

RESERVED
Court No. 1

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

O.A. No. 56 of 2016

Wednesday, this the 19th day of December, 2018

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

Pawan Kumar Dwivedi (No14649946K Hav/ Auto Tech B Veh),
Son of Shri Ramcharit Dwivedi, Serving with 41 Med Regt
(KARGIL) Pin-925741, C/o 56 APO

.... Applicant

Ld. Counsel for the: **Shri Om Prakash**, Advocate.
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence,
Government of India, New Delhi-110011
2. Chief of the Army Staff, Integrated Headquarters of
Ministry of Defence (Army), DHW, Post Office New Delhi-
110011
3. Dte Gen of EME (Pers) IHQ of MoD (Army), DHQ PO,
New Delhi-110011
4. The Officer-in-Charge, EME Records, Secunderabad-
500021
5. Commanding Officer, 41 Med Regt (KARGIL), PIN-
925741, C/o 56 APO

...Respondents

Ld. Counsel for the: **Dr. Shailendra Sharma Atal**, Advocate.
Respondents.

ORDER

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

1. By means of this O.A. under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant prays for the following reliefs:-

“I) The Hon’ble Tribunal may be pleased to set aside the orders dated 26.12.2015 (Annexure-A/1) issued by Respondent no.4.

II) Issue a suitable order or direction to the respondents to restore original status in respect of the applicant with all consequential benefits.

III) Pass any other suitable order or direction which this Hon’ble Tribunal may deem fit and proper in the circumstances of the case.”

2. In brief the facts giving rise to the instant O.A. may be summarised as under:

On 15.02.2002 applicant was enrolled in the Army in EME as Sepoy. He passed Trade Test Class IV on 01.02.2003 at EME Centre Bhopal at No 2 Training Bn. On 29.10.2003 he passed Trade Test Class III at EME Centre Bhopal at Training Bn. On 10/2003 after completion of training the applicant was posted out to 3/11 GR at Ranchi as first posting and in January 2009, applicant was posted to 654 EME Bn at 843 Fd Wksp EME Secunderabad. During 02/2009 respondent no. 4 issued a letter that applicant was lacking requisite criteria for promotion to the rank of Naik for want of Army Education Certificate III (AEC III).

On 24.06.2009 applicant was sent to EME School Baroda for attending II Grade for six months. On 22.08.2009 applicant passed Army Education Certificate III (AEC III) successfully. Applicant was promoted to the rank of Naik on 24.08.2009 with the seniority with effect from same date. On 23.06.2010 applicant passed the Matriculation Examination from UP Board. Applicant's civil educational qualification is graduation. In the year 2011 applicant was posted to 657/861 Field Workshop EME Agartalla and on 09.07.2012 applicant was sent to EME Centre Bhopal to attend the promotion cadre from Naik to Havildar and applicant passed the promotion cadre from Naik to Havilder successfully. On 01.03.2013 applicant was promoted to the rank of Havildar with seniority from same date. On 20.04.2014 applicant was posted to 41 Medium Regiment (KARGIL) and at present he is serving with same unit. From 07.07.2014 to 09.08.2014 applicant was sent to 508 Base Workshop, Allahabad for attending the 1st Grade and he passed the First Grade successfully. On 09.05.2015 respondent no.3 issued a letter to the unit of the applicant with copy to Dte Gen of EME (Pers) IHQ, New Delhi for re-fixation of seniority by saying that applicant was erroneously promoted to the rank of Naik w.e.f. 05.10.2009 with ante date seniority from 24.08.2009 and subsequently to the rank of Havildar w.e.f. 01.03.2013 prior to his seniors. Further a certificate was required from the applicant that " I No14649946K Rank/Trade Hav/Auto Tech B Veh Name Pawan Kumar Dwivedi

do accept the mistake in seniority and promotion and hereby agree to change:-

(a) Date of seniority in the rank of Nk w.e.f. 24.08.2012 instead of 24.08.2009.

