

UNION OF INDIA & OTHERS

A

v.

COL RAN SINGH DUDEE

(Civil Appeal No. 11009 of 2017)

JULY 03, 2018

B

**[ADARSH KUMAR GOEL AND UDAY UMESH LALIT, JJ.]**

*Army Act, 1950 – ss. 83, 39(a) – Selection – Selection from the post of Lt. Colonel to the rank of Colonel – On facts, findings of General Court Martial against respondent-army officer quashed – Reinstatement of respondent – Issuance of directions to the Government for payment of all consequential benefit for the said period – Thereafter, respondent promoted to the rank of Lt. Colonel and, also granted time scale promotion as Colonel – However, officer junior to respondent promoted to the rank of Brigadier – Respondent challenged the same – Selection Board not find the respondent fit, and was not empanelled – In a subsequent order, Selection Board did not find respondent fit to be promoted by selection to the post of Colonel – However, the tribunal found the assessment made by the Selection Board to be perverse and issued directions to the Government to constitute a fresh selection Board – Held: While annulling the findings and effect of the General Court Martial proceedings, the idea was to confer those benefits which the officer stood denied directly as a result of pendency of such proceedings – Such benefits would be those which are easily quantifiable namely those in the nature of loss of salary, emoluments and other benefits – But the expression cannot be construed to mean the promotions which are strictly on the basis of comparative merit and selection must also stand conferred upon the officer – On facts, Selection Board considered the matter on merits and found the respondent unfit for selection as “Colonel” – Assessment was cumulative taking into account the grading as against those six parameters – Action on part of the Selection Board in relying upon the entry of reprimand was consistent with Selection Policy and could not be characterized as incorrect or illegal in any manner – Also there were other factors which weighed with the Selection Board – Thus, the tribunal was wholly unjustified in finding the assessment made by the Selection*

C

D

E

F

G

H

A *Board to be perverse –Judgments and orders passed by the tribunal set aside.*

**Allowing the appeals, the Court**

B **HELD: 1.1 While annulling the findings and effect of the General Court Martial proceedings, the idea was to confer those benefits which the officer stood denied directly as a result of pendency of such proceedings. Such benefits would therefore be those which are easily quantifiable namely those in the nature of loss of salary, emoluments and other benefits. But the expression cannot be construed to mean that even promotions which are strictly on the basis of comparative merit and selection must also stand conferred upon the officer. It is true that as a result of pendency of the General Court Martial proceedings the respondent was kept out of service for nearly nine years and as such his profile would show inadequacy to a certain extent. On the other hand the Department was also denied of proper assessment of the profile of the respondent for those years. [Para 6][108-F-H; 109-A]**

E **1.2 The concept that he must be granted those promotions which his batchmates or juniors received and the idea that he must also be considered for promotions which are strictly based on “selection” basis have not been accepted by this Court in *K.D. Gupta* case. The tribunal therefore, completely erred in passing the directions in its order. Since the opinion of the Law Officer was not consistent with the provisions of the relevant rules and the law declared by this Court in *K.D. Gupta* case, the Department was justified in expressing serious reservations and in generating note. The tribunal, attached undue importance to the opinion of the Law Officer.[Para 7][109-F-H; 110-A]**

G **1.3 The matter was considered on merits by Selection Board which found the respondent unfit for selection as “Colonel”. The matter was analyzed by the Board on six indicia or parameters. The assessment was cumulative taking into account the grading as against those six parameters. Admittedly, the respondent was lower in terms of indicia Nos.(ii), (iv) and (v) as against all other three officers, which included one who was not empanelled at all. Apart therefrom, the entry of reprimand as**

H

against indicia No.(vi) also put the case of the respondent in the negative. [Para 8][110-A-C] A

1.4 In terms of the Selection Policy which has been placed on record by the appellants, disciplinary award forms part of the overall profile of an Officer. Said provision in fact lays down, “character, qualities, disciplinary background and decorations form an important input to the overall profile of an Officer and due consideration should be given while assessing border line cases.”The action on part of the Selection Board in relying upon the entry of reprimand was thus, consistent with Selection Policy and could not be characterized as incorrect or illegal in any manner. In any case that was not the only pointer which weighed with the Selection Board. Even eschewing such entry, the respondent was still found to be lower as against three Officers on other three indicia. Even though one out of those three Officers had fared better than the respondent on those three indicia and also did not have any entry or reprimand, he was not an empanelled Officer. It is precisely for this reason that whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject.”[Para 9][110-D-F] B C D

