

*** THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**
AND
THE HON'BLE SRI JUSTICE N.TUKARAMJI
+ WRIT APPEAL No.423 OF 2021

% Date: 04-04-2023

Union of India, rep by Secretary, Defence Production,
Ministry of Defence, New Delhi and others
... Appellants

v.

\$ Brigadier Vikram Ahooja
... Respondent

! Counsel for the appellants : Mr. R.Sankaranarayanan,
learned Additional Solicitor General of India
Mr. Gadi Praveen Kumar,
learned Deputy Solicitor General of India

^ Counsel for respondent : Mr. B. Adinarayana Rao,
learned Senior Counsel for Mr. T.Srinivas,
learned counsel

< GIST:

➤ HEAD NOTE:

? CASES REFERRED:

1. (2018) 7 SCC 303
2. (1991) 4 SCC 109 : AIR 1991 SC 2010
3. (2017) 3 SCC 740
4. (2014) 7 SCC 303
5. (1999) 7 SCC 207
6. (2010) 4 SCC 290
7. (2011) 7 SCC 789
8. (2022) 6 SCC 105

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN
AND
THE HON'BLE SRI JUSTICE N.TUKARAMJI

WRIT APPEAL No.423 OF 2021

JUDGMENT: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. R.Sankaranarayanan, learned Additional Solicitor General of India (Southern Zone) and Mr. Gadi Praveen Kumar, learned Deputy Solicitor General of India for the appellants; and Mr. B.Adinarayana Rao, learned Senior Counsel for Mr. T.Srinivas, learned counsel representing the respondent.

2. This intra-court appeal under clause 15 of the Letters Patent has been preferred by Union of India and others against the judgment and order dated 14.06.2021 passed by the learned Single Judge allowing writ petition No.16914 of 2019 filed by the respondent as the writ petitioner.

2.1. Core issue raised in the writ petition and carried forward in the present appeal relates to claim of the respondent for promotion from the post of Brigadier to the post of Major General in the Directorate General of Quality Assurance.

3. Respondent had filed the related writ petition seeking a direction to the appellants who were respondents in the writ petition to conduct review Quality Assurance Selection Board for considering the candidature of the respondent for promotion to the rank of Major General with effect from 01.12.2018 and accordingly to revise his pay scale and to grant him all consequential benefits.

3.1. Case projected by the respondent before the learned Single Judge was that he was initially appointed as Second Lieutenant in the Indian Army. It may be mentioned that respondent is an Engineering Graduate in Electronics. After several stages of promotions, respondent was inducted into the establishment of Directorate General of Quality Assurance which is also under the Ministry of Defence, Government of India. Though initially posted at Bangalore, respondent thereafter worked in several stations in the country. He was posted as Colonel in the Office of Senior Quality Assurance Establishment (Electronics), Secunderabad in January, 2009. In the month of September, 2009 he was promoted to the rank of Brigadier

and posted as Controller in the Quality Assurance Systems, Secunderabad. According to the respondent, Directorate General of Quality Assurance has three separate units in Secunderabad; each unit is headed by an officer of the rank of Brigadier, who is rotated normally at intervals of three to five years. Respondent had stated that he worked in the Directorate General of Quality Assurance for twenty years with unblemished and outstanding track record. He was also given additional charge as Additional Director General, Quality Assurance (R&S), Secunderabad with effect from 01.07.2018. Respondent became eligible for promotion to the rank of Major General against anticipated vacancy as on 01.12.2018.

3.2. Quality Assurance Selection Board was convened on 01.05.2018 to consider cases of eligible Brigadiers for promotion to the rank of Major General. The said Quality Assurance Selection Board was convened for considering five vacancies in the rank of Major General (two regular vacancies and three anticipated vacancies) as on 01.12.2018.

3.3. Respondent had stated that five officers in the rank of Brigadiers became eligible for promotion to the rank of Major General. He was the fifth person in the consideration zone as per order of seniority. However, Quality Assurance Selection Board considered only four officers for promotion excluding the respondent. According to the respondent, there was no valid reason for the Quality Assurance Selection Board to exclude him. On the day when the Quality Assurance Selection Board held its meeting on 01.05.2018, no vigilance enquiry was pending against the respondent. No decision was also taken by the disciplinary authority that a departmental proceeding would be initiated against the respondent.

3.4. Respondent obtained minutes of the meeting of the Quality Assurance Selection Board dated 01.05.2018 under the Right to Information Act, 2005. Minutes recorded that in respect of the respondent, vigilance clearance was denied by the Adjutant General (Discipline and Vigilance) i.e., ADG (DV). Quality Assurance Selection Board was informed that orders were obtained from the competent authority i.e. Rajya Raksha Mantri to initiate *de novo* fact

finding inquiry against the respondent. Matter was referred to the Department of Personnel and Training (DoPT) for advice. In the circumstances, Quality Assurance Selection Board decided that one vacancy should be kept unfilled and that the matter would be reconsidered after receipt of advice from DoPT and vigilance clearance.

3.5. Aggrieved by the same, respondent filed the related writ petition seeking the following relief:

... to call for the records pertaining to selection proceedings of QASB(2) 2018, including the Vigilance Clearance denied by the second respondent and the approval given by Hon'ble RRM to initiate *de novo* FFI against the petitioner, for promotion to the rank of Major General and declare the action on the part of the respondents in ignoring the candidature of the petitioner in such selection as illegal, arbitrary, besides violative of principles of natural justice and consequently direct the respondents to conduct review QASB (DPC) for considering the candidature of petitioner for promotion to the rank of Major General and to promote the petitioner to the rank of Major General with retrospective effect i.e., 01.12.2018 and accordingly revise his scale, pay and other benefits and pay him all other consequential benefits.

3.6. It was contended by the respondent that as on the date of meeting of the Quality Assurance Selection Board,

no fact finding inquiry or departmental proceeding was initiated or pending against him. Though respondent had filed representation in January, 2019 and April, 2019 for furnishing him a copy of order of the Rajya Raksha Mantri directing initiation of *de novo* fact finding inquiry against the respondent, the same was not furnished to him. Respondent contended that it was a fit case for holding review Quality Assurance Selection Board meeting to rectify the mistake committed earlier by overlooking the case of the respondent. Reliance was placed on office memoranda dated 14.09.1992 and 25.10.2004 of DoPT. Procedure adopted by the Quality Assurance Selection Board was totally against the guidelines framed by DoPT. Quality Assurance Selection Board had arbitrarily ignored the case of the respondent for promotion. Insofar DV ban is concerned, it is stated that the same is imposed only when the disciplinary authority comes to a conclusion that *prima facie* case is made out against an officer. Admittedly, there was no case against the respondent at any point of time, rather respondent has been graded exceptionally well for the last several years and insofar integrity of the

respondent is concerned, it has been remarked 'beyond doubt'. Thus performance of the respondent has always been outstanding. Notwithstanding the same, respondent was arbitrarily overlooked while considering promotion from Brigadier to Major General.

4. Appellants who were arrayed as respondents in the writ proceedings had filed counter affidavit. It was stated that Ministry of Defence comprises of the following departments with each department being headed by an officer of the rank of Secretary to the Government of India:

- (1) Department of Defence;
- (2) Department of Defence Production;
- (3) Department of Defence Research; and
- (4) Department of Ex-servicemen Welfare.

4.1. Directorate General of Quality Assurance is an inter-service organization under the technical and administrative control of the Department of Defence Production responsible for carrying out quality assurance of all defence stores and equipments used by the defence forces. Directorate General of Quality Assurance comprises of both civilian officers and service officers drawn from the army.

Service officers are taken on tenure and granted permanent secondment. Permanent secondment is nothing but absorption.

