

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

O.A. No. 681 of 2021

In the matter of :

Commander Jenson Mendez

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant : Shri Deepak Jain with Shri K.B. Pradeep, Ms. Anoushka Singh, Ms. Dashampreet Kaur, Ms. Twinkle Gupta and Shri Sajal Gupta, Advocates

For Respondents : Shri Satya Ranjan Swain, Advocate

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)

O R D E R

Invoking the jurisdiction of the Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as 'AFT Act'), the applicant has filed this OA and the reliefs claimed in Para 8 thereof read as under :

“(i) That, the records pertaining to the proceedings of Promotion Board 2/2018 PB 2/2019 and PB 2/2020 for promotion to the

rank of Captain be called for and subjected to an impartial scrutiny.

(ii) That, the records pertaining to the sanctioned vacancy for Law Cadre officers, in the rank of Captain and number of vacancies as on 2018 and 2019, be called for.

(iii) Approach Paper submitted to the Promotion Board held in 2018 and 2019 as mandated by Navy Order (Special) 1/2012 along with the ACR of the Applicant since 2015 to 2019, be called for.

(iv) Approach paper submitted to the Promotion Board in 2018, 2019 and 2020 with respect to Law Cadre officers may be called for an impartial scrutiny as the comparative assessment would reveal the discriminatory stance of Respondents, with respect to vacancy position as projected to the Promotion Board held in 2018, 2019 vis-a-vis Promotion Board held in 2020.

(v) The Respondent 2 be directed to promote the Applicant to the rank of Captain with effect

from 2018, with all consequential benefits as the applicant was unjustly deprived of promotion based on an arbitrary assessment of interse merit and unauthorised apportionment of vacancy of Law Cadre in 2018 and 2019.

(vi) Adverse report in the ACR since 2015, if any, which is contrary to the overall profile and has resulted in low marking in the ACR of the applicant, during the period for consideration for promotion in the year 2018, 2019 and 2020, be expunged.

(vii) The Respondent 3 and 5 be collectively held accountable for arbitrary exercise of delegated authority and malafide actions with personal motives and the applicant be compensated for the gross injustice and loss of personal reputation, social stigma and irreparable breach of dignity.

(viii) Any other order or reliefs the Hon'ble Tribunal may deem necessary in the interest of justice and to ensure accountability and

credibility in the matter of selection process in service.

(ix) The order of promotion of Respondent No.6 and 7 be declared as ‘non est void’ pending final disposal of the present Original Application.”

In the interim, the applicant also prayed for :

“(i) That this Hon’ble Tribunal be pleased to issue directions to Respondent 1 to consider the Annexure-A5A i.e. appeal of the applicant with objectivity, by reviewing records related to the Promotion Board held in 2018 and 2019 and 2020 of Captains and to issue directives to Respondent No 2 promote the applicant w.e.f. 2018 to the rank of Captain, pending disposal of this Original Application.

(ii) The Respondent No.2 be directed not to effectuate/implement the order and consequential benefits of promotion of Respondent No. 6 and 7 pending final disposal of this OA. In case the order of promotion of

Respondent No. 6 and 7 to the rank of Captain has been effectuated, the same be declared as 'non est void' pending final disposal of the present Original Application.

(iii) The Respondent No 2 be directed to keep in abeyance all service and consequential benefits of promotion of Respondent No 6 and No 7 pending final disposal of the present Original Application."

2. The facts of the case in brief are that the applicant, a serving Commander, was commissioned on 10.07.2000 as a Short Service Commission (SSC) officer in Law Cadre of the Indian Navy. It is the case of the applicant that his initial period of SSC tenure was extended voluntarily till 2010 as per the extant policy. On 08.07.2010, prior to the date of release of the applicant from service on 10.07.2010, the applicant was granted Permanent Commission vide respondents' letter No. NA/024B/09 dated 08.07.2010.

3. It is the case of the applicant that in April, 2014, based on the performance and merit, the applicant was selected to

undergo Staff Course in Defence Services Staff College, Wellington and after completion of the Course, the applicant was appointed as Command Judge Advocate in Headquarters Southern Naval Command and handled various complex cases of legal and judicial character. According to the applicant, in the year 2018, he was due for consideration for selection to the rank of Captain as 'First Look' and based on his performance and higher merit, he had anticipated of being promoted to the rank of Captain being the lone 'First Look' officer from Law Cadre. However, the applicant was not selected for promotion to the rank of Captain and he was informed that since there was no vacancy for Law Cadre Officer in 2018, the applicant, being the only officer from Law Cadre may be considered and promoted in the next Promotion Board to be held in 2019. The applicant was sure to get the promotion in 2019 there being one vacancy due to retirement of a Commodore from Law Cadre.

