

**FORM NO.4**  
**(SEE RULE 11 (1))**  
**IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA**

**ORDER SHEET**

**APPLICATION No. O.A.No. 14/2014**

APPLICANT (S)	Naib Subedar Sunil Kumar
RESPONDENT (S)	Union of India & 2 Others
Legal Practitioner for Applicant (s)	Legal practitioner for Respondents
Mr. K Ramesh Ms. Archana Ramesh Mr. S K Choudhury	Mr. Sudipto Panda

<b><u>ORDERS OF THE TRIBUNAL</u></b>	
<u>Order Serial Number:</u>	Dated : 06.07.2015
	<p>1. Mr. K Ramesh, learned counsel appears for the applicant. Mr. Sudipto Panda learned counsel for the respondents is also present.</p> <p>2. This is an application under Section 14 of the Armed Forces Tribunal Act, 2007 (for short the Act, feeling aggrieved with the supersession for not getting the promotion from the post of Naik to Havildar along with his batch mates. The admitted fact is that the applicant was enrolled on 20.12.1985 and promoted to the rank of Naik on 01.04.1989 along with his batch mates. According to the submission of the learned counsel for the applicant, having qualified the Naik to Havildar Promotion Cadre from 07.10.1991 to 30.11.1991, the applicant was not given the promotion when all his batch mates were promoted on 01.01.1992. The reason assigned for his non-promotion is that he was lacking Regimental Report and hence ACR for his consideration before the Promotion Committee was not made available. Admittedly the promotion to the post of Havildar from Naik is in order of seniority subject to fitness. As the ACR had not been sent, the applicant was superseded. However, later on it appears that the applicant's case was considered and he was promoted to the post of Havildar on 01.01.1993 whereas all his batch mates were enjoying such promotion from 01.01.1992. We have been further informed that the applicant has been promoted to the post of Naib Subedar on 01.10.2010 when all his batch mates have been promoted on 01.02.2010. The submission of the learned counsel for the applicant is that it is fault of the AOC Records that he could not earn one Regimental Report and the applicant is in no way responsible for the same and he should not suffer for such inaction</p>

on the part of the Records. The learned counsel has relied on a judgement/order dated 14.11.2011 passed by the Hon'ble Principal Bench in OA No. 166/2009 (Hav Harish Chandra Kandpal vs Union of India & Ors.) and other two judgements/orders passed by the Hon'ble Principal Bench in OA No. 221 of 2010 (Havildar Chandu Chavhan vs UOI) and OA No. 461 of 2011 (Havildar Manoj Kumar vs UOI & Ors.) in support of his case.

3. On the other hand, Mr. Panda, learned counsel for the respondents assisted by Major Narendra Singh, OIC, Legal Cell, HQ Bengal Area submits that they have acted on the policy/circular dated 12.01.1988 from the Ministry of Defence and the applicant could not be promoted because of that policy. His submission is that since the Regimental ACR was not sent, the applicant could not be considered for promotion in terms of the policy. He further submits that according to that circular/policy, for promotion to the post of Havildar from Naik, two reports earned in the rank of Naik must be 'high average' and one of these reports should be on Regimental duty.

4. We have considered the rival arguments advanced by the learned counsel from both sides and also perused the records and averments of the respective sides. The relevant portion of the Circular dated 12.01.1988 is reproduced as under:-

*“Promotion to the rank of Dfr/Hav:- The existing para 3(a) of our letter No. 94930/AG/P82(C) of 28 Feb 87 will be substituted as follows:-*

*(i) Only last three reports in the rank of Nk will be counted in case where three reports in the rank of Nk are not available for consideration, two reports in the rank of Nk and one reports in the rank of L/Nk will be considered.*

*(ii) Two reports earned in the rank of Nk must be 'High Average' and one of these reports should be on Regimental duty.*

*(iii) No reports should be lower than 'Average'.*

*(iv) The individual should have been recommended for promotion in all the three reports.”*

5. It is evident from the above, that the promotion would depend upon the availability of the ACR and the circular provides certain conditions for being eligible for promotion. However, availability of ACR depends upon the Departments concerned and the individual is not at fault for non-availability of ACR. The fault seems to lie on the ministerial section of the Indian Army who has failed to send the records of the applicant along with his batch mates.

6. It is well settled proposition of law that right to consider for promotion is a fundamental right guaranteed by Article 14 read with Article 21 of the Constitution of India. All persons falling within the field of eligibility at a time when a meeting is convened for the purpose shall be entitled to be considered for promotion – *Vide Ajit Singh (I) vs State of Punjab 1996 Vol. 2 SCC 715*. It is well settled proposition of law that equals cannot be treated unequally; those are eligible and qualified for promotional avenues in accordance with rules must be considered simultaneously and be promoted. Different treatment given to people of the same nature falling within the field of eligibility is not permissible; *vide 1990 Vol. 2 SCC 715 (Direct Recruit Class II Engineers vs State of Maharashtra)*.

