IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

O.A NO. 353 OF 2010

LT. GEN. PRADEEP BHARGAVA
S/O. SHRI SHANKER LAL BHARGAVA,
R/O 3, K. KAMARAJ LANE
NEW DELHI – 110 001.

THROUGH: M/S. JYOTI SINGH, AMAN DEEP JOSHI &
TINU BAJWA, ADVOCATES

... APPLICANT

1. UNION OF INDIA THROUGH ITS SECRETARY
MINISTRY OF DEFENCE, SOUTH BLOCK
NEW DELHI.

2. CHIEF OF ARMY STAFF
INTEGRATED HQ OF MOD (ARMY)
SOUTH BLOCK, DHQ PO
NEW DELHI-11.

3. DIRECTOR GENERAL
ARMED FORCES MEDICAL SERVICE
MINISTRY OF DEFENCE, SOUTH BLOCK,
NEW DELHI.

4. LT. GEN. NARESH KUMAR, COMMANDANT
MINISTRY OF DEFENCE,
ARMY HOSPITAL (R&R), DELHI CANTT.
NEEW DELHI

THROUGH: MS. ANJANA GOSAIN, ADVOCATE WITH LT. COL. NAVEEN SHARMA FOR R 1 TO 3
MS. VERONICA MOHAN, ADVOCATE FOR R4.

... RESPONDENTS

CORAM

HON'BLE MR. JUSTICE S.S KULSHRESTA, MEMBER
HON'BLE LT. GEN. S.S DHILLON, MEMBER

JUDGMENT
15.07.2010

1. Lt. Gen. Pradeep Bhargava, the applicant, seeks to quash the order dated 26.4.2010 passed by the Government of India in the statutory complaint filed by Respondent No.4 granting him redressal in the ACR of 2005 earned by him in the rank of Brigadier. Simultaneously, he also seeks to quash further proceedings initiated by the Government of India to hold a Special Review Promotion Board of Special Selection Board 2007 to

consider Respondent No.4's case afresh. A prayer has also been made that respondents 1 to 3 be directed to hold a Special Board for consideration of the applicant for the post of DGAFMS which fell vacant on 1.7.2010, since the applicant is the senior most Lieutenant General in the cadre and most eligible for the post.

2. It is contended by counsel for the applicant that the applicant joined the Army Medical Corps on 7.4.1971 and has been serving with utmost devotion. For his entire service till date, the applicant has been senior to RespondentNo.4. On 19.11.2007, a Special Selection Board was held for promotion to the rank of Lieutenant General for vacancies of 2008, wherein though the applicant and Respondent No.4 were considered, they were not empanelled. Thereafter, neither against his non-empanelment or against any aberrations or irregularities in his CRs was any statutory complaint filed by Respondent No.4. Subsequently, a Special Selection Board for the vacancies of 2009 was held on 29.1.2009. Respondent No.4 through his contacts and by underhand means would have learnt of the outcome of the Promotion Board and realized that

although he was being approved for Lieutenant General, he would not become DGAFMS as the applicant, who was senior to him, was also approved for Lieutenant General. It was only thereafter, on 12.2.2009, a full year after his non-empanelment in the earlier Promotion Board, Respondent No.4 put up a statutory complaint. The sole aim of such complaint was to 'undercut' the applicant for the post of DGAFMS. In March 2009, the results of the Promotion Board of 29.1.2009 were announced and the applicant and Respondent No.4 were empanelled. On approval by the Central Government, both were promoted to the rank of Lieutenant General. The applicant continued to remain senior to Respondent No.4 as can be seen from the seniority list. Respondent No.4 knew that if the CR was interfered with, he would get a chance to be reconsidered afresh by the Selection Board 2007 and even a minute change in profile could upset the earlier selection making him eligible for the post of DGAFMS as vacancy would arise on 1.7.2010. Some how or other, Respondent No.4 managed to get the statutory complaint disposed of in his favour. This was made with a clear intention to unsettle the seniority of the applicant. With a view to help Respondent No.4, it is

contended by counsel for the applicant that purposefully the respondents 1 to 3 kept the statutory complaint of Respondent No.4 pending for about 14 months and it was surreptitiously disposed of two months before the post of DGAFMS fell vacant. Further, if Respondent No.4 is empanelled as a fresh case in the Board of 2007, he would get seniority over the applicant in the rank of Lieutenant General, which would defeat the legitimate expectation of the applicant to be appointed as DGAFMS.

