

A

UNION OF INDIA AND ORS.

v

LT. GENERAL RAJENDRA SINGH KADYAN AND ANR.

JULY 28, 2000

B

[DR. A.S. ANAND, CJ., S. RAJENDRA BABU AND
DORAISWAMY RAJU, JJ.]

Service Law:

C

Promotion—Selection or non—selection post—Determination of—Seniority-cum-fitness, seniority-cum-merit, merit-cum-suitability with due regard to seniority are criteria for selection—If involves comparative assessment of officers, it is merit-cum-suitability criteria—Thus, a selection post.

D

Army Commander—Criteria for appointment of—Purported to be issued under the orders of the President of India—Stipulates that an officer should be fit in every respect for appointment—Equal pay but not the status of Army Commander will be given to those General Officers who are found fit to hold the appointment but are not selected because of the revision in the criteria—

E *Held, post of Army Commander is a selection post and not a post merely based on seniority.*

Additional criteria for appointment—Experience of commander corps for at least one year—No waiver allowed without prior concurrence of the Government—officer with experience of five months and seven days—Waiver of six months granted by Government—Thus, on facts the officer failed to complete the period of one year of experience as corps commander.

F

Promotion to selection post—Contention that the choice cannot be restricted to two candidates when there are as many as nine candidates eligible for consideration—Held, not correct because others have not made a complaint.

G

Annual confidential report—One of the factors and not the sole factor to be considered by the selection authority—Further, reliance on annual confidential report is not justified because selection involves comparative assessment of officers.

H

Administrative Law— Judicial review of administrative decisions— A
When entire service profiles considered by the authorities concerned court
cannot substitute its own views—Constitution of India, Articles 227 and 136.

Words and Phrases:

'Fit', eligible and 'select'—Meaning of in the context of service B
Jurisprudence.

Respondent No.1 challenged the appointments of respondent no. 2 as the Army Commander on the ground that he is the senior most eligible officer to be appointed to the post. High Court treating the post as a non-selection post be filled on the basis of seniority quashed the appointment of respondent no. 2. In appeal, the Division Bench concurred with the Single judge. Hence these appeals. C

Allowing the appeals, the Court

HELD : 1.1. In deciding whether a post is a selection post or not, one of the criteria to be considered is if it involves a comparative assessment of officers, necessarily the element of selection is involved and, therefore, the post of Army Commander is selection post although not totally ignoring seniority. [741-D-E] D

1.2 Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Wherever fitness is stipulated as the basis of selection, it is a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. 'Seniority cum merit postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services involves assessment of comparative merit of all eligible candidates, and selecting the best out of them. [734-B-C] E F

1.3. The letter purported to be issued under the orders of the President of India states that "an officer should be fit in every respect for such appointment" not meaning thereby that he must be physically fit or mentally fit but in every other respect. Pay but not the status of Army Commander will be given to those General Officers who are found fit to hold the appointment but are not selected because of the revision in the criteria is a clear indication that the post of Army Commander is a selection post and not a mere promotion post on the basis of seniority. Further, the nature of rigorous standards adopted H

A in the matter of selection of officers from the stage of Lt. Colonel onwards upto 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 dose not debar the Chief of the Army staff or the Union of India in making the selection of any other person for good reasons, who fulfils the necessary criteria. [738-D-E]

B *Anil Kumar Gupta v. Municipal Corporation of Delhi*, [2000] 1 SCC 128.

C 1.4. The instruction issued by the Government of India for the appointment to the post of Army Commander prescribes an additional criteria for appointment namely, that the officer should have commanded a Corps for at least one year so as to become eligible for appointment as Army Commander and no waiver in this stipulation is allowed without prior concurrence of the Government. Respondent No. 1 had not completed one year of experience as a Corps Commander and he had put in 5 months and 7 days experience. Due to absence of the concerned officer from India on as assignment in the Embassy of France, the waiver was granted only for a period of six months by the Government of India on recommendation of the Chief of the Army Staff for consideration of the case but by adding the waiver granted by the Government in terms of 6 months, experience was only of 11 months and 7 days. Thus, respondent No. 1 cannot be said to have completed the period of one year of experience as Corps Commander. [740-C]

E 1.5. The post in question being a selection post for purposes of promotion, all the eligible candidates in that cadre should have been considered and consideration of only respondent no.2 and respondent No.1 alone could not meet the necessary criteria, is not correct because no one except respondent No. 1 made a complaint and his case has been duly considered. [741-F-G]

G 1.6. The position in law is that appraisal report or an annual confidential report is not the sole factor to be considered by the selection authority but one of the matters to be taken note of by the authority. More so, the contention that the Chief of the Army Staff having recommended the case of respondent 1 in the Annual Confidential Report as fit for promotion could not alter the same subsequently and give a finding that such a recommendation in Annual Confidential Report will have a limited effect cannot be upheld. Thus, the reliance placed on the Annual Confidential Report is not justified because selection involves comparative assessment of the officers. [741-C-D]

H

AVM S.L. Chhabra v. Union of India, [1993] Supp. 4 SCC 411 and *Union of India v. Samar Singh*, [1996] 10 SCC 555, relied on

1.7. The expression 'fit' legally means "Fit to be chosen" by elaborating the expression "eligible". It has different shades of meaning; it also means "a person to be appointed shall be legally eligible" and "eligible" meaning "Fit to be chosen". Further the expression "select" means "chosen or picked up". [738-B-D]

Stroud's Judicial Dictionary 5th Edn., referred to.

