

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

**Review Application No. 09 of 2022  
Inre O.A. No. 107 of 2021**

**Wednesday, this the 4<sup>th</sup> day of January, 2023**

**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)  
Hon'ble Vice Admiral Atul Kumar Jain, Member (A)**

No. 15413260-K, Ex Sep (ACP-I) Dhananjay Kumar Singh  
S/o Sri Binod Kumar Singh  
R/o Vill – Ghteyan, Post – Auraiyan, Tehsil – Mohaniya,  
Dist – Kaimpur Bhabua  
Presently residing at Parasuram Nagar Colony, Manduwa Dih,  
Rohania, Varanasi (UP) – 221008

..... Applicant

Ld. Counsel for the Applicant: **Shri Parijaat Belaura**, Advocate

Versus

1. The Union of India, through Secretary, Ministry of Defence, New Delhi.
2. Addl Dte Gen of Personnel Service Adjutant General's Branch, Integrated Headquarters, Ministry of Defence (Army), L-1 Block, church Road, New Delhi-01.
3. Officer-in-Charge, Record Office, Army Medical Corps, Pin-900450, C/o 56 APO.
4. The Principal Controller of Defence Account (Pension), Draupadi Ghat, Allahabad (UP).

..... Respondents

Ld. Counsel for the Respondents : **Shri Arvind Kumar Pandey**,  
Central Govt Counsel.

**ORDER**

1. The applicant has filed this Review Application under Rule 18 of the Armed Forces Tribunal (Procedure Rules 2009). By means of this Review Application, applicant has prayed "*that this Hon'ble Tribunal may kindly be pleased to review the order dated 04.01.2022 and set*

*aside the same and Original Application be decided on merit after providing opportunity of hearing to the applicant.”*

2. Heard Shri Parijaat Belaura, learned counsel for the applicant and Shri Arvind Kumar Pandey, learned counsel for the respondents.

3. The moot question which arises for consideration in the instant review application is whether benefits of financial upgradation as envisaged in IHQ of MoD (Army) letter dated 13.06.2011 can be denied to an armed force personnel merely on the basis of unwillingness certificate submitted by the personnel without actually offering the promotion to the next higher rank and denied the same?

4. Facts giving rise to application in brief are that applicant was enrolled as Sepoy in the Indian Army on 18.07.2001 and was discharged in the rank of Naik (TS) 31.07.2018 after rendering 17 years and 14 days of service on fulfilling the term of engagement. He was received first financial upgradation in the rank of Naik on 18.07.2009 on completion of eight years service in the rank of Sepoy and was due to receive second financial upgradation in the rank of Havildar on completing sixteen years of service in the rank of Sepoy but the same was denied on basis of unwillingness certificate submitted by him. His case is that he was never offered any promotion during entire career of his service and the unwillingness to accept promotion could only arise if promotion is offered and not accepted by the applicant. The unwillingness certificate which the respondents have referred in their counter affidavit was taken from the applicant at the time of his last leg posting which had nothing to

do with promotion as applicant never intended to refuse promotion, therefore, this could not be made basis for denial of financial upgradation.

5. In support, learned counsel has placed reliance on judgement dated January 03, 2022 of the Hon'ble Apex Court in Civil Appeal Nos.7027-7028 of 2009, **Union of India & Ors Vs Manju Arora & Another** and of this Tribunal dated September 07,2022 in O.A. No. 154 of 2022, **Ex L/NK Navdeep Kaur Vs Union of India & Ors.**

6. .Learned counsel for the applicant submitted that after second financial upgradation being denied by the respondents the applicant had filed O.A. No. 107 of 2021 in this Tribunal seeking directions to the respondents to grant second financial upgradation in the rank of Havildar but the same was dismissed on the ground of unwillingness certificate submitted by the applicant at the time of his last leg posting. The Tribunal while passing the order has failed to consider that no promotion either in the rank of Naik or Havildar was ever offered to the applicant therefore, there was no occasion for him to deny the promotion and even first financial upgradation in the rank of Naik was given on completing the term of eight years in the rank of Sepoy as a relief to avoid the rigour of stagnation for continuously working for so many years in the same rank without promotion. Had promotion been actually offered and refused by the applicant by submitting unwillingness certificate then position would be different and order denying second financial upgradation based on unwillingness certificate could be justified, but as no such situation

existed in the case, this is an apparent error on the face of record and order needs to be reviewed.

