

FROM NO. 21
(SEE RULE 102(1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: O. A NO. 85 OF 2013

ON THIS 17 TH DAY OF SEPTEMBER, 2014

CORAM: **HON'BLE JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)**
HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

IC-38405p Brig DN Singh,
Son of UN Singh,
Presently posted at HQ 33 Corps,
PIN 908533, C/o 99 APO

.....Applicant

-VS-

1. Union of India through
The Secretary,
Ministry of Defense,
South Block, New Delhi-110 011
2. The Chief of Army Staff,
Integrated HQ of MoD (Army),
DHQ PO, New Delhi-110 011
3. Military Secretary,
Integrated HQ of MoD (Army),
DHQ PO, New Delhi-110 011
4. Brig Vikas Puri,
School of Artillery,
Deolali, Maharashtra-422102

.... Respondents

For the petitioner: Mr. Rajiv Manglik, Advocate
Miss Manika Roy, Advocate

For the respondents: Mr. Anand Bhandari, Advocate.

ORDER**PER HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)**

In this original application filed U/s 14 of the AFT Act, 2007, the applicant, who is a serving Brigadier in Indian Army, has ventilated his grievance against his non-empanelment for promotion to the rank of Major General and in stead empanelment of respondent No. 4, Brigadier Vikas Puri to the said rank as illegal and arbitrary.

2. The relevant facts, stated very succinctly, are that the applicant was commissioned in the Regiment of Artillery of the Indian Army on 22nd Dec 1979 as 2nd Lt. He is an ex-NDA regular officer belonging to the 1980 batch. In course of his service, he got successive promotions in different ranks and ultimately came to be promoted to his present rank of Brigadier on 23 Jun 2008. He became eligible and due for next promotion to the rank of Major General and on the first occasion, he was not recommended by the No. 1 Selection Board (SB for short) held in Oct 2011. He was, thereafter considered as a first review Case along with his junior batch i.e. 1981 batch in the subsequent selection by the 1 SB in April 2012.

3. The respondent authorities vide letter dated 20 Apr 2012 (annexure-A4) notified that No. 1 SB would be held on 25 Apr 2012 for consideration of eligible officers of different Corps and Arms including Artillery for promotion to the rank of Major General. So far as Artillery was concerned, total 14 vacancies were allotted as specified in the ibid letter. As already stated, the applicant, who belonged to 1980 batch, was to be considered as First Review along with 1981 Fresh cases in the ibid 1 SB scheduled on 25

April 2012. Respondent No. 4 belonging to the 1981 batch was also slated for consideration in the said SB. The meeting of the said promotion board was held as scheduled and the result was declared on 10 Sep 2012 (annexure-A5). As per the said result empanelment of 13 officers of the Regiment of Artillery for promotion to the Acting rank of Maj Gen was approved by the Central Government; and it was indicated that the said officers would be promoted in their turn. Neither the name of the applicant nor that of respondent No. 4 was included in this list of 13 officers. Being aggrieved, the applicant preferred a non-statutory complaint on 3 Oct 2012 (annexure-A6) against his non-empanelment as also for keeping one vacancy unfilled. The said complaint was rejected on the ground that no military wrong was done to the applicant vide reply dt 15 Jan 2013 (annexure-1). The applicant thereafter filed a statutory complaint on 3 Apr 2013 (annexure-A7) with the same grievance. When the said statutory complaint was pending, the respondents issued the impugned order dt. 26 Apr 2013 by which the respondent No. 4 was approved for empanelment for promotion to the rank of Maj Gen and his name was directed to be placed at Srl. No. 14 below Brig MLNS Kumar, as indicated in earlier order dt.10 Sep 2012 (annexure-A5) based on the same selection dt. 25 Apr 2012. Being aggrieved by his non-empanelment and illegal empanelment of respondent No. 4, the applicant made a supplementary statutory complaint on 16 May 2013. His original statutory complaint was rejected by order dt 4 Jul 2013, being not tenable. Since his grievance was not redressed, the applicant has approached this Tribunal by filing the instant application seeking quashing of the impugned orders dt. 15.1.13, 4.7.13 by which his non-statutory and statutory

complaints were respectively rejected; as also the supplementary result dt 26.4.13 by which respondent No. 4 was empanelled for promotion to the exclusion of the applicant. He has also prayed for a direction to the respondents to either promote him or any other officer in order of merit as on 10 Sep 2012 when the result of first 13 vacancies, out of 14 was declared.

