

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

A.

OA 1106/2022 WITH MA 3316/2022
AND 3328/2022

Maj Gen H. Dharmarajan	Applicant
Versus		
Union of India & Ors.	Respondents

For Applicant	:	Mr. S.S. Pandey, Advocate
For Respondents	:	Mr. Rajeev Kumar, Advocate

CORAM

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

ORDER
17.01.2024

Vide our detailed order of even date, we have dismissed the main OA. Faced with this situation learned counsel for the applicant makes an oral prayer for grant of leave for impugning the order to the Hon'ble Supreme Court in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007.

After hearing learned counsel for the applicant and going through our order, in our considered view, there appears to be no point of law much less any point of law of general public importance involved in the order rendered by the Tribunal, therefore oral prayer for grant of leave to appeal stands dismissed.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

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

/vks/

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ORDER

MA 3316/2022 and MA 3328/2022

For the averments made in these applications, the delay in filing the reply statements along with supporting affidavits is condoned. The same are taken on record.

2. The MAs stand disposed of.

OA 1106/2022

3. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007, by the applicant who is a serving Maj Gen in the Army and is aggrieved by his non-empanelment to the rank of Lt Gen and rejection of his statutory complaint vide order dated 15.10.2021. He has made the following prayers:

(a) Call for the records including the SSB selection proceedings of all the three boards including the file noting exchanged between the Respondents based on which the applicant has been denied empanelment for promotion to the rank of Lt Gen by adopting any method of reducing the Board Member Assessment Marks in any of the considerations to somehow bring the applicant below the last empanelled officer of the batches with whom he was considered for such promotion and the records based on which the respondents have rejected the complaints filed vide impugned order dated 15.10.2021 and thereafter quash all such orders of the non-empanelment as well as the order dated 15.10.2021.

(b) Direct the respondents to promote the applicant to the rank of Lt Gen if in case it is found that he has been denied the earmarked marks as Board Member Assessment on any ground whatsoever contrary to the policy including use of reproof in any manner directly or indirectly for such purpose with further direction to grant him all consequential benefits which includes his original seniority, continuity of service, back wages in the rank of Lt Gen etc. if his merit so determined is found to be above the bench mark merit of the last empanelled

Officer of 1986 batch who were promoted in the command and staff stream or staff only stream in any of the subsequent considerations with a clear direction that for all further appointments the applicant will be deemed to have been promoted as Lt Gen from the date his immediate junior was promoted as Lt Gen based on his consideration as Fresh Case of 1986 Batch to do complete justice with him.

(c) Issue such other order/direction as may be deemed appropriate in the facts and circumstances of the case.

Brief Facts of the Case

4. The applicant was commissioned into 3 Engineer Regiment (ER) on 20.12.1986. During his service career, he served in various sectors and held prestigious command and staff appointments. During this period, the applicant had done all important career courses such as DSSC, NDC, War College in 2010-11 and International Liaison Course at Israel. The applicant was awarded several prestigious awards including Sena Medal (Gallantry) in 1988, and again in 2016, Vishisht Seva Medal in 2019 and Ati Vishisht Seva Medal in 2022. He was also conferred with two Commendations of the Chief of Army Staff, two Commendations of the Vice Chief of Army Staff and three Commendations by the

GOC-in-C, Southern, Northern and Western Command. The applicant was promoted to the rank of Maj Gen on 01.12.2018 and assumed command of an Infantry Division.

5. The applicant was considered as a fresh case by Special Selection Board (SSB) held in June 2020 for empanelment to the rank of Lt Gen and the result was promulgated vide letter dated 26.10.2020. However, the applicant was not empanelled. Aggrieved, the applicant filed a non-statutory complaint dated 09.11.2020 on his non-empanelment by the SSB. In the meantime, he was considered as First Review case by SSB held in Feb 2021 but was again not empanelled. The competent authority vide a detailed order dated 08.03.2021 rejected the non-statutory complaint of the applicant. Thereafter, the applicant filed a statutory complaint dated 17.03.2021 against the non-empanelment. The competent authority found that the applicant had not been empanelled on account of his overall profile and comparative merit. Accordingly, the statutory complaint was also rejected vide order dated 15.10.2021. The applicant was considered for Final Review case by SSB held in Dec 2021 and was not empanelled once again. Hence, this OA.

