

SEE RULE 102 (1)
ARMED FORCES TRIBUNAL, KOLKATA BENCH
R.A. No. 06 of 2014
Arising out of
TA No. 5 OF 2013
THIS DAY 26TH FEBRUARY, 2016

CORAM**HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)****HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)**

APPLICANT(S)

Maj Gen, Dr. S K Choudhury, VSM, (Retd)
 C-3/11, Bhaskar Roy Enclave (AWHO)
 VIP Road (Opposite Haldirams)
 Kolkata – 700 052

Versus

RESPONDENT(S)

1. **The Union of India**
 Through Secretary
 Ministry of Defence
 South Blok, D.H.Q P.O.
 New Delhi- 110 001.
2. **The Chief of Army Staff**
 Integrated HQ of MOD (Army)
 South Block, D.H.Q. P.O.
 New Delhi- 110 011.
3. **The Military Secretary**
 Integrated HQ of MOD (Army)
 South Block, D.H.Q. P.O.
 New Delhi – 110 011.
4. **Lt Gen JDS Rawat, AVSM, SM**
 Commandant Military Intelligence,
 Training School and Depot,
 Wanawrie, Pune-411040

For the Applicant(s) : Mr. K. Ramesh.

For the Respondent(s) : Mr. Anand Bhandari.

ORDER**PER JUSTICE N. K. AGARWAL, HON'BLE MEMBER (JUDICIAL)**

1. This is an application under section 14(4)(f) of the Armed Forces Tribunal Act (for short the Act) read with Rule 18 of the Armed Forces Tribunal Procedural Rules, 2008 (in short the rules) for review of the order dated 25.7.2014 passed in T.A. No. 5 of 2013.

2. We have heard Mr. K. Ramesh, learned counsel for the applicant as well as Mr. Anand Bhandari, learned counsel for the respondents.

3. The applicant was commissioned in the Indian Army on 30.4.1972 in Infantry and was assigned to the SIKH Regiment. Being initially a short service commissioned officer, his date of seniority was later fixed as 18th October, 1973 after grant of regular commission. Thus, he belonged to 1973 batch. Subsequently, he was transferred to the Intelligence Corps in 1982. At the relevant time i.e. in 2006, he was in the rank of Brigadier in the Intelligence Corps. He was due for promotion to Major General, for which No. 1 Selection Board was scheduled to be held in October, 2006. Though the Board meeting was fixed in October, 2006 but the holding of the board was postponed and it was actually held on 13.12.2006 pursuant to the stay order granted by the Hon'ble Delhi High Court in some other case. There were in all three candidates including the applicant and the respondent no. 4. Only one vacancy was allotted for the selection board. The applicant was not approved whereas the respondent no. 4 was approved and recommended by the No.1 Selection Board. Accordingly, the respondent no. 4 was promoted to the rank of Major General earlier than the applicant. Subsequently, in August, 2007 the next selection board meeting was held for next batch. Only one vacancy was made available for this board. There was, however, no fresh candidate from 1974 batch but the case of the applicant was considered and the applicant was eventually approved and promoted to the rank of Major General with effect from 6.3.2008 with seniority of Major General from 1.7.2007. Feeling aggrieved therewith the applicant made both statutory and non-statutory complaints which were rejected on 8.5.2008 and 16.12.2008 respectively. Having not been satisfied he filed T.A. No. 5 of 2013 which was dismissed by this Tribunal vide order dated 25.7.2014.

4. The only point that has been emphasized by Mr. K. Ramesh, learned counsel for the applicant is with regard to allotment of vacancy for promotion to the rank of Major General for 1973 batch. According to him, on 13.12.2006 when No.1 Selection board considered three candidates including the applicant and the respondent no. 4 for promotion to the post of Major General only one vacancy was allotted whereas two clear vacancies were available on that date in accordance with the rules and circulars as Major General Bhutani was to be retired on 1.12.2007 and had any other vacancy, that is, vacancy occurring on 1.12.2007 been allotted for this 2006 selection he could have got promoted along with respondent no. 4 and remained senior

with his original seniority protected and may have become Lt Gen. The above mistake is a mistake which is apparent on the face of the record and, therefore, the order passed by this Tribunal may be reviewed. For this, Mr. Ramesh has placed his reliance upon a judgment of the Hon'ble High Court of Delhi in the case of **Commodore F.H. Dubash VSM vs. Union of India and others 127(2006) DLT 471 (DB)**.

