

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

**T.A NO. 586 of 2009
WP(C) No.5961 of 1998 of Delhi High Court**

IN THE MATTER OF:

HAV (OPR.) SUMER SINGHAPPLICANT

Through: Mr. A.K. Trivedi, counsel for the applicant

Versus

UNION OF INDIA AND OTHERSRESPONDENTS

Through: Mr. Satya Saharawat proxy for Mr. Ankur Chibber,
counsel for the respondents

CORAM:

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

JUDGMENT

Date: 19.03.2012

1. This petition was originally filed before the Hon'ble High Court of Delhi as WP(C) No.5961 of 1998. Thereafter, it was transferred to the Armed Forces Tribunal on 05.12.2009 and was registered as TA No.586/2009.

2. Vide this petition, the applicant has sought directions to the respondents for declaring the applicant having been promoted to the rank of Naib Subedar w.e.f. 01.02.1998 with all consequential benefits.

3. Brief facts of the case are that the applicant was enrolled in the Indian Army on 12.04.1977. After completing his training, the applicant was posted to various field regiments and he also acquired civil

qualification of Matric during his service. The applicant passed his Map Reading Standard-One on 05.11.1983. Operator Class-I exam on 14.4.1984 and Driver MT Class III exam on 30.11.1990. Since the applicant earned professional qualification, he was promoted as a Naik on 10.03.1989 and Paid Acting Havildar w.e.f. 01.02.1992. He was further promoted as Substantive Havildar w.e.f. 01.11.1992.

4. While service with 9 R&O Flight, the applicant appeared in the promotion test for Havildar to Naib Subedar on 9th-10th October 1992. This test comprises 12 subjects and it is alleged that he had passed all those subjects. Results were published by the respondents vide POR Part-II Order dated 10.04.1993 (Annexure P-1 and P-2).

5. Having passed the promotion cadre, the applicant had become entitled to be promoted as Nb Subedar w.e.f. 01.02.1998. Accordingly his particulars were forwarded for promotion on 30.12.1997. In response, Artillery Records wrote a letter on 28.01.1998 to state that the entry in the service records of the NCO shows that 9 R&O Flight has since cancelled the Part-II Order published earlier (Annexure P-3). The applicant was informed of this letter on 08.02.1998. He was asked to read the contents as he was never informed till 08.02.1998 that he had not passed his promotion cadre in 1992. He claims that had he been informed earlier, he would have passed remaining papers.

6. The applicant personally went to the 9 R&O Flight on leave and he personally checked the records of Part-II Order therein. It was

found by him that there was no record held by the Unit regarding the cancellation of the said Part-II Order dated 10.04.1993. When he further checked he found that there was no observation/intimation from the Artillery Records regarding when this Part-II Order was cancelled.

7. Thereafter, the applicant proceeded to Artillery Records to verify about the correctness of the fact regarding cancellation of the promotion cadre test. He found that DO Part-II document cancelling his record does not exist and he apprehends that the whole issue has been manipulated. He also asserts that he was never informed in any manner whatsoever about his failure in the five subjects in the test conducted in 1992.

8. It is further submitted that on 12.02.1998, the CO of 97 Field Regiment wrote a letter to the 9 R&O Flight wherein it was requested that extracts of Part-II Order under which fresh occurrence regarding non-passing of Havildar to Nb Subedar cadre in respect of the applicant may be forwarded directly to the Artillery Records since the promotion is held up for want of the same and the applicant would be overage for promotion in April 1998 (Annexure P-5).

9. On 13.02.1998, the 9 R&O sent a signal to the Artillery Records which is stated as under:-

“....No authority/observation from your office is available with this Flight under which the above Pt II Order has

been cancelled. Request forward the same for our further action. Treat matter most urgent.” (Annexure P-6).

10. The CO 97 Field Regiment again wrote a letter on 26.03.1998 to 9 R&O wherein it was stated that the applicant has passed the promotion cadre for Havildar to Nb Subedar on 09.10.2002 vide Part-II Order dated 10.04.1993 (Annexure P-1 and P-2) and this occurrence was recorded in IAFF 958A but no records have been found regarding cancellation of the occurrence in FS documents as stated by the Artillery Records. He also gave reference to the signal dated 12.2.1998. He further stated in this letter that the entry regarding passing of the promotion cadre kept the NCO in dark and therefore, he never got a chance to attempt or pass the cadre again. He also objected to the unit forwarding copy of 16 Corps Arty. Bde BRO No.34/92 dated 02.12.1992 according to which the NCO has not passed the cadre in all subjects and that now the applicant is unable to qualify that test at this late stage since he would be overage on 13.04.1998. He further stated that rejection/cancellation of this Part-II Orders have adversely affected the career of the applicant (Annexure P-7).

