

**COURT NO. 1, ARMED FORCES TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**  
**(Through Video-Conferencing)**

2.

**OA 2410/2019**

**Col Leena Gurav**

**... Applicant**

**Versus**

**Union of India & Ors.**

**... Respondents**

**For Applicant** : Ms. Ankita Patnaik Advocate

**For Respondents** : Mr. Harish V. Shankar with  
Ms. Bushra Kazim, Advocates for  
Respondents Nos. 1 to 4

Mr. Santhosh Krishnan, Advocate  
for Respondent No. 5

**CORAM :**

**HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON**  
**HON'BLE LT GEN P.M. HARIZ, MEMBER (A)**

**ORDER**  
**08.07.2021**

Vide separate detailed order passed today, OA is disposed of.

Learned counsel for the applicant makes an oral prayer for grant of leave to appeal for impugning the aforesaid order before the Hon'ble Supreme Court. However, there being no point of law, much less any point of law of general public importance involved in the order, which warrants grant of leave to appeal, the oral prayer is declined.

[JUSTICE RAJENDRA MENON]  
CHAIRPERSON

[LT GEN P.M. HARIZ]  
MEMBER (A)

/ng/

**COURT NO. 1, ARMED FORCES TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**OA 2410/2019**

**In the matter of :**

**Col Leena Gurav**

**... Applicant**

**Versus**

**Union of India & Ors.**

**... Respondents**

**For Applicant** : Mr. Maninder Singh, Senior Advocate as instructed by Ms. Ankita Patnaik and Shri Nikhil Palli, Advocates

**For Respondents** : Mr. Harish V. Shankar with Ms. Bushra Kazim, Advocates for Respondents Nos. 1 to 4

Mr. Santhosh Krishnan, Advocate for Respondent No. 5

**WITH**

**OA 576/2020**

**In the matter of :**

**Col Vinod Singh Gaur**

**... Applicant**

**Versus**

**Union of India & Ors.**

**... Respondents**

**For Applicant** : Shri Sathosh Krishnan, Advocate

**For Respondents** : Mr. Harish V. Shankar with Ms. Bushra Kazim, Advocates

**WITH**

**OA 787/2020**

**In the matter of :**

**Col Mukul Dev**

**... Applicant**

**Versus**

**Union of India & Ors.**

**... Respondents**

**For Applicant** : Shri Rajiv Manglik, Advocate

**For Respondents :** Mr. Harish V. Shankar with  
Ms. Bushra Kazim, Advocates for  
Respondents Nos. 1 to 4  
  
Mr. Santhosh Krishnan, Advocate  
for Respondent No. 5

## **ORDER**

1. The three OAs, OA 2410/2019 by Col Leena Gurav, OA 576/2020 by Col Vinod Singh Gaur and OA 787/2020 by Col Mukul Dev have all been filed under Section 14 of the Armed Forces Tribunal Act, 2007. All the three applicants are Army Officers from the JAG Branch who were considered for promotion to the rank of Brig by No. 2 Selection Board (No 2 SB) in December 2019 and have impugned various issues related to the conduct of No. 2 SB. While Col Mukul Dev superannuated on 30.09.2020, the other two are still serving. The case commenced with OA 2410/2019 filed in December 2019; the applicant in OA 576/2020 joined issue in June 2020, while the applicant in OA 787/2020 joined issue in July 2020.

2. The applicant in OA 2410/2019 has challenged the Agenda (List of officers under consideration); allotment of vacancies and retention of her CR covering the period 01.09.2017 to 11.04.2018 in the reckonable profile. The applicant in OA 576/2020 has challenged only the allotment of vacancies. The applicant in OA 787/2020 has challenged the withholding of the results of No 2 SB held in December 2019 as a consequence of this Tribunal's Order dated 08.01.2020 in OA 2410/2019.

### **Prayers of the Applicants**

3. The applicant in OA 2410/2019 has made the following prayers:-

- (a) Court records/ proceedings/ reports based on which the respondents have issued the order dated 07.11.2019 by clubbing different batches and bringing the applicant in the zone of consideration with such officers who ought not to have reckon seniority as per the policy and the judgements, and without prejudice to the rights of the applicant rising from the issue mentioned above have only allotted two vacancies as against the three available vacancies for promotion held on 04.12.2019 to the rank of Brig in JAG's Department as well as the records based on which the respondents have held such a selection board by retaining the ICR for the period 01.9.2017 to 11.4.2018 as part of a actionable profile of the applicant and thereafter squash all such orders including the No 2 SB held on 04.12.2019.
- (b) Call for all the relevant records and pass orders for quashing and setting aside the impugned ICR for the period 01.09.2017 to 11.04.2018 as well as the communication dated 05.08.2020 with the direction that this ICR be omitted from consideration of the case of the Applicant for promotion in the No.2 Selection Board held on 02/04.12.2019 as well as any subsequent Selection process for the post of Brigadier (JAG) and / or for any subsequent promotion.
- (c) Direct the respondents to promote the applicant to the rank of Brigadier with all consequential benefits on the

basis of the reckonable profile excluding the ICR in the spirit of the judgement rendered on 23.07.2014 by not including or clubbing any branch which ought not to reckon seniority as the policy dated 11.12.1991 for the year 1997 with the applicant.

- (d) Pass such orders and further orders as this Hon'ble Tribunal may deem fit and proper in the interest of justice.

4. The applicant in OA 576/ 2020 has made the following prayers:-

- (a) Declare that three (and not two) vacancies are available in respect of JAG branch for No 2 SB for the 1997 Batch.
- (b) Set aside Respondent's decision to allot only two vacancies for the JAG Branch in the No 2 SB Dec 2019, notified vide letter dated 20.11.2019 issued by Respondent No 3 (Annexure A/1).
- (c) Consequential direction to the Respondents to fill up all three accruing vacancies for the post of Brigadier in the JAG Branch from the No 2 Selection Board of the 1997 Batch.
- (d) Pass such orders or other orders as may be deemed fit, in the facts and circumstances of the case.

5. The applicant in OA 787/2020 has made the following prayers:-

- (a) To declare the action of the respondents as unjust, arbitrary and illegal; and
- (b) To direct official respondents to declare the result of the applicant for the No. 2 SB held in Dec 2019 qua the applicant and if required by modifying order dated 08.01.2020 passed by this Hon'ble Tribunal in OA 2410/2019; and

- (c) To direct the respondents to promote the applicant immediately in case the applicant is empaneled to the rank of Brig and not later than 29 Sep 2020 with all consequential benefits, i.e., prior to the superannuation of the applicant in the present rank; and
- (d) To direct the respondents to consider the applicant as case of final review of 1990 batch of JAG Branch by No. 2 SB and declare the result of such consideration prior to the retirement of the applicant, preferably to be considered in the Board scheduled in Jul 2020; and
- (e) To award exemplary cost in favour of the applicant.
- (f) To pass such other and further orders which the Lordships may deem fit and proper in the existing facts and circumstances of the case.
- (g) And in the interim,
  - (i) Pending adjudication of instant application direct official respondents that the applicant be considered as the case of final review of 1990 batch of JAG Branch by the No 2 SB to be held in July 2020 and the result of such consideration is declared before the superannuation of the applicant in the present rank; and
  - (ii) Any further order this Hon'ble tribunal considers just and fit in the interest of justice.

### **Brief Facts of the Case - OA 2410/2019**

6. OA 2410/2019 is hereinafter referred to as the lead case to discuss the various issues raised by the three applicants before this Tribunal. Issues which are specific to the other two applicants are so indicated and mentioned separately where applicable. The brief facts

of the case as per the applicant is that she is the senior most women officer of the JAG Branch and the first selection grade woman officer in the rank of Col outside the Army Medical Corps. That she has worked with utmost dedication and sincerity for the last 23 years carrying out various assignments given to her. It is the applicant's case that the Respondents have had a perpetual gender bias, vindictive attitude and malefice towards her. As a result of such an attitude, the applicant right through her service career, has had to fight and invariably take recourse to legal action to obtain what was due to her. These include her case for grant of permanent commission to women; deferment of posting due to her pregnancy; permission to appear in the departmental promotion exam; her promotion to the rank of Lt Col; grant of permanent commission; payment of arrears and lately, her case for promotion to the rank of Col. The details pertaining to all these have been similarly canvassed by the applicant in her OA 364/2013 on her non empanelment by No 3 SB to the rank of Col and are contained in this Tribunal's Order dated 23.07.2014 in OA 364/2013, as such are not being repeated here. The relationship and relevance of the Order dated 23.07.2014 to the present case is examined subsequently. This order may therefore be read in conjunction with our Order dated 23.07.2014 in OA 364/2013.

7. Whilst the applicant was posted at HQ Central Command as DJAG (Litigation) from 20.01.2017 to 27.01.2019, she worked with

sincerity, dedication and her performance had been always appreciated by her superiors. During this period, the applicant had issues with two of her CRs; the first one covering the period 04.02.2017 to 31.08.2017 and the second CR, an Interim CR from 01.09.2017 to 11.04.2018. It is the applicant's case that her IO, Brig DK Ahluwalia was biased and vindictive towards her. As per the charter of her appointment as DJAG (Litigation) she was required to give a daily progress of listed court cases to JAG Branch at Army HQ and to her IO, Brig DK Ahluwalia.

8. It is the applicant's case that this vindictiveness on the part of her IO arose from professional rivalry between him and the DJAG (Litigation) at Army HQ as both were to be considered by the No 1 SB for a single vacancy of Maj Gen. Consequent to Brig DK Ahluwalia not being approved for promotion by the No 1 SB, he filed various OAs in AFT, Lucknow; first challenging his non empanelment and later challenging the approval of the other officer; DJAG(Litigation) Army HQ. It is the applicant's argument that her IO did not appreciate her interacting with the DJAG (Litigation) at Army HQ and providing requisite updates, and the fact that the applicant did not update him on the progress of cases filed by him in his personal capacity. Since the DJAG (Litigation) at the Army HQ was also a party in the case filed by Brig Dk Ahluwalia, the applicant subsequently gave her updates to Army HQ directly to the ADG.



9. As a result of this vindictiveness, in the CR covering the period 04.02.2017 to 31.08.2017 the applicant had been rated '8' in the overall box grading. Moreover, the CR was initiated only on 30.01.2018, almost five months after it was due. Aggrieved by the grading in this CR, the applicant initially filed a Non-Statutory Complaint dated 20.06.2018, which later was converted as a Statutory Complaint dated 04.12.2018. During the pendency of the Statutory Complaint, the applicant was due for next CR covering the period 01.09.2017 to 11.04.2018. Fearing a similar vindictive report by the Brig DK Ahluwalia the applicant initiated a case dated 15.09.2018 to debar Brig DK Ahluwalia from initiating her next CR. Detailed justification was sought by the MS Branch which too was forwarded on 11.10.2018. However, the plea was rejected by the Respondents vide their letter dated 09.01.2019. Consequent to this, Brig DK Ahluwalia vide his letter dated 25.02.2019 instructed the applicant to submit her CR for initiation, and also stated that failing which the CR would be initiated by the IO without authentication by the ratee (Applicant) as per the provisions of Para 101 of AO 02/2016/MS. The applicant waited for the IO to initiate the CR under the provisions of Para 101 of the AO; and when that did not happen, the applicant forwarded the CR to the IO on 23.09.2019 to be initiated. The CR was initiated by the IO on 15.11.2019 and the extracts were received by the applicant on 26.11.2019. The applicant was again rated '8' in the overall box

grading; and this CR was a one-man report as the RO and SRO had retired by then. It was seen from the extracts that at Para 12(c) of the CR where details of guidance for improvement during the reporting period is endorsed, that the IO had mentioned '*Verbal and in writing; twelve (12) docu attached*'. However, copies of these 12 documents were not forwarded to the applicant with the extracts. The non-receipt of the 12 letters was intimated to the Respondents by the applicant in the letter dated 26.11.2019 under which the authenticated extracts were returned to the MS Branch. The applicant then received from the Respondents, copies of the 12 enclosures mentioned with the CR. Also aggrieved by the second CR, the applicant submitted another Non-Statutory Complaint dated 28.11.2019.

