

COURT NO. 1, ARMED FORCES TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI

108.

OA 275/2022 WITH MA 375/2022

Ex Hav Barot Bharqat Punjabhai  
Versus  
Union of India & Ors.

... Applicant

... Respondents

For Applicant : Mr. Virender Singh Kadian, Advocate  
For Respondents : Ms. Jyotsna Kaushik, Advocate

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON  
HON'BLE LT GEN P. M. HARIZ, MEMBER (A)

ORDER  
20.11.2023

MA 375/2022

Keeping in view the averments made in the miscellaneous application and finding the same to be bona fide, in the light of the decision in Union of India and others v. Tarsem Singh [(2008) 8 SCC 648], the MA is allowed condoning the delay in filing the OA.

OA 275/2022

2. Invoking the jurisdiction of this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has filed this application and the reliefs claimed in Para 8 are read as under:

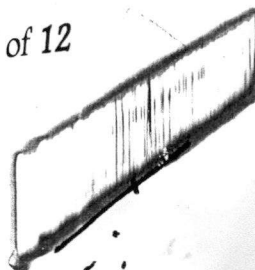
"(a) Quash and set aside the vide impugned letter No 16430/GR/ESM/NER/6937044 dated 24.09.2021. And/or

(b) Pass an appropriate order for promotion to the rank of Naib Subedar and counting his seniority as per his batchmates with all consequential benefits of pay and allowances and other entitlements accordingly.

(c) Any other relief which the Hon'ble Tribunal may deem fit and proper in the fact and circumstances of the case along with cost against the respondents."

OA 275/2022 with MA 375/2022  
Ex Hav Barot Bharqat Punjabhai

Page 1 of 12



3. The applicant was enrolled in the Army on 29.08.1995 and discharged from service on 31.01.2019. While in service on 01.12.2004, the applicant was promoted to the rank of Hav and his pay and allowances were fixed in the substantive rank after publication of Promotion Part-II. On receipt of Promotion Assumption Certificate from the Unit, it is the applicant's case that in the year 2016, he passed the Promotion Cadre for promotion from the rank of Hav to Nb Sub but he was not granted promotion and his batchmates and juniors were promoted to the rank of Nb Sub w.e.f 01.07.2017. The applicant was intimated that on account of two Red Ink Entries awarded to him in the year 2003, much before he was assumed for the rank of Hav on 01.12.2004 and the Part-II order promoting him as a Hav was published, based on the Assumption Certificate submitted by the Unit authorities, the pay and allowances of the rank of Hav were adjusted. The payment of the rank of Hav was illegally granted to him and, therefore, Rs.3 lakh were deducted from his pay and allowances and his seniority was downgraded in the rank of Hav w.e.f 04.01.2008. The applicant, now, claims that apart from restoring his promotion on the cadre of Hav w.e.f 01.12.2004, he should also be granted promotion in the rank of Nb Sub w.e.f 01.07.2017 and re-fixation of his pay and allowances w.e.f 01.12.2004 which was re-fixed w.e.f 04.01.2008.

4. The Appeal-cum-Representation-Legal Notice having been rejected on 24.09.2021, the applicant invoked the jurisdiction of this Tribunal. It is the case of the applicant that he was promoted as Hav on 01.12.2004 by the Departmental Authorities themselves after following all the rules, but it has been withdrawn and the date of promotion changed from 01.12.2004 to 04.01.2008 which is unsustainable in law. Treating himself to have been promoted w.e.f 01.12.2004, the applicant now claims the benefit.

5. The respondents have filed a detailed counter affidavit and they have pointed out that the applicant was enrolled as a Clerk (Inventory Management) on 29.08.1994. The applicant was appointed as Lance Naik on 11.04.1999 and he was detailed to attend Sep to Nk promotion cadre from 15.05.2000 to 24.06.2000 in the Army Ordnance Corps Centre, Secunderabad. After he passed the promotion cadre, he was promoted to the rank of Nk w.e.f 01.10.2000. He was, therefore, detailed for a promotion cadre course that of Nk to Hav. However, the applicant did not attend the said course and thereby was marked as lacking promotion cadre at the time of screening for promotion to the rank of Hav w.e.f 01.11.2003. He was again detailed for promotion cadre on 26.06.2004 and after clearing the promotion cadre, he was promoted to the rank of Hav w.e.f 01.12.2004 vide Assumption Certificate (Annexure R-1). It is pointed by the respondents that the