1.5 The overall CR profile of the respondent was better than the last empanelled officer. But the respondent was certainly lower on other three indicia or parameters. It is the cumulative assessment which the Selection Board was expected to and did undertake. Going by the law laid down by this Court, it cannot be said that the assessment of the Selection Board suffered on any count. This case is not where irrelevant factors have been taken into account or relevant factors have been missed out or eliminated from consideration. The Selection Board comprised of high ranked officials from Indian Army. No malafides have been and could be attributed to the actions on part of the members of the Selection Board. The tribunal was thus wholly unjustified in finding the assessment made by the Selection Board to be perverse. The approach of the tribunal and the assessment made by it were completely erroneous. The tribunal was also not justified in awarding costs of Rupees five lakhs to the respondent. The judgments and orders passed by the tribunal are set aside. [Paras 10, 11, 13][110-G-H; 111-A-B, D] E F G H

A           **1.6 It may be that the respondent was wrongly proceeded against and punished by General Court Martial. He was also awarded sentence of imprisonment and lost out nine years of service. The prejudice is quite apparent. However, sympathy cannot outweigh the considerations on merit. He has received time scale promotion to the rank of Colonel after having put in 26 years of regular service. But if he was not found suitable for empanelment by way of selection, the matter must end there. [Para 12][111-C-D]**

C           *Union of India v. Lt. General Rajendra Singh Kadyan (2000) 6 SCC 698 : [2000] 1 Suppl. SCR 722; Dalpat Abasaheb Solunke v. B.S. Mahajan (1990) 3 SCC 305; Air Vice Marshal S.L. Chhabra, VSM (Retd.) v. Union of India (1993) Supp 4 SCC 441 : [1993] 3 SCR 669; Surinder Shukla v. Union of India (2008) 2 SCC 649 : [2008] 1 SCR 449; Lt. Col. K. D. Gupta v. Union of India and Others (1989) Suppl 1 SCC 416 : [1989] 2 SCR 370 – referred to.*

**Case Law Reference**

|   |  |                    |               |
|---|--|--------------------|---------------|
|   | <b>[2000] 1 Suppl. SCR 722</b>                                       | <b>referred to</b> | <b>Para 4</b> |
| E | <b>(1990) 3 SCC 305</b>  | <b>referred to</b> | <b>Para 5</b> |
|   | <b>[1993] 3 SCR 669</b>  | <b>referred to</b> | <b>Para 5</b> |
|   | <b>[2008] 1 SCR 449</b>  | <b>referred to</b> | <b>Para 5</b> |
|   | <b>[1989] 2 SCR 370</b>  | <b>referred to</b> | <b>Para 6</b> |
| F | <b>CIVIL APPELLATE JURISDICTION: Civil appeal no. 11009 of 2017.</b> |                    |               |

From the Judgment and Order dated 17.01.2017 in OA. No. 260 of 2016 of the Armed Forces Tribunal, Regional Bench, Lucknow.

WITH

G           C. A. No. 5973 of 2018.

Mr. Maninder Singh, ASG, R. Balasubramanian, Prabhas Bajaj, Akshay Amritanshu, Ms. Aarti Sharma, Ms. Sakshi Kakkar, Mukesh Kumar Maroria, Advs. for the Appellants.

H

Respondent-in-person

A

The Judgment of the Court was delivered by

**UDAY UMESH LALIT, J.** 1. These appeals question the following judgments and orders passed by the Armed Forces Tribunal, Regional Bench, Lucknow.

B

(a) Civil Appeal No.11009 of 2017 is directed against the Judgment and Order dated 17.01.2017:

(b) Civil Appeal (Diary) No.40312 of 2017 with an application for leave to appeal is directed against the Judgment and Order dated 12.09.2017. Leave to appeal granted.