4. It is further the case of the applicant that in the year 2019, there were two officers from Law Cadre i.e. applicant and Respondent No. 8, eligible for promotion, however, no

officer was promoted from Law Cadre. The applicant alleged that malafide intentions on the part of Respondents Nos. 3 and 5 was to eliminate the applicant from fair consideration and consideration for the rank of Captain as his chance of selection when he would become R2 (Reconsider) *viz-a-viz* 'Fresh Look' officers in the next Promotion Board of 2020 would be impossible. Aggrieved by this, the applicant submitted a Statutory Complaint dated 21.11.2019 seeking an independent review of the proceedings of the Promotion Board 2/2018 and 2/2019 as the denial of promotion was unfair and discriminatory and violative of Articles 15 and 16 of the Constitution. The said Statutory Complaint was disposed of by the respondents and the decision was communicated to the applicant on 09.09.2020 i.e. after declaration of the results of the Promotion Board 2/2020, where two officers, who are junior to the applicant, were promoted, namely, Respondent No. 6, Capt Nitin Roy, and Respondent No. 7, Capt Varun Singh, who was stated to be working directly under then Judge Advocate General of Navy, Respondent No. 5 herein, and all of his CRs of last five years

was initiated by Respondent No. 5 who was also the Cadre Controlling Authority of Law Cadre. Hence, this OA.

CONTENTIONS OF THE PARTIES

5. The learned counsel for the applicant submitted that that while denying the relief of promotion to the applicant w.e.f. 2018, it was intimated by Respondent No. 3 vide letter dated 22.07.2020 that non-promotion of the applicant was purely on account of him being low in *inter-se* merit, however, in the Promotion Board 2/2018, the applicant was the only Law Cadre officer and thus the assessment of *inter se* merit by way of comparison with officers of other class with different service experience is unfair and unjustified and *non est void*. It is further contended by the learned counsel that in response to the applicant's Redressal of Grievance, Respondent No. 3, vide letter dated 20.07.2020 intimated to the applicant that he was not selected in PB 2018 due to low *inter se* merit *viz-à-viz* other Executive Officers, which is arbitrary and unjust as the *inter se* merit of officers from Naval Armament Inspection and Logistics was assessed among the eligible officers from the same cadre, whereas the

applicant's merit was assessed among the officers of Executive Branch, such as Commanding Officers of Ships, pilots etc.; that as there was vacancy in the Law Cadre in 2018, thus the applicant had to be considered for promotion in the Promotion Board 2/2018.

6. It is further submitted on behalf of the applicant that though Law Cadre is considered as part of Executive Branch, the mode of induction to the Navy, training, sub courses undergone during training phase, service conditions, sanctioned billets for appointments etc. are different for Law Cadre vis-a-vis other officers of Executive Branch. Similarly, prerequisite qualifications for induction to Law Cadre and other components of Executive Branch are also different and therefore, equitable comparison between a Law Officer and another Executive Officer would not be justified; that the applicant was the lone contender from Law Cadre in 2018 eligible for promotion. The learned counsel contended that non-availability of another officer in Law Cadre, as First Look, in year 2018, cannot be allowed to operate so as to cause disadvantage to the applicant; that the applicant

cannot be put to disadvantage merely because the applicant was the only eligible officer due for promotion as there is no policy letter which bars promotion of an officer if he happens to be the only contender; and this vacancy of Law Cadre was arbitrarily apportioned by Respondents No 2 and No 3, in 2018 and 2019 without sanction of law.

7. It is the contention of the learned counsel that it is a settled position in law, that, right to be considered for promotion accrues on the date of vacancy and due date, when eligible candidate comes up for promotion; prior to selection board, an Approach Paper is prepared by Respondent No. 3 for consideration by the Promotion Board; the projections of the vacancy position in the year 2018 and stance of the then cadre controller, i.e. Respondent No.5 and Respondent No. 3 as reflected in the Approach Paper merit an unbiased review by this Tribunal and apportionment of vacancy of a cadre is permissible only in cases where there are no eligible officers from a particular cadre but this was not the case in the year 2018 and 2019. It is further contended that as per the extant policy promulgated by the

respondents, there is no bar for promotion of an officer to a sole vacancy in existence, if no other officer is eligible for promotion and, therefore, non-promotion of the applicant in the year 2018 being the lone eligible Commander from Law Cadre was arbitrary and malafide.