2.1. Critical analysis or appraisal of the file containing service profiles by the court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. One may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and court cannot substitute its own view to that of the authorities. [743-D-E]

3.1. It is well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decision has nexus to the facts on record, it cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision as such. [743-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 359-360 of 1999

From the Judgment and Order dated 11.12.98 of the Delhi High Court in C.W.P. No. 1527 of 1998.

WITH

Civil Appeal Nos. 361-362 of 1999.

Soil J Sorabjee, Attorney General, P.P. Malhotra, R.K. Anand, Gopal Subramaniam, P.P. Rao and S.K. Dwivedi, Dhruv Mehta, Manish Singhvi, Ms. Indu Malhotra, A. Singh, Amit Kapoor, Vikas Mehta, Ms. Madhu Sweta, Rajiv Dutta, Udai Kumar, Ms. Enakashi Kulshreshtha, Kapil Sharma, N.N Gupta, Dalip Tandon, Jamshed Bey, Ms. Neera Gupta and Ms. Devika for the appearing parties.

A The Judgment of the Court was delivered by

RAJENDRA BABU, J. The dispute in this case is in regard to the appointment to the post of Army Commander. When Lt. Gen. H.R.S. Kalkat [hereinafter referred to as 'respondent No.2'] was appointed or promoted as the Army Commander, Eastern Command, the same was challenged by Lt. Gen. Rajendra Singh Kadyan [hereinafter referred to as 'respondent No.1'] by way of a writ petition (Civil Writ No. 1527 of 1998) in the High Court of Delhi principally on the ground that he is the senior-most eligible officer to be appointed to that post; that he was seeking the aid of the court to prevent unnecessary and avoidable aberration with regard to appointment/promotion of senior officers in the Army and keeping in view the long term interest of the Army and the country so as to avoid politicalisation of the crucial posts in the Army; that he had won various meritorious awards; that he commanded a company in Nagaland and was awarded "Vishist Seva Medal" (VSM) on January 26, 1990 and as a Major General he commanded Assam Rifles, Rashtriya rifles and Border Security Force (BSF) and he was successfully able to bring cease fire in 1997 which is still holding; that he was awarded "Ati Vishist Seva Medal" (AVSM) on February 26, 1998 for his operational success and outstanding achievement; that he commanded a company in the Bangladesh war; that his contribution in "Operation Black Thunder" was awarded "The Chief of Army Staff's Commendation" in 1985; that he has the requisite staff experience and has served on the staff of an Infantry Brigade and an Infantry Division in Operational appointments; that he from the rank of Lt. Colonel onwards has attained all his select promotions in the first chance through unanimous decisions; since 1997 he has been in command of the oldest and the most prestigious strike Corps of the Army; that the appointments and promotions to the post of Army Commander/Vice Chief of the Army Staff (VCOAS) are governed by the instructions as contained in the Government of India letter dated October 20, 1986; that the said letter came into effect from January 1, 1989; that he became eligible to be promoted as Army Commander as and when vacancy arose and instructions issued by the Government of India were amended on November 18, 1996 which prescribe an additional criteria for appointment to the post of Army Commander, namely, that the officer should have commanded a Corps for at least one year so as to become eligible for appointment as Army Commander/VCOAS and no waiver in this stipulation is allowed without prior concurrence of the Government; that the order dated November 18, 1996 has come into effect only to affect respondent No.1; that even otherwise in relation to such stipulation he had been granted a waiver by the Government as prescribed

by letter dated November 18, 1996 as per the Government order dated March 16, 1998; that he was fit in all respects for appointment to the post of Army Commander; that the second appellant had recorded in Annual Confidential Reports (ACRs) in respect of respondent No.1 that on or after February 27, 1998 he was fit in all respects; and, that having found respondent No.1 fit in all respects on or after February 27, 1998 and he being the senior most Lt. General in the Indian Army ought to have been appointed as Army Commander.

Respondent No.1 claimed that when he was posted as Attache in Paris he was considered for the post of Major General on April 24/25, 1992 wherein he was approved for being promoted as Major General and the said decision was communicated to him on July 7, 1992. However, he was promoted to the post of Major General on September 1, 1995 after respondent No.1 was repatriated from Paris. The Selection Board for selecting Lt. General met on October 21, 1994, the decision of which was communicated to respondent No.1 on February 21, 1995. The case of respondent No.1 was deferred on the ground that the "criteria appointment was lacking". Again on April 21/22, 1995 his appointment as Lt. General was deferred on the ground "*not adequately exercised in criteria appointment*". Similarly, his case was again deferred on October 11/13, 1995 and on April 24/25, 1996. On October 31, 1996 his case was recommended to be promoted as Lt. General. It was contended before the High Court that for certain irrelevant consideration and *mala fide* reasons the case of respondent No.1 was deferred by the Central Government to accommodate Major General B.S. Malik who was made a Lt. General; that such deferment of the case of respondent No.1 by the Central Government was unprecedented in the history of Army. Respondent No.1 sought for review of the Government decision regarding change of his grading from "approved" to "deferred" by an application made on March 8, 1997. On April 10, 1997 respondent No.1 was again considered by a Special Selection Board to the post of Lt. General.