C

2. The relevant facts in the present case are as under:-

(A) The respondent was initially enrolled in the Indian Army as Sowar in 1981. He cleared the examination conducted by Union Public Service Commission in the year 1988 and got commissioned as an Officer and was posted as Second Lieutenant in the Ordnance Corps of the Army. During his career, he received some commendations and appreciations. However, the respondent was summarily tried under Section 83 of the Army Act, 1950 (hereinafter referred to as the Act) by Commander, 29 Artillery Brigade for the offence of 'absenting himself without leave' for 03 days from 27.06.1991 to 29.06.1991. The Respondent pleaded guilty to the charge under Section 39(a) of the Army Act and was sentenced to 'Reprimand'.

D

E

(B) While the respondent was serving as Major in 2004-05, he was tried by General Court Martial on four charges. The first charge was under Section 52 to the effect that while the respondent was posted at Saugor between November 2000 and May 2002, he pursued a case for procurement of 8.64 hectares of land belonging to Government of Madhya Pradesh for the purposes of building a War Memorial in the memory of late Sepoy Hawa Singh, who was the elder brother of the respondent. The second charge was connected to the first one and was to the effect that while performing duties as officiating Commanding Officer he improperly wrote a Demi Official letter on 09.11.2000 to the Collector, Saugor for allotment of the aforesaid land. The third charge was connected to the second one while according to the fourth charge the respondent had failed to submit report about the acquisition of said land in contravention of Army Order 3/S/98.

F

G

H

- A (C) On 16.05.2005, he was found guilty of the first and third charges but not guilty of the second and fourth charges and was sentenced to be cashiered and to suffer rigorous imprisonment for three years. On 21.10.2005, the competent disciplinary authority confirmed the findings as regards the first, second and fourth charges but did not confirm the finding on the third charge. The sentence awarded by the General Court
- B Martial was confirmed with remission of six months out of three years rigorous imprisonment. Though the Court of Inquiry relating to the matter in issue was undertaken on 07.07.2001 the trial in respect of said charges had commenced on 19.10.2004.
- C (D) The respondent being aggrieved, preferred statutory complaint under Section 165 of the Act. During the pendency of said complaint, selection for promotion to the rank of Colonel of 1988 Batch Officers was undertaken in August 2006 and appropriate selections were made. Since the respondent, by that time had stood punished in the General Court Martial, his candidature was not considered.
- D (E) As his Statutory Complaint was not considered in due course, the respondent filed a Writ Petition in the High Court of Delhi which was later transferred to Armed Forces Tribunal, Calcutta. In pursuance of the directions issued at the interim stage by the Armed Forces Tribunal, the consideration of the pending Statutory Complaint was taken up and
- E the matter was referred to the learned Solicitor General of India for his opinion. As the opinion given by the learned Solicitor General on 01.11.2013 has been extensively quoted and relied upon in the Judgments under appeal, the concluding part of the opinion is extracted hereunder:
- F “17. Since the first Court of Inquiry was ordered to be convened on 07.07.2001, it can be said that the knowledge of the alleged offence (i.e. fraudulent allotment of land) was gained on or before such date. The Applicant’s trial commenced from 19.10.2004, which is 3 years beyond such date. Thus, in my opinion, the CGM proceedings are barred by limitation.
- G 18. Even on merits, the finding of the guilt by the CGM is not tenable in view of the fact that even the Ministry is not clear in whose name the land was allotted, as mentioned above in paragraph 12 and that the allotment was even otherwise valid in so far as the MP Government was concerned, as dealt with in paragraph 15. There has been no challenge to the findings arrived at by the
- H magisterial inquiry.

19. It is also an admitted fact that the purpose of the allotment was only to build a war memorial, which has not been done by virtue of surrender of the land to the Government. I am also unable to see any wrongful pecuniary gain. From an overall perspective, the intent of the Applicant cannot be said to be something which is forbidden by law. It was only to perpetuate the memory of his brother. Taking all these facts cumulatively, in my opinion, the findings of the GCM appear to be unacceptable. My view is also confirmed by Note 89 as would be evident from the file of Mr. Praveen Kumar (Director AG-I’).”

(F) By Order dated 20.11.2013, the Central Government allowed the Statutory Complaint preferred by the respondent and directed:-

“8. Now, therefore, the Central Government, under the powers conferred under section 165 of the Army Act, 1950 do hereby annul the proceedings of the General Court Martial findings and sentence dated 16<sup>th</sup> May, 2005 and confirmation order dated 21<sup>st</sup> October, 2005 being illegal and unjust and allow the petition filed by IC-47908F, Major Ran Singh Dudee, of 36 DOU. Consequently, the penalty imposed upon IC-47908F Ex Major Ran Singh Dudee of 369 DOU stands quashed and he is entitled to all consequential benefits as admissible under rules on the subject.”

