

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5800 OF 2018

UNION OF INDIA THROUGH ITS
SECRETARY & ORS.

.....APPELLANT(S)

VERSUS

MAJ. GEN. MANOMOY GANGULY

.....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

The respondent herein was commissioned in the Army Medical Corps on 3rd March, 1980. By ascending the career ladder, he has reached the position of Lieutenant General (hereinafter referred to as Lt. General), which he occupies at present, though it is a different matter that he had to struggle a lot for claiming his rightful promotion to the rank of Lt. General from that of Major General. Brief factual narration concerning his promotion from Major General to the rank of Lt. General shall be stated at the relevant stage. He is now aspiring to hold the position of Director General Medical Services (Army) [hereinafter

referred to as 'DGMS (Army)] which has been denied to him by the appellants. Feeling aggrieved, the respondent had approached the Armed Forces Tribunal (for short, 'AFT'), Principal Bench, New Delhi by means of O.A. No. 372 of 2018 which has been allowed by the AFT vide its judgment dated 7th May, 2018. Direction was issued to the appellants to post the respondent as DGMS (Army) "as expeditiously as possible and certainly not later than one month from today and for that purpose take all necessary consequential steps". The appellants have taken exception to the outcome, as they feel that the matter has not been examined in correct legal perspective. This has led to the filing of the present appeal wherein the validity of the aforesaid judgment dated 7th May, 2018 of the AFT is called in question.

- 2) The cognizable background facts, which require mentioning for the purposes of appreciating the nature of legal controversy and resolution thereof, are recapitulated hereinbelow:

ROUND I : THE EARLIER LITIGATION

- 3) As mentioned above, the respondent was commissioned in the Army Medical Corps on 3rd March, 1980. He kept on getting promotions from time to time and attained the rank of Major

General on 14th November, 2013.

- 4) When the respondent became eligible for consideration for promotion to the next rank of Lt. General in due course he was considered for promotion to the said rank by the Special Promotion Board (Medical) [for short, 'SPB'] on 20th January, 2016 but was not empaneled for promotion. Thereafter, he was considered for promotion to this rank as a 1st review case on 3rd October, 2016, but again not empaneled. He had submitted a statutory complaint dated 22nd June, 2016, after his first consideration to the said post and rejection thereof, to the Government of India wherein he was granted partial redress by order dated 30th January, 2017 inasmuch as it was ordered that the assessment of Technical Officer in the Annual Confidential Report (ACR) for the year 2014 be expunged on the grounds of inconsistency. The expunction of these remarks necessitated special review of his case for promotion to the rank of Lt. General. Review Board again did not empanel him. This led to lodging of another statutory complaint dated 3rd June, 2017, wherein he primarily questioned the award of lesser marks by the three Service Chiefs who were the Members of the SPB under the head "Overall Profile". It may be noted that he was awarded 1.5 marks, out of 2 marks, under the caption 'Overall Profile' and his

grievance was that he was entitled to better marks under this head. Since disposal of statutory complaint was taking time, the respondent preferred O.A. No. 1093 of 2017 before the AFT assailing his non-selection to the rank of Lt. General. After completion of pleadings, matter was heard and vide judgment dated 2nd September, 2017 the AFT held that he was wrongly allotted less marks by the Board, on account of overall profile. The AFT also refrained the appellants from filling the post of DGMS (Army) (with which this litigation is concerned) that was falling vacant on 1st November, 2017. The appeal against that order of the AFT preferred by the appellant No.1/Union of India, was dismissed by this Court on 10th November, 2017 holding that no interference with the direction of the AFT was warranted and the appellant was directed to take further steps, without loss of time, in terms of the directions given by the AFT in its judgment dated 2nd September, 2017.

- 5) The manner in which the aforesaid judgment was implemented and grievance of the respondent was ultimately redressed only at the highest level by giving him promotion to the rank of Lt. General needs to be mentioned at this stage as these events have some bearing on the present case. Some of the observations of the AFT and the directions given by it may be

reproduced in the first instance. These are as under:

“10. We have checked and rechecked the records. A plain comparison of the applicant's revised profile after getting redressal will indicate that the applicant with 91.25 quantified marks jumps to seventh place, above Maj. Gen Sanjiv Chopra having 91.15 quantified marks, and not 16th / 15th as indicated in Note 3 above notes and also stated in the counter affidavit which is totally false. If the two are compared in totality, the applicant is entitled to same Board Marks which were given to Maj Gen Sanjiv Chopra i.e. 1.7 out of two marks and would be higher in merit than Maj Gen Sanjiv Chopra.

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14. Therefore, in the interest of justice, we quash the proceedings of the Review Special Promotion Board held on 21.03.2017 in respect of the applicant due to wrong Board marks allotted to him in this Board as a result of incorrect date presented to the Board Members by the Secretary of the Board. We also direct that the applicant be put through a fresh Review Special Promotion Board to consider him for promotion to the rank of Lt. Gen in consonance with the parameters of relevant policies and his changed profile after allotting entitled Board marks as pointed out above, and his seniority restored. In the meantime the respondents will refrain from filling up the post of DGMS(Army) falling vacant on 01.11.2017 and will only proceed after the case of the applicant is decided by the Board.”

- 6) While affirming the aforesaid order, this Court in its judgment had made the following observations:

“21) In the original SPB meeting, Major General Sanjiv Chopra was awarded 1.70 out of 2 marks whereas the respondent was awarded 1.50 marks. Lesser marks given to the respondent were because of the reason that marks awarded to him out of 93 were lesser than Mr. Sanjiv Chopra. Result of the redressal was that the marks of the respondent became higher than Mr. Sanjiv Chopra which necessitated Review SPB. This Review SPB meeting has

to be on the same standards which were adopted in original SPB meeting.”