(b) Date of seniority in the rank of Hav be revised as per my entitlement based on mandatory edn qualification attained by me instead of 01.03.2013.

(c) Regulate promotion to the rank of Nb Sub with revised seniority in the rank of Havildar. The certificate required signature of the applicant as well as countersignature by an officer. On 02.09.2015 Officer Commanding LRW 41 Med Regt (KARGIL) gave the reply that applicant was unwilling to accept the mistake and Officer Commanding further submitted that the same mistake occurred at EME Records only and issue be settled by the Records only. On 26.12.2015 respondent no.4 intimated the respondent no.5 that applicant's part II orders were published and part II order 1/1988/2015 dated 17.12.2015 were cancelled and a fresh Part II Order for Naik was published and further respondent no.4 requested to respondent no.5 to inform the applicant and regulate his promotion accordingly.

3. The applicant has assailed the order dated 26.12.2015, which reads as under:-

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Electroniki Aur Yantrik Inginiyari
Abhilekh Karyalaya
EME Records
Secunderabad- 500021

Dec 2015

1360/T2B/ATOTECBV/CA-1
41 Med Regt (KARGIL)
PIN- 925741
C/o 56 APO

RE-FIXATION OF SENIORITY IN RESPECT OF
NO 14649946K HAV/AUTO TECH B VEH
PAWAN KUMAR DWIVEDI

1. Ref:-
 - (a) This office letter No 1360/CA-1/T2B/ATOTECBV dt 09 May 2015.
 - (b) Your office letter No 24501/LRW dt 08 Sep 2015.
2. It is intimated that 14649946K Nk Auto Tech B Veh Pawan Kumar Dwivedi of your unit was incorrectly upgraded to CI-III on 29 Oct 2003 as he was lacking pre-requisite qualification of AEC CI-III at that point of time and subsequently he was incorrectly upgraded to CI-II on 24 Aug 2009, as a result, he was incorrectly promoted to rank of Nk wef 05 Oct 2009 with ante date seniority wef 24 Aug 2009. Ultimately he was promoted to rank of Hav wef 01 Mar 2013 as per his incorrect seniority in the rank of Nk prior to his seniors and batchmates. Actually he was due for promotion to the rank of Nk on 24 Aug 2012, as he was upgraded to CI-II on 24 Aug 2012.
3. Keeping in view of the above, the under mentioned part II orders in respect of above named indl have been published by this office to regulate correct seniority of indl:-

Ser	Pt II Order No	Dated	Description	Remarks
(a)	1/1988/2015	7 DEC 2015	Cancel	Cancellation of Nk & Hav promotion Pt II order
(b)	1/1998/2015	17 DEC 2015	Promotion	Promotion to Rank of Nk
©	1/2008/2015	19 DEC 2015	MACP	Publication of MACP Pt II order

4. It is requested to info the indl and regulate his promotion accordingly.

Sd/-
(LD Bhuyan)
Maj
Senior Record Officer
For OIC EME Records

Encls: As above

Copy to:-

No 14647627Y /Abovementioned Part II Order are enclosed.

Nk/Auto Tech B Veh
Chandrika Prasad
7 Engr Regt
C/o 56 APO”

4. The submission of the learned counsel for the applicant is that the applicant after his promotion had continued on his promotional post for a period of seven years and only on an application of some other person the respondents have reverted him back. Not only the applicant has been reverted to a lower rank but the difference of salary amounting to more than rupees two lacs have also been recovered from him.

5. The learned counsel for the respondents in reply has fairly conceded that in this case by mistake the applicant was promoted before his juniors and this mistake could come to the notice after a period of seven years and thereafter immediate action was taken and the applicant was reverted to a post to which he was entitled.

