

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 5.07.2012

+ **W.P.(C) No.94/2012 & CM Nos.197-198/2012**

Brig. A.K.Sapra & Anr. ... Petitioners

versus

Union of India & Ors. ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.Ankit Swarup Advocate and Mr. Preshit Advocate

For Respondent : Mr. Sanjeev Sachdeva, Sr. Advocate with Ms. Priyam Mehta and Mr. Abhimanyu Chopra, Advocates for Respondent Nos. 1 to 3.

Major K. Ramesh with Ms. R. Archana, Advocate for Respondent No. 4

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE J. R. MIDHA

ANIL KUMAR, J.

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1. The petitioners, Brig.A.K.Sapra and Brig.D.V.Setia have sought quashing of the order dated 22nd November, 2011 passed by the Armed Forces Tribunal, Principal Bench in M.A No.433/2011, titled as 'Brig.Stephen Jude Gracias v. Union of India & Ors' dismissing the application of the petitioners for impleading them as respondents in O.A No.350/2011 filed by respondent No.4, Brig. Stephen Jude Gracias and the order dated 22nd November, 2011 passed by the Armed Forces

Tribunal, Principal Bench in O.A No.350/2011 titled as 'Brig. Stephen Jude Gracias v. Union of India & Ors' allowing the original application of respondent No.4 and holding that respondent No.4 is entitled for a "second look" provided he meets the eligibility criterion and also that his "first look" will not come in the way. The Tribunal further directed the respondents to proceed according to the outcome of respondent no.4's consideration and in case he is selected and found meritorious then to detail him for the NDC-52 course. The petitioners have also challenged the order dated 22nd December, 2011 passed by the respondents nominating respondent No.4, IC-38656, Brig.S.J.Gracias to attend the NDC-52 course and has prayed for a writ of mandamus directing respondent Nos.1 to 3 to create an additional vacancy for the Corps of Engineers for NDC-52 Course or at least to give the 5th vacancy to which the Corps of Engineers are entitled.

2. Relevant brief facts to comprehend the controversies between the parties are that respondent No.4, Brigadier Stephen Jude Gracias, was a very high profile officer with outstanding series of 9/9 in three decades of his service, with A Grade in all courses of instruction and two Delta (outstanding) in Tank Technology, Army Technical Orientation Course. According to him, he was even offered a transfer to the most coveted general cadre so that he could be appointed one day as a GOC of a Division, Corps., GOC in C of a Command and/or even Vice Chief of Army Staff.

3. Respondent No.4 also asserted that he was promoted to the rank of Brigadier and was even nominated for the 50th National Defense College (NDC course). The respondent No.4 contended that he believes that he was first in order of merit in Engineers and the NDC course which commenced on 4th January, 2010. However, after 11 days of attending the course, on 15th January, 2010 he was admitted in the Army Hospital (R&R) where he was diagnosed for “*Acute Myeloid Leukemia*”, a form of blood cancer. Due to his disease, respondent no.4 required a protracted medical treatment and consequently, he could not continue with his NDC course.

4. The respondent No.4 in his original application had contended that as per the rules, an officer could not miss more than 21 calendar days of his training in NDC course. Since he could not continue with the NDC course on account of having blood cancer, respondent Nos.1 to 3 had to react expeditiously and nominate a reserve officer as 10 days were still available to the Army Headquarters from 15th January, 2010 until 25th January, 2010 in order to avoid the loss of vacancy for the NDC-50 course. According to him, this would have been in the best interest of the organization, however, on account of inaction on the part of respondent Nos.1 to 3, a coveted vacancy for the NDC was lost.

5. The plea of the respondent No.4 was that after 10 months of a series of chemotherapy and Stem Cell Transplant, he recovered and on 29th October, 2010 he was upgraded to P2 (Permanent) with Employment Management Index of F1B which is a medically permissible category for further promotions to the rank of Major General and above. This medical category also made him fit to attend the next 51st National Defence College Course.

6. Respondent No.4 had submitted an application on 6th September, 2010 contending that as he had been cured of his disease and his medical category had also been upgraded, he had become fit for the next 51st NDC course. In the circumstance, he sought a “second look” which is permissible under policy, in his case, in accordance with the policy. He sought consideration for the 51st NDC course for which he was also legally entitled on account of his inter-se merit.

7. The letter dated 6th September, 2010, was not replied to and since the 51st NDC course was to commence on 4th January, 2011, he approached the official respondents, who then disclosed to him that since he had already exhausted one vacancy, therefore, he could not be permitted to have another vacancy in the subsequent course nor could he be given a “second look”.

8. The respondent No.4 thereafter, made a statutory complaint dated 28th January, 2011. His complaint was disposed of by order dated 17th August, 2011 and his request for 'Second look' was declined. The respondent No.4, therefore, approached the Armed Forces Tribunal and asserted that he fulfills all the qualitative requirements for the NDC course commencing from January, 2012, even with respect to the age criterion of 53 years as he was 52 years old and therefore, there was no legal embargo whatsoever for his nomination for said course. Respondent no.4 also relied on the Army Headquarters Policy Letter dated 23rd March, 2011 which specifically stipulated that every officer, who fulfills the laid down eligibility criteria, is entitled for two considerations (looks) for the NDC course. Therefore, it was contended that he too should be considered a second time for the subsequent NDC course in accordance with the policy of the Army Headquarter.

9. The selection system for the NDC course is as under:-

“1. Vacancies: Army has been allotting 33 seats in the NDC Course. The arm/service wise distribution is as under:-

(a)	Armed Corps	-	2
(b)	FD Arty	-	6
(c)	AD Arty	-	1
(d)	Engineers	-	4
(e)	Signals	-	3
(f)	Infantry	-	13

(g)	ASC	-	1
(h)	ADC	-	1
(i)	EME	-	1
(j)	Int Corps	-	1
(k)	AMC*	-	1

(* Nominations are made by DGMS Army)

2. QR

(a) Rank:

(i) Combat/Supporting Arms

(ii) Services-Brigs (Cols may be detailed if no Brigs are available)

(b) Age: Less than 54 years as on 01 Jan of the Course Year.

