

**ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL
BENCH AT CHANDIMANDIR**

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OA 2183 of 2012 (Appeal)

Lt Col (Retd) KBL Sharma	Petitioner(s)
Vs		
Union of India and others	Respondent(s)

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For the Petitioner (s) :	Col (Retd) NK Kohli, Advocate
For the Respondent(s) :	Mr. Gurpreet Singh, Sr. PC.

**Coram: Justice Prakash Krishna, Judicial Member.
Lt Gen (Retd) HS Panag, Administrative Member.**

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**JUDGMENT
13.11.2013**

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This petition has been filed under Section 14 of the Armed Forces Tribunal Act 2007 (hereinafter referred to as the AFT Act), by raising the grievance against the incorrect entries in the ACRs for the year 1976-77 onwards until May, 1978, which resulted non-empanelment of the petitioner for promotion.

The case of the petitioner in brief is that he was commissioned on 11.6.1961 in Army Service Corps, and participated in Indo-Pak War of 1965 as Brigade Supplies and Transport Officer, 52 Mountain Brigade deployed in Jammu & Kashmir. During Indo-Pak War of 1971, he was again assigned independent command of 870 Company ASC (MA Mules) and was deployed in Commila Sector in Bangladesh. The further case is that the applicant was due to be considered for promotion by Selection Board to be held in October, 1977, but due to faulty and improper ACRs, he was not found fit for promotion. The case of the petitioner for promotion was considered by the Selection Board in the

absence of a proper ACR for a period of 22 months and based on the aforesaid improper inputs, promotion to the petitioner was denied.

Being aggrieved, the petitioner filed non-statutory complaint under the authority of AO 137/77 claiming that the course report for a long course may be considered as an annual report for the year, it will be unfair to do so in his case and claimed that he was entitled to correct ACR vide Para 36 of ASO 9/S/71. The said non-statutory complaint dated 24.1.1978 was considered and rejected vide order dated 8.6.1978. Thereafter the petitioner sought to get the resolution of grievance by filing a statutory complaint on 8.1.1980 and was insisted by the respondents to split his statutory complaint into two separate statutory complaints. The petitioner was obliged to do so. The statutory complaint was rejected by the Government of India vide letter dated 16.4.1981. Hence the present petition.

It appears that subsequent thereto, two punishment orders dated 20.10.1987 and 26.4.1991/1.5.1991 were passed against the petitioner. 'Severe Displeasure' (to be recorded) of General Officer Commanding-in-Chief, Western Command vide order dated 20.10.1987 was conveyed to the petitioner by way of punishment. By the subsequent order, it was recorded that a sum of Rs. 5737.50 be deducted from the salary of the petitioner on account of alleged loss of five Railway Warrants.

The petitioner successfully challenged these two orders by filing a writ petition being Writ Petition No. 8490 of 1991 before the Punjab and Haryana High Court at Chandigarh which was allowed and the two punishment orders referred to here in above were quashed. The respondents were unsuccessful in appeal being LPA No. 497 of 1992.

Armed with aforesaid judgment of the Hon'ble High Court, the petitioner started claiming promotion on the basis of the Writ Court's judgment. The said claim has always been denied by the respondents. The case of the respondents is that the judgment of the High Court has nothing to do so far as promotion of the petitioner is concerned and the order rejecting the statutory complaint has attained finality. In substance, the respondents' case is that quashing of the penalty orders which were passed long after the denial of promotion to the petitioner, will have no bearing as far as denial of promotion to the petitioner is concerned, both being independent to each other.

The petitioner thereafter filed a contempt petition being COCP No. 478 of 2007 which was dismissed.

