

SUPREME COURT OF INDIA

Major General H.M. Singh, VSM

Vs.

Union of India

C.A.No.192 of 2014

(A.K. Patnaik and Jagdish Singh Khehar JJ.)

09.01.2014

JUDGMENT

JAGDISH SINGH KHEHAR, J.

1. The appellant was commissioned as Second Lieutenant in the Indian Army on 15.6.1969. His initial induction was into the Armoured Corps. On 25.5.1983 the appellant changed his cadre. He permanently moved into the Defence Research and Development Organisation (hereinafter referred to as 'the DRDO'). Having gone through decades of rigorous military service and having consistently earned onward promotions to higher ranks, as were due to him from time to time, he was granted acting rank of Major General on 1.6.2004, after he had been approved for promotion to the rank of Major General by a duly constituted Selection Board.

2. On 31.3.2005 Lieutenant General Ravinder Nath retired from service. Resultantly a vacancy in the rank of Lieutenant General became available. On 1.1.2006 the appellant claims to have become eligible for the consideration for promotion to the above vacancy. It would be relevant to mention, that at that juncture, in the cadre of Major Generals, the appellant was the senior most serving officer (as per seniority list dated 29.12.2006) eligible for promotion to the rank of Lieutenant General. In the Government of India gazette (published on 6.12.2007) the appellant was shown as having been promoted as substantive Major General with effect from 7.1.2004. It would also be relevant to mention, that the name of the appellant was included in the name announced by the President of India for the award of the Vishist Seva Medal on 26.1.2007. The said award was sought to be bestowed upon the appellant, for his having rendered distinguished service of an

exceptional order to the nation. It is therefore, that the appellant was desirous, that his claim be considered for onward promotion to the rank of Lieutenant General. At that juncture, the appellant had not only held the rank of Major General for more 18 months, he had also earned two confidential reports in the said rank. The record appended to the pleadings indicates, that he had also been granted vigilance clearance. Despite the above, the appellant was not considered eligible for promotion to the rank of Lieutenant General as he had not completed two years' service in the rank of Major General at that time.

3. Under the circumstances mentioned in the foregoing paragraph, AVM R. Yadav, an officer from the Indian Air Force was inducted into the DRDO on 29.12.2005, against the vacancy in the rank of Lieutenant General created by Lieutenant General Ravinder Nath. AVM R. Yadav retired from service with effect from 31.12.2006. As such, a vacancy in the rank of Lieutenant General became available with effect from 1.1.2007.

4. On 30.4.2007, the appellant addressed a representation to the Director General DRDO asserting, that he was eligible for promotion against the existing vacancy of Lieutenant General, as he fulfilled the laid down criteria. He expressly pointed out in his above representation, that in the event of his promotion to the rank of Lieutenant General his age of retirement would stand extended. As Major General he would retire at the age of 59 years, on 29.2.2008 (as the appellant date of birth is 2.2.1949). On his promotion to the rank of Lieutenant General his age of retirement would stand extended to 28.2.2009 i.e., to 60 years. The appellant therefore requested the authorities, to immediately constitute and convene a meeting of the Selection Board, for considering his claim for onward promotion to the rank of Lieutenant General. For the above purpose, the appellant also met various higher authorities. On all such occasions he was informed, that the action to convene a meeting of the Selection Board was under process. In fact, in November, 2007 the appellant was assured, that the meeting of Selection Board would be held in December, 2007. He was also assured, that in the event of his being considered suitable for promotion by the Selection Board, he will actually be promoted to the rank of Lieutenant General, before the date of his retirement (29.2.2008) as Major General.

5. Since the date of appellant's retirement – 29.2.2008 was fast- approaching, and because it seemed to the appellant that nothing was moving, the appellant submitted his grievance to the authorities in writing, praying for immediate action in the matter. In this behalf he also sought personal hearing, to present his case.

These pleas were raised by the appellant through separate communications dated 26.12.2007 (to the SA to the Defence Minister, and to the DRDO). On 28.2.2008 he addressed a letter for the same purpose, to the Personal Secretary to the Defence Minister.

6. Two days prior to the appellant's retirement on superannuation (29.2.2008, as Major General), on 27.2.2008 a meeting of the Selection Board for promotion to the rank of Lieutenant General was convened. The Selection Board cleared the appellant for promotion to the rank of Lieutenant General. The Selection Board cleared only the name of the appellant for the above promotion, from out of a panel of 4 names.