3. Selection Procedure:-

(a) The selection system provides for two looks for all Brigs provided they fulfill the laid down eligibility criteria.

(b) At the first stage all eligible officers are shortlisted in a computerized order of merit based on the QR mentioned at Para 4.

(c) The panel of shortlisted officers which includes double the number of the allotted vacancies for each arm and service along with the career profile of the officers under consideration is placed before No.1 Selection Board.

(d) In case an officer in the merit list does not receive recommendation for NDC in at least two reports the same will be brought to the notice of the Selection Board.

(e) Each member of the No.1 SB as per his consideration indicates his order of ranking against each officer. Finally the merit list is prepared on the basis of the average ranking given by the members.

(f) The recommendations of the No.1 Selection Board after approval of the COAS are sent for approval of the Government.

4. Performance Criteria for Drawing order of Merit:-

(a) ACRs considered: All ACRs earned in the rank of Lt Col and above (less ACRs and ERE and deputation) are considered.

(b) Criteria Reports:- Minimum two reports as Brig criteria appointments should have been adequately exercised in the command of a Brigade or equivalent formation for a period of 18 months. In case of officers supporting Army and Services as these officers are promoted to the rank of Brigadier. Competent authority may grant a waiver of six months in AE and accept officers doe consideration with one report. Cut off ACR will be 01 July in the year consideration.

(c) Reject Criteria: An officer is rejected if he attracts any of the under mentioned reject criteria:-

(aa) Discipline

(1) Ban of any type

(2) Disciplinary award other than Ordinary earned in the rank of Lt.Col, Col and Brig.

(ab)Box Grading:- A single box grading of 6 in Brigs report will be a reject criteria.

(ac) Grading in Individual Qualities: 7 or less points not to occur more than twice in each Brig report.

(ad) Specific Weakness- The officer should not been reported to have any of the following weaknesses:-

(a) Integrity and Loyalty

(b) Stability

(c) Moral Turpitude

(d) Wine and women

(e) Financial Affairs”

10. The respondent No.4, thus contended that he should have been considered with the computerized merit list data of 51st NDC Course *inter-alia* on the ground that he fulfilled all the qualitative requirements for the NDC course commencing from January, 2012 including the age criterion of 53 years and as per the Army Headquarter policy he was entitled for “two looks”. It was contended that since the “second look” is given even to an officer who has failed to make the grade in the first attempt, the officer who was selected in the first look but could not complete the course on account of his medical condition or on account of circumstances not imputable to him, cannot be placed in a category different from category in which the officers who fail in the first look are placed and who are still entitled for the second look. In the circumstances, respondent No.4 sought directions to respondent Nos.1 to 3 stating that on the basis of comparing his merit with the computerized merit list of NDC-51, if he is found eligible then a second look be given to the respondent No.4 and if it is proved that he has higher merit than the other Engineer Officers nominated to attend the NDC 51 course, then the respondent No.4 should be nominated to attend the NDC-51 course commencing from January, 2012.

11. The original application filed by respondent No.4 was contested by respondent Nos.1 to 3 contending *inter-alia* that the NDC aims to prepare the next generation of policy makers selected from the defence services and civil services of India for increased responsibility, through a course involving National Security and strategy. It was pleaded that each arm and service of the Army is given specified vacancies in the NDC course and though the NDC course is a career course, yet the officers who are not NDC qualified, can also be promoted, as the chances for promotion to the next rank is based on the overall profile and comparative merit based on the number of vacancies. It was further contended that if an officer is not considered fit to undergo the course, it does not visit any penal consequences nor is it a matter of right to undergo the NDC course.

12. The respondent Nos.1 to 3 rather contended that though every Brigadier is entitled for two looks, however, an officer is given second look/consideration only if he has not been nominated in the first look. It was submitted that since the respondent No.4 was considered and selected for the NDC-50 course commencing from 4th January, 2010 and he had exhausted a vacancy after being nominated, he is not entitled to receive the second look/consideration for a vacancy in the subsequent year.

13. The official respondents admitted that an officer cannot be “taken off” from a course unless his absence exceeds 21 days. As respondent No.4 had exceeded the maximum permissible three weeks absence and his continuation in the course was held to be not feasible, therefore, on receipt of the information about the medical condition of respondent no.4, he was taken off from the NDC course by order dated 16th March, 2010. The respondent nos. 1 to 4 contended that by that time it was neither practicable nor permissible to detail another person in place of respondent no.4.

14. Regarding the fitness of the respondent no.4 for the subsequent NDC course, it was asserted that an officer is required to be in acceptable medical category on the date on which the Selection Board is held. It was submitted that the Selection Board for NDC-51 course was held on 28th October, 2010 whereas the Medical Board in respect of respondent No.4 was held on 29th October, 2010 and the proceedings duly approved by the competent authority were received by letter dated 24th November, 2010, much after the holding of the Selection Board for NDC-51. In any case, according to respondent Nos.1 to 3, respondent No.4 was not entitled for a “second look” as per the uniformly followed practice.

15. The respondent Nos.1 to 3 categorically contended that since the respondent No.4 was selected for NDC-50 on his first consideration, he

is not entitled for a second consideration or “second look” as per the policy in vogue and the practice which is uniformly followed. Selections, according to the official respondents are based on comparative merits of the officers who are in the agenda list of the respective year. It was urged that the respondent No.4 is not eligible for a “second look” as he was not eligible on the date the NDC selection board for NDC-51 was held on 28th October, 2010. Thus, it was contended that the petitioner is not entitled for consideration for the NDC-52 course. The respondent Nos.1 to 3 also relied on the order dated 17th August, 2011 passed on the statutory complaint dated 28th January, 2011 filed by the respondent No.4 against denial of vacancy on NDC-51 course. While rejecting the statutory complaint of the respondent No.4 the respondent Nos.1 to 3 had held as under:-

“2. The Officer has requested for:-

- (i) Grant of weightage of 0.75 marks for NDC in the Quantified System for Selection Boards for all future Selection Boards for purposes of promotion and any other competitive selection since he was denied a fair opportunity to do NDC-51 in 2011 after being withdrawn from NDC-50 in 2010 on Medical grounds for reasons beyond his control.
- (ii) Nomination to attend NDC-52 w.e.f. Jan 2012 in case redress sought is not granted, and weightage of 0.75 marks for doing NDC-52 be given to him in case of any Selection Board is held during the duration of NDC-52 course in 2012.