The decision thereto was conveyed to him on July 8, 1997. It is at this stage that the Chief of the Army Staff had issued letters/instructions stipulating that henceforth an officer to be eligible to become Army Commander/VCOAS should have commanded a Corps for at least one year. That is the first time such a stipulation had been introduced in the Army and made applicable with immediate effect. On a representation made by respondent No.1 waiver was granted for a period of six months for his consideration for promotion to the rank of Army Commander/VCOAS. It was contended on behalf of respondent No.1 that 2/3 days after respondent No.1 was recommended for promotion by

- A respondent No. 2 (Appellant No. 2 herein) on March 2, 1998 a proposal was mooted for appointment of the Army Commander, Eastern Command for filling up the vacancy that arose on March 1, 1998 when respondent No.2 was recommended for promotion/appointment to the post of Army Commander, Eastern Command. On respondent No.1 approaching the High Court on March 27, 1998, while directing notice it was made clear that if "any appointment is made to the post of Army Commander, Eastern Command, the same shall be subject to the result of the writ petition". It was contended before the High Court that for the first time more than one officer was considered at the time of making the recommendations for appointment or promotion to the post of Army Commander in the Indian Army; that in the past only name of senior most officer was forwarded and recommended for appointment/ promotion as Army Commander; that respondent No.1 was recommended for appointment as Army Commander; that when the statutory complaint was filed by respondent No.1, appellant No. 2 had recommended to appellant No. 1 the name of respondent No. 2 and, therefore, the impugned decision dated March 25, 1998 with the recommendation was sent to the Appointment Committee of the Cabinet the name of respondent No. 4 for promotion/appointment as Army Commander, Eastern Command in supersession of respondent No.1 is bad in law.

- The High Court first dealt with contention that stay of respondent No.1 in Paris should not come in his way for purpose of selection to a higher post. After going through the entire files it was noted that had respondent No.1's promotion not been deferred, he would have become Lt. General in 1996 itself although Major General B.S. Malik was promoted as Lt. General in spite of grading "unfit" to him by the Special Selection Board. Surprisingly on November 23, 1996 the Defence Secretary recommended that Major General B.S. Malik's grading may be changed from Grade "D" to Grade "B" and in the case of the petition his grading from "fit" was recommended to be "deferred" and the Defence Secretary relied upon the fact that respondent No.1 has not completed the laid down adequately exercised period of 18 months. The High Court commented on the manner of dealing with the files as rather strange and observed that there is inconsistency in the arguments advanced on behalf of the appellants inasmuch as only seniority of an officer is important; that the words "senior most officer who is otherwise fit" should be understood as that an officer whose name has been recommended by the Board is also fit in all respects. On perusal of files, the High Court came to the conclusion that the second respondent could never be deemed to be senior most officer who was otherwise fit and could not be compared with respondent No.1; that

recommendation is in total disregard of the past practice and procedure; that the cases referred to are those of senior general officers, namely, Lt. General I.G. Khanna, Maya Dass and G.L. Bakshi, who missed promotion to the rank of Army Commander on comparative merit and weak profile; that the note of the Joint Secretary admitted that in these cases there was no recommendation for promotion on account of their C.Rs. However, the High Court proposed to consider their cases separately. The High Court further concluded that from the records made available to the court it was evident that in the past only the senior most Lt. General was considered for promotion to the rank of Army Commander in the vacancy arising as happened due to the retirement of Lt. General Surinder Nath; that the cases of Lt. General K.L. D'Souza and Lt. General S.K. Sharma were recommended for promotion/appointment as GOC-In-C, ARTRAC; that the reason for not appointing Lt. General K.L.D'Souza was that he was placed in low medical category.

The High Court found force in the argument that comparative merit was not the requirement to be applied by the appellants; that the general officers meeting the requirement of Army letter dated October 20, 1996 were promoted as Army Commanders on the basis of the seniority; that fitness in every respect coupled with seniority is the criteria of appointment to the post of Army Commander, and it noticed that the appellants could not go into the question of comparative merit to the post of Army Commander when respondent No.1 carrier profile, experience, positive recommendation in the A.C.R. makes him fully fit for holding the post of Army Commander, any other consideration which has gone into the process of denying that right is not justifiable if respondent No.1 was eligible in terms of policy of the appellants dated October 20, 1986 particularly when the appellants have considered his case for waiver which was granted by six months and when respondent No.1 stayed in Paris for a duration longer period and that the same cannot be utilised against him.