8. It has been submitted on behalf of the applicant that as per the Navy Order (Spl) 1/2012, an officer may be considered three times for promotion in the rank of Captain; the applicant's 'First Look' year was in 2018; as per the current policy issued by IHQ MOD (N), with effect from Promotion Board 2 of 2017, in case of there being no 'First look' batch in a particular year, the 'R' (Reconsider) graded officers of the Branch/Cadre will not be considered by the Promotion Board and their 'Look' would remain protected till their next consideration when a 'First Look' batch is available in that Branch/Cadre; but the applicant was unjustly graded as 'R1' (reconsider) in 2019 without fair consideration in 2018, and graded as 'R2' (reconsider) post Promotion Board in 2019 in PB 2/2020. The learned counsel further contended that if the 'First Look' batch of Law officers were

not available in 2018, applicant should have been graded as 'First Look' in 2019 and not as 'R1'. It is alleged on behalf of the applicant that the 'First Look Batch' was available in 2019 for true assessment of *inter se* merit and selection of eligible candidate for promotion and not selecting the applicant in 2018 or in 2019, was malafide and arbitrary actions of the respondents to deprive the applicant the rightful selection to the rank of Captain, as 'First Look' contenders enjoy higher weightage in comparison with the contenders graded as 'R1' and 'R2'.

9. The learned counsel further submitted that the performance of the applicant during the period 2015 to 2020 as Command Judge Advocate was assessed by three different Initiating Officers. All three Initiating Officers of applicant were not from Law Cadre whereas Initiating Officers of Respondents No.6 and No.7 who were selected as Captains by the Promotion Board 2/2020 were Respondents No.4 and No. 5 respectively, who were, officers from Law Cadre. The appreciation of performance of a law cadre officer by an Initiating Officer of the same cadre *viz-a-viz* Initiating Officer

from a different cadre cannot be compared and any inequality arising out of such assessment should not have adversely affected the applicant.

10. The learned counsel submitted that since the Respondents No.6 and 7 were promoted in the year 2020, that shows that two vacancies of Captain in Law Cadre were in existence in 2018 and 2019; that not only the vacancy was not filled but the same was apportioned to Executive officers in the year 2018 and 2019 which is nothing but misuse of delegated authority. The learned counsel further added that neither a Law Officer can hold an appointment of an Executive Officer nor an Executive Officer can tenet the billet of a Law Cadre officer.

11. The learned counsel submitted that the applicant sent an appeal to the Secretary, Ministry of Defence, through proper channel against the denial of promotion and not being satisfied with the reply of the Respondent No.3 issued vide Annexure-A5, however, no reply was received till the date of filing the OA.

12. The learned counsel submitted that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution and violation of this constitutional right resulted in applicant suffering grave injustice. In support thereof, the learned counsel referred to the judgment of the Hon'ble Supreme Court in ruled the Hon'ble Supreme Court of India in the case of **Union of India Vs. Hemraj Singh Chauhan [2010 (4) SCC 290]** wherein it was held that the guarantee of a fair consideration in matters of promotion under Article 16 flows from guarantee of equality under Article 14 of the Constitution. It is further alleged that supersession of the applicant by Respondents Nos. 6 and 7 being junior to the applicant has resulted in grave loss of reputation and irreparable injury to the applicant although the applicant was fully eligible for promotion, withholding of the Vacancy in 2018 and 2019 and releasing the same at later date with a view to select Respondent No 6 and No 7 in their First Look i.e. year 2020 is unjust and indicative of institutional bias and arbitrariness in the promotion process. The learned

counsel for the applicant also relied on the following judgments of the Hon'ble Supreme Court :

1. **Dr. Jagathy Raj V.P. Vs. Dr. Rajitha Kumar S. And others [(2022) 6 SCC 299]**
2. **Union of India and others Vs. Narinderjit Singh Sidhu [(2010) 10 SCC 416]**
3. **Union of India and Another Vs. Lieutenant Colonel P.K. Choudhary and Others etc. etc. [(2016) 4 SCC 236]**

13. *Per contra*, the learned counsel for the respondents submitted that the policy and procedure regarding promotion to the rank from Cdr to Capt in the Indian Navy had been promulgated under the authority of respondent No.2 which is contained in Navy Order (Special) 1/2012 (Annexure R-1); that in terms of this Navy Order, the cases of all the officers under consideration are placed before a Promotion Board No.2 consisting of senior Naval Officers which submits appropriate recommendations, which are finally approved by Respondent No. 2. The learned counsel for the respondents further submitted that the Promotion Board is guided by an approach paper duly approved by Respondent No. 2 which broadly lays down the procedure to be followed by the Board,

Batches to be considered, number of officers to be select listed based on the long terms perspective and other policy decision as applicable and the Promotion Board is required to assess the comparative merit of officers under consideration which is decided based upon the totality of performance afloat and ashore among other factors with the sole objective of selecting the best suited officers among the officers being considered.

