

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

(Court No. 2)

Transferred Application No. 13 of 2011

Wednesday, this the 23rd day of November, 2016

**“Hon’ble Mr. Justice D.P. Singh, Member (J)
Hon’ble Air Marshal Anil Chopra, Member (A)”**

Baban Prasad Tiwari, Havaladar S/O Lal Mohar Tiwari, Army No 13860333-X Unit No. 954 (I) PL-ASC (TK.TP. TR.) C/O 56 APO resident of village-Thori Pandey Pur, P.O. Murar, District Buxar (Bihar).

.....Petitioner

By Col (Retd) Ashok Kumar, Counsel for the petitioner.

Versus

1. Commander-in-Chief/Chief of the Army Staff, Army Head Quarter, New Delhi.
2. Senior Record Officer, ASC, MT Records, Sena Seva Corps Abhilekh, Bangalore-560007.
3. Officer Commanding 954 (I) Tank T.P.T.R. P.L., A.S.C., C/O 56 A.P.O.
4. G.O.C. 1, Corps C/O 56 APO.
5. G.O.C., 31 Armed Div C/O 56 APO.
6. Commanding Officer, 653 Coy ASC Tk Tp TR, C/O 56 APO.
7. CCDA Pensions Through OIC Pension Cell (Army) H.Q. ASA Allahabad.
8. Union of India Through Secretary Min of Defence, New Delhi.

.....Respondents.

By Ms Appoli Srivastava, Counsel for the respondents assisted by Major Soma John, Departmental Representative.

ORDER (Oral)

1. Being aggrieved with denial of promotion to the rank of Naib Subedar from the post of Havildar, the petitioner had preferred Writ Petition No. 30357 of 2002 in the High Court of Judicature at Allahabad which after establishment of the Tribunal has been transferred to this Tribunal in pursuance to Section 34 of the Armed Forces Tribunal Act, 2007 and renumbered as T.A. No. 13 of 2011.

2. We have heard Ld. Counsel for the parties at length and perused the record.

3. The factual matrix as brought on record is that the petitioner was recruited as soldier in the Army in the year 1977. Later on he was promoted to the rank of Lance Naik in the year 1987 and thereafter he was promoted on the post of Havildar in the year 1994. The controversy arose when the petitioner was denied promotional avenue from 14.02.2001 on the post of Naib Subedar. The Screening Committee to consider names for the purpose of promotional avenue was convened on 10.02.2001 but could not find the petitioner suitable for promotion on the post of Naib Subedar, hence he was superseded.

4. While pressing petitioner's cause for promotion on the post of Naib Subedar, the petitioner has stated in the memo of petition that petitioner's juniors have been promoted, but the petitioner was denied promotion and further the petitioner has been denied promotion on the post of Naib Subedar on unfounded grounds. In the memo of the Writ Petition as well as even in the grounds, no plea has been taken by the petitioner with regard to communication of any adverse entry, but during course of arguments, Ld. Counsel for the petitioner relied on supplementary affidavit raising ground that the respondents should have communicated Confidential Report entries for the year 1996 onwards, relying upon which the Committee had considered the names for promotion to the next higher post. It has further been argued that promotion is a fundamental right; hence the respondents cannot deny promotion on arbitrary grounds.

5. In response to arguments advanced by Ld. Counsel for the petitioner, Ld. Counsel for the respondents Ms. Appoli Srivastava submitted that petitioner's case was considered along with his batch mates, but since he was not eligible in accordance with Policy letter dated 10.10.1997, a copy of which has been annexed as

Annexure CA-1 to the Counter Affidavit, he was denied promotion and was superseded. It has also been brought on record while filing Counter Affidavit that the petitioner was having four high average and one above average entries as under:

- i. 1996 - Above Average
- ii. 1997 - High Average
- iii. 1998 - High Average
- iv. 1999 - High Average
- v. 2000 - High Average.

6. So far as argument advanced by Ld. Counsel for the petitioner that juniors to the petitioner have been promoted, since none of the junior person against whom the petitioner has raised grievance, has been impleaded as party (respondent), no finding may be recorded on this ground.

7. The next limb of argument advanced by Ld. Counsel for the petitioner is that right to promotion is a fundamental right seems also to be misconceived for the reason that in the Constitutional Bench decision of Hon'ble Apex Court in the case of ***Ajit Singh vs State of Punjab*** reported in (1999) 7 SCC 209, only right to be considered for promotion has been held to be a

fundamental right and not the right to seek promotion to the next higher post. It is well settled law that even if there are certain vacant posts and the employer does not intend to fill-up the vacancies, no fundamental right of the candidate shall be infringed unless he is superseded on unfounded grounds.

8. In the present case, it is not disputed that for the promotion to the next higher post of Naib Subedar, the petitioner should have three 'above average entries' and two 'high average entries', but the petitioner was having only one 'above average entry'. It is not the petitioner's case that some person having lower merit has been promoted to next higher post, hence promotion of more qualified person after comparative assessment of merit does not suffer from any impropriety or illegality.

