illustration of a typical composition of a batch for consideration for promotion to the select ranks is at Appx "A".

Para 5 of the 1991 policy unequivocally states that every officer is given three considerations and each consideration is with the next batch seniority. The appendix to this communication clearly illustrates the manner in which the first review has to be given only with the consideration of the fresh case.

(iii) Para 70 of the Defence Service Regulations:-

70. Claims for promotion.- Officers will normally be considered for promotion in the order of seniority in their Corps but an officer whose clearly advancement is in the interest of service may be specially selected for promotion to fill a vacancy whatever his seniority in the rank at the time. The cases of officers who are superseded for promotion will be kept under review in accordance with the existing instructions.

These regulations clearly stipulate that cases of officers who are superseded for promotions, will be kept under review in accordance with existing instructions.

(iv) MS Branch policy dated 7th October, 2002:-

5. First/Final Review Cases. officers. under consideration as First/Final review

cases will be on the basis of policy in vogue for a batch they are being considered "With".

It is thus the clear binding policy that consideration of any officer as first/final review cases will be on the basis of the policy in vogue for a batch that he is being considered "with". This would also suggest that review cases cannot be considered unless there is a fresh batch with which they have to be considered.

(v) MS Branch letter dated 20th March, 2001:-

So far as the description of a batch is concerned, the same is explained in the MS Branch letter dated 20th March, 2001, the relevant extract whereof reads as follows:-

Batch

2. In the R.K. Of Maj. A batch comprises all officers reckoning seniority as substantive Maj within a particular calendar yr. For example, 1982 Batch includes all officers of 1982 and earlier or later Army seniority who become substantive Majs during the calendar yr 1993.

3. In the Rank of Lt. Col. ? In the acting rank of Lt. Col, the batch would comprise of final review and first review selectees of previous batch along with the main batch. Army HQ Letter No. 38360/MS: 5B dt. 29 May 84 refers.

4. For the officers of JAG Deptt. a batch will be defined as laid down in AI 173/66 or AI 49/73 as the case may be.

The respondents have, therefore, defined a batch in the context of Lieutenant Colonels as comprising of final review and first review selectees of the previous batches along with main batch. The same would apply to all ranks including Brigadiers, Major Generals and Lt. Generals as well. No distinction has been drawn by the respondents.

49. It is noteworthy that pursuant to the orders dated 15th September, 2011 of the Armed Forces Tribunal, the respondent nos. 1 to 4 filed an affidavit dated 22nd September, 2011 wherein they again reiterated the above policies in the following terms:-

4. That following policy letters have already been placed on record by way of annexures to the Reply Statement filed earlier:-

(a) Policy letter dated 06 May 1987 on "Selection System (Annexure R-1).

(b) Policy letter dated 22 Aug 1986 on "Sequence of Selection of Review Cases" (Annexure R-2).

(c) Policy letter dated 11 Dec 1991 "Sequence of Selection of Ranks" (Annexure R-3).

5. That Para 4 of the Policy letter dated 11th Dec. 1991 (Annexure R-3) provides,

"Officers are considered for promotion to select ranks batchwise by the appropriate Selection Boards. In Para 8 of the Policy letter dated 22 Aug 1986 (Annexure R-3), a "Batch" has been defined as, "all officers who reckon seniority in a particular calendar year".

Aim of the Selection Board classified in Para 5 of the Policy letter dated 06 May 1987 (Annexure R-1) includes, inter-alia, "To assess all eligible officers of a batch who reckon seniority during one calendar year".

Para 10(I) of the policy letter dated 6-5-1987 (Annexure R-1) further proves "Assessment of the officer is based on comparative merit of the overall profile of the officers within his own batch".

The respondents were therefore bound by the above policy declarations in undertaking the selection process.

50. It has been argued by Mr. S.S. Pandey, learned counsel appearing for the respondent no. 5 that the policies relied upon by the petitioner dated 11th December, 1991 and 22nd August, 2006, do not apply as they relate to only select ranks. However, this submission is to be noted only for the sake of rejection. The 1986 policy and the 1991 policy are concerned with different areas. The 1986 policy relates to consideration of review cases while the 1991 policy relates to consideration of fresh cases for promotion. The respondent nos. 1 to 4 have taken a categorical stand that these policies are valid, binding and applicable to the instant case.

The respondents understanding and implementation of the Regulations/Policies

51. The petitioner has contended that the policy also laid down by the Ministry of Defence in para 74 of the Defence Service Regulations clearly stipulates that officers who are superseded for promotion would be kept under review in accordance with the existing instructions. Such instructions are laid down in the policy letter dated 7th October, 2002 which stipulates that consideration of the officer as the first/final review cases will be on the basis of the policy invoked for the batch that is being considered "with". Ms. Jyoti Singh, learned senior counsel appearing for the petitioner submits that this clearly means and applies that review cases cannot be considered unless there is a fresh batch with which they have to be considered. It is contended that this is supported by the MS Branch letter dated 20th March, 2001 where a batch has been defined in the context of Lieutenant Colonels as comprising of final review and first review selectees of the previous batch along with main batch which is being accorded fresh consideration.

52. A reading of the above Regulations; the communications as well as the policy letters issued by the respondents would show that the Army records three considerations to an officer for promotion. Every officer is first considered as a fresh case. In case, he fails to be selected, he is granted a second consideration as a first review case and if he still does not succeed, then he is granted third and last consideration as a final review case. In the first review, the officer is

considered with the next batch and in the final review, he is considered with the next to next batch respectively.

This is clear from the reading of MS Branch policy dated 22nd August, 1986 and 11th December, 1991. As per para 9 of the 1986 policy, the officers who are not approved, are given first and final review and if approved, their seniority is readjusted with one/two batches junior to their own batch. The 1991 policy in para 9 clearly mentions that every officer is given a total of three considerations and each consideration is with the next batch seniority.

53. The question which arises in the instant case is as to how would the review considerations of an officer who is considered and not selected be effectuated in case, in the next batch or even the next to next batch, there is no officer available for consideration as a fresh case. The petitioner has contended that as per the declared policy of the respondents, which has always been applied, in such eventuality the officers of the next available batch would form the fresh batch to be considered. As a result, the unsuccessful officers of the previous batch are considered as, either the first review case or final review case, depending upon the number of the considerations already afforded only with such next available batch. It is pointed out that for this reason the respondents have also already declared the manner in which the seniority of the officers being given review considerations will be maintained and preserved. We find that this has been illustrated by the respondents in the Appendices/Annexures in the aforementioned policy declarations of the respondents.

54. It has been urged that this reading of the above regulations and the policy is also manifested by the past practice followed by the Army including by the Remount Veterinary Corps.

55. Ms. Jyoti Singh, learned Senior Counsel appearing for the petitioner has submitted that this reading of the applicable regulations and policy as well as implementation thereof as well as practice and procedures has been further admitted in several affidavits filed by the respondent no. 1.

56. To buttress the above, our attention has been drawn to the counter affidavit of September, 2011 filed by the respondent nos. 1 to 4 in O.A. No. 161/2011 filed by the petitioner. In reply to para 5(B) of the grounds, in this counter affidavit, the respondents admitted as follows:-

5(B) That in reply to contents of Ground 5B, it is submitted that under the existing policy, consideration for promotion is batch wise and a batch for consideration for promotion and sequence to select ranks, is as under:-

(a) Final Review Case (e.g. 1973 batch)

(b) First Review Cases (e.g. 1974 batch)

(c) First Case (e.g. 1975 batch)

In this regard, copies of Policy letter dated 22 Aug 1986 "Sequence of Selection

Review Cases" and policy letter dated 11 Dec 91 on "Sequence of Selection to Select Ranks" are annexed as Annexure R-2 and R-3 respectively. Para 9 of Annexure R-2 stipulates that "officers who are not approved are given First and Final Review as required and if approved, their seniority is re-adjusted with one/two batches junior to their own batch, but they remain senior to officers of the fresh batch". It is submitted that an officer does not lose seniority per se on being non-empanelled. His seniority is "re-adjusted" only if he is empanelled as a Review case of his original batch on being considered with next batch.

Policy letter dated 07 Oct 2002 on "Consideration of CRs for Selection Boards" also provides that officers under consideration as First/Final Review cases will be on the basis of the policy in vogue for a batch they are being considered with. Copy of the policy letter dated 07 Oct 2002 is annexed as Annexure R-4.

57. To substantiate his contention before the Armed Forces Tribunal in para 4.4 and ground "B" of O.A. No. 161/2011 as well as in ground "C" of the present writ petition, the petitioner has stated on affidavit that there were non-empanelled officers of the 1979 batch for the rank of Colonel. The 1980-81 batch had no officers available for consideration for the rank of Colonel. However, in view of the aforementioned policies, the non-empanelled officers of the 1979 batch of the RVC were not considered as review cases without the officers who were to be given a fresh consideration. Consequently, the non-empanelled officers of the 1979 batch were clubbed with the 1982 batch being considered as fresh batch for promotion to the rank of Colonel.

Similarly, there was no available eligible officer in the 1983 batch for promotion. Consequently, non-empanelled officers belonging to the 1982 batch were not considered in isolation as first review cases, but were clubbed with the next available fresh consideration batch, that is the 1984 batch for their first review.

58. The petitioner has cited another specific instance to the effect that in the Selection Board for the Judge Advocate General Department (another minor corps) held in April, 2009, a 1982 batch officer has not been considered alone as a first review of 1983 batch but has been considered with the fresh case of 1984 batch as the 1983 batch is non-existent.