- 7) A clear message in the aforesaid order of the AFT as well as order of this Court was that the respondent is to be assigned 1.70 marks insofar as ‘overall profile’ was concerned, which was the standard adopted by the SPB (Medical) itself on an earlier occasion. On the award of 1.70 marks under the aforesaid head, the overall tally of marks of respondent would have been more than Major General Sanjiv Chopra who was junior to the respondent and was promoted as Lt. General. As a natural corollary, the respondent would have also been entitled to promotion in the said rank of Lt. General.
- 8) However, notwithstanding this simple logic, the respondent had to struggle hard even thereafter to get his legitimate due. In the fresh Review by SPB (Medical) held on 4th December, 2017, the respondent was again given 1.5 marks by the SPB (Medical). When the respondent came to learn about the same, he immediately rushed to the AFT by means of M.A. No. 1518 of 2017 in O.A. No. 1093 of 2017. This application was filed on 6th December, 2017 seeking restraint against the appellants from filling up the post of DGMS (Army). In this application, the AFT passed orders dated 7th December, 2017 directing the appellant

not to fill up the post till the time review of the SPB is approved by the Competent Authority. It also called for the records for its perusal. Fortunately, for the respondent, when the matter was examined by the Competent Authority, i.e., the Raksha Mantri, it did not approve the review undertaken by SPB awarding 1.5 marks to the respondent and recommended his promotion. This recommendation met the approval of the ACC as well. The respondent was, accordingly, promoted to the rank of Lt. General on 1st March, 2018 only.

- 9) When M.A. 1518/2017 was taken up by the AFT, after notice to the appellant on 2nd February, 2018, the aforesaid note of Competent Authority of the Ministry of Defence (MoD) was shown to the AFT. The Government was directed to file an affidavit indicating if the name of the respondent for the post of DGMS (Army) had been sent in the proposal to the MoD or not? In response, Army filed the affidavit on 8th February, 2018 stating that Director General Armed Forces Medical Service (for short, 'DGAFMS') had considered the case of the respondent but found him not suitable for forwarding his name for DGMS (Army) to the Ministry of Defence (MoD) and it was approved by the Chief of Army Staff as well. It was also stated that some other officers had been recommended for appointment.

- 10) After finding that his name was not forwarded to MoD for appointment to the post of DGMS (Army), the respondent filed O.A. 372 of 2018 before the AFT which has been allowed as aforesaid.

ORDER OF THE ARMED FORCES TRIBUNAL

- 11) The AFT has narrated the background in which the grievance of the respondent for promotion to the rank of Lt. General came to be redressed after he won the judicial battle before the AFT as well as this Court.
- 12) Thereafter, it noted the contention of the counsel for the respondent that name of the respondent, being the senior most officer, ought to have been included in the panel of names forwarded by the DGAFMS for appointment to the post of DGMS (Army) to the Competent Authority. Based on the said submission, the AFT directed the appellants to file the affidavit as to whether name of the respondent was included in the panel of names recommended for the appointment or not. In the reply, the appellants took the position that name of the respondent was considered for the appointment to the DGMS (Army) but he was not found 'suitable' for the said post and Lt. General Sanjiv

Chopra, who was the next senior officer, was recommended for this post.

- 13) The AFT noted that circular dated 10th July, 1992 lays down criteria of appointment to the posts of DGMS (Army) which mentions not only seniority but suitability as well. We may reproduce the criteria laid down in the said circular in order to appreciate the manner in which the AFT proceeded with the matter:

“2. Taking into account various aspects relating to the appointment of DGsMS of Services the following criteria is laid down for their appointment, in future :

(i) The inter-se seniority and suitability of officers in the rank of Lt. Gen. (and equivalent) holding the posts of Comdt AMC Centre and School, Comdt AFMC, Pune and the Addl. DGAfMS shall be assessed in the light of their earlier experience of serving in particular services and they shall be considered for appointment as DGsMS of services provided they have a minimum remainder service of six months, from the date of the vacancy.

(ii) If, after the exercise of (I) above, none of the officers are found suitable for appointment as DGsMS of services, against available vacant posts, officers of Maj Gen (and equivalent) rank, already approved for promotion to Lt. Gen rank, may be considered for such appointments.

(iii) The lateral shifting of DGMS of one Service to another Service may be considered only in exception circumstances.”

- 14) The criteria mentions ‘inter se seniority and suitability of the officers in the rank of Lt. General (and equivalent)’. What is the

exact meaning and scope of this criteria is the bone of contention. According to the AFT, it meant 'seniority-cum-suitability'. The AFT, on that basis, formulated the following three questions which, according to it, arose for its consideration.

“(i) What is the judicial interpretation given by the Court to the concept of seniority cum suitability?

(ii) Whether the post of DGMS (Army) which is to be tenanted in terms of the circular of 10th July, 1992 is required to be appointed based on seniority cum suitability, and does it give the option to the Respondents for rejecting a candidate to the post of DGMS(Army) despite he having been otherwise fit and fulfilling all other eligibility criteria;

(iii) Whether an officer who has tenure of less than one year can be appointed by the Respondents despite the minimum tenure prescribed by its own circular.”

15) Insofar as question no. 1 is concerned, in order to find an answer thereto, the AFT referred to the law laid down in various judgments defining the meaning of 'seniority' and how the principle of 'merit-cum-seniority' and 'seniority-cum-merit' are to be applied. Based on the discussion contained in the cited judgments, the AFT summed up the position in the following manner:

“20. In view of the above judgements, where-ever the term “seniority cum merit” is used it means that seniority is to be given prime importance and merely because a person happens to be more meritorious, he cannot be promoted or appointed overlooking the seniority. The usage of the term “merit cum seniority” is totally converse to this. In the latter concept, the merit will prevail over seniority. Another indispensable factor is where ever the term “merit” is used

as a prefix or as suffix, it will entail a comparison of two officers so far as their merit is concerned, but in the case of seniority cum suitability, no such comparison is envisaged. Suitability of an officer is totally dependent on the individual characteristic of the officer concerned. An officer may be senior, but he may be unsuitable because of his competence, integrity or any other reasons, but then he has to be declared as unsuitable or unfit and it is only in such circumstances that his claim to be appointment of a particular post will be overlooked. This would be in our considered view the answer to the first query.”

