

**Reserved
Court No. 1**

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

Original Application No. 399 of 2018

Thursday, this the 23rd day of May, 2019

**Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)**

Ex No.14531234-K HAV (Dtmn) Shiv Kumar Tiwari, son of late Durga Prasad Tiwari, resident of Village Rosipurwa, post Parsa Gondri, District Gonda (UP).

.....Applicant

Ld. Counsel for the applicant: **Col (Retd) Rakesh Johri &
Shri Bhanu Pratap Singh Chauhan,
Advocates.**

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi-110001.
2. Chief of the Army Staff, Integrated Headquarters of the Ministry of Defence, South Block, New Delhi – 110001.
3. Adjutant General, Integrated Headquarters of the Ministry of Defence, South Block, New Delhi, 110001.
4. Director General EME, Master Gen of Ordnance Branch, IHQ of Min of Def (Army) DHQ PO New Delhi – 110105.
5. Officer-in-Charge, EME Records, PIN-900453, C/O 56 APO.

.....Respondents

Counsel for the Respondents : **Shri A.K. Sahu,**
Addl Central Government Counsel.

ORDER.

“Per Hon’ble Mr Justice SVS Rathore, (Member-J)”

1. The applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

“(a) To issue/pass an order or direction to the respondents to set aside/quash the arbitrary order of denial of rank of Hony Naib Subedar w.e.f. 01 Dec 2004 as contained in EME Record Office letter dated 24.10.2017 (Annexure No A-1).

(b) To issue/pass an order or direction to the respondents to produce the proceedings of consideration of the Applicant for grant of rank of Hony Naib Subedar before the Hon’ble Tribunal.

(c) To issue/pass any other order or direction to the respondents to grant pensionary benefits of Hony Naib Subedar to the Applicant.

(d) Issu/pass any other order or direction as this Honourable Tribunal may deem fit in the circumstances of the case.

(e) Allow this application with cost.”

2. In brief, the facts of the case are that the applicant was enrolled in the Corps of EME on 22.11.1978. He was promoted to the rank of Paid Acting Havildar w.e.f. 11.06.1992 with ante date seniority w.e.f. 01.05.1992 and Substantive Havildar w.e.f. 01.04.1995. On completion of the term of engagement, he was discharged from service on 30.11.2004.

3. The claim of the applicant in the instant petition is for grant of rank of Hony Naib Subedar. Earlier to the filing of the present O.A., the applicant had preferred Civil Misc. Writ Petition No. 52503 of 2002 before the Hon’ble High Court of Judicature at Allahabad with prayer for relaxation of age limit for promotion to the rank of Naib

Subdear. Said Writ Petition was disposed of by the Hon'ble High Court vide order dated 13.12.2002 with a direction to the respondents to dispose of the statutory complaint preferred by the applicant within three months. Consequent to it, the statutory complaint was considered by the Chief of the Army Staff and was rejected vide order dated 23.04.2003 with due communication to the applicant. Thereafter, the applicant preferred Civil Misc Writ Petition No. 26067 of 2003 before the Hon'ble High Court of Judicature at Allahabad with prayer for a direction to the respondents to promote the applicant to the rank of Naib Subedar w.e.f. 01.12.2002 and to grant him other consequential benefits. It appears that during the pendency of said Civil Misc. Writ Petition No. 26067 of 2003, the applicant preferred yet another Writ Petition bearing No. 8161 of 2007 before the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, Lucknow with the same prayer to promote him to the rank of Naib Subedar after granting relaxation of age limit. Said Writ Petition No. 8161 of 2007 was transferred to this Tribunal and was renumbered as T.A. No. 20 of 2009. Upon hearing of the T.A., vide order dated 13.05.2010, said T.A. No. 20 of 2009 was dismissed by the Tribunal being devoid of merits. Meanwhile, Civil Misc. Writ Petition No. 26067 of 2003 filed by the applicant before the Hon'ble High Court of Judicature at Allahabad was also transferred to this Tribunal and was renumbered as T.A. No. 53 of 2016. This Writ Petition was dismissed as withdrawn by order dated 10.07.2017 of this Tribunal.

4. Thereafter, the applicant moved an application before the respondents for grant of rank of Hony Naib Subedar which was replied by the respondents. Now the applicant has preferred the instant O.A. before this Tribunal to quash EME Records letter dated 24.10.2017 rejecting the claim of the applicant for grant of rank of Hony Naib Subedar.

5. From the facts narrated hereinabove, it is evident that the applicant's prayer for grant of regular rank of Naib Subedar after relaxation of age was rejected by the Tribunal vide order dated 13.05.2010 passed in earlier T. A. No. 20 of 2009. Now the present O.A. has been filed by the applicant for quashing order dated 24.10.2017 passed by the respondents rejecting the claim of the applicant for grant of rank of Hony Naib Subedar.

6. The ground taken by the respondents is that since the applicant did not come within the promotional zone, as such, in the final merit list, his name was not included and he is not entitled for promotion to the rank of Hony Naib Subedar. It is argued by learned counsel for the respondents that the Havildars of the Regular Army who fulfill the eligibility criteria are considered for grant of Hony Rank of Naib Subedar on retirement within one year of their becoming non-effective. Award of Hony Rank is purely based on merit-cum-seniority criteria against the existing vacancies and final list is drawn. Recommendation in respect of the applicant was forwarded for grant of rank of Hony Naib Subedar on the occasion of Republic Day 2005.

