

ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

TA No.04 of 2013

Monday, the 8th day of September, 2014

The Honourable Justice V.Periya Karuppiah
(Member-Judicial)

and

The Honourable Lt Gen K Surendra Nath
(Member-Administrative)

Havildar V Chandran
S.No. 14556705-X

...Applicant

Mr.K.Ramesh
By Legal Practitioner:

vs.

1. Union of India
Through Secretary
Ministry of Defence
New Delhi
2. Chief of Army Staff
Through Adjutant General (ADG PS)
Army Headquarters
New Delhi – 110 011
3. The SRO
EME Records
Secunderabad

...Respondents

Mr. B.Shanthakumar, SPC

ORDER

[Order of the Tribunal made by
Hon'ble Lt Gen K Surendra Nath, Member (Administrative)]

The applicant, Havildar V Chandran had filed this application challenging the impugned EME Records order No. 1361/CA1/P3/T2/Court Case dated 29 April 2008 regarding grant of ante date seniority with a request to quash and set aside the order as also issue of a writ of Mandamus to grant *ante* date seniority of Havildar from 17 August 2003 to 01 June 2003 at par with the batch mates and consequential effect of promotion to the rank of Naib Subedar to meet the ends of equity and justice.

2. The applicant originally filed a writ petition No.9896 of 2008 in the Hon'ble Andhra Pradesh High Court and later withdrew the same on 26 June 2009 owing to the death of his advocate Shri Vishal Saxena. Thereafter, he had filed a civil writ petition No.9938 of 2009 in the Hon'ble High Court of Delhi which was transferred to the AFT Principal Bench, New Delhi as TA No.439 of 2010. Upon the retirement of the applicant from service and he being located at Chennai, the TA was further transferred to AFT, Chennai as TA No. 04 of 2013 (WP (C) No.9938 of 2009).

3. The applicant, in his application states that he was enrolled in the Indian Army on 26 July 1983 and was promoted to the rank of Naik on 01 November 1999 at par with his batch mates. He would claim that for further promotion to the rank of Havildar, though he was qualified in all other aspects and falling within seniority, he was not

detailed for promotion cadre/course No.NH-09/2002-2003 from 03 March 2003 to 12 April 2003 for promotion to the rank of Havildar along with his batch mates due to a clerical error. On coming to know that his juniors had already been detailed for the said course, he approached EME Records, Secunderabad, *vide* signal letter dated 14 May 2003 through his Unit. The EME Records detailed him for the promotion course from 07 July 2003 to 16 August 2003 *vide* their signal dated 30 May 2003. On successful completion of the course, he was promoted to the rank of Havildar from the next day, i.e., 17 August 2003. He would allege that he should have been promoted to the rank of Havildar with *ante* date seniority of 01 June 2003 along with his batch mates to protect his seniority. However, this was not done and he was promoted only on 17 August 2003. This has had a cascading effect and he became junior to his own batch mates for no fault of his. He would further state that though he acquired the requisite qualifications for promotion for the rank of Naib Subedar, well within time, his batch mates and juniors were promoted to the rank of Naib Subedar on 01 May 2008. The applicant would further aver that with effect from 02 May 2008 he became overage for promotion as the upper age limit for Naib Subedar was 44 years. He would claim that non-detailment for promotion Cadre No. NH-09/2002-2003 when he became due along with his batch mates, and subsequent detailment for four months later and that too only when he pointed out, has resulted in his promotion being effected only on 17 August 2003 whereas he ought to have been promoted on 01 June 2003 along with his batch mates. He was, in effect, superseded by his juniors, though no fault was his. He would state that though he was fit and fully qualified to be promoted to the rank of Naib Subedar, due to the earlier wrong fixation of seniority by the respondents, he was

not promoted to the rank of Naib Subedar on 01 May 2008. Though he had approached the respondents *vide* letter dated 15 April 2008 to refix his seniority by granting him *ante* date seniority with effect from 01 June 2003 along with his batch mates, it was not done. The respondents, instead of refixing his seniority and promoting him to the rank of Naib Subedar, his claim was rejected *vide* their letter dated 29 April 2008. In the meantime, the applicant retired from service with effect from 31 July 2009 on completion of service, i.e., maximum of 26 years in the rank of Havildar. In view of the foregoing, the applicant would request the Tribunal to refix his seniority of Havildar by granting *ante* date seniority with effect from 01 June 2003 and, promoting him to the rank of Naib Subedar on 01 May 2008, which is his due, and give him all consequential benefits.