- 16) Applying the aforesaid principle, as culled out by the AFT, in the instant case where the criteria was noticed as ‘seniority-cum-suitability’, the AFT has taken the view that seniority is a decisive factor and suitability is a secondary factor. Then it proceeded on the premises that since it was not the case of the appellants that the respondent is unsuitable, he was wrongly overlooked. The AFT also remarked that there was a deliberate attempt to somehow recommend the name of Lt. General Sanjiv Chopra and ignore the respondent. It also found that there have always been a convention to appoint senior most person to the post of DGMS (Army) inasmuch as the appellants were not able to cite even a single case in last 20-30 years where the seniority was overlooked. Contrary thereto, name of the respondent was not even forwarded by the DGAFMS to the Competent Authority for consideration while sending the names of two other officers (including Lt. General Sanjiv Chopra). In this way the respondent

was wrongly ignored, was the opinion of the AFT.

- 17) After arriving at the aforesaid conclusion, the AFT has remarked that though in normal circumstances the AFT would have given direction to the appellant to consider the suitability of the respondent and pass necessary order, however, that would only give another lever in the hands of appellant to declare him unsuitable. Therefore, on that basis, the AFT has itself directed the appellant to appoint the respondent to the post of DGMS (Army), primarily going by its interpretation to the criteria viz. seniority is the decisive factor and the respondent is the senior most and also that the appellants had given fair treatment to the respondent in the past.

THE ARGUMENTS

- 18) Mr. K.K. Venugopal, learned Attorney General appearing for the appellants, attacked the very approach adopted by the AFT in dealing with the issue at hand. Referring to the Circular dated 1st June 1992, which lays down the criteria for appointment of DGMS (Army), he submitted that the said circular very clearly mentions the criteria of 'inter se seniority and suitability'. According to him, the Tribunal wrongly read this criteria as equivalent to 'seniority-cum-suitability' and in the process totally glossed over the phrase

‘inter se’. His submission was that the AFT formulated wrong questions, particularly question Nos. 1 and 2, which led it in wrong direction and resulted in wrong answers. Stressing the word ‘inter se’ he emphasised that this prefix applied not only to seniority but to suitability as well. Thus, it was inter se seniority and inter se suitability of the eligible persons which was required to be adjudged. He submitted that even if the respondent was senior most, when it came to inter se suitability of the respondent vis-a-vis other eligible officers, Lt. General Sanjiv Chopra was found to be more suitable for the post and for this reason he was recommended for appointment to the post of DGMS (Army). In order to support the aforesaid argument, the learned Attorney General produced the Notings dated 23rd January 2018 and 24th January 2018. He pointed out that in this Noting the criteria laid down was taken note of and the case of the respondent was considered in the light of the said criteria in the following manner:

“3. The criteria laid down by the MoD for the appt of DGsMS are placed at enclosure 1A & 2A. As per the criteria, Lt Gen (& equivalent) will be assessed for the appt of DGsMS in the light of their earlier experience in a particular service, provided they have a minimum residual service of 01 (one) year from the date of occurrence of vacancy.

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6) MR 04141M Maj Gen Manomoy Ganguly, VSM is approved for the promotion to the rank of Lt Gen (&

Equivalent) in AMC vide MoD ID Note No 3(2)/2017/D(Medical) dated 19th January, 2018 (Encl – 4A). The Gen Officer on assumption of the rank of Lt Gen would superannuate on 31st May, 2019 and would have a residual service of more than 01 (one) year. The officer has been proposed separately for the appt of DGHS (AF) office of the DGAFMS.

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7) it is submitted that the DGAFMS has held extensive deliberations regarding the consideration of MR 04141M Maj Gen Manomoy Ganguly, VSM, for the appointment of DGMS (Army) consequent to his approval for promotion to the rank of Lt Gen (Equivalent) in AFMS by a Review Promotion Board held on 4th December, 2017. It has been submitted that, Maj Gen Manomoy Ganguly, VSM would be newly promoted from the rank of Maj Gen and does not have previous experience to the working and environs of the IHQ of the MoD. His proposal, therefore, for appt in the office of DGAFMS as DGHS(AF) would be commensurate with his restored seniority as well as provide him the opportunity to become familiar with the functions, roles and responsibilities of the office of the DGAFMS and various service HQs. The Gen Officer on promotion to the rank of Lt Gen (& Equivalent) would then superannuate on 31st May, 2019. Against this backdrop, the COAS has approved the panel for inclusion of Maj Gen Manomoy Ganguly, VSM for the appt of DGHS (AF).”

- 19) Vis-a-vis the respondent, case of Lt. General Sanjiv Chopra, the next senior most officer, was considered who had residual service of 1 year and 17 days and, therefore, was also eligible and it was found that he was more suitable for the post in question and the Note recorded this consideration in the following terms:

“9. Lt Gen Sanjiv Chopra, VSM, DGHS (AF) and Col. Comdt. O/O DGAFMS, meets the eligibility criteria the appt of DGMS (Army). The COAS has approved the panel for the appt of DGMS (Army) as under:

Sr No.	Personal Particulars	Remarks
(a)	Lt Gen Sanjiv Chopra, VSM Col Comdt (MR 04142P) DGHS (AF) office of DGAfMS	Recommended for appt of DGMS (Army)
(b)	Surg V Adm U K Sharma (MR 04262N) DG (Org & Pers) office of DGAfMS	Not Recommended.

