

Union of India and Another

Vs

Major General Dayanand Khurana

Civil Appeal No. 2574 of 1991

(K. Jagannatha Shetty, V. Ramaswami-II, Yogeshwar Dayal JJ)

06.08.1991

JUDGMENT

YOGESHWAR DAYAL, J. -

1. This appeal by special leave is directed against the judgment of the High Court of Delhi dated April 30, 1991 on behalf of the Union of India and the Chief of the Army Staff against Major General Dayanand Khurana.
2. By the impugned judgment the Division Bench of the High Court directed the issue of writ of mandamus modifying an order dated October 26, 1990 and thereby directing the appellants herein to treat Major General D.N. Khurana, who was approved for promotion to the acting rank of Lt. General for 'Staff Only' stream, senior to all the other Major Generals who were promoted to the acting rank of Lt. General in the 'Command and Staff' stream, and also issued further writ of mandamus directing the appellants to expeditiously promote the respondent herein, ahead of the 1957 batch, to a staff post which has occurred between October 26, 1990 and May 31, 1991 keeping in view the existing policy of the government and in the light of the observations made in the judgment.
3. The brief facts which give rise to the filing of the writ petition in the High Court and the appeal before us may be noticed.
4. The respondent was commissioned in the army in the year 1954, therefore, his original seniority reckons from the year 1954. As per the policy and procedure adopted in this connection every officer is given three chances for consideration for promotion. If an officer is not approved for promotion during the first consideration, he loses one year of seniority and slides into the batch of the next year. In the eventuality of his not being approved for promotion even in the second consideration, he loses one more year of seniority and slides further into the next batch. Thereafter, the officer is considered for the last time for promotion in the third chance and if he is not approved even in the third chance, he is not given any further consideration and is finally regarded as a superseded officer. In pursuance of this policy, the respondent herein while he was acting as a Brigadier was first considered for promotion to the rank to Major General in the year 1983 but was not approved, and, therefore, he became part of 1955 batch instead of 1954 batch. Thereafter he was superseded again and ultimately got selected as a Major General in the 1956 batch. As per the existing policy at that time his seniority in the rank of Major General was re-fixed along with the officers of 1956 batch as per the following sequence of selection :

1956 Batch :

- (a) Final review case of 1954 batch.
- (b) First review case of 1955 batch.
- (c) Fresh case of 1956 batch.

5. The respondent while working as Major General was considered for promotion to the rank of Lt. General in July 1989 but was rejected by the government. He thus once again lost seniority of 1956 batch. He was then considered as a first review case in July 1990 along with 1957 batch and was approved for selection for 'Staff Only' stream in the following sequence of consideration :

- (a) Final review case of 1955 batch.
- (b) First review case of 1956 batch.
- (c) Fresh case of 1957 batch.

Since the respondent was approved only for 'Staff Only' stream he was placed below all other Major Generals who were approved for selection in the stream of 'Command and Staff'. The respondent was aggrieved by his placement below the officers who were approved for 'Command and Staff' stream, though he had been approved only for 'Staff Only' stream.

6. On May 31, 1986 the Government of India approved, the principle, the 'Two Stream' concept of career management of Army Officers of the ranks of Major General and Lt. General subject to the following stipulations :

- (a) The modalities for implementation of 'Two Stream' concept will be worked out by the Army Headquarters and submitted to government for information. This will include identification of appointments to be manned by officers belonging to the 'Staff Only' stream.
- (b) The criteria and the QRs formulated by the Army HQs and submitted to government vide Army HQs Note No. PC-01102/MS 9B dated February 7, 1986 will be applied for screening officers for promotion to the two streams. It will be ensured that the QRs prescribed for promotion to the 'Command and Staff' stream and stricter than those prescribed for the 'Staff Only' stream.
- (c) A comprehensive review of the working of the concept will be done in 1987 and such amendments, as may be necessary, will be put up to government for approval.

7. This approval of the government was preceded by the approval of the Prime Minister on May 26, 1986. The reason for adoption of 'Two Stream Concept' of career management for Army Officers is that the Army is highly command oriented with the system itself providing a distinct edge for proven command performance. This orientation, especially in higher ranks, has helped to maintain the fighting efficiency of the Army and has stood the test of time, besides being in the overall interests of the Service and the Nation. In order to be able to develop command potential, it was thought necessary that officers are allowed to hold command appointments for adequate periods.

