

**COURT NO. 3,
ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**T.A. No. 170 of 2009
(Delhi High Court W.P (C) No. 9912 of 2009)**

IN THE MATTER OF:

Havildar Ram Bahadur**Applicant**
Through Mr. S. S Pandey, counsel for the applicant

Versus

The Union of India and others**Respondents**
Through: Mr. Anil Gautam, counsel for respondents

CORAM :

**HON'BLE JUSTICE MANAK MOHTA, JUDICIAL MEMBER,
HON'BLE LT GEN Z.U.SHAH, ADMINISTRATIVE MEMBER**

Order

Date: 9-3-2010

1. The applicant Havildar Ram Bahadur had filed a writ petition (civil) number 9912 of 2009 before the Hon'ble Delhi High Court, challenging the correctness and legality of the impugned order dated 4.2.2009 by which his statutory complaint with regard to promotion to

the rank of Naib Subedar was rejected. The case was transferred to this Tribunal on 24.9.2009 under the Armed Forces Tribunal Act, 2007.

2. The applicant's date of birth is 1.1.1964 and he was enrolled in the Army on 25.1.1984. He was promoted to the rank of Havildar in 1999 with seniority of 1998 and he successfully completed the Cadre Course for promotion to Naib Subedar between 30.10.2006 to 17.2.2007 but due to non availability of vacancy till 31.12.2007 he could not be promoted. Thereafter, he was denied promotion as he had crossed the requisite limit of age for promotion on 31.12.2007 vide order dated 5.1.2008 (**Annexure P-1**). It was submitted by the applicant that it was not the case of determining the age of retirement where the date of superannuation is fixed notionally for the purpose of easy calculation of pensionary benefits by directing that a person born on the first date of the month will retire on the last date of that previous month and a person born between the second and the last date of month will retire on the last date of the current month. This was not applicable to him and he was entitled to promotion.

3. It is further submitted, by the applicant, that the promotion order of his batch mates was issued on 5.1.2008 (**Annexure A-1**) with

seniority effective from 1.1.2008. The name of the applicant was not included as he had been shown as overage for the vacancy falling on 1.1.2008. The applicant also contended that he was not granted relaxation / waiver of age under 149(c) of the Army Regulation. He was however entitled to it and such relaxations had been made, as a matter of routine, for similarly situated personnel.

4. The applicant filed two statutory complaints dated 31.1.2008 (**Annexure P-2**) and 11.9.2008 (**Annexure P-3**). His complaint dated 11.9.2008 was rejected vide impugned order dated 4.2.2009 (**Annexure P-4**) on the grounds that the calculation of his age had been arrived at correctly. It was also stated that the issue of relaxation of age was neither considered nor granted despite the specific example of similarly situated personnel (**Havildar (Clk) Surjit Singh of HQ, CWE, Delhi Cantonment**).

5. The applicant contends that his date of birth is 1.1.1964 and he only completed 44 years of age on 1.1.2008. He should not have been declared over age on 1.1.2008 and should have been allotted the vacancy which arose on 1.1.2008. The respondents have applied the method of calculation used in case of determining that age of retirement and since

applicant was not completing his age of superannuation as on 31.12.2007 the same method should not have been adopted for calculating his age for promotion.

6. The applicant has prayed that the order of 4.2.2009 rejecting his statutory complaint be quashed and directions be issued to respondent to consider the promotion of the applicant either by declaring him within the age limit of 44 years as on 1.1.2008 or by grant of relaxation of age.