(G) The respondent was thereafter reinstated in service on 13.01.2014 and paid all consequential benefits for the entire period. On 16.08.2014, the respondent was promoted to the rank of Lt. Colonel with effect from 16.12.2004. Sometime in January, 2015, an officer who was junior to the respondent was promoted to the rank of Brigadier. A representation was therefore made by the respondent for grant of all “consequential benefits”. He was principally aggrieved by his non-empanelment for promotion to the rank of Brigadier. Around this time on 30.06.2015, the respondent was granted Time Scale promotion as Colonel, on completion of 26 years of service.

(H) As regards the grievance made by the respondent and his representation in that behalf, the matter was again referred to the Law Officer of the Government of India who in his opinion dated 30.12.2015 opined that the respondent could not be denied promotion to the rank his batch mates and immediate juniors were promoted, that the Government of India having directed in the Order dated 20.11.2013 that all

- A consequential benefits be given to the respondent, the mandatory demands under the relevant Rules would stand waived and that the respondent should be granted the rank of a Brigadier. Serious reservation was however expressed by the Department which was of the view that no promotion to the rank of Brigadier could be granted except through the modalities of selection by the Selection Board and an appropriate Note
- B was written in that behalf by the Additional Secretary in the Ministry of Defence on 03.02.2016. No.3 Selection Board was thereafter constituted and in the assessment made by said Selection Board on 26.04.2016, the respondent was not found fit and as such was not empanelled.
- C (I) The respondent being aggrieved filed OA No. 260 of 2016 in the Armed Forces Tribunal, Regional Bench, Lucknow questioning his non-empanelment in the rank of Brigadier. It was submitted, inter alia, that:
- D (i) The respondent came from a family of soldiers. Though enrolled as Sowar in the year 1981 by sheer dint of hard work he got the status of a Commissioned Officer in the year 1988. In his posting in Kargil he received COAS Commendation Card. He also received Letter of Appreciation from General Officer Commanding 36 Infantry Division and was recommended for Sena Medal in 2002.
- E (ii) In 1990 he had made complaints against his superiors citing various irregularities. Further, sensing threat to his life he had reported the matter to the Brigadier Commander. Offended by such reporting, the respondent was falsely implicated in a Court of Enquiry which found nothing against him. A first information
- F report was also lodged which was found to be stage managed. On the contrary in the Court of Enquiry, the officers against whom the respondent had complained, were found guilty and were suitably punished.
- G (iii) In the year 1997 while he was posted at Jodhpur, he was a member of the Tender Opening Board for Pokhran field firing ranges. He had lodged complaint to the superior authorities with regard to mal-practices in auction proceedings pursuant to which proceedings of auction were annulled.
- H (iv) Since he had reported about corrupt practices of the superiors, the superiors in retaliation had forged the documents of Revenue

Court ascribing motive to the respondent as regards allotment of land. Though initially he was visited with an order of punishment, namely, "Recording of Displeasure", said punishment was later set aside. A

(v) He was wrongly implicated in the General Court Martial. In any case his innocence stood established by reason of order dated 20.11.2013 which inter alia had directed that he was entitled to all consequential benefits. B

(vi) In his submission because of the pendency of General Court Martial proceedings he was kept out of active service for nine years. Relying on the opinion given by the Law Officer on 30.12.2015 he submitted that he was entitled to the rank of Brigadier. C

(J) On the other hand, it was contended on behalf of the appellants that the respondent did not fulfill the required criteria in terms of policy and had not put in requisite period of service while holding the rank of Colonel. It was further submitted that promotion to the post of Colonel could either be purely on the basis of selection by the Board or could simply be on the basis of length of service which is normally known as time scale promotion. The Selection Board in question, namely, No.3 Selection Board had not found the respondent fit to be promoted by "Selection". D E

(K) The Armed Forces Tribunal principally relied on the opinion dated 01.11.2013 of the learned Solicitor General and the order dated 20.11.2013 to come to the conclusion that the respondent was framed by certain persons on unfounded grounds. It further held that the order dated 20.11.2013 was clear that the respondent was entitled to all "consequential benefits" and as opined by the Law Officer in his opinion dated 30.12.2015 the respondent ought to have been promoted as Brigadier. The Armed Forces Tribunal found that the Department was not justified in ignoring the opinion of the Law Officer and in generating the Note dated 03.02.2016. It concluded: F G