8. Thereafter the modalities for above 'Two Stream Concept' were worked out by the Army

Headquarters and an office order was issued by Military Secretary's Branch, Army Headquarters, dated September 9, 1986. The relevant paragraphs are 1 to 3, 5 and 9 which read as under :

"1. The upgradations in senior ranks in the Cadre Reviews have been sanctioned only in the Staff and ERE appointments. This has caused serious imbalances in the existing ratio between the Command, Staff and ERE appointments. Whereas, earlier senior officers could be given a proper command tenure before their turn came up for the next promotion, it is not now feasible in all cases after the upgradations are fully implemented.

2. Ours is a Command oriented Army and successful performance in a command must continue to be mandatory for promotion to higher ranks. It is not desirable to truncate command tenures, if we have to maintain our fighting efficiency. It is to this end, that it has been decided to adopt the 'Two Stream Concept' for officers of the rank of Brig. and above. The details of the concept are given in the succeeding paras.

Concept

3. The concept envisages that officers on promotion to Maj. General and Lt. General will be bifurcated into the 'Command and Staff' and the 'Staff Only' streams as per details given below :-

(a) 'Command and Staff' Stream. Very high calibre officers based on their merit will be promoted to this Stream. They will hold command appointments in the higher rank and thereafter be given exposure to Staff and ERE appointments as necessary. They will be eligible for further promotion as per the existing criteria.

(b) 'Staff Only' stream. Officers promoted to this stream will hold only staff appointments, in the higher rank and will proceed on superannuation thereafter. These officers will not be eligible for further promotion.

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Applicability

5. The 'Two Stream' concept generally will be applicable to the officers of the General Cadre. However, non-General Cadre officers will also be considered for the 'Staff Only' Stream in the rank of Lt. General.

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Inter-se Seniority

9. Officers selected for the 'Command and Staff' Stream, will be promoted first, be it on a Command or Staff appointment. Thereafter, officers of the same batch who are selected for the 'Staff Only' stream will be promoted. Therefore, for the purpose of seniority, officers of the 'Staff Only' stream will be junior to officers of the 'Command and Staff' Stream. After placing the officers of the 'Staff Only' stream in suitable appointments, review selectees of the 'Command and Staff' stream of the next batch will be promoted.

9. Again in adopting the methodology for implementation of the 'Two Stream Concept' the following note dated September 22, 1986 was put up by the Military Secretary to the Chief of the Army Staff :

"1. This note pertains to the sequence of promotion in respect of officers who are approved for promotion under the Two Stream concept.

2. The existing sequence of promotion is laid down vide our policy letter No. 38360/MS 5 B dt. May 29, 1984, placed opposite.

3. With our command orientation, viable tenures in command assignment are mandatory to increase the fighting efficiency of the Army. It is, to this end that the Two Stream concept has been adopted.

4. With the introduction of the two stream concept in the ranks of Maj. Generals and Lt. Generals, the sequence of promotion into the streams needs to be formalised. In so doing, the main reasons for the introduction of the Two Stream concept, have to be the guiding principle.

5. The Two Stream concept was introduced to promote younger high calibre officers early, so that they get viable tenures in command. It is also well known that by and large an officer who is approved as a fresh case is of a higher calibre as compared to the ones approved for promotion as review cases. Thus it would be logical to promote the former category of officers approved in the 'Command and Staff' stream, earlier than the latter category of officers approved in the 'Staff Only' stream.

6. Two options are available for fixing the sequence of promotion under the 'Stream Concept'. These are given in subsequent paras with the help of the following illustrations -

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(a) Batches considered at the Screening Board (i) Final Review 1956 (ii) First review 1957 (iii) Fresh Cases 1958(b) Officers Approved for Promotion (i) Final Review 1956 (aa) Command and Staff stream - one (ab) Staff Only stream - one (ii) First Review - 1957 (aa) Command and Staff stream - one (ab) Staff Only stream - one (iii) Fresh Cases - 1958 (aa) Command and Staff Stream - ten (ab) Staff Only stream - five

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7. Whatever sequence is followed, the IC number seniority within that stream of that batch needs to be maintained. The sequence of promotion could follow the undermentioned options :-

