

COURT NO 1
RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION No 26 of 2016

Monday, this the 20th day of August, 2018

“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

Noor Ahmad Son of Babu Chachadi, Resident of KW-111, JK Ashiyana, Kareli, District-Allahabad.

...Petitioner

Counsel for the applicant: **Shri O.P. Kushwaha**, Advocate

Versus

1. Union Government of India, Ministry of Defence through Director (AG) New Delhi-110011.
2. Chief of the Army Staff, Sena Bhawan, New Delhi.
3. Officer-in-Charge, AOC Records, Secunderabad.
4. Principal Controller of Defence Accounts (Pensions), Draupadi Ghat, Allahabad.

.... Respondents

Ld. Counsel for the Respondents : **Dr. Shailendra Sharma Atal**,
Central Government Counsel

ORDER**“Per Hon’ble Air Marshal BBP Sinha, Member (A)”**

1. The petitioner had filed Civil Misc Writ Petition bearing No 24150 of 2009 in the High Court of Judicature at Allahabad which has been transferred to this Tribunal in pursuance to powers conferred under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 26 of 2016. The petitioner has prayed for the following reliefs:-

(a) A writ, order or direction in the nature of certiorari quashing the impugned order dated 04.03.2009 issued by respondents No 3 in pursuance of respondent No 4 letter dated 03.09.1998 (Annexure No 1).

(b) A writ order or direction in the nature of mandamus commanding the respondents to grant Naib Subedar pension and other benefits for the Naib Subedar rank.

(c) A writ, order or direction in any other nature as this Hon’ble Court deem fit and proper in the circumstances of the case.

(d) Award cost of this writ petition.

2. Prior to filing of the present petition, the petitioner had preferred a Civil Misc Writ Petition bearing No 50475 of 2008, ***Noor Ahmad vs Union of India & Ors*** in the High Court of Judicature at Allahabad against non consideration of his representation dated 10.07.2008 for promotion to Naib Subedar. This petition was disposed off vide order dated 30.09.2008 directing the respondents to decide the petitioner’s representation at an early date. Thereafter the respondents considered the representation of the applicant and rejected the same vide their letter dated 04.03.2009.

3. The undisputed facts are that the petitioner was enrolled in the Army Ordnance Corps (AOC) on 28.09.1983 and was promoted to the rank of Hav on 01.01.1990 alongwith his batchmates. He retired as a Hav on 30.09.2007. The petitioner was screened for detailment in promotion cadre course from Hav to Naib Subedar commencing from 11.04.2005 but was not found suitable due to his lacking in Map Reading Standard Two (mandatory Military Education), required for detailment in Hav to Naib Subedar cadre course. Around this time of service the petitioner was also required to submit his option for extension of 02 years service. On 07.12.2005 the petitioner submitted his written unwillingness for extension of two years of service. Accordingly his discharge order was issued vide Record Office letter dated 31.07.2006 on completion of 24 years of service as Hav and the applicant retired on 30.09.2007.

4. As far as promotion to Naib Subedar is concerned, the petitioner finally passed his Map Reading Standard Two in December 2006 (Notified vide Part II Order dated 09.02.2007) and became eligible for detailment in promotion cadre course from Hav to Naib Subedar. Since the promotion cadre for training cycle of 2006-07 had already commenced, the petitioner could not be detailed for the said cadre till 30.06.2007, he was detailed to undergo the cadre for training cycle of 2007-08 commencing from 02.07.2007 which he passed on 01.09.2007 and became eligible for promotion to the rank of Naib Subedar w.e.f. 02.09.2007. However, he could not be promoted to the next higher rank due to

non availability of a vacancy till his retirement on 30.09.2007. Representation dated 10.07.2008 submitted by the petitioner for denial of opportunity for earlier detailment to Naib Subedar cadre course was suitably replied by AOC Records vide letter dated 04.03.2009 justifying the reasons as to why he could not be detailed earlier.

5. Ld. Counsel for the petitioner pleaded that since the petitioner had passed Map Reading Standard Two and promotion cadre from Hav to Naib Subedar 09 months before his retirement, he should have been promoted to the rank of Naib Subedar rather than retiring him in the rank of Hav on 30.09.2007. He also claimed that the respondents could have detailed the applicant earlier for Naib Subedar cadre course rather than detailing him for the July 2007 course. He further claimed that after passing Hav to Naib Subedar cadre course on 01.09.2007, the applicant asked for 02 years' extension of service but the same was not given. He finally concluded that respondents have been unfair to applicant hence he should be given promotion to the rank of Naib Subedar.

6. Per contra Ld. Counsel for the respondents submitted that upto 30.09.2007, i.e. date of retirement of the petitioner, there was no vacancy to promote the petitioner to the rank of Naib Subedar hence he was discharged from service on 30.09.2007. Ld. Counsel for the respondents conceded that the petitioner had passed promotion cadre from Hav to Naib Subedar on 01.09.2007 and became eligible for consideration for promotion to Naib Subedar on 02.09.2007 but due to non availability of Naib

Subedar vacancy in the Corps till 30.09.2007 the petitioner could not be promoted to the rank of Naib Subedar. It was further submitted that had the petitioner exercised his willingness in time for extension of two years service instead of opting for unwillingness, he would have been retained in service beyond 30.09.2007 and consequently he could have been promoted to the rank of Naib Subedar on or after 01.10.2007.