14. The learned counsel further submitted that for the purpose of deciding the comparative merit of the officer for promotion to the rank of Capt, the Board is required to assess the officers' performance, qualities and promotion potential from the confidential reports; the detailed instructions for rendering confidential reports of Naval officers are contained in Navy Order (Special) 5/2005 and other executive instructions issued for amplifying any changes as may be required to meet the changing needs for Human Resource Management of the Navy.

15. The learned counsel submitted that in order to ensure that the appraisal system of the officers in the Navy, does not

suffer from any major fluctuations in the overall profile of an officer due to differences in style or standards of different appraising officers and other factors, a Centralized Performances Appraisal Review by a Performance Appraisal Review Board (PARB) duly constituted by the Respondent No.2 has been introduced in the service. The composition, functions and powers of the said Board are contained in Para 24 to 27 of Navy Order (Special) 01/2012 and the said Board is required to review confidential reports of the officers since completion of nine years of service.

16. The learned counsel added that this exercise ensures that all the officers are assessed as per their continued good/bad performance and it has been the endeavor of respondents to ensure level playing field for all the officers under consideration for promotion.

17. The learned counsel submitted that the final numerical values in the CR as approved by the Respondent No. 2 and other factors as contained in Para 21 of Navy Order (Special) 01/2012 are taken into account by the Promotion Board for allocating 95% of marks to each officer. A comparative merit

list is thereafter prepared after allocating 5% marks awarded as value-judgment by the Board Members. The provision of 5% marks has been enunciated vide policy letter No. RS/4434/WTAVG dated 05 June 2013 emanating from policy letter No. RS/3155/PB/OA&R dated 14 May 2009.

18. It is submitted by the learned counsel that the comparative merit of the applicant *viz-à-viz* the officers selected by the Promotion Boards reveals that the applicant was low in merit compared to the officers selected in the Promotion Boards. The learned counsel submitted that the representation of the applicant filed against his non-selection was examined in detail by the Dte of Personnel as well as an independent Redressal and Complaints Advisory Board (RACAB) which concluded that no injustice has been done to the applicant. The learned counsel further added that at the request of the applicant, his representation was forwarded to the Ministry of Defence for a *de-novo* examination of the points of grievance, which was rejected by the MoD being devoid of merit.

19. The learned counsel further submitted that the Law cadre is a small cadre of officers of X/GS Branch of the Indian Navy and the strength of Law Cadre officers in Navy is only 43. The learned counsel added that the retirement age of Law cadre officers is different from their counterpart belonging to other cadres of GS Branch, which infers that if Law cadre officers are promoted to the rank of Capt against their own vacancies, next officer cannot be promoted until the senior officers retire, resulting in huge stagnation in the cadre and hence, promotion prospect of officers of a small cadre like Law cadre are wider if they are considered alongwith other Executive officers and, therefore, for the purpose of promotion to the rank of Capt (Select), Law cadre is considered part of X/GS Branch in the Promotion Board. The learned counsel further submitted that the pooling of vacancies of individual cadres for the purpose of promotion to the rank of Capt is also applicable for other small cadres like Provost, Aviation etc. under the GS Branch although the qualification for recruitment and nature of duties of these Cadres are different altogether.

20. The learned counsel contended that Respondent No. 5 who was the Judge Advocate General at the relevant time and was in no way related to Promotion Board which considered the applicant and the allegation made by the applicant regarding ill-intention on the part of Respondent No. 3 and Respondent No. 5 are not correct. With regard to the allegation of the applicant that Respondent No. 5, who was the Cadre Controlling Authority of Law cadre, ensured promotion of Respondent No. 6 and Respondent No. 7 in PB 2/20, it was argued by the learned counsel that the applicant failed to explain the fact that he was also considered by PB 2/18 and PB 2/19 and lagged behind the Selection threshold due to lack of merit when Respondents No. 6 and 7 were not in the contention for selection and if the applicant was meritorious enough, he could have been selected by PB 2/18 and PB 2/19. It is further contended by the learned counsel that the methodology of Promotion to the rank of Captain as stated at Para 4.6 of the OA suggests that for the purpose of promotion to the rank of Captain in Law Cadre, vacancies of the entire X/GS Branch are taken into account and not of

the Law Cadre alone and it is the low *inter-se* merit of the applicant among the X/GS Branch officers that was responsible for the applicant's non-selection to the rank of Captain by PB 2/18 and 2/19 and not due to non-projection of vacancies of Captain by Respondent No. 5.

