

# SUPREME COURT OF INDIA

Lt.Gen.Manomoy Ganguly, Vsm

Vs.

Union of India

WP(Civil)No.980 of 2018

(A.K.Sikri and Ashok Bhushan,JJ.,)

29.10.2018

## JUDGMENT

**A.K.Sikri,J.,**

1. There is a chequered history in this case, which is getting curious with each round of litigation. Present proceedings are the repeat attempt of the petitioner Major General Manomoy Ganguly to get the position of Director General Medical Services (Army) {hereinafter referred to as 'DGMS (Army)'}, which has alluded him till now.

2. First round of litigation started when the petitioner, who was working as Major General, was denied the promotion to the next rank of Lieutenant General. The Special Promotion Board (Medical) {hereinafter referred to as the 'SPB (Medical)'}, which was constituted to consider the cases of promotion and held its sitting on 20th January, 2016, did not empanel him for promotion to the said rank. The petitioner filed the Original Application (OA) before the Armed Forces Tribunal (hereinafter referred to as the 'AFT') which decided the case in his favour vide its judgment dated 2nd September, 2017. The Union of India challenged the judgment before this Court and the said appeal of the Union of India was dismissed on 10th November, 2017. In the aforesaid judgment of the AFT, it had held that the petitioner was wrongly allotted lesser marks than his entitlement by the SPB (Medical) on account of overall profile which resulted in denial of promotion to him. It was categorically held that he was entitled to 1.7 marks (out of 2 marks) for 'Overall Profile' on comparison of his case with Major General Sanjiv Chopra. This Court while upholding the judgment directed the respondents to take further steps without loss of time.

3. Notwithstanding the above, in the fresh review by the SPB (Medical) held on December 04, 2017, the petitioner was again given 1.5 marks. The petitioner approached the AFT again by means of Miscellaneous Application in the earlier disposed of OA seeking restraint against the respondents from filling up the post of DGMS (Army) for which he would have become eligible, had he been promoted as Lieutenant General. Interim stay was granted. In the meantime, the Competent Authority, i.e., the Raksha Mantri, after examining the matter did not approve the review undertaken by SPB (Medical) awarding 1.5 marks to the

petitioner and recommended his promotion. This recommendation met the approval of ACC as well and, accordingly, the petitioner was promoted to the rank of Lieutenant General on March 01, 2018.

4. After earning his promotion to the rank of Lieutenant General with lot of struggle and legal battle, the petitioner aspired to get the position of DGMS (Army), for which position he had gained eligibility. He was also senior most person in feeder rank. The Director General, Armed Forces (Medical) Services, after consideration of his case along with one Lieutenant General Sanjiv Chopra, decided to recommend Lieutenant General Sanjiv Chopra, though the petitioner was senior to him. It is important to mention that while making this recommendation, eligible officer from Army discipline only were considered. The petitioner once again approached the AFT by means of OA bearing no. 372 of 2018. The AFT decided that OA as well in favour of the petitioner vide its judgment dated May 07, 2018. This judgment was again challenged by the Union of India in the form of a statutory appeal, i.e., Civil Appeal No. 5800 of 2018 before this Court.

5. This appeal was decided on August 01, 2018. It was partly allowed on certain aspects with the direction that the matter be placed before the Raksha Mantri to consider as to who would be entitled to the appointment to the post of DGMS (Army). The Raksha Mantri, on examination of the files and 'Note' that was put up before her, decided that the post be manned by a person other than the petitioner. When the petitioner came to know of the intended move, he immediately rushed to this Court by filing Miscellaneous Application no. 2188 of 2018 in Civil Appeal No. 5800 of 2018 with the prayer that status quo order be passed against filling up of the vacancy for a period of two weeks after declassification of the decision of the Competent Authority to enable the petitioner to take a remedial action. This application was mentioned for listing on August 10, 2018 and was directed to be listed on August 13, 2018. However, it transpired that Air Marshal Rajvir Singh, who was holding the position of DGMS (Air) as on that date and had been recommended for appointment of DGMS (Army), had joined the new post on August 10, 2018. In these circumstances, the petitioner filed the instant Writ Petition (Civil) No. 980 of 2018 challenging the appointment of the Air Marshal Rajvir Singh (Respondent no. 4 herein) to the post of DGMS (Army).

6. The aforesaid events would show that insofar as Miscellaneous Application No. 2188 of 2018 is concerned, it has been rendered infructuous. It stands disposed of as such. In the writ petition, the respondents have filed counter affidavit. Arguments have been heard at length and we propose to dispose of the writ petition by this judgment.

7. We may point out at the outset that case of the petitioner is that in spite of judgment dated August 01, 2018 passed by this Court in Civil Appeal No. 5800 of 2018, the matter has not been examined dispassionately and objectively keeping in view the law laid down therein as well as the spirit behind the said judgment. According to the petitioner, the respondents are finding one or the other excuse to deny him the post of DGMS (Army). Interestingly, even the respondents rely upon the same very judgment dated August 01, 2018 and the case set up by the respondents is that fresh exercise has been undertaken strictly in accordance with law laid down and the observations made in the said judgment. It is submitted that 'inter se

suitability' which is the criteria laid down for appointment to such a post has been followed, as explained in the said judgment and on that basis since Air Marshal Rajvir Singh has been found to be more suitable than the petitioner, he is assigned the said post.