4. The respondents, in their reply statement, have stated that the applicant was enrolled in the EME on 26 July 1983 in the Driver (MT) Trade and he was promoted to the rank of Naik on 01 November 1999. He was promoted to the rank of Havildar from 17 August 2003 after having passed the Naik to Havildar promotion course on 16 August 2003. Though he had qualified for promotion to the rank of Naib Subedar on 08 July 2006 and had other requisite qualifications for promotion, he could not be promoted on or before 01 May 2008 for want of vacancies in his Trade. With effect from 02 May 2008, he became ineligible for promotion as he crossed the upper age limit of 44 years for promotion to Naib Subedar. He retired in the rank of Havildar on completion of his terms and conditions of service, on 31 July 2009.

5. The respondents would further submit that the applicant was detailed to attend promotion cadre/course Ser No.09/2002-2003 commencing March 2003 to 12 April 2003 along with his batch mates. However the applicant did not attend the said course for reasons best known to him. During the currency of the course, they would state that the applicant was admitted in 115 Base Hospital for diagnosis 'Fistula' from 17 March 2003 to 10 April 2003. The applicant, immediately after discharge from hospital willfully proceeded on 33 days part of annual leave from 14 April 2003 to 16 May 2003. After rejoining from leave he was re-detailed in the immediate promotion cadre course Ser No NH-1 & 2/2003-2004 with effect from 07 July 2003 to 16 August 2003. Since the applicant had qualified in the said promotion cadre/course on re-detailment only on 16 August 2003, he was promoted to the rank of Havildar with effect from 17 August 2003, i.e., the next day. The respondents would claim that there are no provisions to fix *ante* date seniority to an earlier date without qualifying in the promotion cadre/course and, therefore, his request for the same could not be acceded to. They would further contend that the 3rd respondents, i.e., SRO, EME Records was not at fault at any stage as alleged by the applicant and the allegations leveled by the applicant appear to be motivated, an afterthought and without any substance and merit. They would further contend that the applicant was granted Modified Assured Career Progression (MACP) for the rank of Naib Subedar with effect from 01 September 2008 and granted all applicable arrears to the tune of Rs.50,444/- with Basic Pay of Rs.9,900/- and Grade Pay of Rs.4200/- as applicable to the rank of Naib Subedar. These sums had already been

paid to him *vide* their letter of 11 October 2013. Hence, the respondents have prayed that the contention of the applicant in the main TA is devoid of any merit and substance and should be dismissed.

6. We have heard the arguments of Mr.K.Ramesh, learned counsel for the applicant and Mr.B.Shanthakumar, learned Senior Panel Counsel as well as Maj Suchithra Chellappan, learned JAG Officer (Army) and also perused all the documents and written arguments that were placed before us.

7. On the above pleadings, the following points emerge for consideration:

(i) *Whether the applicant was detailed for the promotion cadre/course Ser No. NH-09/2002-2003 commencing from 03 March 2003 to 12 April 2003, as claimed by the respondents;*

(ii) *In consequence to applicant attending the subsequent promotion cadre/course Ser No.1 & 2/2003-2004 and promoted to the rank of Havildar only on 17 August 2003, whether any of his juniors were promoted ahead of him?*