21. The learned counsel contended that the nature of duties of different cadre are different and assessment of individual officer is made on the duties performed by an officer in his official capacity, however, numerical gradings and WAR/PEER assessment accorded by IO/RO/SRO in the CR are not the sole criterion for promotion as suggested by the applicant; merit of the officer considered for promotion is made based on PARB value of the Confidential Report as well as Value Judgment accorded by the Members of the Promotion Board; in order to ensure that the appraisal system of the officers in the Navy, does not suffer from any major fluctuations in the overall profile of an officer due to differences in style or standards of different appraising officers and other factors, a Centralized Performance Appraisal Review by a Performance Appraisal Review Board

(PARB) is done and the function of the PARB is essentially to bring out the actual consistence level of performance of any officer by eliminating all subjective factors which are likely to influence the final assessment and, therefore, any unfair treatment in the CR gradings of the applicant *viz-à-viz* other officers of X/GS Branch due to his belonging to Law cadre is not possible.

22. The learned counsel submitted that with reference to selection of Capt and RAdm, the methodology for promotion are different in the two cases and PB-1A, takes care of promotion of the RAdm while PB-2 board deals with the promotion of Captain. The learned counsel further added that the rationale for promotion of one Board cannot be applied to the other. The learned counsel argued that it is a fact that eligible officer from Law cadre is selected for promotion to the rank of RAdm and tenet the post of the JAG(Navy) view the fact that there is only one post of the JAG(Navy) and it can be teneted by an officer with legal background only, however, the same principle cannot be applied for selection to the rank of Capt. The learned counsel

submitted that if Law cadre officers are promoted against their own vacancies, given the small Cadre strength of the Law Cadre, a situation will arise where no officers will be eligible for promotion to the rank of Captain in Law Cadre when all the vacancies are filled up and promotion in the Cadre will only be possible when a Law cadre officer retires. The learned counsel added that considering the enhanced retirement age (58 years for Cmde (Law) compared to 56 years in respect of other officer of X(GS/L/E) Cmde rank) and the lean Cadre strength of Law Cadre, the decision of keeping the promotion to the rank of Capt(Select) flexible by considering Law Cadre officers along with other X/GS officers was taken. The learned counsel, therefore, prayed that the OA may be dismissed.

ANALYSIS

23. We have heard the parties at length and perused the various documents/policies/letters, produced before us by both the parties.

24. The applicant had submitted a Redressal of Grievance (ROG) on 21.11.2019 which was duly forwarded to the Chief

of Naval Staff, Integrated Headquarters of MoD (Navy) by the Southern Naval Command. As per the Navy Order 24/07, the said ROG of the applicant was referred to Redressal and Complaints Advisory Board (RACAB) for consideration. We have perused the concerned file wherein the ROG of the applicant has been examined by RACAB and the said ROG of the applicant was dismissed by the Chief of Naval Staff being the Competent Authority on 11.07.2020 and the same was communicated to the applicant vide Naval Headquarters letter No. RS/8586/RACAB/OA&R-II/20 dated 22.07.2020.

25. The applicant thereafter appealed to the Central Government in terms of Regulations 237–239 of the Regulations for the Navy Part II (Statutory) against the disposal of his ROG by the Naval Headquarters vide letter No. 242/JM dated 19.10.2020. The same was processed and forwarded to the Ministry of Defence being the Competent Authority and the same ROG/statutory complaint was rejected by an order of the Ministry of Defence, Department of Military Affairs vide its letter dated 26.11.2021 and the same was communicated to the applicant vide Naval

Headquarters letter dated MF to RS/8586/ROG/OA&R-II/21 dated 02.12.2021.

26. We have also gone through the Promotion Board proceedings of the years 2018, 2019 and 2020 in respect of the applicant and the following emerges :

<u>Sl. No.</u>	<u>Promotion Board No.</u>	<u>Number of officers considered</u>	<u>Merit List of Applicant</u>	<u>Merit List of the last officers selected</u>
1.	PB 2/18	188	80	33
2.	PB 2/19	184	80	37
3.	PB 2/20	167	65	29

It is, therefore, very clear that the applicant's overall order of merit (OOM) was below the last person selected in all the three Promotion Boards (PB) held and hence was not promoted to the rank of Capt and the applicant has availed all the available chances which are afforded to any officer for Select List promotion.

27. The main issues raised by the applicant in this OA are:

- (a) Can a Law branch officer be clubbed with other Executive branch (X branch) officers for consideration for promotion as the method of their induction, training, job requirements etc.

are entirely different from that of the other Executive branch officers.