4.2. Directorate General of Quality Assurance (DGQA) is governed by rules and provisions of the Department of Defence Production, Ministry of Defence as well as by the Army Act, 1950 and the Army Rules, 1954. Procedure for intake of service officers on tenure in DGQA and terms of service in respect of service officers permanently seconded in DGQA are governed by letter dated 28.10.1978 of Government of India, Ministry of Defence as amended from time to time. In terms of paragraph 3(1) of the letter dated 28.10.1978, as amended, Ministry of Defence, Department of Defence Production is the controlling authority insofar matters pertaining to promotion and permanent retention of service officers in DGQA is concerned. The controlling authority which is advised by the Quality Assurance Selection Board is formed with the following composition:

Secretary, Defence Production & Supplies : Chairman
Additional Secretary (Defence Supplies) : Member
Joint Secretary (Dealing with DGQA work) : Member

Director General, Quality Assurance : Member
Under Secretary/Deputy Secretary : Secretary
(Dealing with DGQA work)

4.3. That apart, as and when necessary, representative of the Army Headquarters, MS Branch, preferably of the rank of Brigadier is co-opted.

4.4. In accordance with the letter dated 28.10.1978, selection for promotion to acting rank of Lieutenant Colonel/equivalent and above from amongst permanently retained officers is made by the Quality Assurance Selection Board depending upon vacancies and according to rules of eligibility. The following aspects are taken into account by the Quality Assurance Selection Board while assessing suitability of the service officers for grant of promotion to the acting rank of Major General of the permanently seconded service officers:

- (a) Availability of vacancy;
- (b) Minimum service of 20 years as Commissioned Officer;
- (c) Benchmark of 'very good' in all the five preceding Annual Confidential Reports (ACRs);
- (d) Medical category as indicated in Government of India, Ministry of Defence, Department of

Defence Production office memorandum dated 31.05.1980;

(e) Vigilance clearance from ADG (DV) Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army) as permanently seconded service officers are governed by provisions of the Army Act, 1950 for discipline and vigilance purpose.

4.5. Prior to convening the meeting of the Quality Assurance Selection Board on 01.05.2018 wherein promotion to the acting rank of Major General for five vacancies of the year 2018 was taken up, all requisite information, such as, Annual Confidential Reports (ACRs), medical status, vigilance clearance etc., in respect of officers falling within the zone of consideration were sought for from the concerned authorities. Army officers with DGQA being under the Army Act, 1950 for discipline and vigilance purpose, discipline and vigilance clearance (DV clearance) was sought for from ADG (DV) Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army). DV clearance which is an important and mandatory requirement before an officer can be considered for promotion by the Quality Assurance Selection Board

was not accorded to the respondent as intimated vide ADG (DV) Note dated 08.02.2018.

4.6. In the meeting of Quality Assurance Selection Board held on 01.05.2018, it was decided that one vacancy should be kept unfilled and the matter be referred to DoPT for advice and to be re-considered after receipt of advice from DoPT and vigilance clearance.

4.7. Advice of DoPT was forwarded to ADG (DV) on 17.09.2018. However, vigilance clearance to the respondent has not been accorded till date by the Integrated Headquarters, Ministry of Defence (Army) as there is a case of Major Financial Accounting Irregularities (MFAI) in respect of DGQA Community Hall at Secunderabad which also involves the respondent.

4.8. A fact finding inquiry was convened in accordance with the directions of Rajya Raksha Mantri to inquire into the Major Financial Accounting Irregularities in respect of revenue generated from DGQA Community Hall at Secunderabad while the respondent was the Controller at Secunderabad from 18.09.2009 to 20.12.2013 in his

capacity as head of the establishment and patron/ex-officio chairman of the executive committee of the community hall. Objective of the fact finding inquiry was to specifically pinpoint culpability of the officers in the said irregularities. In accordance with the directions of General Officer Commanding-in-Chief, respondent was attached to HQ 54 Infantry Division. Be that as it may, appellants admitted that name of the respondent was within the zone of consideration for promotion to the rank of Major General and was accordingly considered by the Quality Assurance Selection Board in 2018.

4.9. Vigilance clearance to the respondent has not been accorded till date by the Army Headquarters as the case of Major Financial Accounting Irregularities is in progress against the respondent. It is stated that army personnel temporarily or permanently seconded for duty to civil departments like DGQA would continue to be governed by provisions of the Army Act, 1950. On commission of an offence, such personnel would be tried by the army authorities. Army officers with DGQA are under Army Act for discipline and vigilance purpose and therefore,

Discipline and Vigilance Clearance (DV clearance) is sought for from ADG (DV). DV clearance which is an important and mandatory requirement before an officer can be considered for promotion by Quality Assurance Selection Board was not accorded to the respondent, in fact till date. It was asserted that no officer junior to the respondent was granted promotion to the rank of Major General. Therefore, no injustice was caused to the respondent.

4.10. Case of the respondent would be considered afresh along with other eligible officers by the Quality Assurance Selection Board in its forthcoming meeting taking into account all relevant aspects.

5. Respondent filed reply affidavit reiterating the contentions made in the writ affidavit. Respondent referred to letter dated 20.04.2010 of the Additional Director General (Directorate of Vigilance), Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army) which lays down the procedure for vigilance clearance in respect of service officers of the army and the procedure for vigilance clearance of permanently seconded

service officers of Directorate General of Quality Assurance. According to the respondent, it is only on imposition of Discipline and Vigilance (DV) ban, status of the service officer is frozen with respect to promotion, whereafter sealed cover procedure is required to be followed. There is no procedure overlooking a candidate's consideration for promotion before imposition of DV ban. Respondent has denied committing any Major Financial Accounting Irregularity in respect of the community hall at Secunderabad. It is stated that Major Financial Accounting Irregularities were raised by the audit authorities in respect of the establishment and not against any individual.

5.1. Insofar *de novo* fact finding inquiry is concerned, the same had not even been convened on the date of meeting of the Quality Assurance Selection Board. The same, therefore, could not have had any bearing on the selection proceedings. In fact, presiding officer of the *de novo* fact finding inquiry had faxed a letter dated 09.10.2018 to the respondent asking for his statement on the functioning of the community hall at Secunderabad. Respondent had also contended that stand taken by the appellants that they had

not received any response from the ADG (DV) regarding vigilance clearance is wholly untenable in as much as in terms of DoPT letter dated 14.12.2007 in case no response is received from the cadre controlling authority within a period of three months, it would be presumed that there is nothing adverse against the officer. Respondent further stated that the first fact finding inquiry was cancelled by the Rajya Raksha Mantri for violation of Rule 180 of the Army Rules with further direction to conduct *de novo* fact finding inquiry. *De novo* fact finding inquiry was convened on 23.05.2018, whereas Quality Assurance Selection Board was convened earlier on 01.05.2018.

5.2. According to the respondent, after 08.02.2018 the date when ADG (DV) had not accorded vigilance clearance to the respondent, cadre controlling authority had written three ACRs or Annual Performance Appraisal Reports (APARs) of the respondent; in each of the ACRs (or APARs) respondent's integrity was declared as 'beyond doubt' and he was declared as an asset to the Directorate General of Quality Assurance with grades of 9/10 and 9.5/10.

5.3. Respondent has asserted that as on 01.05.2018, no enquiry was pending or initiated against him. There was no DV ban against the respondent. Therefore, Quality Assurance Selection Board could not have ignored the candidature of the respondent. Every candidate before the Quality Assurance Selection Board is either fit or unfit for promotion or in the event there is an inquiry post charge sheet stage, then proceedings of the Quality Assurance Selection Board *qua* such a candidate is kept in sealed cover.

5.4. Though appellants had contended that DoPT office memorandum dated 14.09.1992 is not applicable to permanently seconded service officers of DGQA, nonetheless according to the appellants they themselves had sought advice from DoPT.

5.5. Learned Senior Counsel for the respondent had argued before the learned Single Judge that the first fact finding inquiry was initiated way back on 20.05.2016. This inquiry was not confined only against the respondent but also covered several officers. Fact finding inquiry is just like

a preliminary inquiry. But even that was found to be vitiated by several anomalies and deficiencies. Rajya Raksha Mantri had come to the conclusion that findings recorded by such fact finding inquiry could not be relied upon for violation of the principles of natural justice. He, therefore, ordered for *de novo* fact finding inquiry but the same was yet to commence. As on date, neither was there any inquiry against the respondent nor was the respondent placed under suspension. There was no DV ban against the respondent as admittedly no charge sheet was issued against the respondent. Therefore, withholding of vigilance clearance was arbitrary and wholly unjustified.