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(a) Option A. To follow the existing sequence of promotion :- (i) Final review Command and Staff stream - 1956 batch. (ii) Final review Staff Only stream - 1956 batch. (iii) First review Command and Staff stream - 1957 batch. (iv) First review Staff Only stream - 1957 batch. (v) Fresh Command and Staff stream - 1958 batch. (vi) Fresh Staff Only stream - 1958 batch. (b) Option B. The sequence of promotion to be :- (i) Final review Command and Staff stream 1956 batch. (ii) First review Command and Staff stream - 1957 batch. (iii) Fresh Command and Staff stream - 1958 batch. (iv) Final review Staff Only stream - 1956 batch. (v) First review Staff Only stream - 1957 batch. (vi) Fresh Staff Only stream - 1958 batch.

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(The officers of 1959 batch, approved ever in the Command and Staff stream, will be promoted after absorbing the Fresh 'Staff Only' stream of 1958 batch.)

8. The advantages of Option A will be the disadvantages of Option B. The advantages and disadvantages of Option A are discussed below :-

(a) Advantages

(i) Those approved for promotion as review cases, will still get their promotion and also have a reasonably viable tenure. The chances of any 'approved' officer retiring without getting his promotion, are remote.

(ii) The existence of dissatisfied officers among those approved for promotion, is unlikely.

(b) Disadvantages

(i) The basic principle behind the introduction of the two stream concept gets defeated.

(ii) Tenure of Command. Delay in the promotion of fresh cases of the Command and Staff stream, will give them lesser tenure, possibly affecting their chances of further promotion, thus having an overall detrimental effect.

(iii) The principle of promotion really high calibre and the best officers early, is violated.

9. Analysis. It would be noticed that the difference in the two options are minimal. In the case of Option A, the existing sequence of promotion has been maintained in that officers are being promoted as per their inter-se seniority, irrespective of the stream. In the case of Option B, whereas the existing sequence of promotion is still being maintained, but promotion is being affected in accordance with the stream in which

an officer is being promoted.

10. Since officers of the 'Command and Staff' are of higher caliber, promoting them over the 'Staff Only' stream is logical and has been accepted in principle. Hence adoption of Option B, is recommended.

11. For approval please. Once approved, Ministry of Defence will be informed accordingly.

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Sd/- (A.K. Chatterjee) Lt. Genl. Sena Sachiv/Military Secretary September 22, 1986COAS through VCOAS"

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10. The above note of the Military Secretary was considered by the Vice Chief of Army Staff and vide note dated September 24, 1986 in which he has observed as under :

"1. As I see it, in the ultimate, promotions in 'Command and Staff' stream and 'Staff' stream should be independent of each other based on identified slots in each stream. The differential in terms of time between the two may be as much as two to three years, the exact period varying from time to time. It is only then that we would be able to have viable tenures for 'Command and Staff' stream officers, both in the rank of Maj. Gen. and Lt. Gen. Thus, our aim should be to promote a 'Command and Staff' stream officer to Maj. Gen. at the age of 48 years or so and to Lt. Gen. at the age of 52 to 53 years. On the other hand, it would be acceptable if a staff stream officer is promoted to Maj. Gen. at the age of 51 years or so and to Lt. gen. at the age of 54 or 55 years.

2. In the light of the above, the proposal put forward by the MS cannot be a long term proposal. However, we have perhaps no option but to adopt this for the short term, as the ages at which the officers are currently being approved for higher promotions are comparatively higher, and there would be imbalances if we increase the differential suddenly. MS proposal must, therefore, be seen as a valid one for the transitional phase only. To that extent, I am in agreement with his recommendation.

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Sd/- September 24, 1986COAS"

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11. The note of the Military Secretary along with the note of the Vice Chief of Army Staff was put up before the Chief of Army Staff, who, on October 8, 1986 approved the note of the Vice Chief of Army Staff. The file was again put up to JDMS through the Military Secretary and the matter was discussed.

12. Paragraph 7(a) of the note of the Military Secretary dated September 22, 1986 mentions Options A which was the existing sequence of promotion prior to September 1986 and recommended in sub-paragraph (b) of paragraph 7 the sequence of promotion which was to be followed. In paragraph 8

the Military Secretary discussed the advantages and disadvantages of Option A and Option B. In paragraph 10 he recommended adoption of Option B. He also mentioned in his note that if note is approved, the Ministry of Defence will be informed accordingly.