11. It is contended by the applicant that in response to the above referred letter of 26.03.1998, the OC of 9 R&O Flight wrote a letter dated 03.04.1998 in which he stated that the applicant has been informed about the results of the tests after receiving the result-sheet

and it is not understood how the applicant is not aware about the same. As regards the entry in IAAF 958A that the individual had passed all the subjects, he stated that it could be due to clerical mistake (Annexure P-8).

12. Feeling aggrieved by the stand taken by the respondents, the applicant made a statutory complaint on 04.05.1998 in the prescribed format through proper channel. No action was taken on this complaint and the applicant was forced to write to the CO 97 Field Regiment on 09.07.1998 (Annexure P-9). To this response, he received a letter from Hq. Bty., 97 Field Regiment on 12.07.1998 (Annexure P-10) which stated that his application is returned as his statutory complaint can only be forwarded after receipt of extract of cancellation of Part-II Order from Artillery Records.

13. Under these circumstances, the applicant approached the Hon'ble High Court by way of the present petition.

14. Learned counsel for the applicant stated that that only source of information for an individual while in service is his service records. All entries in his service record are made in IAAF 958 which is seen by the applicant. In this document it is clearly entered that he had passed the promotion cadre for Havildar to Nb Subedar in all subjects (Annexure P-1 and P-2). This entry still stands good even today and it has not been superseded by any subsequent entry which might have stated that he has passed only in 7 subjects out of total 12 subjects.

As such, he argued that the applicant was legally entitled to believe that what was written in his IAAF 958A was correct and that he had passed the cadre test in 1992.

15. Learned counsel for the applicant also stated that had he was informed that he had not passed the cadre test in all subjects, he would have had ample opportunity to pass the cadre test in the balance of 5 subjects between 1992-1998 till he came up for promotion. Since he was not aware that he would not being considered as passed, therefore, he never attempted to pass these subjects during this interim period. He argued that the respondents can not legally take the excuse that the document IAAF 958A regarding passing of the promotion cadre in all subjects was made due to clerical error because this has adversely affected his promotion prospects.

16. Learned counsel for the applicant also stated that there appears to have been some manipulation in the Part-II Order regarding cancellation of the passing of the promotion test as this cancellation was neither published nor any entry was made regarding cancellation of the passing of the promotion cadre in 1992. He submitted that even if the publication of the casualty as having passed the Promotion Test, which was, as alleged, a clerical error, the cancellation of the same should have listed the subjects he had passed in 1992. The complete records in this respect have not been produced, therefore, a request is

made that adverse inference be taken against the respondents and he be deemed passed in all the subjects.

17. In support of his contentions, Learned counsel for the applicant cited **(2009) 2 SCC (L&S) 197 Union of India and another Vs Ex Major Sudershan Gupta** wherein their Lordships have held as under:-

“6. In our considered opinion, the legality and the validity of the order of convening the General Court Martial cannot now be decided in the absence of the records which the appellant is required to produce before us. We, therefore, find no merit in this appeal which is accordingly dismissed leaving the parties to bear their own costs.”

18. Learned counsel for the respondents argued that the applicant was posted to 9 R&O Flight in 1992. He reported to duty on 25.08.1992. He appeared for Havaldar to Naib Subedar Promotion Cadre test, result of which was published in 16 Corps Artillery Brigade routine order number 34/92 dated 02.12.1992. Accordingly 9 R&O published a part-II order dated 10.04.1993 declaring the applicant as having passed Havildar to Nb Subedar promotion cadre. But this Part-II Order of 10.04.1993 was subsequently cancelled by the 9 R&O Flight vide their fresh Part-II Order dated 03.06.1993 as the Corps Artillery Brigade routine order dated 02.12.1992 reflected that the applicant had only passed in Field Craft, Technical, Signal, Procedure, Elementary Drill, driving, Weapon Training and administration. There is

no entry for either of the Part-II order under reference in IAB-64 (Pay Book) of the applicant which remains the basic document of a soldier indicating various entries right from recruitment to retirement. Only an entry of Part II order dated 10.04.1993 exists in IAFF-958 A which is also unauthenticated. No entry for the subsequent part II order dated 03.06.1993 cancelling the previous part II Order of 10.04.1993 exists in IAFF-958.

19. Learned counsel for the respondents further argued that the applicant was posted back to 97 Field Regiment on 21.02.1996. In 1998 his name came up for promotion of Naib Subedar and the draft promotion board proceedings were forwarded to Arty Records on 12.01.1998. The Arty Records made a observation that the applicant had not passed Havaladar to Naib Subedar cadre based on the records held by them. The matter was referred to the 9 R&O Flight for clarification. 9 R&O clarified that the Part-II Order dated 10.04.1993 was erroneously published and that the same has been correctly cancelled vide a fresh part II order dated 03.06.1993 based on the authority of 16 Corps Arty Brigade routine order dated 02.12.1992 which clearly indicated partial passing of the subjects test by the applicant. The routine order was the responsibility of the applicant to know as these are displayed on unit notice board alongwith unit Part-I orders.