10. However, it is the applicant's case that no counselling or guidance to improve had ever been given to her and that the 12 documents attached were not in any way related to counselling or guidance and that all this had been done by the IO purely as a matter of vindictiveness. On receipt of the 12 documents from the Respondent, the applicant vide her letter dated 02.12.2019 intimated to the Respondents, the irrelevance of these documents and the malefice on part of the IO, Brig DK Ahluwalia. The Respondents were also requested to expunge this CR and not include it in the reckonable profile for the forthcoming No2 SB, the schedule of which had been promulgated by the Respondents vide their letter of 05.11.2019 and

was to be held in Dec 2019. In view of the short time interval available for processing all these issues prior to the No 2 SB, the applicant requested for an interview with Respondent No 3 so that the issues could be explained in person. However, it was only after the No2 SB was held that the applicant was intimated to process the request for interview as per the procedure in vogue. Since the interview did not materialize despite having submitted the request as per procedure, the applicant submitted an Addendum to the Non-Statutory Complaint dated 28.11.2019 explaining the issues. Thus, inclusion of the CR covering the period 01.09.2017 to 11.04.2018 in the reckonable profile of the applicant, which has been initiated with vindictiveness, had many deficiencies, and which should have been rightfully expunged would cause irreparable damage to the applicant in her consideration for promotion to the rank of Brig by the No 2 SB.

11. In the meanwhile, the applicant received a copy of the Respondent No.1's order dated 25.11.2019 under which the applicant had been granted partial redressal in her statutory complaint against the CR covering the period 04.02.2017 to 31.08.2017 in that the complete assessment of the IO had been expunged on grounds of inconsistency.

12. The tentative list of JAG Branch officers of 1997 batch scheduled to be considered by No 2 SB in December 2019 was promulgated vide letter dated 07.11.2019. It is the applicant's case

that she was the only officer from 1997 batch and that no other officer was entitled to this seniority as per policy letter dated 11.12.1991. It is seen from the tentative list that apart from her, two officers of 1995 batch have been included as fresh cases and four other officers included as review cases (Annexure A/1). The final schedule and vacancy were promulgated vide Respondent No 3 letter dated 20.11.2019; the SB was to be held from 02 to 06 December 2019, to consider a total of 07 officers and the batch was allotted 02 vacancies. According to the applicant the inclusion of the 1995 batch officers as 1997 batch fresh case was contrary to this Tribunal's order dated 23.07.2014 in OA 364/2013. The inclusion of the review cases was contrary to the judgement dated 01.04.2014 in OA 121/2012 by AFT Regional Bench Kolkata, judgements in the case of Maj Gen Srikant Sharma, Col RK Tripathi and that of the applicant in OA 364/2013. It's also the applicant's case that Respondent No 3 have incorrectly allotted only two vacancies to this batch and that they should have allotted three vacancies which were available.

### **Brief Facts of the Case - OA 576/2020**

13. The applicant, originally a Short Service commissioned was subsequently granted permanent commission with seniority fixed as 19.04.1994. He was promoted as Lt Col on 19.04.2007 and was considered as a fresh case by the No. 3 SB along with this batch mates of 1994 on 15.12.2012 for promotion to the rank of Col. However, the

applicant was not empanelled and was considered in 2013 as a 'First Review' case with the 1997 batch since there were no officers commissioned into JAG Branch in 1995 and 96. The officer was empanelled and was promoted: on 28.02.2014, and his batch seniority now was 1997.

14. The No. 2 SB for the 1997 batch was held on 04.12.2019 and the applicant was one amongst the seven candidates who were considered by the board. In the meanwhile, this Hon'ble Tribunal has stayed the declassification of the results of No2 SB based on its order dated 08.01.2020 in OA 2410/2019. The applicant on learning that one of the issues raised in OA 2410/2020 was that the No 2 SB 2019 had been assigned only two vacancies while three vacancies were available, realised that the verdict in OA 2410/2019 regarding allotment of vacancies would impact the outcome of his empanelment too. He thus joined issue with OA 2410/2019, though had not been arrayed as a party in OA 2410/2019.

15. Respondent No.3 while calculating the vacancies for No 2 SB 2019 had considered vacancies arising in the one year period from 01 Nov 19 to 31 Oct 2020 based on the fact that the conduct of No 2 SB had been promulgated in November 2019. It's the applicant's case that this one year period should have been actually calculated from the date the last panel of approved officers was exhausted, and not from the date when the conduct of Board was promulgated. The previous

No2 SB conducted in June 19 for 1994 batch had been assigned two vacancies and two officers were empanelled. Of these two officers, the first officer was promoted to the rank of Brig on 06.12.2019 and the second officer on 16.12.2019. Thus, the one year period, according to the applicant, should reckon from 16 Dec 19 to 15 Dec 20. And if this period had been considered, three vacancies would accrue to No 2 SB 2019; two retiring vacancies on 01.04.2020 and 01.06.2020 respectively, and a chain vacancy on the retirement of a Maj Gen on 30.11.2020.

16. The policy letter dated 23.12.2017 on promotion to Maj Gen/ Lt Gen specifically stipulates the cut off dates for calculation of vacancies. In the case for promotion to ranks up to Brig, calculation of vacancies which is governed by the policy letter dated 29.10.2013, the pro rata vacancy for all select ranks of Gen Cadre and major Arms/ Service is to be calculated based on the 'rolling block' method. However, vacancies for Minor Corps including JAG Branch will be based on the functional requirement. It is the contention of the applicant that in various cases before the Hon'ble Tribunal earlier, the Respondents have stated that the one year period for calculating vacancies, commences from the date of exhaustion of the previous panel, and that now for No 2 SB 2019, the Respondents have adopted a contrarian view of how the one year period reckons. The applicant has relied on this Tribunal's

judgement dated 08.10.2018 in OA 1498/2018 Brig DK Ahluwalia Vs UoI and in Maj Gen Alok Deb Vs UoI, 2016 SCC Online AFT 7304.

### **Brief Facts of the Case - OA 787/2020**

17. The applicant was commissioned in 1988 into the Artillery as a Short Service officer who on being granted permanent commission was placed in 1989 seniority. On qualifying in the LLB exam the applicant sought transfer to the JAG Branch, and was transferred retaining his original seniority of 1989. As per the applicant, he had to contend with the bias and prejudices of the direct entry JAG officers at all stages of his career as they perceived his seniority as a treat to their own avenues in higher ranks due to limited number of vacancies in this small Branch. It is the applicant's case that commencing from his transfer into JAG Branch, he had to fight and invariably take recourse to legal action to obtain what was due to him. This includes his case to gain entry into the JAG Branch, against the award of censure and adverse CR; all of which were decided in the applicant's favour. He also had to fight for his empanelment to the rank of Col by the No 3 SB and was finally promoted as a selection grade Col on 05.07.2016 with the batch seniority of 1990 and seniority of 01.05.1990. His batch 1990 was considered by No 2 SB for promotion to the rank of Brig as fresh case in 2014 and subsequently as first review and final review case in 2015 and 2016 respectively. The

applicant was however, not considered with his batch mates as he was lacking requisite CRs in the rank of Col. He once again had to take legal recourse to seek waiver of CRs and based on the partial redressal granted by this Tribunal he was finally considered as a Fresh 1990 batch case by the No 2 SB in May 2018, and not empaneled. Since he was either withdrawn or deferred from subsequent No2 SBs, he was considered as a First Review case only in No 2 SB of Dec 2019 along with the applicants in OA 2410/2019 and 576/2020. It is the applicant's contention that he had been deliberately harassed by not being considered as first review case in his own turn.

18. Thus, now having been considered as First Review case by the No 2 SB Dec 2019, the results have been withheld based on the orders of this Tribunal dated 08.01.2020 in OA 2410/2019. It is the contention of the applicant that he is not related to any of the disputes raised by the applicants in OA 2410/2019 and 576/2020 since, being a First Review case, he does not impinge on the consideration or utilization of vacancy, if approved. Moreover, since the Respondents had issued the notice for No 2 SB to be conducted in Jun 2020, and the applicant's name is not included, it is imperative that the applicant's name is included as Final Review case, if he is not empaneled in No 2 SB Dec 2019, as this would be his last chance as he is otherwise to superannuate on 30.09.2020 in the present rank.



**Progress of the Cases**

19. The applicant in OA 787/2020 initially filed a MA 861/2020 dated 28.06.2020 in OA 2410/2019 seeking intervention and modification of the Tribunal's Order dated 08.01.2020. Since this MA got listed for analogous hearing with OA 2410/2019, and the fact that as an intervener in OA 2410/2019 he cannot seek any separate relief for himself the applicant filed this separate OA. Though the applicant's case was initially heard along with the other two cases, based on a plea by the applicant, his case was delinked from the other two cases vide this Tribunal Order dated 21.09.2020. However, no stay was granted on the applicant's superannuation.

20. The applicant in AO 787/2020, then filed WP(C) 7194/2020 in the Delhi High Court impugning the tribunal Order dated 21.09.2020 by which the applicant's plea of interim relief to stay his superannuation was stayed. The Hon'ble Court in its order dated 29.09.2020 directed that all the three OAs be heard together; superannuation of the applicant not to be affected till the case is heard by the Tribunal; tribunal may also consider the applicant's interim prayer. The Tribunal vide its Order dated 30.09.2020 directed that all parties be mutually impleaded in each other's case with opportunity to all parties to make necessary replies to the case. Subsequently the Tribunal vide its order dated 14.10.2020 directed that the applicant be

retired as on 30.09.2020 and that the retirement will be subject to the final orders in the case.

21. The Tribunal in its Order dated 19.10.2020 vacated the stay granted vide its order dated 08.01.2020 in declassifying the results of the No 2 SB Dec 2019. The applicant in OA 2410/2019 filed a WP(C) 8418/2020 in Delhi High Court challenging the vacation of stay by the Tribunal in its Order dated 19.10.2020. The Hon'ble High Court in its order dated 23.10.2020/ 02.11.2020 set aside the Tribunal's Order dated 19.10.2020 and restored the stay granted vide order dated 08.01.2020; stay to continue till the final outcome of the case.

22. In the meanwhile, the applicant in OA 787/2020 filed another WP(C) 8285/2020 in the Delhi High Court under Article 226/227 arising out of the Tribunal's Order dated 14.10.2020 in OA 787/2020 where by the applicant was to be retired on 30.09.2020. Not finding any merit in the case, the WP was dismissed by the Hon'ble Court vide its Order dated 21.10.2020.

### **Arguments by the Counsel for the Applicant in OA 2410/2019**

23. The Ld. counsel for the applicant commenced his arguments stating that the respondents had not adhered to and implemented the orders issued on 08.01.2020 and on subsequent dates. He further stated that the applicant's case was a premeditated design by the Respondents to ensure that the applicant, a lady officer remains

deprived of favourable and equitable consideration for promotion to the rank of Brig. He added that to this end the respondents, contrary to the policy, had clubbed officers of different batches for consideration by the No. 2 SB; reduce the No. of vacancies available for the batch and included a biased CR in the applicant's reckonable profile for the Board, which actually ought to have been expunged.

24. Elaborating on the batch concept, the Ld. Counsel took us through the details contained in the policy letter on 'Sequence of Selection to Select Rank' dated 11.12.1991. He emphasised that an officer's seniority can only slide by a max of two years if not found fit for promotion in the first and second chances. Referring to the zone of consideration of the No 2 SB in question, he said that while the SB was to consider the fresh batch of 1997, like the applicant, the respondents had included two other officers of 1995 seniority as fresh cases of 1997. The counsel emphasised that these two officers who were originally of 1993 and 1994 seniority were now of reckonable seniority of 1995 by rules, record and judgement.

25. Referring to the Order dated 23.07.2014 by this Tribunal in OA 364/2013 filed by the applicant in an earlier case against her non empanelment in No 3 SB Jun 2013 as a fresh case, the Counsel vehemently stated that in the list of officers under consideration then, these two officers were listed with seniority of 1993 (for Final Review) and 1994 (for First review). Since they were empanelled in this 3 SB,

they would reckon seniority of 1995 for No 2 SB. He further added that though the policy letter dated 01.08.2014 has amended Para 5 of the policy letter dated 11.12.1991, this was not applicable in the case of the applicant as already a judgement based on the original policy letter dated 11.12.1991 had been given in OA 364/ 2013. Thus, the two officers could not be included as fresh cases with batch year of seniority reckoning 1997 and therefore, the list of officers under consideration had been prepared incorrectly and was misleading. The Counsel further added that therefore, the applicant being from 1997 batch should be considered separately, and that these two officers must be considered as fresh 1995 batch.