3. The Statutory Complaint of the officer has been examined in the light of his career profile, relevant records and analysis/recommendations of Army HQ. After consideration of all aspects of the complaint and viewing it

against the redress sought, it has emerged that the issues raised in the complaint are contrary to the existing policy on NDC course. Screening, selection and allocation of marks for the NDC course is a matter of policy which is uniformly applicable to all similarly placed officers. The officer's contention that he be granted a weightage of 0.75 marks for NDC in the Quantified System for Selection Board for all future promotions and other competitive selection is devoid of merit as marks are awarded to officers only on successful completion of the course. The officer's other contention that he be nominated to attend NDC-52 wef Jan 2012 is also devoid of merit since only those officers are given 'Second Look', who have not been nominated in their 'First Look', subject to meeting other eligibility criteria. The officer was nominated for NDC-50 in his 'First Look' and had utilized a NDC vacancy."

16. During the pendency of the original application filed by respondent No.4, he had also filed an interim application seeking consideration for nomination to NDC-52 course which was likely to be concluded by the week ending 15th October, 2011. After considering the pleas and contentions of the respondent No.4 and respondent Nos.1 to 3, the Armed Forces Tribunal by order dated 12th October, 2011 directed the respondent Nos.1 to 3 to provisionally consider respondent No.3 for nomination to NDC-52 course and in case the respondent No.4 meets the eligibility criterion, not to classify the results till the passing of the final orders in his original application being O.A No.350/2011.

17. After the interim order was passed by the Tribunal directing the provisional consideration of respondent No.4 by the official respondents, an application for impleading as parties in the original

application of the respondent No.4 was filed by the petitioners under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure contending inter-alia that they are in the zone of consideration for the 4th vacancy and as such they are vitally interested in the NDC 52nd course since it is an important career milestone, as on successfully completing the course, an officer is entitled to a weightage of 0.75 marks for promotion to the next rank of Major General. According to the petitioners they came to know about the pendency of the original application of respondent No.4 after the results of three vacancies were declassified on 14th October, 2011 and in case the 4th vacancy is given to respondent No.4 it is contended that the career prospects of the petitioners would be seriously prejudiced.

18. The petitioners had also filed a reply to the original application of respondent No.4 contending inter-alia that respondent No.4 is not entitled to any relief as per the existing policy and no challenge has been laid out to the policy governing the nomination to the NDC course and, therefore, the original application of respondent No.4 is not likely to succeed. The respondent Nos.1 to 3 also stated categorically that even if respondent No.4 is nominated for the course commencing in January, 2012, he will not draw any benefit of weightage earmarked for the NDC course, as the Selection Board for the rank of Major General is likely to be held during the currency of NDC-52 course and as such it would have no impact on his next promotion.

19. The application of the petitioners for impleadment being MA No.433/2011 in O.A No.350/2011 was dismissed by the Armed Forces Tribunal by order dated 22nd November, 2011. The Tribunal, while dismissing the misc. application of the petitioners, seeking impleadment as a party, had held as under:-

“12. We have heard all the parties at length. We are of the opinion that whatever decision is taken in OA No.350/2011, the same should be in the larger interest of the organisation. It should also meet the ends of justice. Thus, without observing and commenting on the merit of the main case, we are of the opinion that the contentions of the applicants in this M.A. cannot withstand the legal scrutiny. We, therefore, reject the application. However, the interest of organisation is paramount and interest of all the parties concerned, will also be kept in mind while disposing off the OA No.350/2011.”

20. The Tribunal allowed the application of respondent No.4 holding that respondent No.4 was nominated by his own merit in NDC-50 course commencing on 4th January, 2010 but he had to withdraw from the course for reasons beyond his control. The Tribunal held that the ailment (Acute Myeloid Leukemia) that respondent No.4 suffered was attributable to Military Service. According to Principal Bench, the policy for nomination to NDC course is not very clear as to the look required to be given to the officer, as in normal course, a person who does not figure in the first look will be given second look. Consequently, an

officer who is not able to be selected in the first look is entitled to be considered under the second look. The Tribunal also held that the case of respondent No.4 is unique, he had been nominated in the first look but he could not undergo the course due to reasons beyond his control and the policy letter is silent on such situation. In this regard, the Tribunal took into consideration the whole policy, aim and object of the policy in deciding the case of respondent No.4. The Tribunal also considered the impact of providing the second look to respondent No.1 and its impact in depriving another officer a chance to do NDC course. The Tribunal was conscious of the fact that merely giving second look to respondent No.4 would not mean that he would be selected or nominated as he will have to compete with other officer eligible in the next NDC course and, therefore, giving a second look to the petitioner is not giving him an unfair advantage over the officer who is not nominated to attend NDC-52 course.

21. The orders of dismissing the application of the petitioners for impleadment and allowing the original application, being OA No.350/2011, are challenged by the petitioners in the above noted writ petition *inter-alia* on the grounds that the petitioners were short-listed in NDC-52 course and were vitally interested in the outcome of the original application filed by respondent No.4 seeking consideration as a second look for NDC-52 course and thus, the petitioners were the necessary party and ought to have been impleaded as the respondents

in the original application, being OA No.350/2011, filed by respondent No.4. The petitioners contended that while dismissing their application for impleadment, the Tribunal has not given any reasons. The petitioners have challenged the order of the Tribunal allowing respondent No.4 consideration for the second look for NDC-52 course on the grounds that the impugned order has been passed mechanically by merely noticing the contentions raised on behalf of the parties and without dealing with them. The petitioners alleged that the NDC course is an important career milestone and carries weightage of 0.75 marks for promotion to the rank of Major General and the petitioners being in the zone of consideration would be affected by the decision of the original application filed by respondent No.4.