The High Court also noticed that he had given his willingness certificate is not correct from the perusal of the records and he should have been repatriated on completion of three years which was not done. The High Court also took into consideration the statutory complaint made by respondent No.1. It was noticed that on February 27, 1998 when the Chief of the Army Staff had found respondent No.1 fit in every way to hold his present rank as well as found him fit for promotion to the next higher rank/appointment, how the name of respondent No. 4 could have been recommended on March 2, 1998. Therefore, the High Court critically analysed the Cabinet Secretary's

- A notice and found that respondent No.1 fulfilled the necessary criteria mentioned for promotion to the post of Army Commander. The High Court laid emphasis on the criteria "seniority-cum-fitness" rather than "seniority-cum-merit" and what is obligatory is that the promotion is automatic. Finally, the High Court noticed that the only question before it whether the post of Army Commander which became available on March 1, 1998 on the retirement of Lt. General Ravi Eipe when the cases of respondent No. 1 and respondent No. 2 were considered whether the appointment of respondent No. 2 as Army Commander in spite of respondent No. 1 being admittedly senior to respondent No. 2 was justified. The High Court noticed that the argument advanced on behalf of the appellants that the Circular dated October 16, 1992 was complementary to the Circular dated October 20, 1986 does not inspire any confidence and it is not one of those orders issued in terms of Article 73 of the Constitution. The whole rationale, therefore, was of the principle of "seniority-cum-fitness" and thus considered, the senior person unless unfit should get the promotion automatically and, therefore, seniority ought to have been given preponderating weight. Further, It noted that the appointment of Army commander is a selection grade appointment to be filled from eligible Corps Commander. Prior to 1986 Corps Commanders subject to having positive recommendation in their A.C.Rs. became Army commanders. In 1986 a criteria of two years residual service was introduced for their becoming Army Commanders subject to their being fit in every respect. General Officers meeting the said criteria was promoted in the order of their seniority. One year command of a Corps was added to the criteria prescribed in 1986 by letter dated November 1996 which also provided for a waiver by the competent authority. The note of the Cabinet Secretary in which he has comparatively discussed the A.C.Rs. of 1971 of respondent No.1 amounts to importing a non- existent criteria after respondent No.1 was found fit in all respects in the A.C.R. on the basis of which he was promoted to next higher rank. The minimum tenure of one year as Corps Commander had also been met by respondent No.1 on account of grant of waiver by the Government. The "deferment" made in the grading in October 1996 of the Selection Board had adversely affected respondent No.1 and it is only thereafter stipulated that an officer to become eligible to be an Army Commander should have commanded a Corps for at least one year. In this background, the High Court quashed the appointment of respondent No. 2 as Army Commander, Eastern Command and allowed the writ petition.

Challenging this order of the learned Single Judge of the High Court a Letters Patent Petition (L.P.A No. 568/98) was filed before the Division Bench of the High Court. By a very short order the Division Bench of the High Court

disposed of the Letters Patent Petition stating that the comparative merit of officers was neither the requirement nor it is permissible and the appellants should not have treated the post of Army Commander as a selection post. The Division Bench is in agreement with the opinion of the learned Single Judge that in the past only a single person was considered and if he is not fit, then alone the next person in seniority was considered. Reliance placed by the Government on Circular dated October 16, 1992 is not correct and was rightly rejected by the learned Single Judge inasmuch it is a non-statutory document. This is not the case of "seniority-cum-merit" but it is only "seniority-cum-fitness" subject to rejection on the basis of being unfit. Seniority alone governed the matter. On that basis the High Court dismissed the appeal. Hence the present appeals - one filed by the Union of India and its officers (Civil Appeal Nos. 359-360 of 1999) and the other (Civil Appeals Nos. 361-362 of 1999) by Lt. Gen. H.R.S. Kalkat, respondent No. 2 in Civil Appeal Nos. 359-360 of 1999.

In this Court, the learned Attorney General contended on behalf of the Union of India that the High Court had erred in quashing the appointment of respondent No. 2 as Army Commander, Eastern Command; that the entire consideration of the matter is mis-placed; that the High Court had given undue importance to A.C.Rs. in the matter of promotion and when security of the country is of paramount consideration, mistakes cannot be allowed and gaining necessary field experience is absolutely essential; mere emphasis on the A.C.Rs. will not change the ground realities and, therefore, whatever may be the circumstances in which the appellant could not gain the necessary experience; that the High Court could not have interfered with the impugned action. The High Court has indulged in nit picking by making a censorious approach in examining the dossiers and files as also the note of the Cabinet Secretary; that the comparative merit is not prohibited in making the selection, which was quite often resorted to in making appointments to the post of Army Commander.

Shri Gopal Subramaniam, learned Senior Advocate appearing for respondent No. 2 and appellant in connected matter, supported the contentions of the learned Attorney General and supplemented the same on factual aspects.

Shri P.P. Rao, learned senior advocate for respondent No.1, submitted, at the very outset, that decision in this case is of great momentous nature to the army inasmuch as the principles relating to the promotion to the post of Army Commander, that is, in the highest echelons of service are in issue.

