

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO : OA 40 OF 2011

THIS 22ND DAY OF APRIL, 2013

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

Sri Kartika Chandra Muduli
S/o Late Anam Charan Muduli, No. JC-692905-X,
Ex Nb Sub (Nursing Assistant) KC Muduli,
Presently residing at Village and Post Erasama,
PS – Erasama, Dist. Jagatsinghpur,
Orissa-754139, Last Unit-11 Girls Battalion
NCC, 10, Laxmi Road, Dehradun, Uttaranchal

..... Applicant

-VS -

1. Union of India, service through the Secretary,
Ministry of Defence, Raksha Bhawan, Government
Of India, South Block, New Delhi, PIN 110 011
2. Chief of Army Staff, sena Bhawan,
Army Headquarters, New Delhi, PIN 110 011
3. General Officer Commanding-in-Chief,
Central Command, Lucknow-1,
State of Uttar Pradesh
4. General Officer Commanding,
Eastern Command, Kolkata,
Fort William, West Bengal, PIN 700 021
5. Officer-in-Charge Record,
Army Medical Corps (AMC) Centre
And School, Lucknow-2, State of Uttar Pradesh
6. Commanding Officer,
11, Girls Battalion NCC, 10, Laxmi Road,
Derhadun, Uttaranchal
7. Senior Registrar, Command Hospital,

Eastern Command, Kolkata, Alipore,
West Bengal, PIN 700 027

8. OI/C Records, AMC,
Centre and School, Lucknow-2, Uttar Pradesh.
9. Colonel Records, AMC, Centre Aid School,
Lucknow-2, Uttar Pradesh

..... Respondents

For the applicant : Mr. Subhash Chandra Basu, Advocate

For the respondents : Mr. Anand Bhandari, Advocate

ORDER

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

In this original application filed under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant, who has been discharged from Army Service, has prayed for the following reliefs :-

- i) Direction upon the respondent authorities to grant promotion to the Rank of Subedar from 01.12.2003 as per Notification published in the Gazette of India, dated 20.11.2004.
- ii) Direction upon the respondent authorities to release salary and all monetary benefit up to 17.02.2008 (date of final discharge) and further extension of service up to 22.02.2008.
- iii) Direction upon the respondent authorities to release increment for the period February 2006 to 17.02.2008.
- iv) Direction upon the respondent authorities to grant seniority (promotion) to the rank of Subedar Major w.e.f. 01.02.2008.
- v) Direction upon the respondent authorities to reinstate the applicant in the service on 18.02.2008 to till date had there been promotion to the rank of Subedar Major.
- vi) Direction upon the respondent to grant honorary Rank of Lt. Captain.

- vii) Direction upon the authority to deem the applicant in the service or in the continuation of service till 22.02.2008 and give all aforementioned benefits and seniority.
- viii) Direction upon the authority to release enhanced pension after grant of promotion w.e.f. 01.02.2008 to date of discharge and onwards.

2. The facts relevant for deciding this case are that the applicant was enrolled in the Army, in the Army Medical Corps (AMC) in the trade of nursing assistant on 23.02.1978. During the course of his service, he served at various places and also earned regular promotions to higher ranks. He was posted in the Command Hospital, Calcutta for the period of 23.5.2000 to 1.6.2003 in the rank of Nb Sub. Thereafter he was transferred and posted at Derhadun in 11, Uttranchal (Girls) Battalion, NCC. According to the applicant, he was informed by a communication dt. 22.11.2003 that he would be promoted to the rank of Subedar (Nursing) w.e.f. 1.12.2003 and in fact, he was so promoted by orders dated 30.5.2004 (annexure-A3). Accordingly, the applicant assumed charge of the higher post; but while he was discharging his duties in the promoted rank and post of Subedar, his such promotion was cancelled with effect from the original date of promotion, i.e. from 1.12.2003 vide order dated 24.5.2005 (annexure-A8), on the ground of his alleged involvement in a vigilance case, for which a disciplinary proceeding was initiated against him for certain misconduct that he had committed while he was posted at Command Hospital, Calcutta. It was observed that he was irregularly promoted locally without taking note of the fact that he was involved in a disciplinary case. Accordingly, the applicant was reverted to his former post of Nb Subedar. A court of inquiry was conducted followed by a GCM proceeding against him. In the GCM proceeding, however, the applicant was found to be 'not guilty'. A review GCM proceeding was also held in November 2007 with similar verdict and thus, he was fully exonerated of the

charges framed against him. Thereafter, the applicant made a representation for his re-promotion to the rank of Subedar from the due date i.e. from 1.12.2003 with original seniority in that rank vide representation dated 20.2.2008 (Annexure-A9). The applicant followed up the matter by making subsequent representations and eventually he has filed the instant OA in the year 2011 praying for the reliefs as stated above.

