

ARMED FORCES TRIBUNAL REGIONAL BENCH, KOCHI

O.A.NO. 161 of 2015

TUESDAY, THE 24TH DAY OF JANUARY, 2017/04TH MAGHA, 1938

CORAM:

HON'BLE MR. JUSTICE S.S.SATHEESACHANDRAN, MEMBER (J)

HON'BLE VICE ADMIRAL M.P.MURALIDHARAN, AVSM & BAR, NM, MEMBER (A)

APPLICANT:

NAIB SUBEDAR KRISHNA HARI.C.,
RESIDENT OF 10/757,
SAUPARNIKA,
POST OFFICE KALLIKULANGARA ,
DISTRICT PALAKKAD, KERALA – 678 009.

BY ADV. SRI.V.K.SATHYANATHAN.

Versus

RESPONDENTS :

1. UNION OF INDIA, REPRESENTED BY ITS
SECRETARY, MINISTRY OF DEFENCE,
SOUTH BLOCK, NEW DELHI – 110 011.
2. THE CHIEF OF THE ARMY STAFF,
COAS'S SECRETARIAT,
ARMY HEADQUARTERS,
NEW DELHI - 110 011.
3. DIRECTOR GENERAL OF ARTILLERY (ARTY-7),
ARMY HEADQUARTERS,
NEW DELHI – 110 011 .
4. THE OIC RECORDS,
ARTILLERY RECORDS,
PIN – 908 802, C/O.56 APO.
5. THE COMMANDING OFFICER,
891, MEDIUM REGIMENT,
C/O 56 APO.

BY ADV.SRI. CB.SREEKUMAR, SENIOR PANEL COUNSEL.

O R D E R

VAdm.M.P.Muralidharan, Member (A):

1. This Original Application has been filed by Krishna Hari C, No.14476702W, Ex Naib Subedar seeking reinstatement in service and promotion to the rank of Subedar with consequential benefits.

2. The applicant had earlier filed WP.No.16482 of 2003 in the High Court of Judicature at Allahabad, challenging his discharge from the Army, seeking reinstatement in service and promotion to the rank of Naib Subedar. The Writ Petition, on establishment of Armed Forces Tribunal, was transferred to the Regional Bench of this Tribunal at Lucknow and subsequently to this Bench and re-numbered as TA.No.16 of 2011. The Transferred Application had been disposed of vide orders dated 22 January 2013 (Annexure

A1), wherein the applicant's discharge order was quashed and the applicant was directed to be treated in service till the date of his discharge in normal course with consequential benefits. The applicant had subsequently filed a series of Miscellaneous Applications for implementation of the orders. This Tribunal vide orders dated 26 May 2015 in MA.No.501 of 2013, directed the respondents to pass a speaking order on the claim of the applicant for promotion (Annexure A3(a)) and accordingly speaking order dated 18 July 2015 (Annexure A4) was issued by the respondents. The applicant has essentially challenged the speaking order in the instant Original Application.

3. Sri V.K.Sathyanathan, the learned counsel for the applicant submitted that the applicant was enrolled in the Army on 23 December 1981 and in due course was promoted to the rank of Havildar on 01 April 1988. In the year 2001 the applicant was placed in low medical category

due to 'Central Serous Retinopathy (Right Eye) with High Myopic Astigmatism'. Even though the applicant had expressed his willingness to continue in service despite being in low medical category, he was discharged from service with effect from 30 November 2002.

4. The learned counsel submitted that the applicant who was due to be promoted to the rank of Naib Subedar on the next date, ie 01 December 2002, therefore challenged his discharge order in the Hon'ble High Court of Uttar Pradesh at Allahabad, which was eventually transferred to the Kochi Bench of the Armed Forces Tribunal (TA.No.16 of 2011). This Tribunal had quashed the discharge order and the respondents were directed to treat the applicant in service till his discharge in normal course on fulfillment of tenure or extended tenure with all consequential benefits including backwages, promotion and other benefits (Annexure A1).

5. The learned counsel further submitted that the respondents initially, partially complied with the order and based on subsequent directives by this Tribunal, a speaking order was issued by the respondents (Annexure A4). The applicant who was promoted to the rank of Naib Subedar based on orders of this Tribunal, was eligible to continue in service upto 31 December 2009 ie 28 years of service. He was also to be considered for promotion to the rank of Subedar and subsequent promotions. The claim of the applicant for further promotions was however rejected on the premise that he did not have any ACR in the rank of Naib Subedar and that he did not pass the Junior Leader Proficiency Test (JLP Test). The learned counsel submitted that the applicant could not earn any ACR in the rank of Naib Subedar as he had been improperly discharged from service. Observing that the discharge was irregular, this Tribunal had directed his reinstatement and promotion. Therefore the applicant could not be denied further

promotions merely on the ground that he could not earn any ACR. The learned counsel also submitted that only on promotion to the rank of JCO can a person appear for JLP Test. Therefore the applicant who had been discharged illegally in the rank of Havildar and was promoted to Naib Subedar on orders of this Tribunal, could not be denied further promotion as he cannot be blamed for the shortcomings.

