

RESERVED
Court No.3

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

ORIGINAL APPLICATION NO 29 of 2010

Friday, this the 04th day of December 2015

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Ex Havildar Shiv Shankar Singh Sengar of Ex Central AFD
Depot Kirkee, Pune-03, son of Late Shri Bahadur Singh Sengar,
Resident of Village-Bhitauna, Post-Jagammanpur, Tehsil-
Madhogarh, Distt-Jalaun (U.P.)-285124

.....Applicant

Ld. Counsel for the: **Shri Rakesh Johri, Advocate**
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence,
New Delhi.
2. Chief of the Army Staff, Integrated Headquarter of Ministry
of Defence, South Block, New Delhi-110011.
3. Directorate General of Ordnance Service, Integrated HQ
of MoD (Army), DHQ PO New Delhi-110011.
4. Officer-in-Charge Army Ordnance Corps Records,
Trimulgherry Post, Secunderabad-500015.
5. Commandant Central AFV Depot Kirkee, Pune-411003.

...Respondents

Ld. Counsel for the : **Shri R.S. Mishra, Central**
Respondents. **Govt Counsel assisted by**
Lt Col Subodh Verma,
OIC, Legal Cell.

Air Marshal Anil Chopra, Member (A)

1. This Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, being aggrieved with the impugned order of discharge dated 01.02.2010. He has sought directions to set aside the order dated 09.06.2010 rejecting the Second Statutory Complaint and to re-instatement in service with consequential benefit including promotion to the rank of Naib Subedar.

2. The factual matrix of the case is that the applicant was enrolled in the Army Ordnance Corps on 16.01.1984. He was promoted to the rank of Havildar on 01.03.1990. He was detailed on promotion cadre course from Havildar to Naib Subedar from 06.02.2006 to 08.04.2006 at Army Ordnance Corps Centre, Secunderabad. Subsequently, he attended Non Commissioned Officer Clerk Course from 09.10.2006 to 02.12.2006 at Army Ordnance Corps Centre, Secunderabad. Thus the applicant possessed all the Qualitative Requirement (QR) to get promotion to the rank of Naib Subedar.

3. Since there was no promotion order till Jun 2007, 28 Mountain Divisional Ordnance Unit wrote to Army Ordnance Corps Records (AOC Records), Secunderabad, that the applicant would be overage on 22.07.2007, it was also suggested that reduction of vacancies if any may please be done in phased manner so that it may benefit the applicant (**Annexure A2**).

4. In response AOC Records, informed that there was no vacancy of Naib Subedar and accordingly he would be superseded for promotion to the rank of Naib Subedar because of overage. The applicant submitted a Statutory Complaint dated 14.08.2007 **(Annexure A-3)**. In response of the Statutory Complaint it was intimated to the applicant that there was a reduction of 17 vacancies of Naib Subedar clerks category ordered vide IHQ of MoD (Army) letter dated 29.12.2006 in service interest. The applicant could not be promoted since the vacancies occurred on 01.08.2007, after he became over age for promotion on 22.07.2007. Copy of the directions of the Chief of the Army Staff dated 03.07.2008 on the statutory complaint **(Annexure A-4)** was communicated to the applicant vide AOC Records letter dated 05.08.2008 **(Annexure A-5)**.
5. Applicant contends that out of 17 vacancies which were to be surrendered, 03 vacancies were kept in reserve and request of the applicant was thus not accepted. There was no fault of the applicant but changes in cadre management by the respondents contributed to the denial of promotion to the rank of Naib Subedar to the applicant.
6. Being aggrieved by the above order of the AOC Records, Secunderabad the applicant submitted second Statutory Complaint dated 16.06.2009 **(Annexure A-6)** to seek the waiver of age under Para 149 of the Regulations for the Army, 1987.
7. The applicant has quoted a letter of Directorate General of Ordnance Services dated 10.10.2002 **(Annexure A-8)** where in

one Hav SHGD Param Hans Ram was granted waiving of age limit for promotion in compliance with Hon'ble Allahabad High Court order. Thus applicant feels that two yardsticks have been used in two similar cases. The applicant has been discharged from service in the rank of Havildar on 01.02.2010. Accordingly, to set the wrongs right, the applicant has approached this Hon'ble Tribunal.

