

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED
COURT NO. 2

O.A. No. 133 of 2016

Friday, this the 4th day of November, 2016

“Hon’ble Mr. Justice D.P.Singh, Judicial Member
Hon’ble Air Marshal Anil Chopra, Administrative Member”

No. 1484325 A Havildar Ghanshyam Tiwari, No. 2 Training Battalion,
Bengal Engineer Group and Centre Roorkee (Uttarakhand).

..... Applicant

Versus

1. Union of India Through secretary Ministry of Defence South Block New Delhi
2. Officer-in-Charge, records Bengal Engineer Group and Centre Roorkee (Uttarakhand)
3. The Commanding Officer 69 Engineer Regiment c/o 56 APO.

.....Respondents

Ld. Counsel appeared for the - Shri Ashish Asthana, Advocate.
Applicant

Ld. Counsel appeared for the -
Respondents
Assisted by OIC Legal Cell

Dr. Shailendra Sharma Atal,
Sr. C.G. S. C
Maj Soma John

Order

(Per Hon'ble Air Marshal Anil Chopra, Member (A))

1. This is Original Application under Section 14 of the Armed Forces Tribunal Act, 2007, has been preferred by the applicant being aggrieved with impugned order dated 04.12.2012 by means of which the applicant was severely reprimanded and was not promoted to the rank of Naib Subedar. The applicant has sought the following reliefs:-

- (a) *Quash the impugned order dated 04.12.2012 awarding severe reprimand.*
- (b) *To direct the respondents to promote the applicant to the rank of Naib Subedar with all consequential benefits, with effect from 01.04.2013 when his immediate junior was promoted.*
- (c) *If by any rationale the impugned order dated 04.12.2012 could not be quashed then he be promoted to the post of Naib Subedar through the promotion board held after 04.12.2013.*

2. Heard the Ld. Counsel for both the parties and perused the records.

3. The applicant was enrolled in the Corps of Engineers (Bengal Engineer Group) on 27.10.1990 as draftsman. On completion of military training the applicant was attested and posted to 59 Engineer Regiment. The applicant was promoted to the rank of Naik in the year 1987 and Havildar with effect from 01.12.2004. The applicant earned six ACRs in the rank of Havildar between 2005 to 2011 with Above Average/High Average grading. The applicant successfully qualified the Promotion Cadre Course for Havildar to Naib Subedar on 21.01.2012.

4. The applicant has set up a case that on 01.12.2012 during unit 'Bara Khana' the applicant requested for issue of an additional peg of rum. It is pleaded that Subedar S.C. Joseph of his company used abusive language to which the applicant took strong objection. On the next day the Junior Commissioned Officer (JCO) lodged exaggerated complaint to the Company Commander against the applicant. On 04.12.2012 the applicant was charged under Section 40 (c) of the Army Act, 1950 i.e. 'using insubordinate language to his superior officer'. During hearing of charge under Army Rule 22, the applicant pleaded 'Not Guilty'. However the applicant was awarded 'Severe Reprimand' which constituted a red ink entry. The applicant was not awarded any other punishment during his entire service except for the above punishment.

5. Ld. Counsel for the applicant stated that the applicant did not sign the offence report which is contrary to Army Rule 22 and is mandatory requirement. To give impetus to his submissions Ld. Counsel for the applicant cited the Division Bench decision of the High Court of Uttarakhand in Special Appeal No. 268 of 2009 **Ex Lance Naik (Cook) S. Sekar vs. Union of India & Ors.** The operative portion of the aforesaid judgment, for convenience sake, is quoted as under :-

".....The appellant had never pleaded guilty to the said charge and reiterated his allegations against Subedar B.K. Das. However, in the proforma used for the Summary Trial under Section 80 of the Army Act, 1950, the respondents authority recorded that the appellant had pleaded 'guilty' on his own. The said proforma admittedly does not bear the signature of the

appellant nor there is any other document signed by the appellant where he had pleaded 'guilty' of the charge.....".

6. Ld. Counsel for the applicant further submitted that Promotion Board for promotion of Havildar (GD) to Naib Subedar of the BEG was held under Respondent No. 2 in January 2013 in which the applicant, being in possession of all the requisite qualifications was entitled to be promoted to the next higher rank of Naib Subedar. However, when the result of Promotion Board was declared by respondent No. 2 vide letter dated 09.02.2013, the applicant was shocked to learn that though Havildar Shimbhu Singh, his immediate junior got approved for promotion, the applicant's name was not there in the list of approved candidates. A copy of the said letter dated 09.02.2013 is annexed as **Annexure – A/2.**