7. In order to ensure that the appellant's claim for promotion to the rank of Lieutenant General is not frustrated, the President of India by an order dated 29.2.2008, was pleased to grant the appellant extension of service, for a period of three months. A relevant extract of the above order is being reproduced hereinunder:

“I am directed to convey the sanction of the President to the grant of extension in service to IC-23289 Maj Gen H.M. Singh, VSM, AC, CVRDE, Avadi a permanently seconded officer of Defence Research & Development Organisation, for a period of three months with effect from 01 Mar 2008 or till the approval of ACC, whichever is earlier.

This issues with the concurrence of MOD/Fin(R&D) vide their Dy No. 582/Fin (R&D) dated 29 Feb 2008.”

(emphasis is ours)

A perusal of the above communication reveals, that the aforesaid extension of service was granted to the appellant, to await the approval of the Appointments Committee of the Cabinet. In this behalf it would be relevant to mention, that in the process of consideration for promotion to the rank of Lieutenant General, the recommendation made by the Selection Board requires the approval of the Appointments Committee of the Cabinet, before it is given effect to. It is apparent that the Appointments Committee of the Cabinet, could not finalise the matter during the appellant's extended tenure of three months. As such, for the same reasons, the President of India was pleased to grant the appellant a further extension in service (as Major

General) for a period of one month i.e., up to 30.6.2008 or till the approval of the Appointments Committee of the Cabinet, whichever was earlier.

8. On 2.6.2008, the Secretariat of the Appointments Committee of the Cabinet (Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training) issued a communication with the following observations:

“2. The Appointments Committee of the Cabinet has not approved the promotion of IC-23289 Maj Gen H.M. Singh, a permanently seconded officer of DRDO, to the rank of Lieutenant General.”

In consonance with the order granting extension in service, the DRDO issued an order dated 3.6.2008, retiring the appellant from the rank of Major General with immediate effect. The appellant assailed the above order dated 2.6.2008 (denying the appellant promotion to the rank of Lieutenant General), and the order dated 3.6.2008 (by which the appellant was retired from service) by filing Writ Petition No. 15508 of 2008 before the High Court of Judicature at Madras (hereinafter referred to as ‘the High Court’). Convening a meeting of the Selection Board on 27.2.2008 i.e., just two days before the appellant was to retire on attaining the age of superannuation, as also, the consideration of the recommendation made by the Selection Board at the hands of the Appointments Committee of the Cabinet, more than three months after the date on which the appellant would retire from service, were vigorously referred to, to demonstrate the apathy at the hands of the authorities, which according to the appellant, had resulted in denial of promotion to him.

9. In response to the alleged delay in the matter of considering the appellant’s claim for promotion, it was pointed out that the DRDO had a large number of high value projects viz. design, development and production of Light Combat Aircraft, design and development of Kaveri Engine, design and development of Airborne Early Warning System and a number of projects related to upgradation of avionics and electronics warfare system, Sukhoi, MIG-27 and LCA; accordingly a decision was taken by the DRDO i.e., the appellant’s controlling authority, to earmark the vacancy of Lieutenant General (against which the appellant was claiming consideration), for an officer of equivalent rank from the Indian Air Force, who would be in a position to oversee, provide guidance and coordinate all the abovementioned highly sensitive and intricate projects. The above tentative determination for filling up the vacancy of Lieutenant General from the Indian Air

Force was, however, subsequently reviewed in consultation with the Government of India. The Government of India on 14.2.2008 finally decided to fill up the vacancy of Lieutenant General by promotion of a permanently seconded service officer of the DRDO. It was therefore asserted, that non-holding of the meeting of the Selection Board, and the non-finalisation of the consideration of the appellant's claim for promotion to the rank of Lieutenant General, could not be described as a deliberate and intentional attempt by the authorities to deprive the appellant of his promotional opportunity.

10. In its pleadings the Union of India adopt a clear stand, that the appellant having attained the age of superannuation on 29.2.2008, could not be promoted as Lieutenant General "while he was on extension". It was also the contention of the Union of India, that since the Appointments Committee of the Cabinet had not approved the appellant's promotion to the rank of Lieutenant General, the same could not be challenged specially because the Appointments Committee of the Cabinet had given valid reasons to defer the recommendation of the Selection Board / Departmental Promotion Committee. The Union of India acknowledged, that the Appointments Committee of the Cabinet was the competent authority to approve the recommendation for promotion to the rank of Lieutenant General (made by the Selection Board). It was admitted, that the Selection Board in its meeting held on 27.2.2008 had recommended the appellant for promotion to the rank of Lieutenant General. Pending approval of the Appointments Committee of the Cabinet, the appellant had crossed the age of his retirement on superannuation (in the rank of Major General, on 29.2.2008). Thereafter, the appellant was granted extension in service beyond the period of his retirement up to 30.6.2008.

