

**Court No.1**

ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

**Transfer Application No. 120 of 2009**

Thursday, this 12<sup>th</sup> day of January, 2017

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

B.G.Gowda (J.C No. 209742-L/Naib Subedar/S.K.T discharged), son of Sri Boje Gowda, resident of Byadarahally, P.O. Kirisav, Tahsil C.K.Pattanna, District Hasan (Karnataka)

..... Petitioner

By Legal Practitioner Shri R.K.Agarwal, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Army Headquarters, New Delhi.
3. The Divn. Commander/G.O.C, 27 Mountain Divn., C/o 99 A.P.O.
4. The Officer Incharge, A.M.C Records, Lucknow Cantt., Lucknow.
5. The Officer Commanding, 163 M.H., C/o 99 A.P.O.

..... Respondents

By Legal Practitioner Dr. S.N.Pandey, Learned Counsel for the Respondents, assisted by Col Kamal Singh, OIC Legal Cell

**ORDER (Oral)**

1. Being aggrieved with the impugned order of punishment of severe reprimand as well as non-implementation of the promotional order dated 07.01.1994, the petitioner preferred a writ petition bearing no. 7562 of 1996 (S/S) in Lucknow Bench of Hon'ble Allahabad High Court, which has been transferred to this Tribunal in pursuance to provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 (in short, the Act) and registered as Transfer Application No. 120 of 2009, which is before us for hearing.

2. We have heard Shri R.K. Agarwal, assisted by Shri Vijay Singh, learned counsel appearing on behalf of the petitioner Dr. S.N. Pandey, learned counsel for the respondents, assisted by Col. Kamal Singh, OIC Legal Cell and perused the record.

3. In the rank of Naib Subedar, the petitioner in the year 1990 was serving in 163 MH. He was performing the duties of JCO I/c Ration Store. He was also looking after MES Fuel and Ordnance Stores among others. Normally all these stores should have been held by different personnel; therefore, the load on the petitioner was high. According to the pleadings on record, Lt Col A.K. Chugh

was the Commanding Officer, 163 M.H on 24.12.1992. Lt Col A.K.Chugh proceeded on leave for 33 days. The petitioner also requested for annual leave on compassionate ground. The leave was sanctioned and he was directed to handover the Ration Store to Havildar Store Keeper Technical B.V. Shinde by the Commanding Officer. During the process of handing/ taking over of Ration Stores between the petitioner and Havildar Store Keeper Technical B.V. Shinde, huge deficiencies were found. According to the respondents, the petitioner had accepted the deficiencies. The alleged deficiencies in the Ration Stores were reported to the Commanding Officer when returned from annual leave on 26.01.1994. In the meantime, petitioner's promotion order was issued on 07.01.1994 promoting him to the rank of Subedar. In spite of the fact that the petitioner was cleared to be promoted to the rank of Subedar, he was not given the rank of Subedar. On 15.03.1995, Summary of Evidence was ordered to be recorded. Accordingly, Summary of Evidence was recorded and thereafter on 17.10.1995, charge-sheet was given to the petitioner under Section 163 of Army Act, copy of which has been annexed as Annexure-3 to the petition. The petitioner was subjected to summary trial on

25.10.1995 and he was awarded punishment of severe reprimand.

4. Submission of learned counsel for the petitioner is that the entire evidence collected during Summary of Evidence has not been taken into account during the course of summary trial and the petitioner was punished on unfounded grounds under the teeth of Summary of Evidence, without any misconduct on the part of the petitioner. According to the petitioner, the representation submitted by him to the Chief of the Army Staff on 23.12.1995 was statutory in nature having been preferred under Section 87 of the Army Act and it remained unattended. Since the said representation was not decided by the Chief of Army Staff, the petitioner filed the writ petition before the Hon'ble High Court and has come up before this Tribunal in the shape of present T.A.

5. The argument advanced by learned counsel for the petitioner is that on the date when the petitioner was promoted to the rank of Subedar, no disciplinary proceeding was pending against him and he should have been promoted and given all benefits of the rank of Subedar. The next submission made on behalf of the petitioner is that he was awarded punishment of severe

reprimand in summary trial, but his statutory representation preferred under Section 87 of the Army Act has not been decided till date.