6. Learned Additional Solicitor General for the appellants had contended before the learned Single Judge that in view of the *de novo* fact finding inquiry ordered by the Rajya Raksha Mantri, appellants had rightly declined to issue vigilance clearance to the respondent. In the absence of vigilance clearance, case of the respondent could not have been considered for promotion.

7. After considering the rival pleadings and arguments of learned counsel for the parties, learned Single Judge allowed the writ petition vide the judgment and order dated 14.06.2021 by holding as follows:

15. This Court, having considered the rival submissions made by learned counsel appearing for both the parties, is of the considered view that though the Fact Finding Inquiry was pending against the petitioner since the year 2016, the respondents have not chosen to impose DV Ban on the petitioner. DV Ban was imposed only on 12.12.2019. Admittedly, as on the date of consideration of the case of the petitioner for promotion to the post of Major General by the QASB i.e., as on 01.05.2018, no disciplinary proceedings were pending against the petitioner nor he was issued any charge sheet. Therefore, the action of the respondents in not considering the case of the petitioner for promotion to the post of Major General and also not giving vigilance clearance by respondent No.4, even though no disciplinary proceedings or charge sheet is pending against him as on the date of consideration of his case for promotion, is an arbitrary action.

16. In view of the aforesaid discussion, the writ petition is allowed. The respondents are directed to consider the case of the petitioner for promotion to the post of Major General, as admittedly as on the date of consideration of his case for promotion, neither any disciplinary proceedings were pending nor any charge sheet was issued against him and the so called DV Ban dated 12.12.2019 was imposed after nearly

more than one and half years from the date of actual consideration of his case by the QASB. It is needless to say that as per the Policy of DV Ban, if subsequent proceedings are likely to be initiated against the petitioner, it is always open for the respondents to initiate the disciplinary proceedings against him even in his promoted category of Major General. If the allegations levelled against the petitioner are proved in any enquiry, it is always open for the respondents to impose any stringent punishment against him in accordance with the Rules.

7.1. Thus according to the learned Single Judge, as on the date of consideration of the case of the respondent, there was no disciplinary proceeding pending. Therefore, withholding of vigilance clearance and consequently not considering the case of the respondent for promotion is arbitrary. Accordingly, appellants have been directed to consider the case of the respondent for promotion to the post of Major General though it was clarified that if subsequently proceedings are initiated against the respondent, it would be open to the appellants to take action in accordance with law.

8. Hence the appeal.

8.1. A Division Bench of this Court vide the order dated 25.03.2022 had directed the Central Government to file a detailed affidavit clarifying amongst others as to whether respondent on his secondment to DGQA had become an employee of DGQA or not; whether employees of DGQA are amenable to the jurisdiction of Central Administrative Tribunal or not; etc.

8.2. In response thereto, appellants had filed an additional affidavit on 21.04.2022 stating that respondent is a permanently seconded service officer of DGQA. However, permanently seconded service officers of DGQA cannot avail or invoke the jurisdiction of Central Administrative Tribunal for redressal of grievances pertaining to their service matters. The affidavit stated that service matters of such officers which are controlled by the Ministry of Defence have to be adjudicated through the High Court. Nonetheless it was also contended that the proper forum for adjudication of the present case would be the competent Armed Forces Tribunal.

8.3. In the proceedings held on 24.11.2022, learned Senior Counsel for the respondent had submitted that proceeding against the respondent before the General Court Martial was dropped on 19.08.2022 on account of being barred by limitation. In view of such submission, respondent was directed to file an affidavit in this regard. Meanwhile, liberty was granted to the appellants to take a decision on the verdict of the General Court Martial.

9. It was thereafter that respondent filed an affidavit on 01.12.2022. It is stated therein that while Quality Assurance Selection Board held its meeting on 01.05.2018, *de novo* fact finding inquiry was convened on 23.05.2018 which, therefore, could not have had any bearing on the proceedings of the Quality Assurance Selection Board dated 01.05.2018. *De novo* fact finding inquiry was concluded in February, 2019. The General Court Martial was convened on 14.05.2022 and concluded on 19.08.2022. General Court Martial orally pronounced that proceedings were barred by limitation of three years under Section 122 of the Army Act, 1950. During the court martial proceedings, it transpired that the *de novo* fact

finding inquiry report was not put up before the Rajya Raksha Mantri being the disciplinary authority who had ordered convening of *de novo* fact finding inquiry finding fault with the first fact finding inquiry. When this was questioned by the General Court Martial, neither the prosecution counsel nor the vigilance cell in-charge of Directorate General of Quality Assurance who were summoned as court witness could give any reply as to why *de novo* fact finding inquiry report was not put up before the Rajya Raksha Mantri. General Court Martial also observed that Director General of the Directorate General of Quality Assurance did not inform the Integrated Headquarters of Ministry of Defence, Army Adjutant General (Discipline and Vigilance) regarding the fact that the first fact finding inquiry was declared as legally not tenable by the Rajya Raksha Mantri. In view of above observations, General Court Martial had dropped the charges against the respondent.

10. Mr. Sankaranarayanan, learned Additional Solicitor General of India (Southern Zone) submitted that Directorate General of Quality Assurance is an

autonomous body operating under the guidance and supervision of the Ministry of Defence. Its functions relate to examining the quality of defence related equipments etc., which are sensitive responsibilities requiring high standards of discipline and moral integrity from its officers. Directorate General of Quality Assurance has on its roll officers from the civil side and also uniformed officers from the armed forces who work on temporary or permanent secondment. He submits that while disciplinary proceedings of civilian officers are as per the Central Civil Services (Classification, Control and Appeal) Rules, 1965, persons who come on secondment from the armed forces are subject to the provisions of the Army Act, 1950 and disciplinary proceedings are handled by the armed forces alone.

10.1. Adverting to the first fact finding inquiry, he submits that the same was conducted after issuing notice to the respondent and other affected persons. Statements of witnesses were recorded. Respondent vide letter dated 23.06.2016 had clarified the queries raised in the first fact finding inquiry. Thus opportunity was given to the

respondent to submit his case. Vigilance cell forwarded the report to the Army Headquarters for further action. Adjutant General's Branch, however, observed that principles of natural justice akin to Rule 180 of the Army Rules had not been complied with. Rajya Raksha Mantri approved *de novo* inquiry on 09.04.2018. When such a *de novo* enquiry is ordered, it starts from the stage where failure to observe natural justice was noted. In other words, statements recorded and documents already provided need not be done all over again. His contention is that approval of the Rajya Raksha Mantri for *de novo* inquiry did not absolve or exonerate the respondent from the charges, but the inquiry would continue from the stage where the flaw was noticed. Therefore, *de novo* inquiry is a continuation of the first fact finding inquiry and not in substitution thereof.

10.2. A perusal of the circular dated 22.03.2005 would make it clear that provisions of the Army Act, 1950 would apply to all those who are seconded for duty to civil departments. Whenever there is a misdemeanour allegedly indulged in by the seconded officer, the civil borrowing

department should conduct a preliminary investigation and forward the recommendation to the army authority for necessary disciplinary action. The first step is therefore a preliminary inquiry which can be a fact finding inquiry and thereafter army authorities would initiate disciplinary proceedings.

10.3. Learned Additional Solicitor General has taken the Court to the relevant documents in the paper book and submits that on 25.03.2008 Ministry of Defence had framed recruitment rules for the post of Director General of Quality Assurance which reiterates that seconded officers would be subject to the Army Act, 1950; Navy Act, 1957; or Air Force Act, 1950, as the case may be, and that army instructions would be applicable to service officers permanently seconded to Directorate General of Quality Assurance in service matters, promotions etc. Service conditions of service officers do not fall within the purview of DoPT and Union Public Service Commission (UPSC). On the above basis, he would contend that DoPT circulars are not applicable to army officers who are seconded to the Directorate General of Quality Assurance. Therefore, DoPT

circulars would have no application to a service officer who works on a secondment basis in the Directorate General of Quality Assurance.