Undaunted by the failure in the contempt petition, the petitioner filed another writ petition being CWP No. 6955 of 2007 praying for a writ of mandamus directing the respondents to grant the petitioner promotional benefits, pay and allowances, pensionary benefits etc. The said writ petition was disposed of at the admission stage itself without calling counter-affidavit, by directing the respondents to look into the

representation of the petitioner in this regard and decide the legal notice within a period of six months from the date of receipt of certified copy of the order, vide judgment dated 10.5.2007. The petitioner submitted that the said representation was not decided within the stipulated period. Thereafter the petitioner filed a contempt petition being COCP No. 337 of 2008 (O&M) for the alleged non-compliance of the judgment dated 10.5.2007 passed in writ petition No. 6995 of 2007. The said contempt petition has been decided vide order dated 7.3.2012 by holding that the representation of the petitioner has been decided vide communication dated 20.12.2007 and this should be treated as an 'order' rejecting the petitioner's statutory complaint. The High Court further observed that since the contempt petition is being disposed of on 7.3.2012, the respondents shall not take the plea of limitation, delay or laches against challenge to the aforesaid communication dated 24.12.2007.

Now the present petition has been filed on 21.8.2012.

When the matter was taken up as a fresh, the Tribunal while issuing the notice to the respondents provided that the learned counsel for the petitioner will also be heard on the point of limitation, vide order dated 27.8.2012.

The respondents have filed a short counter-affidavit and took two pleas for the non-maintainability of the present petition. Firstly, the petition is barred by time and the observation made by the Hon'ble High Court in its order dated 7.3.2012 disposing of the contempt petition will not extend the period of limitation so far as promotion matter of the petitioner is concerned. The petitioner was found unfit for promotion.

He was considered by No. 4 Selection Board for promotion to the rank of Lt Col by selection as under :-

S.No.	Considered as	Year	Result
(i)	Fresh Case 1961 batch	Oct 1977	Unfit
(ii)	First Review 1961 batch	Dec 1978	Unfit
(iii)	Final Review 1961 batch	Oct 1979	Unfit

The petitioner was declared unfit for promotion in the month of October, 1979 much prior to award of 'Severe Displeasure(Recordable)' on 6.10.1987. The setting aside of 'Severe Displeasure (Recordable)' by the High Court did not entitle the petitioner to fresh consideration for promotion to the rank of Lt Col. The other plea is with regard to the territorial jurisdiction of this Tribunal. The petitioner is residing at Noida (U.P). In view of Rule 6(2) of the Armed Forces Tribunal (Procedure) Rules, 2008, this Tribunal has no territorial jurisdiction to entertain the present petition, as pleaded in the reply.

In the rejoinder affidavit, the pleas raised in the counter affidavit have been disputed and the stand taken in the Original Application have been reiterated.

Heard Col (Retd.) N.K. Kohli, Advocate for the petitioner and Sh. Gurpreet Singh, Senior P.C. for the respondents. The petition was heard on the following two preliminary points:-

- (i) Whether the petition is within time ?

- (ii) Whether this Tribunal has territorial jurisdiction to entertain the petition ?

First, we will take up question No. 1 for consideration. The main plank of the argument of the learned counsel for the petitioner is that the petition is within time in view of the observation made by Punjab and Haryana High Court at Chandigarh in its judgment dated 7.3.2012 passed in COCP No. 337 of 2008, disposing of the contempt petition. Elaborating the arguments, the learned counsel submits that the High Court while allowing the writ petition and setting aside the penalty orders vide judgment dated 9.1.1992 passed in CWP No. 8490 of 1991 (first writ petition) has provided “all consequential benefits” which would flow to the petitioner as a consequence of quashing the impugned order referred herein. Meaning thereby, the learned counsel submits that the penalty orders having been setting aside, the petitioner is entitled for consideration for promotion. It was also submitted that the respondents have failed to decide the representation of the petitioner which they were duty bound to decide in view of the mandamus issued by the High Court in CWP No. 6955 of 2007 decided on 10.5.2007, the petition is within period of limitation. It was also submitted that after the dismissal of the statutory complaint vide order dated 16.4.1981, the second statutory complaint was filed which is still pending decision. Therefore the present petition is within time.