3. Since there was delay in filing this application before this Tribunal, the applicant also prayed for condonation of delay u/s 22 of the AFT Act, which was allowed on contest and the delay was condoned.

4. The respondents have resisted the application by filing a written reply. They have given the service details of the applicant from which it appears that he was enrolled on 23.02.1978 and was promoted to the rank of Naib Subedar with effect from 18.05.1998 with notional seniority from 01.03.1998. Thereafter, he was further promoted to the rank of Subedar from 01.12.2003, but this promotion was then cancelled because the applicant was placed under disciplinary and vigilance (DV) ban at his previous place of posting in Kolkata, which was not known to the new unit at Dehradun (11 Uttarakhand Girls Battalion NCC) where he was promoted. He thus reverted to the earlier rank of Naib Sub. His date of retirement in the rank of Naib Subedar was from 28.02.2006.

5. It is stated by the respondents that while the applicant was posted at Dehradun, he was considered for promotion to the rank of Subedar with effect from 01.12.2003. His such promotion was subject to all the eligibility criteria as mentioned in the AMC Record Instruction No.10/2000 read with integrated Army HQ of Ministry of Defence letter dated 10.10.1997. When the promotion of the applicant was announced, his local unit was unaware of the fact that the applicant was involved in a vigilance case while posted at Command Hospital, Kolkata. One of the co-accused, whose promotion was withheld

due to such involvement in the said vigilance case, filed a writ petition before the Hon'ble Calcutta High Court alleging that the applicant herein was also involved in that case and despite that, he was given promotion. Thereafter, the matter was enquired into and finally it was found that the applicant was given promotion to the rank of Subedar (Nursing Assistant) erroneously with effect from 01.12.2003. Therefore, his promotion was cancelled by Record letter dated 23.04.2005 w.e.f. 1.12.2003. The applicant made a statutory complaint against such cancellation which was rejected by the competent authority vide order dated 09.05.2006.

6. On the basis of the vigilance case, a court of enquiry was held followed by a General Court Martial (GCM) proceeding in which the applicant was found to be 'not guilty'. A review GCM proceeding was also held with the same result and, therefore, the charges against the applicant were revoked on 31.01.2008.

7. Following such exoneration of the applicant and in consideration of the representation of the applicant made in that regard, a case was taken up for re-promotion of the applicant to the rank of Subedar with the Ministry of Defence and finally the Ministry directed to promote the applicant to the rank of Subedar with all consequential benefits. The applicant, however, had retired by then in the rank of Nb Sub. Therefore, the applicant was notionally promoted to the rank of Subedar with effect from 01.12.2003 i.e. original date of promotion and his date of retirement changed to 01.03.2008 with direction for grant of revised pension and other pension related benefits as would be applicable to a Subedar retiring on 01. 03. 2008. Accordingly, the matter was referred to the concerned PAO which advised that the applicant would have to first refund the pension amount already drawn by him. Similarly, the commuted value of pension and

DCRG money already paid should also be refunded. The applicant was accordingly asked to deposit the said amount which has not been done as yet.

8. So far as promotion to the next rank of Subedar Major is concerned, it is stated by the respondents that since the applicant did not physically serve in the rank of Subedar, thus his ACR in that rank was never initiated. Therefore, his claim for further promotion to the rank of Subedar Major could not be considered being not eligible.

9. The applicant has filed a rejoinder in which he has pointed out that he was wrongly implicated in the vigilance case for which he was wrongfully deprived of his legitimate claim for promotion to the rank of Subedar Major with effect from 01.03.2008 when his batch-mates were also given promotion. He has also prayed for payment of salary for the higher post including that of Honorary Lt and Capt.