13. It is clear that the Vice Chief of Army Staff adopted the proposal as recommended in the note of Military Secretary in paragraph 10 which was again agreed to by the Chief of Army Staff. The matter was again sent to the Military Secretary who discussed it with the officers of Ministry of Defence.

14. It is clear from Option B, which was adopted for working out the 'Two Stream Concept', that the seniority will first be given to the 'Command and Staff' stream selected from any of the earlier batches and after the 'Command and Staff' stream has been accorded the seniority, the three streams of 'Staff Only', mentioned at serial Nos. (iv), (v) and (vi) will be given seniority. It is also clear that the final review, the first review or fresh stream of 'Staff Only' rank below the similar three streams of 'Command and Staff' trained.

15. The substance of this note is again conveyed by the Military Secretary in its communication dated June 1, 1987 by way of further amplifying the methodology for implementation of the 'Two Stream Concept'. The letter reads :

"Command and Staff Stream

1. Further to this Headquarters letter

No. 00476/MS 9B dated September 9, 1986.

2. Certain doubts have been expressed by officers regarding the 'Two Stream Concept'. This letter seeks to clarify the important issues with particular reference to :-

(a) Necessity of the Stream Concept.

(b) Ages of superannuation.

(c) Inter-se seniority."

Necessity

3. The upgradations which were sanctioned in the Second Cadre Review, were mainly on the Staff and ERE. This resulted in an imbalance in the Command and Staff ratio. Tenures in senior ranks in Command consequently became truncated which in a Command oriented Army like ours, is not acceptable. Hence the 'Two Stream' concept was introduced with the due approval of the government.

Ages of Superannuation

4. As per the current rules officers of the 'Staff Only' stream are to superannuate one year earlier than the officers of the 'Command and Staff' stream. This rule is applicable both to the General Cadre and officers from other Arms and Services. However, in the case of officers of other Arms and Services certain other

clarifications gives in the succeeding paras will also be applicable.

5. Maj. Gens. In the case of Maj. Gens. from other Arms and Services, the screening is done primarily to permit the officers to be promoted to unspecified appointments outside their Corps on first promotion and if required ahead of officers not so selected. The ages of superannuation in their respect will remain unchanged and they shall superannuate at an age corresponding to the officers of the Command and Staff Stream in the rank of Maj. Gen.

6. Lt. Gens. Each other Arm/Service is authorised two appointments specific to the Corps in the rank of Lt. Gen. Notwithstanding the proposal to downgrade the schools of instruction, a second appointment in the rank of Lt. Gen. will invariably be made available to them to ensure that their promotional prospects do not lag behind. Officers holding these two assured appointments will superannuate at 58 years. Other officers from a particular Arm/Service in the 'Staff Only Stream' over and above the two assured appointments will superannuate at 57 years as is applicable to officers of the General Cadre. However, if an appointment within the Corps falls vacant, such officer will be screened to assess his fitness for holding the specific vacancy within the Corps. If selected to hold the authorised vacancy, he will superannuate at an age corresponding to the age of Command and Staff Stream, i.e. 58 years. If in case, no vacancy is available, the officers of this stream continue to superannuate at 57 years as mentioned earlier.

Inter-se seniority

7. The 'Two Stream Concept' envisages that officers of the General Cadre of a particular batch seniority approved in the 'Command and Staff' stream will be en-bloc senior to those officers of the same batch approved on the 'Staff Only' stream.

8. Insofar as non-General Cadre officers are concerned, the order of passing out is the determining factor to decide the inter-se seniority amongst them subject to readjustment based on the sequence of selection.

9. Doubts have also been raised regarding the inter-se seniority between the officers of other Arms and Services approved on the 'Staff Only' stream vis-a-vis officers of the General Cadre approved in the 'Command and Staff' stream as well as 'Staff Only' stream. It is clarified, that as regards the seniority within the same batch is concerned, officers approved on the 'Command and Staff' stream continue to be senior to officers approved in the 'Staff Only' stream. However, an officer of an earlier batch approved on the 'Staff Only' stream will be senior to an officer of subsequent batch approved on the 'Command and Staff' stream.

10. It will, therefore, be noticed from the above that while promoting officers in either the 'Command and Staff' stream or 'Staff Only' stream, concept of batch seniority as hitherto applicable has in all case been maintained.

