

A.F.R.

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION NO 234 OF 2016

Wednesday, this the 16th day of August 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

No. 14209037H Ex Hav Chandra Prakash, son of Shri Shamsheer Singh, 63A/CV-2 COD Road, Defence Colony, Agra Cantt. Agra, U.P.- 282001

....Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence, Government of India South Block New Delhi - 110011
2. The Chief Records Officer, Signals Records, Post Bag No. 5, Jabalpur.

.....Respondents

Counsel for applicant: **Shri Veer Raghav Chaubey,**
Advocate.

Counsel for respondents: **Shri G.S. Sikarwar,** Central
Government Stading Counsel.

OIC Legal Cell **Maj Salen Xaxa,** OIC Legal Cell.

ORDER (Oral)

1. The present O.A. has been preferred by the applicant being aggrieved with commission and omission on the part of the

respondents in not promoting the applicant to the next higher rank of Naib Subedar from the rank of Havildar.

2. We have heard Shri Veer Raghav Chaubey, learned counsel for the applicant and Shri G.S. Sikarwar, learned counsel for the respondents assisted by Maj Salen Xaxa, OIC, Legal Cell.

3. Briefly stated, the facts of the case are that the applicant was enrolled in the Corps of Signals of the Indian Army on 01.07.1972. Applicant completed more than twenty three years of service when he retired on 30.06.1996. Applicant's case is that while posted on guard duty, the applicant was found sleeping, hence was punished vide order dated 03.11.1979 for fourteen days imprisonment (Annexure R-1 to the counter affidavit). However, by order dated 01.01.1987, the applicant was promoted from the rank of Naik to the rank of Havildar. Subsequently applicant's batch mates were promoted in the rank of Naib Subedar, but the applicant was not granted promotion. While deciding applicant's complaint with regard to promotional avenue, observations made by Brig. K. Vinod Kumar in his order dated 04.03.2016 are reproduced as under:-

“ WHEREAS, in pursuance of the Hon'ble High Court of Judicature Allahabad order dated 21 September 1995, your Statutory Complaint dated 04 February 1995 regarding setting aside of adverse grading of Reviewing Officer in the Annual Confidential Report 1993 was considered by the Competent Authority i.e. Chief of Army Staff on 13 February 1996 and he had set aside the adverse grading of the Reviewing Officer.

4. *WHEREAS* even though, you became eligible for nomination on 'S' Course on account of Annual Confidential Report Criteria on setting aside of the adverse grading in the Annual Confidential Report for the year 1993 by Chief of Army Staff, but since you had committed an offence under Army Section 36 (c) on active service while posted with 15 Corps Engineering Regiment, you were summarily tried under Army Section 80 and awarded 4 days imprisonment on 03 November 1979, due to which you were permanently debarred for further promotion in terms of IHQ of Mod (Army) (Sigs-4(b)) vide letter No. PC-B/44256/Sigs 4 (b) dated 11 September 1995 read in conjunction to Appendix 'A' to IHQ of Mod (Army) letter No. B/33513/AG/PS2(c) dated 18 January 1993.

5. *IN PURSUANCE* of IHQ of Mod (Army) AG/PS2 letter No. B/33513/ACP/AG/PS-2 dated 18 January 1993 read in conjunction with letter No. 94930/AG/PS-2 (c) dated 10 March 1978, which provides that "JCOs/NCOs who have been convicted of an offence mentioned in Appendix 'A' will be permanently debarred for further promotion", you have been debarred permanently for further promotion having committed an offence under Sec 36 (c) of the Army Act while on active service.

6. *In view of the foregoing facts no case for your notional promotion is made out*".

4. A plain reading of the order passed by the competent authority (supra) shows that the applicant was superseded on account of punishment awarded on 03.11.1979 with fourteen days' imprisonment for sleeping while on guard duty. The competent authority had relied upon Army Order dated 10.03.1978 which provides that JCOs/NCOs who have been convicted of an offence mentioned in Appendix 'A' will be permanently debarred for further promotion. At the face of the record, the order seems to have been passed on unfounded facts for the reason that punishment was awarded on 03.11.1979 and thereafter because of bright service record, the applicant was promoted on the rank of Havildar on 01.01.1987.