8. Having regard to the aforesaid positions taken by the parties, it becomes necessary to first note down the laid down criteria for appointment to DGMS (Army) and the interpretation thereto which has been given in the judgment dated August 01, 2018. The post in question is in an Armed Forces Medical Services (AFMS). At top level, 10 Lieutenant Generals are appointed in the AFMS and placed in different tiers. The structure of AFMS specifying these three tiers is as follows:

DGAFMS (1st tier post)

DGMS (Army) DGMS(Navy) DGMS(Air)

(2nd Tier post)

Comdt Comdt DG Org & Pers DCIDS Comdt DGHS AHRR AMC (C&S) (Med) (AFMS) (AF) (3rd Tier posts)

Though, three DGsMS in Army, Navy and Air Force respectively fall in 2nd tier posts, it is an admitted position that the post of DGMS (Army) is considered better than the other two posts, namely, DGMS (Navy) and DGMS (Air).

9. The criteria for appointment of DGsMS is laid down in policy decision taken on June 01, 1992, which is stipulated in a Circular issued by the Government of India, it reads as under:  
Subject:- Appointment of DGsMS of Service-Policy regarding.

Reference your note No. 16972/11/92/DGAFMS/DG IX dated 1st June 1992.

2. Taking into account various aspects relating to the appointment of DGsMS of Services the following criteria is laid down for their appointment, in future:

(i) The inter-se seniority and suitability of officers in the rank of Lt. Gen(and equivalent) holding the posts of Comdt AMC Centre and School, Comdt AFMC, Pune and the Addl. DGAFMS shall be assessed in the light of their earlier experience of serving in particular services and they shall be considered for appointment as DGsMS of services provided they have a minimum remainder service of six months, from the date of occurrence of the vacancy.

(ii) If, after the exercise of (i) above, none of the offices are found suitable for appointment as DGsMS of services, against available vacant posts, officers of Maj Gen (and equivalent) rank, already approved for promotion to Lt. Gen rank, may be considered for such appointments.

(iii) The lateral shifting of DGMS of one Service to another Service may be considered only in exception circumstances.

3. Government shall review above criteria, for suitable modification, after the tenure of AMC officers in Lt. Gen (and equivalent) rank stabilise."

10. It is the common case of the parties that the aforesaid criteria has not undergone any change till date and continues to govern the appointment of DGsMS of services. As can be seen from the aforesaid criteria, 'the inter se seniority and suitability of officers in the rank of Lieutenant General (and equivalent)' is to be considered.

11. On the last occasion, when DGAFMS had recommended Lieutenant General Sanjiv Chopra for this post and that was challenged by the petitioner before the AFT, while allowing the O.A. of the petitioner, the AFT had held that the expression 'inter se seniority and suitability' meant that the post was to be given to the person who is the senior most eligible officer, if he is otherwise found suitable. In essence, criteria of seniority subject to fitness was applied. Based on this notion that the criteria was 'seniority-cum-suitability', the AFT had taken the view that seniority is a decisive factor and suitability is a secondary factor. Then it proceeded on the premise that since it was not the case of the respondents that the petitioner is unsuitable, he was wrongly overlooked. The AFT also remarked that there was a deliberate attempt to somehow recommend the name of Lieutenant General Sanjiv Chopra and ignore the petitioner. It was also found that there have always been a convention to appoint senior most person to the post of DGMS (Army) inasmuch as the appellants were not able to cite even a single case in last 20-30 years where the seniority was overlooked. Contrary thereto, name of the petitioner was not even forwarded by the DGAFMS to the Competent Authority for consideration while sending the names of two other officers (including Lieutenant General Sanjiv Chopra). In this way, the petitioner was wrongly ignored, was the opinion of the AFT.

12. In the appeal filed by the Union of India against the order of the AFT, which culminated in the judgment dated August 01, 2018, this Court did not approve the said interpretation given by the AFT, namely, criteria laid down in policy decision taken on June 01, 1992 was merely 'seniority-cum-suitability'. On the contrary, it was held that the word 'inter se' occurring in the aforesaid expression applies both to seniority as well as suitability.

Therefore, apart from the 'inter se seniority', 'inter se suitability' is also to be assessed, which assessment is 'in the light of their earlier experience of serving in a particular service'. The Court then defined the meaning of expression 'inter se suitability'. Discussion on this aspect is contained in paragraphs 40 to 45 of the judgment dated August 01, 2018. Since both the parties rely upon the discussion contained therein, it would be apt to reproduce these paragraphs in their entirety.

"40. When we read the aforesaid para (i) as a whole, we find force in the submission of the appellant that the word 'inter se' applies both to seniority as well as suitability. Therefore, 'inter se suitability' is also to be assessed inasmuch as this assessment is

'in the light of their earlier experience of serving in a particular service'. As far as consideration on the parameters of 'inter se seniority' is concerned, it would mean that a person who is senior gets precedence. To this extent, there is no quarrel. Question is as to what meaning is to be assigned to 'inter se suitability'.

Two questions arise from the above. First, what is the meaning of 'suitability'. Second, how the expression 'inter se suitability' is to be construed, i.e. whether it should be understood as choosing a 'more suitable' officer for appointment as DGsMS. As far as inter se suitability is concerned, all the eligible officers in the rank of Lt. General (& Equiv), having regard to their earlier experience of serving in particular services, they are to be considered for appointment as DGsMS of services (i.e. DGMS (Army)).

41. Let us first consider the meaning of 'suitability'.

42. In English parlance, the word 'suitable' is assigned the meaning as 'appropriate, fitted for the purpose or acceptable'. The concise Oxford Dictionary defines the word suitable as 'well fitted for the purpose; appropriate'. This ordinary meaning is to be given effect to as a general guide, unless this expression is given special meaning in a statute or rule in administrative instructions. In R (Quintavalle) v. Human Fertilisation Authority, the House of Lords remarked that "the word 'suitability' is an empty vessel which is filled with meaning by context and background.