Arguments by the Counsel for the Applicant

6. The counsel took us through the service profile of the applicant and the case at hand. The counsel strenuously contented that the respondents wrongfully used a 'non-recordable reproof' to award less board assessment marks to the applicant and bring down his merit. The counsel submitted that this was against the directives issued by the respondents in April 2011 which clearly provides that the Selection Board must give valid reasons to justify any low or incommensurate award of marks in the Board Assessment that disturbs the merit of an officer in relation to the present quantified merit. He further added that the MoD had issued directions that where the award of BMA marks by the Board changes the overall merit of the officer, the Service HQ was required to provide a detailed justification for the change.

7. To substantiate his argument, the counsel submitted that the applicant had no adverse remarks in his CRs during his tenure as GOC of the Inf Div. Moreover, the applicant was likely to be amongst the top few in his course based on the merit in all his earlier boards. He further submitted that the applicant was apprehensive that while the board assessment marks should have been based on material placed before the board as per Army HQ

letter No 31525/P/MS5B dated 06.05.1987, the Board had chosen to consider issues not placed before the Board. However, the respondents themselves admitted that the determination of merit was based on the policy dated 23.12.2017.

8. The counsel further submitted that applicant was apprehensive that the SSB might have used the Reproof (non-recordable) awarded to him on 17.09.2019 for some very minor issue which was not justified. Further, respondents vide order dated 15.10.2021 rejecting the Statutory Complaint, themselves had stated in Para 4 that "The General Officer's apprehension regarding mention of 'Reproof' appears to be misplaced. There is no mention of "Non-recordable Reproof" by any of the ROs in the CR. Moreover, as per MoD Note ID No 25 (1)/2017-D(MS) dated 05.09.2017, non-recordable censures are not placed before the Selection Boards (SSB and SB 1)". However, the respondents have used this non-recordable reproof to arbitrarily bring down the merit of the applicant.

9. The counsel submitted that taking cognizance of a Reproof, which is a non-recordable censure was contrary to the prescribed rules and policies and therefore this administrative action has not

legally sustainable and therefore requires judicial review. The counsel relied on the following cases to support his arguments:-

(a) **Manomoy Ganguly** Vs. **Union of India & Ors.**

[(2018) 18 SCC 83]

(b) **Mohd Mustafa** Vs. **Union of India & Ors.** [(2022) 1

SCC 294]

(c) **Harshit Agarwal & Ors.** Vs. **Union of India & Ors.**

[(2021) 2 SCC 710]

(d) **Brig Nalin Kumar Bhatia** Vs. **Union of India & Ors.**

[(2020) 4 SCC 78]

Arguments by the Counsel for the Respondents

10. The counsel briefly took us through the salient aspects of the policy on promotion to select ranks, the conduct of SSB in particular and emphasised that all officers were entitled to a fair consideration for promotion and that they however, had no right to promotion. He then elaborated that the applicant here too had been given a fair consideration thrice, SSB held in June 2020 (Fresh), Feb 2021 (First Review) and Dec 2021 (Final Review) and that he had not been empanelled only because of his comparative merit. The counsel for the respondents briefly took us through the non-statutory complaint and Statutory complaint filed by the applicant against the non-

empanelment by the SSB held in June 2020 and emphasised that the complaints were duly examined and it was found that the applicant was non-empanelled due to his overall profile and comparative merit. However, the applicant had not submitted any complaints against his non-empanelment in the SSB held in Feb 2021 and Dec 2021. Thus, the OA was not maintainable as the applicant has not exhausted his alternative remedy.