26. Relying on the undermentioned cases, the Ld Counsel argued that the order in applicant's earlier OA 364/2013 had confirmed the original seniority of the two officers now clubbed with the applicant were of 1993 and 1994 seniority respectively, and therefore their current seniority is of 1995 for No 2 SB, and therefore should be considered separately. The order also stated that the following issues were squarely covered by the judgement in OA 121/2012; that batches cannot be clubbed; that there is no official definition of Minor Corps; and that a special review case should be assigned vacancy from future blocks. Referring to the case of Maj Gen Srikant Sharma, the Counsel said that with the AFT dismissing his OA 161/2011, it had concurred with the practice of a Review Case being independently

considered as a fresh batch by the SB. He further added that this case had travelled all the way to the Apex Court and was admitted. Thus, based on the doctrine of merger, the case had attained finality and was therefore binding on all such future considerations. Notwithstanding the fact that the AFT Principal Bench in its order dated 30.05.2016 in OA 269/2016 did not take note of the Hon'ble Supreme Court judgement in the case of Maj Gen Srikant Sharma.

- (a) AFT, Principal Bench Order dated 22.09.2011 in OA 161/2011, ***Maj Gen Srikant Sharma Vs UoI & Ors***
- (b) AFT, Kolkata Bench Order dated 01.04.2014 in OA 121/2012, ***Col RK Tripathi Vs UoI & Ors***
- (c) AFT, Principal Bench Order dated 23.07.2014 in OA 364/2013, ***Lt Col Leena Gurav Vs UoI***
- (d) Supreme Court Judgement in ***UoI Vs Maj Gen Srikant Sharma***, CA 7400 of 2013, dated 11.03.2015 [(2015) 6 SCC 773]
- (e) ***Khoday Distelleries Ltd. Vs Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd, Kollegal***, CA 2432 of 2019, dated 01.03.2019 [(2019) 4 SCC 376] regarding the doctrine of merger.

- (f) ***AV Papayya Sastry and Ors Vs Govt of AP and Others***, CA 5097-99 of 2004, dated 07.03.2007 [(2007) 4 SCC 221] on doctrine of merger.

27. Next, the Ld Counsel, with the help of a time line submitted with the written statement then explained in detail the circumstances concerning the two CRs, elaborated on the reasons why the IO had been vindictive and biased towards the applicant, and why the applicant had constantly remained apprehensive of the IO's intent to harm her professionally. The Counsel said that there had been substantial delay in deciding the applicant's statutory complaint against the first CR, and that it was only fair to assume that the applicant had reasonable apprehension that the IO would remain vindictive and biased while grading her in the second CR. It was because of this apprehension that the applicant delayed submitting her second CR for initiation. The applicant's case to debar the IO from initiating her second CR was rejected too.

28. He further elaborated that it was when she got the extracts of the second CR that her fears came true as the IO had once again graded her lower than her expectations. Immediately she submitted her non statutory complaint against the second CR, and alongside was informed of the partial redressal granted to her in her first complaint; in that the IO's complete report had been expunged. She then sent an addendum to her non statutory complaint and submitted an

application explaining the circumstances and requesting that this CR be not included in her reckonable profile in the No 2 SB. The fact that the non-statutory complaint was finally rejected meant that this biased CR would remain a part of her reckonable profile for all times.

29. The Counsel then vehemently argued that when two complaints were made, against two consecutive CRs by the same IO, and where the IO's report in the first CR had been completely expunged, in the natural course of justice the second report by the same IO should have been expunged. The Counsel then added that the Organisation/ Govt should have stood by her and protected her interest as a junior officer. The Ld Counsel then relied on judgement of the **Central Administrative Tribunal, Lucknow Bench in the case of Amitabh Thakur Vs UoI & Ors., OA 179/2009 dated 19.02.2013** where in similar circumstances of two consecutive reports by the same IO, and where only one report was set aside by the authorities, the Tribunal set aside the second report.

30. The Ld Counsel then elaborated on the issue of allotment of vacancies for the No 2 SB of December 2019 and stated that the vacancies had been deliberately reduced from three to two. He further elaborated that there was no formal policy which defined Minor Corps, concept of functional vacancy, or how the period of one year for calculating vacancies was to be reckoned. As per policy the period of one year is taken from the time the last person on the previous batch

is promoted. However, in the current Board this method had been changed and that change has been detrimental to the applicant and all others being considered in the Board. Referring to the counter affidavit filed by the Respondents in the case of Brig DK Ahluwalia Vs UoI in OA 617/2017 filed at the AFT Regional Bench Lucknow, the Counsel forcefully stated that the Respondents had already stated that the calculation of vacancies commenced from the time the previous panel was exhausted and this was explained by the fact that when a Maj Gen retired on 31.05.2017, the empanelled Brig was promoted to the rank of Maj Gen on 01.06.2017 and thus the previous panel had been exhausted on 01.06.2017. However, in this SB, the one year has been reckoned from 01.11.2019 since the letter on vacancies were issued on 07.11.2017. The counsel then explained that in the previous panel there were two officers and they were promoted on 06 & 16.12.2019 respectively. Therefore, the one year period should have reckoned from 16.12.2019 to 15.12.2020, and in which case the batch would have got two retiring vacancies and a chain vacancy of a Maj Gen who was due to retire on 30.11.2020.

31. The Ld Counsel concluded his arguments by reiterating the mala fide design of the Respondents in denying the applicant a fair and equitable opportunity for promotion to the rank of Brig by adopting a three-pronged approach. In that first the applicant was clubbed with officers from other batched contrary to the policy; the



vacancies for the batch were reduced from a possible three to two by modifying the manner in which the reckonable period of one year was adopted; and finally, by rejecting the applicant's non statutory complaint against the second CR, this biased CR had been made a part of the reckonable profile of the applicant. The Counsel vehemently stated that in order to ensure justice, set aside the CR, give additional vacancy, utilise 2 vacancies for 1995 and one vacancy for 1997. Finally, in all this is the aspect of gender bias and discrimination since the applicant is a women officer. While the aspect of gender bias was not addressed in her previous OA 364/2013, there was adequate support on this issue from the undermentioned cases:-

- (a) **Secretary MoD Vs Babita Puniya & Ors**, CA 9367-9369 of 2011, dated 17.02.2020 (2020 SCC Online SC 200).
- (b) **UoI & Ors Vs Lt Cdr Annie Nagaraja & Ors**, CA 2182 -87 of 2020, dated 17.03.2020 (2020 SCC Online SC 326).
- (c) **Lt Col Nitisha & Ors Vs UoI & Ors**, CA 1109 of 2020 dated 25.03.2021.

### **Arguments by Counsel for the Applicant in OA 576/2020**

32. The Ld Counsel said that the Counsel for the previous applicant had argued at length regarding the clubbing of batches, allotment of vacancies and the necessity of setting aside the CR of his applicant. He then said that his client had three prayers; set aside the allotment of two vacancies; declare three vacancies; and that these three vacancies be made available to the 1997 batch officers. The Counsel then stated that selection is based on suitability and vacancy and that

the grievance of his client was with the vacancy. Referring to the policy letter pertaining to No 1 SB and SSB dated 23.12.2017, the Counsel stated that in this case the reckonable period of one year was clearly defined being from 01 Jan to 31 Dec. While there was no laid down definition of a Minor Corps, the policy for calculating vacancies has been laid down in Para 6 of the letter dated 19.02.2010, in that, due to low batch strength and limited vacancies, the vacancies would be worked out on a functional requirement which are mainly dependent on retirement / chain promotions. The policy however, does not mention actual reckonable period and how it is to be calculated.

33. The Counsel stated that the stated policy of calculating the reckonable one year period was from the day the previous panel is exhausted culminating in an appointment. Referring to the judgement of the **AFT Principal Bench in Brig DK Ahluwalia Vs UoI and Ors in OA 1498/2018 dated 08.11.2018, (2018 SCC Online AFT 8809)** the Counsel vehemently stated that the respondents have categorically stated this position, in that when a Maj Gen retired on 31.05.2017, the empanelled Brig was promoted to the rank of Maj Gen on 01.06.2017 and thus the previous panel had been deemed to be exhausted on 01.06.2017. And that the calculation of vacancy for any SB commences from the exhaustion of the previous panel. In this connection the Counsel also referred to

the judgement by *AFT Principal Bench, **Maj Gen Alok Deb Vs UoI & Ors, in OA 756/2015, dated 06.05.2016 (2016 SCC Online AFT 730).***

34. The Counsel then explained that in the present case, the last officer on the previous panel was promoted on 16.12.2019. Thus, the reckonable one year period for calculating vacancies was from 16.12.2019 to 15.12.2020. By this, the batch would get two retiring vacancies and one chain promotion vacancy accruing from the retirement of a Maj Gen on 30.11.2020. Thus, the stance of the Respondents in the present case was incorrect. In this connection the Counsel referred to the counter affidavit submitted by the Respondents in which it has been stated that exhaustion of panel occurs when the vacancy allotted to a batch becomes available and not when the empanelled officers are promoted to those vacancies.

35. The Counsel then took us through the dictionary meaning of 'exhaustion' in that it meant 'completely use up' and emphasised that while construing the meaning of words and expressions, the ordinary, natural and grammatical meaning should be resorted to. In this connection, the Counsel relied on the following judgements:-

- (a) **Supreme Court Constitution Bench in Navinchandra Mafatlal Vs CIT** (AIR 1955 SC 58)
- (b) **Madan Lal Vs State of J&K** [(1995) 3 SCC 486]
- (c) **Lt Gen RK Anand Vs UoI** (2018 SCC online AFT 6843)
- (d) **UoI Vs B Valluvan & Ors** [(2006) 8 SCC 686]

- (e) **Roshan Bhimrao Patil Vs Secretary Dept of Electronics and Information Technology & Ors.** (2015 SCC Online Del 7531)

**Arguments by Counsel for Applicant in OA 787/2020**

36. The Counsel reiterated the challenges to No 2 SB Dec 2019 made by the three applicants and said that while two of the applicants had directly challenged various issues, his applicant was aggrieved by the non-finalisation of the promotion board, and the fact that the applicant would be denied the opportunity of a Final review, if applicable, since he was due to superannuate on 30.09.2020. He then went on to explain how the applicant had been made party to the other two cases and added that his applicant supports the challenges in the other two OAs; in that the zone of consideration was incorrect and that the vacancy had not been worked out correctly.

37. The Counsel briefly recapitulated the issue of how the zone of consideration was deemed to be incorrect. In that while the applicant in 2410/2019 was a 1997 fresh case, two other officers of original seniority 1993 and 1994 had also been included as fresh cases of 1997. Normally these two officers would have been considered as 1995 batch; however, since there were no officers in 1995 and 1996 batch, they had been incorrectly clubbed with 1997 batch officer. The Counsel added that the dispute regarding batches of these officers had already been adjudicated in the previous case, OA 364/2013 filed

by the applicant in OA 2410/2019; based on the judgements in the case of RK Tripathi by the AFT Regional Bench Kolkata. Though the question of law still remained open to be decided in a later case when it comes up.

38. The Counsel then explained the history of his applicant's prolonged consideration, both by No 3 and No 2 SB due to various reasons. The Counsel further stated that as per the policy on promotion to select ranks, officers were entitled to three considerations. His applicant, however, had been given only two considerations by No 2 SB; May 2018 and Dec 2019. Thus, if the results were not declared in time, the applicant may not get this third consideration as he was due to superannuate on 30.09.2020. In case the applicant had been empanelled by No 2 SB Dec 19, he would have been able to serve another year till 30.09.2021.