7. We have considered the rival submissions of Ld. Counsel for the parties and found that the personnel who qualified in all aspects were detailed to attend Hav to Naib Subedar cadre course commencing from 11.04.2005 to 11.06.2005 but the petitioner could not be detailed due to his lacking of Map Reading criteria and this resulted in his late detailment for the promotion cadre course. Thereafter the petitioner passed Map Reading Standard Two and Hav to Naib Subedar cadre course on 01.09.2007 but could not be promoted to the next higher rank in next 29 days owing to non availability of vacancies before his retirement on 30.09.2007.

8. The Ld. Counsel for the respondents extensively relied upon O.A. No. 117 of 2012, ***Hav Bal Bahadur Katuwal vs. Union of India & Ors***, decided on 10.04.2013 by Armed Forces Tribunal, Kolkata the respondents have argued that in identical circumstances, the case of the applicant in said O.A. was dismissed on the ground of submission of unwillingness certificate for extension of two years of service. He read out the relevant

portion of the aforesaid judgment which is reproduced as follows:-

“1 to 9. X x x x x

10. We have analysed the entire issue in this matter and have gone into the affidavits and submissions made by the learned counsel from both sides. The sum and substance of the applicant's prayer for promotion lie on the facts that the applicant was approved for promotion from Havildar to Naib Subedar but could not be promoted due to non-availability of vacancy. By the time one vacancy for Naib Subedar occurred in his Battalion (3/9 GR), this Infantry Soldier (Soldier GD), who is the applicant, became overage (beyond 44 years) making him ineligible for promotion. He also was not willing for any extension of service in the rank of Havildar as is evident from his option certificate signed by the applicant on 15.01.2011 (Annex. R-1). Therefore he retired after completion of 24 years of service in accordance with his terms and conditions of service. While adjudicating on this matter, we have analysed the following points:-

- (a) Firstly, the applicant attained the age of 44 years on 16.12.2011 thus making him ineligible for promotion to the rank of Naib Subedar which is absolutely in accordance with rules as has been justified by the respondents.
- (b) Being an Infantry Soldier in the category of 'Soldier GD', the rules for promotion did not allow the applicant to be transferred from one Battalion to another to avail the facilities of seniority to enable him promotion. It is a fact that in the Infantry, unit/battalion seniority is maintained while according promotion to NCOs and JCOs in Soldier GD Category. This is a policy matter which is well within the rules and such policy have never been challenged by the applicant. Therefore the respondents were bound by rules and regulations to consider him for promotion within the unit seniority of 3/9 GR which is the unit of the applicant. In this regard, no injustice appears to have been done by the respondents in any manner. Therefore, there is no instance for supersession while promotion was not given to the applicant.
- (c) Although there is a provision for relaxation of age criteria for promotion to be exercised by the COAS in exceptional cases, the applicant at no stage has made out any case for himself to deserve exceptional discretion. In this regard, we have also gone through the service records of the applicant, as submitted before us in original by the respondents. On perusal we find that the applicant has been performing his routine duties to the entire satisfaction of his superiors and has obtained routine professional achievements like his peers within the routine field of duties without any out of the ordinary or exceptional achievements. We have considered the ratio of the Karnataka High Court judgment in the case of Havildar N Bheeman vs Union of India. The *ibid* judgment relates to a petitioner who made out a case for himself where his commanding officer had considered his service as

extremely impressive. In the present case, however, the applicant has not made out any case to deserve such exceptional discretionary treatment. The ratio of the ibid judgment thus does not squarely benefit the applicant's case, although the Ld. Counsel for the applicant vigorously attempted to draw some parallel between the two. Therefore, the authorities have committed no injustice in not considering providing him relaxation of age criteria as exceptional case under special discretionary powers of the COAS.

11. *The applicant retired after completion of his normal terms of service having completed 24 years of service. He was unwilling for extension of service by two years as per an option certificate exercised by him on 15.01.2011 (Annex R-1). In this aspect, therefore we also find no injustice has been done by the respondents.*

12-13. x x x x

14. *In view of what has been discussed above, we do not find any merit in this case, which is accordingly dismissed. There will be no order as to costs."*

9. We have given our anxious consideration to the entire issue involved in this case and have gone into the affidavits and submissions made by the Ld. Counsel for both the parties. The sum and substance of the applicant's prayer for promotion lies on the fact that the petitioner was approved for promotion from Hav to Naib Subedar on 01.09.2007 but could not be promoted in next 29 days due to non-availability of vacancy upto the date of the retirement of the petitioner i.e. 30.09.2007. The petitioner had submitted unwillingness certificate for 02 years extension of service in the rank of Hav as is evident from his signed option certificate dated 07.12.2005. The petitioner could have got his promotion at a date beyond 30.09.2007 if he had opted for 02 years extension of service, well in time. It appears that he has tried to change his option to willingness in the last month of his service i.e. September 2007, however the same was too late and

the respondents cannot be blamed for not responding to such a late request.

10. In view of the above findings and collusions the O.A. is liable to be dismissed.

11. It is accordingly **dismissed**.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : 20 August 2018
gsr