(iii) *What relief, if any, the applicant is entitled to?*

8. The applicant was enrolled in the Indian Army on 26 July 1983 in the Driver Trade and was promoted to the rank of Naik w.e.f. 01 November 1999. We note from the records that he was detailed for promotion cadre/course to the rank of Havildar from 07 July 2003 to 16 August 2003 and he was subsequently promoted to the rank of Havildar on 17 August 2003. His batch mates and some juniors to him were detailed and attended the promotion cadre/course S.No.NH-09/2002-2003 with effect from 03 March 2003 to 12 April 2003 and subsequent courses and were promoted to the rank of Havildar on 01 June 2003. The applicant during a part of this period, was admitted in 115 Base Hospital for the diagnosis FISTULA IN AND (OPTD) on 17 March 2003 and

discharged on 10 April 2003. Thereafter, the applicant was granted 33 days part of annual leave and on return from leave, he attended the promotion cadre/course Ser No.1 & 2/2003-2004 from 14 July 2003 to 16 August 2003 and was promoted to the rank of Havildar on 17 August 2003. He had also qualified in promotion cadre/course for promotion to Naib Subedar rank and he had all the requisite qualification for this promotion. However, when the vacancies for promotion came up on 01 May 2008, he was not promoted to the rank of Naib Subedar as his seniority was fixed from 17 August 2003. On 02 May 2008, he had become overage for promotion after attaining 44 years of age and became ineligible for promotion as Naib Subedar. He superannuated from service in the rank of Havildar on 31 July 2009, after 26 years of service.

9. Points 1 and 2: From the records, we note that the applicant's date of promotion to the rank of Naik which is the rank for fixing seniority for promotion from the rank of Havildar was 01 November 1999. In the Reply Statement on Rejoinder filed by the Applicant, the respondents would claim that the applicant was detailed in the NH cadre/course Ser No.09/2002-2003 commencing with effect from 03 March 2003 to 12 April 2003 along with his batch mates. The respondents would also aver that the applicant did not attend the said course for reasons best known to him. They would also produce records to show that the applicant was admitted to 115 Base Hospital from 17 March 2003 and was discharged on 10 April 2003 and, thereafter, he proceeded on 33 days part of annual leave. According to respondents, this was done with an aim to avoid attending the said promotion cadre/course and deliberately missed the course for reasons best known to him. The Tribunal asked the respondents repeatedly to produce

the letter by which the applicant was said to have been detailed for the said course starting from 03 March 2003. However, despite repeated directions of the Court on the subject, the respondents have not produced the said letter. Instead, they claimed that the correspondence on the subject was destroyed being a routine correspondence in accordance with Para 592 and 596 of the Regulations for the Army, being more than 3 years old. To buttress their claim, they have produced the destruction certificate of the old records and claimed that the said file, i.e., F.No.1335/NH-09/2002-2003/CA 1/P2/TA on the subject of CCNH 09/2002-2003 for the period 31 December 2002 to 30 April 2003 were destroyed by a Board of Officers on 05 August 2009. Per Contra, the applicant has claimed that he was not detailed for the said course. He got to know of that only when he learnt that his juniors had been detailed for the said course. He immediately applied to his Commanding Officer and a signal was sent to the EME Records, Secunderabad. We have perused the signal which states:-

“Promotion cadre course NK to Hav(.) Ref your letter No 1335/NH-14/2002-03/CA1/T2 of Mar 11(11)(.) And 1335/NH-13/2002-03/CA1/P2 of Feb 18 (18)(.) No 14556705X NK/DVR(MT) V Chandran of this Unit has not been detailed in the NH course(.) Juniors to indl already detailed in the NH course(.) Pl Clarify for info of indl.”

In response to the above signal letter, the applicant was detailed for the course Ser No. NH 1 & 2/2003-04 commencing from 7 July 2003 to 16 August 2003 which was conducted four months subsequent to the course for which he was due. We also note from the signal letter Supra, above, five more courses, i.e., upto Ser No.14 were conducted prior to his detailment for the course starting from 07 June 2003. The

respondents have filed in writing before us that the relevant documents have been destroyed from where we could have verified the facts as claimed by the respondents.