22. The petitioners challenged the order of the Tribunal contending that the Tribunal has misinterpreted the policy dated 23rd March, 1995 regarding the second look to an officer who has already been selected in the first look. According to the petitioners, the observation of the Tribunal that the candidates nominated in other courses of instruction do not forfeit authorized number of chances, if they are unable to attend the course due to astonish reasons is incorrect and in any case NDC course cannot be equated with any other course. The petitioners contended that every succeeding batch of officer is entitled to consideration for nomination for NDC course. Since respondent No.4

was considered and nominated along with his batch, therefore, consideration of respondent No.4 for NDC-52 course would mean that one officer from the batch entitled for consideration for NDC-52 course, would lose his chance which is not justifiable in the facts and circumstances.

23. According to the petitioners, the second look can be given only for the next succeeding course and not thereafter and it cannot be carried forward *ad-inefinitum* subject to age criteria in any case, respondent No.4 had sought relief for consideration along with shortlisted candidates for NDC-51 course and if found higher in order of merit, he also asked for nomination to NDC-52 course which could not be done under the policy dated 23rd March, 1995.

24. The petitioners also asserted that the policy dated 23rd March, 1995 was not challenged by respondent No.4 and he had sought relief within the policy which contemplates the second look only in case of succeeding course, and therefore, respondent No.4 at best could claim consideration for NDC-51 course and the Tribunal ought not have allowed his consideration for NDC-52 course which have adversely impacted petitioners as this has resulted in the allocation of additional vacancy apart from the four vacancies provided to the Corps of Engineer. The petitioners made a grievance that this has resulted in

allocation of five vacancies to the Corps of Engineer which in fact has not been done by respondent Nos.1 to 3.

25. The petitioners contended that they have *locus standi* in the matter as they are aggrieved by the decision of the Tribunal dated 22nd November, 2011 and relied on Naresh Shridhar Mirajkar v. State of Maharashtra & Anr., (1966) 3 SCR 744; B.M.Aggarwal v. Chancellor, University of Allahabad & Ors., (2003) 6 SCC 500; Principal, Patna College, Patna & Ors. v. Kanlyan Srinivas Raman, AIR 1966 SC 707 and Raymond Synthetics Ltd. & Ors. v. Union of India & Ors., AIR 1992 SC 847 regarding supervisory jurisdiction of the High Court over the Armed Force Tribunal. The petitioners relied on Gopabandhu Biswal v. Krishna Chandra Mohanty & Ors, (1998) 4 SCC 447; Col.A.D.Nargolkar v. Union of India & Ors., 179 (2011) DLT 447 and Shihabudeen v. Principal Controller of Defence Accounts (Pensions), 2011 (1) KLJ 780.

26. The writ petition is contested by the respondents. Respondent Nos.1 to 3 filed a counter affidavit dated 17th January, 2012 contending *inter-alia* that the writ petition filed by the petitioners is not maintainable relying on a decision of the Supreme Court in the case of Gopabandhu Biswal v. Krishna Chandra Mohanty & Ors., (1998) 4 SCC 447 to contend that remedy available to a person who is aggrieved by the order of the Tribunal to which he was not a party is to file a

separate writ petition before the Tribunal and if the Tribunal agrees with the contentions of such a person who is not a party to the order passed by the Tribunal earlier then to refer the matter to a larger Bench. Respondent Nos.1 to 3 contended that the writ petition could not be filed by the petitioners directly to the High Court challenging the order of the Tribunal allowing the original application of respondent No.4 allowing him to be considered for NDC-52 course. Respondent Nos.1 to 3 also contended that the petitioners could not challenge the order dated 22nd November, 2011 whereby the name of respondent No.4 has been nominated to attend NDC-52 course as the said order was not under challenge in original application No.350/2011 which is a fresh cause of action and the petitioners could challenge the order before the Principal Bench, Armed Force Tribunal only.

27. Regarding the allocation of five vacancies to the Corps of Engineer, respondent Nos.1 to 3 pleaded that the vacancies on NDC course allotted on the basis of *pro rata* share according to which the Corps of Engineer are entitled for four vacancies on NDC-52 course. Regarding NDC-48 course, it was asserted that one more vacancy was allotted to the Corps of Engineer to NDC-48 course which was a special case due to non-availability a suitable officer from some other Army/Service for the said course.

28. Regarding policy dated 23rd March, 1995, respondent Nos.1 to 3 took a stand that Army has a pyramidal rank structure for promotion and selection board taking into consideration various factors viz confidential reports, course done, grading obtained on the course, honors and award, disciplinary background etc. and selection is based on overall profile of an officer. With effect from 1st January, 2009, Army has adopted a quantified system for selection by which parameters for selection have been quantified. The weightage for NDC course is 0.75 marks, however, merely qualifying NDC course, does not entitle an officer automatic selection in the rank of Major General. The officers who have not done NDC course have also been promoted to the rank of Major General on the basis of comparative merit within the batch keeping in view overall profile. According to the said reasons, under the said policy for the purpose of consideration all eligible officers are shortlisted at the first stage as per order of merit on the basis of the qualification requirement and panel of shortlisted officer is double the number of vacancies allocated in each Army/Service.

29. Regarding respondent No.4, respondent Nos.1 to 3 reiterated that he was selected for NDC-50 course, however, he was admitted to R&R Hospital for fever and leucocytosis and his absence exceeded permissible limit of 21 days. He was taken off from NDC-50 course and was placed in low medical category "P3 T-24" on 8th July, 2010. Regarding his non-selection in NDC-51 course, respondent Nos.1 to 3

took a stand that he was not entitled for a second consideration having been selected for the course in the first consideration. The other reasons given for non-selection of the petitioner for NDC-51 course was that he was not in an acceptable medical category on the date of consideration by the selection board for NDC-51 on 28th October, 2010.