4. The official respondents have contested the application by filing a written reply affidavit. It is stated that the applicant, a 1980 batch Artillery officer was considered by No. 1 SB held in Oct 2011 but could not be empanelled for promotion to the rank of Maj Gen on the basis of his overall profile and comparative batch merit. He filed a non-statutory complaint dt. 29 Mar 2012 against his non-empanelment by No. 1 SB held in Oct 2011, which was duly considered and was rejected by order dt. 29 Mar 12. Subsequently, the applicant was considered as First Review 1980 batch along with eligible officers of 1981 batch by No. 1 SB held on 25 Apr 2012 against total 14 declared vacancies. The said No. 1 SB recommended 14 officers which, was forwarded to the MOD for obtaining approval of Hon'be *Raksha Mantri* (RM for short), who is the competent authority in terms of Reg. 108 of Regulations for Army 1987. After due examination, the MoD approved the recommendation of No. 1 SB in respect of 13 officers on 4 Sep 2012 and accordingly result of 13 officer was declassified vide MS Branch letter dt. 10 Sep 2012 (annexure-A5). Subsequently, after due examination the competent authority approved the empanelment of respondent No. 4, Brig Vikash Puri and accordingly, MS branch letter dt. 26 Apr 2013 (annexure-A3) was issued.

5. The official respondents have further submitted that No. 1 SB while recommending 14 officers, also recommended the name of the applicant but the competent authority i.e. Hon'ble RM after due examination revised the grading from 'Z' (unfit) to 'B' (fit) in respect of respondent No. 4 while the applicant's grading 'B' (fit) awarded by the SB was revised to 'Z' (unfit). It is contended that as per regulation 108 of Regulations for Army, the assessment and recommendations of SB are only recommendatory in nature and not binding till approved by the competent authority. Therefore, revision of grading in respect of applicant from 'fit' to 'unfit' and that of respondent No. 4 from 'unfit' to 'fit' by the competent authority is quite in order and legally tenable. Therefore, the applicant cannot make any legitimate grievance against his non-empanelment. His statutory and non-statutory complaints in this regard were duly considered and rejected being not tenable.

6. Respondent No. 4 has also filed a separate but short reply stating that he was empanelled by the competent authority based on his overall profile and comparative merit; therefore, his empanelment cannot be assailed by the applicant.

7. The applicant has filed a rejoinder to the ibid reply of the official respondents reiterating his contention as raised in the OA.

8. We have heard Mr. Rajiv Manglik, Id. adv. for the applicant. Mr. Anand Bhandari, Id. adv. appeared and argued on behalf of the official respondents i.e. respondents 1 to 3 as also for the private respondent No. 4. The official respondents have also produced before us the relevant records of MoD and AHQ as relevant to this case for our perusal.

9. Appearing for the applicant, Mr. Manglik has submitted that as is evident from the reply affidavit filed by the official respondents that the No. 1 SB, which met on 25 Apr 2014, selected 14 officers of the Regiment of Artillery against 14 declared vacancies. The name of the applicant was recommended as 'fit' for promotion whereas the name of respondent No. 4 was not at all recommended. It is true that the recommendation of the selection board is required to be approved by the Central Government, but it appears that when the recommendation was sent to the MoD for approval, it approved only 13 officers for empanelment for promotion excluding the name of the applicant. Therefore, it is quite obvious that the name of the applicant was at the bottom of the list as 13th in order of merit. But it has to be borne in mind that the applicant belongs to 1980 batch and, therefore, in terms of seniority, his position, on selection, would be above 1981 batch officers. Two other 1980 batch officers, viz. Brig A.S.Chowdhury and Brig B.Chakravarty were empanelled and their names are appearing at the top of the select list vide annexure-A5 dt. 10 Sep 2012. Mr. Manglik contends that there is no policy or Govt. instruction to approve the recommendation of selection board in piecemeal which has been done. It is also surprising that even though the name of the applicant was not approved along with other 13 officers and the 14th vacancy was kept in abeyance, the respondent No. 4 was approved long seven months later on 26 Apr 2003 vide annexure-A3. This clearly shows that something wrong was committed in the meanwhile in order to show favour to respondent No. 4, who, despite being junior and lower in merit to the applicant, was declared as 'fit' even though he was graded as 'unfit' by the SB. It is only to favour the said respondent No. 4; the applicant has been