7. On the other hand, learned respondents' counsel submitted that scope of review is very limited to the extent of apparent error on the face of the judgement, i.e. court can review its judgement only when there is apparent error in the judgement. If there is no error in the judgement the same can't be reviewed.

8. Learned respondents' counsel submitted that in respect of PBOR in armed forces rank wise term of engagement is fixed i.e, 17 years for sepoy, 22 years for Naik, 24 years for Havildar and so on. Applicant did not want to continue in service after completing the term of engagement in the rank of Sepoy that is why he submitted unwillingness certificate so that he may not be promoted to higher ranks. As applicant did not want to be promoted and for that purpose he had submitted unwillingness certificate therefore, he was rightly denied the second financial upgradation of the rank of Havildar. Thus he submitted that there is no apparent error in the judgement so that the same may be reviewed.

9. Before reverting to the submissions made by learned counsel of the parties we would like mention that earlier there was no scheme of Assured Career Progression in government services and number of posts in higher ranks being limited there was a lot of frustration among personnel due to being stagnated in the same rank for a long time. To overcome this difficult situation Govt. of India came up with a policy based on recommendations of Vth Central Pay Commission. In

the policy two financial upgradations were provided to the personnel in the manner that if a personnel on her/his appointment remains stagnated for 12 years in the same rank for want of vacancy she/he will get the benefit of scale of next higher rank in the form of financial upgradation without being promoted to that rank. Similarly, if after getting first financial upgradation she/he again remains stagnated for 12 years, she/he will get the benefit of second financial upgradation on completion of 24 years in the next higher rank without being promoted to that rank and thereafter she/he will not get any further financial upgradation for want of promotion. This policy was made effective from 1st January 1996. However, in the case of armed force personnel, two financial upgradation were to be granted based on recommendations of Vth Central Pay Commission, first on completion of 10 years of service and second on completion of 20 years of service and thereafter individual will not get any further financial upgradation for want of promotion.

10. Based on recommendations of VI Central Pay Commission policy for the grant of three financial upgradation on interval of 10, 20 & 30 years for want of promotion in the same rank was introduced for central government employees and this policy is effective from January 01,2006.The above policies were later followed in the armed forces also with a little variation in respect of policy based on recommendations of VI Central Pay Commission effective from January 01,2006.The letter in this regard has been issued by the Gol, MoD No. B/33513/ACP/AG/PS-2(C) dated 13.06.2011 and it provides

three financial upgradation to the armed forces personnel on interval of 8,16 and 24 years for want of promotion unlike 10, 20 and 30 years in the case of central government employees. The letter clearly states that an armed force personnel will get first, second and third upgradation only when she/he remains stagnated in the same rank for eight years and in the event of first promotion being got within the given time of eight years she/he will be allowed second financial upgradation only when he is not promoted in the next higher rank within eight years from the date of first promotion and so on in the case third promotion and thereafter, there will be no further financial upgradation. For the sake of convenience, para 8 of policy is reproduced as under:-

*“8. Financial Upgradation on ACP. There shall be three financial upgradations under the MACPS, counted from the direct entry grade on completion of 8, 16 and 24 years service respectively. Financial upgradation under the Scheme will be admissible whenever a person has spent 8 years continuously in the same grade pay. MACP will imply a minimum increase of 3% of total pay (including Grade Pay, 'X' Group Pay, where 6 applicable) applicable to the rank in respect of which MACP is being granted.”*

11. Hon'ble Apex Court in the case of **Manju Arora** (supra) had occasion to examine the policy in respect of central government employees and held that in the event when substantive promotion is offered to an employee and he refuses to accept the same then only the benefit of financial upgradation can be denied to her or him otherwise not. It further held that question to deny promotion would only arise when it is actually offered and not accepted on own volition. However, if no promotion is ever actually offered no question of denying the promotion will arise and employee will be entitled to

the benefit of financial upgradation, as the case be. Relevant paras of the judgement are reproduced for the sake of convenience as under:-

“13. Reading of the ACP Scheme shows that financial upgradation would accrue to an employee only if no regular promotions have been received by her/him at the prescribed intervals of 12 and 24 years respectively. In the entire service career, an employee is entitled to financial upgradation if the concerned employee had to suffer stagnation in the same post without benefit of any regular promotion and, as earlier stated, the O.M. dated 9.8.1999 was introduced as a “safety net” to deal with the problems of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. But can the benefit of the Scheme be claimed by an employee when she, despite offer of regular promotion, refuses to accept the same and chooses to remain in the existing grade of her own volition?