In reply, the learned counsel for the respondents submits that only issue before the High Court was with regard to the legality and validity

of the two penalty orders which have nothing to do with the promotion of the petitioner. Therefore, the judgment delivered in CWP No. 8490 of 1991(first writ petition) which was directed against the two penalty orders should be read and understood in the context of the controversy involved in the writ petition. So far as the second writ petition filed by the petitioner is concerned, in pursuance thereof, the respondents have disposed of the representation filed by the petitioner which has also been found so by the Contempt Judge of the High Court in the order dated 7.3.2012, the present petition is barred by time. The petitioner wants to raise an issue with regard to his promotion which was denied long back by rejecting the statutory complaint and was found unfit in the month of October, 1979, cannot raise the said issue by twisting the facts. On the question of territorial jurisdiction, the submission is that admittedly, the petitioner is residing at Noida within the State of U.P., therefore this Tribunal has no territorial jurisdiction.

Considered the respective submissions of the learned counsel for the parties and perused the record.

We will consider the question of limitation, as to whether the petition is in time or not, first. At this stage, it would be apt to reproduce the various reliefs claimed in the petition. They are as follows:-

- (a) Summon the records and set aside Government of India, Ministry of Defence orders dated 06.01.1981 and 16.4.1981 intimating non-grant of redress as prayed by the applicant in the statutory complaints dated 16.4.1980

and 17.4.1980 and rejecting the said complaints against non-empanelment for promotion;

- (b) Quash non empanelment of the application by No. 4 Selection Board held in Oct 1977 and subsequent boards;
- (c) Summon the record viz. his ACR Dossier and to set aside the ICR for the period 1975-76 being technically invalid due to non-completion of 90 days physical service under the Initiating Officer as also due to bias and lack of objectivity on part of the Initiating Officer;
- (d) Set aside the course report for the Long Petroleum Installation Course which was treated as the ACR for the year 1976-77 being invalid due to non-publication of the result in respect of the Applicant until 04 May 1978;
- (e) Negative recommendations for promotion, if any, in the impugned report, including in the form of 'Not yet recommended' be also expunged being inconsistent with overall profile of the Applicant as also due to non communication being adverse input;
- (f) Direction to the respondents to consider the Applicant for promotion to the rank of Lt Col (Selection Grade) and higher ranks as per his batch seniority based on his modified profile, i.e. after effects of the aforesaid ACRs have been removed in entirety;
- (g) Any other order or direction that Hon'ble Tribunal may consider appropriate under the circumstances of the case".

The various reliefs claimed, as reproduced above, would show that the grievance of the petitioner is with respect to the orders passed in the years 1980 and 1981 and his non-empanelment by No. 4 Selection Boards held in October, 1977 and subsequent thereto. Indisputedly, the petitioner has retired long ago on 31.12.1992. It is also interesting to take note of Para No. 3 of the OA relating to limitation. For the sake of convenience, the said paragraph is being reproduced below in its entirety:-

“Limitation: Keeping in view the liberty granted by Hon’ble Punjab and Haryana High Court vide its order dated 07 Mar 2012, attached as Annexure A-1, the matter is within limitation as the instant Application has been filed within six months from the date of the said order.”

In this view of matter, the question which falls for consideration is whether the present petition is within the period of limitation in view of the order dated 7.3.2012 passed by the High Court. In other words, whether the present petition which is primarily for grant of promotion can be said to be within the period of limitation and/or also the respondents are debarred from raising plea of limitation due to the said order.