8. Through a Counter Affidavit, the respondents have stated that the applicant was enrolled in Army Ordnance Corps on 16.01.1984 and he was promoted to the rank of Havildar wef. 01.03.1990 at his own turn/seniority on occurrence of vacancy. The applicant's name had not come up for consideration for promotion to the rank of Naib Subedar till 21.07.2007 i.e. upto the date of eligibility for promotion due to non-availability of vacancy. However, no person junior to him was promoted or superseded till 21.07.2007. The applicant had been detailed for promotion cadre course Havildar to Naib Subedar alongwith his batch mates and qualified the same on 06.02.2006 and also qualified the Non-Commissioned Officers Clerk Course on 08.04.2006 which are mandatory for promotion.

9. The applicant's grievance is that he had not been promoted to the rank of Naib Subedar due to reduction of manpower. 520 personnel below officer rank were reduced from authorization of the Corps vide IHQ of MoD (Army) letter dated 29.12.2006. The reduction of 520 personnel below officer rank was imposed due to new raising as part of 10th Army Plan which was supposed to be

implemented w.e.f. November 2006 i.e. from the date of issuance of amendment of Peace Establishments/War Establishment. Out of 520 personnel below officer rank, the share of Junior Commissioned Officers of Clerks category is worked out to 17. The instructions for reduction of manpower as Part 10th Army Plan was issued vide IHQ of MoD (Army) letter dated 29.12.2006 and were supposed to be implemented w.e.f. December 2006 i.e. from the date of issuance of amendment of Peace Establishments/War Establishments. Since promotion order upto April 2007 had already been issued hence the above said instructions were implemented w.e.f. 01.05.2007. Due to the effect of reduction of 17 vacancies of Junior Commissioned Officers Clerk, the turn/seniority of the applicant for promotion to the rank of Naib Subedar had been deferred by default to 01.08.2007, instead of 01.07.2007. The applicant attained the age of 46 years on 21.07.2007, and become overage for promotion to the rank of Naib Subedar w.e.f. 22.07.2007, hence the applicant was not promoted being overage as per the policy in vogue.

10. A Statutory complaint dated 14.08.2007 was preferred by the applicant alleging that he was denied promotion to the rank of Naib Subedar due to overage and requested to grant relaxation of age limit for promotion. The Chief of Army staff rejected the statutory complaint vide Note Number 6 A dated 03.07.2008 (**Annexure A-4**). The second statutory complaint dated 16.06.2009 submitted by the applicant was rejected by the Chief of the Army Staff on 14.05.2010 (**Annexure R-2 to SCA**).

11. It is clarified that the applicant was not promoted being overage and no right of the applicant has been deprived by the Respondents and no injustice has been done to the applicant. The promotion in army is purely based on seniority subject to availability of vacancy in respective category. It is pertinent to mention here that no junior to the applicant has been promoted till he was eligible for promotion. He has been given all his dues as admissible to him from time to time. The allegation of the applicant for wrong planning is totally baseless because no vacancy was kept reserve. However, the applicant could not be promoted even considering the 03 vacancy because 16 qualified persons senior to him were available for promotion. No junior to the applicant has been promoted prior to 01.08.2007.

12. In his Rejoinder Affidavit and Supplementary Rejoinder Affidavit the applicant has questioned the availability of vacancies. He again contends that since vacancies would accrue on 01.08.2007 and he had already qualified all promotion cadre exams, he made a deserving case for waiver of age which involved extension of only 9 days as he became overage on 22.07.2007.

13. Heard Ld. Counsels of both sides and perused the records. The issues that need adjudication are:-

- (a) Was there a vacancy available before the applicant became overage on 22.07.2007?
- (b) Could the applicant have been given extension of service till 01.08.2007 when the next vacancy occurred and his juniors were promoted?

14. Paras 5, 6 and 7 of Chief of Army Staff directions dated 03.07.2008 on applicants first statutory complaint are reproduced below :-

“5. The NCO has requested that he be promoted to the rank of Naib Subedar with retrospective date i.e. 01 Jul 07, when he was due, with all consequent benefits of pay and seniority.

6. I have perused the Statutory Complaint by the NCO and examined the same against his overall profile, other relevant documents, policy on the subject and comments of the Intermediary Authorities. After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that reduction in vacancies ordered vide IHQ of MoD (Army) letter No A/26445/Amdt/OS-20 dt 29 Dec 06 is in service interest. The NCO could not be promoted since the vacancy occurred on 01 Aug 07, after he became overage for promotion on 21 Jul 07.

