COURT NO. 2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

OA 426/2012
with M.A. No. 50/2013

Lt. Gen Ravi Dastane AVSM,VSM .....**Petitioner**

Versus

Union of India & Ors .....**Respondents**

For petitioner: Mr. R.K.Anand Advocate
For respondents: Mr.A. S. Chandihok ASG with Mr. Ritesh Kumar Adv, Mr. Sidharth Tyagi Adv,Ms. Mallika Ahluwalia Adv, Ms. Shweta Gupta Adv & Ms. Honey Kumari Adv, for Col. R. Balasubramanian,Adv for R-3 &4
Mr. J.S.Yadav Advocate for R-1,R-2 &R-5

ORAM:

HON'BLE MR. JUSTICE SUNIL HALI , MEMBER.
HON'BLE AIR MARSHAL J.N. BURMA, MEMBER.

ORDER
24.05.2013

Arguments heard

Judgment reserved.

(SUNIL HALI)
MEMBER (J)

(AIR MARSHAL J.N. BURMA)
MEMBER(A)

New Delhi
24.05.2013
brh

ARMED FORCES TRIBUNAL: COURT NO.2
PRINCIPAL BENH AT NEW DELHI

OA No.426/12

Lt. Gen. Ravi Dastane AVSM VSM **Petitioner**

Versus

Union of India & Ors **Respondents**

For Petitioner: Mr R.K.Anand & Mr. S.K. Sanan Advocates

For respondents Mr. A.S.Chandihok ASG with Mr. Ritesh Kumar, Mr. Sidharth Tyagi, Ms. Mallika Ahluwalia, Ms. Shweta Gupta & Ms.Honey Kumari Advocates & Mr. J.S. Yadav Advocate for R1,R-2 & R-5,
Col. R. Balasubramanian Advocate for R3 & R4.

CORAM
HON'BLE MR. JUSTICE SUNIL HALI: MEMBER(J)
HON'BLE AIR MARSHAL J.N.BURMA: MEMBER (A)

JUDGMENT
6th September,2013

Per- JUSTICE SUNIL HALI

Whether in the absence of a Nominated Selection Committee or Selection Board as per para 108 of Regulations of Army, the Appointments Committee of the Cabinet is empowered to make both selection and appointment for Army Commander, is the issue involved in the present application. In order to appreciate the controversy involved in this case certain facts are required to be noted as given herein below:

2. The petitioner was granted permanent commission in the Indian Army in the Regiment of Artillery and has risen up to the rank of Lt. General, which

is the post he is holding as on today. Two vacancies for Army Commanders were required to be filled up from amongst the Corps Commanders holding the rank of Lt. General, who satisfy the eligibility criteria laid down by the respondents. The criteria for appointment of Army Commander was issued under the Orders of President of India on 20.10.1986. Following criteria was laid down:

a) The officer should be fit in every respect for appointment.

b) The officer should have a minimum of two years left before the retirement age from the date of appointment as Army Commander/ VCOAS

c) This will be applicable w.e.f. 1.1.1988

d) As a one-time exception, the pay but not the status of an Army Commander will be given to those general officers, presently holding the rank of Lt. General, who are otherwise found fit to hold the appointment but are not selected because of the revision in the criteria.

3. The said criteria was further modified by Government of India instructions on 18.11.1996 by virtue of which the following criteria was added:

(e) The officer should have commanded a corps for at least one year so as to become eligible for appointment as Army Commander/VCOAS. No waiver in this stipulation will be allowed without prior concurrence of the Government.

4. Respondents have circulated a policy letter dated 16.10.1992, para 7(d) of which provides the mechanism for making appointment to the post of Army Commander. For specific reason the policy is reproduced as under:

"7(d) There is a Govt. requirement to suggest two senior eligible officers for each Army Commander's vacancy. It is, therefore, essential that when an Army Commander's vacancy arises, the two senior most officers who are eligible, in terms of the residual service rule, have completed command or are in command of a Corps".

In the back drop of this, selection process was undertaken by the respondents to fill the post of two Army Commanders. On 01.06.2012 post of General Officer Commanding in Chief (GOC-in-C), Western Command and Eastern Command were falling vacant owing to the retirement of the then incumbent namely Lt. Gen. S. Ghosh, PVSM, AVSM, SM ADC and promotion of Lt. Gen. Bikram Singh, PVSM, UYSM, AVSM, SM, VSM,ADC (presently the Chief of the Army Staff). The matter regarding selection of a suitable officer was examined in the light of overall profile and service record of each officer under consideration and the proposal to fill up the above mentioned two appointments of Army Commanders was forwarded to the Chief of the Army Staff and then to the Defence Minister on 22.3.2012. While forwarding the proposal, service records of all the seven Lieutenant Generals, including the petitioner, fulfilling the laid down criteria were forwarded for approval of the competent authority i.e Appointments Committee of Cabinet (ACC). Two senior most Lt. Generals, Lt. General Dalbir Singh, AVSM,VSM and Lt. General Sanjiv Chachra, AVSM, VSM were recommended for appointment as GOC in C of Eastern Command and Western Command respectively.