30. Regarding the order of the Tribunal directing consideration of respondent No.4 for NDC-52 course, respondent Nos.1 to 3 contended that after the dismissal of the statutory complaint of respondent No.4 dated 28th January, 2011 by order dated 17th August, 2011 he had filed an original application No.350/2011 in which the interim order dated 12th October, 2011 was passed directing respondent Nos.1 to 3 to provisionally consider respondent No.4 for nomination to NDC-52 course and the result of the consideration was not to be de-classified during pendency of the original application filed by respondent No.4. Since the original application of respondent No.4 was decided on 22nd November, 2011 holding that respondent No.4 is entitled to second look, therefore, the result of consideration was declared and as respondent No.4 stood nominated. He had joined the said course. Respondent Nos.1 to 3 also contended that the Tribunal had directed the respondents to allocate one additional vacancy in view of the peculiar facts and circumstances of the case, however, after the case was taken up by the Military Secretary's Branch with Ministry of Defence, no additional vacancy could be made available. The

respondents further contended that as per the policy dated 23rd March, 1995, an officer is entitled to second consideration only if he was not nominated in the first consideration and since respondent No.4 was nominated for NDC-50, therefore, he was not entitled for second consideration. The said respondents, however, contended that in peculiar facts and circumstances, since the Tribunal directed giving second look to respondent No.4, the judgment of the Tribunal had been implemented by respondent Nos.1 to 3.

31. Regarding observation of the Tribunal that in other course of instructions where nomination is based on comparative merit and if a candidate fails to attend the course due to extraneous reasons, he does not forfeit authorized number of chances/considerations, respondent Nos.1 to 3 contended that the Tribunal has not specified the course referred to by it, nor call it upon the officers respondents to make a submission in this regard.

32. Regarding not creating an additional vacancy for the Corps of Engineer, respondent Nos.1 to 3 disclosed that the direction of the Tribunal for allocation of additional vacancy was considered by the concerned authorities as special case to protect the interest of junior batches in case of selection of respondent No.4 to attend NDC-52 course on its own merits. Respondent Nos.1 to 3 revealed that Ministry of Defense has stated that vacancies were still available with Army

Headquarter (i.e. one each of Engineers and Army medical Corps that were yet to be allocated) which could be utilized to comply with the judgment of the Tribunal. In the circumstances, no additional vacancies could be allocated. In para 13 of the counter affidavit of respondent Nos.1 to 3, they contended in this regard as under:-

“13. That the contents of Ground 13 (h) being contrary to the records are denied. It is denied that Corps of Engineers is authorised 05 vacancies for NDC-52. It is submitted that as per pro rata allocation of vacancies to different Arms and Services, Corps of Engineers is authorised 04 vacancies only. In respect of directions of Hon'ble Armed Forces Tribunal to consider allocation of additional vacancy, it is submitted that Military Secretary's Branch had approached the Central Government, Ministry of Defence, for allocation of additional vacancy as a special case to protect the interest of the junior batches in case Respondent No 4 was selected to attend the NDC-52 on his own merit. MoD had stated that the vacancies still available with Army HQ (i.e. one each of Engineers and Army Medical Corps that were yet to be allotted) may be utilized to comply with the judgment of Armed Forces Tribunal. Consequently, DGMS (Army) had been requested to confirm whether the vacancy can be utilized by Military Secretary's Branch as a special case. However, the selection of AMC officer for NDC-52 had been completed and the vacancy already stood utilized. It is submitted that no additional vacancy, therefore, could be allocated.”

33. Respondent No.4 also contested the writ petition contending, *inter-alia*, that after the dismissal of the application of the petitioners under Order I Rule 10 of the Code of Civil Procedure to be impleaded as the parties, they could have assailed only the order of dismissal of application for impleadment and the petitioner could not assail the

order passed by the Tribunal on the original application of respondent No.4 wherein he had sought a direction to respondent Nos.1 to 3 to provide him 'second look' and if he is found higher in merit in comparison with other Engineers who were to be considered with him, then respondent No.4 should be nominated to attend NDC-52 course commencing from January, 2012. Respondent No.4 also categorically asserted that since the decision of the Tribunal has not been challenged by respondent Nos.1 to 3 and has been rather implemented, the petitioners cannot impugn the same or contend contrary to whatsoever has been held by the Tribunal. Respondent No.4 also asserted that there are no fixed vacancies for any batch of NDC and all eligible officers are considered irrespective of their batch. He also disclosed that in NDC-52 course it has Army Officers from 1980, 1981 and 1982 batches. Regarding the 5th vacancy being allocated, respondent No.4 contended that he could not have any objection to the same.

34. This Court has heard learned counsel for the parties and have also perused the writ petition, replies and documents produced with them and the policy dated 23rd March, 1995 and the precedents relied on by the parties. The first plea of the petitioners is that their application for impleadment ought not to have dismissed as their rights were vitally affected. The Tribunal had dismissed the application of the petitioners on the ground that whatsoever decision shall be taken in

original application No.350/2011 filed by respondent No.4 would be in the larger interest of the organization and would meet the ends of justice and, therefore, without commenting on the merit of the main case, it was held that the pleas and contentions of the petitioners/applicants in the application for impleadment cannot withstand the legal scrutiny and therefore, rejected the application.

35. After the Tribunal declined the application of the petitioners under Order 1 Rule 10 of the Code of Civil Procedure seeking impleadment to the original application by order dated 22nd November, 2011, the Tribunal also disposed of the original application of respondent No.4 on the same date by order dated 22nd November, 2011 holding that keeping in view the overall interest of the organization that the best officers should be selected to attend the NDC Course, respondent No.4 would be entitled for a 'second look' provided he meets the eligibility criteria and his selection in 'First Look' will not come in his way. The respondents have contended that the petitioners are not entitled to file the present writ petition and they should have filed the original application before the Tribunal challenging the order giving 'second look' to respondent No.4. Reliance has been placed on 'K.Ajit Babu & Ors. v. Union of India & Ors., (1997) 6 SCC 473.

36. In K.Ajit Babu (supra), relied on by the respondent no.4 certain applicants had challenged the seniority list prepared on the basis of the decision rendered by the Tribunal, in which case the applicants were not the party, by filing an Original Application under Section 19 of the Administrative Tribunal Act. The Tribunal had held that the persons who were not a party to the decision but are affected by the decision of the Tribunal are not entitled to file an application under section 19 of the Act but could file a review petition seeking the review of the decision adversely affecting them and the application of the applicants under section 19 of the Act was rejected summarily. Rejection of the original application by the Tribunal was challenged in the Supreme Court. The Supreme Court, however, had allowed the appeal filed against the order of the Central Administrative Tribunal dismissing the original application by the party who was not a party to a decision which adversely affected them. The Supreme Court had held that ordinarily the right of the review is available only to those who was a party to a case even though a wider meaning can be given to the expression “a person feeling aggrieved” occurring under Section 22 of the Administrative Tribunal’s Act. It was held that it is for the Tribunal to decide whether such an aggrieved person can seek review by opening the whole case. It was further held that the right of the review is not a right of appeal where all questions can be decided or opened to challenge, as the right of review is possible only on limited ground mentioned in Order 47. The Supreme Court had further clarified that

though Order 47 of the Code of Civil Procedure may not be applicable to the Tribunal, however, the principles contained therein have to be extended to them. The reasoning given for the same was that there being limitation on the power of review and in such cases it would be an appeal and there would be no finality of a decision.