10.4. Learned Additional Solicitor General of India submits that by communication dated 08.02.2018, the Adjutant General's Branch had informed that DV clearance for the respondent could not be accorded. Quality Assurance Selection Board in its proceedings dated 01.05.2018 resolved that since DV clearance was denied to the respondent, one vacancy should be kept unfilled and that the matter relating to promotion of the respondent may be reconsidered after vigilance clearance. He submits that affect of denial of DV clearance is that the respondent could not be considered as on 01.05.2018 as show cause notice was pending. Second show cause notice was issued on 02.08.2017 and approval to the second fact finding inquiry was on 09.04.2018. Therefore, as on 01.05.2018 when the Quality Assurance Selection Board held its meeting, the foundation for disciplinary proceedings by army was pending. As such, DV clearance could not be

issued. The reason for not giving DV clearance is just and valid.

10.5. Continuing with his submissions, learned Additional Solicitor General submits that a DV ban cannot come into existence without there being necessary proceedings prior thereto. A DV ban is issued whenever there is a complaint against an aspirant for promotion and when such aspirant is facing charges against him. However, any such charge has to start with a show cause notice. A show cause notice in a case of present nature has to be preceded by a fact finding inquiry which is equivalent to a preliminary investigation to satisfy the authority that a *prima facie* case is seen for the purpose of initiating the show cause notice. After the show cause notice, DV ban can be imposed in appropriate circumstances. Clarifying the matter, he submits that DV clearance and DV ban are two different aspects. Before a DV ban can be ordered, if necessity arises to consider the case of a person against whom show cause notice has been issued, a DV clearance is required. A DV clearance would be issued, if the authority is satisfied that the person is not involved in the acts alleged. Therefore, he

submits that fact finding inquiry is the first stage followed by show cause notice and if required a DV ban and in the *interregnum* a DV clearance or denial thereof.

10.6. Adverting to the facts of the present case, he submits that a show cause notice was issued on 02.08.2017 and the second fact finding inquiry was approved on 09.04.2018. DV clearance was denied on 08.02.2018. In this connection, he has referred to the policy of DV ban dated 20.04.2010. He submits that the second fact finding inquiry started on 21.12.2018. Adverting to the General Court Martial proceedings, he submits that those are yet to be confirmed by the competent army authority under the Army Act, 1950.

10.7. Finally, learned Additional Solicitor General referred to Section 14 of the Armed Forces Tribunal Act, 2007. Adverting to Section 3(o) read with Section 14(2) of the aforesaid Act, he submits that plea of the respondent that his promotion has been denied can only be agitated before the Armed Forces Tribunal. In this connection, he has sought to distinguish the decision of the Supreme Court in

Lt. Col. Vijaynath Jha v. Union of India¹ and submits that in the said decision Supreme Court did not consider Section 3(o) of the Armed Forces Tribunal Act, 2007, and therefore, the said decision would not help the case of the respondent.

10.8. Winding up his submissions, he contends that learned Single Judge had erred in allowing the writ petition filed by the respondent and therefore, the judgment and order of the learned Single Judge dated 14.06.2021 passed in W.P.No.16914 of 2019 should be set aside.

11. Mr. B.Adinarayana Rao, learned Senior Counsel for the respondent submits that the crucial date for consideration in this case is 01.05.2018 when the Quality Assurance Selection Board considered promotion from Brigadier to Major General. Case of the respondent was not considered on the wholly untenable ground that there was no DV clearance. As on 01.05.2018, there was no proceeding pending against the respondent. He submits that while report of the first fact finding inquiry was not

¹ (2018) 7 SCC 303

accepted by the disciplinary authority on the ground that it was in violation of the principles of natural justice, the *de novo* fact finding inquiry which was ordered had not commenced any proceedings as on 01.05.2018. Fact finding inquiry is nothing but a preliminary inquiry. On the basis of a preliminary inquiry, promotion cannot be denied. But as a matter of fact, there was not even a preliminary inquiry subsisting as on 01.05.2018.

11.1. Proceeding further, he submits that even the outcome of the *de novo* fact finding inquiry is not known till today as the appellants have not been able to tell as to whether the same has been placed before the disciplinary authority or any approval has been obtained thereon. However, the General Court Martial has declined to take cognizance of the allegations against the respondent as the same has become barred by limitation. In the circumstances, non-consideration of the case of the respondent for promotion by the Quality Assurance Selection Board in its meeting held on 01.05.2018 is wholly illegal and was rightly interdicted by the learned Single Judge.

11.2. Further, Mr. Rao, learned Senior Counsel would argue that secondment of a service officer into the Directorate General of Quality Assurance is actually absorption in the latter. When such an officer becomes a part of the Directorate General of Quality Assurance, he would not be subject to the Army Act, 1950 insofar service matters, such as, promotion etc., are concerned. It would be governed by the rules and regulations of the DoPT. In this connection, learned Senior Counsel has referred to a Division Bench decision of the Delhi High Court in **Col. K.P.Kumar v. Union of India (W.P. (C) No.7500 of 2015, decided on 23.12.2015)**. As a matter of fact, the Quality Assurance Selection Board in its proceeding dated 01.05.2018 itself decided to refer the matter to DoPT for advice as to whether the officer against whom fact finding inquiry was being initiated but no charge sheet had been issued could be considered for empanelment.

11.3. Learned Senior Counsel for the respondent referred to the Annual Performance Appraisal Report (APAR) of the respondent for the period 01.07.2018 to 30.11.2018. The Director General himself as the reporting officer remarked

that respondent is a very hard working, intelligent and sincere officer who is professionally very competent. Besides other qualities, he had demonstrated outstanding performance during the period under review and is an asset to the organisation. He submits that if this be the assessment of the respondent by the highest authority of the organization, there can be no justifiable reason to deny the respondent even a consideration for promotion. Such an action on the part of the appellants is wholly unfair, arbitrary and unreasonable.

11.4. On a query by the Court, he submits that respondent is retiring on attaining the age of superannuation in this year itself. Therefore, the entire endeavour of the appellants is some how to stall his promotion on one pretext or the other for reasons other than *bona fide* and germane.

11.5. As to the contention raised by the learned Additional Solicitor General that learned Single Judge had erred in entertaining the writ petition when the subject matter clearly falls within the domain of the Armed Forces Tribunal Act, 2007, he submits that such a submission is

to be recorded only to be rejected. When Brigadier Pawan Kumar Sauntra who incidentally was one of the officers being part of the first fact finding inquiry was prematurely retired from service, he had approached the Armed Forces Tribunal, Regional Bench, Chennai by filing O.A.No.50 of 2021 assailing the said premature retirement. Appellants who were arrayed as respondents in O.A.No.50 of 2021 had taken a specific plea therein that permanently retained service officers in the Directorate General of Quality Assurance though subject to the Army Act, 1950 for disciplinary purposes, their service matters are not amenable to jurisdiction of the Armed Forces Tribunal. Now the same set of authorities cannot take a contrary stand. That apart, in **Lt. Col. Vijaynath Jha** (supra), application filed by Lieutenant Colonel Vijaynath Jha before the Armed Forces Tribunal, Regional Bench, Lucknow was rejected as not being maintainable and was returned with liberty to file the same before the concerned authority. It was this order which was assailed before the Supreme Court. There also, Lieutenant Colonel Vijaynath Jha was inducted into the Directorate General of Quality

Assurance. However, he was found not fit for permanent secondment by the Quality Assurance Selection Board. Armed Forces Tribunal upholding the preliminary objection raised, held that the application was not maintainable, Directorate General of Quality Assurance being a separate organization with its own guidelines for induction, appointment and promotion. When decision was taken that Lieutenant Colonel Vijaynath Jha was not to be considered for permanent secondment, there was no breach in the Army Act and the Army Rules. Therefore, Armed Forces Tribunal is not the right forum for adjudication of matters pertaining to Directorate General of Quality Assurance. Supreme Court while affirming such conclusion rendered by the Armed Forces Tribunal further held that Armed Forces Tribunal can exercise jurisdiction if the action which is complained of flows from the Army Act, 1950. Therefore, Mr. Rao would submit that it is not open for the appellants to argue contrary to the decision of the Supreme Court and it is very unfortunate. He submits that approach of the appellants towards the respondent has been very hostile and discriminatory. Learned Single Judge had

rightly allowed the writ petition of the respondent. There is no error or infirmity in the view taken by the learned Single Judge to warrant interference in an appeal filed under clause 15 of the Letters Patent. Therefore, the appeal should be dismissed with cost.