Assumption Certificate for promotion (Annexure R-1) contained the stipulations vide clause (a), (b), (c), (d) and (e) which are reproduced below:

*“(a) No 6937044W Rank NK Trade CST Name Barot Bharat Punja Bhai (Ser No 03) was physically present in the unit on 01 Dec 2004 and was not on leave (other than CL or sick in Hospital during the period)."*

*(b) He has qualified promotion cadre course NH Srl No 161 which terminated on 26 Jun 2004.*

*(c) He is in med cat SHAPE-1.*

*(d) He has not awarded any punishment involving red ink entry within one year prior to the date of promotion and no disciplinary/vigilance case is pending against him. He was not convicted for any offence under AA Section mentioned in para 29 (b) and (c) of ROIM/03/2001.*

*(e) He has Two punishments in his entire service."*

6. It is stated that the applicant had been awarded the following punishments during the service:

Ser No	Section of Army Act	Date of Award	Punishment Awarded	Unit Name & Part II Order Number	Remarks
(a)	39 (b)	10 Dec 1998	07 days pay fine	AD Bathinda Pt-II Order No 0/003/0004/99	Black Ink entry (Offence report is attached as Annexure-R/2)
(b)	39 (b)	02 Apr 2003	Severe Reprimand	AOC Centre Adm Bn Pt-II Order No 0/0707/0002/2017	Red Ink Entry (Offence report is attached as Annexure-R/3)
(c)	39 (b)	04 Nov 2003	Sever Reprimand	20 Mtn DOU Pt-II Order No 0/0083/0072/2003	Red Ink Entry (Offence report is att as Annexure-R/4)
(d)	54 (b)	18 Sep 2014	Sever Reprimand	8 Mtn DOU Pt-II Order No 0/019/0001/2014	Red Ink Entry (Offence report is att as Annexure-R/5)

7. It is the case of the respondents that in accordance to the provisions of Para 3 (a) of the IHQ of MoD (Army) letter dated 10.10.1997 (Annexure R-6), an individual who has more

than one Red Ink Entry in the last five years is not entitled for promotion to the next higher rank. While screening the applicant for promotion to the rank of Nb Sub, it was found by the respondents that the applicant has earned various punishments like Red Ink Entry, Severe Reprimand from the period 2002 to 2008, details of which are given in Para 6 of the counter affidavit which reads as under:

*"6. While, screening the applicant for promotion to the rank of Naib Subedar, his service records were scrutinised and the following were observed:-*

*(a) The applicant was declared Overstayal of Leave (OSL) and deserter with effect from 26 Mar 2002 vide 183 (I) Field Workshop Part II Order No 0/0016/0002/2002 and 0/0016/0003/2002 respectively.*

*(b) The applicant voluntarily rejoined on 10 Feb 2003 at Army Ordnance Corps Centre, Secunderabad.*

*(c) As per Para 381 of Regulation for the Army (1987) read with Para 12 of Army Order 43/2001, the applicant was tried summarily under Section 80 of Army Act 1950 by the Commanding Officer Administrative Battalion and awarded punishment "SEVERE REPRIMAND" (Red Ink Entry) on 02 Apr 2003 for committing an offence under Army Act Section 39 (b) i.e Over Stayal of Leave as shown at Para 4 (a) above.*

*(d) After awarding the ibid punishment, the applicant was posted to 20 Mtn DOU wef 24 Apr 2003.*

*(e) Due to oversightness, the punishment "SEVERE REPRIMAND" (Red Ink Entry) awarded on 02 Apr 2003 by the Commanding Officer Administrative Battalion, AOC Centre could neither be published by the Administrative Battalion Army Ordnance Corps Centre nor by the 20 Mtn DOU and the applicant despite knowing the facts remained silent and hid the fact from the administrative authority.*

*(f) Being a Clerk by trade, the applicant was well aware of promotion policy, but he did not disclose that he had been awarded two red ink entries on 02 Apr 2003 and 04 Nov 2003 for committing an offence under section 39 (b) i.e "OVER STAYING OF LEAVE" and assume the rank of Hav on 01 Dec 2004. Assumption certificate of the rank of Hav is placed on records as Annexure R/1.*