6. In response, it has been submitted on behalf of the respondents that the petitioner's promotion was made subject to eligibility as given in ROI 41/83. Further submission is that since the petitioner has been punished with severe reprimand, he could not have been granted promotion. It is also submitted by OIC Legal Cell that during pendency of disciplinary proceedings, the petitioner could not have been given the rank of the promotional post i.e Subedar.

7. We have considered the rival arguments advanced on behalf of the parties at length and perused the record.

So far as promotional avenues are concerned, both the parties have relied upon ROI 41/83. For convenience the entire ROI 41/83, copy of which has been filed as Annexure C.A. 7 to the counter affidavit, is reproduced as under:-

*“ Appendix ‘F’  
(Refers to Para 35 of ROI 41/83)*

**INSTRUCTIONS TO BE FOLLOWED BY UNITS  
ON RECEIPT OF PROMOTION ORDERS OF  
JCOs/ OR FROM RECORD OFFICE**

*1. Although the Record Office carries out through scrutiny of all cases before announcing the*

*promotion, units are also required to carry out certain checks before actually promoting the individuals. Instructions to be followed by units on receipt of promotion orders of JCOs/ OR from AMC Records are given in the succeeding paragraphs.*

*2. Promotions will only be carried out provided JCOs/OR fulfil the following conditions:-*

*(a) Should not have more than a total of three red ink entries in his entire service.*

*(b) Should not have more than one red ink entry during the last five years.*

*(c) No red ink entry during the last one year preceding the promotion.*

*(d) Must be in medical category 'Aye'.*

*(e) Not involved in disciplinary case.*

*(f) Should not have been convicted by court martial for an offence mentioned in Annexure I to Appendix 'B' to this ROI.*

*(g) Should not have been summarily tried for an offence mentioned in Annexure 1 to Appendix 'B' to this ROI during the last three years. The date of award of punishment and not the date of offence will be the criterion.*

*(h) Should not have been awarded a red entry for an offence mentioned in Annexure 2 to Appendix 'B' of this ROI during the last three years. The date of award of punishment and not the date of offence will be the criterion.*

*(j) The promotee (Sep/Nk) accepts in writing the terms and conditions of service applicable to the rank of Nk/Hav including reserve liability as laid down in AI 2/S/76. Certificates as per specimen given below will be obtained from the individuals before they are actually promoted to the rank of Nk/ Hav.*

**CERTIFICATE**

(i) I, No. .... Rank.....Name .....  
 hereby accept and give my consent to be governed  
 by the terms and conditions of service prescribed  
 for the rank of \*Hav/Nk including reserve liability  
 as laid down in AI 2/S/76 on my promotion to the  
 rank of \*Hav/Nk.

*\* (Delete whichever is inapplicable)*

Date.....  
 .....  
 (Signature of NCO)

Countersigned

Unit-

Station:

Date:

OC Unit”

A plain reading of para -2 (e) of ROI 41/83 shows that promotions will only be carried out/provided in case a person is not involved in a disciplinary case.

8. Now, a question crops up as to when the disciplinary proceeding shall be deemed to be pending. Admittedly, in the present case, when the promotion order was issued on 07.01.1994, there was no disciplinary proceeding pending against the petitioner. The disciplinary proceeding shall be deemed to be pending only in case there is some communication by the disciplinary authority to the charged officer with regard to initiation of such disciplinary proceeding. In any case, it begins with the framing of charges. In the present case, the Summary of Evidence was recorded on 15.03.1995 and thereafter charges against the petitioner were framed on 17.10.1995. Accordingly, the

disciplinary proceeding shall be deemed to be pending only with effect from 17.10.1995. At the most, for the sake of arguments, if the disciplinary proceeding is treated to be pending from the date of Summary of Evidence, which commenced on 15.03.1995, that too seems to be after a lapse of much more than one year of passing of promotion order dated 07.01.1994. Accordingly, we are of the view that no disciplinary proceeding was pending when the promotion order was passed on 07.01.1994. Even in terms of condition provided by ROI 41/83 (supra), the petitioner should have been given the rank of Subedar.