5. The chief of the Army Staff submitted the complete service profile of seven eligible Lt. Generals, which were forwarded to the Defence Minister on

02.05.2012. The proposal duly recommended by the Chief of the Army Staff was examined by the Defence Minister after ascertaining that there were no administrative / disciplinary / vigilance proceedings pending against any of the seven officers duly certified by the Chief of the Army Staff. The Defence Ministry accordingly recommended two senior most officers, respondent No. 3 & 4 to Appointment Committee of the Cabinet for approval. While the proposal was under consideration of the competent authority, the Ministry of Defence was informed by Army Headquarters on 24.05.2012 that Discipline and Vigilance Ban Type - A effective from 18.05.2012 had been imposed on respondent No3, Lt. General Dalbir Singh Suhag vide Notification No. C/06280/EC/456/B1/965/AG/DV-2 dated 22.05.2012. In view of this communication Appointment Committee of the Cabinet approved the appointment of respondent No4 as Army Commander on 28.05.2012. He was promoted on 01.06.2012 in the acting rank as GOC-in-C, Western Command

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6. The proposal seeking appointment of respondent No3 as GOC in C, Eastern Command was earlier accompanied by a certificate that no administrative / disciplinary / vigilance proceedings were pending or contemplated against the said officer. On the receipt of the communication from the Army Headquarters informing the imposition of DV ban on respondent No3, the Ministry of Defence vide letter dated 25.05.2012 requested Army Headquarters to provide a detailed report along with relevant documents which necessitated the change in the vigilance status of respondent No3. Ministry of Defence accordingly apprised the Cabinet Secretariat on 29.05.2012 of the imposition of DV ban on respondent No.3 with a request

that the proposal for appointment of respondent No3 as the Army Commander be kept on hold pending receipt of inputs from Army Headquarters regarding the facts and circumstances leading to the change in vigilance status of the officer.

7. The Army Headquarters vide its Notification dated 29.05.2012 informed the Defence Ministry that there were certain lapses in the chain of command necessitating administrative action against respondent No.3 by the Chief of the Army Staff. After having imposed the DV ban, a show cause notice was issued to respondent No.3 by the Chief of the Army Staff detailing the said instances of his shortcomings in respect of the incident which had taken place in Assam. The show cause notice was replied to by respondent No3 and the same was considered by the Chief of the Army Staff . After consideration of the reply, DV ban imposed upon the respondent No3 was lifted. The Chief of the Army Staff after examination of the reply and records found that there was no case for administrative action against respondent No.3. After lifting the DV ban, the Appointment Committee of the Cabinet approved the appointment of respondent No3 as Army Commander Eastern Command on 15.06.2012. It is this order which has been questioned by the petitioner.

8. Following contentions have been raised by the petitioner in this application:

a) That in terms of policy of 1992 the names of two senior most eligible officers were required to be suggested for each of the Army Commanders post.- The respondents in the present case have suggested the name of seven senior most Lt. Generals for

appointment to two posts of Army Commanders, which is contrary to the policy laid down.

b) That post of Army Commander being a selection post merit cum seniority principle was to be adopted- The respondents have adopted the policy of seniority cum fitness.

c) That case of all the eligible Lt. Generals were required to be considered by a properly constituted selection committee and accordingly the recommendations had to be made to the appointment committee.- In the present case no selection committee was in existence as such Appointment Committee of the Cabinet which is the competent authority was empowered to hold the selection process by examining the record of all the officers. The cases of the petitioner and other eligible Lt. Generals have never been sent to the Appointment Committee of the Cabinet thereby denying them the right of consideration to the said post.

d) That the whole process of appointment of respondent No.3 was attracted by mala fides, which was clearly reflected in the manner in which the appointment of respondent No3 has been effected. What is contended is that, after the names of respondents No,3 & 4 were sent to Appointment Committee of the Cabinet , the appointment of respondent No3 was withheld on account of a DV ban. It was incumbent upon the respondents to have considered the name of the petitioner, who was next in the queue but instead of doing that they deferred the decision of appointment to the post

of Army Commander till the name of respondent No3 was cleared by the Chief of the Army Staff. This was done with an intention to deny the petitioner the right to be considered.

9. The stand of the respondents is that there was no violation of policy dated 16.10.1992. The expression used in para 7(d) of the said policy contemplates that there was a government requirement to suggest two senior eligible officers for each Army Commander vacancy. This by itself would not debar the government from suggesting the names of more than two officers for the said post for each vacancy. It is not denied even by the petitioner that all the seven officers whose names were recommended for consideration were eligible in terms of the criteria laid down in the year 1986 and modified in the year 1996. Extending the zone of consideration by itself would not defeat the letter and spirit of the policy. The expression used in the policy is that there was a government requirement to suggest two senior officers for each Army Commanders post. That by itself does not create a bar by recommending more than two officers for one vacancy.

10. It is not disputed that the post of Army Commander being a Selection Post, merit cum seniority principle had to be adopted, which is what has been done in the present case. Respondents have appointed respondents No3 & 4 on the basis of merit cum seniority after considering the names of all the eligible persons who were in the zone of consideration.

11. It is further contended that the case of the petitioner was considered by the Chief of the Army Staff and endorsed by the Defence Ministry. It is only after considering the service profile and other aspects as per laid down criteria, the recommendation was made to the Appointments Committee of Cabinet for

granting approval for appointment of respondents No3 & 4. Even though there was no Selection Committee constituted in this behalf, the record of eligible officers were examined and considered by the Chief of the Army Staff which was approved by the Defence Ministry. The contention of the learned counsel for the petitioner that consideration has not been accorded is not factually correct.