5. Mr. Bhandari, learned counsel for the respondents, on the other hand, would submit that No. 1 selection board was scheduled to be held in the month of October 2006 whereas Maj Gen. Bhutani was to retire on 1.12.2007 and, therefore, it was beyond 12 months' period counting from exhaustion of previous panel. Hence, only one vacancy was allotted for 2006 selection board. By referring paragraphs 20 and 21 of the order passed in TA No. 5 of 2013 it was further submitted by Mr. Bhandari that this Tribunal has considered every aspect of the matter and there is no scope for review of the order within the parameters of Order 47 rule 1 of the Code of Civil Procedure and the review petition deserves to be rejected.

6. Under Or. 47 r.1 of the Code of Civil Procedure a judgment may be open to review, inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Or.47 r.1 of the CPC. In exercise of the jurisdiction under Or.47 r.1 of the CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the later only can be corrected by exercise of the review jurisdiction.

7. The power of review may not be exercised as appellate forum. In **Thungabhadra Industries Ltd. Vs. Government of Andhra Pradesh represented by the Dy. Commissioner of Commercial Taxes Anantapur, reported in AIR 1964 SC 1372** the Hon'ble Supreme Court has held as under :

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably

be no two opinions entertained about it, a clear case of error apparent on the face of record would be made out.”

8. While considering the twin grounds with regard to power of review the Supreme Court has held that the first and foremost requirement of entertaining a review application is that the order, review of which is sought (a) suffers from any error apparent on the face of record; and (b) permitting the order to stand will lead to failure to justice (vide **Rajendra Kumar vs. Rambhai**, AIR 2003 SC 2095 ; **Green View Tea and Industries vs. Collector, Golaghat, Assam**, (2004) 4 SCC 122 and **Des Raj vs. Union of India**, (2004) 7 SCC 753.

9. A review petition has a limited purpose and cannot be allowed to be an appeal (pl.see the cases between Parison Devi and others vs. Sumitri Devi and others and Meera Bhanja v. Nirmala Kumari Choudhury , 1997(8) SCC 715 and (1995) 1 SCC 170).

10. Reverting to the facts of the case the issue being raised here by applicant regarding allotment of vacancy for promotion to the rank of Maj Gen for 1973 batch has been elaborately considered by this Tribunal while passing the order impugned. For the sake of convenience relevant paragraphs 16, 20 and 21 of the order are reproduced below.

“16. Keeping in view the above observations and issue raised by the Hon’ble Delhi High Court in this case, we may now examine the main contention made by the applicant i.e. allotment of vacancy of Maj Gen for Intelligence Corps at the relevant point of time. According to the respondents, Intelligence corps is a “minor corps” and is authorized two appointments of Maj Gen. The vacancies are calculated on the basis of retirement and likely promotion /posting in a period of 12 months from exhaustion of the previous panel. The No. 1 SB for 1973 batch i.e. applicant’s batch was actually held on 13.12.2006 though it was tentatively fixed in Oct 2006. Only one vacancy that was anticipated within the next 12 months was that of retirement vancancy of Maj Gen Jaspal Singh. The vacancy that would cause due to retirement of Maj Gen. Bhutani on 30 Nov 2007 was beyond 12 months period and therefore, that vacancy could not be taken into account, rather that would go to the next batch i.e. 1974 batch.

