

FORM NO. 21**{SEE RULE 102(1)}****ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA****APPLICATION NO: O. A NO. 93 OF 2012****ON THIS 15TH DAY OF JANUARY, 2014**

CORAM : HON'BLE MR. JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)
HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

JC-331746W, Nb Sub Gopal Chandra Pal,
 Son of Late Gour Chandra Pal,
 Village & PO Karimpur (Subhash Polly),
 C/O – Nirmal Pal,
 Dist. – Nadia (WB), PIN 741 152,
 Presently posted at Head Quarter,
 Commander Works Engineer,
 Dipatoli Cantt.,
 Ranchi, PIN 900 200, C/O – 56 APO.

.....Applicant

-VS-

1. Union of India,
 Through Secretary,
 Ministry of Defence, South Block,
 New Delhi-110 011
2. The Chief of the Army Staff,
 Integrated HQ of Ministry of Defence (Army),
 South Block,
 New Delhi – 110 011.
3. General Officer Commanding-in-Chief,
 Central Command,
 Pin – 908 304,
 C/O 56 APO.
4. General Officer Commanding,
 Jharkhand and Bihar Sub Area,
 PIN – 900 441,
 C/O – 56 APO.

5. Station Commander, Station Headquarter,
Ranchi, PIN 900 374
C/O 56 APO.
6. Commandant,
Bengal Engineer Group Roorkee,
PIN 908 779,
C/O 56 APO.
7. Commandant Military Hospital,
Namkum,
Ranchi – 10.

.... Respondents.

For the petitioner : Mrs. Maitrayee Trivedi Dasgupta, Advocate.

For the respondents : Mr. Mintu Kumar Goswami

ORDER

PER HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

1. The applicant is a serving Nb Subedar in the Army, who is presently posted at Headquarter Commander Works Engineer (CWE), Dipatoli Cantt., Ranchi. The applicant was initially enrolled in the Indian Army on 31.07.1989 in the Corps of Engineers with the Bengal Engineer Group (BEG), Roorkee. The applicant got promoted to the post of a Naib Subedar in the year 2009.

2. The applicant, while travelling to Allahabad to attend the Service Selection Board (SSB) interview, lost his service identity card on 25th Nov 2009 when he was asleep in the train. The applicant lodged a FIR the next day, i.e., on 26th Nov 2009 with the GRP in Allahabad Railway station, thus reporting the loss of identity card in the train while travelling. At that point in time the applicant was working with the Military Engineering Service (MES) and he was posted with

CWE at Dipatoli Cantt in Ranchi. This MES unit (CWE, Dipatoli Cantt) was within the Military Station HQ Ranchi, which is under the jurisdiction of the Jharkhand and Bihar Sub Area, Danapur (Bihar).

3. Instead of condoning the said loss in a humane and sympathetic manner, the Station Hedquarter, Ranchi ordered a court of inquiry against the applicant on 01.04.2010 that is nearly six months after he lost the identity card. Based on the findings of the ibid court of inquiry, which recommended disciplinary action, a tentative charge sheet was drawn up against the applicant JCO under Section 54(b) of the Army Act. He was punished summarily on 11 Jul 2011 for the above offence by the Registrar MH. Namkum (Ranchi), under whom he was attached for the said summary trial. Directions for such summary trial were ordered by HQ MB Area as well as HQ J&B Sub Area on 31 May 2011. The punishment awarded to the applicant through such summary trial was 'Severe Reprimand'.

4. In the meantime, however, on 19.05.2011, the applicant's promotion order was issued by the BEG, Records, Roorkee promoting the applicant from Naib Subedar to Subedar with effect from 01.05.2011. The said promotion order was, however, not implemented by the CWE, Ranchi, who was the implementing authority since he was posted in that unit. In the normal course the competent authority, who in this case was the OIC Records BEG, Roorkee, should have been apprised of the reason as to why the promotion order was not being implemented; it was however not done. As per the oral submission of the learned counsel for the respondents during the hearing, upon receipt of a reminder from the OIC Records on 26.8.2011 regarding non-implementation of the said promotion order of the applicant, CWE apprised the OIC Records as late as on 7.3.2012 that the promotion of the applicant was withheld because he was involved in disciplinary case. Even at that time no details were given to the OC Records.