10. Lt Gen Sanjiv Chopra, VSM in his illustrious service career of more than 37 years, has tenanted important staff and command appt viz: Brig Training at AFMC Pune, Brig IC Adm Base Hospital, Delhi Cantt., ACIDS (Med) at HQ IDS, New Delhi, Commandant MH Meerut and Base Hospital, Delhi Cantt. and MG (Med) HQ Delhi Area.

11. Lt Gen Sanjiv Chopra, VSM took over the appointment of Director General of Hospital Services (Armed Forces) in the office of the DGAfMS on 18th November, 2016 and assumed the appt of Col Commandant of the Army Medical Corps on 9th July, 2017. He has, thus, been recommended for the appointment of DGMS (Army). Proposal for his relief is being submitted separately.

12. MR-04262N Surg Vadm UK Sharma, DG (Org & Pers) in the office of DGAfMS is the senior most Medical Specialist and Nephrologist. The Flag Officer has been proposed for permanent secondment to Army in the rank of Lt Gen for the appointment of Commandant AH (R&R) which is falling vacant on 31st March, 2018 consequent to superannuation of MR-03992M Lt Gen AK Das. Hence, he is not recommended for the appointment of DGMS (Army)."

This Note prepared by one Brig. B. Sridhar mentions that it has the approval of DGAfMS as well as the Chief of the Army Staff.

20) On the basis of the aforesaid Note, Director (Medical) prepared his Note dated 24th January 2018 as per which Lt. General Sanjiv

Chopra was recommended for appointment to DGMS (Army). Mr. Venugopal pointed out that even in this Note it was reiterated as to why DGAFMS had not included the name of the respondent and also specifically recorded the reason given by DGAFMS in recommending the name of Lt. General Sanjiv Chopra. Relevant portion of this Note is as under:

“Preceding notes may please be perused. DGAFMS has submitted proposal for posting/appointment of DGMS (Army) and the panel of officers proposed for the post contains the following two names:

Sr No.	Personal Particulars	Remarks
(a)	Lt Gen Sanjiv Chopra, VSM, Col Comdt (MR 04142P) DGHS (AF)	Recommended for appointment to DGMS (Army)
(b)	Surg V Adm U K Sharma, (MR 04262N) DG (Org & Pers)	Not Recommended.

2. It may be highlighted here that DGAFMS has not included the name of MR 04141M Maj Gen Manomoy Ganguly, VSM, who is now the senior most Lt Gen (& Equivalent) officer in the AMC having residual service of one year eligible for appointment as DGMS (Army). It may also be noted here that in the past, the senior most Lt. Gen (& Equivalent) officer in the AMC are invariably appointed as DGMS (Army).

3. In this regard, DGAFMS has stated that “the DGAFMS has held extensive deliberations regarding consideration of MR 04141M Maj Gen Manomoy Ganguly, VSM for the appointment of DGMS (Army) consequent to his approval for promotion to the rank of Lt. Gen. (& Equivalent) in the AFMS by a Review Promotion Board held on 4th December, 2017. It has been submitted that Maj Gen Manomoy Ganguly, VSM would be newly promoted from the rank of the IHQ of the MoD. His proposal therefore for appointment in the office of DGAFMS as DGHS (AF) would

commensurate with his restored seniority as well as provide him the opportunity to become familiar with the functions, roles and responsibilities of the office of the DGAfMS and various service HQs. The Gen Officer on promotion to the rank of Lt Gen (& Equivalent) would then superannuate on 31st May, 2019. Against this backdrop, the COAS has approved the panel for inclusion of Maj Gen Manomoy Ganguly, VSM for the appointment of DGHS (AF)".

Below this Note, the Additional Secretary (JN) put the following remarks:

"Panel sub. By DGAfMS at para 1 of the note is sub. for kind consideration of RM for selection of DGMS (Army)."

It was further put up to the Defence Secretary and thereafter to the Raksha Mantri, who approved the same.

21) Based on the aforesaid Notings, the argument developed by the learned Attorney General was that this exercise was strictly in accordance with the criteria laid down in the Administrative Instructions dated 10th July 1992 which, inter alia, lays down the following procedure:

- (i) Inter se Seniority of Lt Generals
- (ii) Their Suitability;
- (iii) Assessment of their suitability in the light of their earlier experience of service in particular service on the date of occurrence of their vacancy vide Government of India dated 10th July, 1992;

(iv) Residual service of one year; and

(v) In case no service Lt Gen is found suitable then Maj Gen who are empanelled for promotion to Lt Gen may also be considered.

22) It was submitted that in the matter of appointment to the post of DGsMS of the Services, the 'assessment of suitability' of a Lt. General or its equivalent plays a vital and significant role. This is further reiterated by the fact that according to the policy, if none is found suitable, the criteria even caters for consideration of a Maj Gen (approved for promotion to Lt. General) for the said post. Consequently, even a junior who is empanelled but yet to be promoted to the rank of Lt. General, can be considered and appointed as DGMS.

23) Mr. Venugopal also submitted that the assessment of suitability per se involves judging the fitness of person to be appointed to the post of DGMS. This is ensured by way of a consultative process and thereafter formulation and submission of a proposal by the DGAFMS as the Cadre Controlling Authority with the approval of the respective Chiefs of Staff for sanction of the Government of India assumes vital importance. In other words, the fitness of a person to be appointed as DGMS is evaluated in

the consultative process. According to him, this process of consultation/deliberation based on record falls in the realm of 'suitability', and consequently, evaluation of worth and merit of an officer for being appointed to the post of DGMS.

24) He also submitted that while the 'seniority' and 'residual service clause' provide a threshold limit or bar to determine the eligibility for consideration, the 'suitability' clause in the policy provides for procedure to be followed to assess fitness of the officer to hold the post based on his appointments held, ability to lead the AMC/Equiv in operations and challenging circumstances, organisational fitness for job (appointment) content, leadership qualities, competence, experience, knowledge, integrity and the like. Ultimately, the appointment to the post of DGMS is approved by exercising the executive powers of the President through the Central Government, which was followed in the present case.