11. The counsel submitted that the judgement of **Brig Nalin Bhatia** (supra) relied on by the applicant was not applicable to the present case. In the case of **Brig Nalin Bhatia** (supra), he was considered under the policy of 2011 and belonged to a Functional Corps and was required to be considered as single agenda single vacancy. On the other hand, the applicant was considered by the SSB in terms of QSS Policy dated 23.12.2017, belongs to the General Cadre and thus the case of the applicant does not stand on the same footing.

12. The counsel referred to the contention of the applicant that he was awarded a Reproof and the same was placed before the SSB contrary to the policy and that as a result of which, in spite of his high quantified merit he was awarded less Board Assessment Marks and thus overlooked for promotion. The counsel submitted that the

award of 'Reproof' was governed by Para 327 of Regulations for the Army (Revised Edition -1987) and was an administrative action as mentioned in Paras 3 and 7 of the Policy dated 11.08.2017. The counsel submitted that the Reproof awarded to the applicant did not form part of service record of the applicant.

13. He further added that during the SSB proceedings, one Member had stated that the applicant whilst being the GOC of an Infantry Division was involved in a cyber security breach of a serious nature. It was only then that the records pertaining to the incident and the subsequent award of reproof was placed before the Selection Board.

14. The counsel stated that the aforesaid breach had taken place through the personal computer of the applicant. The Board, therefore, called for details of the case which was placed for their perusal. The counsel further added that as per Para 12 (f) of QSS policy dated 23.12.2017, award of disciplinary/administrative action forms part of reckonable profile of an officer and will be placed before the Selection Board. In this case, during the tenure of the applicant, a case of cyber security breach/violation at his HQ from his personal computer leading to the loss of classified information between 22.02.2019 to 10.05.2019 was reported. As a consequence

of this breach, the applicant was served with an SCN dated 25.07.2019, to which the applicant replied vide his letter dated 13.08.2019. The reply of the applicant was considered by the competent authorities and the applicant was awarded a **Reproof** vide letter dated 17.09.2019. The counsel further added that the said award was not challenged by the applicant which clearly indicated the applicant's admission to negligence which led to this serious cyber violation. The counsel asserted that it was a serious breach on the part of the applicant and the counsel requested the Hon'ble AFT to consider the seriousness of the negligence, i.e., cyber violation and adjudicate the matter on its merits.

15. The counsel concluded by stating that the applicant had not been empanelled based on his comparative merit and that the recommendations made by the SSB had subsequently been approved by the competent authority. The details of the non-recordable reproof has never placed before the SSB. However, since a member of the board had certain observations in this regard the case has called for and placed before the board. Thus, based on the final merit, the applicant was then not recommended for empanelment to the rank of Lt Gen and this was approved by the competent authority. Thus, there was no mala fide by the board

and the applicant has not been empanelled based on his final merit among those considered.

Consideration

16. Having heard both sides, we have perused the records submitted to us by the respondents, which include the Board Proceedings of all the SSBs in which the applicant was considered, examination of the complaints and the files of HQ 16 Corps pertaining to the incident of the cyber violation and the award of reproof by GOC 16 Corps to the applicant. The main issues to be decided are: whether the SSB was justified in not recommending the officer for empanelment to the rank of Lt Gen and whether the respondents could have considered a 'non-recordable censure' while making a decision on the fitness or otherwise of the applicant for promotion to the rank of Lt Gen, even though the reproof order, being 'non-recordable', was not placed for consideration before the members of the SSB held in June 2020?

Complaints

17. The applicant submitted two complaints against his non-empanelment by the SSB as a fresh case in Jun 2020. Initially, he filed a non-statutory complaint dated 09.11.2020 and when this was

rejected by the competent authority, he then filed a statutory complaint dated 17.03.2021.

18. The main issues raised in the non-statutory complaint are as under and he had prayed that he be empanelled by SSB without loss of seniority:

(a) That considering his past profile and service records, he should have been approved for empanelment to the rank of Lt Gen.