5. As per the oral submissions of the learned counsel for the respondents, the Sub-Area sent all the documents to HQ, Central Command through Area HQ, Jabalpur on 25.04.2012 for JAG review report. JAG rendered opinion on 22.06.2012 setting aside the Trial being legally defective and advised for a fresh trial de novo. Accordingly, Sub Area Commander, on 11.07.2012, ordered holding of summary trial afresh.
6. The applicant was aggrieved with the procedural delays in conduct of disciplinary proceedings that culminated in his summary trial and resultant award of 'sever reprimand', which were all set aside due to legal infirmities; again an order for fresh trial which, according to the applicant, is illegal; all these continuous harassment and delays have cost him his promotion to the rank of Subedar which was due since 1 May 2011. Being thus aggrieved for illegal fresh order for summary trial and for not giving effect to his promotion, the applicant filed this original application (OA No. 93/2013) before this Tribunal on 21.08.2012 for justice. The applicant, besides praying for his promotion to be made effective, also made an interim prayer for restraining the respondents from holding a fresh trial against the applicant for the self same charge for which the applicant had already suffered the sentence. This Tribunal, vide its order dated 22.08.2012, had stayed any fresh trial against the applicant on the self same charge pending disposal of this OA.
7. The respondents in their affidavit-in-opposition (A/O) have, inter alia, raised the issue of maintainability of this application before this Tribunal on the ground that the applicant was seeking threefold multiple relief through the same OA, which is not permissible as per Rule 10 of AFT (Procedure) Rules, 2008. The applicants however have clarified this issue of maintainability in Para 7 of their A/R by submitting that the OA was based on a single cause of action and the reliefs sought are consequential to one another. We are also of the view that the

prayers for non-grant of promotion and ordering of fresh trial on same charge are consequentially interlinked and provisions of Rule 10 of the AFT (Procedure) Rules 2008 are in no way violated. The above objection on maintainability is thus over-ruled.

8. The respondents have alleged that the applicant did not adhere to the laid down procedure to secure and protect his identity card in terms of AO 12/2000 (Annexure R-1). He was found guilty on a charge under section 54 (b) of the Army Act for losing his identity card, a government property issued to him, by neglect, in a summary trial held on 11.07.2011 and the applicant pleaded guilty to the charge for losing his identity card in presence of two independent witnesses. He was, therefore, awarded punishment of 'severe reprimand'. The respondents have further averred in their said A/O that since the summary of evidence was a mandatory requirement of law; and the commanding officer had tried the applicant summarily under the provisions of Section 85 of the Army Act without recording the evidence in writing, the said trial was illegal. Therefore, as per advice of HQ Central Command (DJAG) on 22.06.2012 and in response to the clarification of HQ, CWE, Ranchi on promotion of the applicant from BEG Records, Roorkee, the sentence of 'severe reprimand' to the applicant was not upheld and accordingly it was not entered in his service record. As such the General Officer Commanding (GOC), Jharkhand & Bihar Sub-Area set aside the previous Summary Trial and directed to conduct Summary Trial afresh.

9. The applicant in his affidavit-in-reply (A/R), besides emphatically objecting to the averments of the respondents regarding maintainability as discussed above, further denies all the allegations leveled against him by the respondent authorities regarding his negligence in keeping his identity card. He repeats and reiterates that his loss of identity card was an unfortunate incident and he had never been negligent about safety of his identity card. The applicant has

further averred in his A/R that although the summary trial against him was held illegal, he had to suffer for an illegal punishment for which he had been denied his due promotion. The applicant has stated in his A/R that the actions of the respondent authorities are vindictive in nature to prejudice him and that he was made to suffer the illegal punishment of 'severe reprimand' for which he was denied his due promotion to the rank of Subedar in spite of the promotion order from BEG Records issued way back in May 2011. With the order of a fresh trial for the self same charge he is being subjected to double jeopardy in violation of Art, 22(2) of the Constitution and Army Act Section 121.

10. We have heard the respective rival submissions from the learned counsels from both sides and we have also gone through the application and averments made by the parties. From the records, we observe that the applicant was not given his promotion despite issuance of promotion order, although there was no discipline and vigilance (DV) ban in terms of AO 1/2001 at the time when the promotion order was received. At that point of time, the court of inquiry was concluded and disciplinary proceedings had not commenced. Even after the award of 'severe reprimand', the applicant could have been promoted once the trial proceedings were set aside by the reviewing authority; but he has not been promoted till now. In the meantime, the applicant has already suffered a delay of his promotion for nearly two years. Even if the award given by the first Summary Trial, although subsequently held to be illegal, is to be considered, the effectiveness of 'severe reprimand' punishment would have had any impact on promotion only for one year as per rules. Thus any order for fresh trial under the self same charge i.e. AA Sec 54 (b) for loss of identity card, would amount to double jeopardy.

