

RESERVED**A.F.R**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO 1**T.A. No. 114 of 2009****Tuesday, this the 3rd day of Nov. 2015****“Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member
Hon’ble Lt Gen Gyan Bhushan, Administrative Member”**Havaldar Lekh Raj (No. 3972000P) aged about 43 years son of Batan Chand of 12 Dogra, DRC Faizabad..... **Petitioner**

Versus

1. Union of India through the Secretary, Ministry of Defence, DHQ, PO New Delhi.
2. Chief of the Army Staff, Army Headquarters, DHQ PO, New Delhi.
3. Commandant & OIC Records DRC, Faizabad.
4. Commanding Officer, 12 Dogra C/o 56 APO
5. Col. S.S.Shekhon, 12 Dogra C/o 56 APO.....**Respondents**

Ld. Counsel appeared for the Petitioner**- Shri Ramesh Chandra,
Advocate****Ld. Counsel appeared for the Respondent****- Shri Rajesh Kumar
Sr. Central Govt Counsel**

ORDER

“Per Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member”

1. The matter in hand has come up before us by way of transfer under Section 34 of the Armed Forces Tribunal Act, from Hon’ble the High Court at Allahabad and it has been renumbered as Transferred Application No. 114 of 2009.

2. The reliefs claimed in the T.A. filed by the Petitioner are excerpted below :-

(A) This Hon’ble Court may be graciously pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ direction or order commanding the respondents to promote the Petitioner to the rank of Naib Subedar at his original seniority and all consequential benefits thereof.

(B) This Hon’ble Court may be graciously pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ direction or order commanding the respondents to award suitable compensation for illegal detention of the Petitioner.

(C) This Hon’ble Court may also be graciously pleased to grant such other relief has deemed just and proper in the facts & circumstances of the case.

(D) This Hon’ble Court may also be graciously pleased to award the cost of this petition in favour of the Petitioner.”

3. The factual matrix of the case is that the Petitioner was enrolled in the Army on 26.04.1974 and was posted to 15 DOGRA and later to 12 DOGRA on its raising in 1976. In May 1991, 12 DOGRA moved to Kashmir Valley for operations against Terrorists. In one of the operations of the Battalion in Village - Leergaon on 04 Oct 1991, in which the Petitioner also participated, one civilian, named Muzaffar Ahmed Mirza killed. The local population filed a case of human right violation against the Battalion and named the Petitioner as one of the

persons involved in killing of the said civilian. The Petitioner alongwith other personnel of the Battalion was attached to 312 Field Regiment with effect from 29 Dec 1991 to 01 May 1995 for a Court of Inquiry and subsequently for General Court Martial (GCM) for alleged violation of human rights. On 13 Apr 1995, the Petitioner was found 'Not Guilty' by the GCM and acquitted with full honour. During the attachment of the Petitioner with 312 Field Regiment, a Havildar to Naib Subedar promotion cadre was conducted by 12 DOGRA with effect from 17 Jan 94 to 26.03.1994. The Petitioner could not attend the promotion cadre as he was lacking requisite educational qualification (Army Certificate of Education-1). The Petitioner passed Army Certificate of Education-1 on 29 Oct 1994 at 312 Field Regiment. The Petitioner also passed Havildar to Naib subedar promotion cadre at 312 Field Regiment on 9th Mar 1995. 312 Field Regiment informed 12 DOGRA that the Petitioner had passed Army Certificate of Education-1 and also promotion cadre from Havildar to Naib Subedar and is eligible for promotion to the rank of Naib Subedar, but instead of considering the Petitioner for promotion 12 DOGRA wrote a letter to 312 Field Regiment inquiring about authority under which the Petitioner was permitted to attend the promotion cadre in 312 Field Regiment. The Petitioner sensing that his Unit was not going to consider him for promotion to the rank of Naib Subedar, preferred a representation which is annexed to the Petition as Annexure No 6. It is averred that without disposing of the said representation, the Respondents made orders promoting six of his juniors namely, Hav Ramesh Singh Guleria, Hav Kanwar Singh Rathor, Hav Kehar Singh Thakur, Hav. Sukh Ram, Hav Swarn Singh, and Hav. Tara Singh, have been mentioned to have been promoted

on 4.4.1994, 23.4.1994, 20.5.1994, 16.06.1994, 01.07.1994 and 01.07.1994 respectively excluding the name of the Petitioner. Later on, the Petitioner was informed that since he had already crossed 42 years of age on 01 Oct 1995, he had become overage for promotion to Naib Subedar. As a result of inaction on the part of the Unit, the Petitioner retired in the rank of Havildar only. Aggrieved, the Petitioner filed a Writ Petition No 767 (S/S) of 1996 in the Hon'ble High Court of Judicature at Allahabad which was subsequently transferred to this Tribunal for adjudication.