downgraded from 'fit' to 'unfit' by superseding the SB's recommendation which is highly illegal and arbitrary. It is not a case where there was some adverse material in respect of the applicant which was not considered by the SB or which came to light subsequently requiring any corrective and retrograde decision by the MoD. According to him, even if the Govt. can reduce the number of vacancy from 14 to 13, but it cannot utilize the said vacancy to give promotion to a particular favoured person long after the result was declared on the strength of the same very SB that had declared him 'unfit' and the applicant as 'fit. Mr. Manglik submits that even if it is accepted that the Central Govt. has inherent power to modify, review, approve or repeal recommendations of SBs in terms of regulation 108 of RA, but reason has to be given for such decision when recommendation of SB is modified. Without assigning appropriate reasons, if such change or modification is made to the detriment of the interest of a recommended officer, this will surely results in arbitrary and illegal State action, which is illegal. He points out that in reply to the statutory complaint filed by the applicant against his non-empanelment, the Central Govt. never disclosed any reason as to why the applicant's case was rejected and the complaint was answered by a cryptic reply stating that *no military wrong* was done.

5. In support of his contention, Mr. Manglik has relied on the decision of the Hon'ble Apex Court in the case of **R.S.Mittal –vs- UOI & Ors**, (1995 Supp (2) SCC 230}. He has also relied on a very recent decision of the Apex Court in the case of **Maj Gen H.M.Singh, VSM –vs- UOI & Anr, 2014(1) SCALE 135.**

6. Mr. Bhandari, Id. adv. appearing for all the respondents has submitted that it is well settled that no one has a right to be promoted. The only right that is available to a Govt. servant is consideration for promotion. In this case, the applicant was duly considered for promotion. The recommendation made by the SB is only recommendatory in terms of regulation and therefore, such recommendation cannot bestow any right upon the applicant for appointment. It is for the Central Govt. either to accept or to reject or modify the recommendation. It is also settled legal position that even an empanelled candidate has no right for promotion or appointment. Mr. Bhandari submits that Central Govt. and for that matter the Hon'ble RM in their wisdom have thought it fit to modify the recommendation of the SB for appropriate reasons and has acted accordingly. He has placed reliance on the decision of the Hon'ble Apex Court in the case of **UOI & Ors –vs- Lt. Gen Rajendra Singh Kadyan & Anr**, 2000 AIR SCW 2692 and **Maj Gen IPS Dewan vs UOI & Ors**, 1995(3) SCC 383.

7. We have given our anxious consideration to the fact situation and the submissions advanced by both sides. We have also gone through the departmental files in detail which have been produced before us.

8. The only question that falls for our consideration is whether the decision of the Central Govt. to modify the grading of applicant from 'fit', as recommended by No. 1 SB to that of 'unfit' and similarly change of grading in respect respondent No. 4 from 'unfit' to 'fit' is justified or not.

9. Before we consider the matter, we observe at the outset that in the Army, as it appears, there are no *statutory rules* governing procedure for promotion of officers and

non-officers to various ranks. The only provision that is available is in Reg. 108 of Regulations for the Army, 1987, which are quoted below:-

“108 -Composition and Duties of Selection Boards”

Selection Boards (for officer other than Army Medical Corps, Army Dental Corps and Military Nursing Service) are constituted as required under the order of the Chief of the Army Staff. Their composition and duties are given below:

(a) Composition:

Presiding Officer	Chief of the Army Staff or any other senior officers as directed by him according to the importance of the Selection Board
Members	As directed by the Chief of the Army Staff from time to time in accordance with the nature of their duties.
Secretary	MS/Addl MS/Dy MS

(b) Frequency of Meeting: As required by the Chief of the Army Staff

(c) Duties:-

- (i) Assessment of officer for promotion to Lt. Col. and above, in accordance with criteria laid down for selection.
- (ii) Any other matter which the Chief of the Army Staff may direct the Board to consider.

(d) The assessment of the Selection Board shall be recommendatory in nature and not binding until approved by the competent authority viz. the COAS or the Central Government as the case may be.

(e) The Central Government or the COAS have the inherent power to modify, review, approve with variation or repeal recommendations of the Selection Boards.