11. We also observe from the records that all through, from 1.4.2010 when the court of inquiry against the applicant was convened, which in any case was well after four months from

the date when he lost his identity card, till the date when the summary trial was concluded and punishment of 'severe reprimand' was awarded to the applicant on 11.7.2011, he was never put on in any 'discipline and vigilance (DV) related ban' by the authorities. When queried by us during hearing, the Id. Counsel for the respondents and the OIC legal cell made an oral submission that no such DV ban was imposed on him.

12. The respondents have contended that as per the conditions laid down in Para 3 (a) and (d) of the applicant's promotion order dated 19 May 2011 (Annexure A-5), the applicant's promotion could not have been made effective. The conditions as mentioned in Par 3 and 4 of the above policy letter are quoted bellow:-

"3. Before the individual (s) is/are allowed to wear the badges of higher rank, please ensure that the individual (s):-

- (a) has/have not incurred any Red ink Entry including Recordable Censure in the rank of JCO during last one year prior to issue of this promotion order.
- (b) xxxxx
- (c) xxxxx
- (d) Is/are not involved in any Court of Inquiry/discipline/vigilance/criminal case. Refer AO 1/2001.
- (e) xxxxx.

4. If the individual(s) do/does not fulfill the conditions as mentioned in Para 3 above, promotion orders will not be implemented and this office will be intimated telegraphically so that the promotion order can be cancelled."

13. There are two issues which emerge out of this OA that merit our application of mind and analysis. Firstly; whether it was legal or within rules to withhold the promotion of the applicant that was ordered on 19.5.2011; and secondly, whether it was legally tenable to order a fresh trial for the same charge by the GOC, J&B Sub Area on 11 Jul 2012, after he, as the reviewing authority, set aside the earlier summary trial proceedings on the same charge for

certain legal infirmities as pointed out by the Central Command DJAG's legal advice dated 22 Jun 2012 (Annexure R-2 colly).

14. Let us examine the first issue of promotion. It is relevant to analyze the progress of disciplinary proceedings against the applicant as on 19 May 2011, when the promotion order (Annexure A-5) was issued to be made effective from 1 May 2011. Firstly the court of inquiry that was convened on 1.4.2010 more than four months after the loss of identity card would have been completed by then. In fact as per records (Annexure R-2 colly) annexed with the A/O, the GOC of Madhya Bharat Area had already given his directions on the said court of inquiry on 29 Aug 2010, directing disciplinary action against the applicant. Therefore he was not involved in any court of inquiry; and there were no disciplinary/vigilance/criminal case pending against him as on 19 May 2011. There was no charge sheet against the applicant as on 19 May 2011. Secondly, there was neither any DV ban imposed on the applicant to bar him from promotion nor any other provisions of AO 1/2001 was applicable to deny him promotion on that date. The next point is that the applicant was summarily tried only on 11 Jul 2011 and was awarded a 'Severe Reprimand', which was indeed a Red ink Entry. Therefore he could not have been promoted after 11 Jul 2011. The said summary trial was set aside on 11 Jul 2012 (Annexure R-2 of the A/O) by the reviewing authority on legal grounds; even then the applicant's promotion order was not given effect. In fact, when viewed practically, the adverse impact of the punishment of 'severe reprimand', which was denial of promotion, has been suffered by the applicant, although such punishment automatically stood removed when the trial was set aside by the reviewing authority for certain legal infirmities on 11 Jul 2012. The strange part of the circumstances is that the CWE, Ranchi, who was to execute the promotion order of 19 May 2011, never even, informed the OIC Record of BEG as to why their promotion order was not being implemented with regards to the applicant, as per records. During the oral submissions made by the Id. Counsel for the respondents, he made a submission that, the CWE sent a letter to OC Records only on 7.3.2012, after being reminded by BEG Records on 26.8.2011, to the effect that the applicant could not be promoted since he was involved in a disciplinary case. It was a two lines' cryptic reply, as perused by us, when shown to us by the OIC Legal cell on the day of hearing, without any detailed explanation for non implementation, written after one

year's delay. We are therefore of the view that the respondents while contesting this case could not convince with any logical reasons supported with instructions and rules for their action in not promoting the applicant on receipt of promotion orders dated 19 May 2011 (Annexure A-5) which was to take effect from 1st May 2011; we are thus inclined to consider such action by the CWE, Ranchi, under whom the applicant was posted, as illegal.