12. It is pertinent to mention here that it is nobody's case that there was adverse report against respondents No3 & 4 and as a consequence of which the petitioner would steal a march over them on the basis of merit. All the eligible officers had a good track record which include the petitioner and it is only after considering the same, the respondents No3 & 4 were promoted by virtue of seniority . Lastly it has been contended by the respondents that the appointment of respondent No3 was withheld on account of change in vigilance status of the said officer, in view of the communication addressed by the Chief of the Army Staff on 22.05.2012. Initially, the Chief of the Army staff had observed that there were no administrative/disciplinary/vigilance proceedings against any of the seven officers and thereafter, the matter was referred to Appointments Committee of Cabinet for appointment of respondent No3. It is only during the pendency of the matter before the Appointments Committee of the Cabinet , that a communication was received from the Chief of the Army Staff that DV ban had been imposed on respondent No3. A report was sought by the Ministry of Defence along with the relevant documents which necessitated the change in the vigilance status of respondent No.3. The matter was already pending before the appointment committee when the communication imposing DV ban was communicated to the Ministry of Defence

on 29.05.2012. A request was made that till a reply from the Army Headquarters regarding facts and circumstances leading to the change in the vigilance status of the officer was received , his appointment may be deferred. The show cause notice which was issued by the Chief of the Army Staff to the respondent No3 was replied and the same was put up for consideration before the Chief of the Army Staff who after considering the reply as well as the records, found that there was no material to proceed against respondent No3. As a consequence thereof, the DV ban imposed upon respondent No3 was revoked . Consequently Appointments Committee of the Cabinet was informed about the same and the Ministry of Defence, were pleased to issue the order for appointment of respondents No3. The contention of the learned counsel for the petitioner that once the DV ban was imposed upon the respondent No3, the only consequence which should have followed was to accord consideration of the petitioner for appointing as Army Commander . Since the matter was already pending before the Appointments Committee of Cabinet , it was found appropriate to examine the documents on the basis of which the DV ban had been imposed. Till then no decision could have been taken to consider the appointment of the petitioner. It is wrong on the part of the petitioner to suggest that undue haste was shown in considering the question of lifting the DV ban of respondent No.3.

13. We have heard the learned counsel for the parties.

14. Right to be considered for promotion subject to just exception is recognised by Article 16 of the Constitution which squarely applies to the members of the Armed Forces. Right of promotion by itself is not a fundamental right but in terms of Articles 14 & 16 of the Constitution, each person similarly

situated has a fundamental right to be considered. Determination in this case hinges around as to whether the petitioner has been accorded consideration for the promotion to the post of Army Commander. After scanning through the pleadings of the parties, following questions are called for determination in this application:

a) Whether there is a breach of policy in recommending the names of more than two officers for one vacancy? And if so, whether this strikes at to the very basis of the decision taken by the respondents in appointing respondents No3 & 4;

b) Whether the petitioner had an indefeasible right for being considered for appointment of Army Commander after DV ban was imposed on respondent No3;

c) Whether in the absence of a Selection Committee, the Chief of the Army Staff and the Defence Ministry were competent to make selection or the matter was required to be referred to Appointments Committee of Cabinet for making the selection and appointment of the Army Commander;

d) Whether the post of Army Commander being Selection Post, the policy of merit cum seniority or seniority cum fitness was to be followed.

Issue No.1

15. Respondents No1 & 2 formulated the policy on 16.10.1992 which provided the mechanism for appointment to the post of Army Commander . It

provided that there was a government requirement to suggest two senior most eligible officers for each Army Commander vacancy. What the rule contemplated is, if there was vacancy, names of two senior most Corps Commanders were required to be suggested. In the present case, names of seven officers, who were in the consideration zone were considered for appointment by the Chief of the Army Staff. This according to the petitioner was in violation of the policy as laid down on 16.10.1992. It is contended that the policy provides for recommendation of two names for one vacancy. It also provides that senior most officers be recommended for the said vacancy. The normal course required to be adopted was to follow the policy. However, there has been a deviation in the said policy. Whether such a deviation will be fatal or not is the sole question to be determined by us.

16. The contention of the learned counsel for the petitioner that service record of all the seven senior most Lt. Generals including the applicant fulfilling the laid down criteria were forwarded by the Chief of the Army Staff along with his recommendations to the Ministry of Defence who recommended the names of respondents No3 & 4 for approval by Appointments Committee of Cabinet . It is further contended that two names per post should have been suggested to the Government by the Chief of the Army Staff as was required by the policy. The zone of consideration was arbitrarily extended and finally only one name per post has been recommended in complete violation of merit cum suitability with due regard to seniority. The consequence of this deviation is that while for one post only two officers were required to be considered and the one who was found to be more meritorious and suitable should have been recommended, the same was not done in this case. By extending the zone of

consideration, the petitioner's chance of promotion has been mitigated. Respondents have contended that no prejudice has been caused to the petitioner while extending the zone of consideration. It may be noted that out of seven officers, two were not found to be fulfilling the criteria and the consideration was extended only to five officers. Admittedly, the petitioner was junior to respondents No3 & 4. The decision to appoint respondents No3 & 4 was done on the basis of comparative study of merit of all the officers before the names of the private respondents was recommended for approval of Appointments Committee of the Cabinet. The deviation in the policy by itself did not infringe the right of the petitioner.

17. Reliance is placed by the petitioner on one portion of the policy of 1992 which clearly contemplates that for one post two officers are required to be recommended. The respondents have not placed on record the letters, guidelines, judicial pronouncements which would provide conditions or process for making promotion for the appointment of Army Commanders. Only one para has been quoted from the policy issued by Army headquarters which provides that for one post two officers are to be suggested but the Government orders or policy as such has not been produced . Assuming that there is such guide line or policy, it is to be seen as to whether deviation of any such policy would be fatal or not. As already discussed herein supra, the policy only contemplates that government may suggest two officers for one post. This guide line safeguards the interest of the persons who are within the consideration zone. Since the post of Army Commander is a selection post, merit cum suitability of those who are within the eligible criteria are required to

be considered, so that comparative merit of the officers should be considered for the post of Army Commander.

