

SEE RULE 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION : O.A. : 42/2018

DATED : THE **FOURTEENTH** DAY OF SEPTEMBER, 2018

CORAM

HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC,
HON'BLE MEMBER (ADMINISTRATIVE)

APPLICANT (S) : JC-770954N NAIB SUBEDAR / SKT
AMEET KUMAR
S/O LATE GANGA SINGH
(Presently posted at)
623 EME Battalion, PIN – 906 623, c/o 56 APO

Versus

RESPONDENT (S) : (1) The Union of India, service
through
The Defence Secretary
Ministry of Defence
South Block, DHQ, PO,
New Delhi – 110 011

(2) The Chief of the Army Staff
Integrated HQ,
Ministry of Defence (Army)
South Block, DHQ PO,
New Delhi-110011

(3) The Directorate General of EME
(EME Personnel)
Master General of Ordnance
Branch, Integrated HQ
Ministry of Defence (ARMY)
Sena Bhawan, DHQ PO,
New Delhi – 110 011

- (4) The Commanding Officer
623 EME Battalion
PIN – 906 623
c/o 56 APO
- (5) The Officer-in-Charge, Records
EME Records
PIN – 900 453
c/o 56 APO

Counsel for the applicant (s): Miss Manika Roy,
Ld. Advocate

Counsel for the Respondent (s): Mr. Partha Ghosh,
Ld. Advocate

ORDER

**PER LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC,
MEMBER (ADMINISTRATIVE)**

1. This case (O.A. No. – 42/2018) has been filed by the applicant under Section 14 of The Armed Forces Tribunal Act, 2007 (The Act) for not granting the ante-date seniority along with his batch mates on promotion to the next higher rank (i.e., Nb Sub) after repatriation to India from the deployment / deputation under Union Nations Mission abroad.

2. The applicant is a J.C.O. (Nb Sub), presently serving with 623 EME Battalion. He was selected for a prestigious assignment i.e. to proceed on a United Nations Mission abroad in the rank of Havildar w.e.f. 03.03.2014 where he was on deputation with the United Nations Mission (UN MSN –

UNDOF). He was de-inducted from the Mission on 23.01.2015 and reported back to his new unit. Further, the applicant has now received his order for discharge vide EME letter No. 1508/T-2/CA-2(MP) dated 21.09.2017 from Indian Army w.e.f. 31.10.2018.

3. The dispute in question is that during his tenure with the UN Mission his name came up for promotion to the rank of Naib Subedar along with his other batch mates. However, he could not be promoted due to his deployment with the United Mission abroad on deputation. On his de-induction, he was promoted to the rank of Naib Subedar w.e.f. 01.03.2015 when the first vacancy was available.

4. Though he was promoted to the rank of Nb Sub on 01.03.2015, he was not granted ante-date seniority along with his other batch mates who were in India and who were promoted on an earlier date.

5. Promotion order in respect of the applicant was issued vide EME Records letter No. 1371/CA-1/SKT/PO/NB SUB/566 dated 27.09.2014 titled as "PROMOTION TO THE RANK OF NB SUB PROMOTION ORDER NO. 566/NB SUB/2014". Para 2 of the letter is set out below :-

"2. The NCOs as mentioned at Appx 'A' to this letter are ordered for promotion to the rank of Naib Subedar wef date(s) noted against their name(s). Details of the NCOs who are superseded for promotion to the rank of Naib Subedar with valid reasons as noted against each, is att as per Appx 'B' to this letter."

6. Appendix 'A' to this letter consists of 3 names with date of promotion date noted against each as 01.10.2014. Appendix 'B' of the letter consists of 13 names. The applicant's being Serial No. 9. Against his name, under the column heading *"Reason for superseded for promotion"* it is mentioned as *"Deployed in UN Msn"* and under the column heading the *"Remarks"* it is mentioned *"Intimate likely dt of de-induction from UN Msn for our further action"*.

7. However, the date of seniority of the applicant as per EME Record, Daily Order Part-II No. 01/451/2015 dated 19.03.2015 is **01.03.2015**.

8. The applicant's contention is that while he was promoted to the rank of Nb Sub w.e.f. 01.03.2015, his seniority should be with effect from the date that was given to his batch mates who were approved as per Appendix 'A' i.e. 01.10.2014.

