

IN THE HIGH COURT OF DELHI

+ W.P.(C) No. 10630/2006

% Judgment reserved on : August 29, 2006
Judgment delivered on : October 17, 2006

Major Gen B.D. Wadhwa, AVSMPetitioner.
! through: Mr.R.K. Anand,
Sr. Advocate, with
Ms. Shivani Lal,
Mr. Manoj Ohri,
Mr. Bhagwan Sharma,
Mr. Chetanya Anand &
Mr. D. Das, Advocates.

Versus

\$ Union of India and Ors.
through :Respondents
Mr. Rajeev Mehra with
Mr. Arvind Sharma,
Advocate, for the
respondent no. 1 to
3/Union of India.
Mr. Ashim Vacher with
Mr. Achal Gupta,
Advocates, for the
respondent no.4.

CORAM :
HON'BLE MR. JUSTICE SWATANTER KUMAR
HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether reporters of local paper may be allowed to see judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be referred in the Digest?

yes
yes

SWATANTER KUMAR, J.

1. In the year 1965, the petitioner joined the National

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Defence Academy at Khadakwasla, Pune. He passed out from the said Academy and on 15.6.1969 was commissioned in the Indian Army in the Corps of EME, a technical division of the Indian Army. The petitioner claims to have attended and cleared various courses including YO's course, Long Technical Advance Course in Armament Technology, Six months foreign course in USSR in guided weapon system and Company Commanders Course.

2. In the year 1982, the petitioner claims to have been awarded the Commandant's Medal for securing first position in COY Company Commanders Course of the EME. As a result of his distinguished service profile and hard work, the petitioner picked up his rank as Lt. Colonel and Colonel. In addition to pursuing his professional courses, the petitioner obtained a Master's Degree in Mechanical Engineering (Production Technology) from M.S. University, Baroda. The petitioner was deputed to do one of the Army's most distinguished courses, the Long Defence Management Course. The petitioner was selected for the said course along with respondent no.4 and while the petitioner was retained as a "directing staff" on account of his high position in merits, respondent no.4 proceeded on "staff". Finally, the petitioner was approved for promotion to the rank of Brigadier in the year 1999 and he led the Inter-Service Defence Technical Delegation to France to view and study the French Defence Industry in the year 2002.

The petitioner was appointed as Technical Secretary to the Indo-US Technical Working Group (DRDO), Washington, USA in the year 2003. With his illustrious service carrier, the petitioner was approved for promotion to the next rank of Major General in the year 2000, the rank which he picked up subsequently. On 26.1.2006, the petitioner was awarded AVSM (*Ati Vishisht Seva Medal*) and the same was conferred by the President on 31.1.2006. The petitioner became due and was to be considered for promotion to the next higher rank of Lt. General by the Special Selection Board, which was to be held in April 2006. The petitioner, along with others including respondent no.4, was considered, but on 16.6.2006 the name of respondent no.4 was approved and he was empanelled to the rank of Lt. General in the Corps of EME while the petitioner was rejected by the Board. Aggrieved from this action of the respondents, the petitioner has approached this Court under Article 226 of the Constitution of India praying that the Court may quash the letter dated 16.6.2006 empanelling the name of respondent no.4 as well as the letter dated 26.6.2006 rejecting the empanelment of the petitioner for promotion to the next higher rank of Lt. General and they be directed to empanel the petitioner and give him his due seniority and all other benefits in that rank.

3. The principal ground taken by the petitioner is that action of the respondents is entirely arbitrary and discriminatory. It is not

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only that the ACR profile of the petitioner is better than the respondent no.4, but he is better qualified and is a more decorated officer than the said respondent. More so, the award of AVSM is awarded for distinguished service of very high order rendered to the Nation. It is also the ground of challenge by the petitioner that the Master Data Sheet was not portrayed correctly exhibiting the service profile of the petitioner along with courses, awards etc. and thus, the empanelment of the respondent no.4 is based upon taking into consideration all irrelevant material, while ignoring relevant materials in favour of the petitioner and the selection has been made in a manner which is not supported by the rules and regulations and practice of the Army Headquarters. The petitioner has specifically taken the ground by mentioning that Major General V.C. Jain, who was junior to one Major General M.G. Girish was empanelled and he picked up the rank of Major General primarily on the ground that he was technically more qualified and had done post graduate course in Engineering and a Course at USSR. Applying the same principle, the petitioner was entitled to receive preference over and above respondent no.4. The petitioner claims that he is not only senior to respondent no.4 but has a better grading in the ACRs and is technically more qualified and better suited for holding the post of Lt. General in the Directorate of EME.

4. Separate counter affidavits were filed on behalf of the

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respondents no.1 to 3 and 4 respectively. The stand of the Union of India, respondents no.1 to 3 is that the present petition before this Court is incompetent in as much as the petitioner has been considered by a duly constituted Special Selection Board in accordance with the parameters and provided criteria. The post of Lt. General, being a selection post, the Selection Board, on comparative better merit of respondent No.4 empanelled him while the petitioner could not make the grading to be empanelled for the promotion post. According to the respondents, the petitioner does not belong to the general category and is eligible for consideration for promotion from Major General to Lt. General only in the 'Staff Stream' and within his Corp. The issue of promotion under the 'Staff Stream' does not arise as the 1969 batch of EME has not yet come up for consideration for promotion in the 'Staff Stream' to the rank of Lt. General. The basic facet of pyramidal rank structure of the Army is such that as the rank increases, the number of vacancies in the higher rank decreases. Furthermore, only those officers whose record of service merits promotion, are short-listed for promotion to the higher rank based on their overall profile and comparative merit.

