

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

**OA 605/2016**

**Nk Kalka Prasad**

**... Applicant**

**Versus**

**Union of India & Ors.**

**... Respondents**

**For Applicant** : Ms. Archana Ramesh, Advocate

**For Respondents** : Mr. Avdesh Kumar Singh Mahndiyan, Advocate

**CORAM :**

**HON'BLE JUSTICE RAJENDRA MENON, CHAIRPERSON**

**HON'BLE LT GEN P M HARIZ, MEMBER (A)**

**ORDER**

This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, a serving Nk in the Army who has retired since then. He is aggrieved by the rejection of his application for promotion vide letter dated 04.09.2015 and has made the following prayers:

- (a) Issue directions to quash/set aside the 12 JAT letter dated 04.09.2015.

(b) Issue directions to exempt the applicant from promotion cadre from Nk to Hav in terms of Army Order 45/1980 and he be immediately promoted to the rank of Hav and above at par with his batch mates.

(c) Pass such other and further orders/directions to the respondent by way of payment of all back wages to the applicant as also adequate compensation.

### **Brief Facts of the Case**

2. The applicant was enrolled in the Army on 02.08.1995 in the JAT Regiment (Infantry). He was promoted to the rank of L/Nk on 05.12.2003 and later promoted to the rank of Nk on 23.08.2005. He was then due for promotion to the rank of Hav for which he attended the Hav Promotion cadre in Oct 2010, but failed in the cadre. Having done the Sec Cdr's Course, the applicant was then posted to the JAT Regimental Centre (JRC) in Mar 2010. In Sep 2011, the applicant applied for premature discharge, which was sanctioned and he was then required to submit his pension papers, which he did not. In Mar 2012, the applicant was again detailed to attend the Hav Promotion Cadre, which he did not attend as he had applied for premature discharge. On 08.05.2012, the applicant whilst

conducting training of recruits at JRC sustained a grenade blast injury in both hands. The applicant was granted 70% disability and was also declared a battle casualty. Consequent to his injury and amputation of fingers, the applicant applied for permanent posting at JRC, Bareilly till superannuation under the provisions of the MoD/DGMS letter dated 27.05.2014. On compassionate grounds and as a welfare measure, the applicant was permitted to continue at JRC, Bareilly.

3. Subsequently, vide application dated 12.06.2014, the applicant requested that he be promoted as per his seniority as he had given his willingness to attend the promotion cadre. The applicant then filed a WP 9285/2014 before the Hon'ble Delhi High Court seeking promotion and permanent posting at JRC, Bareilly. However, the Hon'ble High Court while refusing jurisdiction, permitted the applicant to withdraw the matter and file a case before the AFT. Based on a case submitted by JRC the applicant's unit replied vide 12 JAT letter dated 04.09.2015 giving details of the case and stating reasons why waiver of the CO for exempting the applicant from attending the promotion cadre was not granted (impugned order Annexure A-1). Aggrieved on not being granted a waiver for

exemption from promotion cadre and not being promoted to the rank of Hav, the instant OA has been filed.

**Arguments by the Counsel for the Applicant**

4. The counsel reiterated the service particulars of the NCO and elaborated on the incident in which he sustained a grenade blast injury in May 2012 leading to amputation of his fingers and thumb. The counsel stated that despite his disability the NCO had continued to work diligently and had applied seeking the CO's waiver exempting him from appearing in the promotion cadre, for promotion to the rank of Hav.

5. The counsel explained that the CO did not consider the case of the applicant favorably and that the CO's reply dated 04.09.2015 was wholly contrary to the letter and spirit of Army Order 45/1980, which was intended to benefit unfortunate personnel like the applicant. He further asserted that the CO instead of exercising his discretion and granting the requisite waiver from attending the promotion cadre, had denied the applicant a favourable consideration on very specious grounds.