43. In service jurisprudence, where the word 'suitable' is normally examined from the point of view as to whether a particular person is suitable to hold a particular post, it is construed as 'fit' to hold that post. It would mean that the job profile and job requirement of a particular post would be seen and then, going by the calibre, competence, attributes, skill and experience of the candidate, it would be ascertained as to whether such a person would be able to discharge the duties of the post i.e. whether he is suited to carry out the functions of the post, to the satisfaction of his employer.

44. It, thus, follows from the above that the person to be eligible should quality the following conditions:

(i) the officer should be in the rank of Lt. General (& Equiv);

(ii) such an officer should be holding the post of Comdt AM C&C; and

(iii) he should have a minimum remainder service of one year from the date of occurrence of the vacancy.

45. Adverting to the second question, the prefix 'inter se' has also to be given some meaning as it cannot be rendered otiose. Therefore, whereas while assessing 'suitability', it has to be seen that a particular officer is not unfit for the post, when it

comes to 'inter se suitability', it has reference to assessing the suitability of all eligible officers and thereafter finding who is more suitable to occupy such a post. We have to keep in mind that these are very high ranking posts and, therefore, the competent authority is supposed to choose a more suitable officer for such posts. We are of the opinion that for expressing such an intention, the Circular could have been worded more appropriately and with clarity to avoid such doubts. However, since the word 'inter se' is used, it implies that the intention behind laying down this criteria was to give these posts to a better suited person after evaluating their inter se suitability. Of course, while doing this exercise seniority of an officer is also to be given due weightage, meaning thereby if the senior most person is competent to hold the post, he is to be given preference. Therefore, we conclude that the view of the AFT that the post of DGMS (Army) is to be filled by the officer on the strength of 'seniority-cum-suitability', where seniority is a decisive factor and suitability is a secondary factor, is not correct. In the entire discussion resting with the aforesaid view, the Tribunal ignored the fact that it is not only seniority and suitability simpliciter but 'inter se' seniority and suitability. The expression 'inter se' is totally ignored and there is no discussion thereupon at all, which has led the AFT to take wrong view insofar as interpretation of the criteria laid down in the Circular dated 10th July, 1992 is concerned, which talks of 'inter se seniority and suitability'."

13. Thereafter, this Court examined the recommendation of DGMS (Army) to appoint Lieutenant General Sanjiv Chopra and found that the AFT rightly quashed the said recommendation. At the same time, the direction of the AFT that the petitioner be straightway appointed to the post of DGMS (Army) was also set aside and it was found that the said direction of the AFT was on the basis that the appointment was to be given keeping in view the seniority alone which was not found to be the correct position. It is in these circumstances, the matter was remitted back to the Raksha Mantri for taking appropriate decision in the matter.

14. The petitioner contends that his apprehensions that he would be denied the post, come what may, have turned out to be correct. It is stated that even this Court in its judgment dated August 01, 2018 had specifically remarked that the apprehensions of the AFT in regard to the possible ouster of the petitioner may not be unfounded. Still, reposing faith in the Competent Authority, matter was remanded back with the hope that petitioner would be treated fairly. The grudge of the petitioner is that it has not happened and the manner in which the matter is projected and placed before the Raksha Mantri by the concerned authorities shows their state of mind which is antagonistic to the petitioner. It is submitted that Air Marshal Rajvir Singh was empanelled in his second chance, i.e., the next Promotion Board after the previous Board in which the petitioner was empanelled for promotion to the rank of Lieutenant General and was not even in the zone of consideration in the earlier process of selection for appointment to the post of DGMS (Army). There was no way he could have now suddenly made it to the said post on the ground of suitability, especially when he is retiring after 7 months. Further, Air Marshal Rajvir Singh is a plain MBBS doctor, who has never served as an MG (Medical) of a Command, whilst the petitioner besides being a super-specialist and a nationally renowned Onco-surgeon, also has the maximum Administrative and Operational experience.

Therefore, the petitioner feels aggrieved by his non-selection for the post of DGMS (Army), declassified vide promotion order dated August 10, 2018.

15. It is further argued that in case of inter se suitability, the petitioner is any day a more suitable person as compared to respondent no. 4 which is clear from the following:

(i) The petitioner who is one promotion batch senior to Air Marshal Rajvir Singh, is a super-specialist while respondent no. 4 is not even a specialist, leave alone a super-specialist. Besides this the petitioner has the maximum Administrative and Operational Experience, having tenanted two Command Appointments as a Brigadier/Major General and four prestigious appointments of Commandant Officers Training College, MG (Medical) in three different Commands/Armies and Delhi area, whereas as the Head of the Medical Services of these Operational Commands and Armies he has successfully performed the actual work of the DGMS (Army) in half the country.

(ii) In the Special Selection Board for promotion to the post of Lieutenant General held in January, 2016, the petitioner and respondent no. 4 were considered together. The petitioner would be deemed empanelled in the said Board (after a litigation which came upto this Court), as he was considered as a fresh case, whereas respondent no. 4 has been empanelled with the next (Junior) Promotion batch, as a second timer and hence is a batch junior in this rank.

(iii) That as recent as on 23rd January, 2018, the respondents vide their noting dated January 23, 2018, had only recommended the names of Lieutenant General Sanjiv Chopra and Surg. V. Adm U.K. Sharma, in the panel for appointment to the post of DGMS (Army), in spite of him being the senior most eligible Lieutenant General to tenate the post. This noting was ultimately approved by the Raksha Mantri (as submitted by the respondents to this Court, in the earlier hearings) but was not declassified. This order was subsequently quashed by this Court. However, at this stage, respondents had not even found respondent no. 4 worthy of consideration for appointment to the post of DGMS (Army). Now all of a sudden, in August, 2018, after 8 months, respondent no. 4 has been brought from the Air Force, told to change his service and uniform to Army and appointed to the post of DGMS (Army), with the sole purpose of ousting the petitioner from tenating the post of DGMS (Army). This again proves that the respondents have always had a fixed agenda of somehow denying the appointment of DGMS (Army) to the petitioner, by all means possible and have now achieved their aim by appointing respondent no. 4 in an extremely hasty fashion.

