



2024:DHC:6089-DB



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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 12.08.2024

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W.P.(C) 7181/2024

MAJ GEN VINAYAK SAINI SM VSM

.....Petitioner

Through: Mr.Sudhir Nandrajog, Sr. Adv. with
Mr.Indra Sen Singh, Mr.Abhishek Singh, Mr.Nasir
Mohd & Ms.Kaberi Sharma, Advs.

versus

UNION OF INDIA THROUGH & ORS.

.....Respondents

Through: Mr.Harish Vaidyanathan Shankar,
CGSC with Mr.Srish Kumar Mishra &
Mr.Alexander Mathai Paikaday, Advs. with
Col.Sarika & Maj.Anish Muralidhar.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

HON'BLE MS. JUSTICE SHALINDER KAUR

REKHA PALLI, J (ORAL)

1. The petitioner, who is presently serving as a Major General, in the Corps of Engineers in the Indian Army, has approached this Court under Article 226 of the Constitution of India, assailing the order dated 19.04.2024 passed by the learned Armed Forces Tribunal (Tribunal) in OA No.1559/2023. Vide the impugned order, the learned Tribunal has dismissed the petitioner's Original Application (OA).
2. Before dealing with the rival submissions of the parties, we may note the brief factual matrix as emerging from the record.
3. The petitioner was commissioned in the Corps of Engineers of the Indian Army on 19.12.1987 and earned all his promotions till his present



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rank of Major General without ever being superseded. Upon being promoted as a Major General, the petitioner was posted as Chief Engineer (CE), Eastern Command wherein he was graded as “Outstanding” in his Confidential Reports (CR) for the periods between 01.07.2020 to 30.01.2021 and 16.04.2021 to 14.07.2021. However, for the subsequent period between 15.07.2021 to 07.05.2022, the same Initiating Officer (IO), who had recorded his CR for the period between 16.04.2021 to 14.07.2021 as “Outstanding”, downgraded the numerical grading awarded to the petitioner. This downgraded ‘Box Grading’ of the petitioner’s CR was endorsed by the IO on 20.09.2022 whereafter, the CR was forwarded to the petitioner’s Reviewing Officer (RO), who then endorsed his remarks on 26.12.2022.

4. It may be noted that during the same period i.e. on 23.09.2022, the MS Branch, Army Headquarters issued a letter intimating the schedule of the Special Selection Board (SSB) for 1988 Batch of “Non-General Cadet Staff” Stream (NGCS). This was followed by a letter dated 06.10.2022, wherein it was provided that the cut off CR to be a special CR would be up to 31.10.2022. About two months thereafter, the MS Branch vide its letter dated 12.12.2022 intimated the schedule of another SSB for the Corps specific vacancies of Lt. General for the 1987 Batch of Engineers and AOC officers, this time with a earlier cut off CR of 30.06.2022.

5. Based on his seniority, the petitioner was considered by the SSB as a fresh case of 1987 Batch against two Corps specific vacancies of Lt. General in the Corps of Engineers and as a review case by the SSB for the NGCS Stream. The two SSBs were held on the same date and considered the same set of officers of the 1987 Batch. At this stage, the petitioner, after learning about the downgrading of his numerical assessment by the IO in his CR for



the period between 15.07.2021 to 07.05.2022, submitted a Statutory Complaint dated 27.02.2023 to the respondents with a specific prayer that the same be disposed of expeditiously and be incorporated in the SSB held in February 2023. This was followed by a DO letter dated 22.05.2023 by the petitioner addressed to the respondent no.2/the Chief of Army Staff as also the respondent no.3/the Military Secretary with a request for expeditious disposal of his statutory complaint.

6. However, since no action was taken on his complaint and the petitioner apprehended that the results of both the SSBs held on 09.02.2023 may be de-classified before his Statutory Complaint could be decided, he approached the learned Tribunal by way of OA No.1559/2023. In his OA, the petitioner besides praying for stay of the SSB proceedings, had also prayed that one vacancy, out of the two available vacancies in the rank of Lt. General in the Corps of Engineers, be kept vacant till the pendency of the OA. At this stage itself, it would be apposite to note hereinbelow, the reliefs sought by the petitioner before the learned Tribunal:-

“{a} Direct the Respondents to dispose of the Applicant's Statutory Complaint dated 27.02.2023, preferred under Section 27 of the Army Act-1950, at the earliest and till then the result of the Corps Specific SSS held in Feb 2023 should not be de-classified. In case the Applicant gets a redressal in his said Statutory Complaint, then he should be considered afresh along with his batch of Engineer Officers with his updated record of service;