20. We, however, notice that the applicant and Brig Bora of 1973 batch, who could not be approved earlier, were considered as first review case along with 1975 batch fresh candidate which is irregular because the first review cases of 1973 batch are automatically considered as 1974 batch after depression of seniority with the revised reckonable seniority for promotion as 1973 batch as per rules. They ought to have been considered with next batch i.e. 1974 batch because their reckonable seniority then stood as 1974. According to rules, when a person is not approved in a selection, he loses seniority by one year i.e. he ought to be considered along with the next batch ; because the field of choice is extended by bringing into the field junior person resulting in senior being compared with junior. This is totally irregular and illegal as also against the policy of the Govt. This Bench has given a detailed order on this issue in R.K. Tripathi’s case (vide order dt. 1.4.14 in OA 121/12). However, since the applicant has been approved in

first review, we need not interfere with the selection. But we make this observation by making it very clear that had the fresh candidate from 1975 batch been selected, then certainly we would have interfered and quash the selection process. Since nobody is affected, we need not take any judicial notice on this issue at this stage, especially when the applicant was selected ; also retired after enjoying promotion as Maj Gen.

21. We have also gone through the departmental records including the board proceedings. We find that the noting was initiated much before and two retirement vacancies were indicated. It was suggested that the SB meeting may be held in Oct, 2006. This proposal was approved by the competent authority. There are other file notings from which it appears that the meeting could not be held in Oct 2006 because of stay order granted by the Hon'ble Delhi High Court in another matter and it was only after the said interim order was vacated by the Hon'ble Supreme Court that the promotion meeting could be held on 13.12.2006. By that time one vacancy occurred on 1.12.06. Therefore, selection was made against this vacancy. It is of course that one vacancy i.e. retirement vacancy of Maj Gen. V.K. Bhutani would be available from on 12.2.2007, but at the same time it is to be borne in mind that Brig G.K.B. Nair of 1972 batch i.e. senior to the applicant was already approved but could not be promoted for being low medical category. If the vacancy of Maj Gen Bhutani would also have been considered and set off by selection of the applicant or any other person, then Brig Nair would be deprived of his promotion in the event of his medical up-gradation, more so, because then the next vacancy would occur only in 2010. 1975 batch would also have suffered. All these factors must have weighed upon the respondent authorities for allotting only one vacancy of Maj Gen for the 1973 batch Intelligence Corps. We find it quite reasonable and rational action by the MoD/MS Branch and no other malice can be attributed. Therefore, by not allotting the retirement vacancy of Maj Gen Bhutani occurring on 1.12.2007, in our view, no injustice was done to the applicant; rather the respondents have tried to solve the situation in a balanced way. In our considered opinion no prejudice was caused to the applicant in any manner."

11. The matter can be looked into from another angle also. Indisputably on the date i.e. October 2006 when No. 1 selection board was scheduled to be held available vacancy was only one i.e. due to retirement of Maj Gen Jashpal Singh. Due to stay order passed by the Hon'ble Delhi High Court in October 2006 board proceedings were deferred till vacation of stay order and only could recommence in the month of December 2006. It is settled law that after vacation of the stay order the procedure has to be relegated to its original position.

12. The Hon'ble Supreme Court of India in the case of Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, reported in (1992) 3 SCC page 1 held that the order of stay granted pending disposal of a case comes to an end

with the dismissal of subsisting proceedings and it is the duty of the Court in such cases to put the parties in the same position they would have been but for the interim orders of the Court.

Therefore, it cannot be said that while passing the impugned order, this Tribunal has committed error which is apparent on the face of record.

13. So far as the judgment in the case of Commodore F.H. Dubash VSM(supra.) cited and relied upon by the applicant is concerned, the same is of no help to the applicant as in that case it was an admitted position that only one vacancy was considered whereas two vacancies were available.

14. Considering the above aspect of the matter, we do not find any error apparent on the face of the record in the order impugned justifying this Tribunal to exercise its power of review. For the foregoing, the review application deserves to be and is hereby dismissed. No order as to costs.

15. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be supplied to the parties after observance of usual formalities.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE N. K. AGARWAL)
Member (Judicial)

ss.