10. Destruction of the documents, when an issue is *sub judice* and pending before the Courts and Tribunals had been adversely commented upon by the Supreme Court. In a case relating to Union of India and another vs Ex Major Sudershan Gupta in Civil Appeal No.4418 of 2004, decided on May 20, 2009 [(2009) 2 Supreme Court Cases (L&S) 197] the Hon'ble Apex Court had observed as under:

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"2. While allowing the aforesaid writ petition, the High Court has observed in para 4, in the following manner:

"We have been given ample opportunities to the respondents to produce the records as to whether the convening order passed by Major Mehta was passed after the same was endorsed by the Major-General concerned, so that it could have been observed whether the competent authority under the law has applied its mind before convening the General Court Martial or not. In spite of various opportunities granted to the respondents, the respondents have not been in a position to produce the records before us."

3. When the present appeal is taken up for final hearing and on our query, it is pointed out that the records of the convening authority are not available as the same has been destroyed by the army authorities. We are informed that the same has been done pursuant to the prevailing rule that records of all court-martial proceedings should be retained only for a period of 7 years.

4. However, the records disclose that the writ petition was filed in the Delhi High Court by the respondent before the expiry of 7 years' period and since the matter was *sub judice* before the court, the army authorities were required to preserve the records so as to make the same available to the Court to effectively decide the issue with regard to the legality or validity of the order of convening the General Court Martial. It would not be possible to decide the issue raised, as has been rightly held by the High Court, namely, as to whether or not there was proper application of mind by the competent authority while passing the convening order.

5. *Learned counsel appearing for the respondent has stated that adverse inference should be drawn against the inability of the Department to produce the records. However, in view of non-availability of records, we find no reasonable ground to interfere with the order of the Division Bench of the High Court.*

6. *In our considered opinion, the legality and the validity of the order of convening the General Court Martial cannot now be decided in the absence of the records which the appellant is required to produce before us. We, therefore, find no merit in this appeal which is accordingly dismissed leaving the parties to bear their own costs.*

7. *At this stage, learned counsel for the respondent states that in view of the order passed today the respondent shall have to be paid all the consequential benefits. We grant three months' time to the appellant to comply with the order and to give all consequential benefits."*

11. The observations of the Hon'ble Apex Court, with regard to adverse inference when documents are destroyed even though the matter was *sub judice* before Court, squarely fits this case. The matter was *sub judice* since 2008, when it first came up for consideration before Hon'ble Andhra Pradesh High Court and subsequently before Hon'ble Delhi High Court, Principal Bench, AFT, Delhi and this Tribunal. In the extant case, adverse inference would be drawn against respondents for failing to produce the said letter. In consequence, the presumption of fact that the applicant had not been detailed for the said course, i.e., Ser No.NH-09/2002-2003, as averred by the applicant, would weigh in his favour. This is also evident from the reading of the initial submissions before the Hon'ble Andhra Pradesh High Court by the applicant and respondents. Extracts of relevant submissions by the applicant are given below:-

"It is submitted that the petitioner herein had joined Indian Army in the Corps of EME on 26.07.1983 as a Driver (Mechanical Transport) with SSLC (10th) civil qualification to his credit.

It is submitted that Respondents No. 4 & 5 too had joined along with the petitioner herein in the same trade/category of soldiers and were trained and attested together as soldiers.

It is submitted that petitioner had preceded Respondents 4 and 5 in their promotion to the rank of Naik as follows:

Name of Candidate	Date of Promotion to Naik
(a) V Chandran (Petitioner)	01.11.1999
(b) Ugra Narayan Thakur (R-4)	01.11.1999
(c) Madhukar S Karande (R-5)	01.12.1999

It is submitted that in the matters of promotion to the rank of Havildar, Respondents have made it mandatory for a candidate to pass a departmental promotion cadre (NH Cadre for short) to which each eligible candidate is detailed by the department in turn of his own seniority.

It is submitted that the petitioner herein in the month of January 2003 came to know of his juniors having been detailed for such NH Cadre Course and completed the same without offering similar chance to the petitioner herein.

It is submitted the petitioner herein took up the matter departmentally / through proper channel of such denial of promotional avenues to him and in response to his agitation, he had been detailed to undergo NH Cadre from 07.07.2003 to 16.08.2003 at 1 EME Centre, Secunderabad (AP), which he had completed successfully and as a result thereof was granted promotion to the rank of Havildar on and w.e.f. 17.08.2003."

