

FORM NO – 21

(See Rule 102 (1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO : OA 34 OF 2012

WEDNESDAY, THIS 13TH DAY OF FEBRUARY, 2013

**CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)**

Binod Kumar Singh, NC JC 804000Y Rank
Naib subedar, presently having his place of work
At HQ 20 Mountain Artillery BDE, C/o 99 APO

..... Applicant

-VS -

1. Senior Record Officer, Army Educational Corps
Records, Panchmahi, C/o 56 APO, PIN 908 777
2. Officiating Chief Record Officer, Army Educational
Corps Records, Panchmarhi,
C/o 56 APO PIN 908 777
3. Director General of Military Training (MT 14)
General Staff Branch, Integrated HQ of MoD (Army)
DHQPO, New Delhi-110 011
4. Officer-in-Charge, Army Educational Corps Records,
Panchmarhi, C/o 56 APO Pin 901123
5. Additional Director General, Army Educational Corps,
Integrated HQ of MoD (Army) New Delhi-110 011
Kolkata-700 021
6. Director, Military Training GSB-MT 14, Integrated HQ
Of MoD (Army) New Delhi, 110 011
7. Union of India represented through
the Secretary, M/o Defence, Sena Bhavan
New Delhi-110 011

..... Respondents

For the applicant : Mr. Ramesh Sharma, Advocate

For the respondents : Mr. Anand Bhandari, Advocate

O R D E R

Per Lt. Gen. K.P.D,Samanta, MEMBER (Administrative)

The applicant was enrolled in the Indian Army as a Direct entry Havildar in the Army Education Corps on 22.8.86. He has approached this Tribunal for restoration of his seniority since during his service period, he was reduced to the rank of Sepoy and was subsequently promoted as Havildar.

2. The brief case of the applicant is that he had overstayed the leave by one day on 24 October 1988 for which the authorities reduced him from Paid Acting Havildar to the rank of Sepoy, a post which he had never held in his service, under the provision of para 2(e)(i) of Army Instruction No. 84/68. He was, however, subsequently promoted back as Havildar on 26.10.88 and in the process, he became junior to all Havildars held on posted strength of the Corps on 24.10.88; the date when he overstayed leave by one day. The applicant was re-promoted to the rank of Havildar w.e.f. 26.10.88 i.e. from the date of rejoining after overstaying leave. The applicant, however made no representation nor any complaint to such reduction and subsequent promotion till the time he filed a statutory complaint on 13.9.06 i.e. after he found his original batch mates got promoted to the rank of Nb Sub leaving him superseded. The applicant in the present OA has annexed a copy of the statutory complaint at annexure-A in which he has clearly stated that reducing him to the rank of Sepoy, which he

never held since the time of enrolment, was illegal and, therefore, he sought for a direction from the Chief of Army Staff to whom the statutory complaint was addressed, that such reduction to rank to Sepoy was violative of Art. 14 and 21 of the Constitution, as held by the Hon'ble Apex Court in many judicial pronouncements, and, therefore, such punishment should be set aside. Accordingly, he prayed that his original seniority as on 22.8.86 be restored immediately for all purposes.

3. In this regard, the applicant has also annexed Army HQ. policy letter No. B/10195/Org 2(MP)- (C) dated 7th July 94 which refers to an earlier policy letter of 11.8.89 which was cancelled by the ibid policy letter of 7.7.94. It will be relevant to quote the said policy letter :-

“ Reference our letter No. 73170/10 II/Org 2(MP) (O) dated 11Aug 89.

2. As per above mentioned letter, direct entry Havildar Clerk when involved in disciplinary case, hospitalization or overstaying/absent without leave is required to be brought down to the rank of a Sepoy. Recently a ruling has been given by the supreme Court that a person appointed directly to a higher post, service, grade of time scale of pay cannot be reduced by way of punishment to a post in a lower time scale, grade, service or a post which he never held before. It, therefore, implies that directly enrolled Havildar Clerks do not hold the rank of Sepoy at any stage and it would not be appropriate to revert them to Sepoy in the circumstances mentioned in our letter under reference.

3. The case was examined in consultation with JAG's Department and PS directorate. It has been viewed that the ruling given by the Supreme Court is valid for directly enrolled Havildar Clerk. In addition to this, it has also been ruled that serving graduates who are selected as direct entry Havildar Clerk and are promoted as such should also be treated at par with direct entry Havildar clerk from civil. Therefore, for the sake of uniformity in rules, the decision given by the Supreme Court is equally applicable to all cat of pers enrolled directly as Havildar i.e. Havildar clerk, AEC Havildar and Meritorious sportsmen enrolled in the rank of Havildar.

4. These instructions will be applicable from the date of issue of this letter. Our letter No. 73179/XIII/Org 2(MP)(C) dated 11 Aug 89 is hereby cancelled.”