11. It is reiterated that the 'Stream Concept' has been introduced to ensure that the best available talent and expertise available in the service is utilised.

12. Content of this letter be widely disseminated.

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Sd/- (Vijay Kumar) Lt. Gen. Sena Sachiv/Military Secretary"

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16. Before advertng to the submissions of the parties we may also refer to another letter dated May 29, 1984 filed as Annexure P-2 to the writ petition in the High Court (page 306 of the paper book filed on behalf of the respondents along with the counter-affidavit). The letter dated May 29, 1984 reads as under :

"Sequence of Selection for Selective Ranks

1. Reference MS Branch Liaison Letter No. 1/80 forwarded vide this Headquarters Letter No. 00170/MS9A dated August 2, 1980.

2. Paras 26 and 27 of the abovequoted liaison letter deal with the revised sequence of selection for promotion to the rank of A/Lt. Col. However, the example given in para 26 has raised certain doubts in the minds of the officers. According to this example, the revised sequence of selection was to be in the following order :

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(a) Final Review - (Say) 1960 Batch(b) First Review - 1961 Batch(c) Fresh Selectees - 1962 Batch

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3. Prior to February, 1980 two different sequences of selection were being followed for promotion to the rank of A/Lt. Col. and A/Col., illustrated by the following examples :

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(a) for promotion to the rank of A/Lt. Col.(i) Fresh Selectees - (Say) 1959 Batch(ii) Final Review - 1957 Batch(iii) First Review - 1958 Batch(b) for promotion to the rank of A/Col. and above(i) Final Review - 1954 Batch(ii) First Review - 1955 Batch(iii) Fresh selectees - 1956 Batch

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4. In February 1980, it was decided to bring the sequence of selection in the rank of A/Lt. Col. in line with the sequence being followed for promotion to the ranks of A/Col. and above. The changed sequence of selection which is being presently followed is illustrated by the following examples :

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(a) Final Review - 1961 Batch(b) First Review - 1962 Batch(c) Fresh selectees - 1963 Batch

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5. This new sequence was to be applied commencing with the fresh selectees of 1963 as illustrated in para 4 above. Fresh selectees officers of 1962 and earlier seniority were to be treated by the old criterion as given in para 3(a) above. It was also decided that past cases would not be opened up for the revision of seniority.

6. In view of above, para 26 of abovementioned liaison letter may please be treated as cancelled.

7. This letter may please be given wide publicity.

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Sd/- (H.B. Kala) Col. Col. MS 5 for Military Secretary"##

17. Learned counsels also brought to our notice paragraph 169 of Annexure P-3 filed in the writ petition (pages 307 to 309 of the paper book) which reads as under :

"169. 'A' Batch for consideration for promotion to select rank is defined as 'all officers who reckon seniority in a particular calendar year'. This has been done for the following reasons :

(a) Officers are commissioned from IMA in June and December each year.

(b) Officers commissioned from OTS on grant of permanent commission lose seniority as per existing rules and they reckon seniority in March and September of each year.

(c) Officers who forfeit service as a result of disciplinary awards reckon fresh seniority on any date in the calendar year.

(d) Officers passing promotion examinations late also reckon seniority corresponding to the date of the examination on which they finally passed."

18. It will be noticed that both these communications are before the 'Two Stream Concept' which was accepted by the government on May 31, 1986 and its modalities being worked out thereafter. However, we will deal with these two communications little later.

19. The Division Bench of the High Courts considered the note of Military Secretary dated September 22, 1986, referred to above, as well as the note of the Vice Chief of Army Staff dated September 24, 1986 as also the note of the Chief of Army Staff and took the view that if the sequence of promotion which was being followed was for Option A the writ petitioner would be entitled to be placed above the fresh 'Command and Staff' stream cases belonging to 1957 batch. The learned Judges further observed :

"In our opinion it is the sequence which is referred to in the Option A which has to be followed for making promotion to the next higher rank of Lt. General. The reason for this is obvious. It is true that the Military Secretary had recommended in the note dated September 22, 1986 that Option B (supra) should be adopted. The Vice Chief

of Army Staff, however, has stated that the proposal of the Military Secretary cannot be a long term proposal. He further recommended that the proposal of accepting Option B could be adopted for a short term only

'as the ages at which the officers are currently being approved for higher promotions are comparatively higher'.