3. Learned counsel for the applicant urged that the cause of action for the applicant is that in accordance with the norms and culture of service as well as regulations on the subject, the in-house process of selecting an incumbent for any appointment in the Armed Forces starts three months before the occurrence of the vacancy. In this case, since the vacancy was to occur on 1.7.2010, and it was a foreseeable vacancy arising out of retirement, the authorities should have started the process latest by first week of April 2010. Till date, this process has not started let alone reached any finality. This has been delayed purposely with mala fide intention to accommodate the aspirations of Respondent No.4. To

substantiate her argument, learned counsel for the applicant brought out that the Government approval for holding the Board was communicated by the Ministry on 24.4.2010 and redress was granted to Respondent No.4 on 26.4.2010, whereas the case for appointing the new DGAFMS should have commenced on 1.4.2010.

4. The first and foremost argument advanced by learned counsel for the applicant is that the applicant is the senior most amongst Lieutenant Generals and comes within the zone of consideration for the post of DGAFMS. Since the post has already fallen vacant and in view of the existing procedure for selection and promotion of Armed Forces Medical Services Officers (other than the Director General, Armed Forces Medical Services) laid down under Government of India Letter No. 10(1)/2004D(Med) dated 14.1.2004 as amended on 17.5.2006 (Para 7), it is stipulated that "promotion board must be held at least three months in advance of the first anticipated vacancy and the proceedings of the promotion board must be made available to Ministry of Defence at least two months before the first anticipated vacancy arises". Logically, this

time frame would also be valid for the DGAFMS post also. Respondents 1 to 3 did not initiate the process three months in advance and since applicant is the senior most Lieutenant General and he being eligible for the post, his name should have been considered much before, as it was his legitimate expectation. But, with a view to deprive him of being promoted, the process was delayed. Non-initiation of the process in advance is said to have affected his legitimate right for consideration and to unsettle the seniority of the applicant by allowing Special Review Board of 2007 in the case of Respondent No.4. This is stated to be the cause of action of the applicant.

5. However, from the side of respondents 1 to 3, it is submitted that the SSB for DGAFMS could not be convened as per the policy contained in the Government of India letter dated 14.1.2004 and for the reason that based on the earlier direction of the ACC, the case to revise the policy for selection of DGAFMS post had to be submitted to the Ministry of Defence and the decision on the matter was communicated only on 24.4.2010.

6. Counsel for the applicant also urged that the outcome of the statutory complaint of Respondent No.4 has been intentionally delayed by 14 months and announced only on 26.4.2010. This was merely 'delay tactics' as obtaining sanction for holding the Special Promotion Board as well as its convening, processing, finalisation, approval and announcement of results would be time consuming. After which moving the proposal for DGAFMS to Appointments Committee of Cabinet and the consequent bureaucratic delays would ensure that the applicant retires on 31.8.2010 before such process reaches finality. Furthermore, the redress granted to Respondent No.4 is illegal, arbitrary and unjustifiable. In that, the Union of India has specifically held that those ACRs which have been used as a data base for any Promotion Board will not be interfered with. However, in the case of Respondent No.4, despite the fact that the ACR of 2005 was used in his Promotion Board to Major General in 2006, it has been subsequently expunged which is contrary to their own Rules on the subject. It was also argued that if it was an expunction of ACRs across a wide section of officers as ordered by the DGAFMS in 2007, why were these orders not complied with till April 2010 when this remark was finally expunged? If it

was an order applicable to all Brigadiers ACRs till 2005, then there was no necessity for any complaint to be put up by Respondent No.4 to expunge the effected ACR, in fact it should have been done by the department itself.

