



by the ACC as well as any other proceedings towards holding a board for the post of Director General, Armed Forces Medical Science (DGAFMS) for Resp No.4 may be quashed and Respondent be directed to hold a Special Board for consideration of the applicant for the post of DGAFMS as he is the senior most Lt.Gen. in the Cadre against the vacancy which has arisen on 1.7.2010.

2. The brief facts which are necessary for disposal of this petition are that applicant was serving in Army Medical Corps since 7.4.1971 as doctor with utmost dedication. He served as RMO for 4 years in Armoured Corps in desert and then in Medical Battalion in Arunachal Pradesh. He was selected for Advance Course in surgery and passed MS Surgery and also served in Command Hospital, Pune, Leh, Roorkee, Army Hospital, Delhi as Surgical Specialist. The applicant has also done M.Ch. Plastic and Reconstructive Surgery from PGI, Chandigarh and also has served as Plastic Surgeon in Command Hospital (EC), Kolkata, Command

Hospital (SC), Pune, Command Hospital (NC), Udhampur during Kargil war for nearly 4 years. The applicant has been Deputy Commandant Command Hospital (EC) and Consultant Surgery and Plastic Surgery and Officer-in-charge Surgical Division at Army Hospital, R&R. He worked as DDG, P&T in Office of the DGAFMS and worked as Sr.Consultant, Surgery. The applicant was promoted from time to time in all select ranks and became the seniormost AMC (Army Medical Corps) Cadre when he retired on 31.8.2010.

3. It is alleged that petitioner was senior to the Respondent No.4 from the date of Commission and the date of the seniority of the applicant is 7.4.1972 and that of Respondent No.4 is 23.1.1973. When applicant was in the rank of Major General, he was senior to Respondent No.4 and even as a Lt. General he was senior to Respondent No.4.
4. A Special Selection Board was held in 2007 for promotion to the rank of Lt.Gen. for vacancies of 2008.

The applicant was considered and so was Respondent No.4, but both were not selected due to limited vacancies. Respondent No.4 made no grievance about his non-empanelment or any aberrations or irregularities in his ACRs or the system of reporting, until Feb. 2009.

5. The Special Selection Board for vacancies of 2009 was subsequently held on 29.1.2009 and both applicant and Respondent No.4 were empanelled and both were promoted as Lt.Gen. The seniority of the petitioner was kept intact and petitioner was placed senior to Respondent No.4. Soon after the clearance by the Special Selection Board for the post of Lt. General, Respondent No.4 realised that the petitioner will be senior to him, therefore, he deliberately with malafide intention and in order to gain march over the petitioner submitted a statutory complaint of non-empanelment of Selection Board in 2007. He tried to assail the non-empanelment by requesting to consider all the CRs that were considered for the Special Selected Board 2007 for any discrepancies. The intention of the Respondent

No.4 was very subtle and clear that in case the petitioner remain senior to him, Respondent will not get chance to become DGAFMS. Therefore, realising this he filed a statutory complaint to have the march over the petitioner. The normal procedure for promotion to the post of DGAFMS is merit (as admitted by respondent in their reply). Therefore, it is alleged that the statutory complaint filed by the Respondent No.4 was processed by the authorities and it was recommended that complaint was untenable as there was no supersession and the CR had been correctly endorsed by the DGAFMS as per the prevalent norms and Special army order 8/S/91. However, it is alleged that statutory complaint of Respondent No.4 was not rejected, but it was kept in abeyance by the Respondent. It is further alleged that malafide of the Respondent is further clear from the fact that post of DGAFMS was going to fall vacant on account of retirement of the then DGAFMS on 30.6.2010 and vacancy was available on 1.7.2010. The Special Selection Board for the post of DGAFMS

was required to meet three months in advance of falling of the anticipated vacancy. However, for one reason or the other the Special Selection Board which should have met three months before the availability of the vacancy was not convened in order to give benefit to Respondent No.4 and in order to make him senior the statutory complaint of the Respondent No.4 was kept in abeyance. Respondent, the Defence Ministry passed the order on 26.4.2010 whereby granting partial redressal to Respondent No.4 by way of expunging of assessment by Surg. Vice Admiral VK Singh in the capacity of DGAFMS in ACR 2005 on account of technical validity and they removed the aberrations from the ACR. The copy of the order dated 26.4.2010 reads as under:

*“The Central Government after considering the Statutory Complaint dated 12.2.2009 submitted by (MR-03044H) Maj Gen (now Lt.Gen) Naresh Kumar, AVSM, VSM, AMC against supersession by Special Promotion Board (Medical) held on 19.11.2007, hereby grants partial redress to the officer by way of expunction of assessment by Surg. Vice Admiral VK Singh in the capacity of Director General Armed Forces Medical Services in ACR 2005 on grounds of technical validity. The above mentioned aberrations be removed from the CR Dossier of the officer and be he reconsidered for promotion, by an appropriate Promotion Board (Medical), in accordance with the existing policy.”*

6. Against this order the petitioner approached this tribunal and filed this petition OA No.353/2010 which was dismissed by this tribunal by its order dated -15.7.2010 on the ground that "*there was no cause of action as on that date and the same was premature since this was an objection taken by the respondents*". Petitioner approached Hon'ble Supreme Court against this order which was subsequently withdrawn. Thereafter, petitioner came to know that respondents were holding a review board for non-empanelment of Respondent No.4 for the post of Lt.Gen. for the year 2007 but the result of Special Review Board was not declassified in respect of Respondent No.4 till applicant retired on 31.8.2010. Then applicant filed another OA No.524/2010 for declassifying the result and for the orders that retirement of the applicant will not be a fate accompli. Then tribunal disposed of the said OA 524/2010 vide judgement dated 7.9.10 *with the liberty that if the applicant has any grievance for the consideration for the post of DGFMS it will be open for him to approach the*

*Tribunal in accordance with law.* It is now that petitioner has come to know that Special Review Board was held on 13.8.2010 and respondents kept the results pending to delay the DGAFMS board so that the applicant would retire on 31.8.2010. The board empanelling the Respondent no.4 has been approved by the ACC and the respondents are in the process of holding the Board for selection to the only post of DGAFMS. By accepting the Statutory complaint filed by the Respondent No.4 and giving him the post of Lt. Gen. from 2007 after expunging the remarks of 2005, the Respondent No.4 would become senior to the petitioner. Since, Respondent No.4 became senior to the petitioner, therefore, as per the selection criteria this will facilitate the appointment of Respondent No.4 for the post of DGAFMS against the vacancy of 2010 to the detriment of the petitioner. Hence, petitioner has approached this tribunal now by filing the present petition and praying that the order passed by the Respondent dated 26.4.2010 may be set aside as the order is not bonafide

one and it has been deliberately done to by pass the petitioner who otherwise was senior to Respondent No.4 and would have made to the post of DGAFMS in normal course.

7. Respondent has filed the reply and contested the position that the petitioner has no fundamental right to be selected to the post of DGAFMS. He has only right to be considered for the post as and when it arises in accordance with the relevant rules. It is also submitted that since because petitioner is not seniormost, he has no right to be appointed on the post of DGAFMS. It is submitted that Respondent No.4 filed a statutory complaint before Central Government on 12.2.2009 & submitted that ACR of 2005 earned by Respondent No.4 in the rank of Brigadier in the appointment of Deputy DGAFMS (Planning & Training) was initiated by Surgeon Vice Admiral VK Singh (the then DGAFMS) under para-32 of SAO 8/S/91. He endorsed the ACR in three places as Reviewing Officer, Second Technical Officer and as DGAFMS. It is also pointed out that as per para-32 of