12. In reply to this, in the counter filed by respondents 1 to 3 on 30 July 2008, i.e., when the said documents were ought to have been in possession of the respondents, they made no claim that the applicant was detailed for course NH- 09/2002-03 starting on 03 March 2003. Instead, they have stated the following:

"08. In reply to para 12 of the affidavit, it is submitted that the service particulars of Respondents No. 4 and 5 are as under:

<i>Sl.No.</i>	<i>Army No, Rank and Name</i>	<i>Date of Enrolment</i>	<i>Date of promotion as Havildar</i>
<i>i</i>	<i>14556721N Havildar/Dvr(MT) Ugra Narayan Thakur</i>	<i>26.07.1983</i>	<i>01-06-2003</i>
<i>ii</i>	<i>14557758H Havildar/Dvr(MT) Madhukar Digambar Karande</i>	<i>29.08.1983</i>	<i>01-06-2003</i>

09. In reply to para 13 of the affidavit, it is submitted that the dates of promotion to the rank of Naik in respect of the petitioner and Respondents No 4 and 5 are as under:

<i>Sl.No.</i>	<i>Army No, Rank and Name</i>	<i>Dates of promotion as Naik</i>
<i>A</i>	<i>14556705X Havildar/Dvr(MT) V Chandran (Petitioner)</i>	<i>01-11-1999</i>
<i>B</i>	<i>14556721N Havildar/Dvr(MT) Ugra Narayan Thakur</i>	<i>01-11-1999</i>
<i>C</i>	<i>14557758H Havildar/Dvr(MT) Madhukar Digambar Karande</i>	<i>01-12-1999</i>

10. In reply to para 14 and 15 of the affidavit the allegation made in para 15 thereof are incorrect and denied. He was not denied any opportunity. It is submitted that as per records the petitioner was detailed for his mandatory requirement for getting promotion as Naik to Havildar to promotion cadre course Ser No NH 1 & 2/2003-04 which was to be run at 1 EME Centre Secunderabad w.e.f. 07 Jul 2003 to 16 Aug 2003 which he successfully completed. [emphasis supplied by us]

13. From the foregoing it would be abundantly clear that the applicant was not detailed for the said course along with his batch mates, i.e., Course Ser No. NH-09/2002-2003, which would have enabled him to get promoted along with No.14556721 Nk/Dvr(MT) Ugra Narayan Thakur, to the rank of Havildar on 01 June 2003 who is of his batch but below him in the *inter se* seniority. Further No. 14557758 Nk/Dvr(MT) Madhukar Digambar Karande, who is junior to the applicant (seniority as

Naik – 01-12 1999) was also promoted to the rank of Havildar on 01.06.2003, thereby superseding the applicant.

14. The respondents have averred that the applicant was well aware of his supersession since 2003 and should have complained earlier and not at the belated stage of next promotion. This argument cannot be conceded as seniority roster is maintained at Corps level and on "All India Basis". It would be facile to argue that a soldier should keep track of his *inter se* seniority at each rank. Instead, it is the duty of the 3rd respondent, i.e., the SRO, EME Records to maintain the Seniority Rolls and to protect the interest of soldiers by providing equitable opportunities to them, in time, for acquiring requisite qualifications for promotion. Their duties would also include protecting the seniority / promotional prospects of a soldier, when an obvious mistake / omission has occurred on part of the respondents.

15. In view of the foregoing, the following conclusions can be drawn:

(a) The applicant was not detailed by the respondents for Course Ser No.NH-09/2002-2003 commencing from 03 March 2003 to 12 April 2003 along with his batch mates. It was the duty of respondents to provide opportunities for acquiring requisite qualifications for promotion, when an individual is due / in promotion zone. A definite mistake / omission on the part of the respondents is discernible for not detailing the applicant for the said course / similar course, in time.