7. Resisting the application, respondents 1 to 3, apart from the merits of the case, raised some preliminary objections. The application is premature as no cause of action has arisen for filing the same. Till the case of Respondent No.4 is reviewed by the Review Board giving him seniority over the applicant, no cause of action would arise. It is stated that respondents 1 to 3 acted in a fair and objective manner while considering the statutory complaint and, therefore, there is no reason for the applicant to seek remedy at this juncture. As regards the delay in disposal of the statutory complaint, it is stated that the process of selection for appointment is incomplete till approved by the first respondent. The selection procedure attains finality only when the proceedings are approved by the first respondent. The statutory complaint of Respondent No.4 was processed from 12.2.2009 till 26.4.2010. The processing got

prolonged on account of the need for comprehensive analysis, including obtaining legal advice. As per DSR/Army Rules, there is no stipulation of time to submit statutory complaint. Further, during the process, wherever inconsistency/subjectivity or technical invalidity is observed, the confidential reports are intervened by the Chief of Army Staff or by the Ministry of Defence. Therefore, there is no mala fide intention on the part of respondents 1 to 3 in getting the disposal of the statutory complaint delayed.

8. Respondent No.4 also raised preliminary objections by contending, inter alia, that he was well within his right to make a statutory complaint seeking redressal of his grievances and the applicant has no right to question it. The application is said to be premature. That apart, there is no time limit for filing statutory complaint and he was also aggrieved by the delay by the processing of his statutory complaint by respondents 1 to 3. Merely on the basis of the expunction of the remark in the ACR, the applicant cannot anticipate that Respondent No.4 would be

promoted to the post of DGAFMS. On the basis of such apprehension, no cause of action is accrued to the applicant.

9. In this backdrop, the material question that arises for consideration is, how far the applicant is prejudiced by not initiating the process for promotion to DGAFMS well in advance, in view of Government of India Letter No. 10(1)/2004D(Med) dated 14.1.2004 as amended on 17.5.2006. The applicant appears not to have been prejudiced, much less prejudice defacto, on account of non processing of the matter three months in advance. The policy decision to hold Promotion Board is merely directory since a revision in policy was underway. With the development of law, rigidity in the Policy/Rules is somewhat relaxed. The instance of prejudice is accepted as an essential feature where violation of principles of natural justice is understood in common parlance. Merely because the process was not initiated in time as per the policy cannot be said to be prejudicial to the interest of the applicant because it is not the right of the seniormost to occupy the post. It all depends on selection. In other words, delayed selection process would not be a ground to attribute mala fide on

the part of respondents 1 to 3 and to have caused prejudice to the applicant. In **S.L Kapoor** v. **Jagmohan** (1980(4) SCC 379, a three Judge Bench of the apex Court, while following the principle in ***Ridge*** v. ***Baldwin*** (1963(2) All ER 66 (HL), stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case, that principle of natural justice was in itself prejudice would not apply. Here, in this case, if the process for promotion was to be initiated three months prior thereto and on that basis if the principles of natural justice were not followed, it would not cause any prejudice to the applicant. While expanding this principle, the apex Court, in **K.L Tripathi** v. **State Bank of India** (1984(1) SCC 43), held as under:

> "31. ..... it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. .... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the

tribunal is acting, the subject-matter to be dealt with, and so forth."

10. It is next contended that the applicant ought to have been considered the post of DGAFMS by the Special Selection Board by this time, he being the senior most and most eligible amongst the Lieutenant Generals of AMC. By withholding the promotion process and in the meantime making other persons like Respondent No.4 eligible for selection by way of restoring seniority gave accrual of cause of action to the applicant. To the contrary, as has already been stated by counsel for respondents 1 to 3, by allowing the statutory complaint, no cause of action would accrue to the applicant. Moreover, it is only the apprehension of the applicant that by merely subjecting Respondent No.4 for consideration by Special Review Board, his seniority would be interfered with. It would depend upon the selection and further approval of the Central Government. Further, on such apprehension, no cause of action could be said to have accrued to the applicant.

11. It may be mentioned that the expression "cause of action" is neither defined in the Armed Forces Tribunal Act nor in the Rules framed thereunder, but it is of wide import. It has different meanings in different contexts viz. when used in the context of territorial jurisdiction or limitation or accrual of right to sue. Generally it is described as bundle of facts which, if approved or admitted, entitles the applicant to the relief prayed for. "Cause of action" is which gives occasion for foundation of the suit for which it is brought. Here, in this case, whatever be the grievance, it is only presumptive and on that basis, no cause of action can be said to have arisen.