The Vice Chief of Army Staff then (emphasis added) (sic) recommended that Option B should be regarded as being followed 'for a transitional phase only'.

It is clear from the aforesaid note of the VCOAS that Option B was recommended for being approved only by way of temporary measure and with regard to those officers who were being considered for promotion at that time. The use of expression 'Currently being approved' must lead to only one conclusion that it referred to those officers who were being considered for promotion on or about September 1986. What is of greater importance is that the VCOAS was emphatic in observing that Option B could not be favoured as a long term proposal. The Chief of Army Staff agreed with the recommendation of the Vice Chief of Army Staff. The effect of this must be that the recommendation of the Military Secretary to adopt Option B as a sequence of promotion was not accepted. The existing sequence of promotion which was being followed was recommended to be continued."

20. Again the Division Bench observed :

"It is pertinent to note that notwithstanding the note dated September 22, 1986, and the subsequent opinion of the Vice Chief of Army Staff and the Chief of Army Staff, no letter of the type which was issued on September 9, 1986 was ever issued by the Military Secretary's branch. Whereas the letter of September 9, 1986 was issued to all the Command Headquarters, there is no formal document which was issued or made known to the officers, purporting to give effect to Option B suggested by the Military Secretary vide his note dated September 22, 1986. On the contrary, the letter dated June 1, 1987 issued by the Military Secretary's Branch, referred to hereinabove, is clearly at variance with the suggestion of the Military Secretary contained in his note of September 22, 1986. If Option B had been accepted, then that would have been mentioned in the letter of June 1, 1987."

21. Again in relation to the communication dated June 1, 1987 the Division Bench observed as under :

"Reverting to the letter of 1st June, 1987, we find that towards the end of paragraph 9, it has been categorically stated that :

'However, an officer of an earlier batch approved on the "Staff Only" stream will be senior to an officer of subsequent batch approved on the "Command and Staff" stream.'

This is then emphasised by the contents of paragraph 10 of that very letter which reiterates that :

'The concept of batch seniority as hithertofore applicable has in all cases been maintained.'

The anxiety of the Military Secretary's branch apparently was that the batch seniority had to be maintained. If the argument of Mr Vazey is accepted, the batch seniority cannot be maintained if the fresh cases of 1957 batch are to be promoted earlier than the petitioner, which is a first review case of 1956 batch, then the effect would be that officers belonging to the 1957 batch would be senior to the petitioner who belongs to the 1956 batch. Notwithstanding the note dated September 22, 1986 of the Military Secretary, the letter dated June 1, 1987 of the Military Secretary's branch makes it clear that the batch seniority shall always be maintained. Notwithstanding the fact that the fresh cases of 1957 batch have been approved for Command and Staff stream, they would, nevertheless, come in sequence after the petitioner who belongs to the 1956 batch though selected in the Staff Only stream. It may happen that notwithstanding that the petitioner is placed at the head of the panel, no staff vacancy may occur and a vacancy may occur only for a command post to which the petitioner has not been selected but we are not concerned with such a case here. It is the admitted case before us that out of the panel of officers who were selected as per the letter dated October 26, 1990, Major Gen. S.A. Singh and S. Roy Choudhary have been, on promotion, posted to posts which are non-Command posts."

22. It appears to us that the Division Bench totally misunderstood the note of the Military Secretary dated September 22, 1986 as well as the note of the Vice Chief of Army Staff dated September 24, 1986.