4. We have heard Learned Counsel for the Petitioner as also Learned Counsel for Union of India at prolix length.

5. The precise submission of Learned Counsel for the Petitioner is that although the Petitioner had qualified Army Certificate of Education-1 as also the promotion cadre for Promotion from Havildar to Naib Subedar while being attached at 312 Field Regiment, 12 DOGRA instead of considering him for promotion to the rank of Naib Subedar made queries- how the Petitioner was permitted to appear in the tests prescribed for promotion to the rank of Naib Subedar. To sum up, it is submitted that in the facts and circumstances of the case, the qualification obtained by him during his attachment with Field Unit deserves to be reckoned with for promotion. Loss of three precious years of life undergoing the trauma for GCM needs to be adequately compensated, more so, because he has been acquitted of all charges and now neither he nor the Unit is to be blamed. In these three years, he would have easily passed the tests required, and as such he deserves to be promoted from the date his juniors were promoted.

6. On the other hand, Learned Counsel for the Respondents contended that 312 Field Regiment was not recognized by Dogra Regiment and that the said 312 Field Regiment had never obtained the permission of 12 Dogra Regiment to allow the Petitioner to attend the Promotion Cadre. Learned Counsel further contended that the Regimental Promotion Rules 1995 were framed after getting the same vetted by all the Battalion Commanders during mini Biennial conference held at Dogra Regimental Centre attended with further contention that issue of promotion test is elaborated in Para 18 to 21 of the said Rules, which envisages that a candidate can avail three chances to pass the cadre test, and that the promotion test passed while remaining assigned to any outside unit would not be accepted except the Dogra Regimental Centre, sister Battalions of Dogra Regiment, Headquarters-22 Establishment and National Security Guard and in such cases, prior permission of concerned commanding officer will be necessary. He further drew attention to Army Order 45 of 1980 which prescribed the subject/syllabus for promotion cadre attended with contention that the subjects of different Units were entirely different as the roles of both the Arms are different in the course of deployment in various operations of War. He lastly submitted that the Petitioner had already crossed 42 years of age on Oct. 1, 1995 and had become overage, the issue of offering promotion does not arise at this stage.

7. Learned Counsel for the Petitioner repudiated the above contention submitting that the Commanding officer 312 Field Regiment had accorded approval to the Petitioner to complete the promotion cadre and in consequence the Petitioner was fully qualified for promotion to the rank of Naib Subedar. He also repudiated the

contention that prior permission of Commanding Officer of 12 Dogra was required submitting that as per para 9 of Regulation for the Army (Revised Edition 1987), CO of 312 Field Regiment was his commanding officer and in the circumstances, there was no question of permission of CO 12 Dogra Regiment. The further submission is that it was under the direction of his Commanding officer that he appeared in the test for Promotion Cadre for Naib Subedar under the authority of HQ 8 Mountain Arty Brigade Convening Order of No 05/95 dated 04.03.1995. He also submitted that other promotion cadre/trade technical Tests are also held and passed from other units, which organize the same under the convening authority of higher formation Headquarters. He further submitted that as a matter of fact, 12 Dogra unit accepted the Petitioner's Promotion Result which was forwarded by 312 Field Regiment and the same letter was acknowledged by 12 DOGRA Regiment. The Learned Counsel also submitted that Regimental Promotion Policy for JCOs/OR 1995 is void because that policy came into existence on 22.4.1995 which was given retrospective effect i.e. it was effectuated w.e.f 01.01.1995.

8. It is not in dispute that six of the personnel who were junior to the Petitioner were promoted to the exclusion of the Petitioner.

9. The question that remains for consideration is whether the qualification acquired by the Petitioner while attached to 312, Field Regiment could be taken to be the qualification requisite for his promotion to the rank of Naib Subedar and that the Petitioner needs to be compensated sympathetically vis a vis the trauma suffered by him awaiting General Court Martial and the loss of three precious years in acquiring requisite qualification for cadre promotion especially since he had been absolved of all charges.

10. In connection with the controversy involved in this case, we feel called to refer to the decision of the Principal Bench, Armed Forces Tribunal in Hav Pratap Chandra Sahu Vs. Union of India and Ors rendered in O.A.No 191 of 2011 decided on 19.3.2012. Paras 12,13,14 and 16 being germane to the controversy are quoted below.

"12. We realize that the persons who were working in the MES when they go back to their unit, they should get their due place in that unit without affecting their seniority or promotion. It is likely that persons in their parent unit, got promotion and when persons working in MES go back to their parent unit, they will be placed below to their juniors who got promotion while working in parent unit. This will be discriminatory and violative of Articles 14 and 16 of the Constitution of India. The person junior in his cadre is promoted and person who has been sent out of cadre in the public interest and when he is reverted back, he is placed below to his junior. This will cause a great hardship to him and this will be unfair to the person, therefore, we directed the learned counsel for the respondents to seek instructions that when these persons are being repatriated to their parent unit, they must be given their dues and they should not be placed below to their juniors and create a discrimination in their parent cadre. In case a person who is junior is promoted, then the person who is being repatriated from MES to his parent unit should also be promoted in case he is eligible for promotion and if not then he may be given opportunity to acquire the qualification so as to get his promotion.