The respondents have not disputed this factual narration.

59. This understanding of the policy and its such implementation has withstood legal challenge and scrutiny by the Armed Forces Tribunal which in another case (O.A. No. 115/2011, Col. Tej Ram & Anr. v. Union of India) decided on the same day as O.A. No. 161/2011 of the petitioner authoritatively rejected the prayer by Col. Tej Ram and Col. T.S. Sachdeva to be granted the same treatment as was accorded to the present respondent no. 5. O.A. No. 115/2011, Colonel Tej Ram & Anr. v. Union of India & Ors.

60. Col. Tej Ram and Col. T.S. Sachdeva were recruited on 3rd September, 1979 into the RVC and were thus part of the 1979 Batch. They were promoted to the

rank of Lieutenant Colonel but could not be empanelled by the No. 2 Selection Board for the acting rank of Brigadier with the 1979 batch in October, 2009. These two officers had a grievance with regard to their ACRs and had filed non-statutory complaints with regard thereto. Redressal was given to them by the authorities who directed expunging a portion of the ACRs. In view of the expunging of the adverse remarks from their ACRs, a Special Selection Board was held in September, 2010 when these officers were again considered but could not be selected. The stage of fresh consideration of these officers was over. They were subsequently required to be considered as review cases now.

61. The respondents pointed out that during 1980-81, there was no batch available for consideration. When the vacancy arose on 23rd February, 2011, the batch of 1982 was eligible for its first consideration as the next available batch with the petitioners being the first review cases. These two officers were considered as first review cases by the Selection Board No. 2 held in April, 2011 along with fresh cases by the 1982 batch in accordance with the aforementioned policy.

62. For the said vacancy in the post of Brigadier (which had arisen on 23rd February, 2011), Colonel Tej Ram and Col. Sachdeva contended that since they belonged to the 1979 batch, their cases were required to be considered for promotion without being clubbed with persons belonging to the 1982 batch. As this was not being done, Colonel Tej Ram and the other officer approached the Armed Forces Tribunal by way of O.A. No. 115/2011 seeking a direction to the respondents to accord them such consideration. They also prayed for striking down of para 6 of the policy letter for calculation of pro-rata vacancies.

63. Our attention has been drawn to the counter affidavit filed by the respondent no. 1 in O.A. No. 115/2011, Tej Ram & Anr. v. Union of India filed by Col. Tej Ram and Col. T.S. Sachdeva challenging their separate non-consideration. In this counter affidavit, the respondent no. 1 stated as follows:-

In terms of MS Branch policy letters No 37417/QSIR/MS-5 dated 22 Aug 1986, "Sequence of Selection Review Cases", Para 9(a) of letter No 04579/MS (Policy) dated 11 Dec 1991, "Sequence of Selection to Select Ranks" and letter No 04477/MS Policy dated 07 Oct 2002 "Consideration of CRs for SBs" in Army, officers are considered batch-wise to draw a panel to fill likely vacancies, alongwith a fresh batch, officers belonging to the previous two batches are given review consideration. These policy letters are attached as Annexure "R-1" to R-3 respectively.

There was no commissioning and there are no officers in 1980 and 1981 batches of RVC. Col Tej Ram and Col T S Sachdeva, who were not approved as Special Review (Fresh) cases of their own batch 1979 were thus logically required to be considered as normal review cases alongwith Fresh Cases of the next available batch, which is the 1982 batch, which has three Cols, by No 2 Selection Board for one vacancy. The plea of being considered as part of the 1980 batch is not

tenable since there was no commissioning in RVC in that year. Normal review cases cannot be considered in isolation but have to be considered alongwith Fresh Cases of the next available batch who would otherwise be deprived of being considered equitably for the available vacancy. The Special Review (Fresh) cases are considered afresh based on redressal granted consequent to a complaint or for any other reason. The officers are considered as per the policy in vogue at the time of consideration of his original batch and with comparative merit of his batch mates. The policy letter No 04502/MS Policy dated 27 Jul 1995 is attached as Annexure "R-4".

4.8 That the contents of Para 4.8 are denied being false, misleading and perceptions of the Applicants. It is submitted that the review cases cannot be considered alone as the available vacancy will be of the fresh batch and if that batch is not considered, it will be deprived of legitimate and fair consideration. The review cases were already considered as fresh cases for vacancies available to the said (original) batch but they were not empanelled based on quantified merit and value judgment marks. In case logic of the Applicants is accepted that would mean that officer who is not approved as Fresh batch with his batch mates will be considered without a Fresh batch for a vacancy which should logically go to Fresh batch and those review cases officers should be empanelled, even though, below the comparative merit of their batch and that cycle should continue until Fresh batch comes up for consideration, does not stand to logic, otherwise, there may not be any supersession in the Minor Corps.

(Emphasis Supplied)

64. It is pointed out that the two petitions, one by the petitioner (O.A. No. 161/2011) and the other by Col. Tej Ram and Col. T.S. Sachdeva (O.A. No. 115/2011) raised diametrically opposite challenges based on the same regulations and policies. Both these petitions were listed on the 22nd of September 2011. It has been contended by the petitioner that they were listed and heard by the one Bench on the same day.

65. It is noteworthy that Col. Tej Ram and Col. Sachdeva were effectively seeking the same favourable treatment which has been given to the present respondent no. 5 by the respondents. The Tribunal in no uncertain terms negated Col. Tej Ram and Col. Sachdeva's contention that they were entitled to a stand alone consideration as review cases dehors the next available batch. O.A. No. 115/2011 was dismissed by the tribunal by the order dated 22nd September, 2011. This very contention did not find favour with the Armed Forces Tribunal which held as follows:-

6. We have bestowed our best of the consideration and we regret that this argument of learned counsel for the petitioner cannot be acceded to. It is true that the consideration is batch wise and if one person is not found suitable and not empanelled then he is entitled to first review along with the next batch and if he still is not found suitable and empanelled then he is entitled to be considered

for second review along with the next batch. This is the system followed by the respondents. So far as system is considered there is nothing wrong about it. Only question is that whether contention of learned counsel for the petitioner that he should be considered against the vacancy of 2011 de hors the 1982 batch. But this cannot be done. The batch which has become eligible by this time is of 1982 batch. In 1980 and 1981 there was no recruitments in the Corps of RVC therefore no persons of batch of 1980 and 1981 were available for consideration. Recruitment only took place in 1982 in this Corps and persons who were recruited in 1982 by this time have become eligible for consideration. To deny these persons who have become eligible for consideration to the exclusion of 1982 batch would be unfair as these persons have become eligible for consideration for a vacancy which is now available in February ? March 2011. This will amount to a reverse discrimination that persons who have become eligible are being sought to be ignored on account of the fact that the persons of 1979 batch who were not found suitable for first consideration and they should alone be considered to the exclusion of 1982 batch. This will be discriminatory denying the persons equal opportunity for consideration for the post. Therefore this contention of learned counsel for the petitioner cannot be countenanced.

(Underlining by us)

66. Col. Tej Ram and Col. T.S. Sachdeva's contention in O.A. No. 115/2011 that, as review cases, they were entitled to be considered by the Selection Board de hors the next available batch was thus negated by the order dated 22nd September, 2011. The tribunal thereby accepted the present petitioner's contention that a review case has to be considered with the next available batch and that the review case cannot be considered in isolation.

67. The respondents have also reiterated this position in their counter affidavit dated September, 2011 submitted before the Armed Forces Tribunal in O.A. No. 161/2011 (which had been filed by the present petitioner) in the following terms:-

The Applicant's contention about consideration of Review Case of 1979 batch RVC Officers with Fresh Cases of 1982 batch, it is submitted that Col Tej Ram and Col TS Sachdeva are 1979 batch officers of the RVC. They were first considered for promotion to acting rank of Brig, as Fresh Cases of the 1979 batch of RVC, by No 2 Selection Board held in Oct 2009 and not approved. The officers were granted certain redressals on their respective Non Statutory Complaints and were considered as Special Review (Fresh) cases of the 1979 batch, by the No 2 Selection Board held in Sep 2010 but not approved. It is submitted that Remount and Veterinary Corps (RVC) is a minor Corps and no officer was commissioned in RVC during 1980-81. Therefore, 1980 and 1981 batches did not exist for RVC. Accordingly, No 2 Selection Board held in Apr 2011 considered the Fresh cases on 1982 batch (03 officers) along with First Review cases of the 1979 batch (04 officers including Col Tej Ram and Col TS Sachdeva) for promotion to acting rank of Brig against the chain vacancy existing with effect

from 24 Feb 2011 on account of retirement of Lt Gen JK Srivastava. In accordance with extant policy, the First Review cases of 1979 batch were considered with Fresh Cases of 1982 batch for the one vacancy available to the 1982 batch.

(Underlining by us)

68. The Armed Forces Tribunal read the applicable regulations and policies and while deciding O.A. No. 115/2011 and held that there could be no stand alone consideration as a review case which had to be considered with a fresh batch. The inevitable and only result was that this finding had to be applied in the O.A. No. 161/2011 as well.

69. On these findings, the petition filed by the petitioners ought to have been granted, so far as the challenge to the consideration of the respondent no. 5 was concerned. However, by an order of the same date, a contradictory finding was returned.

70. The present petitioner's contention in his O.A. No. 161/2011 that a review case cannot be considered by a Selection Board de hors the next available batch for fresh consideration was rejected.