25) He also argued that when it comes to suitability of a person to man a particular post, it was to be considered by the appropriate authority and such considered opinion of the Competent Authority could not come within the purview of judicial review as held in ***Mahesh Chandra Gupta v. Union of India and Others***¹ in the

¹ (2009) 8 SCC 273

following words:

“42. Hence, Article 217(1) and Article 217(2) operate in different spheres. Article 217(1) answers the question as to who “should be elevated” whereas Article 217(2) deals with the question as to who “could be elevated”. Enrolment of an advocate under the 1961 Act comes in the category of who “could be elevated” whereas the number of years of actual practise put in by a person, which is a significant factor, comes in the category as to who “should be elevated”.

43. One more aspect needs to be highlighted. “Eligibility” is an objective factor. Who could be elevated is specifically answered by Article 217(2). When “eligibility” is put in question, it could fall within the scope of judicial review. However, the question as to who should be elevated, which essentially involves the aspect of “suitability”, stands excluded from the purview of judicial review.”

- 26) He also sought to draw sustenance from the judgment of House of Lords in **Anisminic, Ltd. v. The Foreign Compensation Commission & Anr.**² wherein it is held that a tribunal which is the creature of a statute is bound to act within the parameters imposed by the statute and further that it is obligated to make its enquiry and decision according to the law of land. For that reason the courts can intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have right to intervene to correct the error.

² (1969) 1 All E.R. 208

- 27) Another judgment on which the learned Attorney General relied upon was the case of ***Union of India and Others v. Lt. Gen. Rajendra Singh Kadyan and Another***³. The relevant portion is quoted hereinbelow:

“29. The contention put forth before us is that there are factual inaccuracies in the statement recorded by the Cabinet Secretary in his note and, therefore, it must be deemed to be vitiated so as to reach a conclusion that the decision of the Government in this regard is not based on proper material. The learned Attorney General, therefore, took great pains to bring the entire records relating to the relevant period which were considered by the Cabinet Secretary and sought to point out that there were notings available on those files which justify these remarks. Prima facie, we cannot say, having gone through those records, that these notings are baseless. Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. Maybe one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government.”

- 28) The learned Attorney General, thus, found error in the approach of the AFT in giving primacy to ‘seniority’ alone, ignoring the

³ (2000) 6 SCC 698

second element, namely, 'comparative suitability'. He also submitted that observation of the AFT that in the past only senior most officers were appointed as DGMS (Army) was factually incorrect as one Air Marshal H.K. Maini, though senior, was sidetracked and his junior Lt. General L.P. Sadhotra was appointed as DGMS (Army) on the basis of suitability. Mr. Venugopal went to the extent of arguing that if the wrong principle formulated by the AFT is sustained, it may lead to serious consequences inasmuch as this very criteria is adopted not only for the post of DGMS (Army) but other more important and sensitive posts like Chiefs of the Army, Air Force, Navy as well.

- 29) Mr. Patwalia, learned senior counsel appeared for the respondent defended the order of the AFT by raising multiple arguments. At the outset, he highlighted the manner in which, according to him, the respondent was treated shabbily by the concerned officers. In this regard, he pointed out the manner in which he was earlier refused promotion to the post of Lt. General and the difficulties he had to surmount even after his success before the AFT as well as this Court, inasmuch as, in spite of the categorical directions, the Review Board still chose not to empanel him for promotion to the rank of Lt. General But for a timely objectivity shown by the

Raksha Mantri, the respondent would have been left in the lurch even for the post of Lt. General

- 30) Mr. Patwalia then pointed out that there had always been a practice of appointing the senior most eligible officer to the post of DGMS (Army). He submitted that solitary instance of Air Marshal H.K. Maini stated now by the appellants would not advance their case because of the reason that it is Air Marshal H.K. Maini himself who chose not to seek appointment to the post of DGMS (Army) because of his failing health. Apart therefrom, argued the learned senior counsel, there was no instance even as per the appellants.
- 31) In this hue, he submitted that even in the instant case DGAFMS had initially prepared the Note dated 16th January 2018 for appointment to the post of DGMS (Army) on the basis of seniority. This Note was prepared at the time when case of the respondent for promotion to the rank of Lt. General had not been recommended by the Board and this non-recommendation was forwarded to the Raksha Mantri. Thus, as on that date, the DGAFMS proceeded on the basis that the respondent was not in the reckoning. He, thus, considered Lt. General Sanjiv Chopra to be the senior most person and recommended his name for

appointment as DGMS (Army) on the basis of his seniority. This was reflected in paragraph Nos. 2 and 3 of the said Note which read as under:

“2. The AMC in AFMS cadre has 10 (ten) Lt Gen (& Equiv) holding different appts in the three services. The appt of DGAFMS is held by the senior most Lt Gen, followed by the appt of the DgsMS which is held by the offrs in the order of seniority in the rank in the second tier of AMC cadre. The remaining six Lt Gen (& Equiv) are placed in the other appts i.e. DCIDS (Med.), DGHS (AF), DG (Org & Pers), Comdt Army Hosp (R&R), Comdt AFMC and Comdt & OIC Records, AMC C&C, Lucknow.

3. The annual average vacancies arising in a calendar year is around 4-5. Placement of empanelled Maj Gen (& Equiv) offrs on promotion to the next higher rank is followed strictly on the basis of their seniority and the availability of the appt falling vacant due to chain movement within the cadre to maintain inter se seniority and hierarchy of the appts. MR-04228K Maj Gen Anup Banerji, SM and MR-04432X Maj Gen RS Grewal, VSM, both are empanelled for promotion to the rank of Lt Gen (Equivalent) MoD ID Note No. 3(37)/2016/D (medical) dated 18 Nov 2016 for the vacancies arising in 2017, and hence their names were correctly forwarded in the panel of names of Gen officers for the appt of Comdt & OIC Records AMC C&C Lucknow vide this office note dated 04 Jan 2018 in ref.”