14. As can be seen from the records, Manju Arora and Suman Lata Bhatia were offered promotion to higher grade on multiple occasions, but they refused the same and chose to continue in the existing pay scale. The purport of the O.M. dated 9.8.1999 was subsequently clarified by the O.M. dated 18.7.2001 where it was specifically provided that an employee who had been offered regular vacancy based promotion before grant of ACP benefit and the regular promotion was refused, she/he become ineligible to the grant of the ACP benefits. Even without the clarificatory notification dated 18.7.2001, a plain reading of clause 5.1 of the O.M. dated 9.8.1999 makes it abundantly clear that an employee who has opted to remain in the existing grade, by refusing offer of promotion, forfeits the rights to ACP benefits and such employee, on account of refusal, can be considered for regular promotion only after necessary debarment period is over.

15. However, despite the clear wordings in condition 5.1, the purport of the OM dated 9.8.1999 was missed out in the impugned judgment and the learned Court unnecessarily adverted to the words in condition 10 of the O.M. to hold in favor of the employees who have refused promotion for their own personal reasons.

16. We are quite certain that if a regular promotion is offered but is refused by the employee before becoming entitled to a financial upgradation, she/he shall not be entitled to financial upgradation only because she has suffered stagnation. This is because, it is not a case of lack of promotional opportunities but an employee opting to forfeit offered promotion, for her own personal reasons. However, this vital aspect was not appropriately appreciated by the High Court while granting relief to the employees.

17. It may also be observed that when an employee refuses the offered promotion, difficulties in manning the higher position might arise which give rise to administrative difficulties as the concerned employee very often refuse promotion in order to continue in his/her own place of posting.

18. In the above circumstances, we find merit in the submissions made on behalf of the appellants. Consequently, it is declared that the employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M.

dated 9.8.1999. In this situation, the Scottish doctrine of “Approbate and Reprobate” springs to mind. The English equivalent of the doctrine was explained in *Lissenden v. CAV Bosch Ltd.*<sup>1</sup> wherein Lord Atkin observed at page 429, “.....In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other.....” The above doctrine is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate, or to put it colloquially, “eat their cake and have it too”. It is declared accordingly for the respondents in the C.A. Nos.7027-28/2009.

19. However, the above would not apply to the two respondent employees Kanta Suri and Veena Arora in C.A Nos.7150-7151/2009 as they were not offered regular promotion but conditional promotion on officiating 1 [1940] A.C 412 basis subject to reversion, by the order dated 29.12.1988. These two employees cannot be said to have exercised a choice between alternatives and as such the above Principle would not apply and their refusal to accept the officiating promotion cannot be held against them. The refusal of the promotion offered by the communication dated 29.12.1988 will not disentitle the two employees, Kanta Suri and Veena Arora to the benefits under the ACP Scheme. It is declared accordingly.”

12. When we examine the case of the applicant in the above contexts we find that applicant who joined the service of the Indian Army as Sepoy on 18.07.2001 and discharged on 31.07.2018 from service was never offered any promotion in his entire career. He was given first financial upgradation in the rank of Naik w.e.f. 18.07.2009 on completing eight years from the date of his enrolment. He was due for second financial upgradation in the rank of Havildar w.e.f. 18.07.2017 on completing the term of another eight years from the date he was given first financial upgradation, but the same was denied to him on the ground he had submitted unwillingness certificate. The certificate submitted by the applicant was used as tool for declining second financial upgradation to him without taking the fact into account that second financial upgradation could only be refused if promotion had actually been offered and refused otherwise

not. Since applicant was never offered promotion in his entire career he ought to have been allowed second financial upgradation despite he had submitted unwillingness certificate. This important aspect being left to be considered while passing judgement in the O.A., order needs to be reviewed as under.

13. The Original Application No. 107 of 2021 is allowed. Applicant is held entitled to second financial upgradation in the rank of Havildar with effect from 18.07.2017. The respondents are directed to grant MACP II to the applicant w.e.f. 18.07.2017. The respondents are directed to give effect to the above order within a period of four months from the date of receipt of certified copy of the order. Default will invite interest @ 8% per annum till actual payment.

14. No order as to costs.

15. Pending Misc. Application(s), if any, shall be treated to have been disposed off.

**(Vice Admiral Atul Kumar Jain)**  
**Member (A)**

**(Justice Umesh Chandra Srivastava)**  
**Member (J)**

Dated : January, 2023

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