- A Indeed he submitted that up to the stage of appointment as Lt. General, rigorous tests have to be undergone by the concerned officers before they are promoted and such processes have been undergone having reached a particular level. Further tests are held almost automatically unless there is something adverse as to their fitness. He stated that in these cases it is only seniority that governs and that when it was ignored the matter was taken to the High Court and the High Court has given relief in this case and, therefore, this Court should not interfere in the order made by it. Respondent No.1 has always been senior to respondent No.2 by as many as 40 places although they belonged to the same batch having been commissioned on 10.6.1962. Respondent No.1 had a distinguished career and participated in the operations of 1971 Indo-Pak war and also has extensive counter insurgency experience. The battalion in which respondent No.1 was working during the war was engaged in fighting the enemy from Agartala to Dhaka and reached Dhaka on December 16, 1971 i.e. the date of cease-fire and surrender of the Pakistan Army. In terms of letter dated November 18, 1996, the officer should have commanded Corps for at least one year so as to become eligible for appointment as Army Commander unless waived with the prior concurrence of the Government. As respondent No.1 was the only person to be affected by this new criterion which was sought to be enforced without any lead time, contrary to the earlier practice, in his statutory complaint dated 5.10.1997, he made an alternative request that this stipulation may be waived in his case as the delay in his promotions have been caused entirely in the interest of service and he specifically mentioned that the vacancy was due to occur on March 1, 1998 and he should be considered for the same. On 6.1.1998, the Chief of the Army Staff recommended the waiver by months for consideration for promotion to the appointment of Army Commander for a vacancy occurring on March 1, 1998. The Central Government accepted the recommendation of the Chief of the Army Staff. The case of respondent No.1 would have been considered for appointment for the Army Commander in normal circumstances had he not been inordinately delayed in being placed on present criteria appointment. The delay was caused due to circumstances well beyond the control of respondent No.1 and was primarily due to administrative constraints of the organisation. New clause of tenure of one year as a Corps Commander affected only respondent No.1 and this aspect was borne in mind by the Chief of the Army Staff while making the recommendation. On 10.4.1997, respondent No.1 was selected for the post of Lt. General by the Special Selection Board and on 8.7.1997, he was intimated of the fact of selection and approval by the Government. In another case filed by Major General Bagga, the Delhi High Court passed a stay order in July, 1997. On 23.8.1997, respondent No.1 was

put in-charge of GOI-1 Corps and started gaining experience of commanding the Corps and continues to command the same even now. Thus Shri Rao submits that in terms of letter dated November 18, 1996, it is enough if the officer has commanded a Corps for one year by the date of appointment to the post of Army Commander in the absence of waiver or including the period of waiver. The appointment to the post of Army Commander having been made by an order dated 20.4.1998, as on that date respondent No.1 had actually commanded Corps 1 for a period of seven months and 26 days; adding the period of waiver of six months, it comes to a total of one year, one month and 26 days. In other words, he fulfilled the requirement of commanding a Corps for at least one year by February 22, 1998. Therefore, he was eligible for consideration for the post in question and that he was rightly treated as eligible both by the Chief of the Army Staff as well as by the Government of India. He relies on the decision of this Court in *Anil Kumar Gupta v. Municipal Corporation of Delhi*, [2000] 1 SCC 128. The criterion that "the officer should be fit in every respect for such appointment" stipulated in the Government of India's letter dated October 20, 1986 clearly indicates that the post of Army Commander is a non-selection post. In contrast, the nature of selection posts in the Army should be gathered from the selection system.

The hierarchy in the Army and the method of selection and promotion to various posts starting from the post of Lieutenant and going up to the post of the Chief of the Army Staff will clearly indicate that the posts of Lieutenant, Captain and Major are automatic promotion posts on passing the promotion examination irrespective of *inter se* merit, whereas the posts from Major to Lt. Colonel, Lt. Colonel to Colonel, Colonel to Brigadier, Brigadier to Major General and Major General to Lt. General are all selection posts filled up by promotion on the basis of relative merit assessed by the designated selection boards. From Lt. General [Corps Commander] to Army Commander is a non-selection post to which promotion is made subject to fitness. It is promotion subject to fitness in all respects, although the rank remains the same. From the post of Army Commander to that of the Chief of the Army Staff, it is by promotion for which no specific criteria have been laid down. There have been precedents where the senior-most Army Commanders have not been appointed as the Chief of the Army Staff. Selection implies the right of rejection depending upon the criteria prescribed. Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,

1. Seniority cum fitness,

- A 2. Seniority cum merit,
3. Merit cum suitability with due regard to seniority.

B Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them.

C Shri Rao insisted that the letter dated October 20, 1986 containing the criteria for selection laid down by the President for the Army Commander does not prescribe any minimum merit. In fact the word "merit" is conspicuously absent from the entire letter and the criteria do not postulate the comparative assessment of merit for appointment as Army Commander or Lt. Generals in the same rank.

E Shri Rao further contended that the use of the word "selection" in a rule or administrative instruction does not necessarily make the post concerned a selection as has been contended by the appellant. Nor the expression "selection grade" used by respondent No.1 here and there makes the post in question a selection post to be filled in by promotion on the basis of comparative assessment of merit. In addition to the absence of "merit" being one of the criteria for selection and promotion to the post of Army Commander, the past practice as recorded by the Defence Minister and concurrently found by the courts below shows that the senior-most Lt. General who is found fit in all respects for promotion according to the C.Rs. has always been promoted.