11. Having considered the contentions and prayers made by the appellant, a Single Bench of the High Court while disposing of the Writ Petition No. 15508 of 2008, recorded the following observations:

"40. When the petitioner's extension of service was not on the ground of exigency, DRDO being mainly civilian, Rules do not permit promotion on extension. ACC's action in not granting approval to the recommendation made by Selection Board is in accordance with the Rules and the same cannot be assailed. Petitioner cannot contend that he has been discriminated in not granting promotion while on extension.

41. There is no substance in the contention that the Petitioner having been extended his service, he ought to have been granted promotion. Extension of

service does not give rise the legitimate expectation for promotion. The extensions in tenure were given to the petitioner to ensure that procedure relating to approval of competent authority on the recommendation of Selection Board was completed in an objective manner by following prescribed process. On culmination of process, ACC is the competent authority came to the decision not to promote the petitioner. As such there is not incoherence and arbitrariness in the decision warranting exercise of judicial review.”

In the light of the above observations Writ Petition No. 15508 of 2008 was dismissed on 5.5.2009.

12. Dissatisfied with the dismissal of Writ Petition No. 15508 of 2008, the appellant filed an intra court Writ Appeal No. 779 of 2009. In the process of adjudicating upon the controversy raised in the abovementioned Writ Appeal, a Division Bench of the High Court framed two questions for its consideration. Firstly, whether the appellant Major General H.M. Singh had any fundamental right for promotion solely on the basis of the recommendation of the Selection Board. And secondly, whether Appointments Committee of the Cabinet was liable to accept the recommendation made by the Selection Board in favour of the appellant, and consequently, order the appellant’s promotion to the rank of Lieutenant General. Relying on paragraph 108 of the Regulation of Army which delineates the constitution and duties of the Selection Board, the Division Bench concluded that the recommendations of the Selection Board were merely recommendatory in nature, and therefore, answered the first question in the negative. The Division Bench further held, that a legitimate claim for the promotion would arise, only if a recommendation made by the Selection Board gets the approval of the Appointments Committee of the Cabinet. Relying on the judgments rendered by this Court in *Dr. H. Mukherjee Vs. Union of India and others*, 1994 Supp. (1) SCC 250, *Union of India and others Vs. N.P. Dhamania and others*, 1995 Supp. (1) SCC 1, and *Food Corporation of India and others Vs. Parashotam Das Bansal and others*, (2008) 5 SCC 100, the Division Bench of the High Court further concluded, that the Appointments Committee of the Cabinet was not bound by the recommendation of the Selection Board. It accordingly held, that for justifiable reasons, the Appointments Committee of the Cabinet had the right to either accept, or to refuse the recommendation of the Selection Board. In sum and substance it came to be concluded, that unless it was shown that the determination of the Appointments Committee of the Cabinet suffered from arbitrariness or malafides and capriciousness, the same could not be interfered

with. The Division Bench of the High Court having found none of the above noted vices in the determination of the Appointments Committee of the Cabinet, answered the second question also in the negative.

13. Based on its aforementioned determination, the High Court dismissed Writ Appeal No. 779 of 2009, on 21.7.2009. Dissatisfied with the order dated 5.5.2009 (passed by the Single Judge of the High Court, dismissing Writ Petition No. 15508 of 2009), and the order dated 21.7.2009 (passed by the Division Bench of the High Court dismissing Writ Appeal No. 779 of 2009), the appellant approached this Court by filing Petition for Special Leave to Appeal (C) No. 2008 of 2010. On 11.1.2010 this Court issued notice in this matter. On completion of pleadings the matter was listed for final disposal.

14. Leave granted.

15. On 29.8.2013 while hearing the matter this Court passed the following order:

“Before we proceed for further hearing in the matter, we would like to go through the deliberations of the Appointments Committee of the Cabinet [for short ‘the ACC’] by which the recommendations of the Selection Board was not accepted in the case of the petitioner.

Hence the records of the Selection Board and the final orders passed therein in the case of the petitioner be placed before the Court on the next date of hearing, i.e., 10th September, 2013.”

Thereafter on 12.9.2013 this Court passed the following order: “We have perused the record produced before us and we have also heard the arguments of learned Additional Solicitor General”

Ld. A.S.G. has sought time to seek instructions.

On the next date, Ld. A.S.G. will ensure that a copy of the note put up to the A.C.C. and the decision of A.C.C. as well as a copy of the recommendation dated 27th February, 2008 of the Selection Board are made available to the Court

List this matter on 23rd September, 2013.”