6. The counsel then drew our attention to Para 5 of AO 45/1980 and elaborated that while normally an NCO was required to be in Medical Cat A



to attend the cadre, in the case of a war-wounded NCOs who are placed in low medical cat, the officer commanding was authorized to grant partial or total exemption from attending a cadre course, on the recommendation of the medical officer.

7. The counsel then drew our attention to the AG's Branch letter dated 10.10.1997 'Criteria for Promotion: JCO/NCO' (Annexure A-6). He elaborated on the provisions of Para 4 regarding medical standards and emphasized that under the provisions of clause 4(a) (iii) the applicant was eligible to attend the promotion cadre. Drawing our attention to Para 6 of the counter affidavit, he explained that even the respondents have reiterated the discretionary powers of the CO to grant a requisite waiver to attend the promotion cadre. He then asserted that the CO should have displayed requisite compassion and understanding in dealing with the case. Considering the gravity of the injury and circumstances, the applicant's case deserves compassionate consideration.

### **Arguments by the Counsel for the Respondents**

8. The counsel reiterated the service profile of the NCO and explained that the NCO had failed in the Nk to Hav promotion cadre on his first

attempt and that he did not attend the next chance as he had applied for premature discharge, which had been subsequently sanctioned. The counsel then elaborated on the grenade blast injury sustained by the applicant at JRC on 08.05.2012 whilst training recruits. He then elaborated on the details of the injury and the fact that the NCO had been granted a battle casualty status as a welfare measure and also granted 70% disability.

9. The counsel then explained how the applicant had sought permanent posting at JRC till superannuation and this too was acceded to and facilitated by the CO. Since JRC insisted on a proper jurisdiction, it entailed posting an additional NCO from the unit to JRC to fill the void of the applicant as an instructor. All this while, though the premature discharge had been approved, the NCO refused to submit the pension documents necessary to complete the discharge procedure.

10. The counsel then elaborated that the NCO decided to exploit his medical disability and seek promotion to the rank of Hav, by obtaining a waiver of the CO exempting him from the mandatory promotion cadre. The counsel then drew our attention to AO 45/1980 and added that this had since been superseded by AO 12/2009/MT under which the CO had the

discretion of granting a waiver for exemption from attending the promotion cadre. Further, drawing our attention to Para 11 of AO 12/2009/MT, the counsel stated that *'In case of war wounded and those in low medical category, the commanding officer is authorised to grant partial or total exemption from attending a cadre course on the recommendation of the medical officer'*.

11. The counsel further elaborated that during the visit of the CO to JRC in Jan 2014, the CO had interacted with the NCO who clearly stated that he was unwilling to return to the unit and cannot undertake any duty. Yet the NCO had demanded that he be granted exemption from attending the promotion cadre and be promoted. Despite the CO's assurance of providing a sheltered appointment within the unit, the NCO refused to return to the unit and insisted that he be promoted whilst at JRC.

12. In 2016, the unit was located in a field area and a promotion cadre scheduled from 05.05.2016 to 18.06.2016. Though the applicant had given his willingness to attend the promotion cadre, he was seeking a waiver for which an appropriate certificate from a medical officer was mandatory. Despite efforts, the applicant did not get the requisite certificate. Even

when the unit sent a temporary relief to JRC so that the applicant could come and attend the cadre, the applicant refused to go to the unit.

13. The counsel then emphasized that adequate compassion had been granted to the NCO by sanctioning his premature discharge, not taking action for not submitting the pension documents, permitting the NCO to withdraw his application for PMR, providing a posting to JRC as requested by granting permission for the NCO to continue at the JRC till superannuation and also declaring him a battle casualty, which earns substantial financial benefits.

14. The counsel also stated that the unit had other battle casualties with more severe injuries, and yet have continued to serve with the unit and had been even promoted to the rank of Nb Sub. The counsel emphasized that in this case, the NCO was only seeking personal benefits without wanting to actively serve in the unit. Thus under the circumstances, it was the discretion of the CO not to grant a waiver as the NCO was not willing to serve with the unit and contribute to the unit.