5. The Selection Board and the competent authority, according to the respondents, take into consideration number of factors such as war/operational reports, course reports, ACR, performance in command and staff appointments, Honours and

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Awards, comparative profile of officers under consideration etc. Thus, the decision of the empanelment is based upon overall profile of an Officer and comparative merit with his batch. The petitioner was considered along with other eligible Major Generals of EME including respondent no.4 by a Special Selection Board held on 7.4.2006 for promotion to the rank of Lt. General. This was done with the aim to fill vacancy within EME arising on 5.9.2006. Recommendations of the Selection Board were examined by various authorities in the Army Headquarters as well as in the Ministry, and respondent no.1, after considering the recommendations of the Special Selection Board did not find the petitioner fit for promotion within the Corp based upon his overall profile and comparative merit. As a result, the petitioner was not empanelled for the rank of Lt. General. Reliance was placed on para 108 of the Regulations for the Army, 1987, which reads as under:-

"108 Constitution and Duties of Selection Boards. Selection Boards (for Officers other than Army Medical Corps, and Military Nursing Service) are constituted as required under the order of the Chief of the Army Staff. Their composition and duties are given below:-

(a) Composition

Presiding OfficerChief of the Army Staff or any other senior officers as directed by him according to the importance of the Selection Board.

Members - As directed by the Chief of Army Staff from time to time in accordance with the

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nature of their duties.

Secretary - MS/AddlMS/Dy MS

(b) Frequency of Meeting :- As required by the Chief of the Army Staff.

(c) Duties -

(i) Assessment of officer for promotion to Lt. Col. and above in accordance with the criteria laid down for selection.

(ii) Any other matter which the Chief of the Army Staff may direct the Board to consider.

(d) The assessment of the Selection Board shall be recommendatory in nature and not binding until approved by the competent authority viz the COAS or the Central Government as the case may be.

(e) The Central Government or COAS have the inherent power to modify, review, approve with variation or repeal recommendations of the Selection Boards." (emphasis supplied)"

6. In regard to the comparative merit of the petitioner and respondent no. 4, respondents no.1 to 3 have taken the stand that "Workshop of Company Commander's Course" done in the rank of Captain way back in the year 1982, is not at all an All Arms Course . The attempt to draw a comparison with respondent no.4 on this basis, thus, is not relevant. In fact, the petitioner and two others including the respondent no.4 were awarded A1 grading, thus they were at parity in regard to this course. As far as the Long Defence

Management Course was concerned, it is not disputed that the petitioner was awarded Instructor grading with above average performance. The respondent no.4 as per records had qualified in five 'All Arms Courses' i.e. Junior Command, Senior Command, Staff Course, Long Defence Management Course and Electronic Warfare Course. The term "retained in CDM" after doing LMC as stated by the petitioner is misleading. In fact, the Instructor in CDM is posted by MS Branch in accordance with the organizational requirements. The posting to LDMC as Instructor in no way gives him edge over others in the matter of promotion as all Officers after completion of the LDMC Course are given important appointments. Respondent no.4 was posted to the MS Branch based on the organizational requirements while the petitioner was retained at CDM for Instructor's duties. Respondent no.4 was also graded with 'Instructor' grading and credited with outstanding performance in the said course. As regards the grading given by the Osmania University leading to award of MMS Degree, it is stated that respondent no.4 qualified the same in 1st class with distinction securing 10th place out of 72, while the petitioner secured 1st class but was placed at 48th place out of the 72 persons. It has been specifically disputed that Major General V.C. Jain was empanelled in preference to Major General M.G. Girish on the basis of higher educational qualification (M.Tech). It is argued that he was

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preferred (despite the fact that both of them belonged to different batches) on the basis of the entire service record and better comparative merit.

7. At this stage it may be relevant to notice that in paragraph 11 of the petition, the petitioner had made averments with regard to the criteria which the authorities are expected to take into consideration, in reply to which the respondents have stated as under:-

"That the contents of answering para save to the extent being matter of record are wrong and denied. In reply to this para it is submitted that Annual Confidential Reports profile, Courses, Honours and Awards, Appointment held, sustained good performance, employability (to be judged by the All Arms Courses and career courses) in higher rank, military standing, discipline background, if any etc., are all taken into account by Special Selection Board in judging fitness or otherwise of an officer for promotion. The Special Selection Board comprises of the COAS, the VCOAS and the Army Commanders who apply all relevant parameters and yardsticks to evaluate comparative merit of the officer under consideration for promotion. To the rank of Lt. Gen. And while assessing ACR profile all reports earned in the rank of Brigadier and reports in the rank of Major General (up to cut off ACR), War Reports and Battle Performance Reports earned in any rank are taken into consideration alongwith other inputs forming part of over all profile of an officer. It is before the Selection Board and it is not the sole criteria for selection. Contents of the paras herein above are reiterated and reaffirmed herein."

8. In addition to meeting the case of the petitioner on

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merits, the respondents have taken a specific objection that the petitioner is not privy to the record of other officers which are confidential in nature and reference by the petitioner to his Confidential Record as well as that of others, itself is a ground on which this Court should decline to grant relief to the petitioner.

9. The respondent No.4 who filed a separate counter affidavit has not disputed the basic facts in relation to appointment and picking up of ranks by the petitioner but has seriously disputed that the petitioner in any way has a better service profile, ACRs or service career which on comparison can be said to be, in any way, better than that of respondent No.4. According to this respondent, the petitioner and he both are of 1969 Batch and he passed out from Officers Training School, now called Officers Training Academy, in the year 1971 with ante date seniority of 2 years being a Technical Graduate and as such the petitioner is not senior to him. In regard to various courses stated to have been completed by the petitioner, case of respondent No.4 is that he has done the Company Commander Course, EME, in the year 1982 and was awarded 'A' Instructors Grading. He has also completed Advance Course in Electronics Engineering (Communication) and was graded 'A' in the said Course and he is M.Sc. in Defence Studies from University of Madras and MBA from Faculty of Management Studies, University of Delhi, as such he is no way less in academic profile

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than the petitioner. The said respondent also submits that he has done his Masters Degree in Management from Osmania University in the same year as has been done by the petitioner and he was placed at a higher ranking. In addition to all this, the said respondent claims that he has done the following important courses:

a. *Officers Radio Equipment Courses with "**Distinguished**" grade.*

b. *Junior Command Course from College of Combat, Mhow, now known as Army War College, Mhow.*

c. *Senior Command Course from College of Combat, Mhow, now known as Army War College, Mhow.*

d. *Army Staff Course where he was awarded "psc" which the Respondent No.4 did from Defence Service Staff College, Wellington.*

e. *Electronic Warfare Course at Military College of Telecommunications (MCTE) at Mhow, which is a Premier Institution of the Corps of Signals.*

f. *Army Scientific Orientation Course at the Institute of Armament Technology at Pune under Defence Research & Development Organization (DRDO), now a deemed University.*

g. *Senior Officers (Equipment Management) Course at Military College of EME (MCEME), Secunderabad.*

10. Respondent No.4 also claimed that in addition to the

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other academic and professional courses, he held various important appointments in his illustrious Army career including Commandant Independent EME detachment in captured Pakistan Territory, Joint Director EME, (Ops & Plan) at Army Headquarters, Colonel 'Q', Brigadier Operational Logistics at Headquarters Northern Command (J&K).