18. The other aspect of the matter is that all those officers who satisfy the laid down criteria are required to be considered for the Army Commander post which is a selection post. Non consideration of these officers who are within the consideration zone, would deny them the right to be considered which impinges upon their fundamental rights guaranteed by Article 14 & 16 of the Constitution. Merely because the policy contemplated only two persons to be recommended for one post cannot be an impediment for considering the cases of all those officers who fulfil eligibility criteria, as that would be arbitrary and in violation of scheme of the Constitution. What the respondents have done in the present case is that they have extended the zone of consideration which by itself does not impinge upon the right of the petitioner to be considered for the promotion. It is not the case of the petitioner that his service profile has not been taken into consideration. While extending the zone of consideration the petitioner is required to demonstrate before this court that he has been prejudiced in this behalf. There is no pleading nor any factual foundation laid by him in this behalf. In this view of the matter, it can not be said that extending the zone of consideration has caused any prejudice to the petitioner. The contention of the petitioner is accordingly rejected.

Issue No.2

19. The other contention of the learned counsel for the petitioner is that promotion to the Rank of Army Commander was a selection post and for that, selection has to take place on the basis of merit cum suitability with due regard

to seniority. No Selection Committee/Board has been constituted for promotion nor is there any guide line/circular as to how and by whom the selection has to be made. It is not clearly revealed as to who out of three levels, the Chief of the Army Staff, the Ministry of Defence or the Appointment Committee of the Cabinet would be competent to undertake such exercise. In the absence of any Selection Board, in accordance with Para 108 of the Regulations of Army, the only body left for making such selection is the Appointment Committee of the Cabinet . According to the petitioner, in the absence of a nominated Selection Committee, it is the Appointment Committee of the Cabinet which is empowered to examine the record of all the eligible officers before according approval for their appointment. What has been contended is that in the absence of any other independent authority, having been expressly conferred such power of making selection, the matter should be left to the Appointment Committee of the Cabinet to take a decision in this behalf. In the present case, the Ministry of Defence has sent a proposal on two different dates ie on 02.08.2012 and 08.05.2012 in respect of respondents No3 & 4 respectively containing only one name for one post of Army Commander and therefore the procedure of selection of Army Commander was not followed by the respondents in the present case.

20. On the other hand, the stand of the respondents is that it has been a practice that the Chief of the Army Staff, who in terms of para 4 (b) of the Regulations of the Army is responsible to the President, through the Central Government for command, discipline, organisation etc., is the recommendatory authority at the first stage for selection of an Army Commander. The practice and the procedure followed for appointment of Army Commander was

considered by the Hon'ble Supreme Court in **Union of India Vs. Lt. Gen. R. S. Kadyan and another (2006) 6 Supreme Court Cases, 698.** The Hon'ble Supreme Court observed that while considering the nature of rigorous standards adopted in the matter of selection of officers from the stage of Lt. Colonel onwards upto the stage of Lt. General in the usual course is that the senior most officer is selected as Army Commander. But that would not debar the Chief of the Army Staff or the Union of India from making the selection of any other person for good reasons who fulfils the necessary criteria. What is implied is that making selection to the post of Army Commander, the practice which has been followed for a long period of time was that the Chief of the Army Staff made the recommendations after examining the relevant profile of the officers which was submitted to the Ministry Defence for consideration. It is admitted that there is no Selection Committee in place to select the person for the post of Army Commander. The Chief of the Army Staff considered and examined the profile of all the eligible officers leading to the formulation of his recommendations which forms an integral part of the selection process. Thereafter, the consideration has taken place at the level of Central Government ie Government of India, Ministry of Defence, wherein it was considered by the Defence Ministry. The case was then submitted to the Appointment Committee of the Cabinet for approval to be made by the Government. Defence Minister is a member of Appointment Committee of the Cabinet which approves the appointment. The statutory scheme for obtaining the approval of the Appointment Committee of the Cabinet is clear from the Government of India (Transaction of Business) Rules,1961) which is framed under the proviso to Article 309 of the Constitution of India. In terms of Serial

14 to item B of Annexure –I to the First Schedule, the approval of Appointment Committee of the Cabinet is required in the Army for the post of COAS, VCOAS, Army Commanders . The word "approval" is synonymous with the word "ratify". Therefore, as per the Government of India (Transactions of Business) Rules 1961, the Appointment Committee of the Cabinet is the approving authority and it does not perform the role of a selection committee which is in the present case was discharged by the COAS and the Ministry of Defence.

21. The Army Regulations provides for constitution of Selection Committee for the post of Lt. Generals and below. It does not contemplate any Selection Committee for making selection to the post of Army Commanders and above. This fact has not been disputed. As contended by the learned counsel for the respondents, the practice which has been followed over a period is that service profile of all the officers is considered by the Chief of the Army Staff and recommendations are made to the Defence Minister. The record of all the Officers is submitted to the Defence Minister, who after considering the case of all the eligible persons along with service profile, recommends the names for approval to the Appointment Committee of the Cabinet. After the approval is accorded, the appointment orders are issued by the concerned Ministry. In the absence of any Selection Committee, the respondents can adopt a procedure of making selection which must not be arbitrary. Any authority empowered to make a selection must accord consideration to all the eligible candidates by examining their service profile and other inputs . It must inform in its decision making process that the officer should be fit to be appointed. Once the recommendations have been made by a Selection Committee or any authority

empowered to make selection, recommendations for appointment has to be made to the competent authority of the persons who have been selected. The appointing authority may or may not agree with such recommendations and in that eventuality, the matter has to be referred back to the Selection Committee . To say that in the absence of any nominated Selection Committee, no other person is competent to make selection can not be accepted. Moreover, this practice has been followed in the Army over a period of time.