15. The next issue that needs our analysis and application of mind is whether a fresh summary trial in this case as ordered by the GOC J&B Sub Area in his order dated 11 Jul 2012 (Annexure R-2) is legally tenable. Before that Mr. Goswami, the Id. Counsel for the respondents, during his oral submission raised an objection with regard to our jurisdiction to adjudicate on this aspect of the prayer since, according to him, 'service matter' would include summary trials where the punishment of dismissal was awarded. In the instant case as submitted by him the applicant was awarded a much lesser punishment of 'severe reprimand' by summary trial. Therefore, Mr. Goswami as a preliminary objection submits that by definition it would not be construed as 'service matter'; and thus not within our jurisdiction. For this purpose he draws our attention to Section 3 (o) (iii) of the AFT Act 2007, which is quoted below:-

"3 (o) (iii) of the AFT Act 2007. 'Service Matter', in relation to persons subject to the Army Act, means all matters relating to the conditions of their service and shall include:

(iii) Summary disposal and trials where the punishment of dismissal is awarded."

16. In interpretation of the ibid section of the AFT Act 2007, we are quite clear that any grievance on account of a summary trial, unless the punishment is that of dismissal, is not within the definition of 'service matter' and therefore does not lie within our jurisdiction. We, therefore, are not inclined to question the summary trial of the applicant which was held on 11 Jul 2011 where the punishment awarded was 'severe reprimand'. In any case the ibid summary trial has already been set aside by the reviewing authority on 11 Jul 2012. We are now concerned with analyzing whether a fresh trial on the self same charge, where the applicant as a result of the first trial had already suffered a punishment, is tenable by law as raised by the applicant. We are of the considered opinion that this aspect of adjudication of the legality of a

fresh trial would well be within the definition of 'service matter' within the provisions of Section 3 (o) (iv) of the AFT Act which encompasses 'any other matter, whatsoever' with certain exceptions. Therefore, the *ibid* objection raised by Mr. Goswami on behalf the respondents is not sustainable.

17. While analyzing the legality of the fresh trial, the *Id.* Counsel for the applicant Ms Maitrayee Trivedi Dasgupta drew our attention Section 121 of the Army Act and Article 20 (2) of the Constitution of India, that we quote bellow:-

"Section 121` of the Army Act. Prohibition of second Trial. When any person subject to this Act has been acquitted or convicted of an offence by court-martial or by a criminal court, or has been dealt with under any of the sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court-martial or dealt with under the said sections."

"Article 20 (2) of the Constitution of India. No person shall be prosecuted or punished for the same offence more than once."

18. In the instant case admittedly the applicant was tried under section 85 of the Army Act on 11 Jul 2011 after being charged under section 54 (b) of the Army Act for, 'losing by neglect identity card the property of the government issued to him for his use', found guilty and punished with 'severe reprimand'. Being a summary trial, the punishment was immediately promulgated in this case and the applicant suffered the punishment since the consequential implications of such a 'Red ink Entry' on his career were put into effect; thus making him automatically ineligible for promotion from 11 Jul 2011. His promotion has been delayed till date for this purpose. Now at this stage, having set aside the earlier trial, to order a fresh trial on the same charge clearly violates the provisions of the Army Act Sec 121 as above. Moreover, even if a fresh trial on the same charge was to be held and he was to be punished, then in that case it would amount to double jeopardy, since he has already suffered the punishment of 'severe reprimand' for the same charge in an earlier trial under the Army Act Sec 85. It will thus not be permissible under Article 20 (2) of the Constitution of India. Therefore in all circumstances, a fresh trial under the same charge does not appear to be a legal option. A plain

reading of the legal views narrated by the DJAG HQ Central Command by his advice dated 22 June 2012 (Annexure R-2 colly to the A/O) reveals that the DJAG has also not clearly advised for a fresh trial on the same charge. She, after commenting on the legal defects in the first trial, has merely suggested a 'draft remark' for the GOC of the Sub Area. The GOC appears to have blindly followed the suggested 'draft remarks' and signed his orders dated 11 Jul 2012 (Annexure R-2) without application of mind. The JAG Review Report strangely has not even discussed the issue of 'fresh trial on the same charge' without endorsing any legal grounds before including such an advice in the draft comments of the GOC of the Sub Area. The respondent authorities must take note of this aspect for the future. However, the applicant did not face a fresh trial due to our interim order dated 22.8.2012.

19. In view of the discussions made above, we allow the application with following directions:-

(a) The respondents shall comply with the promotion order in respect of the applicant issued by BEG Records, Roorkee vide their letter dated 19.5.2011 giving effect to such promotion from 01.05.2011 as contained in the said promotion order.

(b) There will not be any fresh trial on the same charge and, therefore, the order dated 11.07.2012 for holding fresh trial is hereby set aside and quashed and accordingly, the interim order dt. 22.8.12 is made absolute.

20. No costs.

21. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

(Lt. Gen K P D Samanta)
Member (Administrative)

(Justice Raghunath Ray)
Member (Judicial)