71. It is noteworthy that while passing the judgment dated 22nd September, 2011 in the O.A. No. 161/2011 filed by the present petitioner, the Tribunal has evidently overlooked the stand of the respondents in the counter affidavit as well as the aforesaid policies. The order dated 22nd September, 2011 of the tribunal in O.A. No. 161/2011 (filed by the petitioner) has thus overlooked relevant material. It is contrary to its findings in the decision of the same date in O.A. No. 115/2011 on identical issues and is legally not sustainable.

The petitioner's eligibility for promotion to Major General

72. The petitioner has laid a claim that he was eligible for consideration for promotion to the rank of Major General on 12th August, 2009. It is contended that he has been unfairly denied his fresh consideration with the review consideration of the respondent no. 5. It is, therefore, necessary to consider the prescribed requirements for appointment as Major General and also to examine the petitioner's claim in this regard.

73. As per the prescribed requirements, for appointment as Major General, a person is required to have two annual confidential reports in this rank. It is further pointed out that the respondents have additionally placed a requirement of tenures Adequately Exercised (AE) as Brigadier for Major General and prescribed a minimum tenure in the rank of Major General to enable an officer to be considered by the Special Selection Board for appointment as Lieutenant General. In this regard, our attention is drawn to the policy declaration by the Military Secretary's Branch in its letter dated 26th September, 2003.

74. The AE stipulations to enable a Brigadier to be considered for appointment as

Major General are provided in this communication dated 26th September, 2003 of the Military Secretary's Branch wherein it is stated thus:-

5. AE stipulations for Brigs will be as follows:-

xxx

(b) Arms/Services Other than Gen Cadre. Tenure in a criteria appt will normally be 18 months subject to min two CRs.

(Underlining by us)

75. It is an admitted position that the petitioner had earned two annual confidential reports as a Brigadier by June, 2009 and, therefore, met the ACR criterion for consideration for appointment on 12th August, 2009 for the post of Major General.

76. Ms. Jyoti Singh, learned senior counsel for the petitioner has urged before us that the prescription of the adequately exercised (AE) period is not mandatory. Para 5(b) of the policy dated 26th September, 2003 uses the expression "normally" which indicates that this is not an absolute.

77. In support of the submission that the respondents have not considered the AE prescription as mandatory, the petitioner has referred to the appointment of Brigadier J.K. Srivastava who was so appointed on the 1st of September 2006. Barely 12 months thereafter Brigadier J.K. Srivastava was considered and empanelled by the Selection Board held on 28th August, 2007 for promotion to the acting rank of Major General. Brigadier J.K. Srivastava was given a waiver of six months AE by the respondent for appointment as Major General. Shortly thereafter, this very officer was again given three and a half months for being appointed as a Lieutenant General. There is no dispute by the respondents to these factual submissions.

78. The petitioner has also referred to the Special Selection Board held in October, 2012 of Maj. General N.S. Kanwar (also of the RVC) who was granted seven months AE waiver.

79. An issue with regard to the waiver of a prescription of having served in a duty battalion to be eligible for promotion in the para-military force arose for consideration before the Division Bench of this court in W.P.(C) No. 21900/2005, Ashok Kumar v. Union of India & Ors. and connected writ petitions. The judgment of the court was delivered on 27th October, 2009 wherein the court discussed the judicial precedents on the spirit, intendment and purpose of residuary rules empowering the employer to exempt the applicability of the rule in the following terms:-

32. Needless to state, as held in the decision reported as Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , the intentment of a residuary rule empowering the employer or the Central Government to exempt the applicability of a rule is intended to remove

hardships i.e. whenever a situation is shown to exist which is causing undue hardship to an officer or a group of officers, the power of relaxation must be exercised to relieve undue hardship caused due to unforeseen or unmerited circumstances. (See para 33 of the decision)

33. In a reverse situation, where the employer had exercised the power of relaxation and some officer had challenged the same, in the decision reported as *State Bank of India etc., Vs. Kashinath Kher and others, etc.,*, the Supreme Court upheld the grant of relaxation taking note of the fact that the strict implementation of the Rule was operating harshly and in a manner unfair to some officers with reference to rendition of service in rural/semi-urban areas. It was held that the object of the relaxation being to see that nobody stole a march over the other; exercise of said power of relaxation was valid. In the decision reported as *Ashok Kumar Uppal and Others Vs. State of Jammu & Kashmir and Others*, it was observed that where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the rule might become impossible, the power of relaxation under the rules must be exercised.

After so discussing, the court laid down the binding principle thus:-

34. It is settled law that where a power is vested in an authority and the situation exists warranting exercising of said power, non-exercise thereof would warrant the issuance of a mandamus requiring the power to be exercised. It is equally settled that while exercising a power where wrong questions are posed or relevant facts are excluded or irrelevant facts are included, the decision would be arbitrary and liable to be set aside and a mandamus would be issued, requiring the power to be exercised strictly within the confines of the facts within which the power has to be exercised.

(Emphasis supplied)

80. The principles laid down by the court in this case squarely apply to the present petitioner's claim of entitlement for waiver of the AE tenure. The failure of the respondents to even consider the petitioner's request for waiver was clearly arbitrary and illegal.

81. It has been pointed out that in any case the petitioner was completing 18 months AE in October, 2009 when Selection Board's are normally held. Given the binding requirement that a review case can be considered only with the next batch being accorded its fresh consideration, in case waiver was not to be granted to the petitioner, the respondents were bound to await availability of an eligible officer from the next batch. No reason for holding the Board in August, 2009 is available on the record of the tribunal. No emergency or service exigency is even suggested. Bald averments cannot replace facts when the court or tribunal is considering a challenge on grounds of favouritism. The petitioner's contention that there was no hard and fast rule and that the respondents could have held the Selection Board in any month in 2009 is manifested from the fact

that the Selection Board for the appointment of the petitioner as a Major General was held in December, 2009.

82. In fact, the respondents have deliberately ignored the petitioner's specific request for waiver and his representations prior to the convening of the Board in August wherein he had requested MS Branch not to hold the Selection Board in August or to give him two and a half month waiver in the AE period as per the past practice. The petitioner had cited the precedent of Brigadier J.K. Srivastava who had been given the waiver twice as noted above. The respondents render not a wit of a reason for why the petitioner's request for the waiver was not even considered.

83. The averments of the petitioner with regard to the waiver given to the other officers as well as to the petitioner's categorical statement that Boards are normally held in April and October and was hastened in August for the sole consideration of the respondent no. 5 remain unchallenged even before us.

84. The policy, instances and the pleadings of the respondent establish that the AE tenure is not considered mandatory by the respondents. It is also manifest that the respondent grant waiver of this stipulation.

85. The respondents do not dispute that they have the power of waiving the requirement of the tenure in a particular rank and that they have relaxed the same in certain cases. There is thus substance in the petitioner's contention that just as other officers who have been granted AE waiver as noticed above, in the given circumstances, the petitioner was entitled for two month waiver in August, 2009 and could have been considered eligible thereupon for appointment as a Major General by the Selection Board held on 12th August, 2009.

86. It is trite that exercise of power of relaxation or waiver of a condition cannot be exercised in an arbitrary manner. The failure to consider the petitioner's requests and to exercise the discretion to waive the period of barely two months was arbitrary, unjustified, illegal. The petitioner was to be treated just like the other officers who had been granted waiver in similar positions.

87. These circumstances taken cumulatively also point to only one conclusion which is that the respondent nos. 1 to 4 were bent on appointing respondent no. 5 irrespective of the rule and policy position without a proper selection in which the relative merit of all eligible candidates was assessed. As such the Armed Forces Tribunal has erred in holding that the petitioner was not eligible for consideration in August, 2009 or that comparing the respondent no. 5 with the petitioner, was comparing unequals. There is no basis at all for these conclusions given the clear stand of the respondents.

Selection Board Misled that the respondent no. 5 (of the 1974 Batch) was being given a consideration as if he was a fresh case of the 1975 Batch.

88. The petitioner has complained that the respondents were aware that the Selection Board was bound by the policies and that the respondent no. 5 could

be considered for promotion as a review case only with fresh cases of the next available batch.

89. We have noticed above the identity of the issue as in the present case which arose with regard to a review case of Col. Tej Ram and Col. Sachdeva of the 1979 batch. No eligible officer was available in the batches of 1980 and 1981. The first batch in which an eligible officer was available for consideration was the 1982 batch. The respondent's clear understanding of the clear rule and policy stipulation is manifested by the MS Branch letter dated 1st March, 2011 on this case when they wrote as under:-

A/47002/2SB/Mar11/MS(X)

01 Mar 2011

INTEGRATED HQ OF MOD (ARMY)

MS(X)

NO. 2 SB: RVC officers

1. Reference your note No. 80134/Q/RV-1 dated 03 Jan 2011.
2. The case has been examined in detail by the competent authority. As per extant policy, Review Cases alone cannot be considered in isolation as a batch for consideration by a Selection Board. Therefore, Review Cases of 1979 batch cannot be considered without the fresh batch, otherwise they will get the vacancy of the batch not yet considered.
3. Hence, the Review Cases of 1979 batch of RVC will be considered along with the next available batch of RVC, that is, 1982 batch of RVC.

s/d

(RB Asthana)

Dir/MS(X)

Dir RVS (RM)

The respondents have herein reiterated the applicability of the policy dated 22nd August, 1986 and 11th December, 1991 coupled with para 70 of the DSR as well as the policy dated 7th October, 2002 as well as their bindingness.

90. It is contended that for this reason, the respondents misled the Selection Board and created an impression that respondent no. 5 was an officer from the 1975 batch.

