

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****TRANSFERRED APPLICATION NO 396 of 2010**Monday, this the 07th day of December 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)**
Hon'ble Air Marshal Anil Chopra, Member (A)

No 4172784-W Hav Hari Murat Singh, Son of Shri Indra Dev Singh Yadav, Village-Basuhari, Post Office-Deoria, District:Ghazipur.

.....Petitioner

Ld. Counsel for the: **Shri P.N. Chaturvedi, Advocate**
Petitioner

Versus

1. Chief of the Army Staff, New Delhi.
2. General Officer Commanding, Uttar Bharat Area, Bareilly.
3. Commandant-cum-CRO Kumaon Regimental Centre, Ranikhet.
4. Union of India Through Secretary, Ministry of Defence, New Delhi.
5. Major General K.C. Vig, General Officer Commanding UB Area, Bareilly (UP).
6. No. 4172450 Hav Satbir Singh C/o KRC, Ranikhet.

.....Respondents

Ld. Counsel for the : **Shri D.S. Tiwari, Central**
Respondents. **Govt Counsel assisted by**
Capt Priti Tyagi,
OIC, Legal Cell.

ORDER (ORAL)

1. Being superseded from the promotional avenue on the post of Naib Subedar, the petitioner a Havildar of Indian Army had preferred Civil Misc Writ Petition No 49517 of 2004 in the High Court of Judicature at Allahabad which after constitution of Armed Forces Tribunal has been transferred to this Tribunal under the provisions of Section 34 of Armed Forces Tribunal Act 2007 and re-numbered as T.A. No 396 of 2010.

2. We have heard Ld. Counsel for the parties and perused the record. The petitioner was enrolled in the Army on 21.04.1979. During 1979 to 30.04.2003, the petitioner served at different places in the Indian Army. On 16.08.1988, he was promoted to the rank of L/Naik. Later on he was promoted on the rank of Naik on 09.05.1990. Thereafter the petitioner was promoted on the post of Havildar on 12.01.1996.

3. According to Ld. Counsel for the petitioner, on 31.08.2002, the petitioner completed the promotion cadre for the promotion from Havildar to Naib Subedar. Submission is that after completing promotional course required for promotion to the post of Nb Subedar, the respondents should have promoted the petitioner on the said post. According to Ld.

Counsel for the petitioner on 02.11.1997, on account of certain errors committed by ministerial cadre, he could not be promoted on the next higher post. Later on again he was superseded and not promoted to the rank of Nb Subedar with effect from 01.03.2003 and ultimately the petitioner was discharged from service with effect from 30.04.2003 without granting promotional avenue. The sole ground for denial of promotion is punishment awarded on 06.03.1984 purported to have been awarded under the provisions of Section 36 (d) of the Army Act 1950.

4. Feeling aggrieved the petitioner submitted statutory complaint which has been rejected by the impugned order dated 27.08.2004 copy of which has been filed as Annexure No 8 of the writ petition. The Chief of the Army Staff while rejecting the statutory complaint and passing the impugned order held that the petitioner was punished during active service under Section 36 (d) of the of the Army Act on 06.03.1984. On account of punishment awarded on 06.03.1984, the petitioner is not entitled for promotion on the post of Nb Subedar and rightly his case was rejected. Accordingly, the Chief of Army Staff declined to grant promotion to the petitioner with effect from 01.03.2003. It has been further observed by Chief of the Army Staff that in view of Notification of Ministry of Defence dated 05.09.1977, the petitioner shall be deemed to be in active service as a result of which, he is permanently debarred for

further promotion as per Army Headquarters letter No B/33513/AG/PS2(C) dated 10.10.1997 and no injustice has been done to him.

5. While assailing the impugned order, Ld. Counsel for the petitioner has submitted that the impugned order of punishment should have been passed only by appropriate court martial proceedings and not by summary trial. His submission is that in view of the provisions contained in Army Act Section 36 (b), the punishment could not have been awarded merely in the summary manner but for the purpose of punishment appropriate court martial proceedings should have been held. It has been submitted by Ld. Counsel for the petitioner that only for short absence, the petitioner was punished with 14 days Rigorous Imprisonment but later on he was promoted and served the Indian Army without any hurdle with bright service record.

6. Attention has been invited to Ministry of Defence letter dated 10.10.1997 which provides that if a JCO or NCO is punished, he may be deprived for further promotion. Further Section 36 provides that for such offence, army person is to be punished through court martial.

“36. Offences punishable more severely on active service than at other times. – Any person, subject to this Act, who commits any of the following offences, that is to say, --

(a) forces to safeguard, or forces or uses criminal force to a sentry; or

- (b) *breaks into any house or other place in search of plunder, or*
- (c) *being a sentry sleeps upon his post, or is intoxicated; or*
- (d) *without orders from his superior officer leaves his guard, picquet, patrol, or post; or*
- (e) *intentionally or through neglect occasions a false alarm in camp, garrison or quarters; or spreads reports calculated to create unnecessary alarm or despondency; or*
- (f) *makes known the people, watchword or countersign to any person not entitled to receive it; or knowingly gives a parole, watchword or countersign different from what he received,*

shall, on conviction by court-martial,

if he commits any such offence when on active service, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and

if he commits any such offence when not on active service, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.”:

7. Admittedly, no court marshal in pursuance of provisions contained in Section 36 was held, rather the petitioner was punished summarily by the authority concerned. Accordingly, order of discharge seems not to be sustainable.

8. However, there is another reason as to why the petitioner should have been granted promotion to the next higher post. In

the present case, the petitioner was promoted on the post of L/Naik, Naik and Havildar from time to time. There appears no adverse entry or complaint on record during discharge of duty on the post of L/Naik, Naik and Havildar. The petitioner seems to have got a bright service record so far as service rendered on promotional avenue (supra) is concerned. It is trite law that once a punishment or adverse entry is over looked or otherwise a person is granted promotion to the next higher post, then all such entries shall lose their significance under the doctrine of 'washing off' with regard to promotion in the same department.

9. In the present case, the respondents have considered petitioner's case and found him suitable for promotion on the post of L/Naik, Naik and Havildar and there appears no reason to deny the petitioner further promotion on the post of Nb Subedar. The order passed by the Chief of the Army Staff seems to be unsustainable. In service jurisprudence, the record is to be seen of the post on which the person is working for promotion to the next higher post. There appears to be non application of mind while considering the petitioner's case for promotion to the post of Nb Subedar.

10. In view of above, not only for the reason that the order of punishment was awarded without court martial in the year 1984, but later on being promoted three times to the higher rank, the respondents could not have denied petitioner's right for being promoted to the next higher post of Nb Subedar. The

solitary reason assigned by the respondents while rejecting petitioner's case for promotion to the post of Nb Subedar is on account of punishment awarded on 06.03.1994 which, as observed above, loses its sanctity for the purpose of promotion to the next higher post. The petitioner seems to be entitled for promotion on the post of Nb Subedar with effect from 01.03.2003. Otherwise also, since the order of punishment was bad in the eyes of law being awarded without court martial proceedings, the petitioner could not have been denied promotion to the post of Nb Subedar. Cumulative effect of the substantial illegality committed by the respondents (supra) is that the petitioner is entitled for promotion on the post of Nb Subedar with effect from 01.03.2003.

11. To avail justice by judicial process, the petitioner was compelled to indulge in litigation. First Writ Petition filed by the petitioner was decided directing the respondents to decide statutory complaint in pursuance to which the statutory complaint preferred by the petitioner was decided. Thereafter the petitioner preferred another Writ Petition bearing No. 49517 of 2004 which has been transferred to this Tribunal as is before us. The petitioner, a Non Commissioned Officer has suffered not only financially but with mental pain and agony while assailing his cause for the injustice caused to him. A person who has served the army has served the nation, no injustice should be caused to such a person by the inbuilt mechanism of

the army itself. It appears that on account of bright service record and performance, the petitioner was promoted from time to time (supra). This shows the efficiency and competency of the petitioner. Denial for promotion on the post of Nb Subedar seems to be an act of non application of mind and arbitrary exercise of power. The petitioner retired after 24 years of colour service. In case he would have been granted promotion on the post of Nb Subedar, he could have served the army for four more years with all benefits and perks and also possible future promotion. The injury caused to the petitioner is irreparable which cannot be compensated in terms of money because by losing the promotion, the petitioner has lost not only his promotional rank but also status which is prime concerned for army personnel. We are of the view that it is a fit case where exemplary costs should be awarded to compensate the petitioner in terms of money, though it may not be sufficient.

12. Hon'ble Supreme Court in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others***, (2011) 8 SCC 249 has given emphasis to compensate the litigants who have been forced to enter litigation. This view has further been rendered by Hon'ble Supreme Court in the case reported in ***A. Shanmugam V. Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others***, (2012) 6 SCC 430. In the case of ***A. Shanmugam*** (supra) Hon'ble the Supreme considered catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. ***Indian Council for Enviro-Legal Action V. Union of India***, (2011) 8 SCC 161;
 2. ***Ram Krishna Verma V. State of U.P.***, (1992) 2 SCC 620;
 3. ***Kavita Trehan V. Balsara Hygiene Products Ltd.*** (1994) 5 SCC 380;
 4. ***Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.***, (1999) 2 SCC 325;
 5. ***Padmawati V. Harijan Sewak Sangh***, (2008) 154 DLT 411;
 6. ***South Eastern Coalfields Ltd. V. State of M.P.***, (2003) 8 SCC 648;
 7. ***Safar Khan V. Board of Revenue***, 1984 (supp) SCC 505;
 8. ***Ramrameshwari Devi and others*** (supra).
13. In the case of ***South Eastern Coalfields Ltd*** (supra), the apex Court while dealing with the question held as under :

“28. ...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to

be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation”.

14. In the case of **Amarjeet Singh V. Devi Ratan**, (2010) 1 SCC 417 the Supreme Court held as under :-

“17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party involving the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court”.

15. The question of award of cost is meant to compensate a party who has been compelled to enter into litigation unnecessarily for no fault on its part. The purpose is not only to compensate a litigant but also to caution the authorities to work in a just and fair manner in accordance to law. The case of

Ramrameshwari Devi and others (supra) rules that it the party who is litigating, is to be compensated.

16. In the case of **Centre for Public Interest Litigation and others V. Union of India and others**, (2012) 3 SCC 1, the Hon'ble Supreme Court after considering the entire facts and circumstances and keeping in view the public interest, while allowing the petition, directed the respondents No 2, 3 and 9 to pay a cost of Rs. 5 crores each and further directed respondents No 4, 6, 7 and 10 to pay a cost of Rs. 50 lakhs each, out of which 50% was payable to the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants and the remaining 50% was directed to be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

17. In the case reported in **National Textile Corporation (Uttar Pradesh) Limited V. Bhim Sen Gupta and others**, (2013) 7 SCC 416 the Hon'ble Supreme Court took note of the fact that the Textile Corporation has not placed the correct facts before the Court and so the contempt petition was dismissed and the cost was quantified at Rs 50,000/- .

18. In view of above, we allow the T.A. with all consequential benefits. Respondents shall consider the petitioner for promotion on the post of Nb Subedar keeping in view the observations made hereinabove from 01.03.2003 with revision of pay, salary and perks. Let entire consequential benefits be paid expeditiously, say, within six months from the date of

presentation of a certified copy of this order.

We quantify the costs to the tune of Rs. 2,00,000/- (Rupees two lacs), which shall be deposited in this Tribunal within four months from today, out of which the petitioner shall be entitled to withdraw Rs. 1,75,000/- (Rupees one lac seventy five thousand) and the remaining amount of Rs. 25,000/- (Rupees twenty five thousand) shall be remitted to the Armed Forces Tribunal Bar Association, Lucknow for its library and other welfare activities.

O.A. is allowed accordingly.

(Air Marshal Anil Chopra)
Member (A)

anb

(Justice D.P. Singh)
Member (J)