The summoning of the record referred to in the orders extracted hereinabove, had become essential for two reasons. Firstly, the appellant did not contest the findings recorded by the Division Bench of the High Court on the two questions framed by the High Court, for the disposal of Writ Appeal No. 779 of 2009. Having given our thoughtful consideration to the determination rendered by the High Court, on the two questions framed by it, we must acknowledge that the High Court was fully justified in drawing its conclusions. We therefore hereby affirm the above findings recorded by the High Court. According to the appellant, the High Court had misdirected itself in its above determination. It was the submission of the appellant, that the determination of the Appointments Committee of the Cabinet, was not supported by justifiable reasons. It was asserted, that the determination of the Appointments Committee of the Cabinet was arbitrary, and based on extraneous consideration. Insofar as the instant aspect of the matter is concerned, it was the vehement submission of the appellant, that the High Court had not addressed the issue at all.

16. The solitary contention advanced at the hands of the appellant, was based on the recommendation made by the Selection Board on 27.2.2008, and the consideration of the above recommendation by the Appointments Committee of the Cabinet (leading to the rejection of the appellant's claim for the promotion to the rank of Lieutenant General). For effectively understanding and determining the solitary contention at the hands of the appellant, it is essential to extract the minutes of the meeting of the Selection Board dated 27.2.2008, as also, the proceedings of the Appointments Committee of the Cabinet. Without understanding the tenor and effect of the above deliberations, it would not be possible to express our findings and the reasons. Had the above proceedings revealed sensitive material, improper for public consumption, or detrimental to national interest, we would have chosen to tread cautiously. The deliberations which resulted in denial of promotion to the appellant (to the rank of Lieutenant General), however, have no such misgivings. We have therefore no hesitation in extracting the minutes of the meeting of the Selection Board dated 27.2.2008. The same are being reproduced hereinunder:- "MINUTES OF (1/2008) DRDO SELECTION BOARD

MEETING HELD ON 27 FEB 2008

The Selection Board comprising the following, met on 27 Feb 08 in the office of the Scientific Advisor to Raksha Mantri, Room No. 532, DRDO Bhawan, New Delhi:-

(a) Shri M. Natarajan, SA to RM - Chairman (b) Shri Pradeep Kumar, Secretary (DP) -Member

(c) Lt. Gen. M.L. Naidu, PVSM, AVSM, YSM, VCOAS – Member

(d) Dr. D. Banerjee, DS & CC R&D (AMS) – Member Secretary

2. Defence Secretary did not attend the meeting due to other prior commitments.

3. SA to RM briefed the Board to say that only one vacancy in the rank of Lt. Gen exists. The other vacancy in lieu of Scientist ‘H’ has been referred back to the RM for reconsideration and therefore will be considered only after a decision.

4. The Board considered the following 04 officers for promotion to the acting rank of Lt. Gen:-|Ser No. |IC No., Rank, Name & Corps | |(i) |MR-03539 Maj Gen J.K. Bansal, AMC | |(ii) |IC-23289 Maj Gen H.M. Singh, VSM, AC | |(iii) |IC-23850 Maj Gen S.S. Dahiya, AVSM, VSM EME | |(iv) |IC-24631 Maj Gen Umang Kapoor, EME |

5. Based on deliberations and record of service, past performance, qualities of leadership as well as vision, the Board recommends IC-23289 Maj Gen HM Singh, VSM, AC for promotion.

Sd/- Sd/-

DS&CC R&D (AMS) VCOAS

Member Secretary Member”

(emphasis is ours)

The proceedings recorded by the Appointments Committee of the Cabinet while rejecting the appellant's claim for promotion to the rank of Lieutenant General are also being set out below:-

“The Ministry of Defence has, with the approval of the Raksha Mantri proposed the promotion of IC-23289 Maj Gen HM Singh, a permanently seconded officer of the DRDO, to the rank of Lieutenant General.

2. Maj Gen HM Singh (dob: 02.02.1949) was due for superannuation on 29th February, 2008 on attaining the age of 59 years which is the age of superannuation for officers of the rank of Major Generals who are permanently seconded to the DRDO. A Selection Board which met on 27th February, 2008 to consider eligible officers of the rank of Major General permanently seconded to the DRDO for promotion to the rank of Lieutenant General, recommended Major General Singh for promotion. As the officer was due for retirement on 29th February, 2008 approval of the Raksha Mantri was obtained for giving him extension of service of three months in the rank of Major General or till the approval of the Appointments Committee of the Cabinet to his promotion to the rank of Lieutenant General, whichever is earlier. Officers in the rank of Lieutenant General retire on attaining the age of 60 years.