11. To sum up, the case of respondent No.4 is that he is not only more qualified than the petitioner but has also held much more significant appointments in his career. The Special Selection Board after taking into consideration all aspects of service have empanelled the said respondent in preference to petitioner and this decision cannot be gone into by the Court on merits. This respondent has also denied that Major General V. C. Jain was promoted to the rank of Lieutenant General being an M.Tech. In fact, out of a number of officers who have held the post of Commandant, Military College of EME, only Lieutenant General V.C. Jain was having the degree of M.Tech and none of the other officers were having that Degree. On the contrary, out of 11 officers, at least, three officers, namely, Lieutenant General M.R. Kochhar, Lieutenant General D.B. Singh, and Lieutenant General R.K. Mehta have done their Staff College Course and they held the appointment of Commandant, Military College of EME. It is further stated that right from the inception of the EME Corps in the year 1943, 24

officers have held the Corps of EME and have held the post of Director General of EME. Out of these 24 officers, the data is available with regard to officers from 1956 till date. Out of such officers, only three officers have M.Tech degree or equivalent thereto while the rest of them were promoted without such a Degree clearly demonstrating that it is not a pre-condition to promotion to the rank of Lieutenant General that such a Degree should be possessed by the candidate. It is also disputed that the Special Selection Board overlooked the ACRs of the petitioner. In fact, on a comparative merit, respondent No.4 has been found to be having better distinguished service career and has rightly been empanelled. According to this respondent, the action of the Competent Authority is neither arbitrary nor discriminatory. It does not violate any rule/regulation or established practice.

12. At this stage, it may be appropriate to note that during the course of hearing the petitioner had filed a table showing comparison between himself and the respondent No.4 in relation to various factors which, according to him, are to be considered by the Selection Board for empanelment.

TECHNICAL COURSES

S.No	Petitioner		Respondent No.4		Remarks
	Course	Grading	Course	Grading	
1.	YO Course	B	YTO Course	B	Petitioner stood first on the course

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2	Officers Armament and Instrument Equipment Short Course	B	Officers Radio Equipment Short Course	Distinguished	---
3	Officers Advance Armament Engineering Course	A (INSTRUCTOR)	Officers Advance Electronics Engineering Course	A	Petitioner awarded Instructor Grade
4	Workshop Company Commanders Course	A (INSTRUCTOR)	Workshop Company Commanders Course	A (INSTRUCTOR)	(a) Petitioner stood first on the Course (b) Petitioner Awarded Commandant's Medal for BEST ALL ROUND PERFORMANCE
5	Specialisation Course Abroad in USSR	Qualified			Respondent No.4 has not done any course abroad.
6	SO (EME) Course		SO (EME) Course	Qualified	Petitioner detailed but could not attend due to exigencies
7	M. Tech (Mechanical Engineering – Specialisation in Production Technology)	Honours Grade with Distinction			Respondent No.4 is not a Post Graduate in any Engineering Discipline
8	B.E. (Mechanical Engineering)	1st Division (65%)	B.E. (Electrical Engineering)	1st Division (61%)	---
9	Senior Officers Equipment Management Course	Qualified	Senior Officers Equipment Management Course	Qualified	---

ALL ARMS COURSES PROFILE

	Petitioner	Respondent No.4	Remarks
S.No	Course	Course	

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1.	Long Defence Management Course	Long Defence Management Course	<p>(a) Both Officers awarded Instructor Grade.</p> <p>(b) Petitioner posted to College of Defence Management as Directing Faculty (A General Cadre Appointment).</p> <p>(c) Respondent No.4 posted as Col MS (EME) a non graded appointment.</p>
2 (a)	---	Army Staff Course	(a) Respondent No.4 did a Staff Course in 1983.
2 (b)	---	Junior Commandant Course	(b) Junior Command Course (2 (b) was compulsory for Officers appearing in Staff Course or Qualified for Entrance in Staff Course). This was not a compulsory Course for EME Officers till 2005.
2 (c)	---	Army Scientific Orientation Course	(c) Army Scientific Orientation Course is not a separate course but only an adjunct to the Army Staff Course. This was also compulsory likewise for Officers who qualified in Army Staff Course. Aim was to orient Officers from Non Technical Arms and Services towards basic Technologies, conducted at IAT, Pune. Since discontinued wef 1993. This capsule was of little/no relevance to Technical Officers
3	---	Electronics Warfare Course	This is not a Course by detailment by MS Branch. Vacancies are distributed by MT Dte, by numbers, to the Line Dtes and Command HQs. Nomination is not by any selection process.
4	---	Senior Command Course	---

It may be noted that Corps of Electronics and Mechanical Engineers is not an **Arm** but a **Technical Service**. Therefore emphasis on All Arms Courses being laid is not understood.

For selection of 1966 batch from Maj Gen to Lt Gen in the year 2002-03 Maj Gen MG Girish was overlooked for promotion by Maj Gen VC Jain, although Maj Gen MG Girish had done seven All Arms Courses (NDC, LDMC, PWO, SC, PTSC, JC and PARA) as compared to Maj Gen VC Jain who had done only two (NDC and LDMC).

PROFILE AS AN INSTRUCTOR

S.No	Petitioner	Respondent No.4	Remarks
1.	Instructor EME School, Baroda,		
2	Directing Faculty College of Defence Management.		
3		Instructor College of Military Engineering (CME)	

AWARDS - A COMPARISON

S.No.	Petitioner	Respondent No.4	Remarks
1.	Commandant's Medal for Best All Round Performance		
2	AVSM	AVSM	Respondent No.4 was recommended for VSM only by the Initiating Officer, Lt. Gen VK Dhir, PVSM, AVSM (Retd.)