Or Alternatively

Call for the complete record of the Applicant's record of service, including his CR dossier as well as proceedings of the Special Selection Board {SSS} held in Feb 2023 vide Army HQ MS Branch Letter dated 12.12.2022 in r/o 1987-batch of Corps of Engineers, and after perusal



thereof, set-aside complete assessment of IO {Respondent No 4} endorsed in the Applicant's impugned Early Confidential Report {ECR} for the period 15.07.2021 to 07.05.2022 and the proceedings of said Special Selection Board {SSS} so far as same relate to the Applicant herein;

{b} Direct the Respondents that in case the Applicant gets a redressal in his said Statutory Complaint, or in the instant OA, then he should be given a Special Review Consideration by the Special Selection Board (SSB), with his updated record of service, on the same parameters as was applied to the original consideration given to his batch by the SSB held in Feb 2023;

{c} Direct the Respondents that while so considering his case afresh for promotion to the rank of Lt General by the SSB, the same cut-off CR as applied to Non- General Cadre Staff {NGCS} Stream and Army Ordnance Corps {Corps Specific Stream} be applied to the Applicant keeping in view the principle of equal opportunity enshrined under Article 14 r/w Article 16 of Constitution of India;

{d} Direct the Respondents not to declare/declassify the result of SSB held in Feb 2023 in r/o the Engineer officers against Corps Specific Vacancy, pending disposal of his Statutory Complaint dated 27.02.2023 or pending disposal of the instant OA, whichever is earlier, and the consequential action to be taken following such disposal;

Or Alternatively

Direct the Respondents to set-apart one vacancy of Lt General, out of the two Corps Specific vacancy in the Corps of Engineers against which the SSS was held in Feb 2023 in r/o 1987 batch of Corps of Engineers, pending disposal of his Statutory Complaint dated 27.02.2023 or pending disposal of the instant OA, whichever is earlier, and the consequential action to be taken following such disposal.”



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7. On 31.05.2023, when the petitioner's OA came up for consideration, the learned Tribunal while admitting the same for final hearing, granted time to the respondents to file their Counter Affidavit. On the said date, the petitioner also prayed that in view of his pending Statutory Complaint, the respondents be restrained from de-classifying the result of the Selection Board already held in February 2023 with respect to the vacancies in the Corps of Engineers. The learned Tribunal, however, instead of staying the de-classification of the result of the Board proceedings, directed that the petitioner's promotion shall remain subject to the outcome of the OA. It, thus, became incumbent upon the respondents to make promotions of the officers, recommended pursuant to the Board held in February 2023, subject to outcome of the OA.

8. Consequently, in terms of the order passed by the Tribunal on 31.05.2023, the respondents declared the result of the SSB with respect to the aforesaid two vacancies in the Corps of Engineers on 19.06.2023. The Board recommended two officers, one senior to the petitioner and the other junior to him, as fit for promotion to the rank of Lt. General in the Corps of Engineers and they were, accordingly, appointed as Lt. General w.e.f 01.07.2023 and 01.10.2023, respectively. At this stage, it may be noted that though the petitioner had through proper channels submitted his Statutory Complaint as early as on 27.02.2023, the same was kept pending at the Army Head Quarters itself and was forwarded to the Ministry of Defence, Respondent no.1 only in July 2023, i.e after the result of the two SSBs had already be de-classified.

9. Soon after the second vacancy of Lt. General in the Corps of Engineers was also filled up as per the recommendations of the SSB, the



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petitioner's statutory complaint was disposed of by the Central Government, i.e respondent no.1, on 09.10.2023 by expunging the IO's 'Box Grading' in his CR for the period between 15.07.2021 and 07.05.2022, which CR was considered in the two SSBs held in February 2023, one for the Corps of Engineers and the other for NGSC Stream. Based on his changed profile, though the petitioner was considered as a Special Review Fresh Case in respect of the NGSC Stream along with the fresh batch of 1989 by a board held in December 2023, wherein he was not recommended for empanelment in the NGCS Stream.