37. In *Principal, Patna College, Patna* (supra) relied on by the petitioners, the Supreme Court had held that the limits of the High Court's jurisdiction to issue a writ of certiorari are well recognized and it is, on the whole, desirable that the requirements prescribed by judicial decision in the exercise of writ jurisdiction in dealing with such matter should be carefully borne in mind. The observation was made by the Court in respect of an interim order passed by the High Court relating to orders passed by the authorities, the Supreme Court had held that under Article 226 of the Constitution of India, the High Court should normally be very slow to pass *ex-parte* interim order, because matters falling within the jurisdiction of the Educational Authorities should normally be left to their decision and the High Court should interfere with them only if it thinks it must do so in the interest of justice. It was held that even if the regulation is capable of two interpretations, it would generally be not expedient for the High Court to reverse a decision of the Educational Authorities on the ground that constructions placed by the said authorities on the relevant regulation appears to the High Court less reasonable than alternative construction

which the High Court was pleased to accept. The learned counsel for the petitioners had emphasized that the limits of High Court's jurisdiction to issue a writ of certiorari are well recognized and it is, on the whole, desirable that the requirements prescribed by judicial decisions in the exercise of writ jurisdiction in dealing with such matters should be carefully borne in mind.

38. In B.M.Aggarwal (supra) relied on by the petitioners, a dispute had arisen as to continuance in the office by the Vice Chancellor, University of Allahabad, in view of the incumbent holding the office having crossed the age of 65 years. A writ of *quo warranto* was filed before the High Court which was dismissed and a special leave petition filed against the order of the High Court was also dismissed. Sh.B.M.Aggarwal, the appellant, filed an SLP though he had nothing to do with the Allahabad University and the order passed regarding the Vice Chancellor of University of Allahabad, making grievance that judgment of the High Court contained observation that no one can be appointed as Vice Chancellor after crossing the age of 65 years which impacted his right also. He contended that while passing order, the Allahabad High Court did not take into consideration the amendment dated 24th February, 2000, where by the provisions regarding maximum age of appointment being 65 years had been deleted, the amendment was not taken into consideration as it was not brought to the notice of the High Court. The apprehension of the applicant was that observation

made by the High Court in its decision pertaining to the office of the Vice Chancellor of University of Allahabad would come in the way of anyone who has crossed the age of 65 years being considered for appointment for the post of Vice Chancellor. *Locus standi* of the said applicant B.M.Aggarwal, was challenged which was repelled by the Supreme Court holding that observation of the High Court does impact the said applicant and therefore, he has a justification for filing the appeal. The Supreme Court, therefore, passed the order by clarifying that appointment to the post of Vice Chancellor shall not be influenced by the observation made by the High Court in its judgment regarding continuance of the Vice Chancellor of the University of Allahabad who had crossed the age of 65 years. Learned counsel for the petitioners has contended that since the direction by the Tribunal in its order dated 22nd November, 2011 to consider respondent No.4 for NDC-52 course will impact his right, therefore, he is entitled to maintain the present writ petition.

39. The petitioners had sought impleadment to original application No.350/2011 filed by respondent No.4 seeking 'second look' as after the 'first look' though he was selected but on account of the losing his medical category on account of cancer, he could not complete the NDC-50 course and on regaining the medical category Shape-I, he sought a 'second look'. The petitioners in their application under Order 1 Rule 10 had contended that they were shortlisted officers for NDC-52 course

commencing w.e.f. January, 2012. They had further asserted that they being in the zone of consideration for the 4th vacancy are vitally interested in the outcome of the original application filed by respondent No.4, therefore, they are necessary parties and should be impleaded as a party to the original application filed by respondent No.4. The Tribunal had dismissed their application on the ground that the decision in the original application filed by respondent No.4 should be in the larger interest of the organization and in order to meet the ends of justice, and therefore, without observing and commenting on the merit of the main case of the petitioners in their application, the application of the petitioners could not withstand the legal scrutiny.

40. Reasoning of the Tribunal that the contentions of the petitioners in their application for impleadment does not withstand the legal scrutiny, is incomprehensible in the facts and circumstances. The petitioners had filed an application for impleadment on the ground that NDC course is an important career milestone and on qualifying it, an officer is given weightage of 0.75 marks for promotion to the rank of Major General and they being in the zone of consideration for the 4th vacancy, therefore, the consideration of respondent No.4 for the 4th vacancy will adversely affect them, and therefore, they should be also heard as to whether respondent No.4 shall be entitled for the 'second look' or not.

41. Whether the petitioners should have been impleaded as parties to the original application filed by the respondent no.4 before the Tribunal? Order 1 Rule 10 specially provides in the Code of Civil Procedure to meet situation so as to implead all the parties which may be affected by any litigation so that the rendering of justice is not hampered. Respondent No.4 as an applicant though was *dominus litus*, however, he was bound to sue every possible adverse claimant in his petition to avoid multiplicity of proceedings and needless expenses and he should have joined all persons against whom his right of relief existed. If respondent no.4 had not impleaded all the persons who could be impacted by the decision of the Tribunal, still the Tribunal was not helpless in such circumstances. Where a claimant does not implead all the necessary parties, the Tribunal could direct such a claimant to be impleaded as a party to the petition as under Rule 10, it is open to the Tribunal to add any person at any stage of the proceedings, which is a necessary or a proper party or a person whose presence before the Tribunal may be necessary in order to enable the Tribunal to effectually and completely adjudicate upon and settle all the questions involved in the matter. Sub Rule (2) of Rule 10 gives a wide discretion to meet every case of defects of a party and is not affected by the inaction of the claimant to bring the necessary or a proper party on record. A necessary party is one without whom, no order can be made effectually and a proper party is one in whose absence an effective order can be made but whose presence is

necessary for complete and final decision on the question involved in the matter.