3	2005 Meerut Ratan Intellectuals Honour Award	The award conferred on the Petitioner was not accepted in person, pending clearance from the AHQ.
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COMPARISON OF APPOINTMENTS :BRIG AND MAJOR GENERAL
Respondent No.4 **Petitioner**

Brig

(a)	Commanded 2 Army Base Wksps. (Strength of 1200-1500 each)	(a) Commanded an EME Training Centre, one of the only two of Corps of EME. (Strength of training recruits 7000 as against the capacity of 2800).
(b)	Brig OL HQ Northern Command (for one year)	Deputy Assistant Chief (HQ Integrated Defence Staff) for 2 yrs 06 Months).

Maj Gen

(c)	Cdr. Technical Group, as a Major General. (Strength of Technical Group)	Cdr Base Workshop Group, as a Major General (Strength of Base Workshop Group)
	Brigadiers :04 Other Officers :50 Military Personnel :350 and Civilians	Brigadiers :08 Other Officers :196 Military Personnel :2200 Civs Personnel :13300

13. In addition to the above, according to the petitioner, he performed better in the rank of Major General than respondent No.4 as he had received 35 '9s' while the respondent No.4 received only 26 '9s' and his general ACR profile was much better than the said

respondent which clearly establishes his plea.

14. The main line of arguments raised on behalf of the petitioner is that the Court is entitled to investigate the action of the authorities with a view to see, whether it has taken into account matters which ought not to have been taken into account or conversely has refused or neglected to take into account the matters which it ought to take into account. It is also contended that no promotion board or authority can exercise unfettered discretion. The process of selection should essentially be in conformity with the basic rule and should not be arbitrary, discriminatory in its form and conclusion. In support of his contention, he relied upon the judgments of Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation 1947 (2) All ER 680 and Air Vice Marshal Harish Masand vs. Union of India & Ors. 2004 VIII AD (Del.) 429.

15. On the other hand, the learned counsel appearing for respondent no.4 with some vehemence contended that the power of judicial review of such administrative actions has inbuilt limitations. 'Reasonableness' and 'Rationality' or even 'Proportionality' of decision-making process can be examined within a very limited scope (Refer:- R.M. Arunachalam vs. Commissioner of Income Tax, Madras 1997 (7) Supreme Court Cases 463)

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16. Further, it is contended that the competent authority can select any person, not necessarily the senior most, keeping in view the service profile of the candidate and 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. In this regard, reliance has been placed to the case of Union of India and Ors. vs. Lt. Gen. Rajendra Singh Kadyan and another 2000 (6) *Supreme Court Cases* 698. Emphasizing on the restricted scope of judicial review under Article 226 of the Constitution of India, it is also contended that the Court does not act as an Appellate Authority and even if a decision taken by the Government does not appear to be agreeable to the Court, the Court would not interfere unless such decision was offending the above rules of law (Refer : Ekta Shakti Foundation vs. Govt. of NCT of Delhi JT 2006 (6) SC 500). The Union of India, in addition to the arguments raised by respondent no.4 further contended that it was not obligatory for the Board to specify any reasons for not empaneling the petitioner in preference to respondent no.4 and such appointments cannot be made purely on seniority and they are made on comparative merit while considering the entire service profile of the Officer. It is further argued by the respondents that the Selection Board while considering the suitability of the Officer for promotion, has taken into consideration various factors and not their appraisal report

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alone and such a decision of the authorities does not call for any interference. Even if the qualification of the petitioner is found to be preferential, though not admitted, still it would not be a criteria justifying the selection of the petitioner. Reliance was placed on the judgments in the cases of Union of India and another vs. Samar Singh and Ors. 1996 (10) SCC 555; Union of India and Ors. vs. Lt. General Rajendra Singh Kadyan and another AIR 2000 SC 2513; Major General I.P.S. Dewan vs. Union of India and Ors. 1995 (3) SCC 383; Secy. (Health) Deptt. Of Health & F.W. And another vs. Dr. Anita Puri and Ors. 1996 (6) SCC 282 and Air Vice Marshal S.L. Chhabra, VSM vs. Union of India and Ors. JT 1993 (3) SC 359.

17. The obvious analysis of the diverse contentions raised on behalf of the respective parties is that the Court would have to determine whether in the facts and circumstances of the case, the Wednesbury's Principle is attracted and the petitioner is entitled to grant of the prayed relief. This doctrine covers various facets of arbitrariness, the Courts more than often have applied this principle to examine the merits or otherwise of such contentions. In the case titled as Dr. Sudha Suri vs. Union of India and Ors. 2002 (1) SLR 665, a Bench of the Punjab and Haryana High Court had discussed at some length the applicability of this principle and had discussed various judgments of the Supreme Court and even the case of Wednesbury Corporation's (supra). The relevant conclusions of the

Court can usefully be referred to at this stage:-

“42. Learned Counsel for the both the parties heavily relied upon the Wednesbury's principle in support of their respective case. According to learned counsel for the petitioner, the said principle is applicable as there has been patent unfairness in appointment of respondent no.4 as the Dean while according to the learned counsel for the respondents the principle has a very restricted application and scope. Once eligible persons have been considered and after looking into their service records, respondent No.4 has been appointed, then such appointment cannot be subjected to judicial review on the strength of principles of Wednesbury.

43. In the case of Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation, 1947 (Vol.2) All England Law Reports 680 enunciating the aspects of unreasonableness in executive action of the public authorities, it was stated that if the power is exercised so as to give impression or inference to the Court that there has been unreasonableness in such action, it is taken in bad faith extraneous circumstances have been taken into consideration, there has been disregard of public policy and relevant consideration have been ignored then authorities would be said to have acted unreasonable. Lord Greene, M.R., expressing the unanimous view observed as under:-

“He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “Unreasonably.” Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON, L.J. I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In

another sense it is taking into consideration extraneous matters."

