

FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A.No. 10 of 2013

Tuesday, the 13<sup>th</sup> day of August 2013

THE HONOURABLE JUSTICE V. PERIYA KARUPPIAH  
(MEMBER-JUDICIAL)

AND

THE HONOURABLE LT GEN (RETD) ANAND MOHAN VERMA  
(MEMBER – ADMINISTRATIVE)

IC-38940P

Brig. Virendra Singh Saini

Brigadier A

Officer Training Academy

St. Thomas Mount

Chennai-600016.

.. Applicant

By Legal Practitioner: Mr.V.T.Gopalan,SC for  
M/s. S.Sathiyaseelan &  
M. Erajasimhan.

vs.

1. The Government of India  
through the Secretary, Ministry of Defence  
Integrated Headquarters of  
Ministry of Defence (Army)  
New Delhi.

2. The Chief of the Army Staff  
Integrated Headquarters (Army)  
South Block  
New Delhi.

3. The Military Secretary  
MS Branch  
Integrated Headquarters of  
Ministry of Defence (Army)  
New Delhi.

..Respondents

By Mr. B.Shanthakumar, SPC  
For respondents.

### **ORDER**

(Order of the Tribunal made by  
Hon'ble Lt Gen (Retd) Anand Mohan Verma,  
Member-Administrative)

1. This application has been filed seeking relief to set aside the order of Government of India, Ministry of Defence, No.A/45501/56/2012/SC/MS(X)/197/SC/2012-D(MS), dated 19.09.2012 vide which petitioner's complaint against non-empanelment for promotion has been rejected and order empanelment of the petitioner for promotion by No.1 Selection Board along with his batch seniority and other benefits.

2. The facts of the case are that the petitioner was commissioned in 1980. He was promoted to the rank of Brigadier on 1<sup>st</sup> May 2008 and was appointed Commander, 26 Artillery Brigade on 5<sup>th</sup> May 2008. The delayed ACR of the petitioner for the period of 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008, hereinafter referred to as 'delayed CR', was initiated in October 2008. The petitioner complained against this delayed CR vide Statutory Complaint dated 23<sup>rd</sup> September 2009 which was rejected vide

order dated 22<sup>nd</sup> June 2010. The petitioner was considered for promotion by No.1 Selection Board on 13<sup>th</sup> and 14<sup>th</sup> October 2011 and was not empanelled. The petitioner filed a Statutory Complaint against non-empanelment on 24<sup>th</sup> April 2012 which was rejected by the order of the Government dated 19<sup>th</sup> September 2012 which has been challenged in this application. The petitioner was considered by No.1 Selection Board as a First Review case on 25<sup>th</sup> April 2012 and was non-empanelled.

3. The petitioner would canvass his case through his application, rejoinder, written submissions and arguments and pleadings by learned Senior Counsel Mr.V.T.Gopalan and learned counsel Mr. S.Sathiyaseelan. The petitioner would provide a glimpse of his record of service in the Army. He would submit he is a Qualified Flying Instructor (QFI) and served in Jammu Kashmir, North East, in Counter Infiltration/Counter Terrorism environment and Siachen, has commanded an independent flight in Jammu and Kashmir and has been awarded three COAs, Commendation Cards and two GOC-in-C Commendation Cards. When he was CO, his Unit was awarded the coveted Unit Citation. After command of the Artillery Brigade in 2010, he was given the prestigious assignment of being Head of Inter Services Trial Team for selection of helicopters for Army and Air Force. Despite his achievements he was not empanelled for promotion and his Statutory Complaint dated 24<sup>th</sup> April 2012 was rejected without application of mind to the facts. The First Review for selection

was held after the rejection against which he has not filed Statutory Complaint as it would be a futile attempt. The main rejection order gives no valid reasons for rejecting the complaint. He would submit that normally CR in Brigade's rank is due on 1<sup>st</sup> July every year for the preceding year. It can be initiated early on or after 2<sup>nd</sup> April and delayed till 29<sup>th</sup> August provided the officer assumed appointment on or before 2<sup>nd</sup> April as stipulated in para-77 of Army Order 45/2001/MS. Since the petitioner had assumed appointment on 05 May 2008, no ACR was due for him till 1<sup>st</sup> July 2009. But this was changed by the respondents who issued a letter No. A/17151/MS 4 Cord dated 27<sup>th</sup> August 2008 which was received in the petitioner's Headquarters on 10<sup>th</sup> September 2008 and which removed the embargo of assumption of appointment on or before 2<sup>nd</sup> April for delayed CR for Brigadiers and Major Generals. The petitioner would submit that in all fairness, the policy should have been effective from 27<sup>th</sup> August 2008, but by this letter, it was made effective retrospectively from 2<sup>nd</sup> April 2008 and consequently, delayed CR for the period from 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008, when the petitioner completed 90 days of physical service under the IO (initiating Officer), was initiated. The petitioner would claim that during this period, his IO did not visit him and therefore, the ACR could not have been an objective assessment of his performance. The petitioner would claim that in this ACR, figurative assessment was 8.3 and Box Grading of 8 was awarded by

the IO. He would go on to say, though there is no personal bias, the casual manner of reporting caused serious repercussion on the career of the petitioner. The same IO in his subsequent ACR on the petitioner, after he had visited him, gave him a figurative assessment of 8.65. The petitioner would claim that if his last 10 to 15 CRs are taken into account, it will show that he was awarded lowest grading in the delayed CR which is surprising since during this period, he handled explosive situation in a large part of Jammu town without firing a single bullet when mass agitation during Amarnath Yatra took place and there was no case of negligent death/murder/suicide/rape during his command. He would claim that the CR box grading was not objective and it should have been 9 or near 9. The order rejecting his complaint states that the policy has been uniformly applied. On checking, the petitioner found that out of 62 officers of his batch, only five including the petitioner were affected. The other 57 had been promoted before 2<sup>nd</sup> April and were not impacted by the above mentioned Policy letter. Out of the five affected officers, only the petitioner lacked objective assessment as other four had been duly visited by their Initiating Officers and therefore, the Policy letter was not uniformly applied, he would claim. The petitioner would also claim that he is a victim of subjective reporting, bias and mala fide assessment by the 4<sup>th</sup> respondent (***we note that there are only three respondents in this application***) for the period of two CRs, i.e., from 16<sup>th</sup> October 2009

to 24<sup>th</sup> March 2010 and 25<sup>th</sup> March 2010 to 30<sup>th</sup> June 2010. In support of this claim, he would cite the instance of not granting extension to one Mrs. Manorama Guleria, a Teacher in Army Public School, Kaluchak (Jammu) of which the petitioner was the ex officio Chairman. The said Teacher was eventually granted extension on the orders of then GOC 26 Infantry Division, who had been approached by brother of Mrs. Manorama Guleria, i.e., Lt Gen B.S. Jaswal. In October 2009, the petitioner was posted to Headquarters Northern Command where the said Lt Gen B.S.Jaswal was posted as GOC-in-C and who was the Reviewing Officer(RO) of the petitioner. The petitioner's apprehension is that the above RO might have caused damage to his two CRs stated above and he has reason to believe that while reviewing his CRs covering the period mentioned above, Lt Gen B.S. Jaswal underrated him while making sure that the CRs remain technically correct and corroborated. The petitioner would pray that the assessment by Lt. Gen. B.S.Jaswal be set aside even if they are technically correct. The rejection of his compliant on 19<sup>th</sup> September 2012 was on the grounds that the impugned CRs are well corroborated and performance based. In response to respondents' statement that the Initiating Officer Major General DL Chowdhari had interacted with the petitioner during 29 Infantry Division Formation Exercise, the petitioner would claim that he was not part of the team conducting exercise in May 2008 and no operational logistics discussions were held during the

impugned period as stated by the IO and the RO. He would further claim that the IO and the RO failed to give weightage to the petitioner's performance during the Amarnath Yatra agitation. The petitioner would claim that he had been graded as outstanding in 2006, 2007, 2008, 2010 and 2011 and therefore, the Selection Board without application of mind and without independent assessment of CR arbitrarily non-empanelled him. The petitioner would claim that the Selection Board is bound to assess independently and judge themselves as to whether the various entries in the ACRs can be said to have been rightly made by the Reporting Officers at the relevant point of time and come to their own conclusion as regards the performance of the officers. He would quote paragraph 137 of Moderation of CRs at MS Branch dated 7.3.2011 which clearly shows the duty cast upon the Selection Board in the matter of selection of CRs. He would claim that a person may not have the right to be promoted, but he has a fundamental right to be considered for promotion. He would claim the statutory complaint had been rejected at the threshold for the reasons which cannot be called as reasons countenanced in law.