4. It may, however, be noted that the ibid policy letter, as mentioned in para 4 of the same, would be applicable only from the date of its issue i.e. from 7th Jul 94. The applicant, however, was reduced in rank on account of overstaying leave on 25.10.88 i.e. before the issue of this ibid policy of 1994. That notwithstanding, the applicant prayed that from the point of view of natural justice, his seniority should be restored to 22.8.86, which was his date of enrolment.

5. In response to the statutory complaint, which is at annexure-A, the authorities provided partial relief to the applicant vide their letter dt. 19.7.07, which was communicated to the applicant vide OIC Records letter dt. 16.8.07, which is at annexure-B to the OA. The said letter is quoted below :-

“2. After examining the statutory complaint dated 13 Sep 2006 submitted by No. 9509922A Hav (AES) Binod Kumar Singh, competent authority has directed vide Integrated HQ of MoD (Army) letter No. A/79021/BKS/GS/MT-14 dated 19 Jul 2007 and even No. dated 10 Aug 2007 that partial redress be granted to the NCO by way of the relief the NCO is getting as a result of his statutory complaint is **his loss of seniority due to OSL and it will not have a cascading effect on his subsequent promotion to the next ranks as and when other NCOs enrolled with him are promoted** provided he meets all other criteria as per policy. Therefore, the NCO has been given notional seniority in the rank of Hav wef 01 Sep 89 along with his batch-mates.

3. The NCO be informed accordingly. “

6. The applicant has emphasized on this letter, which amounts to certain reliefs that have been given to him. But as submitted by the Id. counsel for the applicant, this order of Chief of Army Staff has not been implemented by the

concerned authorities in letter and spirit. Being aggrieved, the present OA has been preferred.

7. The respondents have not contested their own letter of 16.8.07 (annexure-B) quoted above by which certain relief was given to the applicant but they contested the prayer of the applicant by making the following three points :-

- (a) The policy letter at page 40 which is dated 7.7.94 cannot have any retrospective effect. Therefore, it was only to bring down the applicant from Acting Havildar to Sepoy when he overstayed the leave on 25.10.88 and then to re-fix his seniority by a subsequent promotion which as per the relief to the statutory complaint given vide letter dt. 16.8.07 (annexure-B) is w.e.f. 1.9.89 notionally along with his batch mates. In this regard, the respondents continued to submit that his reduction in rank as Sepoy was in accordance with the policy that was in vogue at that point of time as contained in Army Instruction No. 84/68, and, therefore, it was in order. To this effect, the respondents have drawn our attention to a Principal Bench judgement in OA 694 of 2010 (Havildar Harmesh Singh -vs- UOI & Ors) decided on 29.4.11. The ibid judgement also relates to a directly recruited Havildar who had overstayed leave for two days for which he had to lose his rank and reinstated again with fresh seniority, thereby losing one year of seniority. The Principal

Bench had held that such reduction in rank and subsequent promotion after effecting loss of seniority was in order in accordance with para 2(e)(i) of Army Instruction No. 84/68. therefore, it is submitted by the respondents that the ratio of this judgement is squarely applicable to this case.

- (b) The respondents have submitted that the applicant had unduly delayed his representation/statutory complaint amounting to nearly 18 years; implying thereby that the applicant having lost seniority on account of overstaying leave in October 88 should not have waited till Sept. 06 to file his statutory complaint. Therefore, at this stage, the prayer for restoration of seniority, contended by the respondents, should not be accepted.
- (c) The respondents insisted that the authorities after receiving the relevant instruction on the applicant's statutory complaint in Aug 2007 (annexure-B) took most urgent steps to ensure that he obtained the required relief to become a Nb Subedar and was accordingly promoted to the rank of Nb Sub in soonest possible time which was in 2007. They have further stated that subsequent to such relief, the applicant qualified his promotion category in Nb sub on 21.11.07 and was promoted to the rank of Nb Sub on 1.12.07 in the first available vacancy and his seniority in the rank of Nb Sub

has been fixed from that date i.e. 1.12.07 vide order dt. 5.12.07 at annexure-C. Therefore, it will not be possible for them to grant him seniority from any prior date in the rank of Nb Sub as that would cause great injustice to others.

8. We have heard the learned counsel for both the parties at length and have gone through various documents placed on record.

9. We are of the view that Chief of Army Staff in response to the applicant's statutory complaint dt. 13.9.06 has very judiciously considered all the aspects of the matter and was pleased to grant him partial relief vide letter dt. 19.7.07 and 10.8.07 which has been indicated in OIC Record's letter dt. 16.8.07 (annexure-B) that "..... IT WILL NOT HAVE A CASCADING EFFECT ON HIS SUBSEQUENT PROMOTION TO THE NEXT RANKS AS AND WHEN OTHER NCOs ENROLLED WITH HIM ARE PROMOTED....."