We have given careful consideration to the matter. Section 22 of the AFT Act provides period of limitation for filing an application. It injuncts Tribunal not to admit an application, which is not within the prescribed period as per its clauses (a), (b) and (c). However power to condone the delay on the usual ground of “sufficient cause” is there. To

bring its case within the period of limitation the first limb of the argument is based on the last order dated 7.3.2012 passed by the High Court while disposing of the contempt petition. In our opinion, the order dated 7.3.2012 does not come to the rescue of the petitioner. The order dated 7.3.2012 should be read and understood in the light of the subject matter which was involved therein and the context in which the said order came to be passed. Before proceeding further, it would be appropriate to reproduce the relevant paragraph relied by the learned counsel for the petitioner which is as follows :-

“I, therefore, deem it appropriate to clarify that let the above-stated communication dated 24.12.2007 be treated as an ‘order’ rejecting the petitioner’s statutory complaint but at the risk and responsibility of the respondent, with further liberty to the petitioner to impugn the same before an appropriate forum, if so advised. Since this contempt petition is disposed of today, the respondent shall not take the plea of limitation, delay or laches against challenge to the aforementioned communication dated 24.12.2007.”

In the earlier part of judgment, we have already reproduced the various reliefs claimed by the petitioner in toto. The petitioner has not challenged or questioned the legality and validity of the communication dated 24.12.2007 anywhere in the present petition. The liberty was given

to the petitioner to challenge the said communication and it was provided that if so challenged, the respondents shall not take plea of limitation etc.

Debarring the respondents to raise the plea of limitation, was confined by the High Court, to legality and validity of order dated 24.12.2007, not otherwise. Not more than that. We therefore do not find any merit in the above stand of the petitioner.

Noticeably, quashing of the orders rejecting the statutory complaint or the order or the communication dated 24.12.2007, have not been sought for in the present petition.

Reverting back to the facts of the case, there is no denial from the side of the petitioner that his case for promotion was considered thrice by No. 4 Selection Boards and he was found unfit for promotion. Obviously, the petitioner was not satisfied with the result of the Selection Boards and he challenged the same by filing statutory complaints which were rejected in due course of time. One of the rejection orders is dated 16.4.1981. The said fact is not in issue. At this stage, the petitioner submits that he filed a second statutory complaint which is said to be pending. The learned counsel for the petitioner could not refer any provision entitling a person to file a second statutory complaint. In any view of the matter, the said second statutory complaint was filed long-long ago on which as per petitioner no decision has been taken by the respondents. Even if it is so, the petitioner should have sought appropriate remedy for non-disposal of second statutory complaint,

which he failed. Besides the fact that by filing successive representations one after another, a party cannot keep alive the matter in perpetuity. There is nothing on record to show that any effort was made by the petitioner to get his alleged second statutory complaint decided by the competent authority. Inaction on the part of the petitioner in this regard will not extend the period of limitation. In other words, the denial of promotion by the respondents by rejecting the first statutory complaint of the petitioner in the year 1981 has attained finality as the said order was not challenged before an appropriate forum or Court of Law and the period of limitation for the claim of promotion will run from that date.

Much was argued that in the CWP No. 8490 of 1991 filed against the orders, 'Severe Displeasure (to be recorded)' of General Officer Commanding-in-Chief and recovery of Rs. 5737.50, the petitioner also claimed for his promotion. During the course of arguments, a copy of the said writ petition was shown to us to buttress the aforesaid arguments. On a perusal of the same, it appears that besides seeking of the quashing of the penalty orders, the petitioner therein also claimed a writ of mandamus directing the respondents to grant him promotional benefits, pay and allowances, pensionary benefits etc. as relief (p). The said writ petition was allowed vide judgment dated 9.1.1992 by learned Single Judge. A copy thereof has been filed as Annexure P-1 to the present petition. Its perusal would show that the question of promotion was not argued or in issue before the Writ Court. Only the aforesaid two penalty orders were impugned therein. A bare perusal of the judgment dated 9.1.1992 would show that the entire argument was revolved around the

aforesaid two punishment orders impugned therein only. It is interesting to note that the High Court has noted in detail the points raised by the petitioner's counsel, which are as many as seven in numbers. None of the points is either with regard to non-promotion of the petitioner or in respect of improper ACR or non-consideration of the petitioner for promotion. In other words, the judgment is completely silent with regard to the promotional aspect of the petitioner. No such plea with regard to the promotion of the petitioner was either raised or argued or pressed and decided in the said writ petition. The conclusion is that no writ, order or direction was issued providing for the promotion of the petitioner.