F Shri Rao also submitted that circular dated 28/16.10.1992 of the Army Headquarters to the extent it applies to the appointment of Army Commanders and is at variance with the letter dated October 20, 1986 setting out the criteria laid down by the President for appointment of Army Commanders cannot be acted upon. In so far as the said circular provides for appointment of Corps Commander as the caption of the circular indicates, there will be no conflict with the criteria laid down by the President for appointment to the post of

Army Commander. The absence of the word "seniority" in the letter of the Government of India dated October 20, 1986 does not exclude the right to prior consideration flowing from being the senior-most officer entitled to the considered in terms of Articles 14 and 16 of the Constitution. The expression "fitness in all respects" or "merit" or "suitability" is not synonymous. It was submitted on behalf of respondent No.1 that an Army Commander having experience of operations during war and extensive counter insurgency may be more suitable for commanding the Army rather than for an equivalent staff post at the Headquarters and *vice versa* and that even the highest post in any organisation need not be a selection post to be filled on the basis of comparative assessment of merit of eligible officers.

Shri Rao further elaborated that the post of Army Commander, even if it is assumed, is selection post to be filled up on the basis of comparative assessment of relative merit of officers, the field of choice cannot be restricted to two persons only and there were as many as nine Lt. Generals eligible for consideration having had a residual service of two years and put in at least one year as Corps Commander including respondent No.1 and respondent No.2. Admittedly seven out of nine officers were not considered. The criteria adopted by the appellants are not that of selection or assessment of relative suitability of officers. According to Shri Rao, the expression "relative suitability" of the officer does not mean the comparative assessment of merit. It means suitability for the particular command or the particular staff appointment as the case may be and that suitability is related to the command in question or the staff appointment in question and there is no mention of any comparative assessment of merit even in that circular. Even that circular does not itself lay down the two senior eligible officers should be considered for each Army Commander's vacancy. It refers to a pre-existing Government requirement without mentioning any Government letter or circular. No such document containing this requirement has been produced so far. The so-called assessment of merit of respondent Nos.1 and 2 in the instant case does not reveal all the facts or take into consideration all the necessary facts that are required to be taken note of. There are several factors available on record such as Annexures 1, 2 and 3 of his representation to the Attorney General and Annexure C to the written submissions which will clearly indicate that the Government has not taken note of all the factors in making the appointment in question. Shri Rao submitted that advisory remarks are not adverse remarks and they cannot be relied upon for denying the promotion to an officer declared fit for promotion in all respects for that very post and that the reports which are too stale and remote cannot be dug up to change the settled *inter se merit* of officers

- A** assessed by as many as five selection boards for successive promotions from the ranks of Major to the rank of Lt. General all of which are selection posts. Advisory remarks of the Reviewing Officer in the CR of respondent No.1 for 1971 were never communicated to respondent No.1 and, therefore, the same could not be relied upon against him. Another submission that has been made by Shri Rao is that consent to go on deputation cannot take away the right
- B** to be considered for promotion and if selected for promotion and that the policy regarding willingness certificate cannot in any event hold good beyond the normal tenure of three years of officers sent on foreign assignments in public interest and if the post of Army Commander is a non-selection post to which appointment has to be made on the basis of seniority subject to
- C** fitness in all respects and fulfillment of both these criteria having already been held in his favour by the Chief of the Army Staff, the High Court was justified in issuing the writ.

D The matter put before this Court in the light of the arguments advanced on behalf of the parties and the pleadings raised or the findings recorded by the High Court, we have to consider the same from five facets of the case:

- E** [i] Whether the Army Commander holds a selection post or one which is based on seniority but the officer should be fit in every respect for such appointment and should have a minimum of two years before retirement from the date of appointment as Army Commander/VCOAS?
- F** [ii] Whether the instructions given on October 16, 1992 are executive instructions not supportable in law which stipulate that an officer to be eligible to the post of Corps Commander should either be eligible to become an Army Commander or should have a minimum of four years residual service on the date he is promoted to the rank of Lt. General and should have commanded a Corps for at least one year?
- G** [iii] What is the effect of the ACRs recorded by the Chief of the Army Staff?
- [iv] What is the effect of waiver granted to Lt. General R.S. Kadyan when he was a Brigadier serving in the Embassy of France?
- H** [v] Whether the Cabinet Secretary is justified in taking into consideration the service profiles of Lt. General R.S. Kadyan and

Lt. General H.R.S. Kalkat in making his recommendations?

A

Several decisions have been cited before us on either side by the learned counsel appearing in this case but we are not adverting to the same since we are not in any way detracting from the principles stated therein nor are we enunciating any new principle. Moreover, we are deciding on the special features arising in this case.

B

On October 20, 1986 criteria of appointment of Army Commander was issued purported to be under the orders of the President of India and such criteria is as follows :-

(a) The officer should be fit in every respect for appointment; and

C

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

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

D

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

E

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

F

[added on November 18, 1996 pursuant to letter No. 19(24)/96/D(MS) issued by Government of India, Ministry of Defence.]
(Emphasis supplied)

On the basis of this letter the argument advanced before us is that the appointment to the post of Army Commander is of selection and not a mere promotion on the basis of seniority. It is urged on behalf of the Union of India and Lt. General H.R.S. Kalkat is that the post of Army Commander is a selection post and not a post merely based on seniority. While Shri P.P. Rao, learned senior Advocate for the contesting respondents, submitted that what is required in this letter is only that a concerned officer should be fit in every

G

H

- A respect and should have fulfilled the other requirements. Though diametrically opposite views are stated, on a careful reading of this letter it becomes clear that "an officer should be fit in every respect for such appointment" will not merely mean that he must be physically fit or mentally fit but in every other respect. In addition, in clause (d) above in the letter while making certain exceptions what was in the mind of the authority is made clear that an officer
- B holding the rank of Lt. General who is otherwise fit but not selected because of the revision of criteria will be a clear indication that it is a selection and not a mere promotion on the basis of seniority. 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.
- C 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
- D of officers from the stage of Lt. Colonel onwards upto 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 in making the selection of any other person for good reasons who fulfills the necessary criteria. Therefore, we are of the opinion that it was
- E 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.