39. Referring to the calculation of vacancies, the Counsel stated that the period of one year is to be calculated from the day the last person on the previous panel is promoted. However, this had been done arbitrarily by the Respondents. Referring to the policy on No 1 SB and SSB, where in the period of one year over which vacancies are to be calculated is laid down specifically, the Counsel stated that it should be laid down in a similar manner for No 2 SB too. Explaining with the help of a chart submitted in court, the Counsel stated that since the reckonable one year period for No 2 SB Dec 19

had been taken from 01 Nov 19 to 31 Oct 20, the previous Board would have considered the one year period from 01 Nov 18 to 30 Oct 19.

40. The Counsel then explained with help of a chart that based on their appreciation of vacancies and certain permutation combination, that it was possible to provide three vacancies to No 2 SB Dec 19, including the retiring vacancy on 30.11.2020. He further vehemently argued that since in No 2 SB Dec 19 both, zone of consideration and calculation of vacancies were incorrect and illegal, the SB be quashed. He concluded stating that in the eventuality of his applicant not being empanelled in No 2 SB Dec 19, and the fact that he has since superannuated on 30.09.2020, the Respondents be directed to consider the applicant as a case of Final Review with the next batch. And in case the applicant is empanelled, he be reinstated with all dues of pay and allowances and seniority. In the event of the final review happening after 30.09.2021, the applicant's pay and pension be fixed notionally in the next rank.

### **Arguments by the Counsel for the Respondents**

41. The Ld Counsel for the Respondents initially reiterated the prayers of the three applicants and then took us through the basic methodology of the management of the officer cadre in the Army including the promotion policy and the selection to select ranks. In

particular, he took us through the policy details contained in the letter dated 11.12.1991, explained the 'Batch Concept' and the subsequent amendment to Para 5 of this letter issued on 01.08.2014 and the concept of 'Batch Year of Seniority' applicable to Review cases.

42. The Counsel then briefly recapitulated the service details of the applicant in OA 2410/2019 and took us through the details of OA 364/2013, filed by this applicant on her not being empanelled by No 3 SB Jun13. The application had been allowed and the Tribunal in its order dated 23.07.2014 had stated that the vacancy for the Special Review Case be allotted from subsequent blocks and that the No 3 SB be reconvened to consider the applicant. During the pendency of this OA the applicant was considered as a First Review case by No 3 SB in Jun 2014 and was empanelled. However, the applicant had not challenged that empanelment. Having not objected to her empanelment to the rank of Col with BYOS 1999 in 2014, now claiming that it was wrong was fallacious. Based on the orders in OA 364/2013, the applicant was reconsidered by No 3 SB and her seniority was restored to 1997 from 1999.

43. Based on the No 3 SB, Lt Cols AK Panwar and VS Gaur also reckoned as 1997 batch year of seniority. The Counsel then stated that the No 2 SB of 1997 batch was held in Dec 2019 in which the applicant along with Cols AK Panwar and VS Gaur were considered as

fresh cases, Cols AR Manoj and Maneesh Kumar were considered as First Review case and that both the Review cases were compared with their original batch.

44. The Ld Counsel then stated that Col VS Gaur (Applicant in OA No 576/2020) had earlier challenged allocation of vacancy for No. 3 SB held in 2013 in which he was considered as first review case of 1994 batch along with Col Leena Gurav of 1997 Batch, by filing OA No 453/2014 and had prayed that his seniority be restored to 1994 from 1997 BYOS. In the said OA, the Hon'ble AFT vide their judgment dated 06-03-2019 (page 97, para 5 and page 99, para 10 of Annexure – A7 in OA No 576/2020) while rejecting the prayer of the applicant, have clearly mentioned that Col V S Gaur belonged to 1997 Batch. The Counsel further added that even in the present litigation, Col VS Gaur had not challenged his consideration as 1997 BYOS by No.2 SB held in Dec 2019.

45. The Counsel then stated that the applicant had approached the Tribunal without exhausting the statutory remedies available to her. That the applicant fairly participated in the selection board without any grievance and thereafter approached the Tribunal not to declassify the results of the No 2 SB. The applicant was clearly barred by estoppel and acquiescence, from approaching the Tribunal, having chosen to participate without any demur. Moreover, though the applicant submitted a non statutory complaint dated 27.11.2019, it



had no whisper of any alleged grievance of clubbing the batches and was limited to the grievance against the ICR for the period 09/2017 to 04/2018. The applicant had challenged the IO's assessment and had alleged malafide intentions on his part in giving her a lukewarm report. Referring to the applicant's point that her application to debar the IO from initiating her ICR had been turned down, the Counsel stated that though the issues raised by the applicant did not fulfil the provisions of Para 29 and 30 of the AO 02/2016/MS the applicant was advised to file a statement of case, which she did. However, since there were no grounds to debar the IO, the statement of case was dismissed too. In the meanwhile, the applicant was granted partial redressal in the previous statutory complaint filed against her CR for the period 02/17 to 08/17.

46. Referring to the applicant's assertion of gender bias and prejudice the Counsel said that the Tribunal in its order dated 23.07.2014 had clearly ruled out any such bias or prejudice. The Counsel added that the applicant had made a case of victimisation based on certain incorrect assertions including the incident where her posting from Mumbai was deferred based on the orders of the Mumbai High Court. Where in fact, her requirements were met by the organisation by granting her annual leave and maternity leave. That the applicant had averred allegations of arbitrariness, discrimination,

vindictiveness and unjust conduct by the Respondents were not borne out by any facts.

47. Explaining the management of review cases and functional requirement in Minor Corps, the Ld Counsel stated that in major Arms/ Service, officers were commissioned into them every year, and therefore there was always a fresh batch each year. However, in the case of Minor Corps often there were years in which no officer was commissioned. In such cases, officers who are not empanelled as 'Fresh cases' of their own batch were considered as First Review along with the next physically available fresh batch. The Counsel emphasised that this method was followed for all Arms and Service. Further explaining how promotion was carried out based on batch wise consideration, the Counsel stated that this Tribunal's Order dated 30.05.2016 in OA 269/2016, Brig MA Kelkar Vs UoI had clearly amplified the batch concept and how batch year of seniority is worked out where physical batches are absent. He further added that this Tribunal had clearly distinguished the case of Maj Gen Srikant Sharma, that of Col RK Tripathi and of the applicant in this order dated 30.05.2016. In particular, it had observed that 'the view taken in the case of Col RK Tripathi, which was followed in Col Leena Gurav's case had not attained finality as on being challenged it was neither approved or disapproved by the Hon'ble Apex Court. Thus, the applicant's assertion that she had been wrongly considered for

promotion by No 2 SB by clubbing different batches was baseless and devoid of any merit.

48. Explaining the calculation of vacancies, the Ld Counsel stated that the allocation of vacancies for select rank on a yearly basis was regulated by the AG's Branch and that vacancies were calculated as per exhaustion of panels, depending upon the occurrence of vacancies and not on the basis of actual promotion. He further added that the exhaustion of panel occurred when a vacancy allotted to a batch became available for physical promotion and not when officers were physically promoted. Often the physical promotion of an empanelled officer may get delayed for various reasons. So, when a vacancy was available for the physical promotion of an empanelled officer, that vacancy was earmarked for him and the panel was deemed to be exhausted.

49. The Counsel then illustrated the issue with the example in the case of SL APTC, where No 2 SB was held in Feb 2018 for 1988 Batch. The officer considered by the SB continues to remain under DV Ban till date. If physical promotion of the empanelled officer were to be the determining factor for panel exhaustion, then the next batch of SL APTC cannot be considered till physical promotion of the empanelled officer of 1988 Batch. The contention that the earlier panel gets exhausted only on physical promotion of an empanelled officers, is inherently flawed also due to the reason that any vacancy

accruing between the period of availability of vacancies for earlier panel and their actual date of physical promotion, goes unaccounted.

50. With reference to the allocation of vacancies to the 1994 batch No 2 SB Jun 19, the Counsel stated that the batch had been allotted two vacancies; one was an existing vacancy and the other came from Brig HC Joshi proceeding on PMR. Thus the panel of 1994 stood exhausted when Brig HC Joshi proceeded on PMR making the vacancy available for promotion to the empanelled officer.

51. With reference to allotment of vacancies for the 1997 batch, the Counsel stated that the batch was allotted two vacancies arising in the period from 01.11.2019 to 31.10.2020. The panel of 1994 was deemed to have been exhausted from the day Brig HC Joshi retired, the contention that the one year period for the 1997 batch should reckon from 16.12.2019 was ill conceived and made with ulterior motives. The batch was thus allotted the retiring vacancies of 31.03.2020 and 31.05.2020. The Counsel then stated that the retiring vacancy accruing on 01 Dec was not counted as it was beyond the one year period.

52. Referring to the various judgements relied up by the Counsel for the applicant in OA 2410/2019, the Id Counsel stated the following :-

(a) In the case of Maj Gen Shrikant Sharma, though it travelled all the way to the Apex Court, there was no merger as the Apex Court only adjudicated on the point of jurisdiction of the Hon'ble High Court and set aside the impugned judgement of the High Court. The main issue on merits was never dealt with or even referred to in the said Judgment.

(b) That the concept of merger of Judgments in respect of matters where Statutory Appeals are provided for is set out by the Hon'ble Supreme Court in its various Judgments. However, in the case of Maj Gen Srikant Sharma, no statutory appeal was ever preferred and resultantly, there is no merger. [Kunhayammed's [(2000) 6 SCC 359] case and Khoday Distilleries Ltd in CA 2432 of 2019 dated 01 Mar 2019, (2019) 4 SCC 376]

(c) The Hon'ble AFT had clearly distinguished the peculiar case of Maj Gen Srikant Sharma while disposing the OA filed by Col Tej Ram (OA 115/2011). The present case also, was therefore, clearly distinguishable from the case of Maj Gen Srikant Sharma.

(d) The interpretation given to the case of Maj Gen Srikant Sharma in the present case was given during arguments in the matter of Col Tej Ram Vs Union of India (OA 115 of 2011) decided on 22.9.2011 and had been rejected by the Hon'ble AFT.

(e) The Applicant's earlier case, OA 364/2013, decided on 23.7.2014 was based almost entirely on the Judgment of the Kolkata Bench of the Hon'ble AFT in Col RK Tripathi in OA 121/2012 dated 1.04.2014. The said Judgment interpreted the policy of 1991 and the Applicant's case was also decided accordingly. However, the Hon'ble Tribunal had not held that the Applicant Leena Gurav being of 1997 Batch, should not have been considered with Col VS Gaur and Col AK Panwar. On the other hand, the Hon'ble Tribunal upheld the Selection Board and directed the Respondents to **reconvene** the No 3 Selection Board to consider the case of the Petitioner for the fourth vacancy which had been utilised for empanelment of an officer of 1991 Batch considered independently as a special review case. Had the intention of the Hon'ble AFT been to declare that the Col Leena Gurav should not have been considered along with review cases of 1994, the appropriate remedy would have been by way of appropriate direction to consider her separately as 1997 batch, and not to reconvene the earlier selection board and consider her case for the remaining vacancy.

(f) This Hon'ble Tribunal, vide its Judgment in Brig M.A. Kelkar Vs. Union of India in OA 296/2016 dt. 30.5.2016 at Para 20 had held that the judgment in R.K. Tripathi to be Per Incuriam while ascribing the reasons elaborately. A declaration of a Judgment as Per Incuriam resulted in the said Judgment being rendered non-est and has to be

ignored. Consequently, any Judgment which relies on the Ratio of the said Judgment and renders a decision based on the ratio of the said Judgment is liable to be ignored and is not binding.

(g) The contention that the Hon'ble Tribunal in its judgment dated 23.07.2014 OA 364/2013 had determined the seniority of Col Leena Gurav and other officers, was factually incorrect. The details as claimed by the applicant as the seniority fixed by the Hon'ble Tribunal, was only a part of the submissions put forth by the applicant and it did not form part of determination of judgment. It is also submitted that the said judgment of the Hon'ble Tribunal did not specify any batch for the officers considered for No 3 SB. The said judgment has not examined or made a determination regarding the batch.