4. Learned Senior Counsel Mr. V.T.Gopalan would argue that the impugned order rejecting the Statutory Complaint suffers from serious infirmities. He would claim that the rejection order if upheld, will be valid for all Statutory Complaints as no reasons had been given in the order for

rejecting the complaint. The Government Order on Statutory Complaint against the delayed CR likewise is a routine order and no reasons on merit have been provided. The learned counsel would argue that an order must stand or fall on its own. The impugned Rejection Order dated 19.09.2009 hardly contains any reason to stand on its own. This aspect is dealt with in **(1978) 1 SCC 405**, paragraph 8. The learned counsel would say that a non-speaking order was passed with rubber stamp reasons and it cannot be considered as an order at all. To support this argument, he would cite a judgment of Hon'ble Supreme Court in **(2010) 9 SCC 496**. He would reiterate that there was no contact between the IO and the petitioner during the period for which the delayed CR had been incorrectly initiated. In accordance with the existing policy, the petitioner's ACR should have been due on 1<sup>st</sup> July 2009. This policy was abruptly changed on 27<sup>th</sup> August 2008 with retrospective effect from 2<sup>nd</sup> April 2008. The order was received in September by which the last date for the period of delayed ACR, i.e., 29<sup>th</sup> August 2008 had already passed. There was no time for the IO to visit the petitioner and therefore, the ACR was initiated merely to satisfy the provisions of this policy letter. He would argue that an ACR initiated without personal acquaintance cannot be held to be valid and such a departure has been frowned upon by the Hon'ble Supreme Court in the judgment reported in **(1997) 4 SCC 7**, paragraphs-4,7 and 8. The Senior Counsel would say that power to give retrospective effect to any



order is only given to legislature and any administrative order cannot be implemented with retrospective effect. He would further argue that a policy cannot be implemented with retrospective effect. He would argue that despite the Army Act coming into force on 22<sup>nd</sup> July 1950 and authority to frame rules having been vested with the subordinate legislative authority, viz., the Government of India as per Sections 191 and 192 of the Army Act, no statutory rules have been framed so far to govern a situation of this type, i.e., as to how ACR should be made which is very crucial in the matter of appointment by selection and consequently services of Army personnel are not being governed by any statutory rule, but only by Army Orders which are executive instructions as per Article 73 of the Constitution of India. It is thus a gross abuse of power. The provisions of Sections 191 and 192 of the Army Act do not confer any power on Government of India to issue policy with retrospective effect. He would cite judgments of Hon'ble Supreme Court of India in **(2008) 2 SCC 672, paragraphs 78, 79; (2007) 5 SCC 77 paragraphs 19 and 20 and (2006) 3 SCC 620 paragraph 41.** He would submit that the principle of issuing administrative instructions, viz., AO system, is only to fill up yawning gaps in the present system in the absence of statutory rules which are not being made to provide for such contingencies and are so vital in the matter of service of defence personnel. Because of this policy dated 27<sup>th</sup> August 2008 and giving two days only to initiate and

write delayed CR, the petitioner cannot be put to any prejudice and therefore, the delayed CR needs to be interfered with by this Tribunal.

5. It was argued by the learned counsel for the petitioner that the Selection Board ought to have made independent assessment of the ACRs and should have compared the ACRs to ascertain, if it is in conformity with the rest of his profile. An ACR issued can be bad, due to the officer being on leave or being ill or, as in the case of the petitioner, being no personal interaction. The learned Senior Counsel would submit that the Supreme Court in **(2007) 14 SCC 641** paragraphs 28-31 held that the Department Promotion Committee has to make independent assessment of ACR without being influenced by the ratings and grading in CRs. The learned Senior Counsel would argue that the Selection Board has been vested with powers to disregard ACRs given by others and can give their own ACRs. He would cite judgments of Hon'ble Supreme Court in **(2007) 14 SCC 641, Head Note 'C' and 'D'; (2010) 12 SCC 538** and a judgment of **Bombay High Court** in **CDJ 2009 BHC 157**. In order to find out whether the ACR for a particular period could have been correctly decided, it is incumbent on the Selection Board to have examined the ACR of the particular person earlier to the questioned period and later to the questioned period to find out whether the CR during the questioned period could really have been made or is it really justified. The learned counsel would argue that there were no comparative and *inter se*

merits of the persons concerned and objectivity and application of mind by the Selection Board. It cannot be sufficient to say that material was available before the Selection Board. The comparative and *inter se* comparative merits of the persons concerned, rationality, reasonableness, objectivity and application of mind are pre-requisites for proper decision of the State and the same has been dealt with extensively in the judgment reported in **CDJ 2009 BHC 157**. The learned counsel for the applicant would argue that the impugned Rejection Order was made in violation of Principles of Natural Justice and that the Central Government should have asked for the comments of the Army authorities concerned on the Statutory Complaint of the petitioner and the comments should have been supplied to the applicant. In the absence of such mandatory principles, the impugned order is vitiated for non-compliance of the Principles of Natural Justice. The above view is supported by the decision of the High Court of Calcutta in **CDJ 2006 Calcutta High Court 348**, paragraph Nos.51, 52, 68, 70 and 81.

6. Learned counsel for the petitioner would submit that this Tribunal can mould the relief even in the absence of any particular request to that effect to secure the ends of justice, as it has been given the authority under Rule 25 of Armed Forces Tribunal (Procedure) Rules, 2008. They would further argue that this Court can mould the relief in view of the dictum of the Supreme Court made in **(2001) 8 SCC 676**,

paragraph-14. The learned counsel further argued that no man, even the Court itself is above the law. Learned counsel submitted that the respondents have contended that the Commander-in-Chief of the Army has been given the powers in Defence Services Regulations to issue these policies. Learned counsel would claim that a perusal of the so-called Defence Services Regulations does not show the relevant provisions of law. Even in the DSR, nothing has been pointed out regarding the power to make policies with retrospective effect and therefore, it is not known as to how this was made at all, since it has no substance. The learned counsel would submit that no one is above law and the Supreme Court in its decision reported in **(2010) SCC 64**, para-33 held that the Court itself is not above law. He would further submit that accrued right as per the existing policy or rule cannot be taken away by the new policy and to support this argument, he would quote the Supreme Court decision in **(2010), 12 SCC 38**, paragraph-13. Learned counsel would submit that the delayed CR was initiated without any personal interaction or acquaintance and the same cannot be regarded as proper ACR and therefore on the aforesaid grounds, he would request the Tribunal to allow the O.A. by expunging the delayed CR for the period of 5<sup>th</sup> may 2008 to 16<sup>th</sup> August 2008 and set aside the impugned order dated 19<sup>th</sup> September, 2009.

7. The **respondents** through their reply statement, Written Submission and arguments and pleadings by the learned Senior Panel Counsel Mr. B.Shanthakumar along with Col N.K. Ohri of MS Branch of Army Headquarters would initiate their case by submitting that this O.A. which has been filed primarily aggrieved by non-empanelment to the rank of Major General and in which the petitioner has assailed three Confidential Reports, the petitioner has not sought any relief in respect of two of the above mentioned ACRs. The respondents would submit that though the petitioner has challenged three ACRs in the O.A., during the final hearing on 5<sup>th</sup> July 2013, the counsel for the petitioner submitted arguments only with respect to the delayed CR for the period from 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008, non-empanelment by No.1 Selection Board and rejection of the Statutory Complaint filed against non-empanelment. The counsel for the petitioner did not raise or challenge the RO's assessment in the ACRs mentioned by him in the application and hence the petitioner cannot be granted any relief in respect of ACRs for which no relief was prayed.