10. It is seen from sub-paragraphs (d) & (e) that assessment of the SBs is only recommendatory in nature and not binding until approved by the competent authority viz. the COAS or the Central Govt. as the case may be and further that the Central Govt. or COAS have the inherent power to modify, review, approve with variation or repeal

recommendations of the SBs. The Hon'ble Apex Court in the case of **Lakhwinder Singh – vs- UOI & Ors**, (2008) 7 SCC 648 considered the power of Central Govt. as provided in ibid reg. 108 and observed as under:-

“20. It was lastly submitted that para 108 of the Regulations for the Army, 1987, which provides for the constitution and duties of selection Boards, clearly indicates that the assessment of the Selection Board shall be recommendatory in nature and not binding until approved by the competent authority, namely, the COAS or the Central Government as the case may be. The said Regulations also provides that both the Central Government and the COAS have an inherent power to modify, renew, approve with variation or repeal the recommendations of the selection Board. It was urged that it was, therefore, evident that the recommendation of the Special Selection Board was not binding and had to be approved by the Central Government or the Chief of the Army Staff. In support of his aforesaid submission learned counsel referred to the decision of this Court in **Union of India –vs- Lt. Gen Rajinder Singh Kadyan** (2000 (6) SCC 698) in which this Court inter alia held as follows :

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

21. Reliance was also placed on another decision of the Delhi High Court in **Union of India –v- Col. Shyam Kumar**, (1982) 3 DRJ 225, in which it was held that the assessment of Selection Board is purely recommendatory in character and that the power of the appointing authority to accept or even vary the recommendation of the selection Board is implicit.”

11. Therefore, it is the accepted position that the recommendation or assessment of the SB can be modified or repealed by the Central Govt. in terms of this Regulation.

12. As there is no other provision governing the method of selection or criteria to be adopted by the different SBs for promotion to different ranks, the Central Govt. in the MOD issued policy decisions in this regard from time to time which are followed by

different SBs. At the time of ibid selection held on 25 Apr 2012, the policy decision dt. 4 Jan 2011 was operative and selection was also made in terms of this policy. A copy of the same is available in the departmental file. As per this policy, the selection is based on quantification system. Para 3 of the policy stipulates about overall distribution of marks which is as follows:-

“3. The overall distribution of marks of the Quantified System will remain the same as earlier and are as follows :-

- (a) 95 marks will be given for quantified parameters to include confidential report (CRs), Course, Honours and Awards.
- (b) Five marks are earmarked for Value Judgement (VJ) by the selection Board (SB) members for aspects that cannot be quantified.”

13. Now, coming to the main issue, being conscious of the confidentiality of MoD and AHQ files produced before us, we do not incline to divulge any classified information obtaining in these files. We will only give a gist of facts that are essential to be stated for deciding this case.

14. On going through the departmental files, we find that No. 1 SB which is meant for promotion from the rank of Brigadier to Major General, was held on 25th Apr 2012 to consider 29 Fresh cases of 1981 batch, 10 First Review Cases of 1980 batch, 2 Final Review cases of 1979 batch, 1 fresh (withdrawn) case, 2 First Review (withdrawn) case of 1979 batch and 3 final review cases of 1978 batch and 1 special review (fresh) case of 1979 batch of Artillery under quantification system. Total vacancies declared were 14. The SB considered all the aforesaid officers based on the quantification system of selection and finally selected 14 officers, out of which 3 were from 1980 batch and 11 from 1981 batch. The applicant's name was duly recommended and his position in the

select list was at the bottom i.e. 14th. It further appears that he secured total marks (i.e. Q marks plus VJ marks) were 89.622. Thus, this is the cut off mark for this selection.

