

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No.6716 of 2007

% Date of decision: 31.07.2008

RAVI KUMAR SHARMA & ORS. ...PETITIONER
Through: Ms. Jyoti Singh, Advocate.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS
Through: Ms. Anjana Gosain, Advocate
with Major S.S. Pandey.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (Oral)

1. The petitioners were enrolled in the Indian Army in the Bengal Engineering Group in 1996-1999.
2. The respondents introduced a new trade of Surveyor Automated Cartographer in 1993 and the selection to the post was through direct recruitment as per Army instructions 23/90. The necessary qualifications for the said category was incorporated in the appendix to the said Army instruction. The soldiers were to be placed in Class III of the trade and given the rank of Havildar and on completion of

course of training of two (2) years they were to be placed in Class II. The persons so recruited were to be on probation for a period of two (2) years and on successful completion of probation the recruit was to be placed in Class I of the trade. The further promotion to the rank of Naib Subedar was permissible only after completing the total service of five (5) years.

3. The respondents found that there was a deficiency in the number of candidates coming for direct recruitment to this newly created trade and to meet the requirement the Army Headquarters accorded sanction for remustering of personnel from those who were already serving in other Arms/Services having requisite qualification as per AI 23/90. This resulted in the entry from two streams, i.e. through direct recruitment from civil in the rank of Havildar; and remustering from other Arms/Services.
4. The policy provided an exception to the criteria in the case of promotion of remustering category of DHM of Artillery/AD Artillery, HMT of EME as well as directly enrolled Havildars. In cases of directly enrolled Havildars the performance level was fixed at four (4) reports in the rank of Havildar out of which two should be above average as against the requirement of five (5) reports for the remustered category.
5. The remustering took place of three batches in the period 1999 to 2000 and sixteen (16) Sepoys/Naiks and forty-one

(41) Havildars are stated to have been remustered from other Arms/Services. All these Havildars were promoted as Naib Subedars after fulfilling the ACR criteria and it is stated that there was no conflict of interest between remustered persons and the direct entry Havildars from the civil side at that time.

6. The controversy giving rise to the present petition has arisen when the 4th and 5th batches were remustered in the period 2001 to 2003. The remustered individuals were senior to the direct entry Havildars as they had already served the Army for some years before remustering as they had become Havildars earlier than the direct entry personnel. Despite this the respondents started giving preferential treatment to the direct entry personnel inasmuch as for the promotion to the post of Naib Subedar the remustered individuals were required to have five reports while the direct entry Havildars became eligible by only four reports. The consequence of this was that the direct entry personnel became eligible for consideration to the post of Naib Subedar one year prior to the remustered individuals as they had to earn one less report in terms of an exception clause in the policy letter dated 10.10.1997. The petitioners 1 to 3 in the present case were remustered in the fourth batch while petitioners 4 to 6 were remustered in the fifth batch and attended the technical trade training

along with direct entry Havildars. They were senior to the direct entry Havildars.

7. The anomaly created received the attention of the respondents in terms of a letter dated 16.10.2002 which pointed out that in promotion of Havildars to Naib Subedars the difference in the number of reports to be earned was creating the said anomaly. The Record Office was, thus, asked for its response. The Record Office vide its communication dated 25.11.2002 examined the anomaly and found that uniformity and standardization of rules in regard to assessment of the seniority of the direct entry and remustered persons was necessary and made the following suggestions.

“4. With a view of achieve uniformity and standardization of rules in regard to assessment of seniority of direct entry SAC and remustered pers, the following are suggested:-

- (a) Seniority in respect of pers who are remustered from other trades to SAC will be fixed from the date of remustering into SAC irrespective of the rank they are holding for promotion to the rank of Nb Sub and those who are enrolled direct SAC will be fixed from the date of promotion to the rank of Hav i.e. on completion of trg.
- (b) As regards ACR for promotion to the rank of Nb Sub, minimum three ACRs earned in the present trade will be taken into account. Out of three, two ACRs should be 'Above Average' and one should be 'High Average'.
- (c) ACRs earned in the present category will only be counted in the case of remustered pers.”

8. It was, however, further observed that the views of the specialized Units may also be obtained.
9. The Chief Record Officer and Commanding Officer in their letter dated 24.1.2007, however, did not favour the removal of this anomaly and observed as under:

“1. Please ref to your DO letter Nos.123/36/EI and 123/37/EI both dt 15 Jan 2007.

2. The case for relaxation in ACR in respect of the Havs/SAC as mentioned in your ibid DO letter have been examined in detail. The NCOs were attested on 14 Sep 2002. Accordingly, they were promoted on the same date to the rank of Hav. Moreover, they have not been superseded by any Hav SAC and will get their promotion at their own seniority. They are also not meeting ACR criteria as per Para 6 () to (d) of AHQ AG's Branch letter No.B/33513/AG/PS2 (c) dt 10 Oct 97.

3. It is further clarified that indl who are direct entry Havs are required to earn 04 appropriate ACRs and 05 appropriate ACRs in case of remustered Havs as per above quoted AHQ letter.

4. Keeping in view of the above, no relaxation for ACR is required to be given to them as the NCOs will be considered for detailment in 'J' cadre after earning appropriate ACRs for the year 2007.”

(emphasis supplied)

10. The petitioners who were waiting for their departmental redressal were, thus, compelled to approach this Court by filing the present writ petition whereby they have sought quashing of the policy letter dated 10.10.1997 and 10.9.2004 which lay down different ACR criteria for the remustered Havildars like the petitioners and the direct entry Havildars who were in the same batch on grounds of

discrimination and for amendment of the policy to lay down that the ACR criteria for promotion as Naib Subedar should also bring in uniformity between the two categories.