The aforesaid Wednesbury's principle has not only been adopted in various pronouncements by the Hon'ble Apex Court, but even its expanded principles have been applied extensively by our Courts. The apparent unreasonableness in executive action, whatever be its foundations, would normally invite chastisement upon judicial scrutiny. The requirement of fairness is inbuilt in every rule and regulation be it an executive or an administrative act. This basic rule of law is as antique and its application has been consistently expanded. The Court would not draw a comparative merit of the eligible candidates who were considered for the appointment to the post, but where the appointment predominantly indicates that concerned authorities have violated this rule of fairness by unnecessarily emphasising on the irrelevant materials on the one hand, while on the other they have excluded what ought to be taken note of. The rule of fairness has an inbuilt directive to eliminate afore-noticed elements. Then alone an embargo on the scope of judicial review can be entertained(sic).....

....The cumulative effect of the above discussion is that action of the respondent-authorities lacks fairness and the element of unreasonableness is traceable in various facets of the process of appointment to the post of Dean of the Institute. The Hon'ble Supreme Court of India in the case of Badri Nath Versus Government of Tamil Nadu and others, (2000) 8 Supreme Court Cases 395 applied the Wednesbury's principle to the facts of that case and held as under:-

"Unless there is a strong case for applying the Wednesbury doctrine or there are mala fides, courts and Tribunals cannot interfere with assessments made by Departmental Promotion Committees in regard to merit or fitness for promotion. But in rare

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cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision, then the powers of judicial review under Article 226 of the Constitution are not foreclosed."

Their Lordships while further elaborating the applicability of this principle also stated that even if favourable aspects of career of a candidate are dealt with casually and without being given due importance and undue over-emphasis is given to unfavourable aspect of the matter, which itself was old enough, in that event, the case would squarely offend the Wednesbury's principle even in its limited dimensions."

18. In light of the various judgments cited by the parties, it can hardly be disputed that the scope of judicial review in such cases is limited. Merely because another view was possible, would not be a ground for the Court to interfere, unless the process of decision was in violation of the Rules and Regulations, established practice and was coloured with malafides or arbitrariness. In fact, there appears to be hardly any dispute to this proposition of law and in fact, the learned counsel appearing for the parties fairly stated that the Court could examine the records to see whether the process of decision suffered from the element of arbitrariness,

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malafides, in fact or law, and was contrary to the rules governing such decision. The various judgments of the Supreme Court relied upon by the learned counsel appearing for the respondents clearly are in support of such a view and even the judgments relied upon by the petitioners are not giving any divergent views. In other words, these are well-settled principles of law, universally applied to the facts and circumstances of a given case.

19. The Special Selection Board, which was to consider the case of the petitioner and other eligible Major Generals for promotion to the rank of Lt. General, consisted of Chief of Army Staff and 8 Army Commanders. Such a high power board is guided by the Chairman's address, the relevant rules and policies framed by the authorities for selection to such a coveted post. The service profile of an officer is stated to be contained in the Member Data Sheet (MDS) and the entire service record file of the officers is placed before the members of the Board in a single set. The selection is made on the basis of comparative merit keeping in view the entire service profile of the officers and the members of the Board finally vote expressing their opinion in regard to the candidates being fit or unfit in terms of grading. The criteria of promotion is declared in terms of the policy of the Union Government for promotion to the rank of Lt. General. However, in the present case, at page 10 of the file (confidential), the criteria

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was stated as under :-

"CONFIDENTIAL"

CRITERIA FOR PROMOTION TO THE RANK OF LT. GEN:EME

<i>Sr. No.</i>	<i><u>For consideration for promotion</u></i>			<i>Fitness for promotion in order of priority</i>
	<i>Appointment held</i>	<i>Technical Qualifications</i>	<i>Courses in order of importance</i>	
1.	All appointments in the rank of Maj Gen and Brigs.	AMIE (I), EME Officer's Degree Engg Courses. Engg Degree from a recognized university. Engr. diploma which has been recognized as equivalent to an Engg Degree of recognized university.	HC/LDMC SO (EME), SO OR SC (ALL Arms) PSC/ PTSC Adv Mech, Armt Telecom or Eqpt course abroad.	

20. Thus, Member Data Sheet is the primary document on the basis of which the Board takes the final view. The Members are expected not to deliberate and take a final view collectively in regard to a candidate being fit or unfit for empanelment for promotion to the next higher rank. This recommendation is sent to the Defence Ministry, which takes a view, whereafter the

Appointment Governing Committee grants its approval resulting in finality of the officer for being empanelled.

21. Learned counsel appearing for the petitioner contended that the criteria afore-referred is not part of settled guidelines and has been arbitrarily placed in the file as there is policy of the Government dated 6th May, 1987, which was amended on 17th September, 2003, dealing with the promotion to the rank of Lt. General. Except that policy, the respondents were not entitled to create any other criteria, particularly at variance to the prescribed policy, which has uniformly been followed for promotion to this post for years together. It is also contended on behalf of the petitioner that this criteria refers to courses in preferential order, which is not in conformity with the regulations, various instructions and the policies issued by the respondents, which have been in vogue for a considerable time. The change in preference of courses has been shown in an arbitrary manner to tilt the balance against the petitioner.

22. According to the respondents, the above stated criteria is nothing but a concise form of the policy of the respondents. The same was placed before the Court and was applied uniformly to all the candidates under consideration. The courses, which an officer is required to do or does during his service can be professional courses of EME as well as General Courses applicable to all officers. From

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the record it is not evident that this aspect was considered in a manner disadvantageous to one and advantageous to another.

23. It needs to be noticed that number of original files were produced before us, which contained the criteria mentioned above at page 10 of the original record which shows that this criteria was uniformly adopted in the selections made even from the year 2000. It is true that courses are classified under different heads like mandatory courses, technical courses, all armed and professional courses. It is certainly not for the Court to spell out which of these courses have to take precedence over the other. The authorities have applied their mind and framed the criteria, which was uniformly applied to all concerned. The criteria sheet specifies courses in order of importance and what is their significance in the Corp or All Arms is a factor, which requires to be considered by the expert bodies and specialized persons. Merely because in some instructions or policy of the Government one course is said to be having lesser significance than the other what weightage they are to be granted, is a matter for which the Court has no special expertise to determine and normally the Court would accept the criteria to be a fair criteria unless it was clearly offending a statutory rule, regulation or even an established policy of the Government if it was ex-facie arbitrary and lacked bona fide on the part of the authorities concerned. This argument of the learned counsel for

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the petitioner has not impressed us that the entire process of selection stands vitiated because of the above criteria, which according to him, is at variance to the prescribed procedure.