10. As the respondents failed to re-consider him for promotion as a Lt. General in the Corps of Engineers, the petitioner on 11.01.2024 prayed before the Tribunal that the respondents be directed to hold a Special Review Board qua the vacancies of Lt. General in the Corps of Engineers on 09.02.2023, when he had been considered for promotion with his earlier CR profile. Based on his prayer, the learned Tribunal, on 11.01.2024, issued directions to the respondents to consider the case of the petitioner for his promotion in the Corps of Engineers on the basis of his modified CR as per the applicable policies. However, despite these directions, no Special Review Board was held for considering the petitioner for promotion to the rank of Lt. General in the Corps of Engineers. Consequently, on 19.03.2024, when the OA was again taken up for consideration, the Tribunal once again directed the respondents to consider placing the case of the petitioner for promotion before the SSB as a special review case. The Tribunal, however, directed that in case, the respondents still decide to not place the petitioner's case before a Special Selection Board, reasons for the same be informed to the Tribunal for passing of appropriate orders.



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11. On 19.04.2024, when the matter came up for hearing before the Tribunal, the petitioner again prayed that the respondents be directed to consider him for promotion to the rank of Lt General in the Corps of Engineers as a Special Review Case before his retirement on 31.10.2024. It was the petitioner's case that though he had been thrice considered for promotion in the NGCS Stream, he had been considered only once for promotion in the Corps of Engineers that too in February 2023, which was on the basis of a CR that had now been found to be faulty with the 'Box Grading' of the IO in the CR having been expunged by the respondent no.1. It was, therefore, his contention that the respondents had failed to give him any re-consideration for promotion after expunction of the IO's assessment in the 'Box Grading' for the CR for July 2021- May 2022. His plea being, that since as per order dated 31.05.2023, the result of the earlier Selection Board held in February 2023 qua the vacancies in the Corps of Engineers had been directed to be de-classified only subject to outcome of the OA, it was incumbent upon the respondents to hold a Review Board with reference to the very same Board, without waiting for accrual of a fresh vacancy of Lt. General in the Corps of Engineers.

12. The respondents, on the other hand, by relying on their '*Comprehensive Promotion Policy 2023: Select Rank*' urged before the Tribunal that the petitioner could not be considered for Corps specific vacancy in the Corps of Engineers as the policy did not envisage holding a SSB for an individual officer and Special Review Cases. It was their case that officers who get redressal can be considered as a Special Review Case only as and when a fresh batch is considered for promotion against the next available vacancy. It was, therefore, contended by the respondents that since



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the next vacancy in the rank of Lt. General in the Corps of Engineers would be available only on the superannuation of Engineer-in-Chief, Lt General Arvind Walia on 01.09.2025, the SSB for Corps specific vacancy in the Corps of Engineers for the next 1988 batch would be held in 2025 by which time, the petitioner would have superannuated.

13. The learned Tribunal agreed with the respondents and held that in view of the respondent's promotional policy since no vacancy was available in the rank of Lt. General in the Corps of Engineers, the petitioner, despite the redressal granted to him and the consequential change in his CR profile, could not be considered for promotion against the Corps specific vacancy. The Tribunal also did not find any merit in the petitioner's grievance that the same cut off of 31.12.2022 for the CR ought to have been taken both in the NGCS Stream as also the Corps specific stream. Consequently, the Tribunal dismissed the OA, leading to the filing of the filing of the present petition.

14. Before us, learned senior counsel for the petitioner, besides reiterating the pleas put forth before the learned Tribunal, submits that the Tribunal has failed to appreciate that in view of the Central Government expunging the IO's 'Box Grading' in the petitioner's CR of the period before July 2021 and May 2022, which was the only reason for his not being empanelled for promotion in the Selection Board held in February 2023 for promotion to the rank of Lt. General in the Corps of Engineers, the respondents were required to immediately conduct a review of the very same Board held in February 2023. He submits that the respondents' plea that no special review consideration can be given to the petitioner till a fresh vacancy arises in the Corps of Engineers overlooks the fact that the petitioner's profile which was taken into account on 09.02.2023 has radically changed on account of the



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expunction of the IO's 'Box Grading' in his CR for the period between July 2021 to May 2022.

15. Further, without prejudice to his aforesaid plea, he further submits that once the promotions based on the SSB held on 09.02.2023 itself had been made subject to outcome of the OA, the respondents could not be permitted to urge that in view of their promotional policies they could not hold a Review Board till a fresh vacancy accrues in the Corps of Engineers. He contends that in the light of the interim order passed by the Tribunal on 31.05.2023, it was incumbent upon the respondents to ensure that the selected candidates are informed about their selection being subject to outcome of the petitioner's OA. He, therefore, prays that the writ petition be allowed and the respondents be directed to review the recommendations of the Board held in February 2023 with respect to the then available vacancies of Lt. General in the Corps of Engineers.