"There is no room for doubt that ordinarily, right to consider is a fundamental right and in case, the case is considered and incumbent does not qualify because of lack of criteria, he cannot lay claim for promotion. However, the fact remains where in the facts and circumstances as in the present, because of grant of H

A consequential benefits and loss of promotional avenues by virtue  
of pendency of General Court Martial (supra) and having  
suspended service period on account of such proceeding which  
has been held to be based on unfounded facts and allegations,  
rights that accrue to the Applicant on account of setting aside of  
punishment order, include the right to seek promotion to the higher  
B rank from the date his juniors have been promoted keeping in  
view the facts and circumstances of the present case.”

(L) The Armed Forces Tribunal thus by its judgment and order  
dated 17.01.2017 directed that a final decision be taken by the appellants  
keeping in view the opinion expressed by the Law Officer for promotion  
C of the respondent to the rank of Brigadier “Selection Grade”.

(M) The appellants being aggrieved approached this Court by  
filing Civil Appeal No.11009 of 2017. While issuing notice, this Court  
passed the following direction on 01.02.2017:

D “In the meantime, there will be stay of operation of the impugned  
judgment on the condition that the appellants shall take a decision  
on the promotion of the respondent to the rank of Colonel, within  
a period of two weeks from today, in accordance with law.”

(N) No.3 Selection Board was, therefore, constituted on 3.02.2017  
E which considered the candidature of the respondent and the question  
whether he was fit to be promoted by selection to the rank of Colonel.  
The proceedings dated 13.02.2017 indicate that the Board considered  
the profile of the respondent alongwith three other officers (Two of  
them being empanelled officers - the second being the lowest empanelled  
officer and the third being one who was not empanelled). As per record,  
F the matter was considered on the basis of six indicia namely (i) Overall  
C.R. Profile, (ii) Lowest C.R. Assessment, (iii) Recommendations for  
promotions, (iv) Course Profile, (v) Lowest Course grading and (vi)  
Discipline Profile. As against the candidates who were empanelled and  
the one who was not empanelled, the respondent’s profile was found to  
G be lower than all three of them in terms of aforesaid Indicia Nos.(ii), (iv)  
and (v). Further as against Indicia No.(vi), where all those three officers  
had “NIL” entry the profile of the respondent indicated “reprimand”  
which was issued in 1991. It may be noted that only one out of those  
three officers who was empanelled had “Average CR Profile” graded  
as “Above Average to Outstanding” which was the same as the

H

respondent. Considering the comparative profile of the respondent and those three officers, it was found that the respondent was not fit to be promoted by selection to the post of Colonel. A

The assessment made by the aforesaid No.3 Selection Board was approved by Chief of Army Staff.

(O) The Comparative Chart regarding profile of those three officers and the respondent is extracted hereunder. We have however not disclosed the names of those three officers. B

Comparative Profile

|                               | Last Empanelled Officer  | Officer not Empanelled   | Officer Empanelled           | Respondent   |
|-------------------------------|--------------------------|--------------------------|------------------------------|--|
| Name                          | Lt. Col x                | Lt. Col y                | Lt. Col z                    | Col (TS) RS Dudee  |
| Overall CR Profile            | Above Average            | Above Average            | Above Average to Outstanding | Above Average to Outstanding                                 |
| Lowest CR assessment          | 8                        | 8                        | 8                            | 7  |
| Recommendations for promotion | Should promote           | Should promote           | Should promote               | 01x May promote  |
| Course Profile                | Average to above Average | Average to above Average | Average to above Average     | Below Average to Average                                     |
| Lowest Course Grading         | C                        | C                        | C                            | E  |
| Discipline Profile            | Nil                      | Nil                      | Nil                          | Reprimand Dec 91 Army Act Section 39 (Absence without Leave) |

(P) The respondent challenged the decision of No.3 Selection Board by filing OA No.104 of 2017 before the Armed Forces Tribunal, Regional Bench, Lucknow. When Civil Appeal No.11009 of 2017 was taken up, this Court recorded the fact that the Selection Board had found H

A the respondent unfit to be promoted as Colonel against which decision challenge was pending before the Armed Forces Tribunal. The appeal was, therefore, adjourned to await the decision of the Armed Forces Tribunal while continuing the interim order passed earlier.