(g) Since, the applicant was not eligible for the rank of Hav wef 01 Dec 2004 in terms of Para 3 (a) of IHQ of MoD (Army) letter B/33513/AG/PS-2(c) dated 10 Oct 1997 as he had been awarded more than one red ink entry in the last five years of service, therefore, occurrence regarding "SEVERE REPRIMAND" (Red Ink Entry) awarded to the applicant on 02 Apr 2003 was notified vide Administrative Battalion Army Ordnance Corps Centre Part II Order No 0/707/0002/2017 and occurrence regarding promotion to the rank of Hav wef 01 Dec 2004 was cancelled vide Army Ordnance Corps Records Part II Order No 1/0526/0001/2017.

(h) After taking into account the punishments "SEVERE REPRIMAND" (Red Ink Entry) awarded to the applicant on 02 Apr 2003 and 04 Nov 2003 as mentioned at Para 4 (a) and (b) above, his seniority with pay and allowances of the rank of Havildar was re-fixed wef 03 Apr 2008 in accordance with Para 3 (a) of IHQ of MoD (Army) letter B/33513/AG/PS-2(c) dated 10 Oct 1997 and occurrence to this effect was notified vide Army Ordnance Corps Records Part II Order No 1/1073/0001/2017.

(j) Due to re-fixation of seniority of the applicant in the rank of Havildar from 01 Dec 2004 to 03 Apr 2008, his pay and allowances for the period wef 01 Dec 2004 to 03 Apr 2008 affected to the rank of Havildar were recovered by the Pay and Accounts Office (Other Rank) Army Ordnance Corps.

(k) Due to re-fixation of seniority of the applicant in the rank of Havildar wef 03 Apr 2008, the applicant could not be promoted to the rank of Naib Subedar as he did not come up in seniority for promotion prior to his discharge from service on compassionate ground at his own request on 31 Jan 2019."

8. It is the case of the respondents that as the unit had given the promotion by oversight and these punishments were not taken note and the impugned action was taken and the date of the promotion of the applicant on the rank of Hav was changed from 2004 to 2008, i.e., after he became eligible on conclusion of the period of punishment. According to the respondents as the order of promotion of the applicant as Hav w.e.f 01.12.2004 was passed inadvertently and even in the Assumption Certificate the promotion was made subject to the applicant being not awarded any punishment as the



occurrence regarding the punishment was not published and as it was not taken note while issuing the promotion to the rank of Hav, on subsequently coming to the notice of these punishments the mistake committed has been corrected and, therefore, no relief can be granted to the applicant.

9. Faced with the aforesaid situation at the time of hearing today, learned counsel for the applicant submitted that now the applicant is not praying for promotion to the rank of Nb Sub nor is he press for counting his seniority in the cadre of Hav with retrospective effect, but the applicant would be satisfied in case the amount of salary granted to him for the work performed in the cadre of Hav is not recovered and the recovery of more than about of Rs.3 lakh from his salary is refunded to him. Respondents have refuted the aforesaid contention and submit that the applicant having not made any specific prayer with regard to the recovery, the said relief cannot be granted to him.

10. Learned counsel for the applicant invites our attention to the law laid down by the Hon'ble Supreme Court in the case of State of Punjab and others etc. Vs. Rafiq Masih (White Washer) etc. (Civil Appeal No.11527/2014) decided on 18.12.2014 and an earlier judgment of the Hon'ble Supreme Court in the case of Col B.J Akkara (Retd) Vs. Govt. of India & Ors [(2006) 11 SCC 709] to argue that recovery of the excess payments made based on wrong

interpretation and wrong understanding or relief granted without any misrepresentation or fraud on the part of the employee cannot be recovered. He, therefore, submits that now the prayer for refund of the recovery should be allowed and the as the applicant is a Group C and D employee, in view of the findings recorded by the Hon'ble Supreme Court in Para 12 of the judgment rendered in the case of **Rafiq Masih (White Washer) etc.** (supra), the amount recovered should be refunded to him.

11. We have heard learned counsel for the parties at length and perused the records.

12. The only issue warranting consideration is now is as to whether the prayer made at the time of hearing, i.e., refund of the pay and allowances in the cadre of Hav paid to the applicant for the period from 01.12.2004 up to 04.01.2008 is to be refunded to the applicant or not?