20. Learned counsel for the respondents further stated that the applicant preferred a statutory complaint on 13.05.1998. He filed this petition without having exhausted his other available remedies within the channel.

21. Learned counsel for the respondents also stated that the applicant had taken the Havildar to Nb Subedar test on 9-10 October 1992. However, the applicant states that he did not know the name of the unit where he was supposed to have attended the cadre test for about six to eight weeks. He also pointed out that an individual when posted to ERE is usually qualified for the rank he holds and normally is not permitted to attend the promotion cadre for the next higher rank. Perhaps the applicant had just appeared in the test and did not do the pre-course cadre for the test. Besides, he argued that the entry in IAFF 958 is not authenticated and therefore, cannot be taken as evidence.

22. Learned counsel for the respondents also argued that part II order for passing in all subject is dated 10.04.1993. 9 R&O Flight having realised the mistake has cancelled this order vide Part-II order dated 03.06.1993. Reasons for cancelling this order was based on HQ 16 Corps Arty Bde routine order dated 02.12.1992 (Appendix-A). He argued that such incidents of wrong publication and subsequent correction are of routine procedures within the unit in day to day administration. Hence the plea of the applicant that this casualty affected his career which was published on 03.06.1993 was not known

to the applicant till 20.02.1996 i.e. the date when he was posted out from 662 R&O Squadron (9R&O Flight) to 97 Field Regiment i.e. for 28 months of the stay in that unit is rather unlikely. He argued that the fact remains whether or not the entry is made in one of his personnel documents which could be an act of omission on the part of the clerical staff of 9R&O Flight that the applicant did not qualify the examination in 1993. More so, when the specific entry has not been authenticated by an officer, it does not become an authority. Further, no such entry exists in his personal document i.e. Pay Book which is supposed to be the basic personal document of a soldier. A wrong part-II order published can at times go undetected because of the voluminous nature of work. A point to note is that officer administering the R&O Flights are performing dual task of administration as well as flying, a high stress job. Under such circumstances, it may also be pertinent to note that no entry regarding his passing exists in his Pay Book. Had he passed in all subjects in 1992, an entry in the Pay Book would have certainly be made alongwith entry in IAAF 958.

23. Learned counsel further argued that any casualty regarding pay and allowances and other occurrences relating to the applicant would have been published by the unit. The Arty Records would have scrutinized the same for their accuracy and correctness. Due to work load and type of observation it can take any thing from a month to six months till objection is raised. The unit could also rectify/explain the case and the correction could be made. In case the unit detects it's

mistake prior to the raising of observation by Arty Records, necessary amendment is published by way of fresh part-II order and old part-II order stands cancelled. The mistakes generally are of clerical nature which in this case appears to be so.

24. He further argued that the applicant's contention that the part-II order has been manipulated is incorrect as no evidence has been produced to support the contention. Furthermore, the applicant was employed in the office as a part time clerk for a very long period, therefore, the applicant cannot take the plea that he was not aware or was not in a position to know of the procedure/situation from June 1992 to 1996, till he was posted out from 9 R&O Flight.

25. Learned counsel for the respondents also argued that other than IAFF 958, the troops are regularly informed about occurrences by publishing the same in unit part I orders. Hence IAFF 958 is not the only piece of document of information for a soldier. The 9 R&O Flight had written in detail to Arty Records regarding the contention of the applicant that he was not aware about the cancellation of part II order in which it is clearly mentioned that it is unlikely that the applicant was not aware in spite of the same being informed to him by three multiple means i.e. Brigade routine order, display of part II order in unit information room and unit part I orders as applicable.

26. Learned counsel for the respondents lastly contended that the fact remains that the applicant had not passed the promotion cadre

and therefore he was not eligible for promotion to the rank of Naib Subedar as per rules and procedure laid down in this respect. Therefore, no case is made out to declare him Naib Subedar.

27. Having heard both the counsels at length and having examined the documents placed before us, we demanded that the original records in respect of HQ 16 Arty Bde part I order published in 1992 as also the draft part-I order forwarded by 9 R&O Flight for passing of the promotion test and the cancellation of the passing of the promotion cadre test dated 10.04.1993 and 13.06.1993 respectively be produced in original. We have been told that the original documents have been destroyed. Therefore, the only records on which we can rely upon are the service records of the applicant i.e., IAAF 958 and Pay Book. We have also examined the available copy produced by respondent side of the HQ 16 Arty Bde Part I order dated 02.12.1992, but this is also an attested photocopy.