22. In the present case, the Appointment Committee of the Cabinet does not issue the order of appointment but the same is issued by the Ministry of Defence.

23. The question that calls for consideration is as to whether the " approval" require examination of the service profile of all the officers who are in the zone of consideration or it is bound to go by the recommendations made by the Defence Ministry. It is true that the expression " approval" is synonymous with the word "ratifying". The issue before us is whether this ratification can be done without examining the material on the basis of which recommendations have been made. The role of Appointment Committee of the Cabinet is to approve the recommendations made by the Ministry of Defence. It does not have the power to make appointment. Only after the approval is made by the Appointment Committee of the Cabinet, the appointment order is issued by the Ministry of Defence. This, in our opinion would be ratifying the recommendations of the Ministry of Defence, without being privy to the material on the basis of which recommendations have been made.

24. The question that is required to be determined is as to whether the Appointments Committee of Cabinet is required to assume the role of Selection Committee or it is merely to accept the recommendations made by the Ministry of Defence. The policy being followed by the Ministry of Defence in making appointment to the post of Army Commanders does not indicate the parameters as to how the consideration has to be accorded. But the fact remains that it is the Ministry of Defence which makes the selection and the matter is thereafter submitted to the Appointments Committee of the Cabinet for approval.

25. What the Appointments Committee of the Cabinet is required to do is to examine the recommendations made after completion of the selection by the Ministry of Defence. Once it is concluded that the selection process had to be done by the Ministry of Defence, the Appointments Committee of the Cabinet can not undertake the process of reviewing the selection. All that it is required to do is to accept the recommendations or refuse to grant approval. The Selection Committee is empowered to assess the merit of the officers and thereafter, recommendations are made to the competent authority for issuing appointment orders. The competent authority in that eventuality is required to issue the order of appointment. The Selection Committee recommends the name of only those persons whom they find fit to be appointed. It is not necessary for them to submit the list and record of all those persons who have undergone the process of selection. Converse is also true. Once the Selection Committee makes the recommendations, appointing authority may issue appointment orders or refuse the same. In case they refuse to issue the appointment order, the matter is again referred to the Selection Committee.

There is a complete division of power of Selection Committee and the appointing authority. In the present case, Appointments Committee of Cabinet admittedly is not an appointing authority. That by itself does not give it power to assume the role of Selection Committee. It is only to accord its concurrence to the recommendations made by the Selection Committee. The scheme of the rules mentioned herein supra, only provide that approval has to be accorded by the Appointments Committee of Cabinet . Approval is to ratify the decision taken by the Ministry of Defence. So what has been recommended to the Appointments Committee of the Cabinet is the name of two persons who have been selected along with their records. It is not necessary for the selection body to submit the records of all the officers who are within the consideration zone. The body is only required to approve the recommendations. It is for the Selection Committee to assess the service profile of the officers and thereafter make recommendations of all those who are found to be fit to be selected. Apex court in **State Vs. R.C.Anand (2004) 4 SCC 615 at page 620** has observed as under:

> *"11. Ratification is the noun of the verb 'ratify'. It means the act of ratifying, confirmation and sanction. The expression 'ratify' means* ***to approve and accept formally****. It means to conform, by expressing consent, approval or formal sanction. "Approve" means to have or express a favourable opinion of, to accept as satisfactory....." (emphasis added).*

26. The import of the judgment clearly mentions that the word approval is synonymous with the word 'ratify', which means to have or express favourable opinion to the recommendations made. This is not to be interpreted that the

approval has to be accorded without application of mind. Admittedly in the present case what was before the Appointments Committee of the Cabinet , were the recommendations of the Union of India, which is the selection body, which was required to be ratified by it, It was not obligatory on the part of Appointments Committee of Cabinet to seek the record of all those officers who are within the consideration zone. The role of the Appointments Committee of Cabinet was confined only to grant approval and not to review the selection made by the selection body .Any specific complaint if made to the Appointments Committee of Cabinet , it could direct the selecting body to re-consider the matter on that count. Therefore, the contention of the petitioner that since there is no nominated selection committee, the Appointments Committee of Cabinet was empowered to undertake the selection also can not be accepted.

27. The petitioner has placed reliance on the judgment **(2001) 4 Supreme Court Cases 43- Dr. A.K. Doshi. Vs. Union of India.** It was emphasised by the learned counsel for the petitioner that while making recommendations, the selection committee is required to furnish the record of all those candidates who have been considered. While examining the import of the judgment of the apex court it clearly envisages as follows:

> "After the Selection Committee completes the exercise and recommends one or more names for appointment the recommendation along with the materials considered by the Selection Committee should be placed before the Appointments Committee without any further addition or alteration. If in an exceptional case the Appointments Committee feels that certain

material which was not available to be considered by the Selection Committee has come into existence in the meantime, and the material is relevant for the purpose of appointment, then, the matter should be placed before the Appointment Committee with the additional material for its consideration. Such a course, in our view, will be accordance with the scheme of the rules and the purpose of making appointment to the important public office".

28. The import of the judgment does not in any way refer to the fact that all those persons who were in the zone of consideration, their record was also required to be sent. It refers to only those candidates who had been selected by the Selection Committee whose record were required to be sent. The judgment referred to by the learned counsel for the petitioner does not apply to the case of the petitioner.