91. In the present case the respondents knew that the only officer, a Colonel, from the 1975 batch had retired on 29th February, 2008 and there was no Brigadier eligible from the 1975 batch for consideration for promotion to the rank of Major General. It is pointed out that the MS Branch deliberately created the

documents which suggest that the respondent no. 5 was a 1975 batch Brigadier to facilitate his stand alone consideration for promotion.

92. The Military Secretary Branch addressed a letter bearing No. A/47053/1SB/RV/MS(X) dated 7th August, 2009 to the Dy. MS, HQ Eastern Command referring to their letter forwarding the petitioner's representation of 18th July, 2009. In this letter dated 7th August, 2009, the respondents stated thus:-

2. The officer's application has been examined at the appropriate level. It is stated that as per the existing policy on construction of a batch for consideration for promotion, a Brig from the 1975 batch of RVC is due for consideration on forthcoming No. 1SB on 12 Aug 2009. As such, Brig. Shri Kant Sharma who belongs to the 1976 batch of RVC cannot be considered with a 1975 batch officer.

Clearly the authorities were conscious that respondent no. 5 if considered as a review case, had to be considered with the next batch. For this reason, an impression was being created (as in the above) that the respondent no. 5 was a fresh case of the 1975 Batch.

93. The MS Branch letter dated 7th August, 2009 was delivered to the petitioner on 25th August, 2009 (long after Selection Board No. 1 had been held on 12th August, 2009).

94. The petitioner further complains that the order dated 22nd October, 2010 rejecting his statutory complaint, again reiterated the same illegal position adopted by the respondents that the respondent no. 5 was an officer of the 1975 batch when in para 9 it stated thus:-

After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that the No 1 Selection Board held in respect of RVC officers of 1975 batch in August 2009 is in order and in accordance with policy guidelines on the subject.

95. Our attention is drawn to the counter affidavit filed by the respondent no. 5 before the Armed Forces Tribunal to O.A. No. 161/2011 wherein he also has pleaded that he was considered as a fresh case for Major General.

96. The respondents have suggested the same unfortunate stand in the counter affidavit filed in O.A. No. 161/2011 in September, 2011 before the Armed Forces Tribunal as is evident from the following deposition:-

It is submitted that although eight officers were commissioned in the 1975 batch of RVC, none of them had reached the rank of Brig. Also, there was no Brig of 1973 RVC Batch. The Applicant, who belongs to 1976 Batch, could not have been considered as 1975 Batch officer. In the circumstances, the then Brig SS Thakral, the First Review Case of 1974 batch, had constituted the 1975 Batch for consideration for promotion to the rank of Maj Gen in accordance with policy on the subject. Respondent No 5 was considered by No 1 Selection Board held on 12 Aug 2009 and was approved. Respondent No 5 was promoted to the rank of Maj

Gen on 16 Oct 2009.

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It is further submitted that the phenomenon of certain batches not having any officer is not uncommon in the minor corps of Army (RVC, JAG, Mil Farms, Army Aviation etc.) and the extant policy is followed in all relevant cases. It is submitted that No 1 Selection Board held for RVC held in Aug 2009 was justifiable particularly in view of the facts that no other officer was available for consideration to fill the existing vacancy of Maj Gen and the then Brig SS Thakral considered as the First Review case of 1974 batch had constituted the 1975 batch in terms of the policy on the subject. It may be reiterated that though the officers were initially Commissioned in 1975 batch, no one reached to the rank of Brig, while on the other hand, no such constraints were there in the case of No 2 Selection Board for the 1979 batch of RVC which was also considered as per the policy along with the next available fresh batch for promotion to rank of acting Brig. Contentions of the Applicant about extending favour to Respondent No 5 are, therefore, denied.

(Emphasis supplied)

The above statements to the effect that Brig. S.S. Thakral constituted the 1975 Batch or that this was so in terms of any policy are factually incorrect. The statements appear to have been made to overcome the deliberately committed illegality in considering the respondent no. 5 (who was a review case of the 1974 Batch) as a stand alone candidate without considering the fresh cases of any officer from the next available batch.

Whether the respondent no. 5 was eligible for consideration for appointment as Lieutenant General?

97. The petitioner had also challenged the eligibility of the respondent no. 5 before the Armed Forces Tribunal for consideration for appointment as Lt. General inter alia on the ground that he did not have the prescribed confidential reports input.

98. The respondent no. 5's interim confidential report for the period 1st of July 2010 to 23rd of February 2011 was required to be initiated by Lieutenant General J.K. Srivastava. The initiating officer - Lieutenant General J.K. Srivastava retired from the service of the Army with effect from 23rd February, 2011 which was admitted by Lieutenant General J.K. Srivastava in an O.A. No. 111/2011 which was filed by him before the Armed Forces Tribunal.

99. Ms. Jyoti Singh, learned Senior Counsel for the petitioner has drawn our attention to the procedure and policy of the respondents with regard to writing of the Annual Confidential Reports of the officers.

100. The Army authorities have anticipated the contingency of the initiating officer not being available or not being in the position to initiate the confidential

reports. To supply this contingency, the authorities have issued Army order No. 45/2001/MS-Confidential Reports on Officers. Paras 24 and 30 of this order which are material for the present consideration reads as follows:-

24. Initiation of CRs by RO. RO may initiate a CR as due and applicable, provided a ratee cannot earn a CR/ICR from his IO under the following circumstances:-

(a) IO Posted But Not Entitled. RO may initiate a CR (Annual)/Early/Interim), excluding Delayed CR whenever it becomes due; in all cases where IO is posted but not entitled to initiate due to limitations of various provisions of this AO. Sanction of SRO will be obtained before initiation of CRs. However, no Early CR/ICR can be initiated by the RO on posting out of the IO, except in cases, as covered under Paragraph 73 of this AO.

(b) IO Not Posted. RO may initiate all CRs as become due in cases, where IO is not posted on due date for the CRs, with prior sanction of the SRO, subject to the following conditions:-

(i) No CR has been initiated on rate during the period by an IO/RO.

(ii) CR cannot be initiated by officiating IO in terms of Paragraph 22 above.

30. A retired IO (or RO required to initiate a CR under provisions of this AO), is not entitled to initiate CRs. Technical/Special to Corps Reporting Officers at first level of reporting are also not entitled to endorse CRs, after retirement. An officer who is due for retirement must initiate CRs as due and applicable and hand over the same to the RO before the date of retirement or on the date he proceeds on leave pending retirement, whichever is earlier. For this purpose, he can initiate reports up to a maximum of 15 days prior to the date he retires from service or proceeds on leave pending retirement. However, RO/SRO/HTO/HSCRO/HOA may endorse CRs even after retirement at their discretion.

101. This Army order clearly stated that an officer who is due for retirement must initiate confidential reports as due and applicable and hand over the same to the Reviewing Officer (RO) before the date of retirement or on the date he proceeds on leave pending retirement, whichever is earlier.

The confidential report of respondent no. 5 could have been initiated and handed over by the said initiating officer before the 23rd of February 2011 when he retired. This was not done. The petitioner contended that the Interim Confidential Report, though it has been endorsed as if it was written on 23rd February, 2011, has been initiated after the retirement of Lt. Gen. J.K. Srivastava. As such it was contrary to the prescribed procedure in para 30 of Army Order 45/01/MS and was invalid.

102. It is urged that such confidential report cannot be looked at for any purpose. The submission is that on 18th August, 2011 when the SSB was held, the respondent no. 5 therefore, did not have the prescribed confidential reports necessary to entitle him to consideration for appointment as Lieut. General.

103. The policy letter dated 26th September, 2003 issued by the authorities provides the AE and confidential report stipulations for appointment to the rank of Lieut. General. In this regard, the following two stipulations are relevant for the purposes of the present case:-

Maj Gens

3. The min tenure in the R.K of Maj Gen, to enable officers of all Arms/Services (include Gen Cadre) to be considered by Special Selection Board (SSB) will be 18 months subject to earning two CRs.

4. While executing the above, the following will be ensured in respect of Maj Gens of Gen Cadre:-

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(b) Min two CRs in criteria appt would be necessary for being AE. However, in org interest, an offr may be posted out after a period of 12 months in a criteria appt provided, the offr has earned at least one CR.

xxx

104. On the issue as to by when the confidential reports should be in place, a communication dated 31st December, 2010 addressed by the Military Secretary's Branch informing the cut-off dates for the Special CR's for the Selection Board No. 2 planned to be held in 2011, which was the concerned Selection Board. The extract thereof which pertained to the RVC reads as follows:-

SPECIAL CUT OFF CRS: NO 2 SELECTION BOARD 2011

1. The cut off dates for Special CRs for No 2 SB planned to be held in 2011 are as under:-

4. Comd MS Only. Kindly monitor the progress on initiation and subsequent processing of CRs of all affected officers posted in Comd jurisdiction. Monthly progress report as on 15th of every month till Feb 2011 will be fwd to this branch in accordance with Para 71 of AO 45/2001/MS.

105. In O.A. No. 161/2011 a specific objection was raised and pressed by the petitioner before the tribunal that one of the two confidential reports considered by the Selection Board for respondent no. 5's appointment to the rank of Lieutenant General was invalid as it had been initiated by the initiating officer " Lieutenant General J.K. Srivastava after his retirement.