28. We have, however, failed to understand as to how the first Part-II order i.e. dated 10.04.1993 was forwarded to the records for publication because part-I order dated 02.12.1992 clearly states that the applicant had passed in the said 7 subjects. We have also been shown the original board proceedings held for the promotion test conducted by HQ 16 Arty Bde. The Part-I order dated 02.12.1992 clearly states the subjects passed by the applicant as per the Board proceedings held on 9-10 October 1992.

29. However, since the casualty was published that the applicant has passed in all the subjects, there was no doubt in the mind of the applicant that he had not passed in all the subjects. Furthermore, cancellation of the Part-II Order as it is stated at the behest of 9 R&O Flight is not supported by any evidence.

30. Since no entry has been made in the IAFF-958 of the individual regarding cancellation of his passing of promotion cadre, the individual has remained ignorant about the occurrence. In any case there is no entry in his pay book IAF B-64 of either passing of the promotion cadre in 1992 or cancellation order of the said Part-II Order of 10.04.1993. The assertion made by the respondents that Brigade Routine Orders would have been placed or promulgated in the unit besides they would have been placed on the Notice Board, therefore, to say that the applicant was not aware of the outcome of the promotion test is not correct. We can only say that the individual should have been aware of the subjects that he had passed and the subjects in which he had failed to qualify because the results of the same would have been known to him through various means. To say that applicant was working as clerk in the office of 9 R&O Flight and therefore, should have known as was being published on 10.04.1993 and 30.06.1993 are not of conclusive nature and it cannot be presumed that it was known to him.

31. Had the applicant known that he had not qualified fully in the promotion cadre, he would have certainly made an attempt to pass in the remainder 5 subject during in between 1993 to 1998. A fair opportunity was thus not afforded to him since it was being considered that he has passed in all the subjects. So much so, that his parent unit i.e. 97 Fd Regiment also forwarded the draft promotion order on 08.01.1998 in the firm belief that the applicant had cleared the promotion cadre in all the subjects. Since the applicant was in the 9 R&O Flt upto June 1996 and later on in 97 Field Regiment, he also had several opportunities to pass the balance of the subjects in the promotion cadre held in the unit. But he did not appear in the cadre due to publication of Part II Order on 10.04.1993 as he believed that he had passed the promotion cadre in 1992. Therefore, he was deprived to appear in remaining subjects resulting in great injustice to the applicant and also deprived him the promotion consideration due to respondent's wrong publication of Part-II Order.

32. We also note that the 9 R&O Flight has conceded that it is a "clerical error" on their part regarding publication of the part-II Order. But, from the respondents' side, sufficient material has not been produced in this respect to arrive at any conclusion. We have not been provided the relevant material i.e. draft Part II order for cancellation of the Part II order dated 10.04.1993, despite demand, so that the bonafide could be ascertained. Therefore, the stand taken by the respondents that cancellation order of Part-II Order was published and

that the applicant was in a position to know is not acceptable. However, due to this clerical error, the applicant seems to have suffered a grave loss that he was not promoted to the rank of Naib Subedar and was also forced to proceed on retirement prematurely, after completing his tenure as a Havildar.

33. In view of the above, we are of the opinion that the applicant is not to be blamed in this sorry episode. The responsibility of publishing incorrect part-II Order on 10.04.1993 and compounding this mistake by cancelling the entire order without investigating into the matter on 30.06.1993 has further confounded the position. Thus, the entire situation has gone against the applicant resulting in his non-promotion and retirement as a Havildar for no fault of his.

34. We are of the opinion that since the applicant was not fully qualified to be promoted as a Nb Subedar as on 01.02.1998, he cannot be promoted or can be deemed promoted as Nb Subedar. Mandatory requirement for being eligible for promotion cannot be waived. We are also aware that now the applicant cannot be given a chance to pass the balance of the subjects in the promotion cadre since he became overage for promotion on 13.04.1998 and also that he has superannuated as a Havildar. But his grievance is bonafide and he should be compensated for the fault of respondents' side. We have considered the views expressed by Hon'ble Apex Court Order in the matter of ***Union of India and Another Vs Ex Major Sudershan***

Gupta (supra) but the circumstances of the case do not exist to this extent that an adverse inference could have been taken to this extent that he be declared passed and held entitled to the rank of Nb Subedar.

35. Therefore, we feel that in the interest of justice it may be considered that the applicant needs to be compensated since he cannot be promoted as a Naib Subedar despite the vacancy on 10.01.1998. Consequently, we direct the respondents to pay a compensation of Rs.50,000.00 (Rupees Fifty Thousand only). Our view also finds support from the observations made in **Sohan Singh Vs UOI & others 1984(1) SCC 162**. This exercise be completed within a period of 120 days from the date of this order.

36. This T.A. is partially allowed. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

**Announced in the open Court
on this 19th day of March, 2012.**