8. Before proceeding with the arguments, the respondents would bring out some essential background facts which are that the army has a pyramidal rank structure, the number of vacancies in the higher ranks are less and therefore, only those officers having better record of service within a particular batch are selected for the higher ranks and promotions

to higher ranks are carried out through Selection Boards as laid down. According to the policy on promotion, each officer is entitled to three considerations, i.e., Fresh, First Review and Final Review. After three considerations, if an officer is not approved, he is deemed to be finally superseded. In case an officer is granted any relief, then he is considered as a fresh case by the Selection Board and his original seniority is maintained. While considering an officer for promotion to a select rank, the Selection Board takes into consideration the reckonable profile of the officer which consists of number of factors such as war/operational reports, course reports, confidential reports, honours and awards, discipline and so on and comparative merit within that batch. The Selection Board for the promotion to Major General rank comprises the COAS, the VCOAS and the Army Commanders and assessment of No.1 Selection Board is recommendatory in nature until approved by the Central Government.

9. The respondents would submit preliminary objections in respect of this O.A. by submitting that the applicant himself submitted the CR for the period 5th May 2008 to 16<sup>th</sup> August 2008 for initiation when all the provisions pertaining to CRs in AO/45/2001-MS as well as the provisions of the letter dated 27<sup>th</sup> August 2008 were fully in his knowledge. The initiated ACRs were shown to him by the IO and thereafter he remained silent for one year until he submitted a Statutory Complaint against this

ACR on 23<sup>rd</sup> September 2009 which was rejected, vide Government of India letter dated 22<sup>nd</sup> June 2010. Since the petitioner himself had submitted a blank ACR, he is estopped from impugning the said ACR and additionally, the OA is beyond the period of six months from the final order of the Government, i.e, 22<sup>nd</sup> June 2010 and is thus barred by limitation under Section 22 of the AFT Act. He would cite judgments in between **DCS Negi vs. Union of India and others** made in **CC3709/2011, dated 07 March 2011 and UOI & Ors. vs. SS Kothiyal and Others** reported in **(1998) 8 SCC 682**.

10. The respondents would submit that the petitioner was considered by Selection Board in October 2011 as a fresh case of 1980 batch and was not empanelled. Thereafter, he was considered as a Review case in April 2012 and was again not empanelled. In October 2010, a total number of 33 officers had been considered and there were only 10 vacancies. In 2012, 49 officers were considered for 13 vacancies. On both occasions the petitioner was not empanelled on account of comparative merit and limited number of vacancies. The respondents would deny that the Selection Boards did not apply their mind while assessing the merits of the petitioner. The petitioner was considered by the Selection Boards strictly in accordance with the policy on the subject. The Statutory Complaint dated 24<sup>th</sup> April 2012 was duly processed, examined and was

rejected as it lacked merit. The respondents produced before the Tribunal the decision making process involved in processing the complaint.

11. The respondents would submit that Para 16 of the Army Order 15/2001/MS lays down the criteria for initiation of CR wherein it is stated that a personal visit by Initiating Officer(IO) or the Reviewing Officer(RO) is not mandatory. The IO and the RO were asked for their comments when the Statutory Complaint against the delayed CR was processed and they had stated that during the period the IO had met the petitioner and was in constant touch with him during Operation 'SAHYOG' and was well aware of his abilities. The RO too had said that he had seen and heard the officer during various operational logistics and issue based interactions. Thus, it cannot be said that the delayed CR was initiated without knowledge of the officer, the respondents would claim. On the legal validity of the Policy letter dated 27<sup>th</sup> August 2008, the respondents would submit that consequent to the implementation of AVSC Report, additional vacancies were created utilisation of which necessitated shorter command tenures. Officers in the rank of Brigadiers and Major Generals who were posted to command appointments after 2<sup>nd</sup> April were not entitled to CR due to the provision contained in para-74 of the Army Order. As a result, first CR could be earned by them only after 15 months of command tenure. In order to be eligible for consideration for promotion to the next rank, minimum two CRs are required. This



situation would have resulted in extended tenures in the ranks of Brigadiers and Major Generals which would impact cadre management. In order to cater to this contingency, the Policy letter dated 27<sup>th</sup> August 2008 was issued with the approval of the COAS and the policy has been applied uniformly. As regards authority of the COAS to frame such Policy, the respondents would cite judgments of Hon'ble Supreme Court in **Hardev Singh vs. Union of India and another** reported in **(2011) 10 SCC 121; Virender S Hooda and Ors. vs. State of Haryana and Others** reported in **(1999) 3 SCC 696**. The respondents would further submit that the Supreme Court in **Balco Employees Union of India vs. State of Haryana & Ors. [(2002(2) SCC 333]** held that unless decision is contrary to any statutory provision or Constitution, Courts cannot interfere with it. At the base of these judgments, the policy letter dated 27.8.2008 is valid, the respondents would claim.

12. The respondents would submit that the policy letter dated 27.8.2008 has no retrospective application and no right of the applicant which existed as on 29<sup>th</sup> August 2008 has been violated or infringed. On the contrary, by this policy, additional entitlement had been given to the officers in the rank of Brigadiers and Major Generals who were unable to earn a delayed CR which would be beneficial to the petitioner and all officers of rank of Brigadiers and Major Generals who assumed command appointments after 2<sup>rd</sup> April 2008. In the absence of this letter, many

officers would have been withdrawn from Selection Boards due to not earning two CRs. Thus the Policy Letter according to the respondents does not infringe on any legal or fundamental or vested right of the petitioner. In support of this argument, the respondents would cite the judgments of Hon'ble Supreme Court in **State of MP and Ors. vs. Yogendra Srivastava** reported in **2010 (12) SCC 538** and **SS Bola vs. BD Sardana 1997 (8) SCC 522.**

13. The contention of the petitioner that no Reporting Officer visited his Headquarters was denied by the respondents for want of knowledge. Col Ohri further submitted that for initiation/endorsement of CR, it is not mandatory for the IO or RO to visit the ratee's Headquarters/Unit. While processing the Statutory Complaint dated 23<sup>rd</sup> September 2009 which challenged the delayed CR, comments of all Reporting Officers were asked for, and they intimated that they had interacted with the petitioner frequently and the IO was in constant touch with him. The respondents would claim that the CR for the period from 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008 is performance based, objective and mutually corroborated and meshes well with his average CR profile and the CRs earned by the applicant in the rank of Colonel as Commanding Officer as well as in the subsequent two CRs as Brigade Commander, the petitioner had been assessed similarly. The respondents would submit that the assessment by a Reporting Officer is strict, his prerogative and

the petitioner cannot demand that he be graded '9' or near '9'. On the issue of other affected officers being visited by the respective IOs, the respondents would submit that the petitioner has produced no proof of this. On the issue of two CRs in which Lt Gen B.S. Jaswal was his RO, the petitioner has not challenged it during the arguments and these are his mere apprehensions. He has been assessed above average with complimentary pen picture in each of the CRs.

14. The respondents would argue that elaborate procedure has been laid out for initiation of CR in the Army vide AO 45/2001-MS and for Selection Boards. They are distinct from appraisal system of other Central Government employees. The judgments cited by the petitioner held good for other employees, but are not applicable as binding for the system of Selection system for Army personnel. They would support their claim by citing judgments **in Dev Dutt vs Union of India** reported in **(2008) 8 SCC 725; UOI vs. Maj Bahadur Singh** reported in **(2006) 1 SCC 368 and Lt Col KD Gupta vs. Union of India** reported in **1989 Supp (1) SCC 416.**

15. The respondents would submit that it is a settled law that the scope of judicial review in the matters of assessment by Supreme Court/High Court/Tribunals is very limited and a Court cannot substitute its opinion or assessment for that of the Selection Board or assessment of Reporting Officers. They would cite judgments in **Air Vice Marshal S.L.**

**Chhabra vs. UOI and others** reported in **1993 Supp (4) SCC 441**; **Amrik Singh vs. Union of India and others** reported in **(2001) 10 SCC 424**; **UOI & Ors. vs. Lt Gen RS Kadyan** reported in **(2000) 6 SCC 698** and **Surinder Shukla vs. Union of India & Ors.** reported in **(2008) 2 SCC 649** to support the arguments. On the issue of orders passed by the Central Government on Statutory Complaints, the respondents would claim that these orders cannot be termed as non-speaking orders. While it may be said that reasons have not been given, the learned counsel for respondents cited the judgments of the Hon'ble Supreme Court in **Union of India and Ors. vs. EG Nambudiri** reported in **(1991) 3 SCC 38** that administrative authority is not required to record his reasons in the absence of any statutory provision requiring communication of reasons but reasons must exist with the authority on file which can be shown to the Court in case of judicial review. The respondents would submit that a Statutory Complaint is processed independently at three levels before arriving at a decision; namely analysis by MS Branch, independent analysis by Complaint Advisory Board and then by Ministry of Defence, and therefore, there is no scope for bias in passing an order on the Statutory Complaint.