15. As required, the recommendation of the Board was sent to the MoD for approval of the Hon'ble RM on behalf of the President of India since President is the appointing authority. While examining the recommendation in the MoD, it was noticed that respondent No. 4, (Brig Vikas Puri) though earned higher quantified marks (Q marks) 90.542, which was more than the cut off marks of 89.622 secured by the applicant, he (R4) was not awarded any value judgement marks (VJ marks) by the Board Members for certain adverse MI inputs against him. It is also found that a censure i.e. "non-recordable displeasure" was awarded to respondent No. 4 just a few days prior to the date of holding of meeting. But no DV ban or any other major disciplinary action was initiated against him for the said adverse MI inputs. Under such circumstances, clarification was sought for from the AHQ. As it appears from AHQ file, the incident involving the respondent No. 4 was brought to the notice of the Chairman and other Board Members, who unanimously opined that in view of un-officer like behaviour of the said officer, it was decided by the SB not to recommend him and accordingly, graded him as 'Z' i.e. 'unfit' and no VJ marks were awarded. It appears that the MoD was not convinced and therefore, only 13 officers from the panel of 14 officers, were approved for empanelment leaving aside one vacancy open in the event the case of Brig Vikas Puri was ultimately decided in his favour and if in the meantime, all the 14 vacancies were utilized, there would no vacancy to accommodate him. Therefore, one vacancy was kept

apart and accordingly, the applicant, who was the last person in the panel, was not approved.

16. Subsequently, the matter was considered at different levels including further clarification from AHQ and opinion of LA (Def)/M/o Law was also obtained twice. The AHQ stuck to their position and justified the recommendation of the No. 1 SB and the Law Ministry also agreed with such view at the first instance and opined that the recommendation of the SB was legally tenable. In his second opinion, relying on policy letter dated 23.4.07, it was observed by M/o Law that punishment of 'displeasure (non-recordable)' as was imposed on the respondent No. 4 did not form part of his overall record nor it was a bar for promotion and accordingly, relying on para 108 of RA, it was observed that Govt. has inherent power to revise or modify the grading from 'unfit' to 'fit'. Based on such opinion, finally on 12.4.13 the grading of respondent No. 4 was modified from 'Z'(unfit) to 'B' (fit) and that of the applicant from 'B' (fit) to 'Z' (unfit) which was approved by the Hon'ble RM on 15.4.13. Accordingly, the impugned order was issued by approving empanelment of respondent No. 4 against 14th vacancy on the basis of his quantified marks (Q marks) only ignoring the fact that no VJ marks were given by the SB members and thus, the applicant was left out of the select list.

17. It appears that the MoD was of the opinion that since no DV ban was imposed nor any major disciplinary proceeding was initiated against the respondent No. 4 based on his involvement in un-officer activities and only a punishment of "non-recordable displeasure' was imposed just a few days before the board meeting, denying him promotion would invite legal battle. Since "non-recordable displeasure" is not a bar for

promotion and since the respondents No. 4 secured higher quantified marks out of 95 marks, than the last person recommended i.e. the applicant, it would not be proper not to recommend him. On the contrary, the AHQ took the view that the No. 1 SB is an open board and the entire matter involving the respondent No. 4 was brought to the notice of the Members, who are very senior Army Generals and they took unanimous and conscious decision that a person with such non-officer qualities could not be recommended for promotion and accordingly no VJ marks were awarded and thus, was also not recommended.

18. From the above, the following issues emerge, -

- a) Whether selection of respondent No. 4 without VJ marks was justified or not?
- b) Whether respondent No. 4 could be approved by the Central Govt. overruling the recommendation of the SB in view of para 17 of the ibid policy letter of 4th Jan 2011?
- c) Whether in order to accommodate respondent No. 4 within the declared number of vacancies, the grading of applicant as awarded by No. 1 SB could be varied or modified to his disadvantage?

19. As regards the first issue, it is observed that as per MOD's own policy letter dt. 4 Jan 2011, it is provided in para 3 that overall distribution of marks will be; (a) 95 marks for quantified parameters to include confidential reports (CRs), Courses, Honours and Awards, and (b) five marks for value judgement by the selection board members for aspects that cannot be quantified. Therefore, it is evident that there are two separate components viz. Q marks and VJ marks and total marks secured by a candidate will be the full and complete assessment. Only on the basis of singular component i.e. Q marks,

final assessment cannot be made because if VJ marks are omitted, then there will be no need for a SB at all since Q marks are available on records and compiled in MDS (Member Data Sheet) as prepared by the office. Thus, selection of respondent No. 4 excluding VJ marks cannot possibly be done as in that case the spirit of the MoD's own policy circular will be contravened. Such step as has been taken by the MoD will also give rise to serious doubts about the efficacy of the SB if value judgement component to be awarded by the Members based on parameters as set out in the ibid circular, is not at all necessary and only on the basis of records in the form of quantified marks, selection is made against very high positions of military administration of the country. Valued judgement of very senior Army Generals as board members in respect of a particular candidate cannot be ignored like this. This would mean selecting a person whose assessment by the Board is incomplete vis-à-vis others, who have been validly selected in accordance with policy.