3. The propriety of grant of extension to the officer at the verge of his superannuation and also, that of grant of promotion to the officer while on extension has been examined. The matter has been discussed, separately, with officers from the Department of Personnel and Training; the DRDO, and also, the Ministry of Defence (Military Secretary's Branch). This apart, a legal notice has been received alleging perjury on the basis of information secured from the Ministry of Defence under the Right to Information Act. A representation has also been received from an officer, Maj Gen PP Das, alleging discrimination.

4. In terms of the provisions of Section 16A(4) of the Army Act an officer who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in the service for a further period by the Central Government, if the exigencies of the service so require.

5. It is evident from the above provisions that for grant of extension in service, the requirement to be fulfilled, primarily, is the exigencies of service. In the note which was put up to the Raksha Mantri soliciting approval to the proposal for grant of extension, no such exigency has been cited. The only issue that was mentioned in support of the proposal for extension was that the officer had been recommended for promotion to the rank of Lieutenant General. This in the background of the provisions of the Act mentioned above, is no sufficient ground for extension.

6. The Chief Controller Research & Development with whom the matter was discussed has provided copies of orders issued in the years 1995 and 1996 when officers of the rank of Major General were granted extensions. Extensions in service were granted with the approval of the Integrated Finance Division in the Ministry of Defence though approval of the finance angle is not strictly relevant to the grant of extensions. The other two instances cited are of Shri P. Venugopalan, Outstanding Scientist in the DRDL, Hyderabad who was granted extension pending a decision on the question of his regular extension under FR.56 as a Scientist; and of the post retirement appointment of Vice Admiral PC Bhasin on contract basis in the ATVP. These two cases are not relevant to the case of Maj Gen Singh, present under consideration.

7. An instance has been cited, during discussions, of extension of service granted in the year 1997 or thereabouts to Major General Malik who was due for superannuation, and his promotion to the rank of Lt. Gen while on extension.

8. The orders issued by the Department of Personnel and Training lay down that while extension could be granted in exceptional circumstances, there can be no promotion during the period of such extension. These orders apply to the civilian establishment. The instructions which apply to the Defence forces permit extension in service only if the exigencies so demand. DRDO is mainly civilian, and the Rules, as mentioned above, do not permit promotion on extension.

9. The above apart, the plea taken the representation of Maj Gen P.P. Das, and also the legal notice needs to be kept in view. Instances of officers in the Armed Forces retiring just before the vacancies coming their way and being

denied empanelment are not uncommon. Extensions motivated by reasons of promotion being close at hand can have repercussions.

10. The above part, the ACR format which is followed for the officers of this rank, seconded to the DRDO, which has been applied for recording of ACRs in the present case reveal that fitness for promotion should be specifically recorded in the ACr. A perusal of the ACR of Maj Gen Singh reveals that specific record of fitness for promotion has not been made.

11. More pointedly, two questions stand out, firstly, the doubtful authority and grounds for granting extensions, taking into account that there was no exigency and, secondly, extensions, motivated by a promotion in the offing during the extension period cannot be allowed. It cannot be ignored also that such situations trigger litigation, which should best be avoided in such instances.

12. Under the above circumstances, it would be appropriate not to approve the promotion of Maj Gen H.M. Singh to the rank of Lieutenant General.

Sd/-

Cabinet Secretary

22.5.2008

HOME MINISTER Sd/-

28.5.2008

PRIME MINISTER has approved Para 12 above with the direction that the observation in Paras 5 and 8 may be communicated to the MOD for the future.

Sd/-

30.5.2008

Sd/- Director

(emphasis is ours)

17. The appellant points out, that the determination of the Appointments Committee of the Cabinet, overlooked the factual position stated in the counter affidavit, filed jointly on behalf of respondent nos. 1 and 2 (respondent no.1 – the Union of India, through Secretariat of the Appointments Committee of the Cabinet; and respondent no. 2 – the DRDO through its Director General). In this behalf our attention was drawn to paragraphs 3 (xvii) and 3 (xviii) which are being extracted below: “3 (xvii) A meeting of the Selection Board was held on 27.2.2008 and the Selection Board recommended the name of the petitioner for promotion to the rank of Lieutenant General. The post of Lieutenant General then carried the pay scale of Rs.22400-525- 24500. Any appointment against this post requires the approval of Appointments Committee of the Cabinet (ACC) (Respondent No.1), which is a high power body consisting of the Hon’ble Prime Minister of India, Hon’ble Union Home Minister, Hon’ble Union Minister of Department of Personnel and Hon’ble Union Defence Minister. As such, the recommendation of the Selection Board were sent to ACC. In DRDO, the retirement age of an officer of the rank of Maj Gen/equivalent which the petitioner held at that time is 59 years. The petitioner was due to retire from service w.e.f 29.2.2008. Under these circumstances, he was given an extension of service for a period of three months or till the decision of ACC was received whichever was earlier. As the decision of ACC was not received till 31.5.2008, his service was extended further for a period of one month w.e.f 1.6.2008 on the same terms and conditions.