7. The applicant was posted out from 69 Engineer Regiment to BEG & Centre Roorkee on 04.01.2014. After joining his new unit, when the applicant made inquiries from the BEG Records Office about the reason of non inclusion of his name in the approved list dated 09.02.2013, he was informed that due to award of punishment of '**severe reprimand**' on 04.12.2012 which constituted a 'red ink entry' in his service record, the applicant had become ineligible for promotion to the rank of Naib Subedar for a period of one year as per Para 3 (f) of the Army HQ letter dated 10.12.1997, laying down the '**Criteria for Promotion: of JCOs/NCOs.**' Copy of the relevant extracts of the said policy letter dated 10.10.1997 are annexed as **Annexure–A/3.** For convenience sake Para 3 (f) of the said policy letter is reproduced hereunder :-

“ Discipline Criteria

3 (a) to (e). xxx

(f) *An individual will not be considered for promotion within one year of the award of red ink entry/censure as the case may be.”*

8. After completion of one year from the date of punishment i.e. on 04.12.2013 the applicant, being under 44 years of age in terms of ‘age criteria’ laid down under Regulation No. 149 of the Defence Services Regulations for the Army 1987, would have again become eligible for the said promotion to the rank of Naib Subedar in the next year’s Promotion Board. The said Regulation No. 149 is quoted as under:-

“149. Promotion.- JCOs.- (a) *NCOs except those given in Sub-para (b) below will not normally be promoted to the rank of JCO if over 44 years of age or with more than twenty-two years of service*
(b) to (f) xxx.”

9. Admittedly the applicant was due to superannuate on 31.10.2016 on the post of Havildar in pursuance of discharge order dated 27.08.2015 (**Annexure No A/4**).

10. In this backdrop Ld. Counsel for the applicant submitted that even if for argument sake it may be presumed that the punishment order would have continued for a period of one year in accordance with para 3 (f) of Promotion Policy dated 10.10.1997, the applicant was entitled for promotion to the rank of Naib Subedar after 04.12.2013, since on said date he possessed necessary qualifications including age criteria. It is submitted that the action of the respondents in denying promotional avenue to the applicant is hit by Article 14 and 21 of Constitution of India.

11. On the other hand Ld. Counsel for the respondents contended that the applicant was enrolled in the Army on 27.10.1990 and promoted to the rank of Havildar with effect from 11.01.2005 with seniority from 01.12.2007. The applicant had passed promotion cadre for promotion to the rank of Naib Subedar on 21.01.2012. He was considered for promotion to the rank of Naib Subedar along with his batch mates on 01.04.2013 but was not considered since he did not meet the disciplinary criteria as the applicant was awarded 'Severe Reprimand' under Section 40 (c) of Army Act, 1950 on 04.12.2012 which debarred him for promotion for one year i.e. up to 04.12.2013 in terms of Army HQ policy letter dated 10.10.1997. The applicant was again considered for promotion to the rank of Naib Subedar on completion of debarred period on 04.12.2013 but could not be promoted as he was not meeting ACR criteria on the date of promotion since he was having three 'High Average' and two 'Above Average' confidential reports as against the required three 'Above Average' and two 'High Average' ACRs which is mandatory requirement in terms of policy letter dated 10.10.1997 (supra).

11. A question cropped up during hearing of the case whether the O.A. is amenable to jurisdiction of this Tribunal. So far as the question of maintainability of the O. A. for quashing the punishment of 'Severe Reprimand' in this Tribunal is concerned it may be noticed that this Tribunal has allowed T. A. No. 49 of 2012 **Laxman Singh vs Union of India & Ors** regarding maintainability of the T.A. in which the punishment of Severe Reprimand awarded by the Commanding Officer under Section 80 of the Army Act, 1950 was under challenge.

The T. A. was allowed on 02.05.2014 holding that the punishment of Severe Reprimand formed the part of service matters, as defined in Section 3 (o) of the Armed Forces Tribunal Act, 2007. The relevant portion of the said order which is contained in para 16 is reproduced as under:-

*“16. Relying upon the judgment dated 20.02.2014, passed by the Division Bench of the Hon’ble High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in writ petition No 8051 of 1989, **Major Kunwar Ambreshwar Singh vs. Union of India**, we hold that the punishment of ‘Severe Reprimand’ awarded in Summary trial comes within the purview of the service matters as defined in Section 3 (o) of the Armed Forces Tribunal Act, 2007 and this Tribunal has jurisdiction to adjudicate the controversy in the instant case”.*

12. The applicant has impugned order dated 04.12.2012 awarding punishment of ‘Severe Reprimand’. Submission of Ld. Counsel for the applicant is that during hearing of charge, the applicant had pleaded not guilty. However, the Commanding Officer recorded plea of guilty in contravention to the mandatory provisions. It is submitted that Army Rule 22 (1) read with Rule 115 (2) of the Army Rules, 1954 have not been complied with. According to Ld. Counsel for the applicant the provisions contained in Army Rule 115 (2) in conjunction with Army Rule 52 (2A) have been given a go by. For convenience sake, Army Rule 52 (2A) and Army Rule 115 are reproduced as under:

“52. (2A). Where an accused pleads “Guilty” such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner:-

Before recording the pleas of “Guilty” of the accused, the court explained to the accused the meaning of the charge(s) to which he had pleaded “Guilty” and ascertained that the accused had understood the nature of the charge (s) to which he had pleaded “Guilty”. The court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge (s) and the effect of his plea of “Guilty”, accepts and records the same. ; The provisions of rule 52 (2) are thus complied with.)”