SAO 8/S/91, the DGAFMS endorse the CRs of all officers in the rank of Brigadier and above. It is alleged that effect of multiple endorsement by the DGAFMS was under scrutiny at the time of examination of the Non Statutory complaint of Brig. CS Tak in August, 2006, the Complaint Advisory Board has suggested that the procedure is required to be streamlined to make endorsements of DGAFMS uniform and objective. As the additional endorsement over and above the endorsement as one of the reporting officers by DGAFMS in the main channel of reporting results in upward/downward moderation of his own assessment, the then DGAFMS opined that all endorsements of DGAFMS in 2005-06 wherein the then DGAFMS has already endorsed the Reviewing Officer / Senior Reviewing Office may be declared technically invalid as the same has been discontinued in Army on the general side excluding the medical side (AMC). This procedure has been followed from 2005 onwards, therefore, it is denied that the system of multiple reporting across the

board was continued till as late as 2009 and provisions of AO 1/2010 have been used with retrospective effect for Respondent No.4. Therefore, it alleged that AO 1/2010 was issued to done away similarly for the Army Medical Corps also. It is submitted that on 12.2.2009, the ACR of Respondent No.4 was examined and it was found that there is aberration of multiple assessment, therefore, the statutory complaint of the Respondent No.4 was accepted and accordingly the redress was given to the Respondent No.4. It is admitted position that prior to AO 1/2010 the practice which was invoked in Army was not available to Army Medical Corps and it is for the first time AO 1/2010 was issued. It is submitted that consequently to the redress granted to Respondent No.4 on his statutory complaint and having been empanelled for promotion to the rank of Lt. Gen by the Review Selection Board held on 13.8.2010 he has been placed in the select list for the year 2008 by the Promotion board held on 19.11.2007 and he becomes senior to the petitioner in the present rank of Lt.Gen in

AFMS. Therefore, in the changed scenario at present Lt. Gen. Naresh Kumar is seniormost, next to him is Lt.Gen. H.L.Karia and next to him is Air Marshal D Ganguly. It is also pointed out that since the petitioner is already retired he has no right to be considered for the post.

8. The short question for consideration is whether expunging the remarks of Respondent No.4 at this belated stage, invoking the new procedure laid down by AO and which has been brought into affect from 1.1.2010 can be retrospectively applied to expunging the remarks of Respondent No.4 in the rank of Brigadier of 2005 is justified or not. Before we deal with the other arguments, we may dispose of preliminary objections on behalf of Respondent No.4 with regard to maintainability of this petition. First objection is that of res judicata u/s 11 (iv) CPC. Suffice it to say that petitioner has challenged the various orders passed by respondent from time to time to derail petitioner's consideration, otherwise it would have been construed that he

acquiesced in the matter. He could not have joined all the issues as they have happened at different point of time, therefore, there is no question of constructive res judicata. Hence this objection is overruled.

9. Second objection that since the petitioner having been retired he has no right to be considered for the post of DGAFMS. It may be stated at outset that the petitioner has been filing the petition from time to time challenging the development which has taken place and the Courts by various orders have disposed of the petitions holding that the petitioner should wait till selection for the post of DGAFMS takes place, it is only when it came to the knowledge of the petitioner that manoeuvring has been done by expunging the remarks of the Respondent No.4 as Brigadier of 2005, therefore, this would come as a fresh cause of action to the petitioner while he was in service. The vacancy also arose when he was in service i.e. 1.7.2010. Therefore, he cannot be denied consideration. Learned Counsel for Respondent invited

our attention to the order of AFT, Chennai Bench in the case of Col.S.C.Bhattacharya Vs. UOI & Ors stating that since petitioner has retired, therefore, he has no to be right to be considered. That was different case in which petitioner retired before he could be promoted i.e. 31.7.2010 whereas Col. R.C.Sharma was promoted before his retirement i.e. 31.8.2000. Therefore, this is of no help to Respondent.

10. As the vacancy of DGAFMS arose on 1.7.2010, at that time the petitioner was in service and if the Board would have already been convened for the post as a normal procedure prior to three months of vacancy, then petitioner was very much in service and seniormost and if found fit could have been appointed as DGAFMS and got another period of one year as DGAFMS. Therefore, this argument of Respondent No.4 has no merit & same is rejected.