106. The respondent nos. 1 to 4 had responded to this objection submitting that the CRs in respondent of respondent no. 5 became due on the 23rd February, 2011 on the retirement of the IO Lieutenant General J.K. Srivastava and "as per the records, he initiated the concerned CRs of respondent no. 5 on the same day prior to his retirement when he was in service". The respondents contended that CRs were technically valid in the light of the records available with the Military

Secretary of the Branch.

107. This objection of the petitioner was simply brushed aside by the Armed Forces Tribunal holding that the ACR was filed by the IO on the same day when he demitted office and there was no illegality in it. No reference at all was made to the applicable Army Order 45/01/MS specifically pleaded and relied upon by the petitioner.

108. We may first consider the objection with regard to the validity of the interim confidential report of the respondent no. 5. it is undisputed that the initiating officer Lieutenant General J.K. Srivastava had retired on the 23rd of February 2011. The period for which he endorsed the interim confidential report was between 1st July, 2010 and 23rd February, 2011. This interim confidential report was an input forming part of the service profile of the respondent no. 5 which was considered by the Selection Board on the 18th August, 2011 when the respondent no. 5 was considered for appointment as a Lieutenant General. The petitioner has made a categorical submission that this confidential report was written after Lieutenant General J.K. Srivastava had retired. To support this contention, several important factors have been pointed out.

109. It appears that Lieutenant General J.K. Srivastava was aggrieved by the respondent's proposal for his demitting office on the 23rd of February 2011. Therefore, on the 23rd of February 2011, he had filed a petition being O.A. No. 81/2011 before the Armed Forces Tribunal u/s 14 of the Armed Forces Tribunal Act, 2007 for quashing the order directing him to demit office in the afternoon of 23rd February, 2011 as he has attained the age of superannuation. Lieutenant General J.K. Srivastava had contended before the Armed Forces Tribunal that the order of his superannuation was not served upon him and he was orally communicated on 22nd February, 2011 by the Dy MS(X) IHQ of the MoD (Army) about the retirement order.

110. Before the Armed Forces Tribunal, on the 23rd of February 2011, the respondents had taken a stand that the petition was filed only on apprehensions which did not give Lt. General Srivastava any cause of action. It was also submitted that no order requiring Lt. General J.K. Srivastava to demit office had yet been passed and that retirement was based on policy decision. The respondents stated that the MS Branch had not received any communication from the Ministry of Defence with regard to the retirement of Lt. General J.K. Srivastava. It was submitted by the respondents that as no order had been passed, the petition was premature. The case was therefore, adjourned by the Armed Forces Tribunal directing the respondents to file a reply with regard to the averments in the petition.

111. It appears that Lt. General J.K. Srivastava was thereafter (on the 23rd of February, 2011 itself) called upon to go to the office of the QMG, IHQ of the Ministry of Defence (Army) where the retirement order was served upon him at three minutes past 5:00 pm informing him that he had retired from service w.e.f.

23rd February, 2011 (A/N).

112. This order was also challenged by Lieutenant General J.K. Srivastava by way of a second petition being O.A. No. 111/2011 before the Armed Forces Tribunal. A copy of the petition was handed over in the present proceeding by learned Senior Counsel for the petitioner, the correctness whereof was not disputed before us by the respondents. With regard to the events which transpired on the 22nd and 23rd February, 2011 in O.A. No. 111/2011, it is necessary to notice the narration of facts by Lieutenant General J.K. Srivastava which was to the following effect:-

4.8. That on 22 Feb 2011 at about 18:00 hours, the Applicant was informed that he will be retiring on 23 Feb 2011 (AN) on completion of 2 years tenure as DG RVS while the Applicant was out of station at Gondal etc. in Gujarat on Temporary Duty authorized by QMG, IHQ of MoD (Army). The Applicant has been asked to meet the QMG at 10:30 hours on 23 Feb 2011 after returning from T/D in the morning on 23 Feb 2011 for handing over the Retirement Order.

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4.10. That mischievously the Respondents have called the Applicant to the Office of QMG, IHQ of MoD (Army) and served the retirement order at 3 minutes past 5 PM on 23 Feb 2011, telling the Applicant that you have retired from the service wef 23 Feb 2011 (AN). Thereby, ensuring that the Applicant even does not go back to his office which closes at 5:30 PM.

113. The above narration would show that even at 1800 hrs (6:00 pm) of the 22nd of February 2011, Lt. General J.K. Srivastava was on temporary duty at Gondal in Gujarat when he was informed about his retirement on 23rd February, 2011 (A/N) which would mean at about 12:00 noon. It is an admitted position before this court that Lieutenant General J.K. Srivastava had filed O.A. No. 81/2011 on the 23rd of February 2011 which was mentioned for listing and the aforenoticed order was passed thereon.

114. It is argued by Ms. Singh, learned senior counsel for the petitioner that as per the order of the respondents, Lt. General J.K. Srivastava had retired at 12:00 noon on 23rd February, 2011 and, therefore, he would have barely had about three or four hours of service in the morning of the 23rd February, 2011, which period would have been consumed in getting his own petition drafted, filed and listed before the Armed Forces Tribunal on the same day.

115. Given the challenges laid by Lieutenant General J.K. Srivastava, first to the retirement proposal and then to the retirement, it is evident that Lieutenant General J.K. Srivastava was considerably agitated about the action of the respondents in retiring him so much so that he filed two petitions before the Armed Forces Tribunal.

116. It is also on record that Lieutenant General J.K. Srivastava retired in the afternoon of the 23rd of February 2011 and, as per the retirement order, the

same was effective from 1201 hrs. Certainly, when his own fate was in such doldrums and his official position in such jeopardy, it is impossible that this officer would be concerned with the interim confidential report of the respondent no. 5.

117. The submission made by the petitioner is fortified by other facts placed before us. Along with the reply filed before the Armed Forces Tribunal in O.A. No. 161/2011, the respondent no. 5 has enclosed as annexure RA-4, a copy of the forwarding letter of this ICR along with details of its physical service. This letter purports to have been signed by Lieutenant General J.K. Srivastava and bears the date of 23rd February, 2011. It is addressed to the Reviewing Officer Lieutenant General Chetinder Singh. Interestingly, this letter is not on any official letterhead. The same inexplicably contains the residential address of Lieutenant General J.K. Srivastava i.e. 3, B.R. Mehta Lane, New Delhi-110011. Another material factor to which our attention is drawn is the fact that the letter is not numbered in the manner in which every official communication, if it was sent in regular course of official business would have been numbered. The acknowledgment card accompanying this communication which ought to contain the address of the Initiating Officer as well as file number of the Initiating Officer does not do so. The columns of both the file number as well as the address have been left blank.

118. Ms. Jyoti Singh, learned Senior Counsel for the petitioner contends that the very fact that the letter dated 23rd February, 2011 contains the residential address of Lt. General J.K. Srivastava would show that the same was written at his residence. Even if, it was assumed that Lieutenant General J.K. Srivastava was in office for the full day on 23rd February, 2011, he would have gone home only after 5 o'clock. In any case, as per the official order, Lt. General J.K. Srivastava had retired in the afternoon.

119. In view of the above objection of the petitioner, on the 8th of November 2012, we had issued the following directions:-

1. During the course of hearing, it has been urged by learned senior counsel for the petitioner that the Annual Confidential Report of the respondent no. 5 for the period from 1st July, 2010 to 23rd February, 2011 was invalid as the same was initiated by Lieutenant General J.K. Srivastava after he retired. In this regard, our attention was drawn to the pleadings before the Armed Forces Tribunal in the OA filed by the petitioner. Reference is also being made to OA No. 18/2011 filed by the Lieutenant General J.K. Srivastava on the 23rd February, 2011, the date on which he retired. Reliance is also being placed on OA No. 45/2001 with regard to the manner in which an officer due to retire, is required to initiate and hand over the confidential report of the officer to whom he is recording the same.

2. The official respondents were orally directed by us to produce all records relating to said Annual Confidential Report including the receipt and the dispatch register of MS Branch and the movement record.

3. We are informed by Mr. Ankur Chhiber, learned counsel for the respondent nos. 1 to 4 that the said record could not be produced today. He prays for an adjournment to do so. Let the same be positively produced before us on the next date of hearing.

120. Some part of the official record was thereafter made available by the respondents pursuant to our earlier order. Accordingly in the hearing on 19th November, 2012, we had recorded the following order:-

1. Pursuant to the directions made by us on the last date, the respondent nos. 1 to 4 have produced the following records before us:-

(i) The incoming dak register for ACRs for the period 1.12.2009 to 7.9.2011 from the M.S. Branch.

(ii) The dak receipt register from the QMG branch from 23.8.2009 to 16.11.2011.

(iii) The South Block Dak Register for the period 1.1.2009 to 10.5.2011.

(iv) Outgoing Dispatch register of DG (RVC) from 29.10.2010 to 14.7.2011.

2. On instructions from Col. Devender Singh the following submissions are made by Mr. Ankur Chhibber, learned counsel for the respondents based on the aforestated record:-

(i) There is no record of either receipt or dispatch of the letter dated 23rd February, 2011 purportedly sent by Lt. General J.K. Srivastava forwarding the ICR in respect of respondent No. 5 in the DG (RVC) outgoing dispatch register (which has been placed at page 183 of the present record).

(ii) As per the dak register of the QMG Branch, Lt. General Chetinder Singh, the Reviewing Officer has received the ICR in respect of respondent No. 5 on 11th March, 2011.

(iii) As per the dak register of the M.S. Branch, the ICR of respondent No. 5 was received from the Reviewing Officer on 16th March, 2011.

(iv) There is no other record of the letter dated 23rd February, 2011.