42. In order to ascertain whether a person is a necessary party or not what is to be seen is whether in absence of such person, conflicting order may be passed by the Tribunal or not. The only reason which makes it necessary to make a person party to an action is so that he should be bound by the reasoning of the action and the question to be settled. The question to be settled must be a question in the action which cannot be effectually and completely settled unless he is a party. A line has to be drawn on a wider construction of the rule between the direct interest or legal interest and commercial interest. To be impleaded as a party the person seeking impleadment must be directly or legally interested in the action.

43. Applying these principles, it is apparent that the petitioners were vitally interested in the decision whether respondent No.4 was entitled for the 'second look' or not, as it would have impacted their career prospect and selection for the NDC-52 course. In the circumstances, it is inevitable to infer that the petitioners were necessary and in any case proper party to the original application filed by respondent No.4 seeking 'second look' though he had exhausted his 'first look'. In the circumstances, the order of the Tribunal declining the prayer of the petitioners that their application does not withstand the legal scrutiny

was not justifiable and the Tribunal should have impleaded the petitioners as parties to the original application filed by respondent No.4 for their impleadment.

44. However, in the circumstances, whether the order of the Tribunal in the original application being OA No.350/2011 is to be set aside as the petitioners are held to be necessary parties and the Tribunal should be directed to implead them as the parties and then the Tribunal should be directed to decide the matter afresh or their pleas and contentions can be heard by this Court as the petitioners have also challenged the order passed by the Tribunal in the original application of respondent No.4 and not only the order dated 22nd November, 2011 dismissing their application for their impleadment in original application No.350/2011.

45. The plea of the respondent no.4 that the petitioners are not entitled to maintain the writ petition against the order dated 22nd November, 2011 passed in his original application and they should file an independent original application cannot be accepted and for the foregoing reasons as the petitioners were necessary parties in the facts and circumstances. Therefore, the writ petition filed by the petitioners is maintainable and is to be considered and decided on merits. In the peculiar facts and circumstances, it is also not appropriate to remand the matter to the Tribunal to implead the petitioners as party to the

original application of the respondent no.4 and to decide the original application of the respondent no.4.

46. The petitioners have claimed that an additional vacancy for the Corps of Engineers for NDC-52 Course or at least to give 5th vacancy to which the Corps of Engineers is entitled. Respondent Nos.1 to 3 have contested the prayer of the petitioners for creation of an additional vacancy for the Corps of Engineer for NDC-52 course or at least to give 5th vacancy to the Corps of Engineer to which the said Corp is allegedly entitled on the ground that pursuant to the direction of the Tribunal, respondent Nos.1 to 3 had considered allocating one additional vacancy in the peculiar facts and circumstances of the case and the case was taken up by the Military Secretary/Branch with Ministry of Defense for allocation of one additional vacancy. Respondent Nos.1 to 3 have contended that considering the facts and circumstances, no additional vacancy could be made available.

47. The Tribunal by order dated 22nd November, 2011 had directed respondent Nos.1 to 3 to consider the allocation of one additional vacancy to the Army, without doing this as a precedent, as a one time measure, in view of the peculiar facts and circumstances of the case, should respondent No.4 be selected to attend NDC-52 course on his own merit. The directions of the Tribunal were not that in case respondent No.4 is selected to attend NDC-52 course on his own

merits, then respondent Nos.1 to 3 had to allocate one more vacancy to the Corps of the petitioners. In the circumstances, since respondent Nos.1 to 3 had considered about allocating one more vacancy to the Army after respondent No.4 was selected to attend NDC-52 course, the petitioners cannot contend that one more vacancy ought to have been allocated to the Army. This cannot be disputed that the vacancy on NDC course are allotted on the basis of the *pro rata* sharing according to which Corp of Engineers are entitled. Respondent Nos.1 to 3 have also disclosed that the request received from various heads of Armies/Services are examined before finalizing of allocation of vacancy and thereafter, vacancies are allocated on *pro rata* share basis.

48. This is also apparent from the pleas taken by respondent Nos.1 to 3 that only in case of non-availability of suitable official from some other Army/Service for a particular course, an additional vacancy can be allocated to the particular Corp. The petitioners' allegation is not that the suitable officers are not available in other Army/Service and in the circumstances, if respondent Nos.1 to 3 have considered about allocating of additional vacancy and has declined the same, the petitioners are not entitled to claim that an additional vacancy must be created for the Corps of Engineer. The plea of the petitioners in this respect is therefore, declined. The decision of the respondent nos.1 to 3 to decline the request of the petitioners cannot be faulted in the facts and circumstances. Merely because the respondent no.4 was given a

'second look' also cannot be ground for claiming additional vacancy by the petitioners.

49. Whether respondent no.4 was entitled for 'second look' or not, the Tribunal in its order dated 22nd November, 2011 in Original Application No.350/2011 has held as under:-

"21. We have ascertained that in other courses of instructions where nomination is based on comparative merit/entrance examination, a candidate who fails to attend the course due to extraneous reasons does not forfeit his authorised provided number of chances/considerations. Therefore, in all fairness the applicant needs to be given another chance to be considered for selection to the NDC Course, provided he meets the eligibility criteria.

22. We have further considered the impact on the environment by giving the applicant a second look. The very fact that should the applicant be given a consideration and is selected, it will imply that the applicant is higher in comparative merit and as such likely to be promoted to the next rank. Training such an officer who is likely to be promoted, due to his standing in the comparative merit will be beneficial to the organisation in the long term. Thus, the 'aim' set forth for the course will be met.

23. We have also considered the argument that giving the applicant a 'Second Look' will deprive another officer a chance to do NDC. We strongly consider that merely giving 'Second Look' does not mean that the applicant is selected or nominated. He has to meet the eligibility criteria and has to be high enough in the comparative merit. This consideration to the applicant, should he be nominated, will deprive another officer of the chance to do NDC is thus not correct. Therefore, it cannot be said to be giving the applicant an unfair advantage over the officer who is not nominated to attend NDC-52.

