

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: R.A. 01 OF 2013 (TA 88/2010)

THURDAY, THIS 25TH DAY APRIL, 2013

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

1. Union of India represented through
the Secretary, M/o Defence, South Block
P.O. DHQ, New Delhi-110 011
2. Chief of Army Staff, South Block, Integrated head
Quarters, MOD (Army) New Delhi 110011
3. Military Secretary (MS Retirement),
Army Headquarters, PO DHQ, New Delhi-110 011.
4. Director General of Retirement, Army Headquarters,
P.O. DHQ, New Delhi-110 011
5. Controller of Defence Accounts (Officers)
Golibar Maidan, Pune 411 001
6. GOC-in-Chief, Headquarters,
Eastern Command, Fort William,
Kolkata-700 021

Petitioners

- Versus -

Lieutenant Colonel Dipak Kumar
Bhattacharyya, S/o Late Kabi Kinkar
Bhattacharyya, residing at 96/1, Ashok Nagar,
P.O. Ashok Nagar, Dist. 24 Parganas (North)

Respondent/OP

For Petitioners : Mr. D.K.Mukherjee, Counsel
Mr. Mintu Kumar Goswami, Counsel

For the respondent/OP : Mr. Dibyojyoti Raha, Counsel

O R D E R

This review petition has been filed by the Union of India respondents of TA 88 of 2010 seeking review and recall of the order dated 21st December, 2012 passed in the said TA 88 of 2010 on the grounds set out therein.

2. The original applicant (respondent in this RA), who retired as Lt. Col. w.e.f. 28.2.06 had filed a writ petition before the Hon'ble High Court being WP 4132(W) of 2007 ventilating his grievance that his service was not extended upto 54 years, that he was illegally denied higher pay scale of Colonel (TS) and consequential higher pension in terms of A.V.Singh Committee's recommendation. The said writ petition was transferred to this Tribunal and was renumbered as TA 88 of 2010. The said TA was heard by this Tribunal and vide judgement dt. 21.12.20012, the same was allowed in favour of the applicant by giving certain directions. It was noticed that because of a DV Ban imposed on the applicant, 15.4.2004, which was never lifted till his retirement, rather it continued even after his retirement, the applicant was denied the benefit of higher rank and scale in terms of A.V.Singh Committee recommendations as a reason of which, he could not also get extension of service upto 54 years and higher pay scale of Colonel(TS) and he had to retire at the age of 53 years. After hearing both sides and after considering the matter elaborately, the Tribunal inter alia passed the following orders :-

- i) The DV Ban imposed upon the applicant on 12.5.2004 is set aside.
- ii) In accordance with the AVSC recommendations applicable with effect from 16th December 2004, the applicant shall be promoted to the rank of Col(TS) after considering him to be substantive Lt. Col.

iii) (a) His retirement now shall be notionally extended upto the age of 54 years i.e. upto 28.2.2007.

(b) His retirement order, which is impugned, vide Appendix B to the letter dated 28 March 2003 at annexure P2 to the TA, is quashed.

iv) ** ** *** ** ***

3. Through the instant review petition, the petitioners/respondents have sought for review and recall and/or modification of the said order as under :-

- a) To recall order to the extent of quashing of imposing DV Ban from the date of imposition.
- b) To modify the order to the extent that the respondent is entitled to rank of Lt. Col considered for the rank of Col (TS) in accordance with AO 9/2005/PS.
- c) To modify the order to the effect that the respondent be entitled to consequential benefits accordingly.

4. The RA has been contested by the respondent/original applicant by filing a written objection wherein it is contended that there is no error apparent on the face of the order and hence, the order is not liable to be reviewed under the rules.

5. We have heard Mr. D.K.Mukherjee, Id. adv. appearing with Mr. Mintu Kr. Goswami, Id. adv. for the review petitioners and Mr. Dibyajyoti Raha, Id. adv. for the OP/original applicant.

6. The power of review of the Tribunal of its own order has been provided in Sec. 14(4)(f) of the Armed Forces Tribunal, 2007 read with rule 18 of AFT (Procedure) Rules, 2008. It is noticed that this power is exactly in *pari materia* with the powers vested in the Administrative Tribunals under the Administrative Tribunal Act, 1985 in Sec. 22(3)(f) read with Rule 17 of the AT(Procedure) Rules.

7. The said provision of Sec. 22(3)(f) of the AT Act was considered in details by the Hon'ble Apex Court in the case of **State of West Bengal –vs- Kamal Sengupta & Anr**, 2008 SCC(L&S) 735 wherein the scope and ambit of review power vested with the Tribunals have been elaborately dealt with. It will be useful to quote the relevant portion as under :-

“The principles which can be culled out from various judgements are as follows :

- i) The power of the Tribunal to review its order/decision under section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 rule 1 CPC.
- ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.
- iii) The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.
- iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under section 22(3)(f).
- v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- vi) A decision/order cannot be reviewed u/s 22(3)(f) on the basis of subsequent decision/judgement of a coordinate or larger Bench of the tribunal or of a superior court.
- vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.”