16. The respondents would deny the allegation of the petitioner that the Selection Board proceedings were vitiated on the ground that the SB did not compare merits and examined objectivity of the CRs. The

Selection Board comprises nine Senior-most officers of the Army who examined the profile of each officer and assessed them independently. Thereafter, the recommendations of the Selection Board are approved by the 'Hon'ble Raksha Manthri.' Since 2009, the Army is following quantification system wherein out of 100 marks, 95 marks are quantified and 5 marks are allocated for Value Judgment by each member of the Selection Board. The system is totally fair and the petitioner has not been empanelled on account of his overall profile, comparative merit and limited number of vacancies. The respondents would submit that as per the records of the Selection Board, the applicant was low in the merit list of his batch mates who had been considered and much lower to the last officer who had been found 'Fit'. In view of the above, the respondents would submit that the contention of the petitioner is devoid of any substance and there is no merit in this application and the same may be dismissed with costs.

17. Heard both sides and perused the documents.

18. The petitioner has asked for relief of setting aside the Rejection Order and then order by this Tribunal directing the respondent to empanel him for promotion to the next rank. During the arguments, the petitioner's counsel laid emphasis on the Policy letter dated 27<sup>th</sup> August 2008 to establish that its retrospective implementation was devoid of Principles of Natural Justice and Fair Play and had no legal validity and

consequently, the said CR is liable to be set aside. The petitioner is of the view that the primary reason for his non-empanelment is low assessment in this delayed CR for the period 05 Aug 2008 to 16 August 2008. The learned counsel for the petitioner during the argument did not mention the two CRs which had been mentioned in the application in which Lt General B.S. Jaswal was the RO. Learned counsel for the petitioner would also argue that this Tribunal can mould the relief, a contention which was contested by the respondents. Counter of the respondents against the delayed CR would rest on two counts; the petitioner was aware of the provisions of the policy letter dated 27<sup>th</sup> August 2008 since he had submitted the blank CR form for initiation and secondly, he did not object to this CR for one year and is thus barred by law of limitation. We have considered contention of both sides. The delayed CR has been mentioned in the Statutory Complaint against non-empanelment too and therefore, we are inclined to consider the issue of the delayed CR. Based on the arguments and after detailed scrutiny of the documents, the points that have emerged for determination are,

- 1. Whether or not the delayed CR is liable to be set aside?*
- 2. Whether or not the order rejecting the Statutory Complaint against non-empanelment can be set aside?*
- 3. Whether or not decision of the Selection Board can be interfered with by this Tribunal?*

19. Before we embark on the arguments put forth by the two sides, it is worthwhile to mention, as stated by the respondents, that in the Armed Forces, there is a pyramidal rank structure and the ranks above Colonel and equivalent are based on selection by a Selection Board. Each officer is considered for promotion to the next rank along with batch mates in accordance with the Policy and Procedures which are distinctly laid down and are uniformly applied. There are checks and balances in the system to ensure Fair Play. The assessment of the Selection Board is recommendatory and final decision is that of the Central Government. With these brief facts, we proceed to analysis the arguments and documents.

20. POINT No.1: The petitioner has not challenged the Policy letter dated 27 August 2008 per se but has only challenged its retrospective application. The delayed CR has been challenged by the petitioner on three main counts; application of the said Policy letter with retrospective effect, the policy not uniformly applied and lack of objectivity in reporting. The Policy letter No A/17151/MS4 Coord dated 27 August 2008 reads as follows:

*" Tele: 35630*

*Military Secretary's Branch  
Integrated HQ of MoD (Army  
DHQ PO, New Delhi-110 011*

*A/17151/MS 4 Coord*

*27 Aug 08*

Headquarters  
 Southern Command  
 Eastern Command  
 Western Command  
 Central Command  
 Northern Command  
 Army Training Command  
 South Western Command  
 IDS (MS & SD)  
 SFC  
 ANC

INITIATION OF ACRS: BRIG AND MAJ GEN

1. Reference Paragraph 74 of AO 45/2001/MS.
2. Presently the reporting period in respect Brigs and above is from 01 Jul of the current yr to 30 Jun of next yr. For these ofrs the AO stipulates that they can earn a 'Delayed CR' if they have assumed the appt on or before 02 Apr of the yr (ie at least 90 days before the CR becomes due), subject to completion of 90 days of physical service under the IO by 29 Aug (ie max delay of 60 days from the due date of CR) of the yr.
3. The above provision has resulted in extended tenures by some Brigs and Maj Gens who could not earn the mandatory reports before becoming due for their turnover. The problem is likely to further aggravate in times to come. To overcome the *ibid* problem, provisions of Paragraph 74 of AO 45/2001/MS, pertaining to Brigs and Maj Gen, will be read in conjunction with following conditions:-
  - (a) In addition to their entitlement of normal CR, Brigs and Maj Gens posted to an appt between 03 Apr to 01 Jun (both days inclusive) will also be entitled to earn a CR immediately on completion of physical service of 90 days under the IO, subject to a max delay of 60 days from due date of initiation (ie the initiation of CR cannot be delayed beyond 29 Aug of the yr). In these cases conditions under the head 'Latest date by which Ratee should have assumed Appt' at Para 77 of the AO 45/2001/MS will not apply. The second report will be earned as and when it becomes due.



*(b) The above exemption will be applicable to all Brigs and Maj Gen irrespective of their appt (comd/staff/instructional).*

*4. The provisions made at Para 3 above will be effective from 02 Apr 08 and will be reviewed in Apr 2013.*

*(Rakesh Nandan)  
Brig Dy MS (P, CM & CR)  
For Military Secretary"*

The petitioner would argue that this Policy, which is to fill the yawning gap in the absence of Statutory Rules, cannot be applied retrospectively. In support of his arguments, the learned counsel cited the following judgments: In the case **(2008) 2 SCC 672, between Delhi Development Authority & Anr. and Joint Action Committee, Allottee of SFS Flats)**, it is held as follows:

*" 78. ...If an executive authority in absence of any statutory provision cannot apply a decision with retrospective effect, the same would be ultra vires. "*

In the case **(2007) 5 SCC 77** between **Vice-Chancellor, M.D. University, Rohtak** and **Jahan Singh**, it is held:

*"19. The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retroactive operation as it is now well settled that in absence of any provision contained in the*

*legislative Act, a delegate cannot make a delegated legislation with retrospective effect. "*

In the case **(2006) 3 SCC 620** between Mahabir Vegetable Oils (P) Ltd. & Anr and State of Haryana and Ors., it is held:

*" 41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.*

*42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.*

*43. A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of sub-section (2-A) of Section 64 of the Act and not prior thereto. "*

In the light of the above mentioned judgments, the petitioner's case would be that the policy issued on 27 August 2008 cannot be implemented retrospectively.