24. It is not a case where the petitioner has pleaded any personal malafide or even malafide in law. The entire case of the petitioner is based upon the action of the respondents being arbitrary, unfair and violative of the prescribed procedure of selection. In order to further examine the substance in this submission, useful reference can be made to the admitted criteria/factors which are to be considered for selection to such posts under the policy of the Government. These criteria/factors are stated to be relevant and determinative for selection to the posts in question. The same reads as under :-

- (i) Annual Confidential Report Profile of the Officer in the relevant ranks.
- (ii) War Reports
- (iii) Battle Awards and Honours earned by the officers during his service.
- (iv) Professional courses done by the officer, his performance during the course and grading obtained therein.
- (v) Special Achievements.
- (vi) Appointments held by the officers including criteria command appointment.

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(vii) Employability and potential including consistent recommendations for promotion to the next higher rank.

25. The Officer is, thus, assessed on overall profile based on comparative merit within his own batch. The discretion of the Selection Board, thus, is controlled and guided by the above factors. Each member of the Board is expected to apply his mind and then exercise the right to vote independently and uninfluenced by any extraneous consideration. The criteria reflected above shows that Board had considered the Member Data Sheet of the Officer and in light of criteria, which in our opinion, is not really violative of the prescribed policy, had empanelled respondent No.4 on the basis of comparative merit. It appears from the record that the scale tilted in favour of respondent No.4 primarily on the basis of courses, better confidential reports and service profile.

26. It is stated on behalf of the respondents, which is supported by the records produced before us, that the petitioner had earned five reports as Brigadier and in overall Box grading, he had got six '9s' while respondent No.4 in that very rank while earning the same number of reports got overall Box grading of nine '9s'. The petitioner in the rank of Major General earned two reports and in overall Box grading he had got four '9s' while respondent

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No. 4 earned two reports in that rank and got overall box grading of two '9s'. On this analysis, respondent No.4 had received eleven 9s in both the ranks while the petitioner received ten 9s in seven reports. Both the petitioner and respondent No.4 had done Long Defence Managements Course, which they qualified with instructor grading to petitioner at rank 48 and to respondent No.4 at rank 10. Respondent No.4 is stated to have completed and qualified Senior Officer (EME) Course, Senior Command (SC), Staff College (DSSC) and Junior Command while the petitioner is stated to have not done any of these courses. We may notice at this stage that according to the petitioner, he had done other courses including foreign courses and was better qualified as having attained a degree in engineering.

27. Both these officers had been awarded AVSM on the same date and none of them had acquired any special achievements or suffered from any special weakness during their service tenure. Giving weightage to the courses, the respondents have recommended respondent No. 4 assessing that his employability is higher than that of the petitioner. It was argued before us that the petitioner was not available for completing other courses because of his deployment elsewhere and in any case because of his higher qualification, which he had obtained during service, the petitioner has a better service profile and employability than respondent No.4.

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This argument again does not has merit. The petitioner in fact of his own accord, with his open eyes, declined to undertake the course for which he was selected and deputed, fully knowing that non-qualifying of that course may prejudicially affect his future aegis of promotion. At this stage, we may refer to adverse career certificate, which was furnished by the petitioner to SO (EME) Course commencing from 1st March, 1993. The certificate reads as under :-

"ADVERSE CAREER CERTIFICATE

1. Refer AO 47/69.
2. On being informed of selection for SO (EME) Course Serial 59 from 01 Mar 93 to 22 May 93 at MC EME, Secunderabad vide Army HQ Signal No.389480/MS EME dated 08 Jan 93, I do not find myself in a position to attend the course due to personal domestic problems. I understand the implications and adverse affect on my future career prospects due to same.

Sd/-

Dated: 12 Feb 93(IC-23431-Y LT COL BD WADHWA)"

28. The above letter clearly shows that the petitioner was fully aware that some adverse inference is likely to follow because of his non-qualifying of the course. Furthermore, it is brought to the notice of the Court during the course of hearing that the petitioner had in fact taken leave and had done his degree course from a private institution at his own risk and responsibility. He was not deputed by or against the seats available to members of the armed

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forces.

29. The records of the officers produced before us clearly demonstrate that both these Major 'Generals had distinguished service careers. In some field, the petitioner had an edge over the respondent No.4 while in the other places, the respondent No. 4 had an edge over the petitioner. The complete service profile of these officers shows that it was a difficult decision to be made by the authorities to empanel one of them against the single post. The decision has been taken on comparative merit. The Board has exercised its discretion. When such a discretion is exercised, it will be difficult for the Court to substitute its view in place of the view expressed by the Board merely on the ground that it was possible to take another view than the one taken by the authorities. Within the limitations applicable to exercise of judicial review of such administrative actions, the Court would not be able to interfere in the decision taken by the Special Selection Board or the Government, unless such opinion or the decision was ex-facie so arbitrary or discriminatory that it would result in unfairness. The process of decision by and large is in conformity with the policy framed by the respondents and, thus, to vitiate the decision taken on such process would hardly be permissible. In the present case, the Selection Board has applied its mind and the right of voting was

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exercised by 8 Army Commanders besides the Chief of Army Staff out of which majority of the members exercised their discretion in favour of respondent No.4 over and above the petitioner. There is considerable difference between the votes received by each of the candidates. Obviously, members of the Selection Board, who are Army Commanders, are provided with the guidelines for the assessment of the officers, which is also mentioned in the Chairman's address. They have the occasion to know all the officers and besides Member Data Sheet, the complete service profile is also available before them. The power of the Court to probe such process of selection has to be exercised with great circumscribe as the Selection Board consists of highly placed officers, who make recommendation, which in turn is considered at the highest level in the Ministry and then is cleared by the AGC. In the present case, the note contained in the file of the Ministry, placed emphasis on the fact that respondent No.4 had a better overall profile on the basis of the courses, better ACR and that he had obtained more '9s' in criteria reports. It cannot be disputed that the profile of the petitioner (including the MDS) did not refer to all the courses done by him and his higher qualification of post-graduation in Engineering. But this would not necessarily follow that the authorities concerned would have taken a view different than the one taken by them, even if these facts were specifically pointed out.