(iv) Respondent no. 4 is being transferred from Air Force to Army, whereas the petitioner is already serving in the Army. Secondly, in the past, like in the case of last two DGMS's (Army), whenever lateral transfers from one service to another have taken place, it is only to place the senior most officers as the DGMS (Army) as this has always been considered as a "better"/higher post, with the maximum

responsibilities, since he is the Head of the Army Medical Corps, which comprises over 75 per cent of the AFMS (Armed Forces Medical Services).

(v) Respondent no. 4 is already tenating the post of DGMS(Air) and is being shifted laterally only to oust/deny the petitioner from tenating his rightful post of DGMS (Army).

(vi) In fact, in the past couple of decades, only three officers have been transferred laterally from the DGsMS of one service (Navy) to Army, because they were the senior most. This includes Lieutenant General G. Ramdas and the last two DGsMS(Army), i.e., Velu Nair and Bipin Puri (the present DGAFMS).

16. It is, thus, contended, by Mr. Kapil Sibal and Mr. P.S. Patwalia, learned senior counsel appearing for the petitioner is that insofar as Air Marshal Rajvir Singh is concerned he had already been given the post of DGMS(Air). There was no question of considering him, now, for the post of DGMS (Army). Further more, it amounted to lateral shifting of DGMS of one service to another service, namely, from Air Force to Army. According to the policy letter dated July 10, 1992, such lateral shifting could be done only in 'exceptional circumstances'. However, no such exceptional circumstances were mentioned by the respondents. It was also submitted that a novel exercise was undertaken by the respondents by taking into consideration the ACRs of the officers from the beginning of their career terming it as 'Overall Average Profile' which was entirely new concept invented by the respondents for the first time and outside the policy dated July 10, 1992.

17. Mr. K.K. Venugopal, learned Attorney General for India referred to the discussion contained in paragraphs 40 - 45 of judgment dated August 01, 2018 and submitted with much vehemence that the entire exercise was undertaken by the respondents keeping in view the aforesaid interpretation given to the policy letter dated July 10, 1992. He emphasised that this Court very categorically held that while adjudging 'inter se suitability' it was to be assessed in respect of eligible officers. For this reason, all eligible officers, including Air Marshal Rajvir Singh, were considered. He also submitted that this Court has specifically observed that since these are very high ranking posts, the Competent Authority is supposed to choose a very suitable officer for such post who is found to be better suited person, after evaluating the 'inter se suitability'. The Attorney General highlighted that the parameters of suitability in respect whereof the eligible offices are to be considered are stipulated in the judgment itself, viz., suitability is to be assessed with respect to caliber, competence, attributes, skill and experience, with consideration to 'inter se seniority'. In this hue, his submission was that for considering these aspects, Overall Average Performance (OAP) of service ACRs of all eligible General Officers as on November 01, 2017 was rightly taken into consideration, as this provided an objective and fair basis for the assessment of the inter se suitability of the officers. As a result, Air Marshal Rajvir Singh was found to be more suitable than the petitioner. It was argued that such an exercise was strictly in conformity with the judgment given by this Court which could not be faulted with.

18. The learned Attorney General emphasised the importance of DGMS (Army) post by contending that with the vast multitudinous activities in health and medical care of the personnel of the regular army, and which respondent no. 1 is duty bound to take care, the post of DGMS (Army) requires for adequate discharge of its functions, high degree of intellect and experience, having onerous responsibilities, with wide executive powers and not necessarily specialized knowledge in any field of medicine. Respondent No. 1, in the circumstances therefore, had to make the best possible choice it can, keeping in view the larger interests of the regular army. Therefore, in exercise of this choice, the respondent no. 1 has selected and transferred respondent no. 4 from DGMS(Air) to DGMS (Army), but that does not make the transfer arbitrary. He submitted that the transfer is made on account of the exigencies of administration and is not with any discriminatory preference for respondent no. 4 over the petitioner.

19. He also laid emphasis on the proposition that post of DGMS (Army) can only be filled by an incumbent in whom the State must necessarily have the highest confidence, and appointment to the same cannot go by seniority alone as contended by the petitioner. Therefore, once in the opinion of the Raksha Mantri, respondent no. 4 was the most suitable one, it is not open to the petitioner to seek judicial review by filing the writ petition as if it is an appeal over the view taken by the authority in such a case or substitute the view for that of the authority. In support of the aforesaid proposition, Mr. Venugopal referred to the following judgments:

(i) Union of India and Others vs. Lt. Gen. Rajendra Singh Kadyan "20...Further, the expression "fit" has been brought to our notice as legally meaning "fit to be chosen" by elaborating the expression "eligible" in Stroud's Judicial Dictionary, 5th Edn. However, the expression "fit", which has different shades of meanings, also means "a person to be appointed shall be legally eligible" and "eligible" has already been explained by us to mean "fit to be chosen". Again, the expression "select" means "chosen or picked up". Therefore, we are of the view that to the post of Army Commander, selection has to take place. Of course, considering the nature of rigorous standards adopted in the matter of selection of officers from the stage of Lt. Colonel onwards up to the stage of Lt. General in the usual course it may be that the senior most officer is selected as the Army Commander. But that does not debar the Chief of the Army Staff or the Union of India from making the selection of any other person for good reasons who fulfills the necessary criteria. Therefore, we are of the opinion that it was improper on the part of the High Court to have concluded that the post of Army Commander is a non-selection post. Further, the conclusion reached by the High Court that appointment to the post of Army Commander has to be made on the basis of seniority alone cannot be accepted."