(b) Has impugned CR (07/19 – 10/19) earned as a GOC of the Div.

(c) That he apprehends that the "Non-Recordable Reproof" awarded to him on 17.09.2019 by the Corps Cdr had a bearing on his non-empanelment. He then elaborated the incident leading to the award of reproof and contended that there was never any error of intent, deliberate or otherwise on his part.

(d) That since the reproof awarded was non-recordable, it did not merit being re-opened and that IO had confirmed that there was no mention of reproof in the impugned CR.

(e) That as per the provisions of Para 327 of Regulations of the Army (Revised Edition 1987), once a case was closed by

the administration of reproof by the competent authority, no superior authority can open the case.

19. The examination of the compliant reviewed all the CRs in the reckonable profile. The applicant has been assessed as being predominantly 'outstanding' and all reporting officers have endorsed positive pen pictures and made positive recommendations for promotion and command. Thus, all the CRs are performance based, well corroborated and technically valid. The examination also concluded that the apprehension of the applicant regarding a subjective assessment in CR (07/19 – 10/19) was entirely misplaced as the CR was an outstanding assessment with well corroborated positive pen picture of all the reporting officers and that there was no mentioning of the reproof in the CR.

20. The examination also observed that as per the MoD letter dated 05.09.2017, non-recordable censures are not placed before the selection board. Thus, the examination concluded that the applicant had not been empanelled for the promotion to the rank of Lt Gen on account of his overall profile and comparative merit as assessed by the SSB. Accordingly, the complaint was rejected vide order dated 08.03.2021.

21. The statutory complaint dated 17.03.2021 was also filed against his non-empanelment by SSB held in Jun 2020. The applicant had raised the same grounds as was given in his earlier non-statutory complaint and had prayed that he be empanelled without loss of seniority. The examination held that since the CRs in the reckonable profile had already been examined during the processing of the non-statutory complaint and since the statutory complaint reiterated exactly similar issues as those in the non-statutory complaint, the complaint did not merit any *de novo* examination. Thus, this was also rejected by the competent authority vide order dated 15.10.2021.

SSB

22. The SSB held on 22.06.2020, considered General Cadre officers of 1986 Batch for promotion to the rank of Lt Gen as per the QSS policy dated 23.12.2017. It considered a total of 76 officers for promotion in both "Command & Staff" stream and "Staff Only" stream. Of these, 30 officers were fresh cases of the 1986 Batch while the balance were review cases. As seen from the board proceedings, past administrative/disciplinary records as per the provisions of the MoD letter dated 12.07.2017 were also placed before the SSB. The letter dated 12.07.2017 is reproduced below:

Date: 12.07.2017

Military Secretary
AHQ
New Delhi

Sub: Award of Censure and conduct of Selection Boards in the Indian Army

Instructions have been issued from time to time with regard to a ward of Censure of different types to officers & JCOs and placement of the past administrative/disciplinary record of the officers before the Selection Boards in the Indian Army.

2. *In this regard, I am directed to convey the following:*

- (i) *The award of Censure of the type 'Severe Displeasure/Displeasure-Recordable' will have validity for ten years from the date of award.*
- (ii) *The Censure of the type 'Severe Displeasure/ Displeasure- Non - Recordable is abolished henceforth.*
- (iii) *The past administrative/disciplinary record of the officer, including 'Severe Displeasure/Displeasure-Recordable/Non-Recordable' for the entire reckonable period (considered for empanelment) or at least last 10 years will be placed before the Selection Board. The observations of Selection Board on this aspect will form a part of the Minutes/Recommendations of the Board.*
- (iv) *The above instructions will be followed in all the Selection Boards hereafter.*
- (v) *The above instructions will overwrite all other policies in the matter issued by any other Division /Branch of MoD/AHQ.*

3. *This issues with the approval of Hon'ble RM.*

(Prachish Khanna)
Director(MS)