29. The question which now calls for consideration is as to whether the case of the petitioner has been considered by the selection body. In this behalf, it is necessary to examine the record which has been produced. From the record it appears that for making selection to the post of Army Commanders, an exercise was undertaken by the Chief of the Army Staff by short listing seven Lt. Generals who fulfil the eligibility criteria. While considering the case of the officers, the note –III of the recommendations of the Chief of the Army Staff clearly reflects that the service profile and paramount cards of the seven Lt. Generals were examined by him. Complete service profile of all the seven officers were examined by the Chief of the Army Staff. It includes the exposure of the officer to command, staff assignment, instructional assignments, the

details of which were given in the profile of these officers. It also included the Annual Confidential Report in the rank of Major General and above which are above average to outstanding in case of all the officers. It also provides various gallantry awards given to them and medical category they possess. It was found that all the officers were in shape-I including the petitioner. After consideration of service profile, he recommended the names of respondents No3 & 4 for the appointment as Army Commanders of Eastern Command and Western Command respectively.

30. The recommendations along with service profile of all officers was submitted to the Ministry of Defence. The Ministry of Defence in terms of para 3 of the note examined service profile of all the officers who were in the consideration zone. It is also observed that all the officers fulfil the laid down criteria for appointment of Army Commander. Accordingly, the recommendations of the Chief of the Army Staff and on examination of service profile of all the officers including the petitioner, the names of respondents No3 & 4 were recommended for the post of Army Commanders for approval to the appointment Committee by the Ministry of Defence. From the record itself it is clearly revealed that in both the tyre of selections, the Chief of the Army Staff and Ministry of Defence, the service profile of the petitioner was considered along with other officers. The record further reveals that all inputs have been taken into consideration which includes the Annual Confidential Reports, present posting of the officers , gallantry awards given to all the officers , their medical category exposure to the command and staff assignment and the course undergone by them. It is only after considering the service profile of all the officers, recommendations were made. While making recommendations of

respondents No3 & 4 for approval, the record, service profile of other officers were not sent to the Appointments Committee of the Cabinet . The record of service profile of respondent No 3 & 4 were sent to the Appointment Committee. From the aforementioned discussions, it clearly appears that the case of the petitioner was considered along with other officers. The consideration was based upon the relevant service profile. Every input of the service profile was taken into consideration. Therefore, the petitioner could have no grievance that his case was not considered.

31. It is further contended by the learned counsel for the petitioner that comparative assessment of the merit of the petitioner vis-a-vis respondent No3 was not taken into consideration. What is alleged by the petitioner is that the merit of the petitioner was better than that of the respondent No.3. According to the petitioner , his course profile is vastly superior to respondent No.3. It is contended that respondent No3 has not passed the Staff College Course and his nomination on the Long Defence Management Course was also at a time when officers lower in merit got detailed on the Long Defence Management Course vis a vis the Higher command course which the petitioner has done. He further states that besides passing his own Staff Collage Course, he had been selected on the basis of merit and interview to attend a Foreign Command and Staff Course in Dhaka, Bangladesh. On the other hand the respondent No3 has done three months Executive Officers Course and a mere ten days Peace Keeping Orientation Capsule. They do not have any weightage in the selection system. The petitioner's staff assignments have been in the operational field as against much lower scaled appointments held by the respondent No3. He has also alleged that he has done one additional command assignment in rank of a

Maj General with a total command experience of 99 months to that of 81 months in respect of respondent No3.

32. The contention of the petitioner could be judged only on the premises if respondents had provided for giving weightage to various aspects. As a matter of fact nothing is before this court to suggest that any criteria has been laid down for granting weightage to one aspect over the other. In the absence of any such policy or rule in existence, this court cannot conclude that one aspect rather than the other is required to be given greater weightage while assessing the merit of the officers. If any such rule or policy was in existence, then limited role of the court was to find out as to whether the policy or rule has been complied with. In the absence of any such rule or policy, this court cannot draw conclusion on its own that a person who has undergone a particular selection course is to get the weightage over the person who had not undergone the same. In such a situation the matter is left to the wisdom of the selection body to judge the comparative merit of the candidates.

33. From the records it is clearly borne out that the Chief of the Army Staff duly examined the over all profile of seven Lt. Generals including the petitioner before recommending the names of respondents No3 & 4 for appointment of Army Commander. The case was individually examined by the Ministry of Defence along with service profile of eligible officers. The question that calls for consideration is as to whether the respondents have examined comparative merit of the petitioner and respondent No3 and given due weightage to the overall service profile of the petitioner. This is an issue which is required to be judged by the Selection Committee. It is trite that critical analysis or appraisal of the records by the court may neither be conducive to the interests of the

officers concerned, nor for the morale for the entire force. May be 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 the court can not substitute it own judgment on that. It is a well settled principle of administrative law that relevant consideration should have been taken note of and irrelevant aspects eschewed from consideration. No relevant aspects should have been ignored and the administrative decisions should have nexus with the facts on record. Once that is done, the same can not be attacked on merit. 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. So it is the over all assessment of the Selection body to assess and evaluate the comparative study of the merit and this assessment can not be subject to the judicial scrutiny. All that is required to be seen by the court is as to whether the decision making process has been fair or not. It is also important to examine that the comparative study of the merit is dependent upon many factors. So far as the Armed Forces were concerned, number of factors are required to be taken into consideration.

(i) Annual confidential reports profile of the officer in the relevant ranks.

(ii) War reports

(iii) Battle awards and honours earned by the officer during his service.

(iv) Professional courses done by the officer, his performance during the course and grading obtained therein.