20. As regards the second issue, it is observed that as per MoD's ibid policy letter dt. 4 Jan 2011 on the subject of conduct of selection board by quantification system, it is provided in para 17 as under:-

"17. Disciplinary/Administrative Awards: - While assessing officers with disciplinary background, the gravity and nature of the offence and the service level at which the offence was committed will be taken into consideration. **Irrespective of the position in the merit list, officers with the following will not be recommended for promotion:-**

- (a) cases involving moral turpitude, gross negligence, acts of cowardice or **un-officer like behaviour which reflects on the moral fibre of an officer.**
- (b) Negative character traits.
- (c) Poor performance in combat and operational situations.

21. It appears from the departmental file that the MoD was swayed in favour of respondent No. 4 mainly on the ground that even without VJ marks, on the basis of the Q marks alone, respondent No. 4 secured higher marks, than the cut off marks obtained by the last candidate (applicant) recommended by the SB. Therefore, it would be unjust and unfair to deprive him promotion. As indicated in the above-quoted para 17, it is very clearly stipulated that **“irrespective of position in the merit list”** an officer will not be recommended if he is involved in any of the circumstances mentioned therein. As stated earlier, the Selection Board on being apprised of the MI inputs in respect of the respondents No. 4 unanimously decided not to recommend him for his “un-officer like behaviour” and accordingly, consciously did not award any VJ marks and graded him ‘Z’ i.e. unfit. Central Govt., however, was not satisfied with this reasoning, rather they went on to insist that since no DV ban was imposed or any other major disciplinary proceeding was initiated for such omission and commission, he (R4) could not be denied promotion. Without going into the controversy any further, we only observe that No. 1 SB was constituted by very senior Army Generals and its recommendations were concurred by the COAS. If they think that even where in the absence of adequate concrete materials, only non-recordable censure was imposed, and no major action could be taken, that does not absolve him of the un-officer like qualities, then such opinion cannot be totally ignored or by-passed. At least a review of the decision could have been sought from the SB. We have also seen that in the AHQ file as produced before us there are certain other observations which we need not divulge or discuss and we stop here.

22. Selection Board has every right not to recommend an officer if according to the wisdom of the board members, his conduct is under cloud. Even though the Central Govt. has inherent powers not to accept the recommendation of SB, such power has to be exercised prudently and for good reasons as stated in para 20 of **Lt. Gen Rajinder Singh Kadyan** (supra) case, reproduced above. That apart in **Kadyan** (supra), it has been observed at para 29 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 have nexus with the facts on record, the same cannot be attacked on merit. Here the SB took into consideration all relevant facts as also reports as placed before it, which they very well can take into consideration vide **M.V.Thimmaiah & Ors –vs- UPSC, (2008) 2 SCC 119 (para 28)**, and decided not to recommend respondent No. 4, unless good reasons are there, Central Govt. should have accepted the same. We are, however, not saying that Central Govt. does not have the power not to accept such recommendation, but any such power has to be exercised judiciously. In **East Coast Railway –vs- Mahadev Appa Rao [(2010) 7 SCC 678]**, it has been observed by the Hon'ble Apex Court.

“While no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make an appointment is thus a matter which is not beyond judicial review before a competent writ court. If any such decision is found to be arbitrary, appropriate directions can be issued in the matter. The least which the candidate who were otherwise eligible for appointment and who had appeared in the examination that constituted a step-in-aid of a possible appointment in their favour, were entitled to is to ensure that the selection process was not allowed to be scuttled for mala fide reasons or in an arbitrary manner.”