(ii) Indira Jaising v. Supreme Court of India "68. What is merit? Is it the academic qualification or brilliance or is it something more? The matter has been considered earlier by this Court in K.K. Parmar v. High Court of Gujarat. Placing reliance on an earlier view in Guman Singh v. State of Rajasthan it has been held that:  
(K.K. Parmar case, SCC pp. 801-02, paras 27-28)

“27. Merit of a candidate is not his academic qualification. It is sum total of various qualities. It reflects the attributes of an employee. It may be his academic qualification. He might have achieved certain distinction in the university. It may involve the character, integrity and devotion to duty of the employee. The manner in which he discharges his final duties would also be a relevant factor. (See *Guman Singh v. State of Rajasthan.*)

28. For the purpose of judging the merit, thus, past performance was a relevant factor. There was no reason as to why the same had been kept out of consideration by the Selection Committee. If a selection is based on the merit and suitability, seniority may have to be given due weightage but it would only be one of the several factors affecting assessment of merit as comparative experience in service should be.”

(iii) *State of West Bengal and others v. Manas Kumar Chakraborty and others* [Para 17]

"17. The learned Senior Counsel for the first respondent then contended that if a person moves to a post of greater prestige, duties and responsibilities, honour or status, as compared to the previous post held, then that movement, even if lateral, would amount to promotion, even if both the posts carry the same scale of pay. Learned counsel relied upon the case of *Meera Massey and Vice-Chancellor, L.N. Mithila University v Dayanand Jha* to support the contention urged. Even if the contention is accepted, the fact remains that the second respondent was promoted by the composite order dated 23-5-2001 to the substantive rank of DGP and simultaneously posted as DG&IGP. We see no illegality in this. Secondly, there is no dispute that the post of DG&IGP is a selection post like the other DGPs. The post of DG&IGP being a post of very sensitive nature can only be filled by an incumbent in whom the State Government must necessarily have the highest confidence. We are, therefore unable to accept the contention of the respondent that deployment of an incumbent in such a post can go only by seniority. Merit in the nature of past record, the credibility and confidence which one is able to command with — the Government of the State must play a predominant role in selection of an incumbent to such a post. In the opinion of the appointing authority, the second respondent was the most suitable one. It is not open to the courts to sit in appeal over the view taken by the appointing authority in such a case or substitute its own view for that of the duly constituted authority. The Administrative Tribunal, as a matter of comparison of merit, was inclined to hold that the second respondent was by far the better and more meritorious candidate. The High Court has skirted this question and declined to decide this issue. Since we are of the view that there was no legal ineligibility in the second respondent to hold the post of DG&IGP, we must necessarily accept the comparative assessment of merit by the first appellant State of West Bengal and give credence to its own choice, of a suitable incumbent for being posted, as such."

20. He further submitted that internal office notings referring the case for consideration by the Raksha Mantri will bear out the objective exercise undertaken by the respondents and submitted the original records for the perusal of this Court.

21. We have given our thoughtful consideration to the submissions which have been made by the learned counsel on both sides. we have also perused the original records of the case.

22. File of the Ministry reveals that after the judgment of this Court on August 01, 2018, Director (Medical) prepared his 'Note' dated August 02, 2018 in which the salient aspects of the judgment have been summarized. It is a fair and objective recording of the gist of the judgment. The Director has even highlighted the 'admitted facts' which have been culled out in the judgment dated August 01, 2018. After stating the summary of the judgment, the Director (Medical) in his note pointed out that as on the date of the vacancy of the post of DGMS (ARMY), i.e., November 01, 2017, four persons, who were Lieutenant Generals (and equivalent) Officers, were eligible for posting as DGMS (Army). These four names stated in the note are: (a) Lieutenant General Manomoy Ganguly (petitioner herein); (b) Lieutenant General Sanjiv Chopra; (c) Air Marshal Rajvir Singh (respondent no. 4 herein); and (d) Surg V Adm U.K. Sharma. Against each of these officers, Director (Medical) has appended his remark as well in a tabulated form, which is reproduced hereinbelow:

S.No Officer's particulars Remarks

(a) Lt. Gen. Manomoy Ganguly, VSM MG(Med) HQ, SC, Pune (MR- 014141M) Seniority in the rank of Lt. Vide note 23.01.2018, DGAFMS with the approval of COAS had found him to be unsuitable for the post of DGMS (Army) on the ground that he does not have Gen: 1 Sep 2016 Date of retirement: 31 May 2019 previous exposure to the working environs of the IHQ of the MoD. However, these grounds have been quashed by the Hon'ble Supreme Court

(b) Lt Gen Sanjiv Chopra, VSM Col Comdt (MR- 04142P) DGHS(AF) Seniority in the rank of Lt. Gen.: 18 Nov. 2016 Date of retirement: 17 Nov 2018 He has been selected for appointment to the post of DGMS (Army) vide note 9-10 of preceding note. However, the selection has been quashed by Hon'ble AFT vide its order dated 07.05.2018 and upheld by Hon'ble Supreme Court vide its order dated 01.08.2018.

(c) Air Mshl Rajvir Singh, VSM ( MR-04153F) Date of Seniority in the rank : 1 May 2017 Date of retirement: 31 Mar 2019 The officer was not included in the panel for posting as DGMS (Army) in the letter dated 23.1.2018 by DGAFMS as he had already taken over as DGMS(Air Force) w.e.f. 9.1.2018

(d) Surg V Adm U.K. Sharma, (MR-04262N) Commandant AH(R&R) Delhi Cantt Seniority in the rank of Lt. Gen: 1 June 2017 Date of Retirement: 30 June 2019 Vide note 23.01.2018, DGAFMS with the approval of COAS had not recommended the officer for the post of DGMS (Army) on the ground that he "is the senior most Medical Specialist and Nephrologist. The Flag Officer has been proposed for permanent secondment to Army in the rank of Lt. Gen for the appointment of

Commandant AH(R&R) which is falling vacant on 31.03.2018. Hence, he is not recommended for the appointment of DGMS (Army)".