7. I, therefore, direct that Statutory Complaint in respect of No 6920058A Hav/Clk (GD) Shiv Shankar Singh Sengar, AOC be rejected”.

15. Relevant portions of the Chief of Army Staff directions dated 14.05.2010 on application for second Statutory Complaint are reproduced below :-

“3. The NCO has also brought out that he was wrongly denied promotion on the plea of having become overage wef 22 Jul 2007, ignoring the fact that other NCO’s junior to him were promoted wef 01 Aug 2007.

4. *The complainant has also sought to establish a linkage with case of No 6911849W Hav SHGD Param Hans Ram, wherein relaxation in the age criteria was granted by COAS vide Note 17A of OS-8B Note No 23658/SC/218/OS-8B (Part case file No A/23658/SC/229/OS-8B). He has sought a similar waiver in his case also.*

5. *The NCO has requested the following :-*

(a) His case may be placed before the Hon'ble Chief of Army Staff.

(b) Carry out detailed investigation in the matter/manner in which 17 vacancies of reduction of JCO Clk ordered in Dec 2006, were kept intact till May 2007 and the manner in which 17 vacancies were later reduced to 14, making three vacancies available for promotion, till he becomes overage on 22 Jul 2007. Thereafter three others junior to him had been promoted to Naib Subedar wef 01 Aug 2007, denying promotion to him, being overage by 9 days.

(c) Quash above issues and promote him to the rank of Naib Subedar wef original date when due, with all the consequential benefits.

(d) Any other relief which may be considered just and proper under the circumstances of the case, may kindly be awarded to him.

6. *In his complaint, the NCO states that he was superseded due to reduction of 17 vacancies of JCO Clk vide order*

dated 239 Dec 2006, which was implemented in May 2007. He contends that had the vacancies not been reduced abruptly and had there been a phased reduction, he would have been promoted to the rank of Naib Subedar, wef 01 Jul 2007.

7. He is the only NCO affected adversely by the reduction in JCO vacancies, resulting in his juniors being promoted wef 01 Aug 2007.

8. The NCO has requested that he be promoted to the rank of Naib Subedar with retrospective date i.e. wef 01 Jul 2007, when he was due, with all consequent benefits of pay and seniority.

9. I have perused the Statutory Complaint by the NCO and examined the same against his overall profile, other relevant documents, policy on the subject and comments of the Intermediary Authorities. After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that reduction in vacancies ordered vide IHQ of MoD (Army) letter No A/26445/Amdt/OS-20 dt 29 Dec 2006 is in service interest. The NCO could not be promoted since the vacancy occurred on 01 Aug 2007, after he has become overage for promotion on 21 Jul 2007. No injustice has been done to the NCO.

10. I, therefore, direct that Statutory Complaint in respect of No 6920058A Hav/Clk (SD) Shiv Shankar Singh Sengar, AOC, be rejected”.

16. Para 149 of Regulations of the Army, 1987 related to waiver of age for promotion to JCO rank is reproduced below :-

“Promotions – JCOs-(a) NCOs except those given in sub para (b) below will not normally be promoted to the rank of JCO if over 46 years (applicable to the services) or with more than 26 years of service.

(b) NCOs of the undermentioned categories will not be promoted to JCO rank if over 46 years of age or with more than 26 years of service:-

- (i) Clerk GD, GD (SD) and Store*
- (ii) Storekeeper (Storeman Technical)*
- (iii) Ammunition (Technician) Examiners*
- (iv) Personal Assistant (ASC)*
- (v) Instructors AEC*

(c) The age and service limits given in sub paras (a) and (b) above may be waived in very exceptional cases with the permission of the COAS.

(d) to (f) x x x x x x”.