3. Mr. Ankur Chhibber seeks leave to place the relevant extracts of the aforesaid notice registers which is permitted. The same are taken on record.

(Underlining by us)

121. It is evident from the above records and submissions of Mr. Ankur Chhibber, Advocate that the letter dated 23rd February, 2011 and the enclosed ICR surfaced in official records for the first time only on 11th March, 2011 when the same was received in the office of the Reviewing Officer Chetinder Singh. This was long after Lt. General J.K. Srivastava had retired. The manner in which this document was placed in official records of such senior personnel is not disclosed to us. The impropriety of this exercise and the reason therefore stare in the face

as this ICR was one of the essential inputs in the service profile of respondent no. 5 placed before the Special Selection Board specially convened on 18th August, 2011 for his consideration in isolation.

122. The Tribunal has erred on this issue, in the order dated 22nd September, 2011, when it has simply recorded thus-

Learned counsel for the petitioner has also pointed out that the ACR for the period 1st July, 2010 to 23rd February, 2011 was written by the Investigating Officer after he has left the office and as such that could not have been written by the Investigating Officer. But this ACR was filled by the Investigating Officer on the same day when he demitted the office. There is no illegality in it.

As discussed above, there is no material at all to support this finding.

123. It is evident from a reading of the Army Order No. 45/2001 that in case an Initiating Officer cannot initiate the annual or interim confidential report, then the same is required to be initiated by the Reviewing Officer with the prior sanction of the Senior Reviewing Officer.

Thus if Lt. General J.K. Srivastava, the Initiating Officer had retired, the ICR of the respondent no. 5 could have been initiated by the Reviewing Officer in the capacity of an initiating officer. Lt. General J.K. Srivastava was not competent to initiate the confidential report of the respondent no. 5 thereafter.

124. In terms of Army Order 45/01/MS, a confidential report cannot be initiated by the Initiating Officer after he has retired. We have therefore, no hesitation in holding that the Interim Confidential Report of the respondent no. 5 was written by Lieut. General J.K. Srivastava when he was not competent to do so as he had retired. This report could not have been officially placed in the service record of the respondent no. 5. Such invalid confidential report could not have formed an input on the service of the respondent no. 5 and could not have been considered by the Special Selection Board.

125. It is contended by Mr. S.S. Pandey, learned counsel for the respondent no. 5 that retirement of Lieutenant General Srivastava was in unusual circumstances and that Army personnel are normally informed nine months in advance of their retirement. It is urged that Army Order 45 should be given a liberal view and the Interim Confidential Report of the respondent no. 5 should be considered as a valid report. This submission is completely unacceptable, to say the least.

126. The above submission would show that the respondent no. 5 was conscious about the illegality and invalidity of the Interim Confidential Report which was placed on his service profile. The respondent no. 5 was also fully aware that it is not open to this court to ignore the requirements notified by the respondents. The manner in which the Interim Confidential Report has been placed in the service profile of the respondent no. 5 as one of the essential inputs by the Special Selection Board manifests manipulation in official records which has to be deprecated.

127. In the absence of this essential input, respondent no. 5 could not have been considered for appointment as Lt. General by the Selection Board held on 18th of August, 2011.

128. The matter becomes more serious as the SSB was making selections for one of the highest ranks in the army, when neither procedure nor substantial merit can be even remotely compromised. This manner of functioning is unfortunate, to say the least.

Comparative/relative merit of the two officers

129. It has been staunchly urged on behalf of the petitioner that the respondents were bent upon considering the respondent no. 5 as a stand alone case keeping in view the fact that the petitioner had a much more meritorious profile than the respondent no. 5 and that if the two officers were to compete together, it would have been difficult to overlook the merit of present petitioner and to promote the respondent no. 5 over and above him.

130. In this regard, we may refer to the categorical stand of the petitioner in O.A. No. 161/2011 wherein the petitioner had stated that he had served the Organization with utmost dedication and loyalty. He was awarded Chief of Army Staff Commendation Card in January 2001 and Sena Medal (D) on 26.01.2004 and conferred Fellowship of National Academy of Veterinary Sciences during the year 2001. The petitioner specifically contended that he was excluded from the Selection Board No. 1 held on 12th August, 2009 as a fresh case for promotion to the rank of Major General for the malafide reason of favouring the respondent no. 5. It was pleaded that had the petitioner been considered with his profile vis-?-vis that of respondent No. 5, he would have been empanelled over and above the respondent no. 5 and this was well-known to the respondents. The following comparative profile chart was placed by the petitioner:-

131. In their counter affidavit, the respondent nos. 1 to 4 did not dispute that these averments and stated that they are "matter of record" which in law is an admission of the facts pleaded.

132. It has been contended that in the year, 2012 the petitioner has even been awarded a Vashisht Sewa Medal for his meritorious service and his contribution.

133. The petitioner has challenged the respondent's appointment also for the reason that the petitioner and respondent no. 5 underwent the Arms Equestrian Course in 1981. The respondent no. 5 could achieve only an Eco (E) grading. It has been contended that no officer from any Army or service has been promoted to the higher ranks as Colonel/Brigadier/Major General on an "E" grading.

134. Mr. Ankur Chhibber, learned counsel appearing for respondent nos. 1 to 4 and Mr. S.S. Pandey, learned counsel appearing for respondent no. 5 have orally submitted that the respondent no. 5 had suffered a fall during this course for which reason he secured the "E" grading. It is further been contended that the petitioner had scored a "C" grading in this course. There is however, no

challenge to the petitioner's submission that no officer at "E" grading was promoted to the higher ranks especially to that of a major general.

135. The respondents in fact admit the achievements, appointments and assignments of the petitioner vis-?-vis those of the respondent no. 5. The petitioner rests his case on his record manifested by the commendation and awards received by him, the prestigious appointments held by him including Command of important RVC establishments as well as Senior and, even, Chief Instructor positions at the RVC Centre and College.

136. It is trite that it is not for the court to decide the relative merit. The petitioner has urged that these facts explain as to why it was important for the respondents to exclude the petitioner from consideration when respondent no. 5 was accorded the special consideration. We clarify that we express no opinion on the relative merit of the petitioner and respondent no. 5.

137. The petitioner has sought to emphasize the career profiles to support his submission that the consideration and appointment of respondent no. 5 were mala fide and guided only by the spirit of favouritism and special dispensation towards him, irrespective of whether such action resulted in compromising high standards and was fatal to merit, which alone should guide all promotions and appointments in the army, especially at the highest ranks of Major General and Lieutenant General in a minor corps as the Remount Veterinary Corps.

138. Reference requires to be made to a pronouncement of the Supreme Court reported at Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, . In this case, the appointment of the respondent no. 2 as Army Commander was challenged by the respondent no. 1 on the ground that he was the senior most eligible officer for appointment to the said post; that he had won various meritorious awards; had performed difficult functions and had been awarded Vishisht Sewa Medal; had outstanding achievements and commendations from the highest in the force. It was urged that appointments and promotions to the said post are contained in the government of India letter dated 20th October, 1986 (effective from 1st January, 1989); that the respondent no. 1 had been recorded as fit in all respects in his ACRs and being the senior most Lieutenant General in the Indian Army, he ought to have been appointed as Army Commander.

139. So far as the method of selection and promotion to various posts in the army was concerned, in para 11, the Supreme Court noted the criteria for promotion and selection in the following terms:-

11. The hierarchy in the Army and the method of selection and promotion to various posts starting from the post of Lieutenant and going up to the post of the Chief of the Army Staff will clearly indicate that the posts of Lieutenant, Captain and Major are automatic promotion posts on passing the promotion examination irrespective of inter se merit, whereas the posts from Major to Lt. Colonel, Lt. Colonel to Colonel, Colonel to Brigadier, Brigadier to Major General and Major

General to Lt. General are all selection posts filled up by promotion on the basis of relative merit assessed by the designated selection boards. From Lt. General [Corps Commander] to Army Commander is a non-selection post to which promotion is made subject to fitness. It is promotion subject to fitness in all respects, although the rank remains the same. From the post of Army Commander to that of the Chief of the Army Staff, it is by promotion for which no specific criteria have been laid down. There have been precedents where the senior-most Army Commanders have not been appointed as the Chief of the Army Staff. Selection implies the right of rejection depending upon the criteria prescribed. Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,

1. Seniority cum fitness,
2. Seniority cum merit,
3. Merit cum suitability with due regard to seniority.

12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them.

140. While examining such a challenge, the judicial review by the court is permissible only to the extent of finding whether process in decision making has been observed correctly or not but it cannot interfere with the decision taken by the authorities. It was found by the Supreme Court that in this case, the entire service profile had been taken care of by the authorities concerned; that one aspect (in the profile) may have been emphasized rather than the other, but in the appraisal of the total profile, the court could not substitute its view to that of the authorities. The court applied the well settled principle of administrative law that "when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether process in reaching decision has been observed correctly and not the decision as such".

It was in this background that the court was of the view that the challenge by the respondent no. 1 to the appointment of respondent no. 2 was misplaced and accepted the challenge to the High Court judgment granting relief to the

respondent no. 1 in his writ petition.

141. The instant case however, raises a challenge to the promotion to the posts of Major General and Lieutenant General. As held by the Supreme Court, appointments in the Army from the rank of Major onwards are Selection posts filled by promotion on the basis of relative merit assessed by the designated Selection Board. Such assessment requires an examination of the comparative merit of all eligible candidates, and selecting the best out of them. The promotion to the post under consideration is required to be effected on the basis of relative merit which is to be assessed by the designated Selection Boards. The present case is clearly distinguished from UOI vs. R.S. Kadyan (Supra).