23. It is seen from the Board Proceedings that of those considered, the overall merit with respect to their quantified merit had changed in respect of three officers including the applicant. In this reference, Para 12 (f) and 13 of Policy dated 23.12.2017 is reproduced below –

12(f). *"the past disciplinary/ administrative record of the offr for the entire reckonable profile or at least ten years will be placed before the Selection Board. While assessing officers with disciplinary background, the gravity and nature of offence and the service level at which the offence was committed will be taken into consideration.*

13. *Recommendation for Non Empanelment Irrespective of Quantified Merit.*

(a) Officers with disciplinary/administrative awards attributable to moral turpitude, gross negligence or acts of cowardice will not be recommended for empanelment, Irrespective of their Quantified Merit.

(b) Board Members will also have inherent powers to recommend non empanelment of an officer irrespective of his Quantified Merit in case of poor performance in combat/operational situations, unofficer-like/negative character traits or overall weak profile. In case majority of the Board members recommend non empanelment, the officer will not be recommended for empanelment in the final board proceedings.

24. In the subsequent considerations as first review and final review case by the SSB in Feb 2021 and Dec 2021 too, the applicant's overall merit had changed with respect to his quantified merit and requisite justification have been endorsed. In all these considerations, the competent authority has approved the recommendations of the SSB including the non-empanelment of the applicant and the reasons thereof.

Reproof

25. "Reproof" is governed by Para 327 of Regulations for the Army (Revised Edition -1987). Further, Paras 3 and 7 of the policy letter dated 11.08.2017 clearly specifies that *'Reproof is a form of Administrative Action awarded to officers, including MNS officers and re-employed officers, and JCO. It takes form of 'Reproof, Displeasure or Severe Displeasure of the officer awarding the censure.'*

26. As a necessary consequence, Reproof if awarded in writing after following the procedure given under the policy, during the

reckonable profile of the officer can also be taken into consideration by the Selection Boards. However, only the Non-Recordable Censures as specifically mentioned in erstwhile policy dated 23.04.2007 will not be placed before the Selection Boards. The matter also stands clarified by MoD letter dated 05.09.2017 on the subject, which is reproduced below:-

Ministry of Defence
D(MS)

Sub: Award of Censure to officers and Conduct of Selection Boards in the Indian Army.

Reference AHQ's Note No .A/23501/2SB/MS-5 dated 25 Aug 2017 on the subject mentioned above.

2. *The request of AHQ for reconsideration of the instructions on placing of records of 'Non Recordable Censures' before the Selection Boards has been examined. Keeping in view the difficulties highlighted by AHQ in placing the past records of 'Non Recordable Censures' before the Board, it has been decided to agree with the proposal of AHQ for not placing the historical records of 'Non recordable Censures' before the Selection Board.*

3. *However, AHQ's alternate assertion to include the military and spoken reputation of the officers being considered and recording of Board's observations on the same is not in order. AHQ may therefore follow the existing QSS policy in the Selection Boards.*

*Sd/-
(Revati Raman)
US(MS)*

*Brig. Dy MS(B), AHQ
MoD ID No.25(1)/2017-D(MS) dated 05.09.2017*

27. The applicant was awarded the non-recordable reproof for an incident of a serious cyber violation from his personal computer, whilst the applicant was the GOC of the Division. We have perused the files of HQ Corps, which examined the incident and the issue of reproof by GOC Corps. The applicant, was issued a SCN on 25.07.2019, to which he replied vide his letter dated 13.08.2019

and the competent authority after considering his reply awarded the Reproof.

Consideration by SSB

28. We find that the Army has a system in place in the form of a collegium of nine members, who are guided by laid down policies to determine the selection of officers for promotion at the highest level as well as ascertain their suitability for promotion. Therefore, the role of the Tribunal is limited to ascertaining the veracity of claims of mala fide or policy violations when made, and/or when decisions of the Selection Boards do not meet the principles of natural justice due to not being just, fair and reasonable. We are testing the present case on that yardstick only, keeping in view the overall profile and records of the applicant placed before us.