(Q) The Tribunal reproduced the Comparative Chart which was  
B part of the record including names of the officers concerned. According to the Tribunal the entry of “Reprimand” which was of the year 1991 could not and ought not to have been taken into account, more particularly when a clear opinion was expressed by the Law Officer on 30.12.2015. It did not consider the fact that on Indicia Nos.(ii), (iv) and (v) the  
C respondent was definitely found lower than other three officers but relied upon the fact that the overall C.R. Profile was adjudged “Above Average to Outstanding” whereas the lowest empanelled officer was actually graded as “Above Average”. The Tribunal observed:

D “31. We have noticed that over all profile of the empanelled officer is above average whereas the applicant’s over all profile is above average to outstanding. How the applicant’s over all profile has been adjudged to be lower than the last selectee is not comprehensible.

E 32. We thus feel that the Selection Board has not acted fairly and justly after applying mind to the original records and seems to have considered the applicant’s case with pre-disposed mind.”

(R) The Tribunal thus found the analysis and assessment made  
F by No.3 Selection Board to be perverse. While allowing Original Application No.104 of 2017 vide its judgment and order dated 12.09.2017, the Tribunal directed the appellants to constitute a fresh Selection Board and reconsider the case of the respondent in the light of the judgment of the Tribunal. The Tribunal also awarded costs to the respondent which were quantified at Rs.5 lakhs.

(S) The appellants thereafter approached the Armed Forces  
G Tribunal under Section 31 of the Armed Forces Tribunal Act, 2007 seeking leave to appeal to this Court. The application was however rejected on 13.11.2017, whereafter Civil Appeal (Diary) No.40312 of 2017 was preferred by the appellant alongwith an application for leave to appeal.

H 3. Both these appeals being inter-connected and between the same parties, were taken up for hearing together. We heard Mr. Maninder

Singh, learned Additional Solicitor General who appeared for the appellants while Colonel (TS) RS Dudee(Retd.) appeared in-person and made his submissions. A

4. The hierarchy in the Army and the method of selection and promotion was considered by this Court in *Union of India v. Lt. General Rajendra Singh Kadyan*<sup>1</sup> as under: B

“11. The hierarchy in the Army and the method of selection and promotion to various posts starting from the post of Lieutenant and going up to the post of the Chief of the Army Staff will clearly indicate that the posts of Lieutenant, Captain and Major are automatic promotion posts on passing the promotion examination irrespective of inter se merit, whereas the posts from Major to Lt. Colonel, Lt. Colonel to Colonel, Colonel to Brigadier, Brigadier to Major General and Major General to Lt. General are all selection posts filled up by promotion on the basis of relative merit assessed by the designated Selection Boards.....” C D

Since the aforesaid decision, there has been an amendment and as the situation presently stands<sup>2</sup>, all promotions upto the rank of Lt. Colonel are time-bound promotions without involvement of any selection process and it is only for the promotion from the post of Lt. Colonel to Colonel and upwards that Selection Boards are constituted. The composition of relevant Selection Boards in terms of Selection System is as under:- E