11.6. Learned Senior Counsel has referred to the additional affidavit filed by the appellants on 21.04.2022 and submits therefrom that appellants themselves have admitted that while civilian employees serving in the Directorate General of Quality Assurance are amenable to the jurisdiction of Central Administrative Tribunal but same is not available to the permanently seconded service officers. Jurisdiction of service matters of such officers has not been defined. In the absence of jurisdiction of Central Administrative Tribunal, legal recourse of permanently seconded service officers in service matters though controlled by the Ministry of Defence continues to be through the High Courts. He, therefore, contends that what the learned Additional Solicitor General has argued is contrary to the pleaded stand of the appellants themselves.

12. Submissions made by learned counsel for the parties have received the due consideration of the Court.

13. At the outset, it would be essential to highlight the relevant dates. From the pleadings, materials on record and arguments of learned counsel for the parties, the following dates have been found relevant by the Court having a bearing on the adjudication.

13.1. Respondent was initially appointed in the Indian Army as Second Lieutenant. Subsequently, he was inducted into the DGQA where he was permanently seconded. In course of time, he was promoted to the rank of Brigadier. He seeks promotion to the rank of Major General.

13.2. While serving at Secunderabad under DGQA, a fact finding inquiry was constituted to inquire into certain financial irregularities noticed in the construction and maintenance of a community hall. The fact finding inquiry was constituted on 20.05.2016. It submitted report on 30.08.2016. However, office of Adjutant General did not accept the report of the fact finding inquiry on the ground

that principles of natural justice akin to Rule 180 of the Army Rules, 1954 were not followed. Though fact finding inquiry mentioned the name of the respondent and made observations against him, his views were not obtained. Rajya Raksha Mantri also did not approve the fact finding inquiry report; instead he approved a *de novo* fact finding inquiry.

13.3. A show cause notice was issued to the respondent on 12.01.2017 whereafter a second notice along with additional materials were issued to the respondent on 02.08.2017. Respondent replied to the same.

13.4. Office of Adjutant General declined to grant DV clearance to the respondent for the purpose of his consideration for promotion to the rank of Major General on 08.02.2018.

13.5. Meeting of Quality Assurance Selection Board 2018 to consider promotion from Brigadier to Major General was held on 01.05.2018. Case of the respondent though within the zone of consideration was not considered on the ground that his DV clearance was declined. While keeping one post

in the rank of Major General vacant, Quality Assurance Selection Board sought for the advice of DoPT.

13.6. DoPT's advice was forwarded to Adjutant General (DV) on 17.09.2018. But what was the advice given by DoPT or the substance thereof has not been mentioned nor a copy of the advice has been placed on record.

13.7. In the meanwhile, *de novo* fact finding inquiry was convened on 23.05.2018. It completed inquiry in February, 2019. Report was forwarded to Rajya Raksha Mantri for approval on 27.03.2019. There is nothing on record to show Rajya Raksha Mantri approving the report of the *de novo* fact finding inquiry. No decision has been taken thereon.

13.8. DV ban was imposed on the respondent on 12.12.2019 with effect from 17.06.2019.

13.9. General Court Martial was convened on 14.05.2022 on the allegations pertaining to construction and maintenance of the community hall at Secunderabad. However, in the proceedings held on 19.08.2022, General

Court Martial orally dropped the proceedings on the ground that the same had become time barred. This decision of the General Court Martial was forwarded to the Integrated Headquarters on 19.08.2022 but till date no decision has been taken thereon.

13.10. Date of retirement of respondent on attaining the age of superannuation is 30.09.2023.

14. Having noted the relevant facts, it would be apposite to advert to the office memorandum dated 28.10.1978 of Government of India, Ministry of Defence. It deals with procedure for intake of service officers in the Inspection Organisation of the Ministry of Defence and the terms and conditions of service of those permanently retained. It is mentioned therein that Ministry of Defence (Department of Defence Production) would be the controlling authority. It would be advised on matters concerning promotion and permanent retention of service officers in the Inspection Organisation by a Selection Board. While paragraph 4 deals with permanent secondment, paragraph 5(b) deals with promotion. As per paragraph 5(b)(i)(bb), selection for

promotion to acting ranks of Lieutenant Colonel/equivalent and above from amongst permanently retained officers would be made by the Inspection Selection Board in accordance with vacancies and according to rules of eligibility as issued by government for service officers and such other rules made for permanently retained officers from time to time.

14.1. As per paragraph 5(b)(ii)(c), officers though permanently seconded would continue to be shown in the respective service lists, their names would be marked with an asterisk to indicate permanent secondment. In exceptional circumstances, a permanently retained officer may be recalled to parent service with the approval of the Government of India.

15. Circular dated 22.03.2005 issued by the Additional Directorate General of Staff Duties, General Staff Branch, Army Headquarters, says that army personnel temporarily or permanently seconded for duty to civil departments like R&D Organisations would continue to be governed by provisions of the Army Act. On committing an offence, such

personnel would be tried by army authorities irrespective of their place of posting, organization and type of offence. The civil borrowing department may conduct a preliminary investigation into the alleged misdemeanour of army personnel seconded to it and forward recommendations to the army authorities for taking necessary disciplinary action as per provisions of the Army Act, 1950. Such personnel would be reverted to military duty and attached to the nearest appropriate army unit for the purpose of processing disciplinary/administrative action against such personnel. Once that action is over, army personnel may again be posted back to the civil department depending upon the circumstances.

16. Office memorandum dated 25.03.2008 issued by the Government of India, Ministry of Defence, Department of Defence Production deals with framing of recruitment rules for the post of Director General of Quality Assurance. It says that the issue was deliberated upon in the Ministry of Defence in consultation with DoPT. For service officers, Ministry of Defence is the nodal agency in the same manner as DoPT for civilian government servants. UPSC is

not involved in appointment of service officers at any level in the Directorate General of Quality Assurance. Service officers permanently seconded to Directorate General of Quality Assurance continued to be service officers subject to the Army Act, 1950 etc. and are subject to recall to service. Army instructions issued by the Ministry of Defence and applicable to officers in the services are also applied to service officers permanently seconded to Directorate General of Quality Assurance in regard to their service matters, appointments, promotions etc. Cadre of service officer permanently seconded to Directorate General of Quality Assurance remains as service officer; as such, their conditions of service do not fall within the purview of DoPT and/or UPSC. Therefore, view was taken that the post of Director General of Quality Assurance would remain exclusively reserved for a service officer and that there may not be a need to frame recruitment rules for the post of Director General of Quality Assurance.

17. In **Col. K.P.Kumar** (supra) which was a case dealing with denial of promotion of service officers not permanently seconded in the Directorate General of Quality Assurance,

Delhi High Court referred to the office memorandum dated 28.10.1978, more particularly to paragraph 5(b)(i)(bb), which reads as follows:

5 (b) Promotions

(i) Acting ranks

(aa) xxx xxx xxx

(bb) Selection for promotion to acting ranks of Lieutenant Colonel/equivalent and above from amongst permanently retained officers, will be made by the Inspection Selection Board in accordance with vacancies and according to rules of eligibility as issued by government for service officers and such other rules made for permanently retained officers from time to time.

17.1. Thus there is a noticeable change in the language of paragraph 5(b)(i)(bb) of the office memorandum dated 28.10.1978 from what we have discussed in paragraphs 14 and 14.1 above which indicates that the said office memorandum has undergone certain amendments, which have however not been placed on record.

18. Be that as it may, we may now advert to the proceedings of the Quality Assurance Selection Board, 2018 held on 01.05.2018. It considered filling up two existing vacancies in the rank of Major General and three

anticipated vacancies. Paragraph 2 of the minutes are as under:

The Board was informed that two vacancies in the rank of Major General exist and three vacancies are anticipated during the year 2018 on account of retirements. The Board was also informed that as per DOP&T OM No.22011/4/2013-Estt (D) dated 08 May 2017 the vacancy year has been shifted to calendar year w.e.f. 2018. Confidential reports for 5 preceding years will be considered as per the guidelines issued by DOP&T OM dated 08 May 2017. The reckoning APAR for this year shall be 2015-16, 2014-15, 2013-14, 2012-13 and 2011-12.