11. Now coming to the merit of the matter. Learned Counsel for the petitioner submitted that change in ACR policy for

Army Medical Corps came w.e.f. 1.1.2010 by AO 1/2010. Respondent filed the statutory complaint on 12.2.2009 for expunging of remarks which were given in his CR of 2005 in the rank of Brigadier. Learned Counsel further submitted that this AO which has come into force from 1.1.2010 doing away with the multiple endorsements in the Army Medical Corps for the first time cannot be made applicable retrospectively for expunging the remarks of the Respondent No.4 which was there in 2005. This expunging of remarks by Respondent's order dated 26.4.2010 cannot be on the basis of AO which has come on 1.1.2010. This retrospective application of provision which has come from 1.1.2010 and expunging of remarks of Respondent No.4 of 2005 is illegal, arbitrary & malicious.

12. It is already submitted that this CR of 2005 was utilised for the promotion of Respondent No.4 from Brigadier to Major General and Major General to Lt. General. The respondent did not challenge it when he was selected in the year 2008. Petitioner and Respondent No.4 were

not selected in 2007 and Review Selection Board took place in 2009 and in that both petitioner and Respondent No.4 were selected and as a result the petitioner was placed above the Respondent No.4 and till that time Respondent No.4 had no grievance. It is only on the 12.2.2009 Respondent No.4 woke up to file statutory complaint because the result of it became known to everybody that both petitioner and Respondent No.4 have been empanelled and he realised that the petitioner will be senior to him as Lt.General and Respondent No.4 will have no chance to be selected for the post of DGAFS as vacancy arose on 1.7.2010, therefore, he underook this exercise and ultimately he could manage to succeed in getting the order on 26.4.2010 which is illegal, arbitrary and malafide. As against this respondent submitted that this procedure of multi endorsement was under review for the long time on the basis of complaint filed by Brigadier Tak and matter was in process, therefore, the respondent realised that this anomaly should be set right and because of that

anomaly benefit was given to the Respondent No.4 by accepting his statutory complaint.

13. We have considered the rival submissions at length and perused the record. The admitted position is that the multiple endorsements system in Army Medical Corps was for the first time done away by Army Order 1/2010 with effect from 1.1.2010 so as to ensure a uniformity with wings of Army. It is true that in the Army this system of multiple endorsement was done away but same was done away in Army Medical Corps and on account of statutory complaint of one Brigadier Tak the matter was being considered at various levels and ultimately the decision was taken somewhere in 2007 which ultimately was incorporated in Army Order 1/2010 and which came into force from 1.1.2010. There is no dispute that the Army Order AO 1/10 dated 1.1.2010 came into force w.e.f. 1.1.2010 by which the multiple endorsement was done away and prior to that the ACRs were governed by Special Army Order SAO 8/S/91 dated 8.7.1991. The ACR of Respondent No.4 was endorsed as per the

Special Army order which was in force i.e. 8.7.1991 and on that basis his ACR as Brigadier was written and on that Respondent no.4 did not made any grievance and he was promoted from Brigadier to Major General and Major General to Lt. General on the basis of that ACR. So much so in 2007 when he was not promoted for the post of Lt.Gen. along with the petitioner as there was no vacancy available, he did not protest and it is only on 12.2.2009, he filed a statutory complaint when Review Selection Board took place on 29.1.2009 for the promotion to the post of Lt.Gen and in that petitioner and Respondent No.4, both were selected and this selection was known to everybody but it was declared on 6.3.2009. Both were empanelled on 1.1.2009 as Lt. General with original seniority i.e. petitioner was above Respondent No.4. The plea taken by the Respondent is that this matter was under consideration because of complaint from Brig. Tak that when in the general army this multi endorsement system is done away why not in the Army Medical Corps also. The process was on for

changing of this multi endorsement system but infact it was brought out by Army Order w.e.f. 1.1.2010 only and not with retrospective affect. The ACR of Respondent No.4 was written on the basis of Special Army Order which was in vogue at the relevant point of time. The Army Order came into force w.e.f. 1.1.2010 and by which multi endorsement system has been done away, therefore, on the basis of this Army Order AO 1/10 which came into effect from 1.1.2010 cannot be applied retrospectively to expunge the remarks of Respondent No.4 given in the rank of Brigadier in 2005 so as to enable him to have the march over the petitioner. This action of Respondent apparently is without jurisdiction. The only plea which has been taken is that since this matter was under consideration for long time on the basis of complaint of Brig. Tak the file was being processed for the long time and an administrative decision was taken but infact administrative decision actually came into force by Army Order dated-1.1.2010 and made applicable from 1.1.2010 cannot be pressed