142. Our attention has also been drawn to a communication dated 6th May, 1987 filed by respondent nos. 1 to 4 forwarding a paper on the Selection System being followed in the MS Branch of the Army Headquarters for selection of officers to the rank of A/Lt. Col and above. The instant case is concerned with appointments to the rank of Major General and Lt. General. The guidelines of assessment have been provided in para 10 of this paper which states that they have been approved by the Chief of Army Staff. The salient features of the guidelines include the following:-

(1) Assessment of the officer is based on the comparative merit of the overall profile of the officers within his own batches. Needless to say, the grading of the board is to be assessed from the material placed before the board, and not from personal knowledge, if any.

143. The petitioner is aggrieved not because he has been rejected but is aggrieved by the action of the respondents in failing to consider him for promotion though he was entitled to be considered in terms of the policy. A challenge is also laid to the action of the respondents in considering respondent no. 5 in isolation for both the appointments, in other words without assessment of his comparative merit vis-à-vis others in violation of declared and binding policy. There is no legal prohibition to the consideration of the issues raised herein.

Issuance of promotion order dated 28th September, 2011 of the respondent no. 5 (to the rank of Lt. General) and pipping ceremony of the respondent no. 5 in undue haste

144. It is noteworthy that after passing of the order dated 22nd September, 2011, on 23rd September, 2011 the respondent no. 5 had filed a caveat petition being Caveat No. 890/2011 in this court contending that he apprehended that the present petitioner may file a writ petition assailing the order dated 22nd September, 2011. This caveat petition is available on the record.

145. The petitioner filed the present writ petition dated 26th September, 2011, assailing the order dated 22nd September, 2011, after service of the advance copy upon the respondents. The Registry raised certain technical objections

which were removed and the writ petition was re-filed.

146. Along the writ petition, the petitioner had filed CM No. 16399/2011 praying for an order of restraint against the official respondents from getting approval by the Appointments Committee of the Cabinet (ACC) of the recommendations of the Special Selection Board held on 18th August, 2011 whereby the respondent no. 5 was selected and further declassification of the results of the said Board by the Army. The petitioner also prayed for staying the operation of the order dated 22nd September, 2011 passed by the Armed Forces Tribunal. This application was listed along with the writ petition and the caveat petition before the court on 28th September, 2011 when all parties were duly represented. On 28th September, 2011, the court recorded the request of the parties for final hearing of the writ petition and directed its listing for final hearing after exactly seven days on 5th October, 2011. Since the writ petition itself was to be heard for final disposal at such a short date, the interim relief was declined.

147. Learned senior counsel for the petitioner has contended that the spirit and intent of the order dated 28th September, 2011 and the court posting the matter for final hearing speak for itself. It is contended that the respondents were bent upon favouring the respondent no. 5 by any manner and, therefore, the respondents proceeded in undue haste so as to defeat the rights of the petitioner. Therefore, soon after the hearing on the 28th of September 2011, the respondents issued a promotion-cum-posting order dated 28th September, 2011 promoting the respondent no. 5 to the rank of Lieutenant General and appointing him as the Director General, Remount and Veterinary Services during the evening hours. It is submitted that this court was not informed about this in the hearing earlier in the day. The petitioner has contended that thereafter, in a totally unprecedented manner, the pipping ceremony of respondent no. 5 was effected in undue haste late in the evening of 28th September, 2011 at the residence of Lieutenant General Chetinder Singh.

148. Ms. Jyoti Singh, learned senior counsel for the petitioner submits that the pipping ceremony was done in such unholy haste that the senior officers who effected the pipping ceremony were not even in uniform and were in casual attire.

149. The above position is also undisputed before us. The respondents however, have filed an affidavit contending that the pipping ceremony is not an official matter but only a ceremonial affair. Reference is made to the pipping done by parents, spouse and children who may be in uniform or otherwise. The respondents state that pipping ceremony has been carried out in the evening time during MS functions. However, they have not cited a single instance where pipping ceremony of an officer of the rank of Lieut. General has been carried out at the residence of a senior officer in the dark by his superiors in civilian or casual attire. Pipping ceremony of cadets passing out of the National Defence Academy or Gentlemen Cadets at the IMA by relatives and friends cannot be compared to the pipping as a Lieutenant General. The respondents do not even venture even a semblance of a reason why the ceremony had to be done in such

manner on the very eve of the court hearing.

150. While reference is made by the respondents to the fact that an interim order was not granted, the respondents fail to point out that the interim order was not granted because the writ petition had been posted for final hearing. The respondents have not been able to dispute the petitioner's contention that the pipping ceremony being carried out at the residence was unprecedented and was also in unwarranted haste on the very day when the petitioner's writ petition came to be listed.

151. The Selection Board for all Arms and Services except the RVC was held on 28th of April 2011. It is contended again the respondents render no explanation either for the postponement of the SSB for RVC on 28th April, 2011 or why it was suddenly held on the 18th of August 2011 suggest credibility to the petitioner's contention that this was because of the assurance given to the Armed Forces Tribunal.

152. We note that strictly the respondents may not have violated any court order or legal provision in issuing the promotion order or the pipping ceremony, but given the stature of the persons involved and the ranks under consideration, it is impossible to rationalize the haste with which the respondents or the manner in which they proceeded. We have come across instances where steps to render infructuous court proceedings are taken, but such actions have hardly ever been in relation to such high positions, especially when there is no emergency or service exigency. We note with pain that there is substance in the petitioner's grievance that the entire exercise was undertaken so as to put the respondent no. 5 in position in an effort to defeat the petitioner's challenge and claim. This, of course, was short sighted to say the least.

Bias in favour of respondent no. 5.

153. The petitioner has contended that the respondents were bent upon appointing the respondent no. 5 without complying with the binding policy and contrary to the regulations on the subject. It is urged that the respondents exhibited favouritism and partiality towards him and denied quality of treatment to the petitioner. The petitioner has complained that the respondents breached all norms and procedures to favour respondent no. 5 for extraneous considerations other than merit. It is urged that the actions and orders of the respondents suffered from bias and have worked injustice to the petitioner.

154. It is trite that the unequal treatment does not automatically mean favouritism or partiality. These expressions fell for considerations before a learned single judge of this court in a decision rendered on 11th January, 2011 in W.P.(C) Nos. 7707-45/2005 AEPC VRS Employees Union & Ors. v. Apparel Export Promotion Council. In this case, the court was considering a challenge by the petitioners who were denied ex-gratia payment on the ground that they had taken voluntary retirement prior to the office order of the respondents granting the same. The court had occasion to interpret the expressions favouritism and

partiality which appear in item 5 of Schedule IV to the Payment of Gratuity Act, 1972.

155. Keeping in view the contention of the petitioners, the court elaborated on the meaning of the expression favouritism and partiality or preference in the following terms:-

11. "Favouritism means showing favour in the matter of selection on circumstances other than merit. (Per Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn., 2005.) The expression "favouritism" means partiality, bias. Partiality means inclination to favour a particular person or thing. Similarly, it has been sometimes equated with capricious, not guided by steady judgment, intent or purpose. Favouritism as per Webster's" Encyclopaedic Unabridged Dictionary of the English language means the favouring of one person or group over Ors. having equal claims. Partiality is the state or character of being partial, favourable, biased or prejudiced.

12. According to Oxford English Dictionary, "favouritism" means-a deposition to show, or the practice of showing favour or partiality to an individual or class, to the neglect of others having equal or superior claims; under preference. Similarly, "partiality" means the quality or character of being partial, unequal state of judgment and favour of one above the other, without just reason. Prejudicial or undue favouring of one person or party: or one side of a question; prejudice, unfairness, bias.

13. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially:

If however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper.

We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. (Per Frank, J. in Linahan, Rel, F 2d at p. 652.)

14. It is not every kind of differential treatment which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest-whether pecuniary or personal.

On facts, the court found that the use of the expression "favouritism or partiality" to one set of workers in item 5 of Schedule IV to the Act had been used consciously and that there was no reference to differential treatment. It was further held that the element of bias was necessary to be established by cogent evidence. As there was no basis to accept that there was any favouritism or partiality laid before the court and hence relief was denied in that case.

156. In the present case the official respondents were required to explain their actions in not following the binding regulations and policies in holding the unprecedented Selection Board and Special Selection Board exclusively for the respondent no. 5. The respondents were called upon to provide the circumstances as to why a special Selection Board was held for the RVC alone on 18th August, 2011 while the Selection Board for other Arms and Services was held during October, 2011.

157. So far as the consideration of respondent no. 5 as the sole candidate is concerned, the respondents have given the following explanation in their counter affidavit filed before the Armed Forces Tribunal:-

It is submitted that Respondent No 5 was considered by No Selection Board in Aug 2009 due to specific reasons and in the larger interest of functional requirements of Army. For the sake of brevity, the answering respondents re-iterate reply to Paras 4.2 and 4.3 above, which may be read as a part of reply to this Para as well.

158. Importantly the respondents do not elaborate on the "specific reasons" or what was the "functional requirements of the army" for appointment of respondent no. 5. Given the fact that an unprecedented exception was being made despite and de hors the clear regulation and policy stipulation, these bald statements are grossly insufficient explanation. It is noteworthy that the respondents have also unequivocally admitted that such consideration in isolation was unprecedented and a unique instance in the army. The above discussion substantiates the petitioner's contention that the actions and orders of the respondents stemmed out of obvious bias in favour of respondent no. 5 and his selections were not based on comparative (or relative) merit which would have been the sole consideration for the same.