18.1. From the above, it is seen that Quality Assurance Selection Board was informed that as per DoPT office memorandum dated 08.05.2017 vacancy year had been shifted to calendar year with effect from 2018. Confidential reports for five preceding years would be considered as per the guidelines issued by DoPT office memorandum dated 08.05.2017. The reckoning APAR for the year 2018 would be 2015-16, 2014-15, 2013-14, 2012-13 and 2011-12. Quality Assurance Selection Board as per item No.1 considered promotions to the acting rank of Major General as per existing and anticipated vacancies of the year 2018 and noted that altogether fifteen officers were in the zone of

consideration. Method of selection was selection-cum-merit. Officers meeting the required benchmark for promotion “very good” in all the five preceding APARs were empanelled for promotion. Out of the fifteen officers considered, Quality Assurance Selection Board recommended the following four officers as fit for promotion to the rank of Major General:

1. R.K.Malhotra
2. Gautam Narayan
3. Mohan Ram
4. Sanjeev Singh

18.2. However, in case of Sanjeev Singh, his case was placed in medical category to be considered on stabilisation of his medical category. In respect of the respondent, the minutes of the meeting dated 01.05.2018 are as follows:

5. In respect of Brig. Vikram Ahooja the Vigilance clearance has been denied by the AG/DV. QASB was informed that orders have been obtained from the competent authority i.e., Hon’ble RRM to initiate de-novo Fact Finding Inquiry (FFI) against the officer and the matter is being processed accordingly. After considering the matter, QASB decided that the matter be referred to Department of Personnel and Training (DoP&T) for the advice as to whether the officer against whom the FFI is being initiated and no charge sheet has been issued, can be considered for

empanelment. The QASB also decided that one vacancy may be kept unfilled and matter be reconsidered after receipt of advice of DoP&T and Vigilance clearance.

18.3. Thus from the above, it is evident that Quality Assurance Selection Board was informed that order had been obtained from the competent authority i.e., Rajya Raksha Mantri to initiate *de novo* fact finding inquiry against the respondent and that the matter was being processed accordingly. Vigilance clearance had been denied by Adjutant General/Discipline and Vigilance. After considering the matter, Quality Assurance Selection Board decided that the matter be referred to DoPT for advice as to whether the officer against whom fact finding inquiry is being initiated but no charge sheet has been issued can be considered for empanelment. Quality Assurance Selection Board thereafter decided that one vacancy may be kept unfilled and the matter be reconsidered after receipt of advice of DoPT and vigilance clearance.

19. Thus from the above, it is seen that Quality Assurance Selection Board was guided by DoPT office memorandum dated 08.05.2017 and in case of the

respondent, it itself made a reference to DoPT for advice as to whether the officer against whom fact finding inquiry was being initiated but no charge sheet has been issued could be considered for promotion.

20. That apart, as already noted above, what was the advice received from DoPT has not been disclosed by the appellants, not to speak of placing on record a copy of such advice. It is in that light that we may advert to DoPT guidelines pertaining to vigilance clearance for promotion. Office memorandum of DoPT dated 02.11.2012 contains instructions pertaining to vigilance clearance for promotion.

20.1. After a threadbare analysis of the decision of the Supreme Court in **Union of India v. K.V.Jankiraman**², the office memorandum says that vigilance clearance for promotion may be denied only in the following three circumstances:

- (1) Government servant under suspension;
- (2) Government servant in respect of whom a charge sheet has been issued and disciplinary proceedings are pending; and

² (1991) 4 SCC 109 : AIR 1991 SC 2010

- (3) Government servant in respect of whom prosecution for a criminal charge is pending.

20.2. Thus, it was clarified that vigilance clearance cannot be denied on the ground of pending disciplinary/criminal/court cases against a government servant unless the above three conditions are fulfilled.

21. Before proceeding ahead, it would also be apposite to refer to policy of DV ban dated 20.04.2010 circulated by the Additional Directorate General, Discipline and Vigilance, Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army).

21.1. Introduction to the policy says that possession and enjoyment of service rights, benefits and privileges in any organization, institution or society are always subject to such reasonable conditions as may be essential to the functioning, general order and morale of the organization. Organizational functionaries are therefore competent to interfere with service benefits and privileges of its members and impose such reasonable restrictions as are considered necessary in the organizational interest. However, a duty is

alongside cast upon these functionaries to restore immediately the service benefits and privileges which have been withheld/withdrawn temporarily from the officer concerned once the circumstances are removed, in conformity with the principles of natural justice. Keeping the above principles in view, the policy of DV ban attempts to strike a balance between the career interest of the officer concerned on the one hand and organizational interest on the other.

21.2. Paragraph 2 of the policy says that DV ban is imposed only when the competent disciplinary authority comes to a conclusion that a *prima facie* case is made out against an officer. Such a situation arises as soon as the competent disciplinary authority applies its mind to the facts and circumstances of the case and issues directions for initiation of disciplinary or administrative proceedings against the officer on the basis of Court of Inquiry proceedings. Imposition of DV ban, therefore, has its origin in the decision of the Commander to initiate disciplinary/administrative action against an officer.

21.3. In case show cause notice has been issued while conducting Court of Inquiry on the basis of documentary evidence, then DV ban will be imposed from the date of issuance of show cause notice by the competent authority.

Paragraph 6 is relevant and says as follows:

6. In cases of officers seconded to organisations like DGBR, R&D Organizations etc, the borrowing departments will carry out their preliminary investigations into the alleged misdemeanour (in which the seconded officer will be given a chance to put across his case and defend himself) and forward it to DV Dte (DV-2) along with their recommendations for taking action as per the provisions of the Army Act. This will be investigated through a formal inquiry as prescribed under the Act and Rules made there under on comd and cont aspects by SD Dte. The outcome of the C of I/action under AR 22 (without carrying out a C of I) will be processed by DV Dte (DV-2) to progress ban imposition.

21.4. What paragraph 6 says is that in cases of officers seconded to organizations like Directorate General of Border Roads, Research and Development organizations etc, the borrowing departments will carry out their preliminary investigations into the alleged misdemeanour in which the seconded officer will be given a chance to put across his case and defend himself and thereafter forward

it to the discipline and vigilance department along with their recommendations for taking action as per provisions of the Army Act, 1950. This will be investigated through a formal inquiry as prescribed under Army Act and the Army Rules. Outcome of the Court of Inquiry or action under Army Rule will be processed by the discipline and vigilance department to progress ban imposition.

21.5. From the above, it is evident that DV ban is imposed only when the competent disciplinary authority (in this case Rajya Raksha Mantri) comes to the conclusion that *prima facie* case is made out against the officer. Such occasion would arise on the basis of Court of Inquiry proceedings or where show cause notice has been issued while conducting Court of Inquiry on the basis of documentary evidence. In cases of officers seconded to organizations like DGQA, there must be first a preliminary investigation where the seconded officer will have to be given a chance to defend himself and thereafter forward it to the discipline and vigilance department along with the recommendations of formal proceedings.

21.6. On the basis of the above, there would have to be a formal inquiry under the Army Act, 1950 and the Rules made thereunder. Outcome of the Court of Inquiry would be processed by the discipline and vigilance department to progress the ban imposition. Therefore, a DV ban cannot be imposed on a service officer who is on permanent secondment to DGQA unless the above conditions are fulfilled.

22. Insofar the respondent is concerned, the first fact finding inquiry was not accepted because it suffered from violation of the principles of natural justice. While the Rajya Raksha Mantri approved *de novo* fact finding inquiry, the proceedings thereof have not been approved by the Rajya Raksha Mantri. Consequently, there has been no Court of Inquiry or other proceedings against the respondent under the Army Act, 1950 or the Rules framed thereunder. Even the General Court Martial proceedings was closed on the ground that it was beyond the period of limitation; the said decision of the Court Martial has also not received the final approval of the competent authority. Therefore, there is no case made out against the

respondent for imposition of DV ban. Though it is stated that DV ban was imposed on the respondent on 12.12.2019, the same appears to be highly questionable. However, since no challenge has been made thereto, we refrain from expressing any final opinion thereon.