16. On the other hand, learned counsel for the respondents, supports the impugned order and submits that the learned Tribunal has rightly rejected the petitioner's OA after finding that as per the respondents' policies dated 23.12.2017 and 06.12.2023, a Special Selection Board for an individual officer, in the nature of a review, could be held only when a fresh batch was being considered for the next available vacancy. He contends that even otherwise, as per the uniform policy being followed by the Army, once officers are promoted in terms of recommendations made by the SSB, they cannot be reverted, merely because one of their batchmates subsequently gets redressal in his statutory or non statutory complaint, with a consequential improvement in his CR profile. He submits that unfortunately for the petitioner, the next available vacancy in the rank of Lt. General in the



Corps of Engineers would arise only in September 2025, by which time the petitioner will superannuate. Consequently, despite the redressal granted to him by the respondent no.1 and the consequential improvement in his CR profile, he cannot, as rightly held by the Tribunal, be considered by a Special Selection Board for the Corps specific vacancy of Lt. General in the Corps of Engineers. He, therefore, prays that the writ petition be dismissed.

17. Having considered the submissions of the learned counsel for the parties and perused the record, we may begin by noting the reasons given by the Tribunal for rejecting the petitioner's claim. The relevant extracts of the impugned order read as under-

“24. Having thus examined contents of all of the above quoted letters relevant to examination of case at hand we do not find any ambiguity with relation to consideration of the applicant as per both the letters in question whenever be the letter applicable to the case even if it is argued on behalf of the applicant that he was to be governed by policy letter of December 2017 and not December 2023. It is clearly spelt out that there has to be a vacancy to be availed of by the applicant and also there has to be presence of a fresh batch to consider the applicant alongside as there is no provision anywhere to consider a candidate as a lone case based on a redressal thus received or for any other reasons as the case may be.

25. From the facts and the records placed before us it is observed that there are three Lt Gens authorized in the Corps of Engineers in the applicants of Engineer-in-Chief, Director General, Border Roads and Commandant of College of Military Engineering of which all the vacancies are presently occupied by incumbents.

26. On a perusal of records, We find that the first vacancy that would come up for utilization will be that of Lt Gen



Arvind Walia, Engineer-in-Chief when he retires on 31.08.2025 and subsequently, the remainder vacancies will come up on superannuation of respective officers holding the appointment. It is our observation therefore that hypothetically even if the applicant is to be considered by boards as a lone candidate and he is found empanelled for promotion there will be no vacancy available to promote him to rank of Lt Gen before his superannuation in the present rank on 31.10.2024. Thus, the extant conditions do not help the case of the applicant.

27. Moreover, it is settled jurisprudence that the exercise of power of judicial review in the selection process and the policy matters of the executive is limited and, therefore, we do not consider it appropriate to exercise the power of judicial review in the instant case, in absence of any express mala fide.”

18. Since the aforesaid findings of the Tribunal are based on the interpretation of the respondent's promotion policies dated 17.09.2010, 23.12.2017 and 06.12.2023, it would also be apposite to note the relevant extracts of these policies at this stage itself. In this regard, we may first note para nos. 7(a) and 8(b) of the respondents' policy dated 17.09.2010 which provides as to what would constitute a change in profile as also the manner in which an officer who is granted redressal is to be dealt with. The same read as under-

"7. Occurrences Counting towards Change in Profile. The following occurrences will count towards change in profile:-

{a} Expunction/change of remarks including figurative assessment and recommendation for promotion If any of the reports which were considered by the Selection Board{s}.

{b) to{d)



8. Procedure-

{a)

{b) An officer will be given a Special Review for each normal consideration already given to him after the point of time at which change in his profile has occurred. Example:
1. at appendix refers.