It is reiterated in paragraph 7 in the following manner:

“7...The DGAFMS, DgsMS, and the DCIDS are retained in the order of seniority for administrative reasons...”

He pointed out that in paragraph 4 the case of the respondent was discussed and it was mentioned that since his placement was a sub judice matter, he was not being considered for appointment.

- 32) According to Mr. Patwalia, when it was later found that the Raksha Mantri had approved the name of the respondent for promotion to the rank of Lt. General as this recommendation was declassified on 19th January 2018, the DGAFMS got prepared another Note dated 23rd January 2018 (on which the learned Attorney General has placed reliance) by bringing the criteria of comparative suitability for the first time. According to him, it was a clear device to deny the respondent posting as DGMS (Army) who had now become the senior most officer and the event showed that the authorities were bent upon favouring Lt. General Sanjiv Chopra or their intention was to deny the respondent its legitimate claim somehow.
- 33) Coming to the Administrative Instructions in the Circular dated 10th July 1992 laying down the criteria for appointment to the office of DGMS (Army), the submission of Mr. Patwalia was that the correct interpretation would be that the senior most person had to be considered for the said post in the first instance, subject to his suitability. If he was found unsuitable only then the next senior most officer would be considered. According to him, there was no concept of 'more suitable' in the said Instructions. He submitted that the law which was discussed by the Tribunal on 'seniority-

cum-merit' was to emphasise that seniority plays predominant role even when merit is also one of the considerations. Therefore, in the instant case when it is 'seniority-cum-suitability', it implies that the senior most person, unless declared as unsuitable or unfit, was to be given appointment to the post in question. Therefore, according to him, the Tribunal has approached the issue in right perspective. For this purpose, he heavily relied upon paragraph Nos. 9 and 10 from the judgment of this Court in ***B.V. Sivaiah and Others v. K. Addanki Babu and Others***⁴ which read as under:

"9. The principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. In the context of Rule 5(2) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 which prescribed that "selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority" Mathew, J. in *Union of India v. Mohan Lal Capoor* has said: (SCC p. 856, para 37)

"[F]or inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale."

Similarly, Beg, J. (as the learned Chief Justice then was) has said: (SCC p. 851, para 22)

⁴ (1998) 6 SCC 720

“22. Thus, we think that the correct view, in conformity with the plain meaning of words used in the relevant Rules, is that the ‘entrance’ or ‘inclusion’ test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor.”

10. On the other hand, as between the two principles of seniority and merit, the criterion of “seniority-cum-merit” lays greater emphasis on seniority. In *State of Mysore v. Syed Mahmood* while considering Rule 4(3)(b) of the Mysore State Civil Services General Recruitment Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, this Court has observed that the Rule required promotion to be made by selection on the basis of “seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion”. It was pointed out that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.”

- 34) He also submitted that as the authorities had themselves applied the criteria laid down in the said Circular to mean seniority is subject to suitability (i.e. unless found unsuitable), this administrative instruction by the aforesaid prolonged practice had established itself as a legal principle from which the appellants could not deviate. He also referred to the following judgments in support of his submission that under certain circumstances even

the Court can give a positive direction to appoint or promote a person to a particular post:

- (a) ***State of Bihar v. Dr. Braj Kumar Mishra and Others***⁵
- (b) ***State of Mysore and Another v. Syed Mahmood and Others***⁶

INTERPRETATION OF “INTER SE SENIORITY AND SUITABILITY”

- 35) We have bestowed due consideration to various nuances of the issue, as argued by both the counsel for their respective parties.
- 36) Before advertng to the specificity in which the appellant dealt with the matter of the respondent herein, we deem it appropriate to first go into the parameters which are required for the purpose of considering the appointments to the post of DGMS (Army). The respondent belongs to Army Medical Corps (AMC) which comes under Armed Forces Medical Service (AFMS). In this service, there are ten appointments in the rank of Lt. General (& Equivalent) which are held by Officers belonging to AMC. It has three tier structure. On the top is the post of DGAFMS, who is the head of AFMS. He functions directly under the Government of India, Ministry of Defence and is responsible to the Government for overall medical policy concerning the armed forces. The

⁵ (1999) 9 SCC 546

⁶ (1968) 3 SCR 363

functions of the DGAFMS as laid down in Paragraph 18 of the Regulations for the Medical Services of Armed Forces 2010 (Revised Version) (RMSAF) issued under the authority of the Government of India, Ministry of Defence, include *inter alia* that he is the Cadre Controlling Authority in respect of all officers of the AFMS, and is responsible for terms and conditions of services of all officers including for processing cases and obtaining Government sanction where necessary. Below the DGAFMS, there are three posts of Director General Medical Services, one each for the Army, Navy and the Air Force called the DGMS (Army) DGMS (Navy) and DGMS (Air) respectively. The DGs of the three Services are Medical Advisors to the respective Chief of Staff and are responsible for the day to day administration and proper functioning of the medical services of the Army, Navy and Air Force. The remaining six posts of Lt General or their equivalent are placed in other appointments held in other establishments of the Armed Forces.

- 37) DGMS (Army) is in the second tier which is treated as higher than DGMS (Navy) or DGMS (Air). The post of DGMS (Army) is normally tenable by an Officer of the rank of Lt. General belonging to AMC and he acts as Principal Medical Advisor to the Chief of

Army Staff.