11. The parties were heard at length on 13.5.2008 when it emerged from the aforesaid as well as the submissions of the learned counsels for the parties that the grievance of the petitioners was that while on the one hand the remustered persons like the petitioner in the trade of Surveyor Automatic Cartographer had to earn at least five ACRs, the direct recruits had to earn only four ACRs for further promotion as Naib Subedars. This problem had not arisen for the first three batches as there were only remustered Havildars but in the fourth and fifth batches the second stream of direct recruits also started which has resulted in the anomaly. The result of the policy decision of the respondents is that the petitioners would come up for consideration later than the direct recruits though they are in the same batch and thus their consideration for the post of Naib Subedar would be on a later date. At this stage it may be observed that the counter affidavit makes it clear that insofar as the *inter se* seniority of the remustered Havildars is concerned it has been specifically provided that if someone is senior and has not earned five ACRs, on attaining five ACRs such a person would be considered and would be assigned a notional seniority in the cadre of Naib

Subedar without any monetary benefits. There was, however, no explanation about the *inter se* seniority between the two categories of direct recruits and remustered Havildars.

12. A controversy also arose about whether there was a common seniority list of remustered Havildars and direct recruits and thereafter also a common seniority list of persons recruited as Naib Subedars. It was pleaded on behalf of the respondents, on instructions, that there were two separate seniority lists of the two categories. It is in view thereof that the records were asked for and the respondents were directed to specifically state as to whether the concept of notional seniority assigned *inter se* the remustered Havildars when being promoted as Naib Subedars was equally applicable to the *inter se* seniority between the two groups.
13. Learned counsel for the respondents obtained instructions and it transpired that, in fact, there was a common seniority list at both the stages. The natural consequence of this common seniority list was that in these seniority lists the remustered Havildars were senior to the direct recruits but the differentiation in the number of ACRs to be earned by the two categories was creating an anomaly in terms of the number of years they had to serve to earn those ACRs for promotion as Naib Subedars. This was contrary to all

principles of equity and parity and was directly in conflict with Article 14 of the Constitution of India. In a common seniority list the two streams cannot be put to different criterion for common promotion so as to deprive one stream of promotion at the same stage as the other stream.

14. In order to resolve this controversy and especially taking into consideration the fact that there was further no more remustering taking place, learned counsels for the parties proposed that a onetime exception be provided to the petitioners in respect of one ACR in the rank while considering them for the rank of Naib Subedar at par with the direct recruits would remove the anomaly. This is so since these persons have to be considered for the post of Naib Subedar and there was no further remustering taking place. This would have restored the original seniority for the purpose of consideration of further promotion to Subedar which was due at the end of the period of three years of service as Naib Subedars. Learned counsel for the respondents, in fact, did not seriously dispute that this could be a plausible solution but naturally wanted to take instructions.

15. The endeavour of the learned counsel for the respondents to find a reasonable solution in accordance with law has, however, not borne fruit and the respondents have decided

to stick to a stand that the petitioners are not entitled to the benefit they are claiming in the petition.

16. We note with regret the aforesaid stand of the respondents is for the reason that they seek to justify a policy of discrimination even after it was detected in the department and a remedy was sought. A second stage arose when even they were counselled legally that the removal of anomaly is necessary to avoid the stigma of discrimination in the said policy. We are, thus, left with no option but to issue appropriate directions.
17. In view of the facts set out hereinabove we are of the unequivocal view that such a discrimination between the two streams, once streams merged into a common seniority list, cannot be permitted which delays their further promotion. The discrepancy in the number of ACRs to be earned implies that the remustered category of personnel have to put in an extra year of service than the direct recruits to be promoted as Naib Subedars and consequently their further promotion is also affected since they would not have earned the requisite number of ACRs/period of service as Naib Subedars. There is no justification whatsoever coming forth for this anomaly which has been pointed out. The remustered category of personnel though senior in the seniority list of Havildars get their chance of promotion

later and, thus, their junior who are direct recruits are promoted earlier.

18. The respondents in their wisdom have, in fact, even provided for removal of a possible anomaly which arises where two persons in the remustered category may be affected inasmuch as if one of them is senior and has not earned an ACR he would not get the chance of further promotion till he earns that ACR. In such a situation a notional seniority is given when the person is promoted to the post of Naib Subedar which implies that such a person attains his original seniority as existed in his post prior to promotion as a Naib Subedar yet simultaneously the respondents are unwilling to remove the anomaly between the two categories.
19. A writ of mandamus is issued quashing the policy decision of the respondents whereby they seek to discriminate between the number of ACRs to be earned from the two streams of direct recruits and remustered personnel for promotion to the post of Naib Subedar.
20. The result would be that the petitioners are required to be considered for promotion as Naib Subedar on the basis of having earned the same number of ACRs as the direct recruits and on their being so promoted would be entitled to their seniority in the post of Naib Subedar as per the seniority list of Havildars (the original cadre). This would

naturally entail that the said seniority would also prevail for promotion from the post of Naib Subedar to the Subedar when such an eventuality arises. The common seniority list of the Naib Subedar to be drawn accordingly would be the basis for promotion to the post of Subedar and thus both streams of personnel would be simultaneously considered for the said post of Subedar irrespective of the number of ACRs as Naib Subedar.

21. The petition is accordingly allowed.

SANJAY KISHAN KAUL, J.

JULY 31, 2008
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MOOL CHAND GARG, J.