7. The respondents in their counter affidavit have brought out that the applicant had indeed passed promotion cadre from 30.10.2006 to 17.2.2007 but could not be promoted due to non availability of vacancy of Naib Subedar till 31.12.2007 on which date the applicant completed 44 years and he had entered into 45th year of age on 1.1.2008. The vacancy occurred on 1.1.2008 and the same could not be utilised for the applicant as the upper age limit for promotion to the rank of Naib Subedar is 44 years under the rules. Thus he became overage for promotion. In reply it was stated that personnel who are born on 1st day of the month are not promoted against vacancy occurring on that day as these personnel have already become overage on the last day of the previous month. Qualifying in a promotion cadre does not guarantee

promotion to that rank. The respondents have also pointed out that relaxation of age cannot be claimed as a right. It can only be granted in exceptional cases as laid down in Integrated Headquarters of Ministry of Defence (Army) Adjutant General Branch letter No. B/33535/AG/PS-2(c) dated 18.11.2005 (**Annexure R-1**). The applicant did not fall into any of the deserving categories. The case of Hav Surjit Singh, cited by the applicant was not of similar nature. Hav Surjit Singh was to become overage on 3.4.2008 and he was promoted with effect from 1.4.2008 before becoming overage on 3.4.2008. The respondents have prayed that the application be dismissed.

8. We have perused the record and heard the arguments at length. During course of arguments the learned counsel for the applicant reiterated the grounds stated earlier and further contended that his date of birth is 1.1.1964. In calculating the upper limit of age of 44 for promotion it should be taken as 1.1.2008 and not 31.12.2007. He would therefore be entitled to promotion to the rank of Naib Subedar against the vacancy available on 1.1.2008 with all consequential relief. He also contended that in pension cases the Hon'ble Supreme Court has extended the benefit of 5th Pay Commission to persons retiring on

31.12.1995 which would otherwise not have been available to persons retiring on or after 1.1.1996. The learned counsel for the applicant also submitted that exceptional circumstances existed to consider the applicant's case for relaxation. He cited judgment given by by ***Hon'ble High Court of Karnataka in the case of Havildar N. Bheeman Vs. UOI Writ Petition No. 24910 of 2005 decided on 10.7.2007 (2008 (1) Kar LJ 331)*** in support of his contentions.

9. The learned counsel appearing on behalf of the respondent refuted the contentions placed by applicant and further submitted that there is no different method of calculating age in case of promotion. The applicant became over age on 1.1.2008 when vacancy occurred and therefore he was not entitled to promotion. He was also not entitled for relaxation of age as per policy dated 18.11.2005. Learned counsel for the respondent cited Judgements given in the case of ***Prabhu Dayal Sesma Vs. State of Rajasthan and Anr. AIR 1986 SC 1948*** and in the case of ***Achhaibar Maurya Vs. State of Uttar Pradesh and Others (2008) 1 SCC (L&S) 519*** in support of his contentions.

10. We have considered the rival contentions and also perused the judgments cited by the learned counsel of parties. The point that arises

for consideration is whether the applicant was entitled for promotion and was not incorrectly held as over age on 1.1.2008? Further was he entitled for relaxation of age? From the perusal of the record it reveals that the applicant's date of birth is 1.1.1964 and as per provisions he attained the age of 44 years on 31.12.2007. The applicant was not able to establish a different mode of calculating the age in case of promotion. Govt of India Policy specifies that a person born on first date of the month will retire on the last date of the previous month but a person born between the second and last date of the month will retire on the last date of the current month. The same method was applied in calculating the applicant's age of 44 years. The applicant could not be promoted since the vacancy occurred on 1.1.2008 and on that day applicant had become overage and thus was not entitled for promotion. The conclusion finds support from the judgment given in case of ***Prabhu Dayal Sesma (Supra)*** cited by the respondent. We have also considered the contention given by the applicant with regard to benefit extended to retiring persons relating to date for calculating pensions. This cannot be equated for cases for determining age. This contention of the applicant is not sustainable. There were also no special grounds justifying grant of relaxation of age in the light of Rule 149 (c) and policy dated

18.11.2005 (**Annexure R-2**). The applicant has not been able to put forward any valid reasons to justify his prayer. The judgment cited by applicant of Hav N Bheeman Vs. UOI (Supra) does not support his claims. There are no grounds for interference. Application dismissed. No order as to costs.

MANAK MOHTA
(Judicial Member)

Z.U. SHAH
(Administrative Member)

Announced in the open court
Dated: 9-3-2010