15. The counsel then concluded that as per the policy in vogue, a soldier was required to attend the appropriate promotion cadre and pass the cadre

to become eligible for consideration for promotion. In the Infantry Battalion, such promotion cadres are run at the unit level. Thus personnel employed outside the unit due for a cadre are then called back to the unit to permit them to attend the cadre. In the instant case, despite all the efforts of the unit to facilitate the applicant to attend the promotion cadre, he refused. Under these circumstances, the CO was well within his rights to exercise his discretion and not grant a waiver to an NCO who had point-blank refused to come and serve with the unit. The counsel asserted that the OA be dismissed.

### **Consideration of the Case**

16. Having heard both sides, the only issue which requires our consideration is whether the CO was justified in not granting a waiver from attending the promotion cadre, under the discretionary powers vested with the CO under AO 12/2009/MT.

17. The basic policy on criteria for promotion of NCOs/JCOs is laid down vide AG's Branch/PS letter dated 10.10.1997 (Annexure A-6) and amendments issued from time to time through policy letters/Army orders. At the relevant time of the applicant here, the eligibility, procedure,

applicability and syllabi for promotion cadres in the Army for promotion to the rank of Hav/Dfr and Nb Sub/Nb Ris, is laid down vide AO 12/2009/MT- 'Promotion Tests- NCOs'. It is not in dispute here that the applicant is an infantry soldier and is eligible to attend the Nk to Hav promotion cadre. It is also not in dispute that he attended the promotion cadre for the first time in Oct 2010 and failed in the promotion cadre. It is also not in dispute that for the promotion cadre scheduled in May 2012 the applicant declined to attend the promotion cadre since he had by then applied for premature discharge, which was also sanctioned. It is also not in dispute that whilst being posted at JRC, Bareilly, and whilst training recruits, the applicant sustained injuries from a grenade blast, resulting in serious injury to the palm and fingers. His disability was assessed at 70% and he was also declared a battle casualty. Later it was in Jun 2014 that he submitted his application dated 12.06.2014 stating that though he had intimated his willingness for promotion cadre in May, 2012, he had not been promoted. He thus prayed that he be promoted as per his seniority. Thus, it was at this juncture when the next promotion cadre was scheduled between 05 May 2016 to 18 June 2016 that the applicant gave his willingness, which was accepted and he was directed to report to the unit for the cadre.

However, the NCO did not report for the cadre. Here the applicant contends that since he is a battle casualty due to the injuries sustained from training with live munitions, he be exempted from participating in the promotion cadre under the discretionary powers of the CO and he be accordingly considered for promotion.

18. The relevant para from the letter dated 10.10.1997 on medical status for promotion to the rank of Hav and above is reproduced below:

"Medical Standards (all promotions to the rank of Dfr/Hav and above)"

4. *Must be in the medical category 'AYE'. However, personnel in lower medical category (both temporary and permanent) as a result of the circumstances indicated below would be eligible:*

(a) Eligible up to Medical Category 'CEE'

*(i) Battle casualties as defined in Special Army Order 8/S/85 including those casualties in fighting against armed hostiles shall also be treated as battle casualties for the purpose of promotion criteria.*

*(ii) Personnel wounded /injured during deployment in 'OP Meghdoot', 'OP Rhino', 'OP Rakshak', 'OP Pawan', 'OP Bajrang', 'OP Blue Star', 'OP Cactus Lilly' and other similar CI operations involving against Militants/Terrorists and consequently placed in medical category CEE (Permanent/Temporary) will be treated at par with 'Battle Casualties'.*

*(iii) JCOs/ NCOs wounded/injured during battle inoculation, field firing, mine training using the live ammunition and while handing/disposing live ammunition explosives bombs and Improvised Explosive/Devices and placed in Medical Category CEE (Permanent/Temporary) will also be treated as battle casualties.*



