

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

**T.A. No. 400 of 2010
(Delhi High Court W.P (C) No. 9202 of 2009)**

IN THE MATTER OF:

Ex-Hav Kamlesh Kumar**Applicant**
Through Lt Col (Retd) Naresh Ghai, counsel for the applicant

Versus

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|--|-------------------------------|
| 1. Union of India & Others |Respondents No. 1 |
| Through: Col (Retd) R Balasubramanian, counsel for respondents | |
| 2. Addl DG TA, (TA -3) | (Respondent No. 2) |
| 3. OIC Records, Raj Rif | (Respondent No. 3) |
| 4. CO, 105 Inf Bn (TA) Raj Rif | (Respondent No. 4) |
| 5. Nb Sub Udai Veer | (Respondent No. 5) |
| 6. Nb Sub Ghan Shyam Misra | (Respondent No. 6) |

CORAM :

**HON'BLE JUSTICE MANAK MOHTA, JUDICIAL MEMBER,
HON'BLE LT GEN ZU SHAH, ADMINISTRATIVE MEMBER**

Order**Date: 10-5-2010**

1. The applicant filed a writ petition (civil) No. 9202 of 2009 in the Hon'ble Delhi High Court for promotion to the rank of Naib Subedar with effect from 31.1.2009 with all consequential benefits and to quash the letter dated 5.4.2009 (Annexure P-1) by which he was denied promotion. The same was transferred to the Armed Forces Tribunal on 16.11.2009.

2. The brief relevant facts of the case are as under that the applicant born on 25.1.1968 was enrolled in the Army on 5.1.1989 in 105 Inf Bn (TA), Raj Rif. He was subsequently promoted Naik (Nk) and Havildar (Hav). It is stated by the applicant that on 1.4.1999 he was appointed company quarter master havaldar (CQMH) before respondent No. 5 (Nb Sub Udai Veer) and respondent No. 6 (Nb Sub Ghan Shyam Misra). The applicant contends that he passed the promotion test for Naib Subedar (Nb Sub) in August 2005 but was not promoted as Nb Sub and was retired on 31.1.2009 on completion of twenty years of service.

3. The applicant states that during January 1995 the commanding officer (CO) ordered a promotion cadre test, without intimating any date of test, for sepoy to Lance Naiks (L/Nk). Both the petitioner and respondent No. 5 attended the cadre. The test was suddenly held on 22.1.1995 (Sunday) whilst the applicant was on outstation duty. He was therefore marked as “absent” while respondent No. 5 was declared “pass”. He was informed by the Battalion 2nd –in-Command that L/Nk was merely an appointment and it would not effect his promotion to the rank of Naik (Nk), even if so appointed later. The applicant passed L/Nk cadre test in September 1995 and was appointed L/Nk.

4. The applicant states that subsequently he and respondent No. 5 together passed promotion cadres for Nk in July 1996, Hav in October 1998 and Nb Sub in August 2005 and both were promoted to Nk on 24.7.1996 and Hav on 10.3.1999. It is contended that as per the date of enrolment applicant was senior to respondent No. 5 therefore he should have been promoted first in higher ranks. On 31.1.2009 two vacancies of Nb Sub arose in the unit. Respondent No. 5, junior to him, was promoted and the applicant was superseded and was retired on 31.1.2009. Another junior, respondent No. 6, who was to retire on

31.1.2009, was also made Nb Sub without having passed the promotion cadre.

5. It is stated that after retirement the applicant was re-enrolled in 132 TA, but had to leave since he was granted the rank of sepoy. On 27.3.2009 the applicant appealed against his non promotion whereas a junior respondent No. 5 was promoted. He was informed by commanding officer, 105 Inf Bn (TA) Raj Rif that respondent No. 5 had been appointed (not promoted) as L/Nk before him vide impugned letter dated 5.4.2009 (Annexure P-1). No authority was quoted how such an appointment (sepoy to L/Nk) made respondent No. 5 senior to him.

6. The applicant maintains that in protocol he was always considered senior to respondent No. 5 and even appointed CQMH before him. As per Army Rules and Regulations, including TA regulations, promotion to non commissioned officer (NCO) rank are only of naik and havaldar. It was contended that appointment of a Sepoy as L/Nk is not a promotion and mere appointment to L/Nk does not affect seniority. However since he was appointed CQMH before respondent No. 5 he was entitled for promotion to the rank of Nb Sub before respondent No. 5 since he had

joined the Army earlier and was senior to him. The applicant has prayed that letter of respondent No. 4 dated 5.4.2009 (Annexure P-1) by which his statutory appeal was disposed off be quashed and he be reinstated and be promoted Nb Sub with effect from 31.1.2009 with all consequential relief.