6. The learned counsel further submitted that the Hon'ble Delhi High Court in **Nb Sub (Skt) Jasbir Singh vs. Union of India & ors, 115 (2004) DLT 351** had held that an individual cannot be blamed for administrative lapses and had passed the judgment in favour of the applicant therein. The learned counsel also submitted that this Tribunal in **OA.No.74 of 2011, Hav M.Thangavelu vs. Union of India & Ors.,** had allowed the appeal of the applicant therein as it was the respondents who had failed to initiate

necessary ACR. A number of personnel of the applicant's Regiment who had been promoted to the rank of Havildar along with the applicant and eventually to Naib Subedar were promoted to the rank of Subedar and Subedar Major (Annexure A6). The learned counsel therefore prayed that the applicant be reinstated in service, promoted to the rank of Subedar and be considered for further promotions along with his contemporaries with all consequential benefits.

7. The respondents in their reply statement have submitted that the applicant had been discharged from service with effect from 30 November 2002 being in medical category lower than SHAPE 1 under Army Rule 13(3)III(v). Based on the directives of this Tribunal in TA.No.16 of 2011, the applicant was notionally reinstated and promoted to the rank of Naib Subedar with effect from 01 December 2002, allotted JC Number and was discharged

notionally with effect from 31 December 2007 (Annexure R3). The respondents further submitted that a Screening Board is conducted two years prior to completion of terms of engagement of a JCO and only those who meet the requisite medical, ACR and disciplinary criteria as per policy, are given extension of service in the rank of Naib Subedar (Annexure R1). The applicant who was notionally reinstated and promoted, did not have the requisite medical criteria at the time of his retirement, for grant of extension of service in the rank of Naib Subedar. He was therefore granted only regular tenure of 26 years. Further for promotion to the rank of Subedar, personnel are to have requisite ACR and disciplinary criteria and should also have passed JLP test (Annexure R2). The applicant was therefore not eligible for further promotions as he did not have the requisite qualification requirements. The respondents further submitted that the applicant had been granted all benefits as directed by this Tribunal and could not be given

any further promotions or extension of tenure in service as he did not meet the requisite criteria.

8. Heard rival submissions and perused records. We also tacked on and perused records in TA.No.16 of 2011.

9. The essential contention of the applicant is that since this Tribunal in TA.No.16 of 2011 had held that the discharge of the applicant was improper and had directed his reinstatement with all consequential benefits, he was entitled for reinstatement, promotion to the rank of Subedar and for further promotions on par with his contemporaries with all consequential benefits. The respondents, on the other hand, have contended that, in compliance of the orders of this Tribunal, the applicant was notionally reinstated in service and was discharged on completion of the requisite years of service in the rank of Naib Subedar. He was not eligible for further extension of

service or for promotions as he did not meet the requisite criteria.

10. It is not disputed that the applicant who was in permanent low medical category was discharged from service in November 2002, in keeping with the then prevalent policy as specified in Army Order 46/1980. The applicant challenged his discharge from the Army which was considered by this Tribunal in TA.No.16 of 2011. His essential contention was that he could not be discharged on the basis of the said Army Order, without being recommended by an Invaliding Medical Board as required by Rule 13(3)III(iii) of Army Rules 1954.

11. While the applicant was discharged in November 2002 the issue of whether personnel in low medical category could be discharged without there being scrutiny by an Invaliding Medical Board, was looked into and settled

by the Hon'ble Apex Court in **Union of India & Ors. vs. Rajpal Singh, (2009) 1 SCC 216**. The Hon'ble Apex Court held that if a person is to be discharged on the ground of medical fitness, at any stage of his tenure of service, he has to be discharged based on recommendations of an Invaliding Medical Board. This Tribunal observing that no IMB had been held prior to discharge of the applicant, in keeping with the dictum laid down by the Hon'ble Apex Court in **Rajpal Singh (supra)** held that the discharge of the applicant was not proper vide orders dated 22 January 2013 (Annexure A1) and directed as follows:

"9. In view of the above, the T.A. is allowed. The applicant's discharge order, Annexure No.5, is quashed. The applicant is directed to be treated in service till the date of his discharge in the normal course on fulfilment of the tenure or extended tenure with all consequential benefits including backwages, promotion and other benefits. The respondents are directed to act accordingly. The pension of the applicant shall

also be revised as a consequence of this order, in accordance with the relevant rules/regulations. The respondents are further directed to pay the entire arrears of pay, allowances, pension etc. positively within four months, failing which the unpaid amount will carry a simple interest at 8% per annum. "

12. It is further observed that vide orders dated 27 May 2014 in MA.No.501 of 2013 in TA.No.16 of 2011, this Tribunal amplified the directions as follows:

"2. The order passed by this Bench was not only for revision of the pension but also for the re-reinstatement of the applicant in service with consequential benefits of back wages, promotion and other benefits. Therefore, as per the order the respondents were required to re-instate notionally the applicant in service with effect from 1st December 2002 and to pay him pay and allowances and other benefits as per the rules from the said date, upto 31st December 2007 and also grant him promotion, if any, due during that period.. . . ."

13. It is observed that in compliance of the orders of this Tribunal, the applicant was notionally reinstated into service with effect from 01 December 2002 (the next day of discharge from service), promoted to the rank of Naib Subedar and was discharged with effect from 31 December 2007 ie on completion of terms of engagement of 26 years in the rank of Naib Subedar, with all consequential benefits (Annexure A2).

14. While the applicant was granted notional service in the rank of Naib Subedar upto 31 December 2007, he has contended that he was eligible for extension of service for a further period of two years ie upto 31 December 2009. It is observed that procedure and criteria for granting enhanced tenure of service has been specified in Army Headquarters letter No.B/33098/AG/PS-2(c) dated 21 September 1998 (Annexure R1). The criteria includes aspects such as willingness of the individual, medical classification, physical

fitness, ACR and discipline. It is specified that Naib Subedars would be screened in the 23rd year of service for extension of two years. The medical criteria for extension of service, has been specified as medical category AYE. While those in temporary low medical category at the time of screening will continue to be in service, in case the temporary low medical category becomes permanent low medical category, the individual would be discharged from service. It is therefore evident that even if the applicant was actually in service, he could not have been granted extension of service as he was in permanent low medical category.

15. Criteria for promotion to the rank of Subedar and Subedar Major, are specified in Army Headquarters policy letter No.B/33513/AG/PS-2(c) dated 10 October 1997 (Annexure R2) and include among other aspects issues of discipline, medical standards and ACRs. While even

personnel in low medical category upto BEE are eligible for consideration, the ACR criteria specify that three reports would be considered, of which a least two should be in the rank of Naib Subedar while one may be in the rank of Havildar. The respondents have submitted that since the applicant was only notionally reinstated, he did not have the requisite ACRs for consideration. The applicant, on the other hand, has contended that since his discharge was improper, it was due to no fault of his that he could not earn ACR in the rank of Naib Subedar and hence such deficiency should not come in his way of getting promoted. The applicant has placed reliance on the cases of **Nb Sub (Skt) Jasbir Singh** (supra) and **Hav M.Thangavelu** (supra), wherein it was held that waiver could be granted. It is observed that the facts in those cases differ. In the case of **Nb Sub (Skt) Jasbir Singh** (supra), the Hon'ble High Court observing that the applicant who was in service, could not earn a regimental report due to administrative

reasons, held that the petitioner therein could not be held responsible for lack of report. Similar was the case of **Hav M.Thangavelu** (supra) as the applicant therein had continued to serve in the Army and his ACRs had not been initiated due to administrative reasons. Therefore, in our view, the decisions in the said judgments are of no assistance to the applicant as he was physically not serving in the Army.

16. We would also like to observe that the applicant's discharge from the Army had been held as improper, only on technical grounds, in that an IMB was not conducted. It has nowhere been held that the applicant who was in low medical category could not have been discharged from the Army. As directed by this Tribunal, the applicant was to be notionally reinstated with effect from 01 December 2002 to 31 December 2007 and granted pay and allowances and other benefits admissible as per rules and also promotion if

any falling due, during the period. It is observed that the applicant on his notional reinstatement was granted promotion to the rank of Naib Subedar and given backwages and benefits in pension. As regards further extension of service or promotions, as observed earlier by us, he did not meet the requisite criteria and therefore could not have been granted the same.

17. In view of the foregoing, we do not find any merit in the contentions raised by the applicant and the Original Application is accordingly dismissed.

18. There will be no order as to costs.

19. Issue free copy to the parties.

Sd/-

VICE ADMIRAL M.P. MURALIDHARAN,
MEMBER (A)

sd/-

JUSTICE S.S.SATHEESACHANDRAN
MEMBER (J)

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(true copy)