

**COURT NO. 3, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
T.A. No. 143 of 2009
W.P.(C) No. 7048 of 2009 of Delhi High Court**

IN THE MATTER OF:

Hav Kewal Kumar**Applicant**
Through : Mr. K. Ramesh, counsel for the Applicant

Versus

Union of India and Others**Respondents**
Through: Mr. Anil Gautam, counsel for the Respondents

CORAM:

**HON'BLE MR JUSTICE MANAK MOHTA, JUDICIAL MEMBER,
HON'BLE LT GEN M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 19-05-2011

1. The petition was filed in the Delhi High Court on 19.02.2009 and was transferred to the Armed Forces Tribunal on its formation on 12.10.2009.
2. The applicant vide his application has prayed for reinstatement, grant of opportunity to undergo promotion cadre and has sought promotion to the rank of Naib Subedar (Nb Sub) with ante dated seniority in the light of judgments of Hon'ble Delhi High Court dated 20.11.2008 and dated 30.01.2009.

3. The brief facts of the case are that applicant was enrolled in the Army on 14.11.1984. Thereafter he was promoted up to the rank of Hav on 01.01.1991. He was placed in a low medical category A2 (P) w.e.f. 24.09.2004 for fracture based on 02nd and 04th proximal phalanx (RT). He was discharged under Army Rule 13 (3) III (V) w.e.f. 31.01.2008 for being a low medical category under the Army Headquarters orders dated 12.04.2007.

4. Consequent to the Hon'ble Delhi High Court order dated 20.11.2008 given in the case of "*Sub Puttan Lal and Others Versus Union of India and Others*" (WP(C) No. 5946/2007 and other connected cases) (**Annexure P-2**), the applicant reported to AOC Centre on 30.01.2009 (**Annexure P-3**).

5. It is contended that the authorities thereafter instead of reinstating him, declared that he would have been superannuated in the rank of Hav on 30.11.2008 in normal course, therefore, he was only entitled to pay and allowance from 31.01.2008 i.e. from the date of discharge to 30.11.2008 i.e. date of superannuation.

6. Learned counsel for the applicant argued that he was entitled for consideration for promotion as Nb Sub as juniors to him have been promoted to the said rank. Had he not been discharged he would not have been superannuated on 30.11.2008 and would have been promoted and got a two years' extension in service in the rank of Nb Sub. He argued that applicant was fully qualified except for the

promotion cadre course as he was not detailed because of his low medical category. It was contended that this was not the fault of the applicant and he should be given opportunity to attend and pass the promotion cadre course so that he can be considered for promotion to the next rank. He has been superannuated as a Hav and was not considered for promotion to the rank of Nb Sub in the light of judgment dated 30.01.2009 given in the case of “*Naib Risaldar Kalu Ram Versus Union Of India (WP(C) No. 579 of 2009)*” passed by the Hon’ble Delhi High Court (**Annexure P5**).

7. During course of arguments learned counsel for the applicant also drew our attention to the order of Hon’ble Court no. 1 of this Tribunal dated 15.02.2010 titled “*Smt. Shashi Pandey Versus Union of India & Others*” in which Hon’ble Court directed the respondents to consider the case of the deceased husband of the petitioner to be deemed in service up to 09.09.2008 however he had been discharged on 31.08.2008 and expired on 09.09.2008.

8. Learned counsel for the applicant further argued that **Hon’ble Court no. 1** in another identical case titled “**Amarjeet Versus Union of India and Others**” vide order **dated 25.02.2010** ordered that applicant is **needed to be considered for promotion and, if found suitable, be promoted**. Learned counsel also drew our attention to the judgment given in **LPA no. 522/1998 in CWP no. 1208/1979 titled Naib Subedar Mukhtiyar Singh Versus Union of India** along with

noting on LPA No. 522/1998 filed by Union of India in which **Hon'ble Delhi High Court ordered that the JCO be considered for promotion while setting aside the disciplinary proceedings**

9. Learned counsel for the respondents stated that the applicant was detailed for the promotion cadre on 29.08.2007 when the promotion cadre was to commence w.e.f 05.11.2007 to 05.01.2008. The applicant himself chose not to attend the said cadre in view of the discharge order which was made effective from 31.01.2008.

10. Learned counsel for the respondents further argued that since the applicant was not qualified to be JCO, therefore, he was not considered for promotion.

11. We have heard both the counsels at length, perused the record and bestowed our best consideration to both the sides. In this case the applicant was to be discharged on 30.11.2008 before the implementation of judgment given in the case of "*Sub Puttan Lal and Others Versus Union of India and Others (Supra)*" (**Annexure P-2**). Admittedly he was not reinstated. We are of the opinion that the case squarely falls under Para 7(v) of the order of the Hon'ble Delhi High Court dated 20.11.2008 in case of "*Sub Puttan Lal and Others connected Petitioners Versus Union Of India and Others (Supra)*". Relevant para of the said order reads as under:

"It is pointed out that there may be certain PBORs, which may also include some petitioners, whose normal date of superannuation has already arrived or would arrive

before the aforesaid option is issued. In such cases, the persons would be entitled to only the benefit of pay and allowances for the differential period after adjusting any additional benefit arising from the premature discharge. Needless to say that those who decide not to rejoin after their premature discharge would neither be entitled to any pay and allowance nor would be required to repay the amount, if any, paid to them after their premature discharge.”