10. We have heard ld. advocates for both sides and have gone through the various documents produced before us.

11. In this case, the facts are not much in dispute. It is the admitted position that the applicant was given promotion to the post of Subedar (Nursing) with effect from 01.12.2003 in which post he worked for some time. It was subsequently detected that he was involved in a vigilance case while he was posted at Command Hospital, Kolkata relating to some employment irregularities. Therefore, such promotion was considered irregular and he was ultimately reverted to his original rank of Naib Subedar retrospectively from the date of his promotion by an order issued on 23.04.2005 (Annex. R4) and Part I order was published on 24.5.2005 (annexure-A8). It is also admitted position that a GCM proceeding was initiated against the applicant which ended in his exoneration as he was found 'not guilty'. A review GCM proceeding was also held in November, 2007 with same result. However, it appears that the finding of the said

proceeding was not confirmed by the competent confirming authority as per law. In the meantime, the applicant, having been reverted to the post of Naib Subedar, was discharged from service with effect from 28.02.2006 on completion of terms and conditions in the rank of Nb Sub.

12. After the applicant was declared 'not guilty' in the GCM proceedings, the applicant submitted a representation praying for his re-promotion with extended period of service and the competent authority after considering the fact that he was found not guilty in the GCM proceedings, allowed his prayer and he was re-promoted to the rank of Subedar notionally from 1.12.2003 with all consequential benefits including extension of his service up to 29th Feb, 2008 (Annexure-R20).

13. The main prayer of the applicant made in this OA is that he should be given promotion to the rank of Subedar with extended period of service. It appears that his grievance in that regard has already been remedied by the respondents themselves and he has been granted the relief. Therefore, nothing survives to be adjudicated by this Tribunal in respect of such prayers.

14. The other prayer of the applicant is for payment of pay and allowances for the promotional post. In this regard, we find that the Senior Accounts Officer of the Office of PAO, AMC, Lucknow by a communication dated 14.06.2011 (annexure-R22) intimated that the amount of pension drawn by the applicant must be deposited before releasing the amount of pay and allowances for the period of re-instatement i.e. from 01.04.2006 to 29.02.2008. That apart, it is also seen that the applicant is also required to refund the amount of commuted value of pension and DCRG paid to him and his original PPO should be cancelled first before issuing fresh LPC with new date of retirement i.e. 01.03.2008(Annex.22). It appears that the applicant replied to this communication on

15.07.2011 stating that he is in difficulty to refund the aforesaid amount in lump sum and requested for some more time (Annex.24).

15. From the above, it is quite clear that the respondents are ready to pay the arrear pay and allowances for the period of 1.4.2006 to 29.2.2008 i.e. the period of extended service in view of his notional promotion to the rank of Subedar. Incidentally, it may be noted that as the applicant was reverted to the rank of Nb Subedar, he was discharged from service earlier on 28.2.2006 (vide para 5(a) of reply) and therefore, his extended period of service for two years consequent on his re-promotion to the rank of Subedar should be from 1.3.2006 to 29.2.2008 and hence, arrear should be admissible for this period and not from 1.4.2006 to 29.2.2008 as mentioned in the Annexur-22.

16. That apart, the applicant was reverted by orders issued in April/May 2005 whereas he was promoted w.e.f. 1.12.2003. Thus, it is evident that the applicant had worked in the higher post of Subedar and shouldered higher responsibility for nearly 18 months; hence, even if he was subsequently reverted as such promotion was found to be irregular, he cannot be denied salary and appraisal of the higher post for that period of 18 months when he actually held the post of Subedar, worked and shouldered higher responsibility before reversion.

17. Further, the applicant was reverted only on the ground of pendency of vigilance case and subsequent GCM proceedings held against him in which he was fully exonerated and all charges were dropped. Under such circumstances, pay of the post from which he was reverted cannot be denied to him as he was honourably exonerated in the proceedings.

18. In the above view of the matter, we are of the opinion that the applicant is entitled to get salary of the post of Subedar from 1.12.2003 till 29.2.2008 after adjustment of payment already received by him.