### **Consideration of the Case**

53. Having heard all parties at length, there are four issues to be decided:

- (a) Has the Agenda (list of officers for consideration) for No 2 SB Dec 19, been prepared correctly as per the current policies?
- (b) Have the vacancies for No 2 SB Dec 19 been calculated correctly as per policy?
- (c) Have the Respondents adjudicated the Non Statutory Complaint dated 28.11.2019 of the applicant in OA 2410/2019 correctly?

- (d) Should the applicant in OA 787/2020 be considered as a Final Review case with the next batch even though he has retired?

Agenda for No 2 SB Dec 2019

54. In order to decide on the correctness of the Agenda, based on the issues raised by the applicants regarding the agenda for No 2 SB Dec 19, it is necessary to examine the following aspects:-

- (a) Whether listing Col AK Panwar (original seniority 1993), Col VS Gaur (applicant in OA 576/2020 and original seniority 1994) and Col Leena Gurav (applicant in OA 2410/2019 and original seniority 1997), all as fresh cases of 1997 seniority is correct?
- (b) Since no officers were commissioned into JAG Branch in 1995 and 1996, how should the seniority of 1994 and previous batches be designated as they come up for first/ final/special review?
- (c) Whether even in the absence of officers in 1995 batch, can Col VK Panwar and Col VS Gaur be designated as 1995 batch officers and be considered separately?

55. The policy on 'Sequence of Selection to Select Ranks' is given in MS branch letter No 04573/MS: Policy dated 11.12.1991. Relevant portions of both this letter are extracted below :

"Batch Concept"

*4. Officers are considered for promotion to select ranks batch wise by the appropriate Selection Boards.*



*A 'Batch' for consideration for promotion to select ranks is defined as "all Officers who reckon seniority in a particular calendar year". It comprises the following categories of officers:-*

*(a) Officers commissioned from IMA in Jun and Dec each year.*

*(b) Technical graduate officers commissioned from IMA who reckon seniority in the calendar year, after grant of ante date seniority.*

*(c) Officers commissioned from IMA, who reckon seniority in the calendar year, after grant of ante date seniority on account of holding NCC 'C' and 'D' certificates.*

*(d) Short Service Officers commissioned from OTA and subsequently granted permanent commission, who reckon seniority in Mar and Aug each year, after adjustment of their seniority as per the existing rules.*

*(e) Officers who forfeit service as a result of disciplinary awards and reckon fresh seniority on any date in the calendar year.*

*(f) Officers passing promotion examinations late and reckoning seniority corresponding to the date on which they finally passed.*

*(g) Officers who reckon seniority in the calendar year for any reasons other than those mentioned above.*

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

*6. Sequence of Promotion with a Batch. The sequence of promotion within a batch for all select ranks (except to the rank of Maj Gen and Lt Gen in the streaming environment) will be in the same order of seniority as indicated in Appx 'A'. An example of the same is shown in Appx 'B'."*

56. It is relevant to note that para 5 quoted above has been substituted, vide MS Branch, Army HQ letter No. 04573/MS Policy dated 01.08.2014 by a new para 5 which reads :—

*"Para 5. Provisions pertaining to consideration of review cases and consequent revision of seniority are covered below:-*

*(a) Every officer is given three considerations for empanelment for promotion. If an officer is not empanelled for promotion during the first*

*consideration, he will be considered as the First Review case of his batch along with the next physically available Fresh batch irrespective of whether or not the officer(s) constituting the next physically available Fresh batch is / are Adequately Exercised (AE). If empanelled for promotion, he will reckon Batch Year of Seniority (BYOS), i.e. seniority for the purpose of promotion, with that batch. In the eventuality of him not being empanelled for promotion even in the second consideration, he will be considered as the Final Review case of his batch along with the next to next physically available Fresh batch irrespective of whether or not the officer(s) constituting the next to next physically available Fresh batch is / are AE. If empanelled for promotion, he will reckon BYOS with that batch. An illustration of a typical composition of a batch for consideration for promotion to the select ranks, is at Appendix 'A'.*

*(b) A 'Fresh batch' shall be deemed to be physically available if at least one officer constituting that batch has reached the same rank as that of the officer due for consideration for empanelment by the Selection Board.*

*(c) In the event of an intervening batch becoming physically available at a later date, the seniority of the officer empanelled for promotion during the second / third consideration shall be suitably upgraded, in order to prevent any loss of seniority to him or undue advantage of this account to the officer whose arrival has led to creation of the intervening batch.*

*(d) A few sample illustrations are given in Appendix 'F', in order to amplify the above provisions.*

*3. The above may please be promulgated down will unit level."*

57. Appendix F to this letter of 11.08.2014 gives an illustration of consideration of Review Cases which are relevant in the case at hand.

"ILLUSTRATIONS: CONSIDERATION OF REVIEW CASES Illustration I

*1. Situation. One officer of 1992 Batch of a particular Arm/ Service is due for 'First Review' by No 3 Selection Board. However, no officer was commissioned/ reckons seniority in 1993 Batch of the concerned Arm/Service. Two officers were commissioned, in 1994 Batch, both of whom have been already released from service. In 1995 Batch, two officers are available in the rank of Lieutenant Colonel to form the 'Fresh Batch/ Agenda'. The 'First Review' of 1992 Batch officer will take place with which batch? What will be the loss of seniority incurred by him? "*

*2. Comments. Neither 1993 Batch nor 1994 Batch is physically available. The 'First Review' of 1992 Batch officer will be given along with scheduled No 3 Selection Board of 1995 Batch (Fresh Batch). If empanelled as 'First Review' case, officer of 1992 Batch will then reckon BYOS in 1995 Batch, above the empanelled 'Fresh' cases but below empanelled 'Final Review' cases."*

58. These instructions therefore, are self-explanatory and do not suffer from any patent ambiguity. The above illustration given in

Appendix 'F' of the letter dated 11.08.2014 is entirely applicable in the case of fixing the batch year of seniority (BYOS) of both Cols VK Panwar and VS Gaur. Under normal circumstances, if there were officers of 1995 and 1996 batch, Cols VK Panwar and VS Gaur would have been considered as Final Review and First Review Cases with 1995 batch, and if Col VS Gaur did not get approved, he would have been considered as Final Review with 1996 Batch. However, since JAG Branch does not have any officer in both 1995 and 1996, as per the policy letter and as explained in the Illustration above, they now have to reckon BYOS 1997 and have therefore been listed correctly as 1997 fresh case for the No 2 SB Dec 19. It is the right of these officers to be considered thrice for promotion to the rank of Brig thrice, and in the absence of officers in 1995 and 1996 batches, the first time that they are considered fresh, necessarily has to be with 1997 batch.

59. It was however, argued by the Counsels for the applicants that since the batch seniority of both Cols VK Panwar and VS Gaur had been recorded as 1993 and 1994 respectively as adjudicated in OA 364/2013, and that based on the case of Maj Gen Srikant Sharma which has attained finality having been heard in appeal by the Hon'ble Apex Court which implied that Review cases could be considered independently as fresh case, the applicants were not governed by the policy letter dated 11.08.2014.

60. A close reading of this Tribunal's Order dated 23.07.2014 in OA 364/2013 indicates that while many issues have been recorded in consideration of the case, the final determination is limited to the extent that the Special Review case approved by the No 3 SB be allotted a vacancy from subsequent block and that the No3 SB be reconvened to consider the applicant. Thus, there is no determination of the BYOS of Cols VK Panwar and VS Gaur in the order. It is also pertinent to state that when the circumstances of OA 364/2013 were adjudicated, the basic policy followed was the letter dated 11.12.1991. As the Respondents are free to amend existing policy and introduce new rules and policies, the Respondents amended the letter of 11.12.1991 through the letter dated 01.08.2014. Therefore, the circumstances and conditions which have come about in 2019, as given in the three OAs under adjudication, will necessarily be examined only in the light of the policy prevailing at that point of time. Thus, the new policy amendment introduced in the letter of 11.08.2014 will be entirely applicable to the cases at hand.

61. The argument that through the case of Maj Srikant Sharma, issues related to the applicant in OA 2410/2019 had attained finality is also misplaced since the Hon'ble Delhi High Court had set aside the Order dated 22.09.2011 of the AFT, Principal Bench in OA 161/2011, ***Maj Gen Srikant Sharma Vs UoI & Ors***, the matter went up in appeal to the Apex Court. The Apex allowed the Appeal of the UoI and

adjudicated ONLY on the matter of jurisdiction of High Court to undertake judicial review of orders issued by AFT; and set aside the impugned judgement of the Delhi High Court. UoI Vs Maj Gen Srikant Sharma, CA 7400 of 2013 (Supra) is extracted below :-

*"42. If the High Court entertains a petition under Article 226 of the Constitution of India against an order passed by the Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.*

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*45. For the reasons aforesaid, we set aside the impugned judgement passed by the Delhi High Court and uphold the judgements and orders passed by the Andhra Pradesh High Court and Allahabad High Court. Aggrieved persons are given liberty to avail the remedy under Section 30 and leave to appeal under Section 31 of the Act, and if so, necessary may file petition for condonation of delay to avail remedy before this Court."*

62. This issue has already been adjudicated by this Tribunal in its Order dated 30.05.2016 in OA 269/ 2016, **Brig MA Kelkar Vs UoI**; relevant extracts are given below :-

*"13. Learned counsel for the applicant has strenuously contended that the amendment to the policy brought about by the letter dated 01 August*

*2014 (Annex. R-1) cannot take effect retrospectively. According to him, the applicant's case for promotion cannot be considered along with the officers of 1986 batch simply because after his non-empanelment he has to be deemed for the purpose of the First Review as the officer of 1985 Batch in view of the fact that there was no commissioning in that year. He is further of the view that the concept of next physically available Fresh Batch introduced by the letter dated 01 August 2014. To buttress the contention, reliance has been placed on the following precedents:-*

- (1) Maj Gen Shri Kant Sharma Vs. Union of India & Ors.-(OA 161/2013 decided by the Principal Bench of the Tribunal on 22.09.2011)*
- (2) Col Rajendra Kumar Tripathi Vs. Union of India & Ors.-(OA 121/2013 decided by Kolkata Bench of the Tribunal on 01.04.2014)*
- (3) Col Leena Gaurav Vs. Union of India & Ors.-(OA No.364/2013 decided by a Co-ordinate Bench of this Tribunal on 23.07.2014)*

*14. Our attention has also been drawn to the fact that the decisions in the cases of Col Rajendra Kumar Tripathi and Col Leena Gaurav have already been implemented.*

*15. However, as rightly pointed out by learned Sr. CGSC, the view taken in the case of Col Rajendra Kumar Tripathi, that was followed in Col Leena Gaurav's case, has not attained finality as on being challenged, it was neither approved nor disapproved by Hon'ble the Apex Court. For this, the relevant excerpts of the order dated 26.11.2014 passed in Civil*



*Appeal Diary No.(S)23704 of 2014 may be quoted here:-*

*"We do not consider it necessary at this stage to go into the merits of the findings and the conclusions arrived at by the Tribunal. We say so because the subsequent developments, referred to hereinabove, have admittedly rendered this petition infructuous making it unnecessary for us to examine the correctness of the findings recorded by the Tribunal. All that we need to say is that any observation made by the Tribunal or any conclusion arrived at by it, shall not be treated to have been either approved or disapproved by us, and all questions relating thereto shall remain open to be examined in an appropriate case as and when the occasion to do so arises.*

*With the above observations, this petition is disposed of as infructuous. No costs."*

*16. This apart, a close reading of the order passed in Col Rajendra Kumar Tripathi's case makes it clear that the following observations made in para 35, with regard to Army HQ letter No.04573/MS : Policy dated 11 Dec 1991, were apparently inaccurate:*

*"As per the above policy, if an officer is not approved for promotion during first consideration, he loses one year of reckonable seniority and slides into the batch of the next year. It is significant to note that the expression used is "next year" and not "next batch". As per the policy, the applicant was due for consideration as first review in "next year" and not with "next batch". If there was no appointment in 1983, there is no prohibition to consider the first review case independently."*

17. Even at the cost of repetition, we may set out below para 5 of the letter dated 11 Dec 1991 (*supra*):-

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

(Emphasis supplied)

18. Moreover, the illustration given in Appendix 'A' to the letter was not considered at all. Needless to say that illustration appended to the policy was of relevance and value in the construction of the policy letter with the limitation that it could neither curtail or expand its ambit. (See *Shambhu Nath Mehta vs. State of Ajmer* AIR 1956 SC 404).