- (b) The applicant was neither given fair consideration nor promoted in the year 2018 and 2019 inspite of available vacancy of Captain in the Law cadre and the said vacancy was illegally apportioned to the general Executive branch officer by the respondents.
- (c) Respondent No. 4 (A Law cadre officer in the rank of RAdm) was the lone contender for promotion to the rank of RAdm in the year 2020 and was so promoted whereas in the applicant's case, he was the lone contender for promotion to the rank of Capt in the year 2018, however, he was not promoted to the rank of Capt.
- (d) The applicant was graded 'R1' when he was not selected for promotion to the rank of Capt in the year 2018. The applicant has submitted that his Look in the year 2019 should have been preserved and he should have been considered as

‘Fresh Look’ officer in 2019, as the ‘First Look’ contenders enjoy higher weightage in comparison with the contenders as ‘R1’ and ‘R2’.

28. As far as the first issue is concerned, this issue relates to clubbing of officers of the Law cadre and other officers from the Executive branch for consideration for promotion to the rank of Capt. In this aspect, it is important to refer to the Navy Order (Spl) 1/2012 which gives detailed procedure for selection and promotion of officers to the rank of Capt and above. Para 4 of the said Navy Order deals with promotion to the rank of Capt in the Indian Navy and Para 10 thereof describes preparation of ‘Approach Paper’, which reads as follows :

“Approach Paper

10. Before each Promotion Board, an Approach Paper is to be prepared by the Personnel Branch and approved by the CNS. The paper will broadly lay down the procedure to be followed by the Board. It will provide information regarding batches to be considered, number of officers to be placed on Select List based on a long term perspective and important policy decisions as applicable. No departure from the procedure stipulated in the Approach paper will be permitted without prior approval of the CNS.”

Paras 16 and 17 of the aforesaid Navy Order also deal with the selection procedure for promotion to the rank of which read as under :

“16. Number of Vacancies. The number of officers to be Select Listed will be decided by the Personnel Branch and reflected in an Approach Paper approved by the CNS.

17. Number of Officers to be Considered. The number of officers to be considered for promotion would be based on their Look Year. Officers of each Branch will be divided into half-yearly batches depending on their seniority, ie officers of 01 Jan to 30 Jun seniority forming one batch and of 01 Jul to 31 Dec seniority forming the other. The number of half-yearly batches to be considered on a particular occasion will be decided on the basis of long term and short term requirements of the Service and other promotion policies in force.”

29. We have also perused the ‘Approach Paper’ prepared by Naval Headquarters for the years 2018, 2019 and 2020, which deals with the selection and promotion of the applicant. ‘Approach Paper’ for the year 2018, which was prepared in accordance with the Navy Order (Spl) 1/2012 for the Promotion Board (PB) No. 2 to be held from 30.07.2018 to 01.08.2018 specifically deals at Para 6 with Promotion

Factor; Para 7 deals with the Cadre Management and Para 8 deals with Number of Officers to be Select Listed from the Executive Branch. Para 8 (a) and Paras 9 and 10 of the said Approach Paper reads as under :

“8. Executive Branch. Based on the approved PF of 39%, a total of 38 officers (97 FL officers \times 0.39=37.83) maybe promoted from Executive Branch, Cadre wise breakdown is as given below :-

(a) X/GS. The batch under consideration consists of 82 First Look, X/GS officers (including officers of PL, OB, SM, DD, MC, PR, AT& LW specialisations). The Board may select 32 officers ($82 \times 0.39=31.98$).

(b) X/LG. The batch under consideration consists of four First Look officers. The Board may select two officers ($4 \times 0.39=1.56$).

(c) X/HY. The batch under consideration consists of four First Look officers. The Board may select two officers ($4 \times 0.39=1.56$).

(d) X/NAI. The batch under consideration consists of seven First Look officers. The Board may select 03 officers ($7 \times 0.39=2.73$).

9. The total number of officers to be selected is 39 instead of 38 at Para 8 above due to 39% PF being applied separately to each cadre/specialisation and subsequent rounding off.

10. The officers of Law/Provost/ATC specialisations are to be treated as part of ‘X’ Branch and promoted if they are suitably placed in the merit list.”

30. From Para 10 of the 'Approach Paper', it is very clear that the officers of the Law/Provost/ATC Specialisations are to be treated as part of 'X' (Executive) branch and promoted if they are suitably placed in the merit list. Clubbing of officers with specialisations of Pilot, Observer, Submarine Diving Marine Commando, Provost, Air Traffic Controller, Law under the common umbrella of 'X'/GS' Branch has also been amplified in Para 8(a) of the 'Approach Paper'. The consideration of the applicant for promotion, therefore, under the umbrella of 'X'/GS' Branch has been done as per the provisions of the 'Approach Paper' which has the sanctity vide Para 10 of the Navy Order (Spl) 1/2012. The sanctity of the concept of 'Approach Paper' has been upheld in T.A. No. 457/2010 [W.P.(Civil) No. 9952 of 2009 of Delhi High Court] titled **Rajbir SCPO No. 1632138 Vs. Union of India & Ors.** decided on 19.01.2011, wherein a Coordinate Bench of this Tribunal have dealt with the subject of 'Approach Paper' and Paras 6 and 7 of the said order read as follows :

“6. In view of this learned counsel for the petitioner has submitted that this Approach Paper which has been issued by the respondents cannot be treated as a part of

the statute and it is something alien to it and, therefore, it should not be considered.