3 (xviii) The decision of ACC (Respondent No.1) regarding non- approval of promotion of the petitioner to the rank of Lieutenant General communicated vide letter dated 2.6.2008 was received by respondent no. 2 on 3.6.2008 and the latter had to issue orders of the petitioner’s retirement from service from 3.6.2008.”

(emphasis is ours)

18. Referring to the factual position depicted in the joint counter affidavit filed on behalf of the respondent nos. 1 and 2, it was the vehement submission of the appellant, that the Appointments Committee of the Cabinet exceeded its jurisdiction in examining the validity of the orders by which the appellant was granted extension in service. It was the submission of the appellant, that the only

question before the Appointments Committee of the Cabinet, consequent upon the recommendations made by the Selection Board on 27.2.2008, was in connection with the merits of the claim of the appellant, for promotion to the rank of Lieutenant General. Adding to the above contention, it was also the submission of the appellant, that the Selection Board, consequent upon its deliberations held on 27.2.2008, arrived at its findings based on the appellant's service record, past performance, qualities of leadership, as well as, vision, that the appellant was worthy of promotion to the rank of Lieutenant General. The Appointments Committee of the Cabinet, during the course of its deliberations, did not find fault with the above conclusion drawn by the Selection Board. As such, it was sought to be asserted, that even the Appointments Committee of the Cabinet must be deemed to have endorsed the merit and suitability of the appellant, for promotion to the rank of Lieutenant General.

19. In order to contest the submissions advanced at the hands of the appellant, learned senior counsel representing (respondent nos.1 and 2) emphatically relied upon the proceedings of the Appointments Committee of the Cabinet. The proceedings under reference have been extracted by us hereinabove. Referring to the above proceedings, learned senior counsel for the respondents laid great emphasis on the observations recorded in paragraphs 8 and 9 thereof. It was pointed out, that in terms of the orders issued by the Department of Personnel and Training, promotion during the period of extension was unquestionably barred. In this behalf it was the contention of the learned senior counsel for the respondents, that with effect from 1.3.2008, the appellant (who had attained the age of retirement on superannuation on 29.2.2008), was on extension in service. There was, therefore, no question of his being considered for promotion during the period of such extension. In addition to the aforesaid categorical stand adopted by the learned senior counsel for the respondents, it was sought to be reiterated, that the orders dated 29.2.2008 and 30.5.2008, by which the appellant was granted extension in service, for periods of three months and one month respectively, were not sustainable in law, inasmuch as, they were in violation of Rule 16A of the Army Rules which postulates, that an officers who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in service for a further period by the Central Government, only if the exigencies of service so require. It was the submission of learned senior counsel for the respondents, that retention in service of the appellant was not on account of any exigency of service.

20. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the rival parties. First and foremost, we have no hesitation in endorsing the submission advanced at the hands of the appellant, that the Appointments Committee of the Cabinet did not in any manner upset the finding recorded by the Selection Board, in respect of the merit and suitability of the appellant for promotion to the rank of Lieutenant General. On the instant aspect of the matter, the Appointments Committee of the Cabinet has maintained a sullen silence. Even in the pleadings filed on behalf of the respondents, there is an ironic quiescence. Therefore, all other issues apart, the appellant must be deemed to have been found suitable for promotion to the rank of Lieutenant General, even by the Appointments Committee of the Cabinet.