- 38) As noted above, administrative instructions dated 10th July, 1992 are issued by the Government of India, Ministry of Defence laying down the specific criteria for appointment to the post(s) of DGMS. We have already reproduced the aforesaid criteria. However, since para (i) is the bone of contention, we reproduce the same hereinbelow for the sake of continuity of discussion:

“(i) The inter-se seniority and suitability of officers in the rank of Lt Gen (and equivalent) holding the posts of Comdt AMC Centre and School, Comdt AFMC, Pune and the Addl DG AFMS shall be assessed in the light of their earlier experience of serving in particular services and they shall be considered for appointment of DGs MS of services provided they have a minimum remainder service of six months from the date of occurrence of the vacancy.”

- 39) The expression which is to be assigned its proper meaning is ‘the inter se seniority and suitability’. Whereas the respondent argues that it is nothing but ‘seniority-cum-suitability’ which means senior most Lt. General subject to his suitability for the post of DGMS (Army) is to be appointed, the plea of the appellant is that the word ‘inter se’ has also to be given its due meaning and it is related both to seniority as well as suitability. On that basis, it is argued that suitability is to be judged ‘inter se’ between the eligible persons and one who is more suitable would be entitled to appoint as DGMS (Army).

- 40) When we read the aforesaid para (i) as a whole, we find force in the submission of the appellant that the word 'inter se' applies both to seniority as well as suitability. Therefore, 'inter se suitability' is also to be assessed inasmuch as this assessment is 'in the light of their earlier experience of serving in a particular service'. As far as consideration on the parameters of 'inter se seniority' is concerned, it would mean that a person who is senior gets precedence. To this extent, there is no quarrel. Question is as to what meaning is to be assigned to 'inter se suitability'. Two questions arise from the above. First, what is the meaning of 'suitability'. Second, how the expression 'inter se suitability' is to be construed, i.e. whether it should be understood as choosing a 'more suitable' officer for appointment as DGsMS. As far as inter se suitability is concerned, all the eligible officers in the rank of Lt. General (& Equiv), having regard to their earlier experience of serving in particular services, they are to be considered for appointment as DGsMS of services (i.e. DGMS (Army)).
- 41) Let us first consider the meaning of 'suitability'.
- 42) In English parlance, the word 'suitable' is assigned the meaning as 'appropriate, fitted for the purpose or acceptable'. The concise Oxford Dictionary defines the word suitable as 'well fitted for the

purpose; appropriate'. This ordinary meaning is to be given effect to as a general guide, unless this expression is given special meaning in a statute or rule in administrative instructions. In ***R (Quintavalle) v. Human Fertilisation Authority***⁷, the House of Lords remarked that "the word 'suitability' is an empty vessel which is filled with meaning by context and background.

43) In service jurisprudence, where the word 'suitable' is normally examined from the point of view as to whether a particular person is suitable to hold a particular post, it is construed as 'fit' to hold that post. It would mean that the job profile and job requirement of a particular post would be seen and then, going by the calibre, competence, attributes, skill and experience of the candidate, it would be ascertained as to whether such a person would be able to discharge the duties of the post i.e. whether he is suited to carry out the functions of the post, to the satisfaction of his employer.

44) It, thus, follows from the above that the person to be eligible should qualify the following conditions:

- (i) the officer should be in the rank of Lt. General (& Equiv);
- (ii) such an officer should be holding the post of Comdt AM

⁷ (2005) UKHL 28

C&C; and

- (iii) he should have a minimum remainder service of one year from the date of occurrence of the vacancy.

45) Adverting to the second question, the prefix 'inter se' has also to be given some meaning as it cannot be rendered otiose. Therefore, whereas while assessing 'suitability', it has to be seen that a particular officer is not unfit for the post, when it comes to 'inter se suitability', it has reference to assessing the suitability of all eligible officers and thereafter finding who is more suitable to occupy such a post. We have to keep in mind that these are very high ranking posts and, therefore, the competent authority is supposed to choose a more suitable officer for such posts. We are of the opinion that for expressing such an intention, the Circular could have been worded more appropriately and with clarity to avoid such doubts. However, since the word 'inter se' is used, it implies that the intention behind laying down this criteria was to give these posts to a better suited person after evaluating their inter se suitability. Of course, while doing this exercise seniority of an officer is also to be given due weightage, meaning thereby if the senior most person is competent to hold the post, he is to be given preference. Therefore, we conclude that the

view of the AFT that the post of DGMS (Army) is to be filled by the officer on the strength of 'seniority-cum-suitability', where seniority is a decisive factor and suitability is a secondary factor, is not correct. In the entire discussion resting with the aforesaid view, the Tribunal ignored the fact that it is not only seniority and suitability simpliciter but 'inter se' seniority and suitability. The expression 'inter se' is totally ignored and there is no discussion thereupon at all, which has led the AFT to take wrong view insofar as interpretation of the criteria laid down in the Circular dated 10th July, 1992 is concerned, which talks of 'inter se seniority and suitability'.

- 46) Having made this legal position clear, we advert to the facts of the present case.
- 47) Some admitted facts which are pertinent for the outcome of the present appeal need to be highlighted at this juncture. These are:
- (i) The respondent is the senior most Lt. General
 - (ii) He fulfils the eligibility criteria for appointment to the post of DGMS (Army).
 - (iii) DGMS (Army) is treated as better post than other DGs, i.e. DGMS (Navy) and DGMS (AF).
 - (iv) The past practice has been to fill up the post of DGMS

(Army) from a senior most officer. Before the AFT, the appellants failed to give any example where seniority was ignored. In the past, i.e. ever since issuance of Circular dated 10th July 1992, the practice has been to appoint the senior most Lt. General from Army. Before the AFT, the appellants could not cite a single deviation to the aforesaid practice. In the appeal, example of one Air Marshal H.K. Maini is given. However, it is adequately answered by the respondent by pointing out that that happened because Air Marshal Maini himself chose not to be posted as DGMS (Army) because of his health reasons, which the appellants could not controvert.