5. Submission of learned counsel for the applicant is that 'doctrine of washing of' shall apply once the applicant was considered and promoted to the higher rank keeping in view his service record. It is submitted that the respondents have no right to rely upon the adverse entry which has been made anterior to the promotional order.

6. However, learned counsel for the respondents vehemently submitted that once the applicant was convicted and punished with fourteen days imprisonment, he has rightly been denied promotion on the post of Naib Subedar. Learned counsel for the respondents drew attention of the Tribunal to Annexure R-II to the counter affidavit and submitted that the applicant was not granted promotion to the rank of Naib Subedar on account of his not doing 'S' Course. He submitted that Signal Officer-in-Chief General Policy Instruction No. 53 which provides for screening and detailment of NCOs on 'S' Course places an blanket embargo for detailment of NCOs and JCOs on 'S' Course who have been permanently debarred for offences as Appendix 'A'. Learned counsel for the respondents vehemently submitted that 'S' Course is a essential pre-requisite for promotion to the rank of Naib Subedar and since the applicant was not detailed on 'S' Course, he is not entitled to be promoted to the next higher rank of Naib Subedar.

7. So far as arguments of learned counsel for the respondents based on Annexure R-II (supra) are concerned, Army Order

B/33513/AG/PS2(c) dated 18 January 1993 (Annexure R-V to the counter affidavit) specifically provides for the same criteria in regard to discipline for the purpose of promotion to the rank of JCOs and NCOs. Once the applicant was found fit for promotion to the rank of Havildar and was actually promoted on 01.01.2987 to the rank of Havindar despite having been saddled with punishment of fourteen days' imprisonment on 03.11.1979, in view of the settled doctrine of washing of, his further progression by detailment on 'S' Course and promotion on meeting out the requirements for promotion, cannot be denied to him.

8. The doctrine of washing of has been considered by the Allahabad High Court in the case of **Dr. Girish Bihari vs. State of U.P.** reported I n 1984 UPLBEC 953. In the case of **Dr. Girish Bihari**, the Division Bench of Allahabad High Court, as the matter was before it, has held that when an officer is selected and promoted to a higher post despite adverse entries against him, those entries lose their value and it is not open to the authorities to consider those adverse entries against the officer again at the time of his subsequent promotion. For convenience sake, paras 5, 6 and 26 of the case of **Dr. Girish Bihari** (supra) are reproduced as under:

"5. There is no dispute that the petitioner was promoted to the Selection Grade in 1975 despite the entries awarded to him in the year 1961, 1963, 1965-66, 1967-68, 1968-69, 1969-70 and 1974-75.

The question arises as to whether these entries lost their value on the petitioner's promotion to the Selection Grade. While considering this question, it is necessary to bear in mind that selection for promotion to the Selection Grade in the Indian Police Service is made by a committee constituted by the Chief Secretary, Home secretary and the Inspector General of Police of the State and the criteria for selection is merit with due regard to the seniority as enjoined by Rule 3 (2-A) of the rules. The substance of the petitioner's contention is that as the petitioner was found suitable for promotion to the Selection Grade in the year 1975 despite adverse entries awarded to him in the earlier years, the irresistible conclusion is that the Selection Committee did not attach any value to those adverse entries and after the Petitioner's Selection and promotion to the Selection Grade those adverse entries became irrelevant for any future promotion of the petitioner. This submission is based on the doctrine of washing off adverse entries on the promotion of a Government servant to a higher post on the basis of merit and suitability. Learned counsel for the petitioner cited a number of authorities for the proposition that once an officer is allowed to cross efficiency bar or he is promoted to a higher post on the basis of his merit, the adverse entries, if any existing in his service record prior to that period lost all value and they ceased to constitute relevant material for the purpose of retiring a Government servant compulsorily or for reverting him to his substantive post. We will now refer to these authorities."