23. It is in the select panel prepared dated October 26, 1990 that the officers mentioned at (a) are the officers who were selected for 'Command and Staff' stream whereas the respondent was selected for the stream of 'Staff Only'. It is clear from the scheme that the officers who were approved for 'Command and Staff' stream can be appointed both for 'Command' as well as 'Staff' vacancies whereas the officers who were approved only for stream of 'Staff Only' can only be appointed to the vacancies relating to 'Staff' and cannot be appointed relating to vacancies for 'Command'. The expression 'same batch' which is referred to in paragraph 9 of the letter dated June 1, 1987 is for the officers who were considered for selection at one time and not the individual batch of the Major General. The batch in which the respondent was considered for promotion included - (a) fresh cases of 1957, (b) first review case of 1956 and (c) final review case of 1955. It is that batch which is being referred to as the 'same batch' and it is specifically mentioned in paragraph 9 that for the purpose of seniority, officers of the 'Staff Only' stream will be junior to the officers of the 'Command and Staff' stream. It is again specifically mentioned that after placing the officers of the 'Staff Only' Stream, review selectees of the 'Command and Staff' stream of the next batch to be promoted. This concept was further explained in the note of the Military Secretary dated September 22, 1986 which was approved by the Chief of Army Staff as well as duly informed to the government as required by the communication dated May 31, 1986, noticed by us earlier. In the note of the Military Secretary dated September 22, 1986 Option A which was prevalent practice was substituted by Option B which was recommended for future and which was accepted both by Vice Chief of Army Staff as well as the Chief of Army Staff. Option A was never put up as a proposal for acceptance or rejection to the Chief of Army Staff. Vice Chief of Army Staff only considered the proposal as recommended by Military Secretary in his note dated September 22, 1986 and Vice Chief of Army Staff accepted it and the same was adopted by the Chief of Army Staff. This Option B has not been reviewed till date. There can be no doubt that if Option A was available for preparation of select list the respondent would have been senior to other persons who were recommended for 'Command and Staff' stream. But Option A was given up and Option B was recommended for approval. If Option B has been adopted and accepted, as is clear, the seniority of

the respondent placed in the panel dated October 26, 1990 is unexceptionable. It is again clear that the recommendation of the Military Secretary dated September 22, 1986 approved by the Chief of Army Staff was fully stated in paragraphs 7, 9 and 10 of the communication dated June 1, 1987. Merely because no reference is made to the note of the Military Secretary dated September 22, 1986 in the communication dated June 1, 1987 it does not mean that the note has to be ignored. It will be noticed from the communication dated May 31, 1986 that after the government had approved the concept of 'Two Stream', it was left to the Army Headquarters to work out the modalities and merely inform the government. In fact, the select panel, even after being prepared, has to be approved by the government and has been so approved which shows that the government has accepted the modalities worked out by the Army Headquarters of the 'Two Stream'. It is clear from the noting of the Military Secretary which was accepted by the Chief of Army Staff that the same was intimated to the government and that the matter was also discussed with the government by the Military Secretary. Nothing further was required to be done and those decisions find place in paragraphs 7, 9 and 10 of the letter dated June 1, 1987 by way of working out modalities. It is mentioned, even at the expense of repetition, in paragraph 7 of the aforesaid communication dated June 1, 1987 that the 'Two Stream Concept' envisages that the officers approved in the 'Command and Staff' stream will be en-bloc senior to the officers of the same batch approved in the 'Staff only' stream. The same batch here refers to the three types of officers who were considered for promotion in the 1957 batch. Again in paragraph 9 it was repeated "it is clarified, that as regards the seniority within the same batch is concerned, officers approved on the 'Command and Staff' stream continue to be senior to officers approved in the 'Staff Only' stream". It was further clarified that "however, an officer of an earlier batch approved on the 'Staff Only' stream will be senior to an officer of subsequent batch approved on the 'Command and Staff' stream. Here the 'subsequent batch' means the next batch of promotion. The expression 'same batch' in the communications of September 22, 1986 and June 1, 1987 took colour from the context and not from the definition of 'batch' given in paragraph 169 noticed earlier. Nor does the sequence of selection to be considered as was prevailing before the communication dated September 22, 1986 relevant. It was only the sequence of selection as proposed in Option B which was adopted.

24. Again the observation of the Division Bench that the note of the Military Secretary dated September 22, 1986 is contrary to or at variance with the letter dated June 1, 1987 is not correct. The letter of June 1, 1987 is again for working out further modalities of 'Two Stream Concept' vis-a-vis seniority in the light of the note of the Military Secretary dated September 22, 1986.

25. The government has been very fair in placing before us the results of the select panel prepared since the introduction of 'Two Stream Concept'. The first Special Selection Board, after September 1986, for promotion to the rank of Lt. General was held in October 1986. It was 1954 batch comprising - (a) Final Review of 1952, (b) First Review of 1953 and (c) Fresh 1954 and the officers who were selected to the Stream of 'Command and Staff' were of 1954 batch and were placed en-bloc senior to officers selected for 'Staff Only' stream who were again Fresh 1954. Again the same policy was followed in the case of the respondent. It was called 1957 batch comprising - (a) Final Review of 1955, (b) First Review of 1956 and (c) Fresh 1957. Since the respondent was approved only for 'Staff Only' stream, though he was first review case of 1956, he was placed below the officers who were approved for 'Command and Staff' Stream and were Fresh 1957. Since there was no vacancy which could fall to the share of the respondent in his turn as per the seniority till he was superannuated on May 31, 1991, the respondent could not take advantage of his approved promotion.