7. We have bestowed our consideration to this submission and the answer is in negative as it is clearly mentioned in the Naval Order 05/06 in para 14 reproduced above that the Selection Board shall be guided by the Approach Paper being forwarded by INHQ, Ministry of Defence wherein the service requirements which will be required from time to time will be incorporated. Therefore, this Naval Order shall be deemed to be part of the selection process and the Selection Committee cannot ignore it. Therefore, the submission of learned counsel for the petitioner that it may be treated alien to the selection process cannot be accepted.”

31. The issue involved in the said TA was for the selection of Master Chief Petty Officers (MCPOs) but it has specifically dealt with the sanctity of the Approach Paper which has been upheld by the Coordinate Bench of this Tribunal.

32. Clubbing of all small cadre strength branch officers under one umbrella of ‘X/GS’ branch is a policy matter as decided by the respondents and has been promulgated as a policy vide Navy Order (Spl) 1/2012. The ‘Approach Paper’ concept is also part of the said Navy order. We, therefore, find no merit in the contention of the applicant that the Law cadre officers, whose merit or method of induction,

recruitment, training, job requirements are different from other 'X' Branch officers, cannot be clubbed with other Executive branch officers for promotion matters. From the perusal of the records, it has also emerged that Respondents Nos. 4 to 7 have been considered along with other Executive branch officers and were promoted to the rank of Captain by their respective PB 2-X's view they being high in the *inter se* merit in their respective batch. The applicant like all other 'XGS (Law)/JAG Branch officers of the Indian Navy has also been considered on the same parameters and no injustice has been done to him.

33. In so far as the second contention of the applicant which relates to the issue that there was an available vacancy for the post of Capt in the Law cadre and the said vacancy was illegally apportioned to the General Executive Branch officers by the respondents is concerned, it is again important to refer to the 'Approach Paper' of 2018, which has brought out vide Para 8(a) that the Board may select 32 officers from the complete pool of 'X/GS' officers. There has been no bifurcation given or any specific number of vacancies

for any cadre which consists of the General Pool of 'X/GS' officers. Therefore, the contention of the applicant that there was a separate available vacancy of Capt in the Law cadre which was illegally apportioned to the General Executive Branch officers by the respondents is not correct. Even if we consider that there was some post of Law cadre officer which was vacant at the time when the Promotion Board took place in 2018, it is not necessary that the respondents are duty bound to fill the vacant post by selecting a candidate for that post. In this context, the judgment of the Hon'ble Supreme Court in the case of **Subha B. Nair and others Vs. State of Kerala and others [(2008) 7 Supreme Court Cases 210]** may be referred to, Paras 8 and 19 of which read as under :

"8. A decision on the part of an employer whether to fill up the existing vacancies or not is within its domain. On this limited ground in absence of discrimination or arbitrariness, a writ court ordinarily would not interfere in such matters. This has been so held by this Court in Deepa Keyes v. Kerala State Electricity Board, [(2007) 6 SCC 194] observing that the rank list having expired and the validity having not been extended, no relief could be granted to the appellants therein.

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19. The question as to whether there existed 7 vacancies or 16 vacancies in the aforementioned situation loses all significance. We would assume that as per the requisition, 9 more vacancies could be filled up but it is trite that if the employer takes a policy decision not to fill up any existing vacancy, only because a person's name is found in the select list, the same by itself would be a ground to compel the bank to fill them up."

In the case of *Subha B. Nair (supra)*, the ratio laid down by the Hon'ble Apex Court is that filling up vacancies is the prerogative of the employer. However, there would not be any arbitrariness and discrimination in filling up the vacancies. In case of the applicant as brought out at Para 26 above, the applicant was very low in *inter se* merit in 2018 as well as all subsequent boards. It is gleaned from the records that the applicant as well as Respondent No. 8 were low in *inter se* merit and accordingly, Respondent Nos. 2 and 3 (who were involved in the process of selection) did not select either of them. We do not find any malafide on the part of the respondents as they have selected only the candidates meriting selection i.e. Respondent No. 6 and Respondent No.7 who were higher in *inter se* merit as compared to applicant and Respondent No. 8. It is important to note that

it is only the right of the applicant to be considered for promotion by a Promotion Board based on the QRs fulfilled by him, however, the selection of the applicant will entirely depend on many other factors like grading in the ACR, his overall order of merit (OOM) in the batch etc. It is also not incumbent upon the respondents to fill-up specialisation related vacancies of PL, OB, SM, DD, PR, AT & LW specialisations.