29. On the role of the Selection Board, it would be appropriate if we refer to Para 43 of the order dated 08.10.2018 of the AFT (PB) in the case **Brig. Dinesh Kumar Ahluwalia Vs. Union of India and others** (O.A No.1498 of 2018), which is reproduced as follows:

"43. A fair reading of the above policy letter clearly elaborates that these are guidelines that need to be considered by the Board members for allocation of five marks (value judgment). At this stage, we recall the arguments of learned counsel for the respondents, who have emphasized that the Board consists of nine very senior officers headed by the Chief of Army Staff, in fact, the senior most hierarchy of the Indian Army, many of whom know the applicant and other candidates and thus comment on their attributes, achievements, potential or otherwise during deliberations in the Board. Not doing so, would amount to injustice to the Value Judgment, which, in any case, are earmarked for non-quantifiable parameters in respect of the applicant and are thus best left to the judgment, views and experience of the members of the Board. This allocation of marks,

as we understand, brings into fore the human angle in the otherwise quantifiable merit based on computerized inputs available from the records of the applicant. If this was not to be allowed, then there would have been no reason to hold a Selection Board comprising of such very senior officers for assessing officers for promotion to the next level of higher ranks. We do not wish to comment on the deliberations during the proceedings, as long as there is no bias or discrimination, and we would leave the allocation of these Value Judgment marks to the collective wisdom of the Board members who, we are confident, have only the organizational interest as the prime objective, more so, when they are assessing officers to hold senior ranks in the Army for the future. Attributing any mala fide, bias or discriminatory thrust to their wisdom should be curbed, if not entirely discouraged. A detailed scrutiny of the Board proceedings and without casting any aspersions, we are convinced that the value-added judgment marks during the No. 1 SB held on 14.10.2017 allocated by the members of the Board after due deliberations and recording of their reasoning in the record satisfies our jurisprudence."

30. Tribunal vide order dated 20.03.2019 in OA 1826 of 2018 in the matter of **Maj Gen Subodh Kumar Vs. Union of India & Ors** held that-

"22. The Army has a pyramidal structure and the number of vacancies in higher ranks is limited. Therefore, despite outstanding performance, officers often miss out on promotion to higher ranks. It is up to the Selection Board to assess the suitability of an officer for promotion. However, the assessment of the Selection Board is recommendatory in nature and is subsequently approved by the competent authority viz. The Chief of Army Staff or the Central Government, in accordance with Regulation 108 of the Regulations for the Army. In this regard, it appropriate if we quote Regulation 108 of the Regulations for the Army, which specifies constitution and duties of Selection Boards. It reads as under:

108. Constitution and Duties of Selection Boards:- Selection Boards (for officer other than Army Medical Corps, Army Dental Corps and Military Nursing Service) are constituted as required under the order of the Chief of the Army Staff. Their composition and duties are given below:

- (a) xx xx xx xx xx xx
- (b) xx xx xx xx xx xx
- (c) xx xx xx xx xx xx

(d) The assessment of the Selection Board shall be recommendatory in nature and not binding until approved by the competent authority viz the COAS or the Central Government, as the case may be.

(e) The Central Government or COAS have the inherent power to modify, review, approve with variation or repeal recommendations of the Selection Boards.

23. Regulation 108 thus specifies that the assessment or selection made by the Selection Board is recommendatory in nature and is not binding until approved by the competent authority. It also states that the Central Government or the Chief of Army Staff has the inherent power to modify, review, approve with variation or repeal

recommendations of the Selection Boards. Further, empanelment for appointments to the rank of Lieutenant General or equivalent of the services requires approval of the Appointment Committee of the Cabinet (ACC). In Lt. Gen. R.S Kadyan (supra) and AVM S.L. Chhabra (supra), the Hon'ble Supreme Court has held that Courts should not substitute the findings of Selection Boards by its own judgments and this view is being reiterated in catena of judgments."