Conclusion

159. The declared spirit, intendment and purpose of the appointment policy and method is to secure the most meritorious person for the highest appointment in the Army. For this reason, an officer who was not found meritorious in his comparison with his own batch at the time of first consideration, became entitled to a review consideration only in comparison against officers from the next available batch who have been granted their fresh consideration a laudatory policy which gives three opportunities to be promoted to a higher rank to all officer. The undisputable object of this policy is to have the most meritorious person available in the next year, meaning thereby that even an officer who could not make it on comparison in his own batch, would be entitled to promotion if he is found more meritorious on comparison with the next available batch. On the other hand, if the eligible officers in the next batch are more meritorious, the officer from the previous batch would not be entitled to promotion. This rule is in the best interest of the Armed Forces and needs strict adherence.

160. It is, therefore, evident that assessment of the officer has to be based on the comparative merit of the overall profile of the officers within his own batches and merit is to be assessed from the material placed before the Board and not from personal knowledge.

161. The respondent no. 5 could not compete with his own 1974 batch mates and was not empanelled when he was first considered for appointment as a Major General. When being considered as a review case, he had to be considered along with the next available batch which was being accorded its fresh consideration. Consideration and selection could be effected based on the comparative merit of the overall profile of the officers.

Instead the respondents have conducted fads of selection processes wherein respondent no. 5 was the sole candidate for consideration. The illegal purpose was to ensure that only respondent no. 5 was considered, selected and promoted to senior ranks irrespective of his comparative/relative merit.

162. The established and undisputed facts which preceded the orders appointing respondent no. 5, first as major general, and then as Lieutenant General, manifest the bad faith in the exercise of the power to effect the said appointments of respondent no. 5. The intent of the respondents is evident from the impression created that the respondent no. 5 was of the 1975 batch; the official respondents ignoring the established policy of giving review consideration only with fresh cases; the deliberate failure of the respondents to address the petitioner's requests for AE waiver and his objection in his several representations; not deciding the petitioner's statutory petition for over one year; placing in official records the invalid ICR in the service profile of the respondent no. 5 other than in due and regular process; treating the invalid ICR as an essential input for appointment of respondent no. 5; the undue haste in conducting the Special Selection Board, appointment of respondent no. 5 as Lieutenant General and pipping. It is noted that the petitioner was wrongly denied waiver of the AE stipulations and consideration for appointment as Major General by the Special Selection Board on 12th August 2009 and for appointment as Lieutenant General. The petitioner was empanelled as a Major General only on 8th December 2009.

163. The respondent nos. 1 to 4 have ignored several relevant factors, which failure offended against procedural propriety, making their decision in proceeding with the selections perverse and irrational, a facet of unreasonableness warranting interference by this court.

164. The respondents failed to exercise discretion of waiver of the AE stipulations in favour of the petitioner eschewing all relevant considerations. The respondents have therefore failed to comply with prescribed procedure, acted arbitrarily and abused discretionary powers.

165. Comparative or relative merit postulates a comparison which is completely absent when only a single candidate is considered as was done in the case of

respondent no. 5 by Selection Board No. 1 on 12th August, 2009 and Special Selection Board on 18th August, 2004. Consideration of the candidature of the respondent no. 5 by the Selection Board no. 1 and the Special Selection Board was therefore no consideration in the eyes of law.

166. The Armed Forces Tribunal accepted the binding position that a review case cannot be considered in isolation and has to be considered with the fresh cases of the next available batch when it passed the order on 22nd September, 2011 dismissing O.A. No. 115/2011 filed by Col. Teja Ram and Col. T.S. Sachdeva. Despite the above finding, a diametrically opposite view was taken on the same date in the impugned order without dealing with the issues raised or considering the relevant material on record.

167. Ignoring merit in effecting appointments has far reaching and disastrous consequences on organizations. It immediately leads to lack of respect for not only the person so appointed, but for superiors who effect such appoints and then permeates towards all superiors generally. The negative impact thereby on the morale of meritorious personnel and consequentially, on the organization as well as the level of efficiency would be inevitable. Such appointments would breed indiscipline and insubordination and create a sense that it is currying favour with superiors or persons in authority, and not merit, which is essential for obtaining promotions and appointments. This would be a disastrous impression in any organization which would have the propensity to breed corruption, nepotism and favoritism.

Such consequences could also result even if merit is not ignored but the prescribed methodology is not met with or standards are lowered, so as to appoint a particular person. This cannot be tolerated in a disciplined force as the army, and that too at the highest levels.

We may point out that such impact would be proportionally much more in a minor corps as the RVC in the Army, which would have lesser officers at all levels and a minimal number who actually reach senior positions.

168. Appointments made de hors the applicable procedures and without selection from meritorious candidates in the Army are opposed to national interest and cannot be permitted to stand. With regard to such an appointment, in Union of India & Ors. Vs. Lt. Gen. Rajendra Singh Kadian &Anr. (Supra), the Supreme Court had observed thus:-

30. Before parting with the case we need to observe that considering the nature of the sensitivity of the posts involved and that each of the officers feeling that he did not get the best of the deal at the hands of the Government or that the members of the force being aware who is the best is not heading them will certainly weaken the esteem and morale of the force. Therefore, the standards to be adopted and applied should be of the highest order so as to avoid such an impression in the force.

(Underlining by us)

169. In view of the above discussion, the order dated 22nd September, 2011 passed by the Armed Forces Tribunal in O.A. No. 161/2011, the order dated 22nd October, 2010 passed by the respondents rejecting the statutory complaint of the petitioner; the proceedings and result of the Selection Board No. 1 dated 12th August, 2009 with regard to the RVC and the Special Selection Board held on 18th August, 2011 with regard to RVC cannot stand. It has to be held that the petitioner was entitled to be granted his fresh consideration by the Selection Board No. 1 on 12th August, 2009 as well as by the Special Selection Board on 18th August, 2009.

170. We may note that the instant case is not the first occasion that the appointments to the rank of Lieutenant Generals have been assailed before this court. In W.P.(C) No. 5182/2012, Darshan Lal Choudhary v. Union of India and Ors. and W.P.(C) No. 5303/2012, V.S.S. Goudar v. Union of India and Ors., this court had found that the Special Selection Board had assessed officers for promotion to the rank of Lieut. Generals based on a promotion policy which had not even been approved by the competent authority and, therefore, the decision of the Selection Board was illegal. The court had rejected the respondent's contention holding that there can be no ratification of an illegal act. In this background, the court set aside the decision of the Armed Forces Tribunal dated 23rd April, 2012 and the proceedings of the Special Selection Board and quashed the proceedings of the Special Selection Board held on 7th January, 2011. A direction was issued by the Board to hold a Special Selection Board for assessing the officers who were assessed by it on 7th January, 2011 including the petitioners based on the correct policy.

Result

In view of the above discussion, it is held as follows:-

(i) the impugned judgment dated 22nd September, 2011 passed by the Armed Forces Tribunal in O.A. No. 161/2011 is set aside.

(ii) the proceedings and the result of the Selection Board no. 1 held on 12th August, 2009 for the RVC for the promotion of respondent no. 5 to the post of Major General are declared illegal and hereby set aside and quashed.

(iii) the proceedings and result of the Special Selection Board held on 18th August, 2011 for the RVC promoting respondent no. 5 to the post of Lieutenant General are declared illegal and hereby set aside and quashed.

(iv) it is held that the respondents have not treated the AE tenure for promotions in the RVC to the post of Major General and Lieutenant General as mandatory and have waived the requirement thereof to officers. The petitioner is entitled to the same treatment.

(v) a direction is issued to the respondents no. 1 to 4 to consider the case of the

petitioner for waiver of the AE tenure as on 12th August, 2009 for consideration for promotion to the post of Major General and as on 18th August, 2011 for the post of Lieutenant General in the light of the observations made in the present judgment and pass orders thereon accordingly.

(vi) as a corollary to the above, the respondents are directed to hold a Selection Board (as per the grounds on which the second vacancy of the Major General was sanctioned in the RVC) following the procedure laid down in the binding policies and taking into consideration the petitioner (for his first consideration) and respondent no. 5 (as a review case) as eligible officers for consideration for promotion as Major General as on 12th April, 2009.

(vii) the respondents no. 1 to 4 are directed to pass appropriate orders for appointment to the vacancy of Major General in the RVC as on 12th April, 2009 based on the consideration by the Selection Board.

(viii) a further direction is issued to respondents no. 1 to 4 to hold a Special Selection Board for effecting promotion to the rank of Lieutenant General (DG RVS) for eligible officers including the petitioner for consideration which would relate back to eligibility as on 18th August, 2011.

(ix) in case the officer is not in service today on account of retirement or such like cause, upon the above considerations and finding of his merit by the board, notional promotion, may be given w.e.f. 12th August, 2009 as Major General and 18th August, 2011 as Lieutenant General. In such eventuality, the officer concerned would be entitled to all consequential benefits upon notional promotion as Major General and restoration into service if selected as Lieutenant General. All consequential benefits would relate back and be advanced.

(x) given the ranks involved and the brief tenures available to the incumbents, the respondents shall ensure appropriate steps are taken within six weeks.

(xi) the petitioner would be entitled to costs which are quantified at Rs. 25,000/- to be paid by respondents no. 1 to 4 within a period of six weeks.

This writ petition is allowed in the above terms.