19. This apart, the Bench even after taking notice of the first decision on the subject rendered by the Principal Bench in *Col Tej Ram Vs. Union of India & Others* (OA 161/2013 decided on 22.09.2011), proceeded to ignore it on the ground that a conflicting view was taken on the same day by the same Bench in the case of *Maj Gen Shri Kant Sharma* (*supra*). However, fact of the matter is that while

*deciding the OA filed by Col Tej Ram the Bench, headed by Hon'ble Justice A.K. Mathur, the then Chairperson, had considered the decision in Maj Gen Shri Kant Sharma's case and had distinguished the same on facts. The distinguishing features were:- (i) A one additional vacancy of Major General was released in RVC in 2009 for which Brig SS Thakral was considered as First Review case treating him as an officer belonging to 1975 Batch. (ii) The Selection Board was held in Aug 2009 and at that point of time Shrikant Sharma (a Brig then) was not even eligible for consideration as he had not completed the requisite tenure of 18 months. Above all this, as reflected in para 8 of the Policy letter dated 11 Dec 1991, Hon'ble the Supreme Court has already upheld (in Union of India Vs. Dayanand Khurana AIR 1991 SC 1955), though in a different context, the concept of Batch as contemplated in paragraphs 8 and 9 of the MS Branch letter No.30386/C&S/MS(X) dated 01 Jun 87.*

*20. As explained by a Constitution Bench in Atma Ram Vs. State of Punjab AIR 1959 SC 519, where Benches of equal strength are not in agreement the better course would be to refer the matter to a larger Bench otherwise the Courts are placed under the embarrassment of preferring one view to another. However, fact of the matter is that in the case Col Rajendra Kumar Tripathi, the Kolkata Bench neither touched the reasoning given by the Principal Bench in Col Tej Ram's case nor dissented therefrom on merits. The obvious consequence is that the decision in the case of Col Tej Ram still holds the field as a binding precedent and for the reasons enumerated*

*above, the view taken in Col Rajendra Kumar Tripathi's case has to be ignored as per in curium.*

*21. Col Tejram and the co-petitioner in that case were commissioned in the RVC on 3<sup>rd</sup> Sep 1979. They could not be empanelled for promotion to the rank of Brig even in the Special Review Board held in Sept 2010. Thereafter, a vacancy in the rank of Brig had arisen on 23 Feb 2011. Placing reliance on the decision rendered in Maj Gen Shri Kant Sharma's case wherein Brig SS Thakral's empanelment as First Review case treating him as an officer belonging to 1975 Batch even in absence of a fresh batch of that year, was upheld, they put forth the contention that they had also become eligible for consideration to the exclusion of 1982 Batch as there was no commissioning in the years 1980 and 1981. Rejecting the contention, the Tribunal observed that exclusion of officers of 1982 Batch from consideration would not only be unfair but would also amount to a reverse discrimination in view of the fact that by the relevant point of time, they had become eligible for being considered for the promotion.*

*22. In Col Tejram's case, the Tribunal had also refused to strike down para 6 of the circular laying down that block method of calculating vacancies is not applicable to minor corps such as RVC, as discriminatory vis-a-vis Army HQs letter dated 19 Feb 2010 providing for allocation of pro rata vacancy for General Cadre.*

*23. We find ourselves in full agreement with the conclusions arrived at in Col Tejram's case. The decision in the case of Col Rajendra Kumar Tripathi*

*has already been characterized as ignored as one reached per in curium. In such a situation, there is absolutely no need to refer the matter to a Larger Bench, as prayed for by learned counsel for the petitioner."*

63. During the course of hearing both sides, there were considerable arguments that the concept of 'Minor Corps' is not defined and that the concept of 'functional requirement' utilised in the context of Minor Corps was vague and lacked clarity. It is true that the term 'Minor Corps' is by usage and relates to those Services with small cadre strength and limited No of vacancies. Also, unlike the major Arms/ Services which have a large cadre strength and a fresh batch each year, the Minor Corps have small cadre strength and often do not have a fresh batch every year. As a result of which the method of assigning pro rata vacancy based on the 'rolling block method' of three years cannot be implemented in their case. Thus, in their case, vacancies only arise from retirement/ chain promotions and are limited in number. It is relevant to mention that even the Apex Court understands and acknowledges the utilisation of the term 'Minor Corps' as borne out by the extracts from the Apex Court judgement in the case of ***UoI & Ors Vs Lt Col PK Choudhary & Ors*** in CA 3208 of 2015 dated 15.02.2016 :

*"33. We have, while answering question No. 4 above, already held that officers in different streams*

*constitute different cadres. Since however, the argument based on legitimate expectation is pitched on a broader principle, we need to recapitulate on the risk of repetition that the Indian Army comprises the following 11 major streams: (1) Armoured Corps, (2) Infantry, (3) Mechanised Infantry, (4) Artillery (5) Air Defence (AD) (6) Engineers, (7) Signals (8) Army Service Corps (9) Army Ordnance Corps (10) Electronical and Mechanical Engineers and (11) Other Corps including Intelligence, Aviation and other Minor Corps. The first of these three streams namely Armoured Corps, Infantry, Mechanised Infantry are called as 'Combat Arms' which participate in direct tactical land combat in a war with requisite weaponry. The next four namely Artillery, Air Defence (AD), Engineers, and Signals are commonly known as 'Combat Support Arms' while Army Service Corps (ASC), Army Ordnance Corps (AOC), Electronical and Mechanical Engineers (EME) and other minor corps are known as 'Services'. As noticed in the beginning of the judgment, the newly selected Gentlemen Cadets get inducted as Commissioned Officers on successful completion of their training from the training academy. The Defence Service Regulations, Regulations for the Army govern the first appointment of the Commissioned Officers. Para 63 of the said Regulations reads: (Emphasis supplied)*

64. Therefore, in answering the question whether the Agenda (list of officers for consideration) for No 2 SB Dec 19, had been prepared correctly as per the current policies; we have no hesitation in answering that the Respondents have prepared and listed the Agenda

correctly as per the policy in vogue. *It is also pertinent to state that this policy is uniformly followed in the conduct of all Selection Boards for all Arms and Services.* To this end, the Respondents have also correctly listed Cols AK Panwar and VS Gaur as 1997 batch fresh cases since there are no officers in 1995 and 1996, along with three officers who have been listed as First Review and one officer (applicant in OA 787/2020) as First Review (Withdrawn) case. In corollary, since there are no officers in 1995 and 1996, review cases cannot by themselves constitute a batch for consideration in 1995 and 1996. Moreover, since the case of Maj Srikant Sharma did not actually attain finality, the case of Brig MA Kelkar holds and is applicable in this case too.

### **Calculation of Vacancies for No 2 SB Dec 19, JAG Branch**

65. It was argued by the Counsels for the applicants that the No 2 SB Dec 19 for JAG Branch should have been allotted three vacancies instead of the two allotted. While calculating the vacancies for No 2 SB 2019, Respondents had considered vacancies arising in the one-year period from 01 Nov 2019 to 31 Oct 2020 based on the fact that the conduct of No 2 SB had been promulgated in Nov 2019. As per the applicants, this one-year period should have been actually calculated from the date the previous panel of approved officers was exhausted, and not from the date when the conduct of Board was promulgated. The previous No2 SB had been assigned two vacancies and two officers were empanelled who were promoted to the rank of Brig on

06.12.2019 and 16.12.2019 respectively. Thus, according to the applicants, the one-year period should reckon from 16 Dec 19 to 15 Dec 20. And in this period, the batch would then have been eligible to a total of three vacancies; two retiring vacancies available on 01.04.2020 and 01.06.2020; and a chain vacancy on the retirement of a Maj Gen on 30.11.2020.

66. The files pertaining to the calculation of vacancies and their approval, for all the No 2 SBs conducted from 2015 to 2020 were submitted to the Tribunal by No 3 Respondent and these have been examined in detail along with the relevant policy letters on calculation of vacancies. The following are established.

67. The management of rank wise cadre strength of officers in various Arms/ Services in the Army is a combined function of the AG's Branch and the MS Branch. While the AG's Branch decides the rank wise cadre strength and issues regular policy guidelines on this aspect, MS Branch is responsible to ensure that officer management including promotions is carried out as per the laid down policy of rank wise cadre strength. The authorization of cadre strength in various ranks including select ranks is intimated by the AGs Branch normally at the beginning of the year, and changes if any, are intimated subsequently. Based on the schedule of Promotion Boards, MS Branch works out the vacancies and initiates the case for approval of vacancies by the



competent authority. These cases are routed through the AG's Branch for endorsement/ concurrence on cadre strength and vacancy allotment.

68. The policy on calculation of vacancies for selection boards based on pro rata vacancy system was initially promulgated vide MS Branch Letter No 04502/MS Policy dated 19.02.2010 and this was superseded by the letter dated 29.10.2013. As per this policy, consequent to adoption of vacancies related selection system in 1998, the concept of allocation of pro rata vacancies (PRV), based on the batch strength and vacancies was formulated. PRV is the ratio of No of vacancies in a block of three years to the total strength of batches considered in the three year block. The resultant PRV is multiplied by the batch strength to determine the actual No of vacancies for a batch of the Arm/ Service. While prior to 2010, PRV was determined over a 'fixed block' of three years and that has since been modified to a 'rolling block' of three years. The policy stipulates that while this method will be adopted for calculation of vacancies for all major Arms/ Services, vacancies in Minor Corps will continue to be based on functional requirement due to low batch strength and limited vacancies which are dependent on actual retirement / chain promotions. *Examination of the records submitted of all No 2 SBs held since 2015 indicate that the vacancies for both the major Arms/ Service and the Minor Corps have been calculated in the stipulated*

*manner. All cases for approval of vacancies by the competent authority are processed by MS branch with the concurrence/ endorsement of AGs Branch. Para 4 and 6 of the letter dated 29.10.2013 are reproduced below.*

*"4. Accrual of Vacancies. Vacancies accrue in a given period based on the following:*

*(a) Retirement/ PMR. Vacancies arising out of officers retiring/ proceeding on premature retirement (PMR).*

*(b) Chain Vacancy. Vacancy arising from officers being promoted to higher ranks.*

*(c) Existing Voids. Existing voids/ shortfalls in the authorized cadre of select ranks.*

*(d) Additional Vacancies. Additional vacancies when released are apportioned amongst various batches such that the benefit of additional vacancies is shared by many batches as required.*

*6. Vacancies in Minor Corps i.e., Army Aviation, Int Corps, RVC, AEC, JAG, Mil Farms, PC(SL), APS and TA will continue to be based on functional requirement."*

69. Officers normally retire on the last day of the month in which they reach the age of superannuation. Thus, all retiring vacancies accrue on the first day of the next month. This issue is also governed by MoD/MS ID No 11(3)/MS/96 dated 04.12.1996 which stipulates that **"promotion cannot be given effect to without a vacancy**

***being available. An officer who is retiring on the last day of the month will release the vacancy only from the next day”.***

70. The cadre strength of various Arms/Services for the year 2019, was intimated by the AG's Branch vide their letter No PC-08176/EST/SRV-19/MP-2 dated 06 Feb 2019 and 06 Jun 2019. JAG Branch is authorized a cadre strength of 12 Brigs and 02 Maj Gens. On 01 Dec 19, when the No 2 SB was to be held, out of the authorized 12 Brigs, two appointments of Brigs at IHQ of MoD (Army) were vacant.

71. Prior to this, on 05 Nov 19, the results of the previous No 2 SB held in Jun 19 was declassified and two officers were empaneled. The administrative process of obtaining various clearances, examining their posting proposals, and obtaining the approval of the competent authority concluded by end Nov 2019 and their postings were issued on 02.12.2019. Col Desai, who was already located at Delhi, assumed his appointment on 06.12.2019 while Col Ratra, posted in a field formation had to be relieved and move to Delhi to assume his appointment on 16 Dec 19.