31. Essentially, the applicant has contended that his non-empanelment to the rank of Lt Gen and rejection of his statutory complaint were unjust and arbitrary. We would like to observe that the proceedings of the Selection Board are classified information and the results are declassified only after approval of the competent authority. It is to be noted that it was not mandatory on the part of the Selection Board to have recommended the applicant only for the reason that he was meritorious, or a lone officer under consideration for one vacancy. Considering the characteristics/suitability vis-à-vis the onerous responsibility upon the Selection Board to select officers of high moral fibre, immense drive and initiative and suitability to be a role model to lead the officers and men, the Selection Board consisting of senior most officers of the Indian Army did not find the applicant suitable for promotion to the rank of Lt Gen.

32. As seen from the Board Proceedings, the reproof awarded to the applicant, being non-recordable was not placed before the SSB held in Jun 2020. It is only when one of the Members drew the

attention drew of the Board to the incident and award of reproof, that the records pertaining to the case and award of reproof was placed before the SSB. The SSB having considered all relevant issues, did not recommend the applicant for empanelment. This Tribunal vide order dated 13.09.2023 in OA 293 of 2023 in the matter of **Maj Gen M Indrabalan Vs. Union of India & Ors** held that –

"52.The results and the appointments of senior officers of Lieutenant General rank require the approval of Appointments Committee of the Cabinet (ACC) under Transaction of Business Rules 1961 which is further defined as "Unpublished Official Records i.e. Privileged Documents" :- Privilege is a right of a party do not disclose any information in front of court.

53. Similarly, Section 123 of Indian Evidence Act states that no person is allowed to give any evidence that may be derived from any unpublished records of any state affairs, Section 124 defines official communication as subject to provision of Section 123, no public officer shall be compelled to disclose any oral, written or electronic communication made to him in official confidence, when court considers that public interest would suffer by such disclosure."

33. It is to be noted that no employee has the right to get promotion but only a right to be considered for promotion. The observations made by the Hon'ble Supreme Court in this regard in **Hardev Singh Vs. Union of India and Another** [(2011) 10 SCC 121] would be relevant, which read as under:

"17. It cannot be disputed that no employee has a right to get promotion; so, the appellant had no right to get promotion to the rank of Lieutenant General but he had a right to be considered for promotion to the rank of Lieutenant General and if as per the prevailing policy, he was eligible to be promoted to the said rank, he ought to have been considered. In the instant case, there is no dispute that the fact that the appellant's case was duly considered by the SSB for his promotion to the rank of Lieutenant General."

34. Admittedly, the reproof awarded to the applicant, being non-recordable was not placed before the SSB held in Jun 2020. It is only when one of the Members drew the attention of the Board to the incident and award of reproof, that the records pertaining to the case and award of reproof was placed before the SSB. The SSB having considered all relevant issues, did not recommend the applicant for empanelment.

35. While applicants have relied on a series of judgements, we find that none of these are of any help to the applicant, and thus, we distinguish each on the basis of facts and the jurisprudential aspect dealt with.

(a) **Brig Nalin Kumar Bhatia** Vs. **Union of India & Ors**

[(2018) 18 SCC 83] – In the case of Brigadier Nalin Bhatia, we find that the aforesaid policy letter dated 23.12.2017 under discussion in the instant case was not promulgated till then, and hence, the situation has changed as of now.

(b) **Lt Gen Manomoy Ganguly** Vs. **Union of India & Ors**

[(2018) 18 SCC] – This case is on a different footing from the instant case, as the applicant in this case was found unsuitable for the post of DGMS (Army) on the ground that he does not have previous exposure to the working environment of the IHQ

MOD, a ground which was rendered unreasonable by the Hon'ble Supreme Court, while cautioning that in exercise of judicial review, Court is not concerned with correctness of findings of fact on basis of which orders are made so long as they are reasonable and supported by evidence.