“115. General Plea of “Guilty” or “Not Guilty”.- (1) *The accused person’s plea – “Guilty” or “Not Guilty” (or if he refuses to plead, or does not plead intelligibly either one or the other, a plea of “Not Guilty”) – shall be recorded on each charge.*

(2) *If an accused person pleads “Guilty”, that plea shall be recorded as the finding of the court, but before it is recorded, the court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.*

[2A) Where an accused pleads “Guilty”, such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner:-

“Before recording the plea of “Guilty”, of the accused the court explained to the accused the meaning of the charge (s) to which he had pleaded “Guilty” and ascertained that the accused had understood the nature of the charge (s) to which he had pleaded “Guilty”. The court also informed the accused the general effect of the plea

and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge (s) and the effect of his plea of "Guilty", accepts and records the same. The provisions of rule 115 (2) are thus complied with.]

3. *Where an accused person pleads guilty to the first of two or more charges laid in the alternative, the court may, after sub-rule (2) of this rule has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges without requiring the accused to plead thereto, and a record to that effect shall be made upon the proceedings of the court."*

A plain reading of Army Rule 52 (2A) shows that when accused pleads "guilty" then pleading of "guilt" should be recorded on each charge. Further it provides that the Presiding Officer or Judge Advocate, on behalf of the Court, shall ascertain that the accused understands the nature of the charge to which he has pleaded "guilty". The averments contained in para 4.15 of the Original Application with regard to non compliance of Army Rule 115 (2) read with Army Rule 52 (2A) seems to be not categorically denied. In para-8 of the counter affidavit, a bald statement has been made that as per statement of accused, he pleaded guilty and did not want any witness to be brought for the same. No injustice has been done against the applicant. However, statement of accused annexed as Annexure-IV to the counter affidavit evidently shows that it has not been signed by the Commanding Officer. The reply seems to be vague and does not establish that the applicant was apprised by the Commanding Officer

with regard to consequence of guilt, which seems to be mandatory. In the case reported in AIR 1982 SC 1413 ***Lt Col Prithi Pal Singh Bedi vs. Union of India*** the Hon'ble Apex Court has held that Rules 22 and 23 are mandatory to the persons who are not officers. It has been settled by the Tribunal in the case of ***Rishi Ram Pandey v. Union of India***, T.A. No 1287 of 2010 decided on 06. 09.2012 that provisions contained in Rule 115 (2A) and Rule 52 (2A) are mandatory and its non compliance shall vitiate the trial.

13. The second limb of submissions of Ld. Counsel for the applicant is that the charge sheet has not been signed by the Commanding Officer. Rule 31 of the Army Rules, 1954 relates to signature on the charge sheet. It provides that charge sheet shall be signed by the Commanding Officer of the accused and shall contain the place and date of such signature. Rule 31 of the Army Rules 1954 is reproduced as under:

“Signature on charge-sheet. – The charge-sheet shall be signed by the commanding officer of the accused and shall contain the place and date of such signature.”

14. As perusal of the charge sheet, a certified true copy of which has been filed along with the counter affidavit, indicates that it does not bear signature of the Commanding Officer. The charge sheet thus loses its legal sanctity and on the basis of such defective charge sheet, the punishment of Severe Reprimand cannot be sustained in law.

15. Since we are of the view that the punishment of Severe Reprimand based on defective charge sheet is untenable, and on this

ground alone denial of promotional avenue by the Selection Board held in the year 2013 is against the mandatory provisions, we do not intend to burden our judgment with other grounds raised by the Ld. Counsel for the applicant.

16. In view of our observations made herein above, we are of the view that the punishment of Severe Reprimand awarded to the applicant cannot be sustained and deserves to be set aside.

15. The O.A. is allowed. The order awarding punishment of Severe Reprimand dated 04.12.2012 is set aside. The applicant shall be considered for promotion to the rank of Naib Subedar along with his batch mates in the Selection Year January 2013 ignoring the punishment of Severe Reprimand with all consequential benefits.

16. O.A. is allowed accordingly

No orders as to costs.

Interim order dated 20.10.2016 is hereby vacated.

(Air Marshal Anil Chopra)
Member (A)

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

Dt: November, 2016.

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