However, since the applicant did not come in the final merit list, he was not granted rank of Hony Naib Subedar. Hence he is not entitled for pensionary benefits in the Hony rank of Naib Subedar.

7. Learned counsel for the applicant argued that the applicant was not considered for grant of rank of Hony Naib Subedar in view of Regulation 180 of the Regulations 1987 (Volume-1) for the Army while he was entitled for the same in view of criteria given in Regulation 180 (surpa).

8. Regulation 180 of the Regulations for the Army (supra) reads as under:

“180. Honorary Rank of Naib Subedar on Retirement.-
The following are eligible for the grant of honorary rank of Naib Subedar, on retirement:-

- (a) *Dafadar and Havildar clerks (including those employed in recruiting offices) with twenty eight years' pensionable service.*
- (b) *Dafadars and Havildars (other than clerks) who have not less than 21 years' meritorious pensionable service and have served for two years in the rank of Dafadar/Havildar in a substantive capacity.*
- (c) *Individuals in (a) and (b) above whose pensionable service is not sufficient to qualify under those clauses but who have rendered specially meritorious service.”*

9. The applicant for the first time moved application for grant of rank of Hony Naib Subedar on 29.09.2017 while he stood discharged in the rank of Havildar on 30.11.2004. Thus, after lapse of about 14 years, he has raised claim for grant of rank of Hony Naib Subedar while his claim for the promotion to the rank of regular Naib Subedar has been rejected by the Court of competent jurisdiction and the order rejecting his claim has attained finality by efflux of time.

10. At this stage, we feel appropriate to reproduce Order II Rule 2 of the Code of Civil Procedure, which reads as under:

“2. Suit to include the whole claim. –(1) *Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*

(2) **Relinquish of part of claim.** -*Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*

(3) **Omission to sue for one of several reliefs.**- *A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so-omitted.*

Explanation.- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

11. In view of aforesaid provision of the Code of Civil Procedure, the applicant was supposed to raise his claim of Hony Naib Subedar in the earlier Writ Petitions, though the prayer may have been made in the alternative. Not raising his claim for the Hony rank of Naib Subedar, in the garb of Order II Rule 2 of the Code of Civil Procedure, it shall be deemed to have been waived off barring the applicant from raising same plea in a separate O.A.

12. The legal position for claim of promotion is manifested from the following decisions of Hon’ble the Apex Court.

13. In the case of ***P.S. Sadasivaswamy vs. State of Tamil Nadu*** reported in (1975) 1 SCC 152 : 1975 SCC (L&S) 22, their Lordships of Hon’ble Apex Court while considering a claim for promotion belated by 14 years, observed that a period of six months or at the

utmost a year would be reasonable time to approach a court against denial of promotion and that it would be a sound and wise exercise of discretion not to entertain such claims. The above dictum was followed by Hon'ble Apex Court in Civil Appeal No. 2763 of 2018 ***Union of India & ors vs. Chaman Rana*** and Civil Appeal No. 2764 of 2018 ***Union of India & ors vs. Gulshan Kumar Shukla***, reported in (2018) 5 SCC 798. Their Lordships of Hon'ble Apex Court observed that in service matters, especially with regard to promotion, there is always an urgency and aggrieved must approach court at earliest opportunity or within reasonable time. Repeated filing of representations would not be sufficient explanation for delay in approaching court. In para-8, it was observed thus:-

*“Manifestly, the cause of action first arose to the respondents on the date of initial supersession and again on the date when rejection of their representation was communicated to them, or within reasonable time thereafter. Even if the plea based on **Dev Dutt** {(2008) 8 SCC 725} be considered, the cause of action based thereon accrued on 12.5.2008. There has to be a difference between a cause of action and what is perceived as materials in support of the cause of action. In service matters, especially with regard to promotion, there is always an urgency. The aggrieved must approach the Court at the earliest opportunity; or within a reasonable time thereafter as third-party rights accrue in the meantime to those who are subsequently promoted. ...”*

14. In view of aforesaid settled principle of law, we do not find any justification in the claim of the applicant for grant of rank of Hony Naib Subedar with effect from the date of his discharge which relates to the year 2004.

15. After arguments were concluded by learned counsel for the applicant, the applicant argued the case in person and tried to make

certain emotional statements viz. his mother and father expired and prayed that the record of the case may be perused. We have perused the record carefully and are of the view that after demise of a member of the family or one or both the parents, the mourning would take place for a few months, and thereafter the life moves as usual and such unfortunate eventualities in life would not mean to give a license to the applicant to plead that he could not approach the appropriate forum for such a long period of more than 13 years or so.

16. As mentioned hereinabove, the categorical case of the respondents is that the applicant's name could not find place in the merit list for promotion to the rank of Naib Subedar. Therefore, in view of aforesaid legal position, after lapse of about 15 years, we do not feel it appropriate to unsettle the position and direct the respondents to prepare fresh merit list.

17. In view of our discussions made hereinabove, we do not find any merit in the petition which deserves to be dismissed.

18. It is accordingly **dismissed**.

No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

Dated: May , 2019

anb

(Justice SVS Rathore)
Member (J)