(c) to (f)

19. We may now refer to para nos.10,11, 12, 19, 21 & 22 of the policy dated 23.12.2017, which read as under-

*“10. **Batch-wise Consideration.** Officers will be considered for promotion to the select rank of Maj Gen and Lt Gen batch-wise. The No 1. SB and SSB will be held only when a fresh batch is physically available for consideration (they will constitute the Fresh Agenda) and vacancies are accruing In that year/period. In the event of nonavailability of a fresh batch during a year/period, the No 1 SB & SSB will be conducted with the next available fresh batch If vacancies are occurring in that year/ period.*

*11. **First and Final Review Cases.** First and Final Review cases will form part of the Agenda of the batch under consideration and will only be considered along with the next physically available Fresh Batch. For example, First Review cases of 1984 Batch or Final Review cases of 1983 Batch can only be considered along with the next physically available Fresh Batch of 1985. In case, Fresh Batch of 1985 is not physically available for consideration due to any reason; then the Review Cases will have no claim to be considered independently or as the Fresh Batch of 1985. These officers will be considered for promotion only with the next Fresh Batch which is physically available, in this case the 1986 Batch and so on.*

*12. **Batch Year of Seniority (BYOS).** The Review Cases when empanelled will reckon Batch Year of Seniority*



(BYOS} of the Fresh Batch with which considered, for subsequent consideration to the next rank. For example, a First Review Case of 1983 Batch considered along with the Fresh Batch of 1984 (a and when physically available), if empanelled, will reckon BYOS of 1984 for all purposes.

Superannuation Before Occurrence of First Vacancy

19. If an officer is superannuating before the occurrence of the first vacancy then he will not be eligible for consideration by No 1 SB or SSB. The name of the officer will be included in the agenda and shown as 'Not Eligible' If all the officers of a particular batch are superannuating before the occurrence of the first vacancy then the next batch will be considered by No 1 SB or SSB, as the case may be.

Deferred/ Withdrawn/ Special Review Cases

21. Deferred/Withdrawn Cases. All Deferred/Withdrawn cases will only be considered with the next physically available Fresh Batch of their own Arm/Service with the same cut-off CR as that for the Fresh Batch. In such cases, the officers will be compared with the Fresh Batch with which they are being considered and will be empanelled if In merit, against the vacancies accruing for that Fresh Batch. If empanelled for promotion, they will reckon the seniority of their original Batch.

22. Special Review cases.

(a) All Special Review cases will be considered in a manner similar to Deferred/Withdrawn cases as given at Para 21 above.

(b) Special Review will be granted to the officer against Non empanelment in the impugned Selection Board only and not for previous ranks/boards, notwithstanding the point of time at which the redress has been granted in the officers' profile.

(c) If an officer is already approved for promotion as a First Review or Final Review is granted Special Review, then he



will be eligible for consideration for Restoration of Seniority (ROS). If approved, his Batch Year of Seniority (BYOS) will be adjusted accordingly."

20. Even though the petitioner has vehemently urged and in our view rightly so, that the policy dated 06.12.2023 would not be applicable to him as his right to seek re-consideration of his case for promotion to the rank of Lt. General with reference to the consideration by the SSB on 09.02.2023, stood crystallised before this policy came into force, since the learned Tribunal has referred to this policy, we are noting the relevant extracts of this policy as well. The same read as under-

*"13. **Batch Year of Seniority (BYOS).** The Review cases when empanelled will, with which considered, for subsequent consideration to the next rank.*

*14. **Special Review/ Deferred/ Withdrawn Cases.** Such cases will only be considered with the next physically available Fresh Batch of their own Arm/Service with the same cut-off CR as that of the Fresh Batch under consideration. Such cases will be compared with the Fresh Batch with which they are being considered and will be empanelled, if in merit, against the vacancies accruing for that Fresh Batch. If empanelled for promotion, they will reckon the seniority of their original batch.*

*17. **Superannuation before Occurrence of First Vacancy.** If an officer is superannuating before the occurrence of the first vacancy, then he will not be eligible for consideration by SBs. The name of the officer will be included in the agenda and shown as 'Not Eligible'. Such officers will also not be PRV Index. If all reckoned in batch strength for calculation of officers of a particular batch are superannuating before the occurrence of the first vacancy, then the next batch will be considered by the SB.*



Consideration: No 1 SB and SSB

38. **Batch-wise Consideration.** Officers will be considered for promotion to the select rank of Maj Gen and Lt Gen batch-wise. The No 1 SB and SSS will be held only when a fresh batch is physically available for consideration (they will constitute the Fresh Agenda) and vacancies are accruing in that year/period. In the event of nonavailability of a fresh batch during a year/period, the No 1 SB & SSS will be conducted with the next available fresh batch if vacancies are occurring in that year/ period.