21. The respondents would deny the contention of the petitioner by saying that it is not a retrospective application and no right of the petitioner which existed on 29.08.2008 has been violated or infringed. The respondents would cite judgment of the Hon'ble Supreme Court in **(2010) 12 SCC 538**, which held:

*" It is no doubt true that Rules made under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already earned or acquired under the existing Rule cannot be taken away by amending the Rules with retrospective effect.*

The respondents would add a Note to this quote as: *"In the instant case no existing right of the applicant has been taken away or effect."*

In the case of SS Bola vs BD Sardana reported in **(1997) 8 SCC 522**, it was held:

*"Act giving retrospective effect without affecting any fundamental or vested or accrued right is valid (Head note)."*

22. Now, the issue before us is whether the retrospective application of the policy is valid or not. The petitioner's right as on 29<sup>th</sup>

August 2008 was to earn a CR on 1<sup>st</sup> July 2009. On the basis of Policy letter dated 27 August 2008, he was given an opportunity to earn one more CR in addition to the CR that he would earn on 1<sup>st</sup> July 2009. Thus it is evident that no right of the petitioner has been taken away by retrospective application of this Policy. On the question of whether or not the retrospective application of the Policy is valid, we are guided by the Supreme Court judgments in **Hardev Singh vs. Union of India and anr (2011) 10 SCC 121** in which it has been held:

*"It is always open to employer to change policy of giving promotions to its employees."*

In **Virender S Hooda and Ors. vs. State of Haryana and Ors. (1999) 3 SCC 696** it was held:

*"Policy decision is binding if not contrary to the rules."*

*In the light of the above, we are of the view that retrospective application of the Policy did not in any way infringe upon the rights of the petitioner and caused him no prejudice. Had such Policy not been implemented with retrospective effect, the petitioner would have earned his first report on 1<sup>st</sup> July 2009 and thereafter he could have earned his second report depending on his own move out of his command appointment or move out of the IO from his command appointment towards the end of 2009 making his command tenure longer which would*

have had adverse impact on cadre management of all officers of his seniority and of those who are junior to the petitioner and would be approved waiting to be promoted. We also ask the question that had this delayed CR been to the liking of the petitioner or had the petitioner been approved for promotion to the next rank would he have challenged the retrospective application of the CR? The answer obviously would be no, and therefore, we find no infirmity in the retrospective application of the Policy dated 27.8.2008.

23. The petitioner would claim that the Policy was not uniformly applied and he would cite examples of five Brigadier rank officers who were impacted by this Policy including him. Out of this, according to the petitioner, four officers had been visited by their respective IOs and he was the only one who did not have the benefit of a visit by the IO and therefore, the Policy was not uniformly applied. The petitioner has not produced any evidence to support his claim. The respondents have produced the decision making process involved in drafting this Policy letter. We find that this letter has been issued after due deliberation in that the problem of Brigadiers and Major Generals was due to shortened tenures and the Minute Sheet on which the draft of the letter was approved mentions names of eight Major Generals who would be impacted since they had assumed their respective command assignments after 2<sup>nd</sup> April. The Minute Sheet does not mention names of Brigadiers,

but only mentions this problem would be encountered by Brigadiers too. The route of the Policy letter was preferred to amendment to the Army Order as a Policy letter is temporary in nature and can be visited at any time. The policy letter was issued thereafter and has been applied to all Major Generals and Brigadiers who had assumed command assignments after 02 April 2008. We find no reason why uniform application of this policy can be questioned. The policy was uniformly applied and the petitioner's claim in this regard is not sustainable.

24. The third issue before us in determining Point No.1 is whether the delayed CR lacked objectivity and whether it caused any prejudice to the petitioner. The instructions on issue of ACRs are contained in Army Order 45/2001/MS. Para 16 of the Army Order lays down that a ratee should have completed 90 days physical service under the Initiating Officer, the report is initiated and reviewed as per the laid down channel of reporting and the officer, i.e., ratee is posted to the appointment for which report is being initiated. Paragraphs 74 and 76 of the said Army Order read as follows:

*" 74. In accordance with the due dates as given at para 70 above, Early ACRs under the provisions of Paragraphs 72 and 73 above can be rendered as follows:--*

- |  |                                |
|--|--------------------------------|
| <i>(a) Officers above two to eight years service--</i>                 | <i>on or after 03 Oct.</i>     |
| <i>(b) Officers above eight years of service up to the rank of Maj</i> | <i>-- on or after 03 Mar.</i>  |
| <i>(c) Lt Cols and Cols</i>  | <i>-- on or after 03 Jun.</i>  |
| <i>(d) Brigs and above</i>   | <i>-- on or after 02 Apr."</i> |

*" 76. An officer is entitled to a Delayed ACR, if he had assumed appointment on or before the dates mentioned at Paragraph 74 above, but cannot be reported upon on due dates of initiation of CR, as at Paragraph 70 above, due to non-completion 90 days physical service under the IO (or RO when initiating CR under the provisions of the AO)."*

Admittedly, on receipt of the Policy letter dated 27<sup>th</sup> August 2008 the petitioner himself gave a blank ACR Form to the Initiating Officer for initiation. Approximately, one year after the ACR had been initiated, the petitioner sent a Statutory Complaint which was rejected vide Government of India letter dated 22<sup>nd</sup> June 2010. The rejection letter reads as follows:

*" No. A/45501/109/2009/SC/MS(X)/64/SC/2010-D(MS)  
Government of India  
Ministry of Defence  
New Delhi, dated 22<sup>nd</sup> June 2010*

**ORDER**

*IC-38940P Brig VS Saini, Arty, has submitted a Statutory Complaint dated 23 Sep 2009 against CR 05/08-08/08. In his complaint the officer states that he assumed the appointment of Commander 26 Artillery Brigade with effect from 05 May 2008. As per provisions of Army Order 45/2001/MS in vogue at that time, the reporting period in respect of Brigadiers was from 01 July to 30 June. As per Paragraph 74 of the above mentioned Army Order a Delayed Confidential Report was to be initiated, if the appointment was assumed on or before 02 April, i.e., atleast 90 days before the Annual Confidential Report was due, subject to stipulation of 90 days physical service under the Initiating*

*Officer by 29 Aug, ie a max delay of 60 days. However, the policy with regard to Confidential Report of Brigadiers and Maj Gens was changed abruptly vide IHQ of MoD (Army) MS Branch letter Number A/17151/MS-4 Coord dated 27 Aug 2008. Under the new policy, a delayed Confidential Report was made applicable to Brigadiers, who had assumed the appointment between 03 April and 01 June (both days inclusive), immediately on completion of 90 days physical service upto 29 Aug i.e., a max delay of 60 days. This policy was made applicable with retrospective effect, i.e., from 02 April 2008. The policy letter was initiated on 27 Aug 2008, ie two days before the deadline of 29 Aug, and recd at his HQ on 10 Sep 2008. Accordingly a Delayed Confidential Report was initiated by his IO covering period 05 May 2008 to 16 Aug 2008 (ie, on completion of 90 days physical service). Under the previous policy he was not entitled to a delayed CR since his date of assumption of appointment was 05 May 2008.*

*2. The officer further states that his HQ was neither visited nor inspected by any of the reporting officers (Initiating Officer/Reviewing Officer/Superior Reviewing Officer/First Special to Corps Reporting Officer/Head of Arms) during the period of impugned report. The exact dates of first visit to his HQ by various reporting officers of the impugned report is as under:-*

*(a) IO – 01 Dec 08                      (b) RO – 01 Dec 08      (c) SRO – 24 June 09*

*(d) FSCRO – Not visited    (e) HOA – Not visited.*

*3. The officer feels that such an assessment which 'prima facie' lacks objectivity may adversely affect his career progression in future. He also contends that the applicability of a change of policy with retrospective effect is devoid of natural justice and fair play.*

*4. The Officer has requested that his delayed CR covering period 05 May 08 to 16 Aug 08 be set aside, as it lacks objective assessment by the reporting officers due to lack of adequate knowledge about him.*

*5. The statutory complaint of the officer has been examined in detail alongwith his overall profile and other relevant documents. After consideration of all aspects of the*



*complaint and viewing it against the redress sought, it emerges that the CR 05/08-08/08 is objective, performance based and devoid of any bias/inconsistency.*

6. *The policy letter dated 27.08.2008 on entitlement to a delayed CR has been uniformly applied to all officers falling in that category and the aim was to facilitate earning of mandatory reports by Brig and Maj Gens before becoming due for turnover. CR 05/08-08/08 is technically valid.*

7. *The Central Government, therefore, rejects the Statutory Complaint dated 23 Sep 2009 submitted by IC-38940P Brig VS Saini, Arty, against CR 05/08-08/08, being devoid of merit.*

*By order and in the name of the President  
(R.Sunder)  
Under Secretary to the Government of India"*

25. The respondents produced the decision making process at the level of Army Headquarters on this Statutory Complaint. The Army Headquarters asked for comments of the Initiating Officer Major Gen DL Chowdhary , Reviewing Officer Lt Gen Vinay Sharma and Senior Reviewing Officer, Lt Gen TK Sapru. As mentioned earlier, the Initiating Officer said that he had frequent interaction with the petitioner and was in constant touch with him. The IO also included some praiseworthy remarks about the petitioner in his comments. The RO said that the ratee had been seen and heard with SRO concurred with the RO. Thereafter, the impugned ACR was compared with his profile and found to be performance based and consistent with his profile. The respondents' case would be that the IO or the RO did not visit the petitioner's