Much reliance has been placed by the learned counsel for the petitioner on the ultimate paragraph of the writ petition which reads as follows:-

“For the foregoing reasons, this writ petition is allowed and the orders dated 20.10.1987 (Annexure P-3) and 26.4.1991/1.5.1991 (Annexure P-11) are hereby quashed. Recovery of the money, it has already been affected vide order, Annexure P-11, would be refunded to the petitioner. Needless to mention that by quashing of the Order Annexure P-3 and Annexure P-11 all consequential benefits would flow to the petitioner. However, there will be no order as to costs.”

Learned counsel for the petitioner submits that in view of the observation quoted herein above, granting of “all consequential benefits”, it would mean that the petitioner was also granted promotion. The said argument has no merit. A judgment has to read in the light of the points

raised and dealt therein. Any observation cannot be read out of the subject and beyond the context of the controversy. Significantly the order dated 16.4.1981 rejecting the statutory complaint was not impugned in the said writ petition. Nor the grievance was raised that a second statutory complaint was filed which has not been decided. No mandamus seeking direction to decide the said second statutory complaint was prayed for. The said plea was available to the petitioner. The petitioner should have and ought to have raised the said plea in the petition. Failure of a party to raise a plea which is available to him, will bar him to raise it subsequently at a belated stage. Viewed as above, the argument of the petitioner that the petitioner is entitled for promotion in the light of the judgment of the Hon'ble High Court dated 9.1.1992 is meritless and is liable to be rejected.

Our above view finds support from the judgment dated 21.4.2006 delivered by the High Court in Contempt Petition filed by the petitioner being COCP No. 478 of 2007 wherein similar kind of argument was advanced and negated. The High Court has very categorically repelled the plea of the petitioner for promotion. It was contended that the petitioner has since retired from service, is entitled to retrospective promotion from the due date as he was not promoted on account of order of punishment of 'Severe Displeasure' passed on 20.10.1987. The said matter has been dealt with by the High Court. The relevant portion from the order is reproduced :-

“No particulars regarding the claim for retrospective promotion have been given. In the circumstances, I am not inclined to exercise the contempt jurisdiction of this court. However, whatever consequently benefits that may be due to the petitioner in consequence of the order dated 9.1.1992 (Annexure C-1) the petitioner would be entitled to claim the same by availing other remedies in accordance with law.

In the circumstances, the contempt petition is dismissed.”

The contempt petition having been dismissed expressly vide order dated 21.4.2006, now it does not lie in the mouth of the petitioner to say that in view of the observation made by the Writ Court, the petitioner in the guise of consequential order is entitled for retrospective promotion. The matter stands concluded and attained finality way back on 21.4.2006.

The attention of the Court was further invited towards communication dated 29.7.1992 which was issued in the light of the petitioner's letter dated 11.1.1992, claiming for consideration of his name for promotion in the light of the judgment of the High Court. The said communication dated 29.7.1992 when read in the light of the letter of the petitioner, does not advance the case of the petitioner. Only certain documents were asked for. That is all.

Undaunted by his failure in the contempt proceedings, the petitioner started second round of limitation by filing another writ petition being CWP No. 6955 of 2007 before the Punjab and Haryana High Court. In the said writ petition, the only grouse raised by the

petitioner was that his legal notice has not been decided till date. (A copy of the said notice was not referred to us during the course of arguments). The High Court, it appears, without calling of the counter affidavit, disposed of the writ petition with a direction to decide the said legal notice within a period of six months, vide its order dated 10.5.2007. In pursuance thereof, the said legal notice has been disposed of vide order dated 24.12.2007, a copy whereof has been filed as Annexure P-6 to the petition. This disposal has been considered by the Contempt Court in another (second) contempt case COCP No. 337 of 2008 as compliance of the order passed by the Writ Court. The Contempt Court made it clear that the communication dated 24.12.2007 “being treated as an order rejecting the petitioner’s statutory complaint.....”. In that connection, the Contempt Court further provided that since the contempt petition is being disposed of today i.e. on 7.3.2012, the respondents shall not take the plea of limitation, delay or laches against challenging the aforesaid communication dated 24.12.2007.