12. Thus the applicant was only entitled for financial benefit of pay and allowances for the differential period and any additional benefit arising out of premature discharge, but he was not entitled for reinstatement. Therefore, the contentions raised in this respect are not tenable.

13. The applicant has also referred the judgment given in case of “*Naib Risaldar Kalu Ram Versus Union Of India (Supra)*” (**Annexure P-5**). We have perused the judgment. In that case, the petitioner Kalu Ram was holding the rank of Naib Risaldar (Naib Subedar) at the time of discharge on 31.01.2008 being in LMC A2 (P) and in normal course he was to retire in the rank of Naib Risaldar on 31.01.2009. He was again reinstated in view of Hon’ble Delhi High Court judgment dated 20.11.2008 passed in case of “*Sub Puttan Lal and Others Versus Union of India and Others (Supra)*” on 19.12.2008. He was due for promotion to the rank of Risaldar (Subedar) as during that period juniors to him were promoted to the higher rank. He was not lacking

any 'eligibility' but he was denied promotion on account of non availability of vacancy. This is not the position in the present case. Here the applicant is lacking in 'promotion cadre', therefore, this judgment does not help the contentions of the applicant. The relevant portion of the order dated 27.05.2009 in CM No. 3353/2009 in WP(C) No. 579/2009 is reproduced as under :

“On hearing learned counsels for the parties we find that the letter issued by the respondents of February 2009 denying the promotion to the petitioner on the ground that there is no vacancy available in the Unit is unsustainable. The policy of the respondents directing discharge on law medical grounds had been set aside by the Supreme Court and thereafter directions were passed by us for putting such persons back in service. The petitioner was put back in service but his termination of service resulted in his non-consideration for promotion and his juniors had got promoted in the mean time in September 2008.”

14. We have also examined the other cases cited by the learned counsel for the applicant. The case titled “Smt. Shashi Pandey Versus Union of India & Others” disposed of by Hon'ble Court no. 1 of this Tribunal vide order dated 15.02.2010 pertains to the individual having expired after his release on 09.09.2008 and, therefore, had no chance for being reinstated in terms order of Hon'ble Delhi High Court in case of Sub Puttan Lal and Others Versus Union of India and Others (supra). In that background directions were given for consideration for

monetary benefits. In the another case cited by learned counsel for the applicant titled "*Amarjeet Versus Union of India and Others (Supra)*" decided by Hon'ble Court No.1 of this Tribunal vide order dated 25.02.2010, the last operative order clarified that the petitioner should be considered for promotion "if found suitable". In that case the person was involved in a District Court Martial proceeding and ultimately that was set aside by Hon'ble Division Bench of Guwhati High Court on 28.08.1997. In view of that order later on his services were restored till date of superannuation i.e. 30.06.1988. Thus neither he was in a position to clear the requisite test nor any opportunity was given. In that background directions were given but that is not the position in the present case. In the present case, the opportunities were given to the applicant to clear the test which he has not availed, therefore, respondents cannot be blamed for denying consideration. Thus, the judgment cited above does not help his contention. In the case of "*Nub Sub Mukhtiyar Singh Versus Union of India (Supra)*", the GCM was set aside by the Hon'ble Delhi High Court, therefore, making the individual eligible for consideration for promotion. Thus these judgments do not help the applicant.

15. It is seen from the records produced before us that the applicant's name figured in the detailment of the promotion cadre course vide letter of 14.06.2007. Against his name it was remarked "Lacking in MR Std-II". The applicant had however passed MR Std-II examination on 21.03.2007 and the casualty of the same was

published vide Part II order dated 22.06.2007. The applicant did not bring this fact to the notice of the authorities or else he could have been detailed to attend this cadre since the cadre was to commence on 02.07.2007.

16. The applicant again got a chance to attend the promotion cadre which was to commence from 05.11.2007 and was to be completed on 05.01.2008 while he was on strength. The contentions of the applicant that he was not detailed as he was directed to be discharged being LMC case is not correct. The applicant has not made any protest at that time. Now he is not entitled to grant of opportunity to undergo promotion cadre after expiry of normal superannuation period.

17. In view of the specific order of the Hon'ble Delhi High Court dealing with personnel whose normal date of superannuation had arrived before the rejoining option has been issued, as is so in the instant case, no interference is needed.

18. In view of the foregoing, the T.A. is dismissed. No orders as to costs.

M.L. NAIDU
(Administrative Member)

MANAK MOHTA
(Judicial Member)

Announced in the open Court
on this 19th day of May 2011