7. In the case of Hav Harish Chandra Kandpal, in similar circumstances, the Hon'ble Principal Bench has passed the following order:-

*“In view of the foregoing, we are of the opinion that injustice has been done to the applicant by delaying his promotion to the rank of L/NK by 17 months and thus setting into motion of chain of even which cascaded into the applicant's loss in terms of seniority as Naik and consequently for promotion to that of Havildar.*

*In the light of above discussion, we are of the opinion that the impugned order is liable to be struck down. The impugned order is hereby set aside and quashed. The respondents are directed to reconsider the applicant as per the seniority of a Naik which has been given to his batch mates and thereafter to the rank of Havildar and onwards with all consequential benefits.*

*The present OA is hereby allowed. No order as to costs.”*

The other two judgements relied upon by the learned counsel for the applicant also follow the case of Hav Harish Chandra Kandpal.

8. Mr. Sudipto Panda, Id. counsel for the respondents vehemently argued and brilliantly tried to pursue the Tribunal to form a different opinion than what has been held by the Hon'ble Principal Bench. Appreciating the argument of Mr. Panda we are of the view that once three Benches of the AFT have held in favour of the persons like the applicant there appears no reason to take a dissenting view. It is trite law that judgments/orders of the Co-ordinate Benches are binding. Accordingly, it shall not be appropriate to form a different opinion than what has been held by the Co-ordinate Benches (supra).

9. Needless to say that a person cannot be deprived from the benefit available to him from the constitutional or statutory right. For any

reason whatsoever, in case a person could not be considered for promotion on account of ministerial lapses then as a follow up action as early as possible he or she should be considered with all benefits which would have been extended to him/her at the time of entitlement in accordance with rules. Of course, this is subject to the condition that aggrieved persons must have enforceable right which was given to others; *vide 1997 Vol. 3 SCC 321 (State of Haryana vs Ram Kumar Mann)*.

10. In this case the authorities have compounded their error by 'adding insult to injury' in that instead of correcting the error by restoring his seniority to that of his batch mates after he became Havildar, they continued to peg his seniority at 01.01.93 instead of 01.01.92 which subsequently had a cascading effect and led to his retirement without becoming a Subedar.

11. It may be noted that promotional avenue in service jurisprudence not only extend the financial gain and status but it also enhances the dignity and quality of the person in public eye which is his fundamental right in view of the various pronouncements of Hon'ble Supreme Court; *vide AIR 1991 SC 1902 (Bangalore Medical Trust vs B S Mudappa)*; *AIR 2007 SC 1046 (Milkmen Colony Vikash Samit vs State of Rajasthan)*; *2003 Vol. 6 SCC page 1 (Kapila Hingorani vs State of Bihar)*.

12. It seems to be not proper that the Army personnel who may be benefited by the orders of the Hon'ble Principal Bench(supra) including the present one be compelled to file O.As. in different Armed Forces Tribunals of the country. It shall be appropriate for the Chief of the Army Staff or appropriate authority to circulate the present order to different authorities of the Army to extend benefit to all similarly placed persons. Multiplicity of litigation does not seem to sound good that too with regard to the Army personnel who are serving the country at the cost of their family life and their own life.

13. The Constitutional Bench of the Hon'ble Supreme Court in the case reported in *1999 Vol. 7 SCC 209 (Ajit Singh & Ors.(II) vs State of Punjab)* held that where promotional avenues were available, seniority becomes closely interlinked with promotion which should be done provided equal opportunity to all eligible persons are given. For convenience relevant portion is reproduced as under:-

"..... 22. Article 14 and Article 16(1) are closely connected. They deal with individual right of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal

*protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".*

*It has been held that repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its root from Article 14. The said clause particularizes the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotion to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.*

*"Promotion" based on equal opportunity and "seniority" attached to such promotion are facets of fundamental right under Article 16(1).*

23. *Where promotional avenues are available, seniority becomes closed interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of "seniority-cum-suitability", the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the senior most person at the basic level is to be considered first and then the others in the line of seniority). This is now right to be*

*considered for promotion and the “seniority” attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).*

*Right to be considered for promotion is not a mere statutory right.*

27. *In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, kif it is intended to lay down that the right guaranteed to employees for being “considered” for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be “considered” for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950.*

*Article 16(4) and 16(4-A) do not confer any fundamental right to reservation. “*

14. In view of the above, there appears no doubt that the applicant has suffered for the inaction on the part of the respondents. The arguments advanced by Mr. Panda, even if taken as correct, that does not mean that the respondents have any right to adopt their own way without bothering for the benefit flowing from Art. 14 and Art. 21 of the Constitution of India.

15. In view of the above, we allow the Original Application. The respondents are directed to re-fix the seniority of the applicant from 01.01.1992 and all consequential benefits should be provided to him. The respondents are further directed to issue necessary orders in this regard within three months from the date of receipt of the certified copy of the order.

16. A copy of the present order shall be sent to the Chief of the Army Staff by the Registry for his information and appropriate action within a week.

A plain copy of the order, duly countersigned by the Tribunal Officer, be given to the parties upon observance of all usual formalities.

(Lt Gen Gautam Moorthy)  
Member (Administrative)

(Justice Devi Prasad Singh)  
Member ( Judicial )