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According to the respondents, this information was available in the complete Records available to the Members of the Board.

30. We have already noticed that learned counsel appearing for the petitioner with great vehemence has contended that Major General V.C. Jain was promoted to the rank of Lt. General only because he was given preference over others on the ground that he was having M. Tech qualification, which the petitioner was having in preference to respondent No.4.

31. At the very outset, we may refer to decision of the Supreme Court in the case of **Secy. (Health) Deptt. Of Health & F.W. and Another Vs. Dr. Anita Puri and Others** (1996) 6 SCC 282 where such an argument was not accepted and the Supreme Court while discussing it held as under:-

"....When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed. In adjudging the suitability of person for the post, the expert body like Public Service Commission in the absence of any statutory criteria has the discretion of evolving its mode of evaluation of merit and selection of the candidate. The competence and merit of a candidate is adjudged not on the basis of the qualification he possesses but also taking into account the other necessary factors like career of the candidate throughout his educational curriculum, experience in any field in

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which the selection is going to be held, his general aptitude for the job to be ascertained in course of interview, extracurricular activities like sports and other allied subjects, personality of the candidate as assessed in the interview and all other germane factors which the expert body evolves for assessing the suitability of the candidate for the post for which the selection is going to be held. In this view of the matter, the High Court in our considered opinion was wholly in error in holding that a M.D.S. qualified person like Respondent 1 was entitled to be selected and appointed when the Government indicated in the advertisement that higher qualification person would get some preference."

32. We had directed the respondents to produce the original file relating to the selection of Major General V.C. Jain to the rank of Lt. General. The said file was produced before us. Perusal of the file shows that no preference was given to Major General V.C. Jain in relation to his higher qualification. His name was considered with four other officers and while one of them was deferred, other three were found unfit and Major General V.C. Jain alone was found fit for empanelment. In that case, when the matter was considered by the Ministry, it was noticed that Major General M.G. Girish had six 9 points box grading in his report in the rank of Major General while Major General V.C. Jain had three '9s' in two reports. Major General Girish had done better courses but Major General V.C. Jain had been awarded AVSM in 2003 and VSM twice in the year 1995 and 2001, thus, while referring to the better achievements in Award, he was

given preference and declared fit for empanelment. There is no indication in the Selection Board Proceedings or in the file of the Ministry that higher technical qualification, in any way, was of great benefit to the said officer.

33. In view of the above explained principle of law seen in light of the facts and circumstances appearing from the original records, even this contention raised on behalf of the petitioner is void of substance. The policies framed, which were amended in the year 1991 and 1993 by competent authority, provide for selection process and criteria for selection to the post of Lt. General. Even if the preference indicated at page 10 of the file, which has been reproduced above, is not the correct preference of courses, still it may not by itself sufficient to alter the view taken by the respondents. The petitioner had admittedly not performed better than respondent No.4 and had chosen not to complete a course being aware of its adverse consequences in his service career. Some of the courses may be material while others may not. Which of the professional courses, mandatory courses or career courses would be consequential, would have a bearing and in what order of preference, are the matters, determination of which fall in the domain of the specialized bodies and so far any criteria, which is otherwise reasonable, is materially in consonance with the policy and is not ex-facie arbitrary or malafide exercise of power, would

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not vitiate the process of selection. As a result of this discussion we are unable to accept the contention of the petitioner that empanelment of respondent No.4 and the entire process of selection suffers from the vice of arbitrariness, discrimination or is in violation of the Rules.

34. The facts of the present case clearly show that the selection to the rank of Major General and above is highly competitive to the extent that even the smallest fraction of better performance reflected in the service profile of an Officer can discernly give him an edge over his competitive officers. The competitive merit reaches its epitome at the top promotional pyramidal channel of the Armed Forces. The process of selection to such posts should not only be just and fair but it essentially must bring the element of discretion to *nadir*. The decision-making process should be of the highest order while the decision should meet the percepts of perfection. In Armed Forces, greater caution has to be taken by all concerned so as to minimise the element of dejection and all efforts must be made to ensure building of confidence in the fair selection and decision-making process. It is a fact that earlier, curio were the cases relating to promotion in Army to these ranks but now because of expansion of Army and greater dissatisfaction, large number of cases are being filed in the Courts by very high-ranked officers i.e. Major Generals and Lt. Generals,

questioning the legality and correctness of the selection process and the decisions relating to empanelment of officers for higher ranks. Fair chasticism should lead to proper introspection and re-affirmation that proper selection process is being followed in the hierarchy of Armed Forces and the Government in relation to empanelment of such officers. We have already noticed and in fact, it was commonly argued that the selection to these posts is primarily based on comparative merit based upon the entire service profile of the Officers under consideration by the Special Selection Boards and thus, the process of selection has no scope for element of arbitrariness, discrimination or unfairness.

35. It is also true that providing of reasoning in administrative actions may not be of sense in all administrative actions, but in order to attach credence to the process of selection and fairness to the decision-making process, it may be proper and even somewhat obligatory upon the authorities concerned to provide some kind of expression to the thought of processing, which ultimately culminates into final selection or decision. It will be in the administrative interest and would help in spreading confidence in the process of fair selection to all concerned that records indicate proper application of mind in relation to all the ingredients of criteria prescribed by the authorities for such selection. Fairness in administrative action must not only be done but also appears to

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have been done in consonance with the basic principles of law. The Supreme Court in the case of Union of India and Ors. vs. E.G. Nambudiri 1991 (2) S.L.R. 675 answered in affirmative the need for the authorities to record reasons in support of their decisions. Still in another case titled as Chabunqbam Ibohal Singh Vs. Union of India and Ors. 1995 [Suppl. (2)] S.C.C. 83, the Supreme Court though declining to interfere in the selection made, enunciated and stressed the need for recording of reasons, while a junior is promoted superseding his senior. The scope of judicial review of Courts is limited and the Court would not go into the niceties of selection process and would interfere where the selection is arbitrary, contrary to criteria or suffers from the element of malafides etc. Right from the case of A.K. Kraipak and others Versus Union of India and Ors. 1969 (2) S.C.C. 262, the Supreme Court had said that the aim of the rules of natural justice is to secure or to put it negatively, to prevent 'miscarriage of justice'. The principles of equality includes fair opportunity of consideration to all eligible persons. A fair consideration must emerge from the record itself and not submitted by way of affidavits before the Court as the members of the Selection Committees/Selection Boards are normally not parties before the Court and there is no way that the Court can go into the minds of the Selection Board, except by going through the proceedings recorded in the files produced before the