34. The third contention of the applicant is a comparison he has attempted to do of his case that with the promotion of an officer of Cmde Rank to the rank of Rear Admiral of the Law cadre stating that in both the cases they were lone contenders, however, Respondent No. 4 was promoted whereas he was not promoted. It is important to note that the Judge Advocate General (JAG) vacancy in the Indian Navy is teneted by an officer of the rank of Rear Admiral who is the head of the Law Branch of the Indian Navy. There is only one post of Law branch officer in the rank of RAdm in the Indian Navy. The selection of the JAG of the Indian Navy is done by a different Board viz. PBIA and cannot be

compared with the selection of the applicant in his selection from the Cdr to Capt rank as it is done by the PB-2 Board as both the boards viz PBIA and PB-2 are guided by different sets of parameters and 'Approach Papers'. It is also important to note that Respondent No. 4 was promoted from Cdr to Capt rank by virtue of being high in the *inter se* merit in his batch competing with other Executive officers of his batch, when he was considered for promotion from Cdr to Capt rank as at that time he was selected based on the 'Approach Paper' of PB-2.

35. In so far as the fourth and the last contention of the applicant being graded 'R1' when he was not selected in the year 2018 and stating that his First Look should have been preserved while considering him for selection in the year 2019 is concerned, it is important to note that Para 20 of the Navy Order (Spl) 1/2012 states that an officer gets three (3) considerations for promotion. Para 20 of the said Navy Order is reproduced as under :

“20. Number of Considerations. The officers placed in Select List for promotion to higher rank

will be considered for promotion upto three times. This would also be applicable for officers being considered in the Staff Stream.”

Para 22 of the said Navy Order reads as under :

“Gradings

22. The Promotion Boards will grade the officers considered into the following categories:-

- ‘S’ - Selected for promotion**
- ‘S (Staff)’ - Selected for promotion under Staff Stream.**
- ‘D’ - Deferred for consideration without loss of seniority. This is not to be treated as a consideration for promotion in terms of paragraph 14 & 20 above.**
- ‘R’ - Reconsider. Not yet selected for promotion.**
- ‘N’ - Not selected for promotion having been considered three times.**

NOTE 1: An officer may be graded ‘D’ under the following circumstances, provided, the Board considers that he has the potential for selection:-

(a) An officer who has not yet earned a sea report in the rank where it is mandatory.

(b) An officer who is involved in a disciplinary/vigilance case or an inquiry is in progress to establish his culpability in a disciplinary case.

NOTE 2: An officer should NOT be graded ‘D’ if he is unable to earn the requisite sea report due to being in low medical category or if the officer was

unable to undergo mandatory sea time when offered due to personal/domestic compulsions and has rendered an adverse career certificate.”

36. It is important to note that since the applicant was considered along with all other Executive branch officers and was placed lower in the merit as brought out in Para 26 above as compared to the last officer selected, the officer has to be graded as ‘R1’ in the year 2018 and ‘R2’ in the year 2019 as he was not selected in both the Promotion Boards i.e. PB 2/2018 and PB 2/2019 and his contention that he should have been given ‘First Look’ in 2019 is not correct.

37. Para 17 of the ‘Approach Paper’ also very eloquently describes about ‘R1’ graded officer which reads as under :

“Promotion Prospects of ‘R’ Graded Officers

17. The Promotion Board is to consider ‘R’ graded officers ‘de novo’ without any bias to their having been graded ‘R’ by previous Board.”

38. From the above, it is clear that the Board does not have any bias for ‘R1’/‘R2’ graded officers while considering them for promotion in the Promotion Boards and, therefore, the contention of the applicant about any bias for ‘R1’/‘R2’

graded officer *viz.a viz.* their promotion prospects with 'First Look' officers is without any merit.

39. There is also no discrimination qua the applicant *viz. a viz.* other officers of the Law cadre. He has been given fair opportunity and no rights guaranteed under Articles 14 and 16 of the Constitution have been violated by the respondents. The applicant in all promotion boards, has been found to be low in *inter se* merit and, therefore, was not promoted.

CONCLUSION

40. In view of the above, the OA 681 of 2021 is dismissed being devoid of merit.

41. There is no order as to costs.

Pronounced in open Court on this 7th day of October, 2024.

**[JUSTICE RAJENDRA MENON]
CHAIRPERSON**

**[REAR ADMIRAL DHIREN VIG]
MEMBER (A)**

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