9. Right to consider for promotional avenues is a fundamental right. However, right to avail the benefit of promotional avenues is a civil right conferred and provided by Article 21 of the Constitution, being related to livelihood, status and dignity of the person. In this view of the matter, it would not be open for the respondents to deprive the petitioner of the rank of Subedar, granted to him vide order of promotion dated 07.01.1994. Accordingly, we are of the view that the order of promotion dated 07.01.1994 should have been given effect in its letter and spirit, permitting the petitioner to put on the rank and



resume duty on the said post with all consequential benefits and perks.

10. So far as the question with regard to severe reprimand is concerned, it appears that against the order of severe reprimand, the petitioner had submitted statutory complaint/representation under Section 87 of the Army Act. For convenience, Section 87 of the Army Act is reproduced as under:

*“87. Review of proceedings.- If any punishment awarded under any of the sections 83, 84 and 85 appears to a superior military authority as defined in Section 88 to be illegal, unjust or excessive, such authority may cancel, vary or remit the punishment and make such other direction as may be appropriate in the circumstances of the case.”*

11. The statutory right available to the petitioner in the form of review petition aforesaid cannot be thwarted by the respondents by keeping the matter pending. It was incumbent upon the Chief of the Army Staff to decide the said statutory complaint under the power conferred upon him under Section 87 of the Army Act. It is submitted by learned counsel for the petitioner that the statutory complaint/representation dated 23.12.1995 submitted under Section 87 of the Army Act is still pending or at least no communication has been made to the petitioner with respect to its disposal.

12. Our attention has been invited to letter dated 21.02.1996 sent by Col Records with respect to grant of promotional avenues to the petitioner. The Col Records vide aforesaid letter informed the petitioner that since he was punished with severe reprimand, he was ineligible for promotion to the rank of Subedar for one year from the date of award of punishment. The observation made by the Col Records seems to be not sustainable keeping in view the fact that the punishment of severe reprimand was awarded to the petitioner, that too on the basis of disciplinary proceeding, which was initiated after one and a half years of the passing of promotion order. In view of above, we are of the opinion that the petitioner is entitled to all service benefits and perks including salary of the rank of Subedar right from 07.01.1994.

13. So far punishment of severe reprimand is concerned, since it involves mixed question of facts and law, it shall be appropriate for the Chief of the Army Staff to decide the statutory petition/representation preferred by the petitioner under Section 87 of the Army Act in case it has not already been decided. If the representation has been decided, then a copy of the order shall be forwarded to the petitioner. In case the petitioner is aggrieved of the said order, it would

be open to him to approach the appropriate forum for redressal of his grievance.

14. Though a long time has elapsed on account of pendency of writ petition in the High Court and later on T.A in this Tribunal, but the fact remains that the petitioner may not be made to suffer because of pendency of the petition in a judicial forum. It is well settled proposition of law that the things and law should be looked into for the purpose of judicial review keeping in view the factual matrix on record when the impugned order was passed.

15. In view of above, we partly allow the T.A with the following directions:

- (a) The petitioner shall be granted the benefit of the rank of Subedar including arrears of salary from 07.01.1994 till the date of his superannuation and also post-retiral benefits alongwith arrears of pension and revised pension, as the case may be, with effect from the date of retirement from the rank of Subedar.
- (b) The respondents shall give all consequential benefits to the petitioner in the rank of Subedar.
- (c) Statutory complaint/representation submitted by the petitioner under Section 87 of the Act (supra), if

already not decided, be decided by the Chief of the Army Staff by passing a speaking and reasoned order expeditiously, say, within a period of four months from the date of receipt of a certified copy of the present order alongwith copy of representation sent by the petitioner. The petitioner shall forward a copy of aforesaid representation alongwith copy of the present order to the Chief of the Army Staff within a period of one month from today.

- (d) Let entire exercise be done by the respondents in compliance of the present order expeditiously, say, within a period of four months from today.

16. There would be no order as to costs.

**(Air Marshal Anil Chopra)**  
**Member (A)**

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

Dated : 12 Jan 2017  
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