#### “Composition of Selection Boards

##### 1. Special Selection Board

(a) Function: To screen officers for promotion from Maj Gen. to Lt. Gen. F

##### (b) Composition:

(i) Chairman - COAS

(ii) Members - Army Cdrs (5) VCOAS G

(iii) Secretary - MS

---

<sup>1</sup> 2000 (6) SCC 698

<sup>2</sup> Ref.: Para 3 of Written Submissions of the appellants H

- A        2. No. 1 Selection Board
- (a) Function: To screen Brig for promotion to the rank of Maj.Gen.
- (b) Composition
- (i) Chairman        - COAS
- B           (ii) Members        - Army Cdrs (5) VCOAS/PSO (1)
- (iii) Secretary    - MS
3. No. 2 Selection Board
- (a) Function: To screen Col. for promotion to the rank of Brig.
- C           (b) Composition
- (i) Chairman        - Army Cdr (1)
- (ii) Members        - Corps Cdr (1)
- Lt. Gen. of Staff
- D                               [Should have commanded a Div.(1)]
- Maj. Gen. (GOC Div) (1)
- Maj. Gen. (Staff) (1)
- (iii)Secretary    - Addl.MS (B)
- (iv)In attendance - Respective Heads of Arm/Services
- E           4. No. 3 Selection Board
- (a) Function: To screen Lt. Cols to the rank of Col.
- (b) Composition
- (i)Chairman        - Corps Cdr or Lt. Gen. who has
- F                               commanded a Corps(1)
- (ii)Members        - Div. Cdr (2), Maj Gens on Staff (2)
- (iii)Secretary    - Dy. MS(B)
- (iv)In Attendance - Respective Heads of Arm/Services.”
- G           5. We are presently concerned with selection from the post of Lt. Colonel to the rank of Colonel and the appropriate Selection Board would therefore be No.3 Selection Board with Officer of the rank of Lt. General as Chairperson, two members of the rank of Major General and two Div. Commanders. On few occasions this Court has considered the cases where the assessment and analysis made by such Selection Boards
- H           were directly put in question. Some of the observations of this Court are

extremely relevant for the present purposes:

A

(a) In *Dalpat Abasaheb Solunke v. B.S. Mahajan*<sup>3</sup> this Court observed:

“.....It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. ....”

B

C

(b) In *Air Vice Marshal S.L. Chhabra, VSM (Retd.) v. Union of India*<sup>4</sup>, this Court observed:

D

“.....No oblique motive has been suggested on behalf of the appellant against any of the members of the Selection Board and there is no reason or occasion for us to infer such motive on the part of the members of the Selection Board for denying the promotion to the appellant with reference to the year 1987. Public interest should be the primary consideration of all Selection Boards, constituted for selecting candidates, for promotion to the higher posts, but it is all the more important in respect of Selection Boards, meant for selecting officers for higher posts in the Indian Air Force. The court cannot encroach over this power, by substituting its own view and opinion.....”

E

F

(c) In *Union of India v. Lt. General Rajendra Singh Kadyan* (Supra), this Court observed:

“.....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

G

<sup>3</sup> 1990 (3) SCC 305

<sup>4</sup> 1993 Supp (4) SCC 441

H

A 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.....”

B

(d) Further, in *Surinder Shukla v. Union of India*<sup>5</sup>, it was observed:

C “11. Considering the comparative batch merit, if the Selection Board did not recommend the name of the appellant for promotion to the rank of Colonel which appears to have been approved by the Chief of Army Staff, it is not for the court exercising power of judicial review to enter into the merit of the decision. The Selection Board was constituted by senior officers presided over by an officer of the rank of Lt. General. It has been contended before us that the Selection Board was not even aware of the identity of the candidates considered by them because only in the member data sheet all the informations of the candidates required to be considered by the Selection Board are stated, but the identity of the officers is not disclosed. The appellant moreover did not allege any mala fide against the members of the Selection Board.....”

D

E 6. The first question that arises is regarding the significance of the expression “consequential benefits” as used in the order dated 20.11.2013. The matter which was directly in issue and under consideration was the correctness and validity of General Court Martial proceedings. While annulling the findings and effect of such General Court Martial proceedings, the idea was to confer those benefits which the officer stood denied directly as a result of pendency of such proceedings. Such benefits would therefore be those which are easily quantifiable namely those in the nature of loss of salary, emoluments and other benefits. But the expression cannot be construed to mean that even promotions which are strictly on the basis of comparative merit and selection must also stand conferred upon the officer. It is true that as a result of pendency of the General Court Martial proceedings the respondent was kept out of service for nearly nine years and as such his

F

G

H <sup>5</sup> (2008) 2 SCC 649

profile would show inadequacy to a certain extent. On the other hand the Department was also denied of proper assessment of the profile of the respondent for those years. The correct approach in the matter is the one which was considered by this Court in *Lt. Col. K. D. Gupta v. Union of India and Others*<sup>6</sup> as under:-

“8. The respondents have maintained that the petitioner has not served in the appropriate grades for the requisite period and has not possessed the necessary experience and training and consequential assessment of ability which are a precondition for promotion. The defence services have their own peculiarities and special requirements. The considerations which apply to other government servants in the matter of promotion cannot as a matter of course be applied to defence personnel of the petitioner’s category and rank. Requisite experience, consequent exposure and appropriate review are indispensable for according promotion and the petitioner, therefore, cannot be given promotions as claimed by him on the basis that his batchmates have earned such promotions. Individual capacity and special qualities on the basis of assessment have to be found but in the case of the petitioner these are not available. We find force in the stand of the respondents and do not accept the petitioner’s contention that he can be granted promotion to the higher ranks as claimed by him by adopting the promotions obtained by his batchmates as the measure.”