Looked from any angle, the petitioner who has retired long ago on 31.12.1992, now wants quashing of his non-empanelment by No. 4 Selection Boards held in October, 1977 and subsequent Boards, at this distance of time.

Section 22 of the Act provides limitation and it bars Tribunal to admit application where a final order has been made under Section 21(2)(a) unless the application is made within six months from the said date on which such final order has been made, or under 21(2)(b) where

no such final order has been made, the period of six months has expired thereafter without such final order having been made. It is no longer in dispute that in the case of the petitioner, promotion to him was denied in the year 1979. The petitioner was considered thrice for promotion to the rank of Lt Col by No. 4 Selection Board in October, 1977, December, 1978 and October, 1979 and was declared unfit. The statutory complaint was rejected on 16.4.1981. Since 16.4.1981, the cause of action for promotion arose and the time started running. He kept quiet. According to him, second statutory complaint was filed, the maintainability of which is doubtful. Except filing of the second statutory complaint, he took no tangible steps by approaching the appropriate Court, Forum or authority, for redressal of his grievance with regard to promotion. The respondents are right in their contention that the petitioner was considered unfit for promotion to the rank of Lt Col way back in the year 1979 much prior to the award of 'Severe Displeasure (Recordable)' on 6.10.1987. Therefore, the case of the petitioner falls beyond the periods as finds mention in clauses (a), (b) and (c) of Section 21(1) of the A.F.T. Act.

The result of the above discussion is as follows:-

- (i) The period of limitation for the reliefs sought for in the present petition was not extended by the High Court vide its order dated 7.3.2012, disposing of the contempt petition.
- (ii) The claim of the petitioner for promotion, which is substance is the main relief in the present petition

to the post of Lt Col, was denied by the respondents by rejecting the statutory complaint in the year 1981 itself. The petitioner was found unfit by Selection Board No. 4 in the year 1979. Therefore, the cause of action, if any, arose to the petitioner then and there after rejection of the statutory complaint in the year 1981 and not subsequent to.

- (iii) The effect of the judgment delivered in the first writ petition No. 8490 of 1991 which was against the punishment order, will not give fresh period of limitation for promotion, as consideration for promotion and passing of punishment orders were entirely two different matters. It was also made clear by the High Court while dismissing the contempt petition i.e. COCP No. 478 of 2007 wherein the High Court negated the plea sought to be presently raised vide its judgment dated 21.4.2006. The said order has attained finality.

In view of the above said discussion, present petition is hopelessly barred by time. The petitioner is not right in his submission that in view of the order of the Punjab and Haryana High Court dated 7.3.2012, it is within time. The liberty was given to challenge the communication dated 24.12.2007 which has not been availed of in the present petition. On careful reading of the various orders passed by the Writ Court's and

Contempt Court's, it is but obvious that the order denying empanelment of the petitioner for promotion attained finality long ago in the year 1981 itself. By means of present petition, petitioner is indirectly challenging those orders which is not permissible at this distance of time in view of the Section 22 of the AFT Act. We find sufficient force in the submission of the learned counsel for the respondents that the petition is barred by time. The case of the petitioner is beyond the period of limitation as provided for under Section 22 of the A.F.T. Act.

So far as second question with regard to territorial jurisdiction is concerned, we leave the matter undecided in view of our findings on Issue No. 1, recorded as above.

With the result, the present petition is dismissed as barred by time.

No order as to costs.

(Justice Prakash Krishna)

(Lt Gen (Retd) HS Panag)

13.11.2013

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Whether the judgment for reference to be put up on website – Yes/No