Headquarters during this period and that there was no logistic discussion during which the RO is claimed to have interacted with him. The petitioner would claim that he was given a figurative assessment which was lower than what he got later from the same IO after he, that is the IO, had visited him. We find that there is no mandatory requirement for an IO to visit the officer before initiating his ACR. 90 days physical service has been mandated to ensure that the Initiating Officer gets to know the officer, on whom ACR has to be initiated, well. A perusal of the dossier of the petitioner reveals that in this delayed CR, he was given four '9s' in figurative assessment whereas in the next CR which he got from the same IO in July 2009, he had six '9s' in figurative assessment though the Box Grading remained unchanged. The petitioner would claim that the assessment of the IO changed after he had visited him and therefore, the ACR for the delayed period is somewhat less than what he should have got. The learned counsel for the petitioner would cite the Hon'ble Supreme Courts judgement in State of U.P. vs. Yamuna Shanker Misra, reported in **(1997) 4 SCC 7** wherein it was held:

*" This case would establish as a stark reality that writing confidential reports bears onerous responsibility on the reporting officer to eschew his subjectivity and personal prejudices or proclivity or predilections and to make objective assessment. It is needless to emphasise that the career prospects of a*

*subordinate officer/employee largely depends upon the work and character assessment by the reporting officer. The latter should adopt fair, objective, dispassionate and constructive commends/comments in estimating or assessing the character, ability, integrity and responsibility displayed by the officer/employee concerned during the relevant period for the above objectives if not strictly adhered to in making an honest assessment, the prospect and career of the subordinate officer would be put to great jeopardy. The reporting officer is bound to lose his credibility in the eyes of his subordinates and fail to command respect and work from them. "*

*".....The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. "*

26. There is no doubt that Initiating Officer and the Reporting Officer must know the ratee well to facilitate initiation of an objective CR. In the instant case, admittedly both the Initiating Officer and the Reporting Officer did not visit the petitioner's Headquarters during the period covered by the delayed CR and therefore, there is a possibility of some lack of objectivity in reporting since the IO could not fully gauge the

capability of the officer. Though the delayed CR is by and large in tune with his CR profile, just on the ground of lack of personal acquaintance, we are inclined to grant relief to the petitioner on the issue of the delayed CR which we are of the view is liable to be set aside. Point No.1 is answered accordingly.

27. Point No.2: The respondents have argued that the O.A. in respect of the Statutory Complaint against the CR for the period of 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008 is barred under the statutory provisions of limitation contained in Section 22 of the Armed Forces Tribunal Act 2007 since the complaint against the delayed CR was rejected vide Government of India letter dated 22<sup>nd</sup> June 2010 and this O.A. is beyond the period of six months from the final order. They would quote the case of DCS Negi vs. Union of India and others [**CC3709/2011, dated 07 March 2011**] in which it has been held:

*"It is the duty of the Tribunal to first consider whether the application is within limitation. An application can only be admitted if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so."*

In the case between **Union of India vs. MK Sarkar** reported in **(2010) 2 SCC (9)**, it has been held:

*"The issue of limitation or delay should be considered with reference to original cause of action."*

In the case between **UOI & Ors. vs. SS Kothiyal and Ors.** reported in **(1998) 8 SCC 682**) it has been held:

*"Repeated representations do not extend cause of action. Cause of action held on facts arose when first representation was rejected."*

The petitioner would state that in the order passed in the Statutory Complaint, no findings have been given particularly on the question whether retrospective effect can be given to the Policy and therefore, there can be no finality of this order and consequently, there can be neither *res judicata* nor constructive *res judicata* in matters of pure question of law. They would cite judgments of Supreme Court to support their claim. In **UOI vs. Pramod Gupta (Dead) by Lrs. & Ors.** reported in **(2005) 12 SCC 1**, it has been held:

*" 29. The principle of res judicata would apply only when the lis was inter partes and had attained finality in respect of the issues involved. The said principle will, however, have no application inter alia in a case where the judgment and/or order had been passed by a court having no jurisdiction therefor and/or in a case involving a pure question of law. It will also have no application in a case where the judgment is not a speaking one. "*

In **Isabella Johnson (Smt) vs. M.A. Susai (Dead) By Lrs.** reported in **(1991) 1 SCC 494**, it has been held:

*" It is well settled that there can be no estoppels on a pure question of law and in this case the question of jurisdiction is a pure question of law."*

In Rajasthan State Industrial Development and Investment Corporation vs. Subhash Sindhi Cooperative Housing Society, Jaipur and Ors., reported in **(2013) 5 SCC 427**, it has been held:

*" 34. Be that as it may, there can be no estoppel against the law or public policy. "*

We have carefully examined this issue. The order on the Statutory Complaint was based on facts and there was no question of law. The order rejecting the Statutory Complaint cannot be considered to have attained finality as it has not been contested yet in a court of law and therefore *res judicata* will not apply. As regards limitation under Section 22 of AFT Act, we are of the view that the case of the petitioner deserved a hearing in the interest of justice and accordingly we are inclined to examine the issue of delayed CR on its merit.

28. The petitioner filed a Statutory Complaint against non-empanelment on 24<sup>th</sup> April 2012 in which redressal sought was to set aside the delayed CR from 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008, set aside the assessment by Lt Gen B.S.Jaswal on CRs from 16<sup>th</sup> October 2009 to 24<sup>th</sup> March 2010 and 24<sup>th</sup> March 2010 to 30<sup>th</sup> June 2010 and thereafter to consider him as a fresh case for empanelment to the rank of Major General.

The Statutory Complaint was rejected by the Government of India letter dated 19<sup>th</sup> September 2012 which reads as follows:

*" No A/45501/56/2012/SC/MS(X)/197/SC/2012-D (MS)  
Government of India  
Ministry of Defence  
New Delhi, dated 19<sup>th</sup> Sep 2012*

*IC-38940P Brig VS Saini, Arty has submitted a Statutory Complaint dated 24 Apr 2012 against non-empament for promotion to the rank of Maj Gen by No 1 Selection Board (Fresh) held in Oct 2011. Main points of the complaint are as follows:-*

*(a) Abrupt and Retrospective change in Policy: In his complaint the officer states that he assumed the appointment of Commander 26 Artillery Brigade with effect from 05 May 2008. As per provisions of Army Order 45/2001/MS in vogue at that time, the reporting period in respect of Brigadiers was from 01 Jul to 30 Jun. As per Paragraph 74 of the above mentioned Army Order a Delayed Confidential Report was to be initiated, if the appointment was assumed on or before 02 April, i.e., at least 90 days before the Annual Confidential Report was due subject to stipulation of 90 days physical service under the Initiating Officer by 29 Aug i.e. a maximum delay of 60 days.*

*(b) The officer states that however, the policy with regard to Confidential Report of Brigadiers and Maj Gens was changed abruptly vide IHQ of MoD (Army) MS Branch letter Number A/17151/MS-4 Coord dated 27 Aug 2008. Under the new policy, a delayed Confidential Report was made applicable to Brigadiers who had assumed the appointment between 03 Apr and 01 Jun (both days inclusive) immediately on completion of 90 days physical service upto 29 Aug. This policy was made applicable with retrospective effect i.e. from 02 Apr 2008.*

*(c) The officer states that the policy letter was initiated on 27 Aug 2008 i.e. two days before the deadline of 29 Aug and received at his HQ on 10 Sep 2008 when his CR had already become due from retrospect (17 Aug 2008). Accordingly a Delayed Confidential*

*Report was initiated by his IO covering period 05 May 2008 to 16 Aug 2008 i.e. on completion of 90 days physical service.*

*(d) The officer states that his HQ was neither visited nor inspected by any of the reporting officers during the period of impugned report. He avers that this has created lack of objectivity in reporting. The officer has cited examples and said that only five officers (including him) from Artillery 1980 and 1981 batch got affected with this change of policy during the year 2008.*