*(iv) JCOs and NCOs who sustain injuries or are wounded as a result of accidental explosion of mines caused while laying operationally oriented mine fields or lifting or negotiating mine fields laid by the enemy or own forces in operational areas, near the international borders or the Line of Control and consequently placed in Medical Category CEE (Permanent/Temporary) will also be treated as battle casualties.*

*(v) JCOs/NCOs, who are wounded/injured during UN Mission, where such a deputation is to count as active service in field, will also be treated as battle casualties.*

*(b) Eligible up to Medical Category 'BEE'.*

*Personnel placed in medical category 'BEE', will be eligible for promotion to the next higher rank. This will include both temporary and permanent low medical categories. This will be irrespective of whether or not the disease, sickness or injury is attributable/non-attributable to or aggravated by service conditions. However, cases of medical category 'BEE' (both temporary /permanent) due to psychological causes, misconduct or self inflicted injuries will not be eligible for promotion.*

*(c) (i) Eligibility at (a) (b) above is subject to proficiency of the affected personnel being of a specially high standard and suitable appointments being found for them within the Regiment/Corps.*

*(ii) The above yardsticks will apply uniformly to all categories of JCOs/NCOs and no consideration will be grand that a particular disability (hearing, eye-sight and so on) does not interfere in the performance of their duties."*

19. The relevant para extracts of the AO 12/2009/MT are extracted below:

**Aim**

*2. The aim of this AO is to lay down eligibility, procedure, applicability and syllabi for promotion cadres in the Indian Army to the rank of a Havildar/ Dafadar and Naib Subedar/ Naib Risaldar.*



3 to 10 XXXXXX

**Basic Quaifications**

11. NCOs in Medical Category SHAPE -1 only will be detailed to attend the cadre course. If a formation or unit commander details an NCO of a lower medical category, to attend a particular cadre course, he will furnish a certificate to the Record Office concerned, that the NCO is capable of undergoing that cadre course. This certificate will be endorsed by the Unit Medical Officer, to the effect that the cadre course will not have an adverse effect on the health of the NCO. However, in the case of war wounded NCOs, who are placed in low medical category, the Officer Commanding is authorized to grant partial or total exemption from attending a cadre course, on the recommendation of the Medical Officer.

20. The applicant being an Inf soldier from 12 JAT, the promotion cadre was to be conducted by the unit of the applicant. Thus the unit was justified in instructing the applicant to report to the unit to participate in the cadre. As per Para 11 of the AO 12/2009/MT, states that "*However, in the case of war wounded, who are placed in low medical category, the officer Commanding is authorized to grant partial or total exemption from attending the Cadre, based on the recommendations of the Medical Officer*". In practice the discretion is allowed to permit soldiers' participation in the promotion cadre taking into consideration their disabilities from being a war wounded. Thus, since in this case, he had injury to his fingers and palm, he may have been exempt from firing or any other subject/test that required the use of his hands. The letter dated

10.10.1997 also stipulated that those in Cat CEE/BEE being permitted to participate in a cadre is subject to the proficiency of the affected personnel being of a specially high standard and suitable appointments being found for them within the Regt/Corps.

21. The impugned letter dated 04.09.2015 is the reply of the CO to the comments sought by the JAT Regimental Centre on the case of the applicant. The CO has explained the background to the case, his request for premature discharge, the injury sustained by the applicant, permanent posting to JRC till superannuation, the reasons for not granting a waiver for attending the promotion cadre, the interview of the applicant with the CO. Based on all these issues, the CO was of the opinion that the applicant did not merit the discretion of the CO. Para 10 and 11 of the letter are reproduced below:

*"10. Interview with Commanding Officer at Bareilly on 07 Jan 2014. During visit of the undersigned to JAT Regimental Centre, Bareilly on 07 Jan 2014, an interaction was held with the NCO. In the interaction, the NCO clearly stated that he will not return to the unit and cannot undertake any duty whatsoever. Yet he demanded promotion to the rank of Hav. It may be noted that despite his disability, he can perform certain duties like co-dvr, supervising NCO exchange operator (lecturer) or office bearer. If he has the will, suitable emp is available for him.*