12. A petition can be filed only when there exists a cause of action and has arisen within the jurisdiction of the Court. Ordinarily, the rights and obligations of the parties are to be worked out with reference to the date of institution of the petition (see **Jindal Vijayanagar Steel (JSW Steel Ltd)** v. **Jindal Praxair Oxygen Co. Ltd** – 2006(11) SCC 521). Here, in this case, the applicant is simply asserting his legitimate right of being promoted as DGAFMS as he is the seniormost. As has already been stated,

by now, no process has been initiated by respondents 1 to 3. The post fell vacant on 1.7.2010 and so it is premature to say that his legitimate expectation is going to be frustrated in the near future. He cannot be said to be aggrieved in any way by putting Respondent No.4 before the Board. Determination in regard to maintainability of the present application, it is trite, must be made with reference to the date of institution of this application. As nothing has been done so far, as to affect the seniority of the applicant and simply because the statutory complaint of Respondent No.4 against his CR has been allowed, it would not give any cause of action to the applicant. The Supreme Court has laid down that the cause of action is a fundamental element to confer jurisdiction upon any Court and which has to be proved by the plaintiff to support his right to a judgment of the Court (see **Rajiv Modi** v. **Sanjay Jain and others** – 2009(13) SCC 241). It further held:

> "13. It is relevant to take note of what was stated by this Court in *State of Bombay* v. *Narottamdas Jethabhai* (AIR 1951 SC 69). In this case, it is observed that:

> '.... The jurisdiction of the courts depended in civil cases on a 'cause of action' giving rise to a civil liability, and in criminal cases on the commission of an offence, and on the provisions made in the two codes of procedure as to the venue of the trial and other relevant matters.'

15. In *Gurdit Singh* v. *Munsha Singh* (1977(1) SCC 791) this Court held that:

> '41. The expression 'cause of action' has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit.'

16. In *State of Rajasthan* v. *Swaika Properties* (1985(1) SCC 217) it was observed that:

> '8. .... The 'cause of action' means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.'

18. In *Bloom Dekor Ltd* v. *Subhash Himatlal Desai* (1994(6) SCC 322) it was observed that:

> '28. By 'cause of action' it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court, (*Cooke* v. *Gill* (1873 LR 8 CP 107). In other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit.'

19. In *Rajasthan High Court Advocates' Assn*. V. *Union of India* (2001(2) SCC 294) this Court stated that:

> '17. The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in 'cause of action'. It has to be left to be

determined in each individual case as to where the cause of action arises.'

20. In *Y. Abraham Ajith* v. *Inspector of Police* (2004(8) SCC 100) this Court said that:

'17. The expression 'cause of action' is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. In *Black's Law Dictionary* a 'cause of action' is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In *Words and Phrases* (4th Edn.), the meaning attributed to the phrase 'cause of action' in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.'

21. In *Halsbury's Laws of England* (4th Edn.) it has been stated as follows:

'Cause of action has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is

> material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.'"

13. Lastly, it is submitted that if, by dubious method, Respondent No.4 is considered over the applicant, who served the Government for a considerably long period with sincerity and devotion and was all along senior to Respondent No.4, and that this would cause injustice to the applicant and, therefore, the Tribunal should exercise its jurisdiction not to perpetuate any injustice, especially since the applicant is retiring on 31.8.2010, may be premature. It is expected that the statutory authority would act reasonably and without arbitrariness. There is also an obligation on the part of the public authorities in their acts, omissions and commissions to be reasonable (see **Kumari Shrilekha Vidyarthi and others** v. **State of U.P and others** - 1991(1) SCC 212; **M/s. Dwarkadas Marfatia and Sons** v. **Board of Trustees of the Port of Bombay** - 1989(3) SCC 293

and **Biman Krishna Bose** v. **United India Insurance Co. Ltd and another** - 2001(6) SCC 477).

14. In view of the above discussion, we are of the view that the applicant has not been able to establish any cause of action to file the present application. It is his apprehension, which may or may not come true, that made him approach this Tribunal. For such a future cause of action, this application is not maintainable. Consequently, the application is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER