

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION NO 237 of 2014**Tuesday, this the 05th day of January 2016**Hon'ble Mr. Justice D.P. Singh, Member (J)**
Hon'ble Air Marshal Anil Chopra, Member (A)

Jagat Pal Singh Rathore (Ex. JC 141068L SUB (AEC), S/o Sri Gaya Singh R/o Civil Lines, Baragadia Ghat Road, Fatehgarh, District Farrukhabad.

.....Applicant

Ld. Counsel for the: **Shri Ashok Kumar, Advocate**
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, Delhi-110011.
2. Chief of Army Staff, Integrated Head Quarter of Ministry of Defence, New Delhi.
3. Chief Controller of Defence Account (Pension), Allahabad, U.P.
4. Incharge-Record Officer, Records, AEC Pachmarhi (M.P.).

...Respondents

Ld. Counsel for the : **Mrs Appoli Srivastava, Central**
Respondents. **Govt Counsel assisted by**
Capt Priti Tyagi, OIC, Legal Cell.

ORDER (ORAL)

1. We have heard Shri Ashok Kumar, Ld. Counsel for the applicant and Ms. Appoli Srivastava, Ld. Counsel for the respondents assisted by Capt Priti Tyagi, OIC., Legal Cell and also permit applicant to assist the Court.

2. In the present Original Application filed under Section 14 of the Armed Forces Tribunal Act, 2007 (in short, the Act) the applicant is aggrieved by supersession while working on the post of Subedar. The respondents had declined to promote the applicant on the post of Sub Major. Feeling aggrieved, the applicant had submitted statutory complaint which was rejected. Later on, a civil suit was filed but that too was dismissed on 12.04.2007 on the ground that the Court has no jurisdiction to entertain a suit with regard to service matters of the Army personnel. Thereafter the present Original Application has been preferred.

3. Delay in filing the Original Application has been condoned by the Tribunal after considering the objections raised by the Ld. Counsel for the respondents.

4. The applicant was enrolled in the Indian Army as Havildar (Education) on 13.09.1967. After completion of prescribed training, he was promoted to the rank of Subedar on 04.10.1990. He was thereafter discharged from Army on

31.03.1994 after attaining the age of 50 years, which was maximum permissible age limit prescribed for the rank of Subedar.

5. The controversy arose in the year 1993 when the Committee constituted for the purpose of promotion, after considering the name of the applicant for promotion to the post of Subedar Major had rejected applicant's case on the ground that the applicant was having only two above average entries and three high average entries in last five preceding years. While assailing the impugned decision, the applicant stated in the statutory complaint as well as before the Tribunal that in the year 1988 he was having above average entry with four quality marks, but the same have been wrongly treated to be average entry by the respondents. While filing rejoinder affidavit, the applicant has placed on record photo state copy of the service book which indicates that the applicant was granted four marks in the year 1988. According to the note contained in the service book, four mark is equivalent to "above average" entry. Thus, submission is that in view of the service record, the applicant should have been treated as person possessing above average entry in the year 1988.

6. In compliance of order of the Tribunal, the respondents have produced original service record of the applicant. The service record proves the applicant's contention that in the year 1988, he was granted four quality marks, which is equivalent to

“above average” entry. Accordingly, submission of Ld. Counsel for the applicant seems to be correct that the applicant was having above average entry in the year 1988, but admittedly, while considering his case for promotion, he has been treated to be a person having average entry in the year 1988.

7. While submitting reply in paragraphs 14, 15, 16 and 17 of the Original Application, the respondents have categorically pleaded that in the year 1988 the applicant was having average entry. For convenience sake, paragraphs 14, 15, 16, and 17 are reproduced as under:

“14. That in reply to the contents of paras 4 (4) and 4 (5) of the O.A., it is submitted that the statutory complaint and Civil Suit No. 265/1999 filed by the applicant in the Hon’ble Court of Addl. Civil Judge Junior Division Court No. 10 at Farrukhabad on the matter has already been dismissed due to lack of merit. It is further submitted that the applicant was not considered in both DPC year 1993 and 1994 due to not fulfilling ACR criteria as per IHQ of MoD (Army) letter No. 94930/AG/PS-2(c) dated 20 Dec. 1979 (i.e. a Ris/Sub must have at least three ‘Above Average’ reports out of the last five reports earned by him, the other two must be at least ‘High Average’). ACR grading as calculated vide IHQ of MoD (Army) letter No. 94930/AFR-F/AG/PS-2(c) dated 16 April 1990 in respect of the applicant is appended below :-

<i>Sr. No.</i>	<i>Year</i>	<i>Grading</i>	<i>Remarks</i>
<i>a</i>	<i>1988</i>	<i>Average</i>	<i>-</i>
<i>b</i>	<i>1989</i>	<i>Above Average</i>	<i>-</i>
<i>c</i>	<i>1990</i>	<i>Above Average</i>	<i>-</i>

d	1991	High Average	-
e	1992	High Average	-
f	1993	High Average	-

Copies of the aforesaid letters dated 20.12.1979 and 16.04.1990 are being annexed herewith as **Annexure No. R-1 and R-2** to this affidavit respectively.

15. That the contents of para 4 (6) of the O.A., are incorrect hence denied. It is submitted that the DPC for the year 1993 approved 63x JCOs for 47 anticipated vacancies arising during 1993-1994. The candidates approved in DPC for the year 1993 exhausted on 28 Feb 1994 and the last JCO on seniority was promoted to the rank of Sub Maj on 01 Feb 1994. As such, fresh DPC for the year 1994 was constituted and finalized on 16 Mar 1994 for approving JCO for the vacancies which was created on or after 01 March 1994, the applicant was not considered in both DPC for the year 1993 and 1994 due to not fulfilling ACR criteria as mentioned in preceding paras.

16. That in reply to the contents of para 4 (7), 4 (8) and 4 (9) of the O.A., it is submitted that detailed reply has already been given in preceding paras and same are reiterated.

17. That the contents of para 4 (10) of the O.A. are incorrect hence denied. It is submitted that the D.P.C. for the year 1994 was constituted and the finalized on 16 Mar 1994 for approving JCO for the vacancies which was created on or after 01 Mar 1994. The applicant was not considered in both DPC for the year 1993 and 1994 due to not fulfilling ACRs criteria”.

8. A plain reading of above paragraphs shows that so far as year 1988 is concerned the Committee for considering promotion was constituted and the matter was finalized on 16.03.1994 for promotion of JCOs against vacancies which were created after 01.03.1994. The counter affidavit, however, shows that with regard to year 1993 Departmental Promotion Committee also considered the name of the applicant for the purpose of promotion, but the applicant was not granted promotion to the next rank. Obviously, for the year 1993, preceding five years entries would relate to the year 1988, 1989, 1990, 1991 and 1992 which would fall within the field of eligibility and require to be considered for the purpose of promotion. When the matter of promotion comes in the year 1994, the entries for preceding years 1989, 1990, 1991, 1992 and 1993 would come within the eligibility zone for the purpose of promotion.

9. So far as rejection of applicant's case is concerned for promotion against vacancy falling in the year 1994, there appears to be no reason to interfere, but once the applicant's case is considered against vacancy for the year 1993 then five preceding years shall start from the year 1988 to 1992.

10. From the original service record as well as in the rejoinder affidavit, it is evident that in the year 1988, the applicant was having above average entry; hence the respondents seem to have committed substantial illegality while assessing applicant's

merit and treating him as a person having average entry in the year 1988. The four marks granted to the applicant in the year 1988 as per service record should have been considered for the purpose of above average entry, which seems to not have been done.

11. We take note that while filing counter affidavit, the respondents have tried to mislead the Tribunal inasmuch as in paragraph 17 of the counter affidavit it has been mentioned that the Departmental Promotion Committee for the year 1994 was constituted and finalized on 16.03.1994 for approving JCO for the vacancies which were created on or after 16.03.1994. But the respondents have not indicated the date and the year when the Departmental Promotion Committee for the vacancies arising in 1993 is not understandable. The respondents have mentioned in counter affidavit with regard to 1994 and did not mention the process with regard to 1993 and have concealed material fact while filing counter affidavit. We feel that it is not only unjustified but also it is condemnable and we deprecate such action on the part of the respondents or the counsel who had drafted the counter affidavit.

12. A perusal of original records further reveals that ACR entry for the year 1988 was finalised in the year 1989 then there appears no occasion on the part of the respondents to show inadvertence with regard to entry of the year 1988 which was finalised in the year 1989 when the applicant's case was

considered for promotional avenue. There appears to be not only substantial illegality but someone has not placed correct facts before the Departmental Promotion Committee.

13. The applicant attained the age of superannuation on 31.03.1994. Since then he has been pursuing the matter. He filed statutory complaint and thereafter preferred a suit for redressal of his grievances.

14. It has been submitted by Ld. Counsel for the respondents that because of average entry for the year 1988 the applicant's case for promotion was not considered. Since we find that applicant was having above average entry in the year 1988 he was entitled to be considered for the purpose of promotion. Needless to say that it is well settled proposition of law that right to be considered for promotion is a fundamental right as held by Hon'ble Supreme Court in the case of **Ajit Singh vs. State of Punjab** reported in (1999) 7 SCC 2009 (Paras 18, 19, 20, 21 and 22). Hence gross injustice has been done to the applicant by the respondents on unfounded grounds. Those who serve country, at the cost of their life are entitled for utmost regard, honour and respect with fair treatment in their service career.

15. Needless to say that people join armed forces not only for monetary gain but also for the status, honour and dignity of the

rank and post and that is why the applicant seems to have been pursuing his case with regard to promotional avenue since the last more than two decades. The illegality and error is apparent on the face of record. We feel that it is a fit case which should be allowed with exemplary cost on account of omission and commission on the part of the respondents. Though while deciding the controversy at this belated stage we cannot compensate the applicant with regard to honour but as a token we feel that the applicant would be compensated in terms of monetary gain and we quantify the cost to Rs two lakhs which shall be in addition to applicant's right to claim damages in accordance with law.

16. 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 a 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).

17. Accordingly O.A. is allowed with cost quantified to Rs two lakhs which shall be deposited in this Tribunal within three months. The applicant shall be entitled to withdraw cost to the tune of Rs 1,75,000/- (Rupees one lakh and seventy five thousand only) and balance amount of Rs 25,000/- (Twenty five thousand only) shall be remitted to Bar Association Library of Armed Forces Tribunal, Lucknow. We further set aside all the decisions taken by the respondents with regard to rejection of applicant's promotional avenue for the post of Subedar Major and direct the respondents to reconsider the applicant's case keeping his status in 1993 and take a fresh decision expeditiously, say, within four months and pass a speaking and reasoned order with due communication to the applicant, keeping in view the observations made hereinabove.

18. Needless to say that applicant's promotion to the post of Subedar Major shall be notional for the purpose of pensionary benefits status, rank and perks etc. with effect from the date of discharge from the army which shall be provided to him within aforesaid period of four months.

No orders to cost.

(Air Marshal Anil Chopra)
Member (A)

anb

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