7. The opinion of the learned Solicitor General dated 01.11.2013 and the consequential order dated 20.11.2013 must be confined to the question of validity and correctness of the General Court Martial proceedings and the benefits which respondent stood denied purely as a result thereof. The concept that he must be granted those promotions which his batchmates or juniors received and the idea that he must also be considered for promotions which are strictly based on “selection” basis have not been accepted by this Court in *K.D. Gupta* (supra). The Tribunal therefore completely erred in passing the directions in its order dated 17.01.2017. Since the opinion of the Law Officer dated 30.12.2015 was not consistent with the provisions of the relevant rules and the law declared by this Court in *K.D. Gupta* (supra), the Department was justified in expressing serious reservations and in generating note dated

<sup>6</sup> 1989 Suppl (1) SCC 416

A 03.02.2016. The Tribunal, in our considered view, attached undue importance to the opinion of the Law Officer dated 30.12.2015.

8. Be that as it may, the matter was considered on merits by No.3 Selection Board which found the respondent unfit for selection as “Colonel”. The matter was analyzed by the Board on six indicia or parameters. The assessment was cumulative taking into account the grading as against those six parameters. Admittedly, the respondent was lower in terms of indicia Nos.(ii), (iv) and (v) as against all other three officers, which included one who was not empanelled at all. Apart therefrom, the entry of reprimand as against indicia No.(vi) also put the case of the respondent in the negative. At this stage we may consider whether the entry of reprimand of the year 1991 was rightly or wrongly taken into account.

9. In terms of Paragraph 10 (f) of the Selection Policy dated 06.05.1987 which has been placed on record by the appellants, disciplinary award forms part of the overall profile of an Officer. Said provision in fact lays down, “character, qualities, disciplinary background and decorations form an important input to the overall profile of an Officer and due consideration should be given while assessing border line cases.” The action on part of the Selection Board in relying upon the entry of reprimand was thus consistent with Selection Policy and could not be characterized as incorrect or illegal in any manner. In any case that was not the only pointer which weighed with the Selection Board. Even eschewing such entry, the respondent was still found to be lower as against three Officers on other three indicia. It is relevant to note at this juncture that even though one out of those three Officers had fared better than the respondent on those three indicia and also did not have any entry or reprimand, he was not an empanelled Officer. It is precisely for this reason that the law as laid down by this Court is, “whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject.”

10. It is true that overall CR profile of the respondent was better than the last empanelled officer. But the respondent was certainly lower on other three indicia or parameters. It is the cumulative assessment which the Selection Board was expected to and did undertake. Going by the law laid down by this Court, it cannot be said that the assessment of the Selection Board suffered on any count. This case is not where irrelevant factors have been taken into account or relevant factors have

been missed out or eliminated from consideration. The Selection Board comprised of high ranked officials from Indian Army. No malafides have been and could be attributed to the actions on part of the members of the Selection Board. The Tribunal was thus wholly unjustified in finding the assessment made by the Selection Board to be perverse. A

11. Having considered the matter in its entirety, we cannot support the view taken by the Tribunal. According to us, the approach of the Tribunal and the assessment made by it were completely erroneous. The Tribunal was also not justified in awarding costs of Rupees five lakhs to the respondent. B

12. It may be that the respondent was wrongly proceeded against and punished by General Court Martial. He was also awarded sentence of imprisonment and lost out nine years of service. The prejudice is quite apparent. However sympathy cannot outweigh the considerations on merit. He has received time scale promotion to the rank of Colonel after having put in 26 years of regular service. But if he was not found suitable for empanelment by way of selection, the matter must end there. C  
D

13. We therefore allow both the appeals and set aside Judgments and Orders dated 17.01.2017 and 12.09.2017 passed by the Armed Forces Tribunal, Regional Bench, Lucknow.

14. No order as to costs. E