(b) The applicant was detailed on a subsequent course, four months later, in Course Ser No.NH-1 & 2/2003-2004 commencing from 07 July 2003 to 16 August 2003, following a representation made by him.

(c) The applicant was promoted to the rank of Havildar on completion of the course, i.e., 17 August 2003.

(d) In the meantime, two NCOs, i.e., Nk Ugra Narayan Thakur and Nk Madhukar Digambar Karande, junior to him in the *inter se* seniority, were promoted to the rank of Havildar on 01 June 2003, thereby superseding the applicant. The supersession of the individual was caused not due to a willful or wanton omission by the applicant, but due to a mistake by the respondents.

(e) The effective *inter se* seniority for subsequent promotion to the rank of Naib Subedar was listed as under:

(i)	Hav Ugra Narayan Thakur	01 June 2003
(ii)	Hav Madhukar Digambar Karande	01 June 2003
(iii)	Hav V Chandran	17 August 2003

(f) The applicant's representation to restore his seniority by giving him *ante* date seniority of 01 June 2003, was rejected by the respondents, on the plea that seniority cannot be re-fixed retrospectively as there is no provision to execute the same prior to his passing promotion cadre.

(g) Though all above named Havildars were fully qualified and eligible for promotion to the rank of Naib Subedar on 01 May 2008, only Hav Ugra Narayan Thakur and Hav Madhukar Digambar Karande were promoted.

(h) Hav V Chandran was not promoted to the rank of Naib Subedar on 01 May 2008, being lower in seniority for promotion. He became ineligible for promotion with effect from 02 May 2008, being overaged for promotion from that date.

(i) In consequence, the applicant retired in the rank of Havildar on completion of 26 years of service.

16. In sum, the respondents have erred, firstly in not providing timely opportunity to the applicant to acquire requisite qualification for promotion to the rank of Havildar and, thereafter, in not protecting the seniority of the applicant, while promoting his juniors. This has resulted in the supersession of the applicant at the rank of Havildar and subsequent denial of promotion to the rank of Naib Subedar. Thus, both Points 1 and 2 are in the applicant's favour.

17. Point 3: As on 01 May 2008, the applicant had possessed all the requisite qualifications for promotion to the rank of Naib Subedar and adequate vacancies for promotion existed on that date. In view of our conclusions at Points 1 and 2, we are inclined to accept the plea of the applicant that his seniority for promotion to the rank of Havildar should have been fixed at 01 June 2003, i.e., the date on which his juniors were promoted. Accordingly, we fix the *ante* date of seniority of the applicant for the said rank to be 01 June 2003. Further, he is deemed to have been promoted to the rank

of Naib Subedar from 01 May 2008 and is entitled to all consequential benefits, till the date of retirement as per service conditions for the said rank.

18. In fine, the TA is allowed. The respondents are directed to pay the arrears of pay, pension and gratuity as admissible to him in the rank of Naib Subedar from the date of his notional promotion, i.e., 01 May 2008. While calculating the arrears, payments made on account of grant of MACP and gratuity etc. will be adjusted. The respondents are directed to comply with this order within three months from the date of receipt of this Order. In default, an interest of 9% *per annum* is payable from that date. No order as to costs.

Sd/-

Lt Gen K Surendra Nath
Member (Administrative)

Sd/-

Justice V.Periya Karuppiah
Member (Judicial)

08-09-2014

[True copy]

Member (J) – Index : Yes/No

Internet : Yes/No

Member (A) – Index : Yes/No

Internet : Yes/No

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To:

1. Secretary
Ministry of Defence
New Delhi
2. Chief of Army Staff
Through Adjutant General (ADG PS)
Army Headquarters
New Delhi – 110 011
3. The SRO
EME Records
Secunderabad
4. Mr.K.Ramesh
Counsel for applicant.
5. Mr. B. Shanthakumar, SPC
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7. Library, AFT/RB, Chennai.

Hon'ble Justice V.Periya Karuppiah
(Member-Judicial)
and
Hon'ble Lt Gen K Surendra Nath
(Member-Administrative)

T.A.No. 04 of 2013

Dated: 08.09.2014