9. This contention of the applicant has been opposed by the Respondents on the grounds of the Integrated HQ, Ministry of Defence (Army) letter No. B/33513/Prom/AG/PS-2 (C) dt. 23.11.2010. The same is reproduced below :-

ADJUTANT GENERAL'S BRANCH
PS-2

GRANT OF NOTIONAL SENIORITY ON PROMOTION OF NCO
TO THE RANK OF JCO ON DE-INDUCTION FROM UN MSN

1. Reference your Note No. 8/10199/MP-3(PBOR) dt. 11 Oct 2010
2. As per adverse career certificate/undertaking submitted by the individual prior to moving on posting to msn abroad, he undertook "to forego his further promotion from the date of submission application till he completes his tenure with msn abroad and posted back and his further promotion will be subject to availability of vacancy and meeting eligibility criteria for such promotion". Therefore, the individual may be considered for promotion to the next rank on his posting back from msn abroad alongwith other eligible NCOs against available vacancies without any exception. The original seniority on promotion in the present rank will remain unchanged (will be maintained) as mentioned in Para 1 (c) of AO/2001/MP while being considered for promotion to the next rank. However, his seniority on promotion to the next rank will be from the actual date of promotion to the next rank without any ante date seniority of Notional seniority alongwith his batch mate in view of the adverse career certificate/undertaking given by the individual as mentioned above.

(Ravin Khosla)
Col
Dir/AG PS-2

MP-3(PBOR)

10. The Respondents have also produced a letter dated 27 May 2015 (Annexure – R 4), which is also set out as under :-

"B/33513/AG/PS-2 (c)

27 May 2015

ADJUTANT GENERAL'S BRANCH
PS-2

NOTIONAL SENIORITY FOR HAVs APPROVED FOR PROMOTION
WHILE ON UN MSN AND PROMOTED ON REPATRIATION

1. Ref this Office Note No. B/33513/Prom/AG/PS-2 (c) dt. 23 Nov 2010, not ref to all.
2. The contents of the letter under reference has come up for reconsideration at this HQ. It will be seen that Havs proceeding on UN Msn who come up for promotion to the rk of Nb Sub while on UN tenure are they only pers who are adversely affected by the policy in vogue issued through this letter under ref.
3. Accordingly, it is hereby clarified that in case of all Havs coming up for promotion to the rk of JCO during the period of UN Msn / from the date of signing adverse career cert till repatriation. This promotion on repatriation shall be given if they continue to meet discp and med criteria for the said promotion on occurrence of the first available vacancy in which case they will be given the seniority with the batch along with whom they were considered and found fit for promotion. This their seniority would be protected. Pay and allces of the new rk shall be payable from the date of physical promotion.
4. A format of adverse career certificate to be obtained for affected pers is attached as per Appx to this letter.

5. This policy shall come into effect from the date of issue of this letter, superseding this office Note under ref. No past cases shall be re-opened.

Sd/-= x x x x x x x x x x
 (Sanjay Singh)
 Brig
 DDG PS (B)

EME Pers

All Line Dtes

- The contents of this letter may be disseminated to your
 Concerned Records offices p.

MP-8 (1 of R), MP-1/MP-3

CAB & SD 3

11. As per the above mentioned letter (i.e., dt. 27.05.2015), while superseding the letter of 23.11.2010 on the grounds that "Havs proceeding on UN Msn who come up for promotion to the rank of Nb Sub while on UN Msn tenure are the only pers who are adversely affected" it has further been stated that "promotion on repatriation shall be given if they continue to meet the discipline and med criteria for the said promotion on occurrence of the first available vacancy in which case they will be given the seniority with the batch mates along with whom they are considered and found fit for promotion. **Thus their seniority would be protected.** Authorities further added a rider in Para 5 of the letter saying that "**No past cases shall be re-opened' (emphasis added).**"

12. Hence, it is manifestly clear that the Respondents themselves have realized that the letter dated 23.11.2010 was bad in law as it created an unnecessary discrimination by

denying those who were selected for UN Mission, their seniority upon their return to India. It is well-known that officers, JCOs and NCOs who are selected for UN Missions abroad are high profile individuals at the top of their batch and therefore, the discriminating letter dated 23.11.2010 was superseded vide letter dated 27.05.2015 (Supra). However, while superseding the letter, the respondents added the clause in Para 5 which stated that “**no past cases shall be re-opened**” and hence denied seniority to the applicant on this ground.

13. Ld. Counsel for the Respondents has vehemently argued that the applicant gave a temporary unwillingness certificate while proceeding on deputation and hence cannot now claim to be granted ante date seniority. The certificate given by the applicant is set out as under.