*11. Opinion of the Commanding Officer. Adequate compassion has been ex with Nk Kalka Prasad Vishwakarma by way of sanctioning his pre-mature discharge*

*application, not taking disciplinary action against him for non-preparation of discharge documents in time, by granting him permanent posting at Bareilly till superannuation, by declaring him a Battle Casualty and by giving him adequate opportunity to withdraw his discharge application. Discretion for promotion to the rank of Hav without undergoing promotion cadre can only be exercised in those cases where an individual is willing to serve his battalion in whatever capacity. The battalion has cases where limbs of men have got amputated in mine blasts, yet they left no stone unturned to fulfill their duties to their best capability. Such persons have been made even JCOs at discretion of Commanding Officer, but here is a case where an individual does not want to comply with laid down regulations, does not want to return to the unit and does not want to undertake any duty at all. Discretion of the Commanding Officer cannot be exercised in such cases."*

22. The discretion of the CO to grant partial/full waiver from attending a promotion cadre is based on the individual forwarding the requisite medical certificate and based on the fair assessment of the CO that the NCO is of an exceptional high calibre and that his retention in the unit (subject to qualifying on the cadre and meeting the prescribed CR criteria), will be beneficial to the organization. It is clear from the contents of the impugned letter that the conduct of the applicant did not inspire confidence in the CO of the applicant being a useful member of the unit. Thus, in exercise of his discretionary powers, he did not grant any waiver for the promotion cadre. This being discretionary power, and the fact that the CO has adequately explained the reasons for not exercising the discretion, we find no reason to interfere in the matter at this juncture.

23. However, the records show that the applicant had passed the Nk to Hav promotion cadre on 05.06.2018 and has since been promoted to rank of Hav on 11.08.2018. The extracts of the letter No 3188600/LC/JR dated 15.01.2022 is reproduced as under:

" OA NO 605/2016 FILED BY NO 3188600A NAIK KALKA PRASAD VS UOI & OTHERS IN HON'BLE ARMED FORCES TRIBUNAL (PRINCIPAL BENCH) NEW DELHI (REGN NO 47/2556/AFT)

1. xxx

(a) xxx

(b) xxx

2. It is intimated that No 3188600A Naik Kalka Prasad of your unit has filed OA No 605/2016 for seeking directions of Hon'ble AFT (PB) New Delhi to exempt himself from Naik to Hav cadre and be granted promotion to rank of Hav. The case defended by your unit by submission of brief facts of case and parawise comments to Legal Cell (AFT) Delhi) Area vide your letter No 3188600/LC/JR dt 16 Jul 2016 and 3188600/KPV/A/ dt 07 Oct 2017.

3. After submission of brief facts of the case and parawise comments, the petitioner passed Nk to Hav promotion cadre on 05 Jun 2018 and promoted to rank of Hav on 11 Aug 2018. As relief sought by the petitioner in subject OA has been granted to the petitioner, your unit was requested to apprise the facts to this effect to Hon'ble AFT (PB) New Delhi in consultation with Legal Cell (AFT) Delhi Area earliest vide this office sig under reference.

4. The instant case last came up for final hearing but the matter adjourned on the request of counsel of the respondents. Since the next date of hearing fixed

*for 23 Feb 2022, it is requested to liaise with Legal Cell (AFT) Delhi Area for filing an application before Hon'ble AFT (PB) New Delhi with prayer to dismissed the instant OA as infructuous as relief sought therein has been complied with as detailed in para 3 above. xxxx"*

24. In view of the above, since nothing else survives in the OA, the OA is accordingly disposed of.

Pronounced in open Court on this 22<sup>nd</sup> day of March, 2024.



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**(JUSTICE RAJENDRA MENON)**  
**CHAIRPERSON**



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**(LT GEN P.M. HARIZ)**  
**MEMBER (A)**

/ashok/