"6. The doctrine of wiping off adverse entries on crossing efficiency bar by a Government servant was enunciated for the first time by the Supreme Court in State of Punjab v. Dewan Chunni Lal (AIR 1970 SC 2086). Dewan Chunni Lal was a sub-Inspector of Police in the service of the State of Punjab. He earned a number of adverse entries in service record, but subsequently he was allowed to cross efficiency bar. In October 1949, a charge of inefficiency was framed against him and he was called upon to answer those charges which were

based on the adverse entries as awarded to him in his character roll. He was dismissed from service. Thereupon, he filed a suit in the civil court. The trial court declared that the order of dismissed from service was illegal and inoperative. On appeal, the High Court upheld the trial court's decree. On appeal by the State of Punjab the Supreme Court upheld the: decree of the High Court and it observed thus:

“In our view reports earlier that 1944 should not have been considered at all inasmuch as he was allowed to cross efficiency bar in that year. It is unthinkable that if the authorities take any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing efficiency bar in 1944.

The above observations of the Supreme Court, if considered in the back-drop of the facts involved in that case would make it clear that the adverse entries awarded to a Government servant after he is allowed to cross efficiency bar lose all value. In State of Uttar Pradesh v. Dr. D.N. Sharma and others, (1975 (1) A.L.R. 399) a Division Bench of this court while upholding the order of a learned Single Judge quashing the order of compulsory retirement, held that adverse entries awarded to a Officer prior to his crossing efficiency bar and promotion to senior post lost all value and since the authorities despite all those entries allowed the officer to cross efficiency bar and granted him promotion, would very clearly show that the entries has lost all value and the same could not be taken into account while considering the material for the purpose of retiring a Government servant in public interest. In Girish Chandra v. Union of India (1976 L & I.C. 1608) another Division Bench of this Court quashed the order of compulsory retirement of a member of the Indian Administrative Service. The Bench held that the adverse entries, if any, awarded to the officer prior to his promotion to the Indian Administrative Service stood wiped off and those

entries were not relevant while considering the question as to whether he should be retired in public interest.”

“26. In its report the Selection Committee stated that on consideration of the service record of the eligible officers it found that the petitioner was not suitable for selection and promotion while those who were selected had for more better record of service. The Committee further proceeded to record reasons for supersession. The committee referred to the adverse entries awarded to the petitioner in the years 1961, 1963, 1965-66, 1967-68, 1968-69, 1969-70, 1974 and 1975-76 and it also referred to the complaint made by the District Magistrate, Varanasi, against the petitioner. The report of the Selection Committee, however, does not indicate that it took into consideration the petitioner’s promotion to the selection grade, the laudatory remarks contained in his character roll, the award of President’s Medal or his selection by the Union Government for appointment to the Post of Deputy Inspector General of Police. The reasons, as disclosed, only contain in substance of the adverse entries only. The Committee failed to state reasons in a manner to disclose how the petitioner’s record was bad in relation to Selection Committee does not refer to any of the matters which were in petitioner’s favour, which certainly indicated his outstanding merit in service. The reason given by the Committee was uniform which could be applied to any officer. The reason given by the Committee does not indicate that the relevant matters were considered by the Committee. Since the Committee was required to take into consideration the entire service record of the petitioner, there was no reason for the Committee not to consider the Laudatory remarks made in favour of the petitioner in his service record, his selection to the Selection Grade and the award of President’s Police Medal and his selection by the Union Government to the post of Deputy Inspector General of Police. These were relevant matters which went a long way in showing the efficiency and merit of the petitioner. The Selection Committee

has not made any reference to these matters in its report nor is there any averment in the affidavit of the Chief Secretary or the Home Secretary, the two members of the Selection Committee. The directions contained in the Government letter dated 26th August, 1976 required the Committee to consider the entire service record of the petitioner. The Committee was under a legal duty to consider the relevant matters as discussed above, since the committee failed to consider the petitioner's case in accordance with the directions of the Union Government its recommendation for superseding the petitioner was vitiated. We need not advert to the question that violation of even administrative instructions having statutory force is enforceable in a Court of law. In this connection we would refer to the decision of the Supreme Court in Union of India v. K. P. Joseph and others (AIR 1973 SC 303), where it was held that an administrative order confers justiciable right provided it is statutory in nature. The directions contained in the Union Government's letter dated 26th August, 1976 are statutory in nature as was held by the Supreme Court in Sant Ram Sharma v. Union of India (AIR 1967 SC 1910). We are therefore of the opinion that the Selection Committee acted in violation of the statutory directions contained in the Union Government's letter dated 26th August 1976, which vitiates its recommendations."