8. As provided in Order 47, Rule 1 of CPC, the scope of review is very limited. An order can be reviewed only when apparent error on the face of the judgement/order is

pointed out and when new and important materials are brought out which could not be produced earlier at the time of hearing of the main application despite exercise of due diligence.

9. Keeping the aforesaid principles in mind, we may now examine the grounds advanced by the petitioners seeking review of the order in question.

10. During the course of hearing, it is mainly contended on behalf of the petitioners that the Tribunal should not have quashed the DV ban imposed on the applicant as he did not pray for it and further that the Tribunal should not have directed grant of scale of Col (TS) to the applicant straightway. It is pointed out that the entitlement to rank of Lt. Col.(TS) is not automatic but it is subject to certain criteria as laid down in AO 9/2005/PS. It is, however, admitted even in the RA that the respondent, who at the relevant time was holding the rank of Lt. Col (TS), was also eligible for the rank of Col (TS). But all eligible officers are required to be screened by appropriate selection board for grant of Col (TS) rank and the respondent was entitled to consideration only and that he would be entitled to the said rank only if found fit. Therefore, the Tribunal should modify the order directing consideration of his case by the selection board only. It is also contended that in the main application, there was no such prayer for grant of rank of Col(TS), and therefore, the Tribunal cannot go beyond the prayer.

11. Such submission is, however, strongly disputed by Mr. Raha, Id. adv. for the respondent/OP. It is forcefully submitted by him that even though the petitioner in TA 88 of 2010 has not categorically prayed for such scale benefit, it has been unequivocally averred in the writ petition itself that he was deprived of all sorts of promotional benefits because of imposition of DV ban which continued even till the date of his retirement without any rhyme or reason. It is within the competence of the court to grant reliefs

which the petitioner is entitled to irrespective of non-inclusion of such prayer specifically in the prayer portion of the writ petition. It is further contended by him that there is nothing wrong on the face of order in granting notional promotion to the petitioner on the grounds which have clearly been spelt out in the body of the judgement. That apart, relying upon the decision of the Hon'ble Apex Court reported in AIR 2000 SC 106 (**State of Bihar, Appellant –vs- Dr. Braj Kumar Mishra and others, Respondents**) it is argued by him that in the peculiar facts and circumstances of the case, especially whenever the petitioner has already retired, the court can grant such promotion from a particular date of his entitlement. In such a situation, the Hon'ble Supreme Court has held that such order granting promotion to the appellant from a particular date by the High Court is not illegal. However, in the afore-mentioned case, the Hon'ble Supreme Court directed that such order should not be treated as precedent. Ld. counsel for the respondent further argued that the Tribunal has no legal authority to modify its own order disturbing the merit of the case while hearing a review petition. He forcefully argues that if there is any illegality or irregularity in the order granting reliefs to the petitioner, it is for the appeal court to set aside or modify suitably the order in question, if such occasion arises but the powers of appeal court cannot be usurped by the Tribunal on the basis of a review petition. He has, therefore, urged this Tribunal to dismiss the instant petition since no patent error is apparent on the face of the order under review.

12. We have meticulously taken into consideration the rival submissions so advanced by both the sides. It is importantly important to note that in the order under review, it has clearly been observed that only because of the DV ban, the applicant could not be given the benefit of ABS Committee's recommendation even though he was also eligible for the same along with his batch mates who got such benefit. After carefully considering the

facts and circumstances as also the arguments advanced by both sides in TA 88/2010, the Tribunal thought it fit and proper to allow the application and to issue certain directions which were necessitated for granting proper reliefs to the petitioner. Accordingly, the TA was allowed and appropriate directions were recorded in para 32 of the order under review. Whether grant of benefit of rank of Col (TS) was automatic or not was also discussed in the said judgement. Considering the fact that the applicant had already retired without getting the benefit and all other batch mates got such benefit except him, and the applicant was already a Lt. Col (TS), the Tribunal thought it fit to grant appropriate reliefs on notional basis, which the petitioner is entitled to get as per relevant Army Orders and Instructions. It would be travesty of justice if such legal entitlements are denied to the petitioner on the plea that such prayer was not specifically inserted in the prayer portion of the petition. In fact, these issues as raised by the applicants/respondents in this review application appear to be irrelevant and misconceived for the simple reason that this Tribunal cannot judge the legality or illegality of the reliefs granted to the petitioner in TA while disposing of the RA. In the review petition, there is no scope to modify/recall the order dt. 21.12.2012 passed by this Tribunal, as prayed for.

13. Having heard the ld. advocates for both parties and having gone through the averments made in the RA and reply thereto, we are of the considered opinion that the grounds adduced in the review petition are all grounds of appeal as the petitioners have mainly alleged that the Tribunal has erred in law. We also notice that in the A/O to the writ petition, the respondents/present petitioners have mentioned that Army Order No. AO/9/2005/8 was applicable. Such being the position, we do not find any patent error apparent on the face of the order. In the garb of review, the petitioners cannot claim

reconsideration of the main issue, which is not permissible under the law enunciated by the Hon'ble Supreme Court as set out in the preceding paragraph.

14. In view of the above, we do not find any merit in this review petition which is accordingly rejected. No costs.

15. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both parties.

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

(JUSTICE RAGHUNATHRAY)
JUDICIAL MEMBER