26. The note dated September 22, 1986 amending the sequence of promotion and after giving

advantages and disadvantages of the two options i.e. Option A and Option B had, thereafter, recommended that Option B should be adopted.

27. It may not be accurate for the High Court to apply Option A which has never been recommended and which was superseded by Option B which was accepted at the highest level. Fact remains that even the select panel prepared by the army authorities was approved by the government before it was released.

28. Learned counsel for the respondent referred to the case of Major General R.K. Gaur as mentioned in paragraph 49 of the writ petition. The averments in paragraph 49 of the writ petition is that Major General Gaur was a case of 1954 batch - first review, and was approved on August 26, 1988 for 'Staff Only' stream. Some time in October 1987 fresh cases of 1955 batch were also approved for promotion to the rank of Lt. General in which Major General V.K. Singh and Major General Harvans Singh, in addition to many others, were approved for 'Command and Staff' stream. By the time Major General Gaur was approved in its first review on August 26, 1988 various officers of 1955 fresh cases were promoted except Major General V.K. Singh and Major General Harvans Singh. Between August 26, 1988 on which date Major General Gaur was approved in 'Staff Only' stream and October 26, 1988 no promotions were made to the rank of Lt. General and on October 26, 1988 Major General Gaur was ordered to be promoted and in his order it is mentioned that the general officer i.e. Major General Gaur will report for his new appointment forthwith. Since the order has come on October 26, 1988 itself and the order was to report forthwith he could have picked up the rank the same day but incidentally he was out of station and returned only on October 31, 1988 and he could pick up the rank only on November 1, 1988. The orders of promotion of Major General V.K. Singh and Major General Harvans Singh were issued on October 27, 1988 which clearly indicate that the order of promotion of Major General Gaur was issued ahead of both the aforesaid officers. This would clearly indicate that Major General Gaur who was a 1954 batch first review case was promoted ahead of Major General V.K. Singh and Major General Harvans Singh who were approved in 'Command and Staff' stream as fresh cases of 1955 batch. The intention of issuance of such order promoting Major General Gaur on October 26, 1988 clearly indicates that he was to be promoted ahead of those two officers.

29. In reply to the submissions made in paragraph 49, it is pleaded on behalf of the government that it was clearly mentioned that Major General Gaur, being a list review selectee of 1954 batch in 'Staff Only' stream, reckoned seniority below the Fresh Selectee 'Command and Staff' stream of 1955 batch. In the Army, the seniority is decided by the date of substantive promotion and not by the date, the officer picks up his acting promotion. In many cases officers due to various administrative reasons, who are otherwise seniors, pick up their acting rank due to late assumption of higher office later than their juniors. However, in such cases it is ensured that while granting substantive rank the panel seniority is maintained. It is a well known principle practised in almost all services and the writ petitioner is trying to confuse the issue with the latter relating to posting and promotion of senior officers which was issued one day later than his junior. It was contended that even in those promotions it was ensured that the seniors were at liberty to assume their higher appointment in acting rank along with Major General Gaur. It was averred that it has been conveniently overlooked by the writ petitioner that promotion orders of several other of his seniors were issued earlier. Moreover Lt. General Gaur was given substantive promotion at a date later than the other two officers mentioned by the writ petitioner. Under no circumstances a junior is promoted ahead of the senior. It was stated that Lt. General Gaur was given substantive rank w.e.f. November 1, 1988 whereas Lt. General Harvans Singh and Lt. General V.K. Singh, both seniors to Lt. General Gaur, were given substantive promotion w.e.f. October 27, 1988.

30. We find that in view of this reply the petitioner cannot take advantage for being promoted earlier than the officers selected for the 'Command and Staff' stream.

31. We, thus, accept this appeal, set aside the order of the High Court dated April 30, 1991 and dismiss the writ petition filed by the respondent. However, on the facts of the case, parties are left to bear their own costs throughout.

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