39. **First and Final Review Cases.** First and Final Review cases will form part of the Agenda of the batch under consideration and will only be considered along with . the next physically available Fresh Batch. For example, First Review cases of 1987 Batch or Final Review cases of 1986 Batch can only be considered along with the next physically available Fresh Batch of 1988. In case, Fresh Batch of 1.988 Is not physically available for consideration due to any reason, then the Review Cases will have no claim to be considered independently or as the Fresh Batch of 1988. These officers will be considered for promotion only with the next Fresh Batch which is physically available, in this case the 1989 Batch and so on.”

21. Having noted the relevant extracts of the impugned order as also the respondents’ three policies, we may now summarise the facts on which the parties are *ad idem*. We find that both the parties are in agreement that the IO’s ‘Box Grading’ for the petitioner’s CR, for the period between July 2021 and May 2022, which was the primary reason for his non-empanelment for the post of Lt. General against a Corps specific vacancy by the SSB held on 09.02.2023, stands expunged. The parties are also not at variance that this expunction amounts to an “*occurrence counting towards*



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change in profile” in terms of para no. 7(a) of the respondent’s policy dated 17.09.2010. They are also in agreement qua the fact that as per para no. 8(b) of this policy, an officer has to be given a Special Review for each normal consideration already given to him whenever there is a retrospective change in his profile and in case, he is found fit for promotion as per the changed profile, his seniority has to be restored.

22. We find that it is also not in dispute that much before the result of the SSB held in February 2023 was de-classified on 19.06.2023, the petitioner had not only submitted a Statutory Complaint dated 27.02.2023 against the IO’s downgrading of his CR, but had also approached the Tribunal assailing the same. Further, the parties are also not at variance that vide an order dated 31.05.2023 the learned Tribunal had itself, after considering the petitioner’s prayer for reserving one vacancy for him, directed the respondents that the promotions to the rank of Lt. General, with reference to the Board held in February 2023, would remain subject to outcome of the OA, by specifically directing that the petitioner’s promotion would remain subject to outcome of the OA. It is also an admitted position that though the petitioner was granted a special review consideration in December 2023, *vis-a-vis* the Board held in February 2023 in respect of the NGCS Stream, wherein he was not empanelled, till date no review consideration has been granted to him in respect of the Board held in February 2023 qua the vacancy in the Corps of Engineers.

23. At this stage, we may also note that even though, the petitioner had before the Tribunal additionally urged that the cut off CR for the two SSBs held on 09.02.2023 one for the NGCS Stream and the other for the Corps of Engineers ought to have been the same i.e. 31.12.2022, this plea has not



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been seriously urged before us. Consequently, the petitioner's grievance in the present petition is confined to non-grant of a review consideration to him *vis-a-vis* the Board held in February 2023 for promotion to the rank of Lt. General in the Corps of Engineers

24. From the factual position noted herein above, what emerges is that while the respondents do not deny that there has been a change in the petitioner's CR profile with retrospective effect, their sole contention to deny a review consideration to the petitioner viz a viz the Corps specific vacancy is that as per their applicable policies, no such consideration can be granted till a fresh vacancy of Lt. General arises in the said Corps. Their plea being that where redressal is granted to an officer by way of a statutory/non-statutory complaint, he does not automatically become entitled to a special review consideration with respect to the earlier Corps specific vacancy; this review consideration, it is contended is required to be granted only when the next batch is to be considered for the next available vacancy. The learned Tribunal accepted this contention of the respondents and has, therefore, held that the petitioner is entitled for a review consideration only when the next available vacancy of Lt. General in the Corps of Engineers accrues on 01.09.2025, when Lt. General Arvind Walia superannuates. Consequently, the Tribunal concluded that despite a radical improvement in his profile, the petitioner cannot be granted any consideration by way of special review and would have to retire in the present rank without being considered for promotion.

25. The learned senior counsel for the petitioner has however urged that the petitioner cannot be denied the fruits of the redressal granted to him and has by placing reliance on the decision in *Union of India & Ors. v. Major*



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General Manomor Ganguly, (2018) 1 SCC 552 urged that the respondents are required to immediately reconsider the petitioner for promotion with reference to the parameters applied in the SSB for the Corps of Engineers held on 09.02.2023.