19. So far as the prayer of the applicant for promotion to the next higher grade of Subedar Major is concerned, it is stated in the rejoinder that his batch mates Shri Basudev Lenka and Shri Balbir Singh were promoted to the said rank with effect from 1.3.2008. Except that no other details are available nor any document in that regard has been produced. The respondents have, however, stated in their reply that since the applicant did not physically work in the post of Subedar, no ACR was raised and hence his case could not be considered for next promotion. In this context, ld. adv. for the applicant has relied on the decision of the Hon'ble Supreme Court in the case of **Pilla Sitaram Patrudu & Ors –vs- UOI & Ors**, AIR 1997 SC 250 and also the decision of the Hon'ble Delhi High Court dt. 5.9.1997 in the case of **Brig. S.P.Chawla-vs- UIO** in CWP of 888 of 1997. The facts of both the cases are clearly distinguishable. The case before the Hon'ble Supreme Court relates to a case of direct recruitment on the basis of merit and there was delay in joining by the petitioners for no fault of them and in that context, the Hon'ble Supreme Court held that they are entitled to the rank as per select list. In the latter case, the joining of the petitioner was delayed as he was not relieved and therefore, could not earn requisite number of ACRs. In that context, the Hon'ble Delhi High Court passed the order that the petitioner cannot be allowed to suffer twice for no fault of him. In the present case, the facts are quite different. Firstly, it is not a case of direct recruitment but promotion. Secondly, the applicant was indeed promoted as Subedar from his due date i.e. 1.12.2003 but he was subsequently reverted as it was detected that he was given such promotion erroneously as a vigilance case was already pending against

him. As per Govt. policy on the subject, a person cannot be promoted if any proceeding is pending against him or his conduct is under cloud. However, after the proceeding was concluded and the applicant was exonerated, he was re-promoted from the original date and was also given notional extension of service as due and admissible. Therefore, there was no question of any administrative delay or delayed joining as was the case before the Hon'ble Delhi High Court. That apart, the applicant himself has stated that Shri Lenka and Singh i.e. his batch mates were promoted as Subedar Major from 1.3.2008. The date of discharge of the applicant from the post of Subedar is 29.2.2008 and therefore, promotion of any person, may be his batch mate, from a subsequent date i.e. 1.3.2008, cannot confer any right on the applicant to claim such promotion, as he already stood discharged from service before that date. We, therefore, find no merit in this claim of the applicant.

20. So far as claim of the applicant for grant of honorary rank of Lt/Capt is concerned, it is for the respondents to consider and if it is due and admissible under the rules, they may pass appropriate orders in that regard. The rules for grant of honorary ranks to JCOs are governed by different rule and these are meritorious awards conferred after a stiff competition. Therefore such a prayer at this stage is rather irrelevant and presumptive.

21. In view of our findings made above, we allow this application in part by issuing the following directions:-

- a) The applicant is held entitled to arrear pay and allowances in the post of Subedar for the period from 1.12.2003 to 29.2.2008. The respondents are directed to release the same to the applicant, if not already done, after adjustment of the payment he has already received. The

applicant shall not be required to refund the payments on account of pay, pension and other terminal grants as was allowed, which he has already received on account of his service in a lower rank and due to earlier date of discharge, as stated in Annexure-R22.

b) The revised PPO based on a revised LPC and pension at enhanced rates including commuted value of pension as also higher amount of DCRG etc. on account of his extended period of service be also issued and paid to the applicant without insisting him on refunding the commuted value of pension, DCRG and other retirement benefits viz. AGI etc, he had received earlier. The payment as above will, however, be subject to adjustment of the amounts already received by the applicant.

c) No Cost.

22. Before we part with this case, we would like to make two observations. Firstly, in many such cases filed before this Tribunal, we have noticed that even when the dues of the individual employee is more than that Govt. dues payable by him, the respondents insist on payment of Govt. dues by the individual first and then to release the admissible dues to the employees. It must be appreciated that when an individual is discharged or had to remain out of employment, it is very difficult for him to pay back the Govt. dues in lump sum before he could get his own dues and arrears from the Govt. which is much higher amount that payable to the Govt. Considering such hardship, the respondents should consider and evolve suitable modalities for payment of residual amount to the individual after adjustment of the Govt. dues, without insisting on payment of Govt. dues at the first instance. Such procedure will not harm or prejudice the Govt. or any party to the proceedings; rather it will be beneficial and helpful to such discharged employee to

get his dues expeditiously. Secondly, disciplinary proceedings must be expedited specially for those in promotion zone and on verge of retirement. The authorities must evolve a monitoring system within the Army to ensure that avoidable delay does not take away the rights of a soldier and impede on delivery of natural justice. In this case it took more than three years to complete the disciplinary proceedings that finally resulted in the applicant's exoneration; but by this time the soldier missed his promotion and had to proceed on retirement prematurely having to reconcile to his fate. Delay in completion of departmental proceedings has, in this case, hurt him in the process to an extent for which he cannot be compensated.

23. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to the parties after observance of due procedure.

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

(JUSTICE R.N.RAY)
JUDICIAL MEMBER