- F The next question, which we have to consider, is what is the nature of the executive instructions that have been given. Even if we accept the view taken by the High Court that Army Headquarters communication in this regard merely amounted to an executive instruction and not supported by any orders made by the President of India or the Government of India, the learned Attorney General submitted that the other parameters that are clearly laid
- G down in the letters of the Government of India should be strictly followed, that is, all officers who are likely to be eligible for an Army Commander appointment in terms of two years residual service will have to be given command of a Corps and unless such officer has commanded the Corps for at least one year he cannot be considered for promotion. In the present case, respondent No.1 became a Corps Commander on September 24, 1997 and the
- H vacancy in the post of Army Commander arose on March 1, 1998 and thus

he had not completed one year of experience as a Corps Commander and he had put in 5 months and 7 days experience and to this if we add the waiver granted by the Government in terms of 6 months, it will only be 11 months and 7 days experience. Even so, he falls outside the zone of consideration for being appointed as an Army Commander. However, much argument was addressed on the effect of the recommendation made by the Chief of the Army Staff and the order made by the Government of India in that regard. On November 6, 1998 the Chief of the Army Staff recorded a note in the following terms :-

“In view of the above, I recommend that redress be granted to the Gen officer by way of granting 6 months AE waiver to him for consideration for promotion to the appointment of Army Cdr/VCOAS for a vacancy occurring on 01 Mar 98.”

The argument addressed is that the waiver granted by the Government is identical with the consideration of his case for appointment as Army Commander inasmuch as waiver has been granted for the purpose of considering his case to the post of Army Commander it is contended that his case should have been considered. We fail to appreciate this line of argument. The basis upon which the High Court proceeded is that having taken all the issues into consideration the respondents have taken a stand totally contrary to the recommendations of the Chief of the Army Staff as well as the Ministry of Defence. The absence of the concerned officer from India on an assignment in the Embassy of France, the waiver granted only for a period of six months and other various factors taken into account are also set out in the following terms :-

“In view of the above detailed examination of the case, CAB is of the view that Lt. Gen R.S. Kadyan, VSM, be granted waiver of six months in tenure of GOC I Corps and considered for the appointment of GOC-IN-C Eastern Command as the Gen Offr is not completing AE criteria due to :-

- (a) Delayed repatriation from France resulting in -
- (b) Delayed placement on criteria appointment in the rank of Maj Gen.
- (c) Delayed consideration for promotion to the rank of Lt Gen and
- (d) Revision of ‘FIT’ grading to ‘Deferred’, which resulted in

A (e) Further delay in consideration, approval and placement as GOC Corps, and

(f) Application of new clause vide MOD letter of 18 Nov. 96, the provisions of which only exclude him in 1962 batch *vis-a-vis* his batchmates.

B All the above events were beyond the control of the complainant and were basically caused by the administrative constraints of the organisation. Hence, the Gen Offr deserves the benefit of grant of waiver in terms of natural justice and equal rights, clause of the law.

C But whatever may be the circumstances or the period for which he fell short the waiver granted is only for a period of 6 months. If that is so, respondent No.1 cannot be said to have completed the period of one year of experience as Corps Commander. Further, Lt. General R.S. Kadyan was considered by the Selection Board and found fit on April 10, 1997 but he could not be promoted as Lt. General and appointed as Corps Commander because of stay order passed by the Delhi High Court in the writ petition filed by Lt. General H.S. Bagga. The said order was vacated and thereafter Lt. General R.S. Kadyan was promoted on September 24, 1997 and he functioned as Officer In-charge 1 Corps with effect from August 23, 1997 without any effect on promotion, pay or any related benefits till he was actually promoted on September 24, 1997. Lt. General R.S. Kadyan was appointed as GOC 1 Corps after the stay was vacated on September 24, 1997. Hence that period including the period of waiver falls short of the requisite period of two years.

F On 5.10.97, respondent No.1 made a statutory complaint that his case should be considered on the basis of merit-cum-seniority subject to being found fit for promotion and ultimately prayed for the following :

G (1) The decision to defer his case in connection with the selection board met on October 31, 1996 may be reviewed and if he is deemed to have been placed in command of a corps retrospectively from the date of declaration of the results of that Selection Board.

H (2) In the alternative, he prayed that the stipulation of commanding of a corps for minimum one year to become eligible for appointment as an Army Commander under the letter dated November 18, 1996 may be waived in his case as the delay in his promotion seems to have been caused entirely in the interest of service.

The Chief of Army Staff recommended waiver of this stipulation contained in the letter dated November 18, 1996 limiting to a period of six months. Therefore, the conclusion of the High Court that he became eligible to be considered to the higher post does not seem to be valid nor the High Court was justified in proceeding on that basis. The conclusion of the High Court to that extent is erroneous.