9. So far as argument of Ld. Counsel for the petitioner that the entries should have been communicated to the petitioner also seems to be misconceived argument for the reason that 'high average entry' is not adverse entry. Reliance has been placed by Ld. Counsel for the petitioner to Army Headquarter Policy No. A/23014/P/OS-88 dated 20.01.1991. Though argument advanced by Ld. Counsel for the petitioner ought to have been

rejected outright since it is not part of the pleadings in the original petition filed in the High Court which has been transferred to this Tribunal and renumbered as T.A. No. 13 of 2011 (the present petition) but for the ends of justice we have taken into account the Policy relied upon by Ld. Counsel for the petitioner which has been filed along with the Written Arguments. The Policy as relied upon by the Ld. Counsel for the petitioner is reproduced as under:

“1. It has been observed that in large cases adverse remarks/weak points endorsed by IO/RO in the ACR of an individual have not been communicated by IO/RO to the individual reported upon under the impression that for ‘Average’ and ‘High Average’ reports there is no requirement of communication such adverse remarks/weak points. Due to this lapse on the part of the IO/RO, complaints are received from affected individuals subsequently for expunctions of the adverse remarks and setting aside the ACR.

2. Instructions exists in para 4 of Army HQ letter No 48854/ org8 (I of R) (a) dt 07th Dec 87 that irrespective of the grading award, adverse remarks/weak points endorsed in the ACR will invariably be communicated to the individual, his signature

obtained and communication slip posted in the ACR.

3. In view of the above, you are requested to issue suitable instructions to all units/Depots under your jurisdiction to impress upon all officers to comply with the orders contained in para 2 of Army HQ letter under reference.”

10. A plain reading of the policy shows that the department took notice that in large cases adverse remarks/weak points endorsed by IO/RO in the ACR of an individual have not been communicated by IO/RO to the individual reported upon under the impression that for ‘Average’ and ‘High Average’ reports there is no requirement of communication such adverse remarks/weak points. Due to this lapse on the part of the IO/RO, complaints are received from affected individuals subsequently for expunctions of the adverse remarks and setting aside the ACR. Para 2 of the Policy (supra) further shows that instructions exists in para 4 of Army HQ letter No 48854/org 8 (I of R) (a) dt 07th Dec 87 that irrespective of the grading award, adverse remarks/weak points endorsed in the ACR will invariably be communicated to the individual, his signature obtained

and communication slip posted in the ACR. Accordingly direction was issued to comply with the Army HQ letter.

11. So far as submission of Ld. Counsel for the petitioner that with regard to communication of Annual Confidential Report entries is concerned, suffice to say that the petitioner should have moved appropriate application to the authorities concerned which seems to not have been done. While preferring Writ Petition in the High Court (now T.A.) the petitioner has made the following prayers:-

“(i) to issue a writ, order or direction in the nature of mandamus directing the respondents to promote the petitioner on the post of Subedar with effect from 14.02.2001 and pay his promotional benefits accordance with the law.

(ii) to issue a writ, order or direction in the nature of mandamus directing the respondents to pay arrear of salary which has been deducted by the respondents from his Basic pay.

(iii) to issue any other writ, order or direction which this Hon’ble Court deem fit and proper of the circumstances of the case.

(iv) to award the cost of writ petition in petitioner’s favour and against respondents

(v) to issue a writ, order or direction in the nature of Mandamus commanding the respondent No. 1, i.e. Chief of the Army Staff to examine the

statutory complaint of the petitioner dated 23rd May 02/30th Apr 03, under the powers vested in him under section 26 of Army Act, 1950 and dispose off the same by a reasoned order within a time frame to be fixed by this Hon'ble Court.

(vi) To issue Arit of certiorari and quash the impugned Cryptic Rejection order of the Army Chief dated 17th July 2004, with all the consequential benefits to the petitioner.

(vii) To issue a Writ, Order or Direction in the nature of certiorari (including of records of the case), quashing the order dated 17 Jul 2004 (Annexure SA 1 refers), with all the consequential benefits including elevation of the applicant as Naib Subedar with effect from the date of original seniority.”

12. A plain reading of the prayer clause shows that the petitioner has not made any prayer for communication of Annual Confidential Report entries. The fact remains that so far as promotional avenue is concerned, on comparative assessment the petitioner was not found eligible with regard to promotion on the next higher post of Naib Subedar. To that extent the petition fails. However we give liberty to the petitioner to move appropriate application for communication of Annual Confidential Report entries of the required period which

shall be attended to by the respondents in accordance with rules expeditiously, say, within a period of four months from the date of presentation of certified copy of this order.

13. With the aforesaid directions, we **dispose** of the petition finally.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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