The officer has since been posted as Commandant AH(R&R) w.e.f. 01.04.2018.

23. The matter was placed before the Raksha Mantri, who gave the following direction on August 03, 2018" 'in compliance with the Hon'ble Supreme Court's order, a proposal may be put up".

24. On the said direction, DGAFMS/VCOAS were requested by the Ministry to submit a proposal. DGAFMS vide his note dated August 04, 2018, proposed a panel of five names for consideration for the post of DGMS (Army). Apart from the four names which are noted above, he added name of Lieutenant General Anup Banerji as well. On the above panel proposed by DGAFMS, the COAS has put his note dated August 08, 2018. He revised the panel by removing the name of Lieutenant General Anup Banerji and considered the suitability of the four officers. After considering their ACRs of the entire service, he concluded that "considering the seniority and by also factoring the conditions of suitability; it is apparent that Air Mshl Rajvir Singh, VSM DGMS(Air) is more suited to tenant the appointment of DGMS (Army)." In his note while recommending Air Marshal Rajvir Singh, the COAS stated that Air Marshal Rajvir Singh has the highest ACR average among the officers in the panel. Once this proposal was received by the Ministry, the Director (Medical) appended his note dated August 09, 2018 thereupon, incorporating the aforesaid exercise and the recommendation of COAS. In his note, he also brought out the following three pertinent aspects:-

(A) In respect of exercise undertaken by COAS based on the ACRs of the officers, while considering their suitability, it is remarked that average of ACR gradings have never been used as criteria for posting of Lieutenant General rank officers.

(B) Air Marshal Rajvir Singh was not included in the panel for the post of DGMS (Army) forwarded by the DGAFMS/COAS in their earlier note dated January 23, 2018 as he had already assumed the post of DGMS(Air) at that time. It is also stated in the note that MoD's guidelines dated July 10, 1992 provided that "lateral shifting of DGMS of one service to another service may be considered only in exceptional circumstances."

(C) The note again points out the observations of this Court in its order dated August 01, 2018 to the effect that matter was remitted back to the Raksha Mantri reposing full faith in her and the Court was confident that she would consider the entire matter in totally dispassionate manner, with utmost objectivity and depicting total fairness. In the process, "the admitted facts culled out in the judgment would also be placed before the Raksha Mantri".

25. Raksha Mantri while accepting the recommendation of COAS, remarked that COAS had relied upon the Overall Average Performance (OAP) as per the personal profile sheets

(Confidential Reports). It is further stated that this Court has clarified that the suitability of a candidate is to be assessed upon the touchstones of caliber, competence, attribute, skill and experience and since the confidential report mechanism of the Armed Forces has been a rigorous and time tested tool to assess the suitability of officers to hold high command appointments and has an inbuilt assessment of all characteristics specified in the judgment, the exercise of COAS based on OAP could be accepted. It is also specifically remarked that though ACR gradings have never been used as a criteria for posting of a Lieutenant General rank officer earlier, this was adopted to comply with the directions of this Court. It is also mentioned that guidelines dated July 10, 1992 do provide for "lateral shifting".

26. On the aforesaid parameters, the Raksha Mantri expressed her agreement with the recommendation of the COAS and approved the appointment of Lieutenant General Rajvir Singh as the DGMS (Army).

27. We may record at the outset that the exercise undertaken by Raksha Mantri does not suffer from any element of unfairness and that Raksha Mantri has endeavored to arrive at the decision, by interpreting the order of this Court in a particular way. We shall advert to the question as to whether such an understanding of the order is correct or not. However, the record shows, at least, that the exercise undertaken in arriving at the said decision dated August 10, 2018 is bona fide, at least insofar as the Raksha Mantri is concerned. At the same time, we are constrained to remark that the decision making process suffers from some significant errors and it cannot be said to be unblemished.

28. At the outset, we may observe that emphasis of the learned Attorney General about the importance of DGMS (Army) post is absolutely correct. The incumbent to this post has the responsibility to discharge his function with high degree of intellect and experience as it carries onerous responsibility, with wide executive powers, which would include, but is not limited to, specialised knowledge in any field of medicine. Therefore, the person to be appointed to this post should be one in which the State has highest confidence and the appointment cannot go by seniority alone. At the same time, it is also to be borne in mind that the Government has itself taken a decision on July 10, 1992 which mentions the eligibility conditions for this post and also lays down the criteria which has to be adopted while deciding the person who would be eminently suited to hold such a post. To repeat, the criteria is 'inter se seniority' and 'suitability'. While adjudging this inter se seniority and suitability, assessment is in the light of their earlier experience and serving in particular service. Therefore, in this scenario the scrutiny of this Court is limited to the aspect as to whether the aforesaid criteria is scrupulously followed.

29. We are also one with Mr. Venugopal about the scope of judicial review in such matters. The court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonable and supported by evidence. The court does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either. The court does not supplant "the feel of the expert" by its own review. Undoubtedly, this Court is not sitting as an appellate authority over the decision taken in making such appointments and is not

supposed to substitute its view for that of the respondent authorities. However, scope of judicial review certainly extends to examining the decision making process and to see as to whether appropriate process, legally permissible, has been undertaken while taking the decision. While undertaking this examination, the court can deliberate and ensure that all relevant factors are taken into consideration and, correspondingly, no irrelevant considerations have crept in in the decision making process. These are, among others, the accepted norms of judicial review. After all, discretionary powers conferred on the administration cannot be unguided. No doubt, in such matters, the discretion exercised by the authorities is to be generally accepted. This does not, however, mean that there is no control over discretion of the administration. All powers have legal limits. There is distinction between decision making process and the merit of the decision. Whereas in the former, the court applies the standard of judicial review, in the latter, it enters into the merits of the matter. In the leading decision of *Chief Constable of the North Wales Police v. Evans* (Evans) , Lord Hailsham stated:

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.