TEMP UNWILLINGNESS CERTIFICATE FOR PROMOTION TO THE RANK OF NB SUB

1. I No. 14614967F Hav/SKT Ameet Kumar is serving with INDCON LOGBATT (UNDOF), GOLAN HEIGHTS (Ex 315 Fd Regt C/o 56 APO) do hereby declare that, I am TEMP UNWILLING to the rank of Nb Sub For the period of deputation in UN-Msn according to para 9(g) of EME Records letter No. 1371/CA-1/SKT/PO/NBSUB/566 dt 27 Sep 2014.
2. I also render a willingness certificate.

Station c/o 56 APO

(Signature of the indl)

COUNTERSIGNED

Station c/o 56 APO
Date 25 Nov 2014

14. The respondents then produced a letter of Director General of EME (Pers) No. B/12500/P/MP(A)/EME Pers/MP-1 dated 04.08.2017 stating that the statement of case for notional seniority along with batch in respect of personnel who were repatriated from UN Mission between 04.08.2014 and 27.05.2015 has not been granted by AG/PS-2 due to policy issued vide their letter No. B/33513/AG/PS-2(C) dated 27.05.2017 that no past cases will be re-opened as the policy has been uniformly applied in past without any prejudice to any individual.

15. The Ld. Counsel for the respondents has also produced one Judgment of the Hon'ble Apex Court Civil Appeal No. 5224 of 2008 – arising out of Special Leave Petition (Civil) No. 8765 of 2007 2008 (6) Supreme 158, General Manager, State Bank of India & Ors. vs. Anju Jain (Respondents); the relevant paragraph to this case is set out as under :-

"37. Even on second ground, the submission of the Bank is well-founded. As noted earlier, the learned Single Judge issued direction to the Bank to appoint the writ petitioner-widow of the deceased employee within one month. As per settled law, a writ of mandamus can be issued directing the authority to consider the case of the petitioner for an appointment or promotion as the case may be but no direction can be given to appoint or promote a person.

16. The certificate dt. 27.11.2014 rendered by the applicant very clearly states that he was "**TEMP UNWILLING to**

the rank of Nb Sub for the period of deputation in the UN Mission.” Any prudent person will understand that this certificate as was signed by him was for the period while he was posted with UN Mission and would automatically cease to be effective on his repatriation to India.

17. From the submissions made by both the parties, it is abundantly clear that the policy for granting ante-date seniority for promotion to personnel proceeding on UN Mission after their repatriation existed and was applied in the past. It continues to apply even today to all personnel. However, there has been an exception in that it does not apply to those who were repatriated from UN Mission between **04.08.2014** and **27.05.2015**.

18. This patent discrimination has taken place only because of clause in the letter dated 27.05.2015 stating **“No past cases shall be re-opened.”** While it is well understood that a person who is on deputation may not be able to get his promotion during the period of his deputation, it beggars belief as to how he can be denied his ante date seniority on completion of his deputation, thereby seriously jeopardizing his future promotions and forcing him into early retirement. The very fact that the letter dated 23.11.2010 (Supra) was suspended

because it was bad in law is significant and impacts upon this case. Besides, it is ultra vires to Article 14 of the Constitution as it directly hits his Right to Equality since all other Havildars repatriated from UN Mission prior to 04.08.2014 post 27.05.2015 have been/are being granted ante-date seniority.

19. Hence, this Bench directs the concerned authorities to consider the case of the applicant for granting him ante date seniority with that of his batch mates by ignoring rider clause "*No past cases shall be reopened*" as mentioned in their letter dt. 27.05.2015 being **bad in law** within a period of one month from the date of receipt of this order. This Bench is of the opinion that this rider ought not to have been put there in the first instance itself.

20. The Ld. Counsel for the applicant has pleaded for an interim order to cancel the EME Records letter No. 1508/T-2/95/CA-2 (MP) dt. 21.09.2017 whereby the applicant has been directed to report to Depot Battalion, EME Centre on 03.10.2018 to attend his discharge drill.

21. As we are of the opinion that the authorities have, on hyper technical grounds been disingenuous, by relying on a clause which is bad in law, denied the applicant ante-date seniority, we are inclined to stay the move of the applicant to

the Depot Battalion EME Centre for attending to his Discharge Drill and his consequent discharge on 01.11.2018.

22. Accordingly the move of the applicant to the Depot Battalion EME Centre is stayed as also his discharge from the Indian Army as on 01.11.2018.

23. List the matter on 09.10.2018 for appropriate orders.

24. A plain copy of this order, duly countersigned by the Tribunal Officer, to be furnished to both the sides after observance of all usual formalities.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)