9. One another judgment relied upon by the learned counsel for the applicant is in the case of **Baidyanath Mahapatra vs. State of Orrisa and another**, reported in (1989) 4 SCC 664. Though this judgment relied upon relates to compulsory retirement, but in this case also Hon'ble the Supreme Court has held that adverse entries awarded in remote past and preceding promotion and crossing of efficiency bar, cannot form the basis of compulsory retirement.

Relevant portion of the decision in the case of **Baidyanath Mahapatra**, for convenience sake, is reproduced as under:-

“.... If those entries did not reflect deficiency in appellant’s work and conduct for the purpose of promotion, it is difficult to comprehend as to how those adverse entries could be pressed into service for retiring him prematurely. When a government servant is promoted to a higher post on the basis merit and selection, adverse entries if any contained in his service record lost their significance and those remain on record as part of past history. It would be unjust to curtail the service career of government servant on the basis of those entries in the absence of any significant fall in his performance after his promotion.”

10. In view of above, there appears to be no room of doubt that adverse entries or punishment awarded to the petitioner prior to promotional stage, i.e. 01.01.1987 shall not come in the way to consider him for promotion on the next higher rank of Naib Subedar.

11. There is one more reason. A perusal of the counter affidavit indicates that applicant’s name was not considered at all because of aforesaid red ink entries/punishment awarded to him on 03.11.1979 that too on unfounded grounds and contrary to well settled proposition of law. Right to promotion is not only a fundamental right; rather it also affects civil right of the incumbent to avail promotional avenue which does not only enhances his status but also provides more salary as source of livelihood. In the case of **Ajit Singh and**

others (II) vs. State of Punjab and others, reported in (1999) 7

SCC 209, the Constitutional Bench held as under :-

“22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the “State shall not deny to any person equality before the law or the equal protection of the laws”. Article 16(1) issues a positive command that

“there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”.

It has been held repeatedly by this Court that (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularizes the generality in Article 14 and identifies, in a constitutional sense “equality of opportunity” in matters of employment and appointments to any office under the State. The word “employment” being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be “considered” for promotion. Equal opportunity here means the fight to be “considered” for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be “considered” for promotion, which is his personal right.

“Promotion” based on equal opportunity and “seniority” attached to such promotion are facets of fundamental right under Article 16(1).”

23. Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of “seniority-cum-suitability”, the eligible seniors at the basic level as per seniority

fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through the process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotes but in all cases the seniormost person at the basic level is to be considered first and then the others in the line of seniority.) That is how right to be considered for promotion and the "seniority" attached to such promotion becomes important facets of the fundamental right guaranteed in Article 16(1).

12. In view of above, we are of the view that the applicant has been superseded substantially against the settled principles of law and gross injustice has been done to him for the reason that his batch mates have already been promoted on the post of Naib Subedar and have retired or may retire availing higher pensionary benefits, perks and status.

13. As a result, the O.A. deserves to be allowed; hence allowed. Impugned orders dated 04.03.2016 (Anneuxre-1 to

the O.A.) is set aside. We further direct the respondents to notionally promote the applicant to the rank of Naib Subedar along with his batch mates with all consequential benefits for the purpose of payment of post retiral dues, arrears and perks and re-fixation of back wages expeditiously, say, within a period of four months from today. However, back wages and arrears of salary and pension etc. is confined to 50% out of total entitlement of the applicant for the rank of Naib Subedar.

14. O.A. is **allowed** accordingly.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Dated:16.08.2017

anb