22.1. At this stage we may mention that as per paragraph 16 all cadre controlling authorities must obtain prior DV clearance from Adjutant General/Discipline and Vigilance Department before issuing any orders for promotion and posting of officers including permanently seconded officers to DRDO, DGQA etc., to sensitive departments, foreign assignments etc., or while recommending their names for honours and awards.

23. Be that as it may, there is no provision in the policy of DV ban dated 20.04.2010 for withholding of DV clearance. Paragraph 16 alluded to hereinabove cannot be read as a source of power for withholding prior DV clearance, that too in the absence of any formal proceedings or even the preliminary proceedings not being approved by the competent authority, thus not attaining

any finality. Though learned Additional Solicitor General had argued that because show cause notice was issued to the respondent on 12.01.2017 and thereafter on 02.08.2017 DV clearance has been declined, those notices were in connection with the fact finding inquiry and not in connection with any disciplinary proceedings by the DGQA or Court of Inquiry by the army authorities. Those notices cannot be the basis for withholding vigilance clearance. Even otherwise, as per DoPT office memorandum dated 02.11.2012, vigilance clearance for the purpose of promotion can be denied only when the government servant is under suspension; the government servant in respect of whom charge sheet has been issued and disciplinary proceedings are pending; and the government servant in respect of whom prosecution for a criminal charge is pending. Therefore, neither under the policy of DV ban dated 20.04.2010 nor on the basis of office memorandum of DoPT dated 02.11.2012, withholding of DV clearance can be justified in as much as on the date when Quality Assurance Selection Board held its meeting to consider promotion from Brigadier to Major General

i.e., 01.05.2018 there was neither any disciplinary proceeding pending against the respondent nor any Court of Inquiry pending against the respondent. Therefore, in any view of the matter, withholding of DV clearance and non-consideration of the case of the respondent for promotion is wholly unsustainable in law as well as on facts.

24. Delhi High Court in **Col. K.P.Kumar** (supra) has held that DGQA was constituted or set up as an independent organization under the Ministry of Defence Production with a specific mandate i.e., dealing with technical matters and examining the issue of merit substitution in regard to requirements of armed forces. It is staffed from employees from various streams – Indian Army, Indian Air Force and Indian Navy. Besides, it is also manned by other civilian personnel with engineering or scientific background. The various disciplines that the 1978 memorandum envisions are vehicles, engineering, equipment, armament and stores. Personnel deployed or sent on initial tenure and later permanently seconded from the Indian Army have to possess specific qualifications.

24.1. Paragraph 5(b) of the 1978 office memorandum specifically spelt out the eligibility for promotion i.e., through selection. Delhi High Court has observed that ordinarily DGQA officials after permanent secondment are not expected to be active armed force personnel. In the case of Indian Army, provisions of the Army Act, 1950 apply only so far matters of discipline are concerned. With respect to conditions of service, provisions applicable to Indian Army officers do not apply. On the other hand, policies evolved by the Central Government and made applicable to DGQA are applicable. Thereafter, Delhi High Court concluded that officers permanently seconded to DGQA are expected to discharge functions quite differently from what is expected of Indian Army officers in the normal line of their duties – even technical and engineering personnel. They function like their colleagues from other forces and those drawn from civilian streams in their technical disciplines with identical objectives that are expected to be fulfilled by DGQA.

25. Though learned Additional Solicitor General at the time of argument raised the issue that the writ petition should not have been entertained by the learned Single Judge in as much as case of the respondent is required to be decided by the Armed Forces Tribunal under the Armed Forces Tribunal Act, 2007, there was no such pleading in the counter affidavit filed by the appellants to the writ petition of the respondent. In fact, this issue was also not argued before the learned Single Judge on behalf of the appellants. It was only after filing of the writ appeal that a Division Bench of this Court in its proceedings held on 25.03.2022 directed the Central Government to file a detailed affidavit as to whether the respondent on his secondment to DGQA had become an employee of DGQA or not and whether employees of DGQA are amenable to the jurisdiction of Central Administrative Tribunal or not amongst others, that appellants filed an additional affidavit on 21.04.2022 which has already been adverted to. While acknowledging that respondent is a permanently seconded service officer of DGQA, it is however, stated that permanently seconded service officers of DGQA cannot

avail the jurisdiction of Central Administrative Tribunal. Therefore, their service matters which are controlled by the Ministry of Defence have to be adjudicated through the High Court. However, contrary to the above, it is also contended that the proper forum for adjudication in this case would be the Armed Forces Tribunal.

26. The above contention flies on the face of the stand of the appellants themselves before the Armed Forces Tribunal, Regional Bench, Chennai in O.A.No.50 of 2021 (Brig. Pawan Kumar Sauntra v. Union of India). Brigadier Sauntra was also a permanently seconded service officer in DGQA. In fact, he was one of the members of the first fact finding inquiry ordered in respect of the community hall at Secunderabad. He had filed O.A.No.50 of 2021 against his premature retirement. In that, appellants who were arrayed as respondents took the stand in paragraph 15 of the reply statement that promotion and medical criteria are different from that of the service personnel employed in the Army. Service matters of permanently retained officers in DGQA though subject to the Army Act for disciplinary purposes are not amenable to jurisdiction of the Armed Forces

Tribunal. This reply statement of the appellants in O.A.No.50 of 2021 has been brought on record by the respondent vide memo dated 08.02.2022. There is no objection or clarification by the appellants to the above. Therefore and having regard to the stand taken by the appellants themselves in the case of Brigadier Pawan Kumar Sauntra, it is not open to the appellants to *approve* and *reprobate* at the same time.

27. This question is also no longer *res integra* in view of the decision of the Supreme Court in **Lt. Col. Vijaynath Jha** (supra). Though learned Additional Solicitor General tried to distinguish the above decision of the Supreme Court on the ground that Supreme Court did not consider Section 3(o)(ii) of the Armed Forces Tribunal Act, 2007, we are not persuaded to accept such a contention. Armed Forces Tribunal Act, 2007 has been enacted by the Parliament to provide for adjudication or trial by Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 and also to provide

for appeals arising out of orders, findings or sentences of Courts Martial held under the aforesaid three Acts and for matters connected therewith or incidental thereto.

27.1. It is in this context that the expression “service matters” has been defined in Section 3(o) of the Armed Forces Tribunal Act, 2007. Section 3(o)(ii) says that service matters in relation to persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 would mean all matters relating to the conditions of their service and include tenure, commission, appointment, enrolment, probation, confirmation, seniority, training, promotion etc. As already held by the Delhi High Court, permanent secondment is in effect permanent absorption. Therefore, on permanent secondment, respondent has become an officer in the Directorate General of Quality Assurance (DGQA). As Delhi High Court has explained, in case of service personnel from the Indian Army serving in DGQA, provisions of the Army Act would apply only so far matters of discipline are concerned. With respect to conditions of service, provisions applicable to Indian Army officers would not apply. On the other hand, policies

evolved by Central Government and made applicable to DGQA would be applicable.

28. In **Lt. Col. Vijaynath Jha** (supra), appellant Lt. Col. Vijaynath Jha, an officer of the Indian Army, was inducted into the DGQA but was not found fit for permanent secondment. When his complaint was rejected, he filed original application before the Armed Forces Tribunal, Regional Bench, Lucknow under the Armed Forces Tribunal Act, 2007. However, the Armed Forces Tribunal rejected the original application as not maintainable vide the order dated 03.08.2012. This came to be challenged by Lt. Col. Vijaynath Jha before the Supreme Court. Supreme Court referred to a decision of the Principal Bench of the Armed Forces Tribunal in **S.B.Akali v. Union of India** (T.A.No.125 of 2010), wherein the subject matter was selection of the applicant in Defence Research and Development Organization. Objection was raised by the appellants and others that Armed Forces Tribunal had no jurisdiction to entertain the matter. Principal Bench of the Armed Forces Tribunal upheld the said objection. In that case, it was held that service conditions of service officers

inducted into DGQA including those who are permanently seconded are governed by the office memorandum dated 28.10.1978 as amended from time to time. Non-selection was on account of service conditions mentioned in the office memorandum dated 28.10.1978. Therefore, it was held that Armed Forces Tribunal would have no jurisdiction to interfere with the matter.