(v) Special achievements and weaknesses

(vi) Appointments held by the officer including criteria command/staff appointments.

(vii) Disciplinary background and punishments.

(viii) Employability and potential including consistent recommendations for promotion to the next higher rank.

34. Based on the above considerations and all the relevant factors, the necessary recommendations are made. It is not for the courts to enter into the merit of the decision. In **Union of India Vs. Lt. Gen. Rajendra Singh Kadyan reported in SCC Page 715 para 29** the following observations have been made:

> *"29..... 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".*

In view of the above, we do not find any merit in the contention that the comparative merit has not been properly assessed by the respondents.

35. The third contention raised by the learned counsel for the petitioner is that he had an indefeasible right to have been considered for promotion after the DV ban was imposed upon the respondent No3. It is contended by the

learned counsel for the petitioner that after the DV ban was imposed on the respondent No3, the next option available to the respondents was to recommend the name of the petitioner. In order to examine this issue, certain facts are necessary to be examined. It is submitted that the show cause notice dated 19.05.2012 served by the then Chief of the Army Staff on respondent No3 invited attention to certain lapses on his part based on the proceedings of the court of inquiry which was convened by the Headquarters Eastern Command to investigate the circumstances under which 3 Corps intelligence and Surveillance Unit had conducted an operation at Jorhat on the night of 20/21.12.2011. On examination of the court of inquiry, it was found that the respondent No3 had not been examined as a witness in the said court of inquiry nor had the then Chief of the Army Staff in his earlier direction dated 23.04.2012 ordered initiation of any administrative/disciplinary action against respondent No3. Admittedly on that date no lapse was found on the part of the respondent No3. However, it appears from the issuance of the show cause notice that on the basis of the proceedings of the same court of inquiry concluded earlier an administrative/disciplinary action was proposed against respondent No.3. The DV ban was imposed by Army Headquarters after issuance of show cause notice to respondent No3. Detailed reply was filed by the respondent No3 on 31.05.2012 . On 07.06.2012, the Chief of the Army Staff considered the show cause notice and DV ban imposed on respondent No3 was found to be without merit. As such the case was ordered to be closed after due examination of the entire material on record by the Chief of the Army Staff.

36. The cases of the respondents No3 & 4 were already under consideration of the Appointments Committee of Cabinet , when it was informed that DV ban type-A has been imposed on the respondent No3 w.e.f. 18.05.2012, as a result of which the appointment of respondent No3 was deferred . The Ministry of Defence vide letter dated 25.08.2012 requested the Army Headquarters to provide a detailed report along with the relevant documents, which necessitated the change in the vigilance status of respondent No.3. The appointment of respondent No3 was deferred pending reply from Army Headquarters regarding the facts and circumstances leading in the change in the vigilance status of respondent No.3.

37. The contention of the learned counsel for the petitioner is that once the DV ban is imposed, necessary implication was that his case for appointment should have been considered. He has also pleaded that the respondent No2 wanted to help respondent No3 as a result of which utmost haste was shown in disposing of the DV ban proceedings initiated against respondent No3. What is contended is that it had never happened in the history of Armed Forces that matters were disposed of in such a haste. The only conclusion which can be drawn is that extra ordinary interest was shown by the respondent No2 in this behalf so as to ensure the exclusion of the petitioner for being considered for the post of Army Commander.

38. The first omission committed by the petitioner in this behalf is that he has not impleaded respondent No2 by name. As such while levelling these allegations against respondent No2, he would not be in a position to answer the same. Since imputation is against the Chief of the Army Staff, as such it is necessary in law to have impleaded him by name as a party which has not

been done. Necessary ingredients of proving the allegations of mala fide are not reflected in the pleadings. What is alleged by the petitioner is that DV ban proceedings initiated against respondent No3 have been disposed of in utmost haste with an intention to deny the petitioner his right of being appointed as the Army Commander . It is trite that burden is on the applicant to prove mala fide which in law is heavy on the person making the allegations. What is required to be shown is that the dominant purpose was to achieve a collateral purpose and not the one for which the decision has been taken. Petitioner shall hve to show animus of the respondent No2 against him. Mala fide can not be based on surmises or conjectures or insinuations. Presumption is in favour of bona fides of the order unless contradicted by acceptable material .

39. The pleadings are absolutely absent on this count. The only contention of the learned counsel for the petitioner is that utmost haste has been shown in disposing of the DV ban proceedings initiated against the respondent No3 so as to exclude the petitioner for being accorded consideration for appointment . The facts reveal that the matter was under consideration before the Appointment Committee of the Cabinet for making appointment of respondents No3 & 4. This was not a case which was at the stage of selection process. Selection process had been concluded and recommendations were made by the Ministry of Defence to the Appointment Committee. It is important to observe at this stage that at the time of selection of the respondent No3 the then Chief of the Army Staff had observed that there were no administrative or vigilance proceedings pending against respondent No3. It may be observed that while ordering court of inquiry on 23.04.2012 no suggestion was made nor any direction was passed ordering administrative inquiry against the respondent

No3. The decision was taken by the Chief of the Army Staff on 18.05.2012 not on the basis of any fresh material but on the basis of earlier material based on which he had ordered initiation of proceedings against other officers and not against respondent No3. After having recommended the name of respondent No3, the order of the Army Headquarters was received by the Ministry of Defence indicating that DV ban-I has been imposed upon the respondent No.3. Immediately after the receipt of the report from the Chief of the Army Staff, promotion of respondent No3 was deferred. One fails to appreciate the contention of the learned counsel for the petitioner that once the DV ban was imposed upon the respondent No3, he should have been recommended for appointment which cannot be accepted for the following reasons:

a) that decision was taken by the Chief of the Army Staff on 23.04.2012 recommending action against some officers of the Eastern Command without recommending any action to be taken against the respondent No3;

b) that the Chief of the Army Staff on the basis of same records available with him on 23.04.2012 decided to proceed against the respondent No.3 on 18.05.2012.