26. From the aforesaid submissions of the parties, we find that the factum about the redressal being granted to the petitioner being undisputed, the question for our consideration now lies in a very narrow compass. Should the petitioner, who has been granted redressal by the Central Government itself, thereby vindicating his stand that his IO had wrongly downgraded his Box Grading in his CR which was considered by the SSB held on 09.02.2023, be told that he cannot be granted any consequential relief, by accepting the respondents' stand that since the vacancies of Lt. General, as available on 09.02.2023, already stand filled, no special review consideration can be granted to him. The issue, thus, would be whether the respondents' contention that despite it being conclusively found that the petitioner was considered in the SSB on 09.02.2023 on the basis of his faulty CR, he cannot be granted a special review as he will retire before the next vacancy arises on 01.09.2025.

27. Having given our thoughtful consideration to this question, we are of the opinion that if the petitioner is not granted review consideration for promotion with respect to the SSB held on 09.02.2023, despite the redressal granted to him and his stand being vindicated that he had been wrongly downgraded by his IO, the very purpose of redressal being granted to an officer would stand defeated. This may lead to a situation like the present case, where despite being meritorious, an officer may still be denied promotion only because his IO/RO, as the case may be, arbitrarily



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downgrade his CR. Such an officer, in our view, cannot be told that even though the downgrading of his CR by his IO/RO was illegal and has been subsequently, set aside by the Central Government/the Chief of Army Staff by accepting his statutory/non-statutory complaint, he would still continue to be deprived of his rightful promotion as his junior has already been promoted in the meanwhile and he will be required to wait for accrual of the next vacancy.

28. There is yet another angle from which this issue can be examined. In case, the respondents' plea that a review consideration can be given only against the next available vacancy and not with reference to the Board where he was wronged, was to be accepted, it would lead to a situation where in order to harm the promotional prospects of an officer, the disposal of the statutory complaint preferred by him may itself be delayed deliberately. In the present case, the record in itself shows that though the petitioner had submitted a statutory complaint on 27.02.2023, the same was not forwarded to the competent authority/respondent no.1 till as late as July 2023 by which time the result of the Board held on 19.02.2023 was de-classified. Further we also wonder as to why the statutory complaint was not decided before the second vacancy of Lt. General in the Corps of Engineers was filled on 01.10.2023 but was instead decided just nine days thereafter.

29. In our view, the respondents' refusal to grant a review consideration to the petitioner *vis-a-vis* the vacancies of Lt. General in the Corps of Engineers as on 09.02.2023 is in itself arbitrary and illegal. However, even if we were to accept their plea that such a review consideration is not in consonance with the existing promotion policy, the petitioner, in our view, would still be entitled to relief. We say so as we find that the promotions



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pursuant to the Board held in February 2023 were itself directed to be made subject to the outcome of the OA. The Tribunal specifically directed on 31.05.2023 that the petitioner's promotion would remain subject to outcome of the OA and therefore, it was evident that the promotion of the two officers as Lt. General in the Corps of Engineers recommended by the Board on 09.02.2023 in itself was subject to outcome of the OA. This necessarily implied that these two officers, who were promoted pursuant to the Board held in 2023, were to be put to notice qua their promotion being subject to outcome of the OA.

30. At this stage, it may be noted that on 07.08.2024, we had directed the respondents to file a specific affidavit informing us as to whether this fact of their promotion being subject to the outcome of the OA was communicated to the officers who were empanelled as Lt. General in the Corps of Engineers pursuant to the Board SSB held on 09.02.2023. Today, learned counsel for the respondents hands over an affidavit running into 23 pages. Though the said affidavit is taken on record, we find that the same does not answer this specific query of the Court. We, therefore, proceed on the basis that the Tribunal's interim order dated 31.05.2023 was not conveyed to the selected candidates.

31. In any event, irrespective of whether these directions of the Tribunal were conveyed to the empanelled officers or not, the fact remains that on 31.05.2023 vide a judicial order, it was specifically directed that promotions pursuant to the Board held in February 2023 in the Corps of Engineers, would remain subject to outcome of the OA. We also find that it is the respondent's own stand that the result of this SSB held in February 2023 was de-classified only on 19.06.2023 i.e., after the Tribunal had issued the



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aforesaid interim directions. In these circumstances, we are in agreement with the petitioner that it was incumbent upon the respondents to ensure that either the de-classification of the results was withheld till the disposal of the OA or the empanelled officers were informed that their promotions would be subject to the rights of the petitioner, as may be determined by the Tribunal in his pending OA. The respondents, in our view, were bound by these interim directions and therefore, cannot be permitted to urge that the petitioner's junior having been already promoted as Lt. General on 01.10.2023, there is no vacancy to consider the petitioner at this stage.