21. We have extracted hereinabove the factual position noticed by the respondents in paragraphs 3(xvii) and 3(xviii) of their counter affidavit. If the aforesaid averments are read in conjunction to the factual position, that the vacancy against which the claim of the appellant was considered, had arisen on 1.1.2007, it clearly emerges, that the appellant was the senior most eligible officer holding the rank of Major General whose name fell in the zone of consideration for promotion. The Selection Board having conducted its deliberations singularly chose the name of the appellant from the panel of four names before it. The proceedings of the Selection Board reveal, that its recommendations were based on record of service, past performance, qualities of leadership, as well as, vision. No other name besides the appellant's name was recommended for promotion. Having been so recommended, the President of India, in the first instance, by an order dated 29.2.2008, extended the service of the appellant, for the period of three months with effect from 1.3.2008 "or till the approval of the ACC whichever is earlier". Since the Appointments Committee of the Cabinet did not render its determination within the extended period expressed in the order dated 29.2.2008, yet another order to the same effect was issued by the President of India on 30.5.2008 extending the service of the appellant for a further period of one month with effect from 1.6.2008 "or till the approval of the ACC whichever is earlier". The President of India, therefore, was conscious of the fact while granting extension in service to the appellant, the appellant's case for onward promotion to the rank of Lieutenant General was under consideration. Therefore, to ensure that the aforesaid consideration fructified into a result one way or the other, extensions were granted to the appellant twice over. The aforesaid determination at the hands of the President of India in granting extension in service to the appellant, stands noticed in the factual position expressed in paragraphs 3(xvii) and 3(xviii) of the counter affidavit filed on behalf of the respondents 1 and 2. It is not possible for us to

accept, that the aforesaid determination in allowing extension in service to the appellant can be described as being in violation of the norms stipulated in Rule 16A of the Army Rules. It is necessary in this behalf, for us to test the above conclusion drawn by us, on the touchstone of Articles 14 and 16 of the Constitution of India. It is not a matter of dispute, that the appellant was promoted to the rank of substantive Major General with effect from 7.1.2004. It is also not a matter of dispute, that the substantive vacancy in the rank of Lieutenant General, against which the appellant was eligible for consideration, became available with effect from 1.1.2007. Even though the appellant had nearly 14 months of military service remaining at the aforesaid juncture, the procedure contemplated for making promotions to the rank of the Lieutenant General was initiated for the first time just two days before the date of retirement of the appellant, on 27.2.2008. Although it is the contention of the learned senior counsel for the respondents, that the delay in convening the Selection Board and conducting its proceedings was not deliberate or malafide, yet there can be no doubt about the fact, that the appellant was not responsible for such delay. For all intents and purposes, he was repeatedly seeking consideration orally as well as in writing. He had been repeatedly informing the authorities about the approaching date of his retirement. In response, he was always assured, that if found suitable, he would be actually promoted prior to the date of his retirement. It was for the respondents to convene the meeting of the Selection Board. Since the Selection Board came to be convened for the vacancy which had arisen on 1.1.2007 only on 27.2.2008, the respondents must squarely shoulder the blame and responsibility of the above delay.

22. The question that arises for consideration is, whether the non- consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition, that the respondents were desirous of filling the vacancy of Lieutenant General, when it became available on 1.1.2007. The factual position depicted in the counter affidavit reveals, that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view, that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed

extension in service on two occasions, firstly by the Presidential order dated 29.2.2008, and thereafter, by a further Presidential order dated 30.5.2008. The above orders clearly depict, that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant General, (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet), stands affirmed. The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant General, would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary. We are therefore of the view, firstly, that the order allowing extension in service of the appellant for a period of three months, dated 29.2.2008, and the order allowing further extension in service by one month to the appellant, dated 30.5.2008, so as to enable his claim to be considered for onward promotion to the rank of Lieutenant General, cannot be held to be in violation of the statutory provisions. Rule 16A of the Army Rules, postulates extension in service, if the exigencies of service so require. The said parameter must have been duly taken into consideration when the Presidential Orders dated 29.2.2008 and 30.5.2008 were passed. The respondents have neither revoked, nor sought revocation of the above orders. Therefore, it does not lie in the mouth of the respondents to question the veracity of the above orders. The above orders were passed to ensure due consideration of the appellant's claim for promotion to the rank of Lieutenant General. Without rejecting the above claim on merits, the appellant was deprived of promotion to the rank of Lieutenant General. Besides the above, we are also of the considered view, that consideration of the promotional claim of the senior most eligible officer, would also fall in the parameters of the rule providing for extension, if the exigencies of service so require. It would be a sad day if the armed forces decline to give effect to the legitimate expectations of the highest ranked armed forces personnel. Specially when, blame for delay in such consideration, rests squarely on the shoulders of the authorities themselves. This would lead to individual resentment, bitterness, displeasure and indignation. This could also undoubtedly lead to, outrage at the highest level of the armed forces. Surely, extension of service, for the purpose granted to the appellant, would most definitely fall within the realm of Rule 16A of the Army Rules, unless of course, individual resentment, bitterness, displeasure and indignation, of army personnel at the highest level is of no concern to the authorities. Or alternatively, the authorities would like to risk outrage at the highest

level, rather than doing justice to a deserving officer. Reliance on Rule 16A, to deprive the appellant of promotion, to our mind, is just a lame excuse. Accordingly, extension in service granted to the appellant, for all intents and purposes, in our considered view, will be deemed to satisfy the parameters of exigency of service, stipulated in Rule 16A of the Army Rules.