10. A plain reading of the relief granted by the COAS clearly shows that justice has been granted in two ways to the applicant in response to his statutory complaint. First, the applicant suffered enough for being OSL for one day by losing seniority in the rank of Havildar by three years and on that account had to work under his juniors for the entire duration he was in the rank of Sepoy and Havildar. Such punishment was, perhaps, severe enough for the omission committed by the applicant. Moreover, the COAS would have been well aware of the matter that subsequent to various Apex Court judgements, such reduction of directly recruited Havildar was not to be done in future for which the policy letter was issued on 7th Jul 1994 by the Army HQ. Unfortunately, the applicant did not

fall within the purview of this policy letter because it did not have retrospective effect.

11. Be that as it may, the applicant has not prayed for back dated seniority in the rank of Havildar, perhaps, he is satisfied with what has been awarded to him in terms of the relief that has been granted by the COAS in response to his statutory complaint.

12. Ld. Counsel for the respondents has drawn our attention to the last line of para.2 of Annex. 'B' dated 16.08.2007 which stated that the "NCO has been given notional seniority in the rank of Havildar with effect from 01.09.1989 along with his batch-mates". It is contended that since the COAS has already fixed this notional seniority, the applicant cannot claim any ante-dated seniority from the date of his original direct entry in the cadre of Havildar i.e. from 22 August, 1986.

13. We have considered this aspect and we do not find from the reply of the respondents wherefrom this cut-off date i.e. 01.09.1989 has been arrived at. We find from para 2 of Army HQ Circular No.94938/AG/PS2(3388) dt. 3rd March 88 (at Annex-A collectively, page 42 of OA), which stated as follows :

"2. This will take effect from 02.03.1985. Case of affected JCOs/NCOs will be reviewed. Re-promotion will be granted **with notional seniority from the date of their original promotion**. Pay and allowances, however, will be admissible from the date the individual is actually promoted."

14. There was further clarification dated 21.11.1988 (Annex A collectively at page 43 of the OA) which stated that the notional seniority should be from the date of re-promotion and not from original promotion. It, therefore, appears that there is inconsistency in these two orders; whereas the first order of the Army HQ

states that the notional seniority will be from the date of original promotion but the pay and allowances will be admissible from the date of actual promotion but the second letter says that the notional seniority should be from the date of the promotion. In the instant case, after reduction to the rank of Sepoy, the applicant was re-promoted as Havildar from 26.10.1988 and, therefore, even as per this order his notional seniority should actually be fixed from that date i.e 26.10.1988 i.e. date of re-promotion. But it is not clarified by the respondents as to how the date 01.09.1989 has been fixed in Annex. 'B' so far as the notional seniority of the applicant is concerned.

15. Be that as it may, we find from the original order of the Army HQ dated 3rd March, 1988 that the notional seniority should be from the date of original promotion which in this case is 22.08.1986 i.e. the date when the applicant was initially enrolled as direct recruit Havildar and before the issue of subsequent letter dt. 21.11.88, the applicant was re-promoted. In that view of the matter, we are of the opinion that in terms of the first order, the applicant should get notional seniority from that date of his initial direct entry into the cadre only along with his batch-mates.

16. The second aspect of the relief granted by the COAS is very clear that such loss of seniority would not have any cascading effect in his promotion on account of so called loss of seniority. It would, therefore, mean that his seniority would be adjusted along with his batch mates who were enrolled with him on 22.8.86. This aspect of protection of seniority from the next rank onwards and not

to have any cascading effect in future promotion is very clear from the order of relief as per annexure-B.

17. In view of the above discussion we are clearly of the view that although the applicant was promoted on 1.12.07, his notional seniority as Nb Subedar should be at par with his batch mates who were enrolled along with him on 22.8.86 as Havildar and were promoted to the rank of Nb Sub in the year 2004-05. Therefore, the applicant's prayer to restore his original batch seniority in the rank of Nb Sub along with his batch mates, who were promoted to that rank, is very valid and judicious. It must be implemented. The applicant after having been notionally brought at par with batch mates should now be considered for subsequent promotion without any further suffering by way of interference with his seniority.

18. In the result, the original application is allowed on contest and with the following directions :-

- 1) The respondents are directed to restore the seniority of the applicant along with his batch mates in accordance with his Army Number, who were enrolled directly as Havildar on 22.8.86 and were later promoted as Nb Subedar in 2004-05.
- 2) Although his promotion may be given effect from 1.12.07, as has been done, for the purpose of pay and allowances only, but his seniority for next promotion will be considered treating him at par with his batch mates who were enrolled along with him as

Havildar i.e. on 22.8.86, and who were promoted to the rank of Nb Sub in 2004.

- 3) This order be implemented within 60 days from the date of communication of this order.

19. Let a plain copy of this order duly countersigned by the Tribunal Officer be furnished to both parties on observance of usual procedure.

(LT. GEN. K.P.D.SAMANTA)
MEMBER(A)

(JUSTICE R.N.RAY)
MEMBER(J)