(emphasis supplied)"

30. First fundamental error has occurred in lateral shifting of Air Marshal Rajvir Singh and considering his candidature along with others. It is contrary to the policy Guidelines dated July 10, 1992. The Guidelines permit such a lateral shifting 'only in exceptional circumstances'. No such exceptional circumstances are stated anywhere on the basis of which this move of lateral shifting is justified.

31. It is pertinent to mention here that DGAFMS/COAS in their earlier notings dated January 23, 2018 had not included Air Marshal Rajvir Singh in the panel for the post of DGMS (Army) on the ground that he had already assumed the post of DGMS(Air) at that time. Again, at that time only the petitioner and Lieutenant General Sanjiv Chopra were considered and Lieutenant General Chopra was recommended for the post. This recommendation had been set aside by the AFT and that decision was approved by this Court. In such circumstances, lateral shifting of Air Marshal Rajvir Singh is beyond comprehension, more so, when no exceptional circumstances, which is the requirement, are pointed out. These are neither stated while taking the decision nor in the counter affidavit filed by the Union of India.

32. It has to be highlighted that this Court, no doubt, explained the meaning of 'inter se suitability' by examining the same on the basis of caliber, competence, attributes, skills and experience of the officers. However, these attributes are to be seen in the context of 'suitability of the eligible persons'. Once we discard lateral shifting, only the petitioner and Lieutenant General Sanjiv Chopra remain in the fray. Now, we advert to 'inter se suitability' as per the decision dated August 01, 2018 of this Court. The criteria is 'inter se suitability' and not 'inter se merit'. Thus, suitability of the persons was to be adjudged with the adoption

of the said criteria. It is for this reason that in the judgment dated 01-08-2018 it was also recorded: 'of course, while doing this exercise seniority of an officer is also to be given due weightage, meaning thereby if senior most person is competent to hold the post, he is to be given preference'. It seems that the COAS got an impression (may be bona fide, but definitely erroneous impression) from the judgment dated August 01, 2018, that "comparative merit" of the officers is to be adjudged and for that purpose better method would be to go through the Overall Average Performance (OAP). We fail to understand as to on what basis this methodology was thought of, when concededly ACR gradings have never been used as a criteria for posting of a Lieutenant General rank officer earlier. Guidelines dated July 10, 1992 are in place for last more than 26 years. If it has not happened earlier and there was no such mandate of this Court also, as the Court never meant that performance of an officer from the beginning of his career is to be adjudged, such an exercise was unwarranted. We state at the cost of repetition that the parameters of caliber, competence, attributes, skill and experience are to be looked into, but with the objective to find out the 'suitability of a person'. Guidelines dated July 10, 1992 do not stipulate the criteria on 'comparative merit' and it is not treated as 'selection' post. It uses the expression 'suitability'. Above all 'inter se seniority' is also an important criteria mentioned in the said policy. It is for this reason, this Court had categorically stated that if the senior most person is competent to hold the post he is to be given preference. Thus, we also find that the mechanism of OAP adopted is foreign to the Guidelines dated July 10, 1992. Having regard to this position contained in the policy decision dated July 10, 1992, the judgments in the case of Lt. Gen. Rajendra Singh Kadyan and Indira Jaising, which have been relied upon by the learned Attorney General, would have no application. No doubt, judgment in the case of Lt. Gen. Rajendra Singh Kadyan throws light on the meaning which is to be given to the expression 'fit' as the Court has said that a person who is to be selected for the post should be 'fit to be chosen'. However, as is seen, nowhere the respondents have undertaken the exercise to this effect, namely, fitness or suitability of the petitioner to occupy the post in question. On the earlier occasion, when he was considered along with Lieutenant General Sanjiv Chopra, the latter was recommended only on the basis that the petitioner would be newly promoted from the rank of Major General, he does not have 'previous exposure to the working and environs of the IHQ of the MoD'. It was held that it was an extraneous reason and did not amount to fair and objective consideration of his suitability for the post of DGMS (Army) as it is not necessary to have working experience in IHQ alone. This time, again, nowhere his suitability to man the post of DGMS (Army) is adjudged. On the contrary, norm of Overall Assessment Purpose (OAP) is brought in and applied, which is again foreign to the guidelines dated July 10, 1992.

33. We, thus, are of the opinion that the process undertaken by the respondents in taking decision to appoint Air Marshal Rajvir Singh as DGMS (Army) does not stand judicial scrutiny. We are constrained to set aside the appointment of respondent no. 4 as DGMS (Army).

34. With this, we come to another crucial part, namely, in this whole background and scenario when we find that respondent No.4 could not have been literally shifted and appointed as DGMS (Army) in the absence of any exceptional circumstances, what kind of

directions can be issued. Once when lateral shifting is held to be impermissible, two officers remain in the fray, namely, the petitioner and Lieutenant General Sanjiv Chopra. Having regard to the fate of Lieutenant General Sanjiv Chopra in the first round of litigation, we are left with the petitioner. As already pointed out above, it is not the case of the respondents that the petitioner is not suitable for the post of DGMS (Army). After all, he has not been rejected on this ground. It is also an admitted fact that he is the senior most person. At this juncture, we would like to reiterate the admitted facts which were taken note of in the judgment dated August 01, 2018.

"47. Some admitted facts which are pertinent for the outcome of the present appeal need to be highlighted at this juncture. These are:

(i) The respondent is the senior most Lt. General.