23. While dealing with the issue of consideration of the appellant's claim for onward promotion to the rank of Lieutenant General, it is necessary for us to also conclude by observing, that had the claim of the appellant not been duly considered against the vacancy for the post of Lieutenant General, which became available with effect from 1.1.2007, we would have had to hold, that the action was discriminatory. This because, of denial of due consideration to the appellant, who was the senior most eligible serving Major General, as against the claim of others who were junior to him. And specially when, the respondents desired to fill up the said vacancy, and also because, the vacancy had arisen when the appellant still had 14 months of remaining Army service. Surely it cannot be over looked, that the Selection Board had singularly recommended the name of the appellant for promotion, out of a panel of four names. In such an eventuality, we would have no other alternative but to strike down the action of the authorities as being discriminatory and violative of Article 16 of the Constitution of India.

24. The deliberations recorded by us hereinabove are incomplete, inasmuch as, we have not answered the pointed objection raised by the learned senior counsel for the respondent nos. 1 and 2, namely, that an officer is not entitled to promotion during the period of extension in service. For the instant objection raised at the hands of the respondents, it is necessary to refer to the deliberations of the Appointments Committee of the Cabinet, and specially paragraphs 8 and 9 thereof. A collective reading of the paragraphs 8 and 9 reveals an extremely relevant objective, namely, situations wherein an officer attains the age of retirement without there being a vacancy for his consideration to a higher rank, even though he is eligible for the same. Such an officer who is granted extension in service, cannot claim consideration for promotion, against a vacancy which has become available during the period of his extension in service. The above conclusion drawn by us is clearly apparent from the paragraph 9 of the proceedings of the Appointments Committee of the Cabinet. In fact in the operative part of the proceedings recorded in paragraph 11, it has been noticed, that "...extensions motivated by a promotion in the offing during the extension period cannot be allowed..." We can derive only one meaning from the above observations, namely, extension being granted for promotion against a vacancy in the offing. That is to

say, retention in service, so as to consider an officer for a vacancy which has not become available prior to his retirement, but is in the offing. The above reason recorded in the operative part of the proceedings of the Appointments Committee of the Cabinet, is laudible and legal. Insofar as the present controversy is concerned, there is no doubt whatsoever, that a clear vacancy against the rank of Lieutenant General became available with effect from 1.1.2007. At that juncture, the appellant had 14 months of service remaining. It is not as if the vacancy came into existence after the appellant had reached the age of retirement on superannuation. The present case is therefore, not covered by the technical plea canvassed at the hands of the learned senior counsel for the respondents. The denial of promotion to the appellant mainly for the reason, that the appellant was on extension in service, to our mind, is unsustainable besides being arbitrary, specially in the light of the fact, that the vacancy for which the appellant was clamouring consideration, became available, well before the date of his retirement on superannuation. We have, therefore, no hesitation in rejecting the basis on which the claim of the appellant for onward promotion to the rank of Lieutenant General was declined, by the Appointments Committee of the Cabinet.

25. In view of the fact, that we have found the order of rejection of the appellant's claim for promotion to the rank of Lieutenant General, on the ground that he was on extended service to be invalid, we hereby set aside the operative part of the order of the Appointments Committee of the Cabinet. It is also apparent, that the Selection Board had recommended the promotion of the appellant on the basis of his record of service, past performance, qualities of leadership, as well as, vision, out of a panel of four names. In its deliberations the Appointments Committee of the Cabinet, did not record any reason to negate the aforesaid interference, relating to the merit and suitability of the appellant. We are therefore of the view, that the appellant deserves promotion to the rank of Lieutenant General, from the date due to him. Ordered accordingly. On account of his promotion to the post of Lieutenant General, the appellant would also be entitled to continuation in service till the age of retirement on superannuation stipulated for Lieutenant Generals, i.e., till his having attained the age of 60 years. As such, the appellant shall be deemed to have been in service against the rank of Lieutenant General till 28.2.2009. Needless to mention, that the appellant would be entitled to all monetary benefits which would have been due to him, on account of his promotion to the rank of Lieutenant General till his retirement on superannuation, as also, to revised retiral benefits which would have accrued to him on account of such promotion. The above monetary benefits shall be released to the appellant within three months from the date a certified copy of this order becomes available with the respondents.

26. Allowed in the aforesaid terms.