7. The respondents in their counter affidavit have stated that the applicant retired on 31.1.2009 on completion of twenty years of service. The promotion policy is as directed by Raj Rif Regimental Centre letter No. AP/32/1 dated 6.2.1981 which lays down that for promotion to L/Nk, a sepoy has to pass “ummedvar” promotion cadre test (Annexure R-2). The same was conducted on 30-31 December 1994 which was attended by the respondent No. 5, who passed the same. The applicant attended a cadre test later on 28-30 September 1995 and passed. Since respondent No. 5 was appointed L/Nk on 1.1.1995 and the applicant was appointed only on 30.9.1995 thus the former (Respondent No. 5) became senior to the applicant. As regard promotion of respondent No. 6 is concerned, the individual was remustered to the trade of religious teacher (Nb Sub) in an existing vacancy, as he was meeting that eligibility criteria (Annexure R-4).

8. The respondents state that the applicant kept silent about this revised seniority for fifteen years and now cannot challenge the same due to inordinate delay and laches. The applicant was always aware of the revised seniority as given in unit seniority rolls for L/Nk, Nk and Hav. The applicant also never submitted a statutory petition on the issue while he was in service. The applicant had not attended the cadre test held on 30-31/12/1994. His claim that he was marked “absent” is incorrect. It is contended that respondent No. 5 passed the requisite test for L/Nk earlier to applicant. The applicant’s contention that two vacancies for Nb Sub arose on 31.1.2009 is also not correct. Two vacancies arose on 1.2.2009 due to retirement of Honorary Lt Balwant and Sub Maj and Honorary Captain Gaje Singh with effect from 1.2.2009 whereas respondent No. 5 (Nb Sub Uday Veer Singh) had been promoted earlier on 1.10.2008.

9. We have heard the arguments and perused the records. During the course of the arguments it was again contended by the learned counsel for the applicant that appointment to the post of L/Nk is not promotion. He also drew our attention to the Army Regulations and again stressed

that no where it has been mentioned that appointment to the rank of L/Nk is a promotion from sepoy. Thus merely passing test prior to applicant would not make respondent No. 5 senior. Seniority was to be seen from the date of enrolment in Army. It was submitted that applicant joined the Army earlier and he was always treated senior while posting him as CQMH. The learned counsel again stressed that applicant be promoted earlier to respondent No. 5. During the course of the arguments he did not agitate the promotion of Respondent No. 6 as he had been remustered as religious teacher as stated in counter. He also argued that the policy dated 6.2.1981 is not sustainable as it is not in consonance with Army Rules and Regulations. On the contrary learned counsel for the respondents maintained that appointment as L/Nk was a promotion as it entailed passing in promotion test for L/Nk and also reflected in the relevant promotion policy of 6.2.1981. The respondents also denied that mere appointment as CQMH would make the applicant senior to respondent No. 5.

10. We have considered the rival contentions made by the parties. The first contention of the applicant that he became senior when he was appointed CQMH is not sustainable in light of total relevant facts. It is

beyond doubt and well established from records that respondent No. 5 had passed the promotion cadre for L/Nk earlier than the applicant and thus was appointed L/Nk in an earlier time frame. This revised seniority continued to be reflected in the unit seniority rolls for L/Nk, Nk and Hav maintained by the unit and produced for perusal by the respondents. The applicant had continuously been shown below the respondent No. 5 in the seniority roll. This fact was known to the applicant. Respondent No. 5 was thus promoted earlier to Nb Sub on 1.10.2008. The contention of the applicant that seniority was to be seen from the date of enrolment in the Army is not sustainable. We have gone through the policy dated 6.2.1981 (Annexure R-2) wherein in annexure schedule it has been mentioned that for promotion to the rank of L/Naik, cadre test has to be passed. The relevant portion is quoted as under

“Qualifications for Promotions: JCOs/NCO

1. Rifleman to Unpaid Lance Naik

(a) Should be a soldier class II under new Pay code

(b) Weapon training should be a standard shot in LMG and first class in his personal weapon.

(c) Should have passed a unit “ummadwar” cadre which all riflemen otherwise eligible for promotion should be allowed to attend.”

11. The applicant superannuated on 31.1.2009 on completion of twenty years service. Till that time no vacancy existed. The applicant has not been able to explain why he did not complain about the revision of seniority for promotion to L/Nk, Nk and Hav earlier. During course of arguments contentions were also raised with regard to said policy but we do not find any arbitrary or illegality in the said policy. We have considered the policy of 6.12.1981 in light of submission made but it does not support the contentions of the applicant. There is no substance in his contention that he was senior to respondent No. 5. Thus on the basis of records respondent No. 5 was rightly promoted first. There is no grievance of the applicant with regard to promotion of respondent No. 6, therefore, that contention is in fructuous. In view of the aforesaid the application is dismissed. No orders as to costs.

MANAK MOHTA
(Judicial Member)

Z.U. SHAH
(Administrative Member)

Announced in the open court
Dated: 10-5-2010