32. In the light of this factual position, when the Tribunal, by way of its interim order dated 31.05.2023, had already protected the rights of the petitioner, he cannot now be told that the Tribunal's order was of no consequence. In our view, it would be a travesty of justice if the petitioner were to be told that, despite it having been conclusively established that his IO had wrongly downgraded him in the assessment of one of his CRs, which was considered by the Selection Board held in February 2023, he cannot now be considered for promotion as his batchmates, including a person junior to him, have already been promoted and that too by ignoring the interim order passed by the Tribunal. The learned Tribunal, we find, has simply overlooked this aspect of the matter and has accepted the respondents' plea that now that the vacancy against which the petitioner could have been considered has already been allocated to his junior, he must retire in his present rank itself, despite being meritorious. We are, therefore, of the considered view that the impugned order is unsustainable and is liable to be set aside with directions to the respondents to grant a special review consideration to the petitioner with reference to the SSB held on 09.02.2023



for the Corps of Engineers by applying the same parameters as applied to the Board.

33. In this regard, we may refer to the following extracts from the decision of the Apex Court in *Union of India & Ors. v. Major General Manomor Ganguly*, (2018) 1 SCC 552:

“In the original SPB meeting, Major General Sanjeev Chopra was awarded 1.70 out of 2 marks whereas the respondent was awarded 1.50 marks. Lesser marks given to the respondent were because of the reason that marks awarded to him out of 93 were lesser than Mr Sanjeev Chopra. Result of the redressal was that the marks of the respondent became higher than Mr Sanjeev Chopra which necessitated Review SPB. This Review SPB meeting has to be on the same standards which were adopted in original SPB meeting. It has to be on the assumption as if case of the respondent is considered in the original SPB, but with revised profile. In SPB held on 20-1-2016, had the revised marks of the respondent been available, which were more than the quantified marks of Sanjeev Chopra, the respondent would have certainly got 1.70 out of 2 marks by the Board. It is stated at the cost of repetition that that was the criteria adopted by the Members of the Board itself viz. awarding the marks (out of 2) in line with the quantified marks. Having not undertaken the independent exercise of looking into the “overall profile” in SPB held on 20-1-2016 and instead assigning the marks to all the officers out of 2 marks, on the basis of quantified marks of the candidates which they had received out of 93 marks by treating the same as “overall profile”, when it comes to Review SPB the appellant is supposed to stick to the same criteria. Only that would show fairness in approach, which would also be in conformity with the principles of equality enshrined in Article 14 of the Constitution. It is because of the reason that Review SPB is nothing but extension of original SPB, wherein the respondent was supposed to be considered on the same parameters as if he was participating in promotion



process undertaken in original SPB.”

34. Before we conclude, we may also note that during the course of the hearing, we had put to the respondents as to whether taking into account that the parties were governed by the Tribunal’s interim order as also the fact that their policies itself envisage restoration of seniority in a case where an officer is found fit in the review board, with respect to his initial consideration, the petitioner could be considered for promotion as a Lt. General without disturbing the promotion of his junior. The respondents had, however, submitted that the petitioner could not be accommodated and will have to retire as a Major General. In these circumstances, we have no other option except to set aside the impugned order.

35. In the light of the aforesaid, we allow the writ petition by setting aside the impugned order and directing the respondents to re-consider the petitioner’s case for promotion as a Lt. General in the Corps of Engineers with respect to the SSB held on 09.02.2023 by taking into account the vacancies as existing on the said date and applying the same benchmark criteria as was applied for consideration of the other officers by the said SSB.

36. It is further directed that in case the petitioner is recommended for promotion, on the basis of the same parameters as applied by the SSB for the Corps of Engineers held on 09.02.2023, he will be granted promotion as a Lt. General with retrospective seniority and notional fixation of pay, without any arrears of wages. However, since the Officers empanelled pursuant to the recommendations made by the SSB for the Corps of Engineers held on 09.02.2023 are not before us, we are consciously not issuing any directions



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qua them, leaving it open for the respondents to pass appropriate orders in this regard. Taking into account that if the petitioner is not promoted to the next rank of Lt. General, he will superannuate on 31.10.2024, we direct that the exercise in terms of this order be carried out within four weeks.

37. The writ petition is, accordingly, disposed of in the aforesaid terms.

(REKHA PALLI)
JUDGE

(SHALINDER KAUR)
JUDGE

AUGUST 12, 2024
kk/ dv