*(e) Granting Extension to a Teacher in Army Public School: The officer states that as Brigade Commander he was also performing the duties of Station Commander, Kaluchak (Jammu) and Chairman, Army Public School, Kaluchak. During the course of his duties he took a decision not to grant two years extension of service to an English Teacher entirely on professional grounds. The English Teacher turned out to be sister of Lt Gen BS Jaswal, PVSM, AVSM\*\*VSM, the then GOC-in-C, ARTRAC. The officer believes that in his next posting, Lt Gen BS Jaswal in his capacity as GOC-in-C, Northern Command, while reviewing his CRs covering the period from 16 Oct 2009 to 24 Mar 2010 and 24 Mar 2010 to 30 Jun 2010 as RO, may not have given the officer objective assessments which may have been based on personal prejudice and biases.*

*2. The officer has requested that:--*

*(a) His delayed CR covering period 05 May 2008 to 16 Aug 2008 be set aside as it lacks objective assessment by the reporting officers due to lack of adequate knowledge about him and being devoid of natural justice and fair play due to abrupt change in policy.*

*(b) Assessment of RO in the CRs from 16 Oct 2009 to 24 Mar 2010 and 24 Mar 2010 to 30 Jun 2010 be set aside on the grounds of bias and personal prejudice.*

*3. The Statutory Complaint of the officer has been examined in the light of his career profile, relevant records and analysis/recommendations of Army Headquarters. After consideration of all aspects of the complaint and viewing it against the redress sought, it has emerged that all the CRs in the entire reckonable profile including impugned CRs are well corroborated*



*and performance based. There being no evidence of any bias or subjectivity, none of the CRs merit any interference.*

*4. The officer has not been empanelled for promotion to the rank of Maj Gen on account of his overall profile and comparative merit.*

*5. The Central Government rejects the Statutory Complaint dated 24 Apr 2012 submitted by IC-38940P Brig VS Saini, Arty against non-empanelment for promotion, being devoid of merit.*

*By order and in the  
name of the President  
(R.Sunder)*

*Under Secretary to the Government of India"*

29. The petitioner would submit that the Rejection Order is in violation of the Principles of Natural Justice and that a non-speaking order was passed for rubber stamp reasons and hence cannot be construed as an order at all. In support of his arguments, he quotes a judgment of the Hon'ble Apex Court in **Kranti Associates private Ltd. & Anr vs. Masood Ahmed Khan & Ors.**, reported in **(2010) 9 SCC 496** wherein it was held:

*" 23. In Union of India v. Mohan Lal Capoor (AIR 1974 SC 87) this Court while dealing with the question of selection under the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations held that the expression 'reasons for the proposed supersession' should not be mere rubber-stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. "*

.....

*24. In Siemens Engg. And Mfg. Co. Of India Ltd. v. Union of India (AIR 1976 SC 1785) this Court held that it is far too well settled that an authority in making an order in exercise of its quasi-judicial function, must record reasons in support of the order it makes. "*

.....

*47. Summarising the above discussion, this Court holds:*

*(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*

*(b) A quasi-judicial authority must record reasons in support of its conclusions.*

*(c) Insistence on recording of reasons is meant to serve the wider principle of justice that just must not only be done it must also appear to be done as well.*

*(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*

*(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.*

*(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*

*(g) Reasons facilitate the process of judicial review by superior courts. "*

30. The petitioner would argue that the Central Government should have asked for comments of the Army officers concerned and a copy of such comments should have been provided to the petitioner. He would cite a judgment in Major General Arun Roye vs. UOI reported in **CDJ 2006 Cal HC 348**, wherein it was held:

*" (68) In terms of Section 27 of the Army Act, statutory complaints are filed before the Central Government. Before deciding the statutory complaint submitted by an aggrieved officer, the competent authority of the Central government asks for the comments of the concerned Army authorities and only after receiving the comments from the Army authorities the statutory complaint is decided. However, the copy of such comments is admittedly not supplied to the aggrieved Army*

*Officer. The comments of the superior army authorities in respect of the complaint submitted by an aggrieved officer are thus taken into consideration by the competent authority of the Central government without even giving an opportunity to the aggrieved Army officer to deal with the same. "*

*"71. I am also of the opinion that the decisions of the Central Government dated 14<sup>th</sup> March, 2002 and 2<sup>nd</sup> February, 2006 rejecting the authority complaints filed by the petitioner have been vitiated on account of violation of the audi alteram partem rule as the vital documents, namely, the comments of the Army authorities on the statutory complaints of the petitioner were not supplied to the petitioner for information and submission of necessary comments. "*

The respondents would submit that the orders of the Government dated 19<sup>th</sup> September 2012 rejecting the Statutory Complaint admittedly does not give detailed reasons but cannot be termed as a non-speaking order. The Order was passed after a detailed analysis and the Order does not need to provide reasons. In support of their argument, they cited a judgement of the Supreme Court in **UOI & Ors. vs. E.G. Nambudiri reported in (1991) 3 SCC 38**, which reads,

*" .....duty to give reasons by administrative authority not a rule of natural justice where orders do not effect any vested right or involve civil consequences. Administrative authority is not required to record his reasons in absence of any statutory provision requiring communication of reasons but reasons must exist with the authority on file which can be shown to the Court in case of judicial review. "*

The respondents would produce the complaint file which contains the detailed analysis. The analysis at Army Headquarters level indicates that comments of the concerned officers in the case of delayed CR had been obtained and had been adequately analysed. This being a complaint against non-empanelment, there was no requirement of asking for comments as per the existing instructions. The analysis of the complaint indicates that the policy of initiating delayed CR was willingly applied and the impugned delayed CR was almost identical to the subsequent two CRs. The analysis also indicates that the issue of Teacher Mrs Manorama Guleria not being granted extension initially is totally unsubstantiated. Both the CRs were found to be entirely in tune with the earlier as well as the one that followed. Consequently the Statutory Complaint was rejected. In the Complaint the petitioner requested that the delayed CR and two CRs in which Lt Gen BS Jaswal was the RO be set aside. The respondents have pleaded that since the learned counsel for the petitioner did not argue on

these two ACRS no relief can be granted to him. We have, while analysing Point No 1, deliberated on the issue of the delayed CR. On the issue of the other two CRs challenged by the petitioner, in the interest of justice, we perused the dossier of the petitioner. When the petitioner was posted to HQ Northern Command, he got seven CRs out of which he has challenged the ROs grading in two. We find that the assessment of Lt Gen BS Jaswal, who was the RO in these two CRs, is entirely in tune with the assessment of the IO and his overall profile and there has been no down grading as was the apprehension of the petitioner. Therefore, we find there is no cause for these two CRs to be interfered with in any manner. After examination of Point No 1, we have come to be of the view that the delayed CR is liable to be set aside which implies that the request of the petitioner in the Complaint has been partly granted, and consequently, the Government Order on the Statutory Complaint rejecting the same stands diluted and is liable to be interfered with. Accordingly, we are of the view that the Government Order on the Statutory Complaint is liable to be set aside only on the count of the delayed CR being liable to be set aside and NOT the other two CRs which were requested to be set aside in the Statutory Complaint against non-empanelment. It is clarified that no relief is being provided to the petitioner on the issue of the other two ACRs challenged by him in the Statutory Complaint, in which Lt Gen BS Jaswal was the RO. Point No.2 is answered accordingly.

31. Point No.3: The learned counsel for the petitioner would submit that the comparative merit ought to have been looked at by the Selection Board. He would cite a judgement of the Hon'ble Supreme Court in **Anami Narayan Roy vs. Suprakash Chakravarthy & Ors** reported in **CDJ 2009 BHC 157** wherein it is observed,

*" 83. ....The reasons produced before us clearly demonstrate that action of the State Government is arbitrary and violative of Articles 14 and 16 of the Constitution of India. Decision of the then Deputy Chief Minister, in-charge of Home portfolio reflects non-application of mind and the only reason stated in the note have no nexus to the object sought to be achieved. The process adopted and even the final decision arrived at are not in conformity with law. The administration has taken note of irrelevant considerations while it has taken note of irrelevant considerations while it has ignored the relevant parameters for appointment to coveted post. In fact, the process adopted by the State in the selection is opposed to the basic doctrine of equality and there has been no appropriate and effective consideration of the eligible Officers by the Competent Authority. No comparative merit is discussed; no plausible reason has been stated for preferring the selected candidate over the candidates ignored. Reasoning is the soul of the decision even in an administrative order of this nature. "*

.....