(iv) Even, in the present case, for appointment of DGMS (Army) the first Note dated 16th January 2018 by DGAFMS, in no uncertain terms, stated that the appointment to this post is to be made 'strictly on the basis of their seniority', meaning thereby the senior most Lt. General (& Equiv) is to be posted. That Note was prepared on the assumption that the respondent is not in the reckoning as his case for promotion to the post of Lt. General was not recommended.

(v) It is for the first time that in the Note dated 23rd January 2018 the question of so-called 'suitability' is taken up. We have used the expression 'so-called' for the reason that (as would be

discussed in some detail afterwards) even this Note dated 23rd January 2018 does not reflect that any exercise of “inter se suitability” is carried out strictly in accordance with the criteria laid down in the Circular dated 10th July 1992, i.e. on the touchstone of ‘inter se seniority and suitability’.

48) Apart from the aforesaid admitted facts, we also would like to state some of the findings as recorded by the AFT, with which we are in agreement. These are listed below:

(i) There has been some attempt (though we are not suggesting as to whether it was deliberate or *bona fide*) in denying the respondent his claim for promotion to the rank of Lt. General. Events in detail on this aspect have already been narrated above, which need not be reiterated. Suffice it is to mention that even after the orders of the AFT and affirmation thereafter by the judgment of this Court, the Board had stuck to its earlier notion about the respondent. Fortunately for him, the Raksha Mantri took a fair and objective view in the matter and granted him his deserved promotion, which was legitimately due to him.

(ii) As on 16th January 2018, when DGAFMS prepared his Note for appointment to the post of DGMS (Army), which had fallen

vacant few months ago, he only knew that the Review Board had again refused to recommend the case of the respondent in the rank of Lt. General. Therefore, he proceeded on the basis that since the respondent is not occupying the post of Lt. General he is out of reckoning and, accordingly, Lt. General Sanjiv Chopra was the senior most officer. Proceeding on the aforesaid presumption, after excluding the respondent from consideration, he recommended Lt. General Sanjiv Chopra for appointment as DGMS (Army) being the senior most in the AFMS cadre. This Note went to the extent of recording that not only promotion is strictly on the basis of their seniority, it was being done even for the posts of 'DGAFMS', 'DGsMS' and the 'CDC IDC' who are retained in the order of seniority for administrative reasons. Within three days thereafter, when the decision of the Raksha Mantri to promote the respondent to the rank of Lt. General was declassified, in the fresh Note prepared on 23rd January 2018, there was a complete turn around. For the first time, it was mentioned in this Note that as per the criteria Lt. General (& Equiv) will be assessed for appointment of DGMS 'in the light of their earlier experience in a particular service'. No doubt, this criteria is mentioned in the Circular dated 10th July 1992 and, therefore, there may not be anything wrong per se. However, we

find substance in the submission of the learned senior counsel appearing for the respondent that such a realisation dawned only after coming to know that the respondent was also in the reckoning for appointment to the post of DGMS (Army) and he was the senior most officer.

(iii) The manner in which this Note is written leaves a reasonable impression that the exercise was done to exclude the respondent from appointment to the post of DGMS (Army). In the first instance, though the criteria of assessment 'in the light of their earlier experience in a particular service' is mentioned in paragraph 3 of the Note, it nowhere reproduces the exact criteria, namely, 'inter se seniority and suitability'. Thus, while considering the earlier experience in a particular service, it was to be done in the light of inter se seniority-cum-suitability is not reflected in the said Note. In fact, there is no such exercise of inter se suitability undertaken in this Note.

(iv) In paragraph 7 of the Note dated 23rd January 2018, case of the respondent is discussed. Qua him it is mentioned that since he would be newly promoted from the rank of Major General, he does not have 'previous exposure to the working and environs of the IHQ of the MoD'. On that basis, he is proposed for appointment as DGHS (AF) instead of DGMS (Army). This,

according to us, is not a fair and objective consideration of his suitability for the post of DGMS (Army) as it is not necessary to have working experience in IHQ alone. Mr. Patwalia had vehemently argued that the respondent had adequate administrative experience while working as Major General in Southern Command, which was equally relevant, doing similar nature of duties from which he has gained sufficient experience making him aptly suitable for the post of DGMS (Army). He had also pointed out that in the past, officers who are appointed to the post of DGMS (Army) were not necessarily those officers who had earlier worked in the environs of the IHQ of the MoD. This fact also could not be refuted by the appellants. Therefore, we find that there has not been any proper and valid consideration in applying the criteria of inter se seniority and suitability.

- 49) For the aforesaid reasons, we agree with the ultimate conclusion of the AFT that appointment of Lt. General Sanjiv Chopra to the post of DGMS (Army) warrants to be quashed.
- 50) However, in view of our aforesaid discussion, we are of the view that the direction of the AFT that the respondent be straightaway appointed to the post of DGMS (Army) may not be proper. We are conscious about the apprehensions of the AFT, which may not

unfounded altogether. However, since we have not agreed with the conclusion of the AFT that the appointment to the post of DGMS (Army) is not based on seniority alone, it may not be proper to uphold such a direction of the AFT. While setting aside this direction, we remit the case back to the Raksha Mantri. We repose full faith in the Raksha Mantri and are confident that she would consider the entire matter in a totally dispassionate manner, with utmost objectivity and depicting total fairness. Copy of this judgment and particularly the findings recorded by us, including the admitted facts which are culled out hereinbefore, would also be placed before the Raksha Mantri. Keeping in view that the post is lying vacant for some time and also that time is running out insofar as the respondent is concerned, we direct the appellants to place the matter before the Raksha Mantri forthwith, with no loss of time, and are hopeful that the decision shall be taken within a week.

51) The civil appeal is partly allowed and is disposed of in the aforesaid terms.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

**NEW DELHI;
AUGUST 01, 2018.**