72. Normally, the SB is held for all Arms / Services together based on the schedule promulgated in advance. The summary of details, from the Records, of all No 2 SB of JAG Branch conducted since 2015 are tabulated below.

Schedule	Batch#	Fresh	R/SR/ D/W	Total Offrs	Vacancies	Vac From - To	Vac Case Initiated	Vac Case Approved	Vac Promulgated	Result promulgated	Dt last empanelled offr assumed apt
	1989										29.12.2014
Jun 2015	1990	2	1	3	3	One year (Existing -2, Chain from retirement on 31.05.15)	18.05.2015	08.06.2015	08.06.2015	10.08.2015	05.02.2016
Nov 2015	1991	2	1	3	1	One year (Existing -1)	14.10.2015	16.10.2015	19.10.2015	06.04.2016	30.05.2016
Feb 2017	1992	2	1	3	2	One year (Chain from retirement on 31.05.17 & 31.12.17)	20.01.2017	27.01.2017	30.01.2017	17.03.2017	12.01.2018
May 2018	1993	5	2	7	3	One year (Chain from retirement 30.06.18, retirement 31.08.18 & 31.10.18)	20.11.2017	30.11.2017	21.12.2017	28.06.2018	07.01.2019
Jun 2019	1994	4	3	7	2	01.05.19 to 30.04.20 (Existing -1, Retirement 31.03.20)	17.05.2019	28.05.2019	28.05.2019	05.11.2019	16.12.2019
Dec 2019	1997	3	4	7	2	Oct 19 to Sep 20 (Retirements on 31.03.20 & 31.05.20)	07.11.2019	20.11.2019	20.11.2019	With held	

73. The analysis of the Table and the Records indicates the following :-

- (a) The process of obtaining sanction of vacancies commences more than a month prior to the conduct of the Boards.
- (b) The vacancies are promulgated immediately on approval.
- (c) Sometimes, whilst the vacancies have been approved and promulgated, the conduct of the Board is deferred for various reasons. For example, the Board of 1993 Batch which was originally scheduled in Jan 2018 had to be postponed to May 2018 since there was a court case and this Tribunal had stayed the conduct of No 2 SB.
- (d) Vacancies are calculated for a period of one year. Till 1993 batch, the records mention one year without a definitive period being specified in the records. However, for 1994 and 1997 batch Boards

the definitive period of one year is mentioned and it commences from the first of the month in which the case for vacancy approval is initiated.

(e) The Board in Jun 2019 considered four officers from the fresh 1994 batch and three officers of earlier seniority who were Review/Special Review/Deferred/ Withdrawn cases. The Batch was allotted two vacancies. The vacancies were calculated for the period 01 May 2019 to 30 April 2020. This gave this Board all retiring vacancies for a period of one year from 30 May 2019 to 30 April 2020. In addition to an existing vacancy arising from the demise of an officer in February 2018, this period had one retiring vacancy (31 March 2020), making a total of two vacancies. Prior to the declassification of the results on 05.11.2019, a Brig who was due to retire on 31 Mar 2021 proceeded on PMR on 26 Sep 2019. Thus, the two vacancies actually utilized for 1994 batch were the existing deficiency and the vacancy arising out of the PMR. The original retiring vacancy of 31 Mar 20 was subsequently utilized by No 2 SB Dec 2019.

(f) The vacancies for No 2 SB Dec 2019 were worked out for the first time, by an internal MS Branch Board Convened vide A/ 21501/ 2SB/ Dec19/ MS-5 dated 29 Oct 2019. Accordingly, the vacancies were calculated for a one year period from 01 Oct 2019 to 30 Sep 2020, which gave this batch two retiring vacancies of 31.03.2020 &

31.05.2020. The other vacancies in a block of two years, accruing in 2020 and 2021 placed on record were that of a chain vacancy arising out of the retirement of a Maj Gen on 30.11.2019 and a retiring vacancy on 31.08.2021.

74. The applicants have vehemently argued that the one-year period for calculating vacancies should commence only when the previous panel is physically exhausted and that comes about when the last officer of the previous panel assumes the next rank. Once the results are promulgated, there are many administrative processes before the appointment order is finally issued. The date of assumption of an appointment too is based on a variety of factors. It might entail requisite time to be provided for moving in from another appointment; having to wait for an impending administrative action to be completed; delay due to sickness, injury or any other medical issue; having to wait for the retirement of the present incumbent. Thus, trying to fix a future period based on an indeterminate date cannot be a method for calculating vacancies.

75. Exhaustion of panel occurs when a vacancy allotted to a batch becomes available for physical promotion and not when officers are physically promoted. So, when a vacancy is available for the physical promotion of an empanelled officer, that vacancy is earmarked for him and the panel is deemed to be exhausted. The contention that the earlier panel gets exhausted only on physical promotion of an

empanelled officers, is inherently flawed also due to the reason that any vacancy accruing between the period of availability of vacancies for earlier panel and their actual date of physical promotion, then goes unaccounted. The examination of the records indicates that there is a methodology being followed in the case of Minor Corps. The records also indicate many related issues and contingencies which are taken into consideration while firstly scheduling the SB, and working out vacancies. In this case, since the vacancies allotted to 1994 Batch were vacant and already existing, they are deemed to be available on the day the results of No 2SB Jun 19 (1994 Batch) was declassified on 05.11.2019. Thus the vacancy due from the retirement on 30.11.2020 which would be available on 01.12.2020 is outside the reckonable period of one year.

76. We, therefore, uphold the current method of determining the one year period and calculating vacancies based on functional requirement. However, considering the large number of litigations by officers from the Minor Corps arising from these issues, to provide more clarity and transparency, it would be prudent for the Respondents to review their methodology and lay down a set of robust and specific rule/ policy so that there is no ambiguity in how the management of officers in select rank of these minor corps are carried out, including issues related to reckonable period of one year and calculation of vacancies.

**Rejection of Non Statutory Complaint against ICR**

77. The sequence of events regarding the initiation of CRs; various complaints and their outcome are recapitulated here. It has been the applicant's case that she perceived a bias and vindictiveness on the part of her IO. The applicant got a lukewarm grading in the first CR (2/17 to 8/17), which was also initiated only on 30.01.2018. Subsequently, she was due for an ICR (9/17 to 4/18) as the IO was being posted out. She did not however, submit the ICR for initiation apprehending similar bias and vindictiveness. In order to safeguard against these reports harming her, she initiated a non-statutory complaint in Jun 2018 against the first CR and a case in Sep 18 to debar the IO from initiating her second CR; the ICR. The non-statutory complaint was not accepted being delayed well beyond the stipulated time and it was finally converted and registered as a statutory complaint in Dec 2018. In the meanwhile, the applicant was advised to initiate a statement of case regarding her plea to debar the IO from initiating the ICR. The statement of case was forwarded in Nov 18 and was finally rejected by MS Branch in Jan 19. The IO on 25.02.19 intimated the applicant to submit the ICR or that it would be directly initiated by the IO under the provisions of the Policy on the subject. Finally, the applicant dispatched her ICR on 12.09.2019, presumably on the premise that since the No 2 SB would generally be in Dec 2019, there was time for this ICR to reach the MS



Branch. It was returned by the IO with certain observations for correction and was finally submitted on 07.11.2019. Alongside on the same day, the tentative list of JAG Branch officers to be considered by the 2 SB in Dec was also promulgated. The ICR was initiated by the IO on 15.11.2019; the extracts were received by the applicant on 26.11.2019. The extracts contained endorsement of counselling and reference to 12 letters to support the counselling. Since the 12 letters were not included with the extracts, the applicant had to get them separately from the MS Branch. In the meanwhile, the final schedule and vacancy for No 2 SB in Dec 2019 was promulgated on 20.11.2019. Immediately on receipt of the extracts and having seen that the IO had given her a lukewarm grading, the applicant submitted the non-statutory complaint against the ICR on 28.11.2019. On 25.11.2019 the orders on her first statutory complaint, granting partial redressal with the complete assessment of the IO being been expunged on grounds of inconsistency was promulgated.

78. The records and files produced to the Tribunal pertaining to the examination of both complaints have been perused. It is seen from the examination by the CAB of the statutory complaint in the first CR where the IO's report has been completely expunged, that the IO had given a box grading of '8' and 1x9, 20x8 and 1x7 in various qualities. The CAB had concluded that the IO's report was lukewarm,

inconsistent and considering her past profile, the report stood out as an aberration. The CAB also concluded that the IO's report was conspicuous; that the figurative awarded by the IO were subjective and clearly indicative that events quoted by the applicant may have impacted the IO's objectivity. This was concurred by the competent authority on 11.10.2019 and forwarded to the MoD on 14.10.2019. The MoD examined the case and finally issued the orders of expunction vide its letter dated 25.11.2019.

79. However, while examining the non-statutory complaint against the second CR, where the IO has given a box grading of "8" and has given 20x8 and 2x7 in various qualities, it concluded that though the IO's Report was harsh; was performance based, that the applicant had similar grading in some of her previous reports and that it was not possible to corroborate it in the absence of assessment by RO & SRO. In the light of such an assessment, and the fact that it was technically valid, the CAB recommended that the CR be not interfered with and that the complaint be rejected. This was concurred to by the competent authority, and necessary orders promulgated. The CAB also acknowledged the fact that the twelve documents attached by the IO with the ICR did not qualify as counselling/ warning letters.

80. It is the contention of the applicant that if her complaint against the IO's report in the first CR had been accepted and expunged, her second CR by the same IO in the same appointment

should also have been automatically expunged as part of the internal assessment. Apprehending another vindictive and biased report from her IO, she had even taken up a case to debar the IO from initiating the Report, which was not agreed to by the respondents. Notwithstanding that, once the CR was initiated, she sought the interview of the MS, which was not granted in time to state her case to the authorities before the conduct of the Board. Moreover, the fact that she had submitted a non-statutory against the said CR, including an addendum, which was also later dismissed, has aggrieved her. As a result, the impugned CR formed a part of the reckonable profile for the No 2 SB in Dec 2019, and would continue to reckon in all future Boards too.

81. Thus, if anything, the second CR which is harsher than the first CR that had been expunged should therefore have been considered as an aberration too. Given the overall background of the case and the fact that the two complaints were against two consecutive CRs by the same IO, against the applicant in the same appointment, and where the IO's report in the first CR had been completely expunged, the CAB should have examined this aspect in greater detail and taken a more considered view of the case.

82. The Respondents also argued that there had been considerable delay in the applicant initiating the complaint against the first CR; that the applicant herself was responsible for the 19 months delay in

submitting the second CR, thus resulting in a one-man report. It has also been stated in the records that the second complaint had been initiated by the applicant immediately after the communication of partial redressal in her previous complaint was received, with a view to undertake a deliberate and staggered cleansing of the applicant's profile. Here again we are of the opinion that the applicant cannot be entirely faulted in these delays. The first CR which ought to have been initiated in Aug 2017 was finally initiated by the IO on 27.01.2018 and signed by the applicant on 30.01.2018. Even when the process of the complaint commenced in Jun 18, based on the policy and rules, it finally got registered as a statutory complaint only in Dec 18; obtaining comments took another three months before it was formally examined in Mar 2019. Thus, from the time the complaint was registered and orders issued in Nov 2019, it had taken 11 months. As seen, the period from Feb 2019 to Dec 2019 was lost and it would be reasonable to assume that if the complaint had been initiated in time, it would have been disposed of early. With respect to the second CR, the applicant initially attempted to debar the IO from initiating the ICR. And when that failed, she delayed handing over of the CR till it was no longer possible to be withheld if she was to be considered by No 2 SB in Dec 19. And right through this period, she awaited the outcome of the first complaint filed in Dec 18. In the meanwhile, immediately on receipt of the extracts of the ICR on

26.11.2019, the applicant initiated her second complaint; followed by the addendum.

83. We therefore find much force in the arguments of the Counsel for the applicant that given the circumstances, the applicant was justified in having a reasonable apprehension of bias and vindictiveness by her IO. It is this apprehension of continued bias and vindictiveness that prevented the applicant from handing over her second CR in time for initiation. And her apprehensions have been borne out by the grading; the attempt to endorse counselling and attach 12 letters which were irrelevant to the issue at hand; and the comments of the IO on the complaint that it was the applicants endeavor to avoid this report.