13. Learned counsel for the respondents after seeking instructions submitted that the authority will take proper care of the persons who are being repatriated to their parent cadre and if they are otherwise qualified then they will be considered for promotion from the date persons junior to them have been promoted. In case they are not eligible then they will be promoted after acquiring necessary qualification and their seniority of unit will be maintained vis a vis their juniors. He also submitted that seniority of these people who are being repatriated will be looked into and they will be placed accordingly. In case any person junior to these persons is being promoted to a higher rank then though case of these persons will be considered vis a vis such junior person and if they are found suitable then they will be given their due promotion and their seniority will be restored.

14. We hope and trust that all these aspects will be examined by the Government and thereafter, all the personnel who are repatriated to their parent department will be restored back to their original seniority and they will be given their due. In case, if one is required to pass certain eligibility test for the promotion, then he will be given that opportunity. This whole exercise will be undertaken and completed within a period of six months from the date of this order. It is also observed that in case these persons who are being repatriated from MES to their parent cadre are lacking a regimental report then the report obtained by them while working in the MES will be taken into consideration because they are working in the MES as a combatant.

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16. It is true that we are only concerned with the MES personnel and this arrangement only pertains to the MES personnel as other issues are not before us. Therefore, we confine this arrangement to all the MES personnel whether who have filed the present petitions and not filed, it will be unanimously applicable to all MES persons who are being sought to be repatriated to parent unit."

11. Reverting to the vexed question involved in this case, it may be recalled that the Petitioner on being involved in a murder case, was arrested and was tried by the General Court Martial which required him to be assigned to a unit other than his parent Unit for facility of investigation and trial. This arrangement continued from the year 1991 to the year 1994. It brooks no dispute that during the period of his continuance in 312 Field Regiment, he with prior approval of the Commanding officer of that Unit, passed the test held by 312 Field Regiment for promotion from Havildar to Naib Subedear. During his continuance in the said Unit, the Petitioner also passed the Army Certificate of Educatuin-1 Test with prior approval of the Commanding Officer. On being repatriated to his parent Unit, the Petitioner informed his Unit about his qualifications acquired after passing the test held there and claimed to be promoted to the rank of Naib Subedar but his request remained unacted upon. The inaction on the part of 12 Dogra led him to prefer a representation also did not elicit any action or order. In the meanwhile, at least three personnel junior to him as referred to above, were promoted to the rank of Naib Subedar to the exclusion of the Petitioner. In the facts and circumstances discussed above, we veer round to the view that the Petitioner was separated from his parent Unit and was attached to 312 Field Regiment for facility of investigation and also for trial in the murder case for which he was charged. It would thus transpire that the Petitioner was separated from his parent Unit as expediency then warranted. It would

also crystallize that the Petitioner had appeared and qualified the requisite tests with prior permissions of the Commanding Officer of 312 Field Regiment. The contention of the Respondents that since syllabus/subjects of both the units were distinct and different and that the promotion test held by any outside Unit was not recognized and accepted by the Dogra Regiment, does not commend to us for acceptance qua the fact that the Petitioner had not, on his own free volition, sought to be attached to 312 Field Regiment and it was done as expediency then warranted. It brooks no dispute that the Petitioner was purged of all charges in the year 1994. After being purged of the charges, the Petitioner appeared and qualified the First Class certificate of Education held between 24.10.1994 and 29.10.1994. He further appeared and qualified the test held by 312 Field Regiment for promotion to the rank of Naib Subedar. In our considered view, the approach of the Respondents would be discriminatory and violative of Articles 14 and 16 of the Constitution of India besides being unfair to the Petitioner. The qualification requisite for promotion to the rank of Naib Subedar acquired during his continuance in the 312 Field Regiment would for all practical purposes be deemed to be qualification obtained in 12 Dogra Regiment as the Petitioner had performed his duties in 312 Field Regiment as combatant. To cap it all, the Petitioner served in the Field Regiment as a Combatant and not otherwise.

12. The quintessence of what has been observed in **Hav Pratap Sahu vs Union of India and Ors** (supra) is that in case, the personnel, who is repatriated to the parent department, will be restored back to his original seniority and will be given his due. It was further observed that if one is required to pass certain eligibility test

for the promotion, then he will be given that opportunity. Further observation was to the effect that in case, the personnel is not eligible then he will be promoted after acquiring necessary qualification and his seniority of Unit will be maintained vis a vis his juniors. We are in agreement with the observations made the Principal Bench in the aforesaid case.

13. In the instant case, at the risk of repetition, the Petitioner after due approval from the commanding officer of the 312 Field Regiment to which he was attached, had appeared and had qualified the test for promotion from Havildar to Naib Subedar and he had also acquired the qualification of Army Certificate of Education-1. As discussed above, the qualifications that the Petitioner acquired while attached to 312 Field Regiment, will be treated as requisite qualification. If the ratio flowing from the decision of Hon'ble Principal Bench is applied to the instant case, the Petitioner who is otherwise qualified, deserves to be considered for promotion from the date persons junior to him, have been promoted.

14. Now we proceed to deal with the question whether there was any vacancy in the Unit to accommodate the Petitioner on his return to the 12 Dogra Unit from 312 Field Unit. This question has to be dealt with in the light of the fact that the personnel junior to the Petitioner were promoted to the rank of Naib Subedar in the year 01.04.1996 while the Petitioner had already become overage on Oct 1, 1995 on his attaining the age of 42 years. The aforesaid personnel junior to the petitioner had acquired the requisite qualifications on 26.11.1994 that is prior to that of the Petitioner.

15. In connection with the above submission, we may refer to the seniority list attached to the second Additional Replication Affidavit

sworn on 10.1.2012 by Capt Anjali Singh. In the said list, as many as six personnel namely Hav Ramesh Singh Guleria, Hav Kanwar Singh Rathor, Hav Kehar Singh Thakur, Hav. Sukh Ram, Hav Swarn Singh, and Hav. Tara Singh, have been mentioned to have been promoted on 4.4.1994, 23.4.1994, 20.5.1994, 16.06.1994, 01.07.1994 and 01.07.1994 respectively. The personnel are shown to be junior to the Petitioner vis a vis their seniority as Havildar. The contention of the Learned Counsel for the Respondents that on the date on which the aforesaid personnel were promoted the Petitioner did not possess the requisite qualification and that he had ample opportunity to pass the requisite test but he made no efforts, does not commend to us for acceptance considering that the Petitioner had been attached to 312 Field Unit awaiting Court of Enquiry as well as G.C.M. The submission of the Learned Counsel for the Petitioner that the Petitioner remained attached to 312 Field Unit where he was detained and thus, neither he had any opportunity to pass the requisite test nor was offered any opportunity by his Unit to do so between 29.12.1991 and May 1,1995, is loaded with substance. Even otherwise, the case of the Petitioner deserves to be considered with due sympathy and he has to be compensated vis a vis the trauma suffered by him awaiting Court of Enquiry and General Court Martial and also considering the loss of three precious years in acquiring requisite qualification for cadre promotion especially when he had been absolved of all charges. If the ratio of the decision of Principal Bench is brought to bear, the Petitioner would be entitled to be restored to his seniority on return to his parent unit. The contention that there was no vacancy at the time when the Petitioner was relegated to his Unit, cannot be countenanced. If there is no vacancy, the Petitioner deserves to be

accommodated by creating a supernumerary post in the special circumstances

16. In the above conspectus the reliefs sought by the Petitioner deserve to be allowed. The contention of the Respondents that the Petitioner became overage on 01.10.1995 and hence the reliefs sought are not liable to be allowed is unjustifiable. In our considered view the Petitioner was denied his rightful claim prior to his attaining the age of 42 years as he had obtained the requisite qualifications prior to attaining the age of 42 years. We are surprised at the forceful way the Learned Counsel for the Respondents opposed the rightful claim of a soldier whose performance in the Army was always appreciated and was praised in eulogistic terms. It would be a gross injustice if the Petitioner is denied his rightful claim on nuances.

ORDER

17. In the result, the T.A. No 114 of 2009 is allowed and the respondents are directed to promote the Petitioner to the rank of Naib Subedar notionally from the date, the persons junior to the Petitioner had been promoted, regard being had to his qualification acquired during his continuance in 312 Field Regiment which would be deemed to be requisite qualification for promotion from Havildar to Naib Subedar. In case, vacancy be wanting, the Petitioner has to be accommodated by creating supernumerary post in special circumstances. The Petitioner shall be entitled to wages of the rank of Naib Subedar from the date of promotion to the date of his retirement in the rank of Havildar. It may be clarified that his retirement as has happened would be final and no benefit would accrue to him on the count of his promotion as Naib Subedar. The Petitioner shall be treated as Ex Naib Subedar with full pensionary benefits of this rank from the

date of retirement. The Petitioner would be entitled to interest @ 9% on arrears. The Respondents are directed to comply with the above order within a period not exceeding four months.

18. There shall be no order as to costs.

(Lt Gen Gyan Bhushan)
Administrative Member

(Justice Virendra Kumar DIXIT)
Judicial Member

Date: Nov, ,2015

MH/-