40. A close scrutiny of the two events shows that the then Chief of the Army Staff did not find anything prima facie against the respondent No3 at an earlier stage. How and on what basis he had changed his mind on 18.05.2012 is not forth coming . This creates doubt in the mind of this court more particularly, when recommendations had reached to the Appointment Committee of the

Cabinet. The petitioner wants to take benefit of this action on the part of the Chief of the Army Staff and stake his claim for consideration to the appointment of Army Commander after the DV ban was imposed upon the respondent No3. Since some doubt had been raised on account of the DV ban imposed by the Chief of the Army Staff, it was found necessary to examine the record which necessitated imposition of DV ban upon the respondent No3. Respondents No1 & 2 were within their right to defer the appointment for the post of Army Commander Eastern Command till the matter was examined. The petitioner could not claim any right to be appointed to the said post immediately after DV ban was imposed on respondent No3 in view of the matter being still under consideration with the respondents No1 &2.

41. The other contention raised by the learned counsel for the petitioner is that undue haste has been shown in disposing of the case of the respondent No3. Here was a matter where recommendations of an officer to the post of Army Commander had been approved by the Selection Committee and referred to the Appointment Committee of the Cabinet . The question was deferred on account of the DV ban imposed by the then Chief of the Army Staff. The matter was required to be disposed off immediately. We say so because the post of Army Commander could not have been kept vacant looking to the security environment.

42. The Chief of the Army Staff had earlier recommended the name of respondent No3 by recording that no administrative or vigilance inquiry was pending against him which opinion was changed by him by ordering an administrative action while the matter was pending before the Appointment Committee of the Cabinet. It was natural for respondents No1 & 2 to entertain

the doubts regarding the manner in which the whole matter was pursued by the erstwhile Chief of the Army Staff. Therefore, it was necessary for the respondents to have taken a decision in this behalf immediately after examining the record submitted by the Army Headquarters regarding imposition of DV ban upon the respondent No3.. It is pertinent to mention here that the removal of DV ban against respondent No3 is not the subject matter of challenge before this court. It is also important to mention here that principle of DV ban could be invoked at a time when selection process was on . At that stage it could be said that case of the respondent No3 could not be considered in view of the DV ban which is not the case here. The matter was at the level of approval by the Appointment Committee of the Cabinet.. Apex court in **E.P.Royappa's case (1974) 4 SCC 3** has observed as under:

> *"Secondly, we must not overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The Court would therefore, be slow to dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other, not because of any special status., but because otherwise, functioning effectively would become difficult in a democracy" (emphasis added)*

43. Therefore, the petitioner can not claim that he had an indefeasible right to be appointed as Army Commander after the DV ban was imposed upon the

respondent No3. We do not find any merit in the submission made by the learned counsel for the petitioner.

44. The last contention raised by the learned counsel for the petitioner is that respondents have not applied principle of merit cum seniority but seniority cum fitness. The argument is factually misconceived. It is admitted case of the respondents that all the eligible officers were considered before the recommendations of respondents No3 & 4 were made. This by itself is sufficient to indicate that the principle of merit cum suitability was applied. Since the merit of all the officers were found to be at par, therefore, the principle of seniority was to be followed. This is what has been done in the present case. Petitioner admittedly is junior to respondents No3 & 4. Since his merit was found at par with respondents No3 & 4, the appointment was required to be made on the basis of seniority , which is what has been done in the present case. Therefore, this contention of the learned counsel for the petitioner is factually not correct.

45. The respondents have raised preliminary objection that the present petition is not maintainable as the petitioner has alternative remedy of filing his statutory appeal before the respondents No1 & 2. We are not inclined to delve on this issue as the case is decided on merits. Learned counsel for the petitioner has stated that filing a statutory appeal before the respondents No1 & 2 is not efficacious as it is the order of respondents No1 & 2 which is subject matter of challenge. They cannot become judge of their own cause. Be as it may, the issue is left open.

46. Before parting with the judgment, it is important to observe the observations made by the apex court in **2000 (6) Supreme Court Cases 698, Union of India Vs. Lt. Gen. Rajendra Singh Kadyan** as under:

> *" We need to observe that considering the nature of the sensitivity of the posts involved and that each of the officer's feeling that he did not get the best deal at the hands of the Government or that the members of the force being aware who is the best is not heading them will certainly weaken the esteem and morale of the force. Therefore, the standards to be adopted and applied should be of the highest order so as to avoid such an impression in the force".*

47. The observation clearly indicates that important policy directions of the Government or the Ministry of Defence must not only be available with the concerned agencies but disseminated to all concerned to avoid the apprehension expressed by the Hon'ble Supreme Court as quoted above. What has been emphasised by the apex court is that Ministry of Defence must disclose the parameters which are hassle free for selecting the Army Commander and above. We hope that the Ministry of Defence will come out with such a policy in future.

48. In view of the above, we do not find any force in the petition. The petition is dismissed. No order as to costs. Record of the case has been handed over to Col. N.K.Ohri (MS Legal) branch, today in the court.

(JUSTICE SUNIL HALI)
Judicial Member

(AIR MARSHAL J.N.BURMA)
Administrative Member

New Delhi
6th September,2013
brh