24.

25. Considering the facts and ailment suffered by the applicant which was beyond his control and has been declared as attributable to Military Service by medical authorities, we feel that denying him the second look is in a form of penalty rather than giving the officer a favourable consideration of having suffered this ailment attributable to Military Service. Thus, we hold that the applicant was entitled for the 'Second Look'. The selection in the 'First Look' was not completed due to his illness beyond his control and attributable to military service. Therefore, he cannot be blamed for not completing the course.

26.

27. Keeping in view the overall interest of the organisation, which specifically translates to the best officer to be selected to attend the NDC Course, we are of the opinion that the applicant needs to be given a 'second look' provided he meets the eligibility criteria. His 'First Look' will not come in the way. Since the consideration for NDC-52 was to take place on 13.10.2011 as per the assertions made by the applicant as well as the respondents, we had issued an interim order dated 12.10.2011 to consider the applicant subject to outcome of this petition. Now the OA has been finalised, the respondents are directed to proceed accordingly as per the outcome of his consideration. In case he is selected and found meritorious, he should be detailed on the course NDC-52. The interim order stands disposed off."

50. The Tribunal, therefore, held that in other Courses of Instructions where a candidate fails to attend or complete the course due to extraneous reasons, the candidate does not forfeit his authorized number of chances/considerations. The Tribunal also considered the impact of giving a 'second look' to the respondent No.4, as he had not been able to complete the course on account of reasons beyond his control. The Tribunal has also held that even if an officer has not been

able to complete the course after getting selected in first consideration, if he is given a 'second look' on the comparative merit, then such an officer will be beneficial to the organization in the long term. The Tribunal also held that merely giving 'second look' does not mean that respondent No.4 was to be selected or nominated on the basis of first consideration, as he had to meet eligibility criteria and had to be high enough in the comparative merit list of those who were to be considered for NDC-52 course.

51. Though, respondent Nos.1 to 3 had contended that respondent No.4 was not entitled for the 'second look' under the policy, however, they have not challenged the order of the Tribunal dated 22nd November, 2011 passed in OA No.350/2011. If the direction of the Tribunal to consider respondent No.4 for the 'second look' was contrary to the policy dated 23rd March, 1995 for any reason, in that case the respondent Nos.1 to 3 ought to have challenged such direction instead of implementing it. After implementing it, respondent Nos.1 to 3 now cannot contend that policy contemplates that a 'second look' cannot be given to an officer who is selected after consideration on 'first look' but who is not able to complete the course on account of the extraneous reasons or reasons not attributable to him.

52. The Tribunal drew the comparison with other courses where nomination is based on comparative merit/entrance examination and in

which courses, if a candidate fails to complete the course due to extraneous reasons or the reason not imputable to him, such candidates do not forfeit their number of chances and considerations. Respondent Nos.1 to 3 in their reply to the writ petition have asserted that the Tribunal has not specified the course in which a candidate after failing to complete a course because of the reasons not imputable to him does not forfeit his number of chances and consideration. The observation of the Tribunal must have been based on whatsoever was submitted before it and cannot be faulted on the ground that such courses have not been detailed by the Tribunal. Though respondent Nos.1 to 3 have contended that criteria for each course for nomination can be different and policy on two courses cannot be equated, however, it was for respondent Nos.1 to 3 to have given details of the course in which after failing to complete a course for extraneous reasons, an officer is not entitled to remaining chances/considerations available to him.

53. No rational reason is given by respondent Nos.1 to 3 and even by the petitioners that an officer who is selected in the “first look” but who is not able to complete the course because of the reasons not attributable to him, and beyond his control, will not be entitled for a ‘second look’ except that in the earlier course on account of such an eventuality one seat is wasted.

54. If an officer who is not selected in a particular course, is entitled for reconsideration on merit for a 'second look' i.e. reconsideration on merit for a subsequent course, an officer who is selected in the 'first look' but who is not able to complete the course for the reasons beyond his control, a *fortiori* will be entitled for reconsideration on merit for the subsequent course. From the perusal of the policy of respondent Nos.1 to 3, it is apparent that there is no specific stipulation that in case an officer selected for a course does not complete it for any reasons, even reasons beyond his control, he will not be considered for nomination for the subsequent course on the basis of his comparative merit.

55. An officer who is selected in the 'first look' but who is not able to complete the course for the reasons beyond his control cannot be considered lower in merit to another candidate who is not even selected in the 'first look'. A candidate who is selected in the 'first look', therefore, shall be entitled for a 'second look' on merit.

56. The reasoning given by the petitioners that because of non-completion of the course by an officer who was selected in first attempt, because one seat is wasted and therefore, he will not be entitled for a 'second look' for a subsequent course does not appear to be a cogent reason in the facts and circumstances. The objective is to have the best

officer selected on merits which is ultimately beneficial to the organization in the long term as has also been reasoned by the Tribunal.

57. The Tribunal has held that the fact that ailment suffered by respondent No.4 was beyond his control and was attributable to Military Service as had been held even by medical authorities. In the circumstances denying him the 'second look' would have been in the form of penalty rather than giving respondent No.4 a favorable consideration and thus, allowing him a 'second look' on merit cannot be faulted on any of the grounds raised by the petitioners and respondent nos. 1 to 3.

58. For the foregoing reasons and in the facts and circumstances, the petitioners and respondent Nos.1 to 3 have failed to make out any illegality, irregularity or such perversity in the order of the Tribunal dated 22nd November, 2011 in OA No.350/2011 which was filed by respondent No.4 where respondent Nos.1 to 3 were directed to give a 'second look' to respondent No.4 provided he met the eligibility criteria for NDC-52 Course. The order dated 22nd November, 2011 does not require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India in the facts and circumstances. This was also disclosed during the arguments that

respondent No.4 pursuant to the orders of the Tribunal was considered on merit and has joined NDC-52 Course.

59. In the facts and circumstances, the writ petition is without any merit and it is therefore, dismissed and all the pending applications also disposed of. The parties are, however, left to bear their own costs.

ANIL KUMAR, J.

J.R.MIDHA, J.

JULY 5, 2012

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