6. Learned counsel for the applicant in support of his submission has placed reliance on a pronouncement of Hon'ble Chennai Regional Bench of the Armed Forces Tribunal in T.A. No. 50 of 2009 **Kewal Nath Ram vs. Union of India and others** decided on 05.03.2010. He has drawn our attention towards Para-5(m) of the said judgment, which reads as under:-

“So in our considered view, while fixing the seniority, if a person has been promoted to a rank, then the date of such promotion shall alone be taken into consideration for re-fixing the seniority and not the date of enrolment as contended by the learned JAG officer.”

7. We have gone through the aforesaid judgment. The facts of that case were entirely different. In that case it was a matter of seniority and the question for consideration was as to from which date the seniority has to be counted. But in the instant case it is not the point involved. The only point involved here is that the applicant was promoted due to mistake because he was not having the requisite educational qualification for his promotion and he continued to work for seven years on promoted post and thereafter he was reverted to the post to which he was entitled. In this back ground the question involved in this case is different. The legal point which is involved in this case is as to whether a person who has been promoted by mistake can be reverted to the lower post or as to whether because of this mistake he gets a right to continue on the said post. This point has been considered by the Hon'ble Apex Court in the case of **Union of India and another vs. Narendra Singh** (2008) 2 SCC 750, Para-35 of which reads as under:-

“35. The last prayer on behalf of respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so, that only few days have remained. He will be reaching at the age of superannuation by the end of this month i.e. December 31, 2007. In our view, therefore, it would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. upto December 31, 2007. At the same time, we hold that since the action of the Authorities was in accordance with Statutory Rules, an order passed by the Deputy Accountant-General cancelling promotion of the respondent and reverting him to his substantive post of Accountant was legal

and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all throughout.”

8. Thus the aforesaid pronouncement of the Hon’ble Apex Court shows that a person who has been promoted by mistake he has to be reverted back to the post to which he is entitled as per his seniority. In the peculiar facts of that case Hon’ble Apex Court has permitted the petitioner of that case to continue on the said post as he was going to retire within a few days. In another case of **Anand Kumar vs. Prem Singh and others** (2000) 10 SCC 655 Hon’ble Apex Court has observed in Para-2 as under:-

“2. Learned counsel appearing for the appellant while conceding that the ad hoc service rendered by Respondent 1 ought to have been included while fixing his seniority, urged that in view of the fact that the appellant has been working on the promoted post for the last several years, the High Court ought not to have interfered with the promotion of the appellant. We do not find any basis for such an argument. Once it is found that the respondent was treated with uneven hands in the matter of fixation of seniority, the promotion of the appellant on the basis of wrong seniority cannot be upheld. We, therefore, find that the High Court was justified in setting aside the promotion of the appellant.”

Thus the facts of this case also are similar to the facts of the case before Hon’ble Supreme Court. That was also a case of wrong fixation of seniority. Thus, law is settled by the aforementioned judgment that a wrong fixation of seniority does not render a right to the applicant to continue on the said post.

9. The next point involved is as to whether the respondents have rightly recovered the excess amount paid to the applicant. We are of the considered view that this act of the respondents was not in accordance with law because for the wrong fixation of seniority the applicant was not responsible. The applicant after his promotion worked satisfactorily to the satisfaction of his seniors and has discharged higher responsibility and therefore he was entitled to the salary of the post on which he worked because he was not the least responsible for the mistake for his wrong promotion, consequently wrong fixation of pay. Therefore to that extent we find action of the respondents unsustainable in the eyes of law.

10. Accordingly, this O.A. deserves to be partly allowed and is hereby **partly allowed**. The impugned order so far as it directs the reversion of the applicant to the post to which he is entitled is upheld. However, the respondents are directed to refund the amount which they have recovered from the applicant from his wrongly fixed salary. The amount so recovered shall be refunded to the applicant within a period of four months from today, failing which the respondents will have to pay interest @ 9% per annum from the due date till the date of actual payment.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

Dated: December 19, 2018
JPT

(Justice SVS Rathore)
Member (J)