(c) **Smt S.R. Venkatraman** Vs. **Union of India & Anr.**

[(1979) 2 SCC 491] – While this case deals with the meaning of mala fide, elaborating the concept of malice in fact and malice in law in service jurisprudence, we are of the opinion that in absence of any mala fide in the instant case, this case doesn't come to the rescue of the applicant.

(d) **Mohd. Mustafa** Vs. **Union of India**, [(2022) 1

SCC 294] – In this case, the Hon'ble Supreme Court explained that the grounds on which administrative action is subject to judicial review are illegality, irrationality and procedural impropriety. However, in this case, no procedural impropriety or illegality was committed by the respondents.

(e) **Harshit Agarwal** Vs. **Union of India**, [(2021) 2

SCC 710] – In this case, the Hon'ble Court reiterating grounds of Judicial review held that a decision is illegal if irrelevant considerations are taken into account for reaching the decision

or relevant considerations have been ignored, the decision stands vitiated as the decision maker has misdirected himself in law. However, in this case award of reproof and the subsequent consideration by the Selection Board was as per policy in vogue and the SSB was duty bound to ensure that the most suitable officers are selected for promotion to the rank of Lt Gen who are required to hold important appointments in the organisation.

36. Further, the Hon'ble Supreme Court in this regard in Civil Appeal No.14524 of 2015 **Union of India and Another Vs. Air Commodore NK Sharma** held that –

28.4 *Challenging the basis of promotion after having participated in the process on consideration of promotion and having been declared unsuccessful thereunder, is not a valid ground to impugn the policy/method. Repeatedly, this Court has held that such challenges cannot be allowed. On this, we may refer to certain past instances: –*

28.4.1 In **Pradeep Kumar Rai v. Dinesh Kumar Pandey**, it was observed:-

"17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

28.4.2 In **Ramesh Chandra Shah v. Anil Joshi**, it was observed:-

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

28.4.3 Recently, in Tajvir Singh Sodhi & Ors. v. State of Jammu Kashmir & Ors having considered a number of earlier decisions, it was held by this Court that:-

"69. It is therefore trite that candidates, having taken part in the selection process without any demur or protest, cannot challenge the same after having been declared unsuccessful. The candidates cannot approbate and reprobate at the same time. In other words, simply because the result of the selection process is not palatable to a candidate, he cannot allege that the process of interview was unfair or that there was some lacuna in the process. Therefore, we find that the writ petitioners in these cases, could not have questioned before a Court of law, the rationale behind recasting the selection criteria, as they willingly took part in the selection process even after the criteria had been so recast. Their candidature was not withdrawn in light of the amended criteria. A challenge was thrown against the same only after they had been declared unsuccessful in the selection process, at which stage, the challenge ought not to have been entertained in light of the principle of waiver and acquiescence."

Conclusion

37. In view of the above consideration, we therefore conclude that that the applicant had been given a fair consideration by SSB for promotion to the rank of Lt Gen as per his entitlement. As regards the 'Reproof' being placed before the SSB, though initially it was not placed before the SSB as per policy, it was called for only when a Member raised a query regarding the applicant's case of a serious cyber breach from his personal computer whilst he was the GOC of the Division, for which he was awarded the 'Reproof'. We do not find any mala fide in the conduct of the SSB and the circumstances leading to calling for the details of the applicant's case for the information of the Board. Though the quantified merit of the applicant was high, with the award of BMA marks the applicant's overall merit position had changed, for which the Board has

furnished requisite justification, which was then upheld by the competent authority while approving the recommendations of the Board. Thus, the conduct of the SSB does not call for any interference by the Tribunal qua the applicant. We also uphold the rejection of the non-statutory and statutory complaints by the competent authority.

38. In view of the foregoing, the OA is dismissed being bereft of any merit.

39. No order as to costs.

40. Pending miscellaneous application(s), if any, stands closed.

Pronounced in open Court on this 17th day of January, 2024.

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**(JUSTICE RAJENDRA MENON)
CHAIRPERSON**

**(LT GEN P.M. HARIZ)
MEMBER (A)**

Neha