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Court. For a decision not to be hit by Rule of Wednesbury, it is essential that there should be patently no infirmity in the decision-making process and it ought not to have been arbitrary. The relevant materials must not have been ignored by the authorities nor should they have taken into consideration the irrelevant materials to create an edge in favour of one and against the other. Over-emphasizing a particular aspect of the criteria, would certainly not be in consonance with the doctrine of fairness. The absence of detailed reasoning may be tolerable but there has to be at least some iota of reasoning on record to support the decision-making process and the ultimate decision. A decision which has been taken in bad faith on extraneous consideration or under extraneous circumstances or there has been a disregard of public policy, would be liable to be assailed before the Court. We have gone through the records produced by the respondents in the present case and as already noticed, it was primarily on the ground of courses and better ACRs that the respondent no.4 was empanelled in preference to the petitioner.

36. In the records relating to appointment of Major General V.C. Jain, which were also produced before us in the Court, as noticed above, the Officer was promoted to the rank of Lt. General primarily on the reasoning of he having achieved better Awards. Still in another case of Major General S.K. Jain, he was promoted to

the rank of Lt. General on the basis of courses and Awards being better than his competitors. In the case of Major General V.K. Dhir, when he was promoted to the rank of Lt. General, though he had above average ACRs but taking into consideration the courses and Awards he was given preference in comparison to the other officers. We may also, with some concern, notice here that a number of cases are filed in Courts challenging the promotion to the ranks of Major Generals/Lt. Generals. Varied grounds are raised to question the correctness of the decision taken by the respondents and consequent empanelment. In one of the cases, amongst others, i.e, Major General Lakhwinder Singh v. Union of India & Ors. Civil Writ Petition No.899/2006, the Special Selection Board had recommended the name of the petitioner for empanelment and promotion to the higher rank of Lt. General but the Ministry, for the reasons stated on record, declined to grant its approval for empanelment. It has been noticed that though the criterion is uniform but it is not applied uniformly and in more than one cases, undue weightage is given to one aspect while other aspects are ignored, even without any reasoned discussion in relation to the specified criteria. These examples have been noticed by us as the records were produced or reference was made by the parties during the course of hearing of this Writ Petition. We have noticed these cases also with an intention to deal with the plea of arbitrariness

and as basis for justifying the issuance of directions in the Writ Petition.

37. We have already noticed that the service profile of the Officer for promotion to higher rank is based upon the criteria indicated in the judgment i.e. about 7 aspects of the service profile along with the entire record are considered by the Selection Board. Thus, it is essential, as there is no dispute to the policy and criteria being adopted by the authorities, that all aspects of the service profile of the officers should be considered to give him a fair and reasonable consideration. Attaching an overwhelming importance to one aspect is bound to be prejudicial to the system of selection. Having regard to the synoptic view of the above narrated facts and law with an intent to crystalline the selection process for promotion to such coveted ranks, it is not only desirable but also indispensable that certain directions be issued to the respondents to introduce greater directional approach and transparency in the entire selection process. These directions, thus, would not only help in strict adherence to the basic rule of fairness but would also be in the interest of justice so as to improve the confidence level of the high-ranked officers in such administrative decisions. Thus, we issue the following directions to the respondents for their strict compliance:-

- (i) In order to enable the members of the Selection Board to have a clear understanding and proper vision of the service profile in relation to criteria of

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selection, the Member Data Sheet should be more comprehensive.

(ii) Besides Member Data Sheet, the authorities should prepare a separate note titled 'Special Service Profile' which should be placed before the Members of the Selection Board. This note should be comprehensive with reference to all the criteria points as well as educational and other achievements of the officer during the course of service. The purpose of this note should be to bring out in a concise manner the entire service profile of the officer, even touching upon such subjects which are not specifically covered under the above noted seven-point criteria.

(iii) Grading system should be incorporated with reference to every criteria and each of its components. For example, distinct marks or grading should be given for an officer under consideration, who has achieved Vishisht Seva Medal and different grading for a person, who has achieved Ati Vishisht Seva Medal. Similarly, courses should be graded. A person who has done Staff College or a person who has done NDC course should be graded as per established norms. This is necessitated for the reason that before the Board as well as the Government, all criteria are not cumulatively discussed and the different files produced before us had not reflected discussion on the 7 points criteria provided by the respondents under their policy. Ignoring even a single criteria may prejudicially affect the process of selection. In order to avoid such element of arbitrariness and to ensure fair consideration, all criteria points should be graded.

(iv) The selection of the officer should be based upon relatable comparative merit on all criteria points. At no stage, only one of the criteria should be so highlighted as to demonstratively diminish the value of other criteria as all of them are of relevant consideration for promotion to these ranks.

(v) Selection on comparative merit has an inbuilt

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element of exercise of discretion wherever required. 'Proper exercise of discretion' would normally invite, if not detailed reasons, at least expression of fair opinion on record so as to make it convenient and reasonable for the higher authority to examine the matter objectively. This subjective satisfaction has to be arrived at objectively and even to satisfy the basic ingredients of judicial review, the opinion of the authorities including the Selection Board should be somewhat expressive in its language.

- (vi) The Selection Board or the Government while approving or declining to approve must apply its mind on all facets relatable to the criteria points afore-referred and the service profile as reflected in the Special Service Profile/Record. The moment the authorities highlight one criteria point and ignore the others, it would result in a process of Selection, which can be termed as unfair, unjust and suffering from the element of arbitrariness.

38. While declining to grant any relief to the petitioner, we dispose of this petition with the above directions, while leaving the parties to bear their own costs.


SWATANTER KUMAR
(JUDGE)


G.S. SISTANI
(JUDGE)

October 17, 2006
sk/vk