28.1. Supreme Court also considered its earlier decision in **Mohammed Ansari v. Union of India**³. That was a case where appellant was an assistant executive engineer in Border Roads Engineering Service. He was not granted non-functional financial upgradation. His representation in this regard was turned down. Thereafter, he filed original application before the Central Administrative Tribunal. Central Administrative Tribunal decided the issue of jurisdiction in favour of the appellant holding that it had jurisdiction to entertain the appeal of the appellant. Against such decision of the Central Administrative Tribunal, Union of India filed a revision before the High Court. High Court framed a question as to whether a

³(2017) 3 SCC 740

member of General Reserve Engineering Force (GREF) can be regarded as member of the armed forces. After referring to the Armed Forces Tribunal Act, 2007 and the Central Civil Services (Control, Classification and Appeal) Rules, 1965, High Court held that Central Administrative Tribunal had no jurisdiction. Only remedy of the appellant was to file an application under Article 226 of the Constitution of India. Assailing the decision of the High Court, appellant Mohammed Ansari filed the civil appeal before the Supreme Court. In the above context, Supreme Court examined the question as to whether after coming into force of the Armed Forces Tribunal Act, 2007, it shall be the Armed Forces Tribunal which shall deal with the controversy or the High Court has jurisdiction under Article 226 of the Constitution of India. Supreme Court referred to its decision in **Union of India v. G.S.Grewal**⁴ and thereafter, observed as follows:

26. The judgment of this Court in *Union of India v. G.S. Grewal* [(2014) 7 SCC 303 : (2014) 2 SCC (L&S) 481] was extensively quoted by this Court and after quoting para 26 of the judgment, the following was stated in para 29: [*Mohd. Ansari v. Union of India*, (2017) 3 SCC 740 : (2017) 1 SCC (L&S) 761] , SCC p. 755)

⁴(2014) 7 SCC 303

“29. Thus, the Court in *G.S. Grewal* case clearly held that merely because the respondent is subjected to the 1950 Act would not by itself be sufficient to conclude that the Tribunal had jurisdiction to deal with any case brought before it by such a person. It would depend upon the subject-matter which is brought before the Tribunal and the Tribunal is also required to determine as to whether such a subject-matter falls within the definition of “service matter” as contained in Section 3(o) of the 2007 Act.”

28.2. Thus, in **G.S. Grewal** (supra) Supreme Court examined the contours of the definition of “service matters” as contained in Section 3(o) of the Armed Forces Tribunal Act, 2007 and thereafter laid down the following proposition in

Mohammed Ansari (supra):

33. The situation insofar as jurisdiction of the Armed Forces Tribunal (AFT) to hear the appeals arising out of court martial verdicts qua GREF personnel, however, appears to stand on a different footing. It is because the provisions of Chapter VI i.e. offences, Chapter VII i.e. punishment, Chapter X i.e. “courts martial”, etc. apply with full force, subject to minor exceptions and modifications here and there, as applied to GREF. Therefore, the provisions of the 1950 Act dealing with various punishments inflicted by way of courts martial qua GREF personnel as applied can be agitated before AFT and AFT shall have jurisdiction to hear appeals arising out of courts martial verdicts. There can be no doubt that in respect of said matters AFT shall have jurisdiction. Denial of jurisdiction to

the said Tribunal would be contrary to the 1950 Act and the provisions engrafted under the 2007 Act. To elaborate, right to approach AFT by the personnel of GREF who are tried by a court martial held under the very same Act has to be recognised. At the same time, if the punishment is imposed on GREF personnel by way of departmental proceedings held under the CCS (CCA) Rules, 1965 then obviously the same cannot be agitated before AFT since the penalty in such cases will not be one under the 1950 Act but will be under the CCS (CCA) Rules, 1965. The distinction, as the law exists in the present, has to be done.

34. From the aforesaid, the legal position that emerges is that AFT shall have jurisdiction (i) to hear appeals arising out of courts martial verdicts qua GREF personnel. To this extent alone AFT shall have jurisdiction. At the same time, if the punishment is imposed on GREF personnel by way of departmental proceedings held under the CCS (CCA) Rules, 1965 the same cannot be agitated before AFT; and (ii) AFT shall have no jurisdiction to hear and decide grievances of GREF personnel relating to their terms and conditions of service or alternatively put “service matters”.

28.3. Based on the above, Supreme Court held that Armed Forces Tribunal can exercise jurisdiction if the action complained of flows from the Army Act, 1950, e.g., a court martial verdict given against General Reserve Engineering Force (GREF) personnel. However, if GREF personnel had been administratively dealt with under the

Central Civil Services (Classification, Control and Appeal) Rules, 1965, the same cannot be agitated before the Armed Forces Tribunal. Finally Supreme Court expressed the view that Armed Forces Tribunal had committed no error in holding that application filed by Lt. Col. Vijaynath Jha was not maintainable before the Armed Forces Tribunal.

29. Therefore, it is clearly evident that objection raised by learned Additional Solicitor General that the subject matter of the present appeal should have been agitated before the Armed Forces Tribunal has no merit at all. The same has been made and recorded only to be rejected.

30. Ultimately, what is the grievance of the respondent? He is serving as Brigadier in DGQA on permanent absorption. He seeks promotion from Brigadier to Major General. His case for promotion was not considered by the Quality Assurance Selection Board in the meeting held on 01.05.2018 on the specious ground that vigilance clearance had been denied to the respondent. We have already seen that there was no tangible proceeding against the respondent as on 01.05.2018; there was neither any

disciplinary proceeding pending nor any charge sheet issued against the respondent. The show cause notices adverted to by the learned Additional Solicitor General of India were issued in relation to the fact finding inquiry which is in the nature of a preliminary inquiry; even that has not reached any finality. Such a show cause notice cannot be construed to be one in connection with a formal disciplinary proceeding and on that basis, DV clearance could not have been denied to the respondent. In the circumstances, learned Single Judge was justified in directing the appellants to consider the case of the respondent for promotion from Brigadier to Major General.

31. A constitution bench of the Supreme Court in **Ajit Singh (II) v. State of Punjab**⁵, laying emphasis on Articles 14 and 16(1) of the Constitution of India, held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then it would be a clear violation of his fundamental right to be considered for promotion. It was held that right to be considered for

⁵ (1999) 7 SCC 207

promotion is indeed a fundamental right guaranteed under Article 16(1) of the Constitution of India.

32. In **Union of India v. Hemraj Singh Chauhan**⁶, Supreme Court reiterated the proposition that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution of India. The guarantee of fair consideration in matters of promotion under Article 16 virtually flows from the guarantee of equality under Article 14 of the Constitution of India.

33. Supreme Court in **Jagdish Prasad v. State of Rajasthan**⁷ held that governmental action must be fair. Rule of fairness in government action is an essential feature.

34. Reiterating the above principle, Supreme Court in **Ajay Kumar Shukla v. Arvind Rai**⁸ held that right to be considered for promotion is a fundamental right.

35. Thus, on the conspectus of facts and law, we find no error or infirmity in the decision of the learned Single

⁶ (2010) 4 SCC 290

⁷ (2011) 7 SCC 789

⁸ (2022) 6 SCC 105

Judge to warrant interference. On the contrary, a reasonable view is possible that respondent has been denied due consideration of his case for promotion from Brigadier to Major General in DGQA arbitrarily and that he has not been dealt with in a fair manner. This is more so in the context of hardly a few months of service left for the respondent.

36. Consequently and in the light of the above, we decline to entertain the appeal. Writ appeal is accordingly dismissed. However, there shall be no order as to cost.

Miscellaneous applications, pending if any, shall stand dismissed.

UJJAL BHUYAN, CJ

N.TUKARAMJI, J

04.04.2023

Note: LR copy be marked.
(By order)
Pln