17. The copy of the Army HQ letter dated 10.10.2002 **(Annexure A-8)** wherein Chief of Army Staff give a waiver to Hav SHGD Param Hans Ram is reproduced below :-

“REGISTERED/SDS
Directorate General of Ordnance Services
Master General of Ordnance Branch
Army Headquarters
DHQ, PO, New Delhi-110011

A/23658/SC/178/OS-8B 10 Oct 2002

Col (Retd) Ashok Kumar, Advocate
161, Preetam Nagar

Allahabad-211001

COMPLIANCE OF HON'BLE ALLAHABAD HIGH COURT
JUDGEMENT DT 20 MAR 2002 IN CMWP NO 11739/02 IN
RESPECT OF NO 2911849W HAV SHGD PARAM HANS RAM

Sir,

1. Please refer to your letter dt 23 Mar 2002.
2. In this connection, it is intimated that the Statutory Complaint in respect of No 6911849W Hav SHGD Param Hans Ram of 16 Inf DOU (now serving with 9 FOD) has since been finalized by the COAS. Partial redress has been granted to the NCO by way of waiving the age limit for promotion by one year. Promotion cadre course is being conducted as per requisites to qualify for promotion.
3. The petitioner may be informed accordingly.

Sd/ x x x x x x x
(Seemit Kumar)
Major
Dy Dir OS (Pers)
For DG OS"

18. Cadre management is the right of any organization. Personnel have to be reduced in some Corps/Formations to create manpower for new raisings. In the instant case 520 personnel below officer rank were required to be reduced, and out of these 17 had to be Clerk JCOs. The timing of such reduction may be decided on operational/administrative reasons. Any time vacancies are reduced, a few personnel may be affected. It is clear that the timing of reduction is across the board and is not individual specifics. We therefore are of the view that applicant's

contention that the vacancy reduction could have been delayed or reduced in a phased manner cannot be accepted as valid.

19. It is an accepted fact that the applicant had become overage a few days prior to the accrual of vacancies on 01.08.2007 as per new plan. The applicant had finally retired in the rank of Havildar on 01.02.2010. Immediately after his superannuation, the applicant filed a statutory complaint seeking waiver of age under Para 149 of the Regulations for the Army, 1987. These provisions authorize the Chief of the Army Staff to give waiver under exceptional circumstances. The issue that needs adjudication is that was the applicant's case an exceptional circumstance?

20. The applicant was fully qualified for promotion to the rank of Naib Subedar from 02.12.2006 onwards. He was short by 9 days for being eligible to promotion. If 9 days waiver of service had been granted he would have been promoted to the rank of Naib Subedar when his juniors were promoted. It would have made a big difference to his status and respect among his peers and community. It would have made big financial differences. Promotion would have also opened further career prospects. There have been other cases wherein such waiver has been granted within the domain of policy. In this case of Hav SHGD Param Hans Ram, waiver of one year was given after judicial intervention. In this case it involved only 9 days. A plain reading of the orders of the Chief of Army Staff while rejecting the two statutory complaints of the applicant primarily dwell on the subject of reduction of vacancies. No clear reasoned order has been

passed on the issue of waiver of 9 days as requested in the statutory complaints. We feel that sudden change of policy and reduction of vacancies would have affected very few personnel of the applicant's seniority. The applicant had a good track record. His being overage by just 9 days could have been considered as an exceptional case.

21. It is well settled proposition of law that equals cannot be treated unequally vide 1997 Vol 1 SCC 701 **SC & ST Welfare Association Vs. State of U.P.**, 1995 (Supp 2) SCC 246 **K. Rabindranath Vs. State of Karnataka** and 1990 (2) SCC, 715 **Direct Recruits Class II Engineers Vs State of Maharashtra**. Grant of relaxation in the matter of promotion must be considered fairly and justly without any discrimination. The Chief of the Army Staff had considered the case of Param Hans Ram and given waiver of one year then there appears to be no reason of denial by not granting a waiver of 9 days only in the case of the applicant. The Case of both the persons seems to be based on similar facts and circumstances. In case Chief of Army Staff is not agreed with the applicant's case then precisely reason should have been given while declining to granting waiver and taking different opinion than Param Hans Ram. It appears that applicant's case has been rejected without application of mind merely on the basis of office notes which seems to be not justified affecting adversely the applicant's right of further promotion. Applicant seems to entitle for waiver.

22. In view of the above, we feel the applicant has a case. The O.A. is allowed. We direct that 9 days waiver be considered. Since applicant has already retired, he be notionally promoted to

the rank of Naib Subedar as on 01.08.2007. He be then retired at the age of retirement for Naib Subedar. He be paid no back wages. He will be entitled to all pensionary benefits except back wages for the rank of Naib Subedar. All arrears be paid within 4 months of the receipt of this order.

No orders for costs.

(Air Marshal Anil Chopra)
(Member A)

gsr

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