The ACR for the period 1.10.1997 to 31.1.1998 is to the effect that he considered him fit in every way to hold his present rank and also to the next higher rank. On this basis, it is contended that the Chief of the Army Staff having recommended his case in the ACR as fit for promotion could not alter the same subsequently and give a finding that such a recommendation in ACR will have a limited effect. The position in law is that appraisal report or an annual confidential report is not the sole factor to be considered by the selection authority but one of the matters to be taken note of by such authority. We may advert to two decisions of this Court in this regard, namely, *AVM S.L. Chhabra v. Union of India*, [1993] Supp. 4 SCC 441 and *Union of India v. Samar Singh*, [1996] 10 SCC 555. Therefore, we are of the view that heavy reliance placed by the High Court on the ACRs to reach the conclusion otherwise is not justified. In deciding whether a post is a selection post or not, one of the criteria to be considered is if it involves a comparative assessment of officers necessarily the element of selection is involved and, therefore, the post with which we are concerned is indeed a selection post although not totally ignoring a senior.

In raising an argument that respondent No.1 being the senior-most officer in the cadre was being considered for the next higher post. The post in question being a selection post for purposes of promotion, the contention advanced is that all the eligible candidates in that cadre should have been considered and consideration of only two candidates, namely, the appellant in one of the cases and respondent No.1, alone could not meet the necessary criteria. This contention does not also hold water because no one else has made a complaint and the case of respondent No.1 has been duly considered. Thus the argument advanced by Shri P.P.Rao on this aspect does not stand to reason.

Now we come to the last aspect of the matter, namely, the manner in which the Cabinet Secretary examined the service profiles of the two officers in question. For purposes of convenience, we may set out the relevant portion of the note:

A "Lt. Gen. RS Kadyan:- He was commissioned in the Rajputana rifles regiment of the Infantry in June, 1962 and has held various Command, Staff and Instructional appointments. He picked up the rank of Lt. Gen. On 24th September, 1997 and started functioning as regular Corps Commander. The General Officer has a balance exposure in Command, Staff and Instructional appointments. However, his staff experience in senior ranks from Brig. onwards is only limited to that of Military Attachee. He has no experience of working in Northern Command and Army Headquarters. Since 1980 he has worked for about 4 years in field areas. It also appears from his records that he did not participate in 1962, 1965 operations. In his report of 1971, when he participates in the operations, there are some advisory remarks both by the IO and RO as below:-

"..... should be bold and aggressive in operation Should lead his men personally to difficult objectives." (Remarks by IO).

D "..... his performance as a Rifle Coy Commander in the recent operations has been satisfactory though not upto the expected level." (Remarks by RO).

E The overall profile of the officer, especially in senior ranks has been clearly above average. All the reporting officers gave him above average ratings with sprinkling of outstanding ratings.

F As regards CI operations, the officer has handled the same as IG North, Assam Rifles, but he has not had experience of commanding a regular Army Division. His experience as Corps Commander is also limited. He is a graduate of Staff College and has also done higher command courses. He is recipient of Chief's Commendation, VSM and AVSM. He is medical category SHAPE- 1."

G "Lt. Gen HRS Kalkat: - He was commissioner in Maratha Light Infantry in June, 1962. He became Lt. Gen in Feb, 1996 and since then he is commanding 33 Corps in the Eastern Sector. The general officer has rich experience in Command and Staff appointments. He has worked both in Eastern and Northern Commands including high altitude areas. Since 1982 he has worked for about 4 years in remote field areas in the Eastern Sector, especially the border areas with China. He has also held important staff assignments in Military Operations, Infantry and Staff Duties, Directorates in the Army Headquarters. His

instructional experience is however limited to junior ranks only and he has practically no experience of CI operations. A

The officer did not participate in 1962 and 1965 operations. His report of 1971, the year in which operations took place is quite laudatory. The overall profile of the officer, especially in senior ranks has been clearly above average. All reporting officers have given him above average ratings with sprinklings of outstanding ratings. He is a graduate of Staff College and has also done Senior Commands and NDS Courses. He is also a recipient of AVSM. He is medical category SHAPE-1." B

The contention put forth before us is that there are factual inaccuracies in the statement recorded by the Cabinet Secretary in his note and, therefore, must be deemed to be vitiated so as to reach a conclusion that the decision of the Government in this regard is not based on proper material. The learned Attorney General, therefore, took great pains to bring the entire records relating to the relevant period which was considered by the Cabinet Secretary and sought to point out that there were notings available on those files which justify these remarks. *Prima facie*, we cannot say, having gone through those records, that these notings are baseless. Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. May be one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government. C D E F

Before parting with the case we need to observe that considering the nature of the sensitivity of the posts involved and that each of the officer feeling that he did not get the best of the deal at the hands of the Government or that the members of the force being aware who is the best is not heading them will certainly weaken the esteem and morale of the force. Therefore, the standards to be adopted and applied should be of the highest order so as G H

A to avoid such an impression in the force.

In the result, we allow the appeals filed by the Union of India and Lt. Gen. H.R.S. Kalkat and set aside the orders made by the High Court and dismiss the writ petition filed by respondent No. 1.

B N.J.

Appeals allowed.