To explain the definition of the term 'arbitrary', It has been further observed in

Para 23 of the ibid decision as under:-

“There is no precise statutory or other definition of the term 'arbitrary'. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making an order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This must be evident from the order itself or record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording reasons that led the authority to pass the order in question. Absence of reason either in the order passed by the authority or in the record contemporaneously maintained, is clearly suggestive of the order being arbitrary hence legally unsustainable. “

23. So far as third issue is concerned, although no reason was given for downgrading the grading of applicant from 'fit' to 'unfit', it is evident that in order to give berth to respondent No. 4 within the 14 vacancies declared, the applicant's empanelment has been sacrificed despite he being duly recommended by the Board. There was no other additional input in respect of the applicant available to the authorities so that his grading could be altered to his detriment. As it appears that the Central Govt. was very much eager to protect the interest of respondent No. 4, notwithstanding whether injustice to the applicant or any other is inflicted upon. They appeared to be least bothered to safeguard the interest of the applicant; rather they deprived him of his fair chance of promotion despite his recommendation by SB and also ignoring the fact that he belonged to a senior batch, though being considered as first review. It is of course true that even an empanelled candidate does not have an indefeasible right to be appointed. “But at the same time the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been

selected by the Selection Board and there was a vacancy which could be offered to him, keeping in view his merit position, then ordinarily, there was no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel." Vide **R.S.Mittal –vs- UOI & Ors**, (supra). As already stated above, even though applicant's name was recommended along with others, his case for empanelment was kept in abeyance till decision in the case of respondent 4 and in that process more than 7 months passed and next selection was also due. There is no other reason available from the file.

24. Having considered the matter from all angles, we are of the considered opinion that the modification of grading of applicant from 'B' (fit) to 'Z' (unfit) by overturning the recommendation of the No. 1 SB in order to give berth to respondent No. 4 is not at all justified. If respondent No. 4 is to be empanelled only because his Q marks were higher than the cut off marks i.e. that of the applicant, who was the last person recommended, ignoring other aspects, as has been discussed above as also the unanimous opinion of senior Army Generals being members of the Selection Board, who are specialist in the field, then alternative method ought to have been explored by arranging for an additional vacancy for him or if necessary, by creating supernumerary post. It could not have been done by displacing the applicant, who was not at fault at all.

25. We also find from the records that the applicant's non-statutory and statutory complaints against non-empanelment/ promotion were rejected by the competent authorities without any application of mind. The merit of these of these complaints were not even analysed; and instead rejected on a flimsy unreasonable ground that *no*

military wrong was done and hence the said complaints were not tenable. The authorities appear to have been so obsessed to find ways to approve Respondent No. 4 that any representation that appeared to be a hurdle on the way was pushed aside. Therefore the impugned rejection orders dated 15.01.2013 (Annexure-A1) and 04.07.2013 (Annexure-A 2) are liable to be quashed being unreasonable.

26. As regards the empanelment /approval orders dated 26 April 2013 in favour of Respondent No. 4 (Brig Vikas Puri) is concerned, we have already observed that recommendations of a duly constituted selection board comprising senior general officers and concurred after perusal by the COAS has been altered and modified by the MoD under powers vested upon them in terms of Reg. 108 of RA 1987 without any convincing reasons as brought out earlier. The MoD (Respondent No1) may take necessary actions as deemed appropriate in the light of our observations made in *ibid* paragraphs (19, 20, 21, 22, 23 and 24).

27. In the result, the application is allowed in part on contest by issuing the following directions:-

- i) The respondents are directed to approve empanelment of the applicant against the 14th vacancy in terms of recommendation of No. 1 Selection Board held on 25 Apr 2012 and to consider grant of promotion accordingly to the acting rank of Maj Gen with effect from the date as per his seniority when such vacancy accrued/accrues with all consequential service and monetary benefits.

- ii) The impugned orders dated 15.01.2013 (Annexur-A1) and dated 04.07.2013 (Annexure-A2) are hereby quashed.
 - iii) The empanelment of respondent No. 4 is not judicially interfered with considering our observations summarized in the form of an advice in Para 26 above. We, however direct Respondent No1 to ensure that in order to accommodate him no candidate empanelled in the 1 SB of 25 Apr 2012 should be made to suffer. An additional vacancy may be arranged or if required, a supernumerary post may be created temporarily.
 - iv) The above directions be implemented within 60 days from the date of communication of this order. O I/C Legal Cell HQ Bengal Area shall send a copy of this order to Respondents No 1 and 3 immediately by fastest means so as to not delay implementation so that the applicant does not retire awaiting implementation.
 - v) No costs.
28. The original records be returned to the representative of MOD/MS Branch in sealed cover on proper receipt.
29. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of usual formalities.

(LT. GEN. K.P.D.SAMANTA)
MEMBER (ADMINISTRATIVE)

(JUSTICE RAGHUNATH RAY)
MEMBER (JUDICIAL)