into service retrospectively to expunge the remarks given to Respondent No.4 in the year 2005 as Brigadier. The principle of law and matter of retrospective operation is well settled. No statutory or administrative order can be construed retrospectively until it is intended by its intention apparent in the provisions. It is undisputed that this Army Order came w.e.f.1.1.2010, therefore, it cannot have the retrospective implication and the ACR of 2005 which was written on the basis of Special Army Order dated -8.5.1991 cannot be superseded by invoking Army Order 1/2010.

14. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation

than its language renders necessary. Therefore the retrospective effect can be if it is intended so. But it has been clearly mentioned in Army Order 1/2010 that it shall come into effect from 1.1.2010. It is more than clear that Army Order has not been given a retrospective effect. Simply because the matter was under consideration and on the notesheet the proposal was mooted out to change the multiple endorsement but the noting on Sectt. file cannot be construed to be a law, it was a general proposal which was mooted out on the basis of statutory complaint of Brig. Tak. But, the law will only come into force when it is so notified by proper army order. A change in executive procedure has to be notified by a proper army order. In Indian Army, the Army order becomes law when it comes into force, when it is made by public order and that is how the army orders are issued for the benefit of the Defence forces. That army order came to the light when it was properly notified as an Army Order 1/2010 and it was clearly mentioned that it shall come into force from 1.1.2010 that is, it has

prospective operation and all the matters subsequent to 1.1.2010 shall be reviewed on the basis of this order. If such orders are to be construed retrospectively then it will open the Pandora's box. All the people who have already suffered by multi endorsement system will rush to file representation and it may relate to indefinite period of time and this will create chaos. This seems to be have been done for the benefit of R-4 only and not for all.

15. Learned Counsel for the petitioner submitted that such benefit has not been given to others. Be that as it may the fact remains that by no means we can construe this Army Order to be construed retrospectively to change the multi endorsements ACRs of all the Army officers from retrospective date. Therefore, whatever the ACR which was written at the time when Special Army Order 8/S/91 was prevalent that ACR cannot be changed by the Army Order dated 1.1.2010 which is prospective and it cannot be retrospective for the benefit of Respondent No.4. We do not want to go into further detail that what

were the factors which were taken into consideration but fact which stands out is this that it may be only sole purpose to see that Respondent No.4 makes a march over the petitioner. The expunging of remarks of the CR of 2005 of Respondent No.4 and giving him benefit of promotion to the post of Lt. Gen from 2007 to have march over the petitioner was not bonafide action. The strange plea has been raised that because the matter was under consideration therefore, they have taken the resort to expunge remarks of Respondent No.4 is far from legal. It is only smacks of legal malafide so as to enable the Respondent No.4 to have march over petitioner. The administrative action of respondent has to be fair and transparent but this kind of approach cannot be countenance as it is not fair and just, it is only for the purpose of benefit of one individual and that cannot be accepted.

16. Hence, as a result of above discussion, we are of the opinion that expunging remarks of Respondent No.4 by order dated 26.4.2010 is quashed and the petitioner and

Respondent No.4 alongwith other eligible persons shall be considered for promotion for the post of DGAFMS as it fell vacant on 1.7.2010. At that time the petitioner was very much in service. In case after the reconsideration, if the petitioner is found suitable for the appointment of DGAFMS then all consequential benefits should be given to him. The order dated 26.4.2010 is set aside and Respondents are directed to consider the case of petitioner along with the Respondent No.4 and other eligible candidates in accordance with law without expunging of remarks of Respondent No.4 in the rank of Brigadier in 2005.

17. The Petition is allowed. No order as to costs.

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[Justice A.K. Mathur]  
Chairperson

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[Lt. Genl. ML Naidu]  
Member (A)

New Delhi

20<sup>th</sup> January, 2011