84. It is relevant to record what the Hon'ble Madras High Court in **A V Bellarmin vs V Santhakumaran Nair**, in Crl.O.P.(MD)No.12212 of 2013 , dated 13.08.2015 said on bias and reasonable apprehension. By examining the case at hand, and the details presents, against the frame work elaborated below, it emerges that the applicant had valid reasons to be apprehensive of both personal and official bias on the part of her IO.

*"Bias:*

*3. Bias is a condition or a state of mind which impairs the concept of impartiality in a decision making process. It might arise in an administrative, executive, quasi-judicial or judicial decision making. Such a bias occurs due to pre-determination or pre-disposition*

*leading to a decision moving in one direction, sans impartiality. Thus, bias strikes at the very basis of a decision, which is supposed to be fair.*

*4. As bias emanates from the mind of a person, proof of it is at times very difficult. Therefore, a litigant has been given the lesser burden of establishing before the Court that there exists a real likelihood of bias or reasonable suspicion of it. The test is not existence of the bias as an authority may act in good faith, but such an action is liable to be questioned on the ground of real likelihood of bias or reasonable suspicion of it. This is for the reason that a mind may honestly think and act keeping fairness in mind, but such a decision which flows from it might lead to an element of bias unconsciously.*

*5. Bias is synonymous with prejudice. Robert Ingersoll defined prejudice in the following manner: "Prejudice is the spider of the mind. It is the womb of injustice.\_ When an apparent bias transforms itself into a womb of injustice then, it has to be struck down by the Courts".*

*6. Bias can be divided into three parts. They are:*

- (i) Pecuniary Bias*
- (ii) Personal Bias and*
- (iii) Official Bias.*

*7. We are primarily concerned with personal and official bias. Bias may also occur by a combination of these two. When an authority, plays a role being predominant in nature, cannot thereafter take a different role leading to a positive or potential conflict with the earlier one. This mixture of two roles would create either likelihood of bias or reasonable apprehension of bias. The source of the potential bias*

*has to be a personal interest for it to be potentially objectionable in law.*

8 to 9      xxx                      xxx                      xxx

*10. Coming to an official bias, it can transform into legal malice at times but not in every case. To decide as to whether there exists a likelihood or reasonable suspicion of bias, the test shall not be unacceptably high considering the concept and proof of bias.*

*11. An apparent bias can be identified with the relative ease in pecuniary and personal as against official. Deciphering an official bias is an arduous job for a Court. That is the reason why the tests of likelihood or reasonable suspicion of bias is required to be used.*

*12. In P.D. Dinakaran v. Hon'ble Judges Inquiry Committee ((2011) 8 MLJ 331 (SC), the Apex Court after considering the judgments of the foreign Courts as well as our High Courts summed up the principles of bias by applying the test of real likelihood from the point of fair minded informed observer."*

85. The Apex Court in the case of **S Parthasarathi Vs State of Andhra Pradesh, CA 656 of 1973 dated 20.09.1973. [(1974) 3 SCC 459]** has stated the following with rest to the test of likely hood of bias.

*"14. The test of likelihood of bias which has been applied in a number of cases is based on the "reasonable apprehension" of a reasonable man fully cognizant of the facts. The courts have quashed decisions on the, strength of the reasonable suspicion of the party aggrieved without having made any finding that a real likelihood of bias in fact existed*

*[see R. v. Huggins(2)]; R. v. Sussex JJ., ex. p. McCarthy(3); Cottle v. Cottle(4); R. v. Abingdon JJ. ex. p. Cousins(5). But in R. v. Camborne ff., ex. p. Pearce(6), the Court, after a review of the relevant cases held that real likelihood of bias was the proper test and, that a real likelihood of bias had to be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. The question then is : whether a real likelihood "of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively, or, upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large.*

*15. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will*



*be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in Metropolitan Properties Co, (F.G.C.) Ltd. v. Lannon and Others, etc.(1)]. We should not, however, be understood to deny that the court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings."*

86. A similar situation where in two consecutive appraisal reports of a petitioner was initiated by the same IO and where one report was set aside by the Govt but it did not set aside the second report was adjudicated by the Central Administrative Tribunal, Lucknow Bench in the case of Amitabh Thakur Vs UoI & Ors. OA 179/2009 dated 19.02.2013. This case has been relied upon by the Counsel for the applicant too. Having considered all the relevant aspects the Tribunal ruled that the second report too should be set aside.

*"The applicant had averred the following :-*

*"4.290. That thus a very strange thing happened that the State government deleted the adverse entries in the ACR of one year while decided not to delete adverse entries in the ACR of another year while the ACRs of the two successive years were written about the same officer, were written by the same officer, were for the same posting at the same place and were written identically word by word. Hence, if adverse entries of ACR of one year were considered*

*fit to be deleted, how come were the adverse entries of another year not considered to get deleted? Thus, if the State Govt. found that the adverse entries of one year shall be deleted, the adverse entries of the previous year need certainly have been deleted because of the above-mentioned reasons”*

*.....We could not find any convincing reason whatsoever for arriving at such a contradictory decision. In fact, the perusal of the relevant order passed by the State Govt. on 26.4.2011 (Annexure A-22) refusing to delete the impugned adverse remarks reveals that in the last paragraph of the order consisting of only six lines, it has been merely said that after due consideration, a decision has been taken not to delete the adverse remarks pertaining to the year 1998-99. In the absence of any reasoning, we are feeling handicapped to agree with the above decision of the respondent/State Govt. Two identical and similar things should have been dealt with similarly. Otherwise it amounts to an arbitrariness. It is also against the principle of natural justice and fair play. In fact, the Principle of Natural Justice and Fair Play is an ante-thesis to arbitrariness. Similarly, giving out proper reasons in an order, ensures application of mind which is lacking in the aforesaid decision of the respondent/State Govt. If proper reasons are given in an administrative order, it not only shows proper and due application of mind but also prevents unnecessarily litigations. Presently, we are living in the age of transparency. The transparency is supposed to be one of the significant components of real justice. Therefore, in view of the above discussion, this point is also decided in favour of the*

*applicant. Since the respondent State Govt. itself has deleted similar adverse remarks for the successive year, about the same officer, recorded by the same officer for the same posting at the same place written identically word by word, the adverse remarks in question also deserves to be expunged and deleted.*

*25. In view of the discussion made hereinabove, this O.A. is therefore, partly allowed. The impugned adverse remarks for the year 1998-99 as communicated to the applicant on 23.5.2007 and endorsed by the Govt. O.M. dated 16.3.2009 and further endorsed by the State Govt. vide order dated 26.4.2011 deserves to be deleted and both the above orders upholding the same are required to be set aside and accordingly it is so ordered. The remaining reliefs are hereby declined having been not pressed by the applicant. No costs."*

87. We are therefore of the opinion that adequate mitigating circumstances existed for the applicant to have reasonable apprehension of harm in her CRs by her IO. Moreover, in the light of the fact that out of the two consecutive reports initiated by the same IO, the first report by the IO was fully expunged, it flows from the concept of natural justice that the second report too should have been expunged, especially when the applicant had raised a complaint against it. From the records pertaining to the examination of this complaint produced for perusal, we see no objective evaluation of the connection of the complaint with the first complaint which was expunged and no reasons why this complaint did not merit a similar

consideration. We therefore hold that the IO's report in the ICR covering the period 09/17 to 04/18 be completely expunged.

**Consideration of Applicant in OA 787/2020 as Final Review Case**

88. Apart from the fact that the applicant in OA 787/2020 supported the issues raised by the other two applicants, his Counsel had argued that in the eventuality of his applicant not being empanelled in No 2 SB Dec 19, and since he has already superannuated on 30.09.2020, the applicant be considered as a Final Review with the next batch. And that, in case the applicant is empanelled, he be reinstated with all dues of pay and allowances, and seniority. Also, that in the event of the final review happening after 30.09.2021, the applicant's pay and pension be fixed notionally in the next rank.

89. The issue of his continuation in service till the declassification of the board results has already been adjudicated in our Order dated 14.10.2020 where it states :-

*"13. ....However, we are of the considered view that merely because we had stayed the declaration of result of No.2 Selection Board held in December 2019, that by itself cannot be a ground for permitting the applicant to continue in service once he has attained the age of superannuation on the post of Col.*

*14. Today the entire proceedings of No.2 Selection Board were produced before us and after going through the same, we find that the applicant's case*

*has not been recommended by the Selection Board. However, in view of the interim stay granted by this Tribunal in OA 2410/2019, the proceedings of No.2 Selection Board (JAG) have not been forwarded for consideration/ approval or finalization by the Union of India, Ministry of Defence. The fact, however, is that the Selection Board has not recommended the case of the applicant for promotion.*

*15. Accordingly we, direct that the applicant can now be retired from service. He would be deemed to have retired from service from 30th September, 2020, his original date of retirement. However, the retirement shall be subject to any final order passed on merits after hearing all concerned."*

90. Under the normal circumstances, if both No 2 SB Dec 19 and Jun 20 had proceeded as per schedule, the applicant would have been considered thrice before his superannuation. However, based on the facts and circumstances of the case, the results of No 2 SB Dec 19 were stayed vide our Order dated 08.01.2020. While the stay was vacated vide our Order dated 19.10.2020, it was set aside by Hon'ble Delhi High Court vide its judgement dated 23.10.2020, based on a WP filed by applicant in OA 2410/2019 challenging the vacation of stay, and the stay was to remain operative till the final outcome of the case.

91. It is also pertinent that based on a WP(C) filed by the applicant in the Delhi High Court impugning the Tribunal Order dated 21.09.2020 the Hon'ble Court in its order dated 29.09.2020 directed that all the three OAs be heard together and that the superannuation

of the applicant be not affected till the case is heard by the Tribunal. In the subsequent proceedings which followed, the applicant maintained that he supported the issues raised by the other two applicants. Since the outcome of the cases are being jointly adjudicated, all three applicants will necessarily bear the consequences of the case and its outcome. Therefore, the applicant is deemed to have superannuated in his present rank having been considered twice out of the possible three chances; as a Fresh and First Review case. As such no case is made out for his consideration as a Final Review Case with the next batch after his retirement.

### **Summary of Consideration**

92. With the above considerations we hold that the Agenda (list of officers for consideration) for No 2 SB Dec 19, has been prepared correctly as per the current policies; the vacancies for No 2 SB Dec 19 has been calculated correctly as per policy, that the Respondents should have upheld the Non Statutory Complaint dated 28.11.2019 of the applicant in OA 2410/2019, and applicant in OA 787/2020 is not entitled for a final review with the next batch as he has already retired on superannuation. In view of this, we direct the following :-

- (a) The stay on declassification of results of No 2 SB held in Dec 19, ordered on 08.01.2020 is hereby vacated.
- (b) In respect of Col Leena Gurav, applicant in OA 2410/2019, the IO's Report in the ICR covering the period 9/17

to 4/18 be completely expunged. In case the applicant is not empaneled by No 2 SB Dec 19, she be assessed by a Review Board as per policy.

(c) Both, OA 576/2020 and OA 787/2020 lack merit and are dismissed. In the case of OA 787/2020, this order be read in conjunction with our order dated 14.10.2020.

(d) The batch concept including the batch year of seniority concept, and calculation of vacancies as being currently implemented by the Army is upheld.

(e) Considering the need for complete clarity in understanding the concept of functional requirement, scheduling Boards, designating reckonable period for calculating vacancies and method of calculating vacancies, the Respondents are directed to formulate and promulgate a separate policy letter for the officer management of Minor Corps in the select ranks, catering for the unique peculiarities, requirements and contingencies that arise in their management. This policy letter, duly approved by the competent authority be promulgated within six months of the issue of this order and a completion report be filed.

93. Accordingly, OA 2410/2019, OA 576/2020 and OA 787/2020 stand disposed of in the above terms. There is no order as to costs.

Pronounced in open Court on this the 8 day of July 2021.

[REDACTED]  
[JUSTICE RAJENDRA MENON]  
CHAIRPERSON

[REDACTED]  
[LT GEN P.M. HARIZ]  
MEMBER (A)

/ng/