" 84. It was expected of the State to have constituted a High Power Committee at least to examine the contemporaneous service record of the eligible Officers and submit a report to the appointing authority in accordance with the Rules. Then the Competent Authority could consider same and take final decision with reference to the service record, length of service, meritorious performance, contribution and utility of the Officers to the Department and remaining tenure of service of the Officers along with other important aspects. It would have ensured lawful, fair and transparent process of consideration to all the eligible candidates. A comparative study of merit of the eligible Officers is an expected norm of administrative and service jurisprudence which would put the record straight in regard to the selection of best candidate to the post. The Courts in that event may not really examine the decision of selection as an appellate authority primarily for the reason that the decision making process would be in conformity with the statutory provisions, law of the land and in any case, basic rule of law. Proper application of mind in contrast to 'no application of mind' is a sine qua non for taking proper and acceptable administrative or executive decision. Even if the State bona fide believed that there was no specific law in force to make appointments to the post of Director General of Police and that there was no prescribed procedure for such appointment, still it was obligatory on the State authorities to adopt mechanism which is just, fair, transparent and free from evil of arbitrariness. "



The petitioner would claim that it is not sufficient to say that the material is available before the Selection Committee, but such comparative assessment should be done only by the Selection Committee and by none else. The petitioner would also state that the Selection Board ought to have made independent assessment of CRs and not proceeded only on the basis of the delayed CR without adjudging as to whether such a delayed CR could have been accepted taking into consideration of the earlier CRs. Learned Senior Counsel for the petitioner would submit that the Supreme Court in **(2007) 14 SCC 641** held that the Department Promotion Committee has to make independent assessment of ACR without being influenced by the ratings and grading in CRs. The respondents' case would be that elaborate procedure has been laid down for initiation of CRs in Army Order 45/2001/MS and similarly for Selection Boards which are distinct from those of the Central Government employees. To support this argument, they would quote the judgment of the Hon'ble Supreme Court in **Dev Dutt vs Union of India** reported in **(2008) 8 SCC 725**:

*It is settled law according to the respondents that scope of judicial review in matters of assessment of Supreme Court/High Courts/Tribunals is very limited.*

In the case **Air Vice Marshal S.L. Chhabra vs. UOI and others 1993 Supp (4) (SCC 441)** it was held:

*" 10. It is well known that a Selection Board, while considering the suitability of an officer for promotion to a higher post or rank, takes into consideration several factors and it is not solely based on the Appraisal Report of the controlling officer. "*

.....

*" In such a situation, it was neither possible for the High Court, nor is possible for this Court to act as a court of appeal against the decision of the Selection Board, which has been vested with the power of selection of an officer for being promoted to the rank of Air Vice Marshal. No oblique motive has been suggested on behalf of the appellant against any of members of the Selection Board and there is no reason or occasion for us to infer such motive on the part of the members of the Selection Board for denying the promotion to the appellant with reference to the year 1987. Public interest should be the primary consideration of all Selection Boards, constituted for selecting candidates, for promotion to the higher posts, but it is all the more important in respect of Selection Boards, meant for selecting officers for higher posts in the Indian Air Force. The court cannot encroach over this power, by substituting its own view and opinion. According to us, there is no scope to interfere with the decision of the Selection Board of 1987 merely on the ground that adverse remarks, in the Appraisal*

*Report of 1986, which were placed before the Selection Board in the year 1987, were later expunged. "*

.....

*"According to us, neither the High Court nor this Court can moderate the appraisal and the grading of the appellant for a particular year. While exercising the power of judicial review, a court shall not venture to assess and appraise the merit or the grading of an officer. "*

In the case **UOI & Ors. vs. Lt Gen RS Kadyan** reported in **(2000) 6 SCC 698**, it is observed,

*" Prima facie, we cannot say, having gone through those records, that these notings are baseless. Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. May be one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant*

*aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government. "*

In the case **Amrik Singh vs. Union of India and others** reported in **(2001) 10 SCC 424**, it has been observed,

*"21. In the result, we are not inclined to grant any relief to the appellant in spite of the fact that his performance in the subsequent years has been shown to be very good and his ratings were very high. Ultimately the single adverse remark of 1985-86 by the Reviewing Officer had stood in his way, not only at the time of original consideration but also when the matter was considered afresh pursuant to the directions of the High Court. The result may be unfortunate. But the scope of the jurisdiction of the High Court being very limited, we cannot go into the correctness of the adverse remarks nor into the assessment made by the Selection Board on the two occasions. "*

In the case **Surinder Shukla vs. Union of India & Ors.** reported (2008) **2 SCC 649**, it is observed,

" 11. *Considering the comparative batch merit, if the Selection Board did not recommend the name of the appellant for promotion to the rank of Colonel which appears to have been approved by the Chief of the Army Staff, it is not for the court exercising power of judicial review to enter into the merit of the decision. The Selection Board was constituted by senior officers presided over by an officer of the rank of Lt. General. It has been contended before us that the Selection Board was not even aware of the identity of the candidates considered by them because only in the member data sheet all the informations of the candidates required to be considered by the Selection Board are stated, but the identity of the officers is not disclosed. The appellant moreover did not allege any mala fide against the members of the Selection Board. What impelled the Selection Board not to recommend his case but the names of other two officers is not known.*

.....

"14. *The peculiarities of special requirements of defence services in a case of this nature must also be kept in view. The considerations which apply to other government servants in the*

*matter of promotion may not be held to be applicable in the Army services. (See Lt. Col. K.D. Gupta v. Union of India)."*

The judgments quoted above make it abundantly clear that judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such. On the issue of decision making process, we examined the proceedings of the Selection Board held on 13 October 2011. A total of 33 officers considered and there were 10 vacancies. The comparative merit shows that the petitioner was at Serial No.20 in merit and the first ten in the order of merit were found fit for promotion. The difference in the total quantitative marks obtained by No.10 officer in the merit list, who got selected and the petitioner is over 2.4. Thus we find that Selection Board was absolutely fair and their recommendations which were later approved by the Central Government are devoid of any infirmity. This Tribunal has no intention of encroaching upon the power of the Selection Board and we do not wish to interfere with the decision of the Selection Board. Point No.3 is answered accordingly.

32. In fine, the application is partly allowed, in that the order rejecting the Statutory Complaint against non-empanelment alone is set aside without affecting in any manner the CRs covering periods 16 October 2009

to 24 March 2010 and 25 March 2010 to 30 June 2010. The request for promotion by No 1 Selection Board is rejected. We direct that the delayed CR for the period 5<sup>th</sup> May 2008 to 16<sup>th</sup> August 2008 be set aside and the petitioner be considered for promotion to the next rank by a Selection Board with his revised profile as a fresh case within three months from today. No costs.

Sd/  
LT GEN (Retd) ANAND MOHAN VERMA  
MEMBER (ADMINISTRATIVE)

Sd/  
JUSTICE V. PERIYA KARUPPIAH  
MEMBER (JUDICIAL)

**13.08.2013**  
**(true copy)**

Member (J) – Index : Yes / No  
Member (A) – Index : Yes / No

Internet : Yes / No  
Internet : Yes / No

To:

1. The Secretary, Ministry of Defence  
Integrated Headquarters of  
Ministry of Defence (Army)  
New Delhi.

2. The Chief of the Army Staff  
Integrated Headquarters (Army)  
South Block  
New Delhi.

3. The Military Secretary  
MS Branch  
Integrated Headquarters of  
Ministry of Defence (Army)  
New Delhi.

4. M/s. S.Sathiyaseelan &  
M. Erajasimhan,  
For applicant.

5. Mr. B.Shanthakumar,  
Senior Panel Counsel  
For respondents.

6. OIC, Legal Cell, ATNK & K Area  
Chennai.

7. Librarian, AFT/RBC, Chennai.



HON'BLE JUSTICE V. PERIYA KARUPPIAH  
(MEMBER-JUDICIAL)  
AND  
HON'BLE LT GEN (RETD) ANAND MOHAN VERMA  
(MEMBER – ADMINISTRATIVE)

O.A. No.10 of 2013

Dt: 13.08.2013