13. The issue of deduction from salary and other benefits to a retired employee has been considered in the case of **Rafiq Masih (White Washer) etc.** (supra) by the Hon'ble Supreme Court and after relying upon various judgments based on the decision rendered on a reference made by a Division Bench to a Three Judge Bench on 08.07.2014 and after taking note of the observations made by a Three Judge Division Bench on the reference made in Para 12 of the judgment rendered in the case of **Rafiq Masih (White**



Washer) etc. (supra), the following principles have been laid down by the Hon'ble Supreme Court:

*"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employees, would be impermissible in law:*

*(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*

*(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*

*(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*

*(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*

*(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

14. From the aforesaid, it is clear that payments made by mistake in excess of their entitlement would be impermissible in law in the stipulations envisaged from Clause 1 to 5 and in the present case, the case of the applicant falls in the category 1, 4 and 5. Admittedly in the detailed counter affidavit filed, the respondents have not come out with any case to say that the applicant is responsible for misrepresentation or fraud or in suppressing the fact about his punishment which resulted in his being promoted to the cadre of Hav w.e.f 01.04.2004. If any mistake has occurred, it has occurred at the unit level which failed to publish the requisite Part-II order

promulgating the punishment awarded on 02.04.2003 and the unit which processed his claim for promotion and went through his service record and issued an Assumption Certificate indicating that he has not been awarded any punishment involving Red Ink Entry, etc.

15. That being so, it is a case where without any fault of the applicant he was promoted to the rank of Hav, assumed charge of Hav w.e.f 01.04.2004, continued to work on the promoted post till 04.01.2008, discharged the higher responsibilities of Hav and earned salary for the same. Now, recovery of the aforesaid amount from the applicant, in our considered view, is not proper for the following reasons:

(a) The applicant is not responsible for having committed any act of commission or omission on his part which amounts to misrepresentation or fraud in the matter of issuance of promotion order in the cadre of Hav w.e.f 01.04.2004.

(b) The mistake, if any, is attributable to the Departmental Officials and the Departments concerned which failed to publish the Part-II order of the award of punishment and later who issued the certificate based on which the promotion was granted. There is nothing on record nor an iota of whisper anywhere in the records that the applicant in

anyway was responsible in instigating or was a party to the aforesaid error by the Departmental Authorities concerned.

(c) The applicant having discharged the responsibilities of a higher post and having earned salary of the post on the basis of the work performed by him cannot be held responsible for the promotion granted to him by the Departmental Authorities.

16. Now if a recovery of the amount for the simple reason that the applicant had earned the salary to which he was entitled to on which he was promoted, it is a case falling under Clause 4 of the principles laid down in the case of Rafiq Masih (White Washer) etc. (supra), whereby the employee was wrongly required to discharge the duties of a higher post and was paid accordingly. Even when the applicant was required to work against a inferior post once the applicant has worked on a higher post, he is entitled to the salary of the said post not only on the basis of the law laid down by the Hon'ble Supreme Court as indicated hereinabove but also on account of the fact that he had discharged higher responsibilities and earned salary on the said post.

17. Accordingly, keeping in view the facts and circumstances of the case and the reasons indicated hereinabove, we allow the OA in part. Even though, we dismiss the OA and as far as the all other claims of the applicant are concerned, we direct that with regard to

the pay and allowances granted to the applicant on the post of Hav for the period 01.12.2004 to 04.01.2008, the recovery made from his salary be refunded to the applicant within a period of three months from the date of receipt of a copy of this order and if it is not done within a period of three months, the amount shall carry an interest @ 6% till payment.

18. As far as calculation of the post retiral benefits of the applicant is concerned, the same shall be calculated based on the substantive post held by the applicant and the salary drawn by him at the time of his retirement or superannuation, i.e., on the promoted post of Hav treating him to have been promoted on the said post w.e.f 04.01.2008 and re-fixing his pay in the cadre of Hav w.e.f 04.01.2008. All retiral benefits shall be calculated on the aforesaid basis.

19. In view of the aforesaid, the OA stands disposed of.

20. No order as to costs.

21. Pending miscellaneous application(s), if any, stands closed.

[RAJENDRA MENON]  
CHAIRPERSON

[P. M. HARIZ]  
MEMBER (A)

Neha