(ii) He fulfills the eligibility criteria for appointment to the post of DGMS (Army).

(iii) DGMS (Army) is treated as better post than other DGs, i.e., DGMS(Navy) and DGMS(AF).

(iv) The past practice has been to fill up the post of DGMS (Army) from a senior most officer. Before the AFT, the appellants failed to give any example where seniority was ignored. In the past, i.e. ever since issuance of Circular dated 10th July 1992, the practice has been to appoint the senior most Lt. General from Army. Before the AFT, the appellants could not cite a single deviation to the aforesaid practice. In the appeal, example of one Air Marshal H.K. Maini is given. However, it is adequately answered by the respondent by pointing out that that happened because Air Marshal Maini himself chose not to be posted as DGMS (Army) because of his health reasons, which the appellants could not controvert.

(v) Even, in the present case, for appointment of DGMS (Army) the first Note dated 16th January 2018 by DGAFMS, in no uncertain terms, stated that the appointment to this post is to be made 'strictly on the basis of their seniority', meaning thereby the senior most Lt. General (& Equiv) is to be posted. That Note was prepared on the assumption that the respondent is not in the reckoning as his case for promotion to the post of Lt. General was not recommended.

(vi) It is for the first time that in the Note dated 23rd January 2018 the question of so-called 'suitability' is taken up. We have used the expression 'so-called' for the reason that (as would be discussed in some detail afterwards) even this Note dated 23rd January 2018 does not reflect that any exercise of "inter se suitability" is carried out strictly in accordance with the criteria laid down in the Circular dated 10th July 1992, i.e. on the touchstone of 'inter se seniority and suitability'.

35. Having regard to overall circumstances of the case and the manner in which this case has been dealt with in the past, we are left with no alternative but to give the directions ourselves.

In adopting this course of action, we would also like to reproduce the following discussion from the judgment dated August 01, 2018:

"Apart from the aforesaid admitted facts, we also would like to state some of the findings as recorded by the AFT, with which we are in agreement. These are listed below:

(i) There has been some attempt (though we are not suggesting as to whether it was deliberate or bona fide) in denying the respondent his claim for promotion to the rank of Lt. General. Events in detail on this aspect have already been narrated above, which need not be reiterated. Suffice it is to mention that even after the orders of the AFT and affirmation thereafter by the judgment of this Court, the Board had stuck to its earlier notion about the respondent. Fortunately for him, the Raksha Mantri took a fair and objective view in the matter and granted him his deserved promotion, which was legitimately due to him.

(ii) As on 16th January 2018, when DGAFMS prepared his Note for appointment to the post of DGMS (Army), which had fallen vacant few months ago, he only knew that the Review Board had again refused to recommend the case of the respondent in the rank of Lt. General. Therefore, he proceeded on the basis that since the respondent is not occupying the post of Lt. General he is out of reckoning and, accordingly, Lt. General Sanjiv Chopra was the senior most officer. Proceeding on the aforesaid presumption, after excluding the respondent from consideration, he recommended Lt. General Sanjiv Chopra for appointment as DGMS (Army) being the senior most in the AFMS cadre. This Note went to the extent of recording that not only promotion is strictly on the basis of their seniority, it was being done even for the posts of 'DGAFMS', 'DGsMS' and the 'CDC IDC' who are retained in the order of seniority for administrative reasons. Within three days thereafter, when the decision of the Raksha Mantri to promote the respondent to the rank of Lt. General was declassified, in the fresh Note prepared on 23rd January 2018, there was a complete turn around. For the first time, it was mentioned in this Note that as per the criteria Lt. General (& Equiv) will be assessed for appointment of DGMS 'in the light of their earlier experience in a particular service'. No doubt, this criteria is mentioned in the Circular dated 10th July 1992 and, therefore, there may not be anything wrong per se. However, we find substance in the submission of the learned senior counsel appearing for the respondent that such a realisation dawned only after coming to know that the respondent was also in the reckoning for appointment to the post of DGMS (Army) and he was the senior most officer.

(iii) The manner in which this Note is written leaves a reasonable impression that the exercise was done to exclude the respondent from appointment to the post of DGMS (Army). In the first instance, though the criteria of assessment 'in the light of their earlier experience in a particular service' is mentioned in paragraph 3 of the Note, it nowhere reproduces the exact criteria, namely, 'inter se seniority and suitability'. Thus, while considering the earlier experience in a particular service, it was to be

done in the light of inter se seniority-cum-suitability is not reflected in the said Note. In fact, there is no such exercise of inter se suitability undertaken in this Note.

(iv) In paragraph 7 of the Note dated 23rd January 2018, case of the respondent is discussed. Qua him it is mentioned that since he would be newly promoted from the rank of Major General, he does not have 'previous exposure to the working and environs of the IHQ of the MoD'. On that basis, he is proposed for appointment as DGHS (AF) instead of DGMS (Army). This, according to us, is not a fair and objective consideration of his suitability for the post of DGMS (Army) as it is not necessary to have working experience in IHQ alone. Mr. Patwalia had vehemently argued that the respondent had adequate administrative experience while working as Major General in Southern Command, which was equally relevant, doing similar nature of duties from which he has gained sufficient experience making him aptly suitable for the post of DGMS (Army). He had also pointed out that in the past, officers who are appointed to the post of DGMS (Army) were not necessarily those officers who had earlier worked in the environs of the IHQ of the MoD. This fact also could not be refuted by the appellants. Therefore, we find that there has not been any proper and valid consideration in applying the criteria of inter se seniority and suitability."

36. As a result, we allow this writ petition and quash orders dated August 01, 2018 and issue mandamus directing the respondents to appoint the petitioner as DGMS (Army). Necessary orders in this behalf shall be passed within one week.