

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

% *Judgment Reserved on : January 19, 2015*
Judgment Pronounced on : January 21, 2015

+ **W.P.(C) 562/2015**

HAV DADASO SAMPATRAO PHADTARE Petitioner
Represented by: Mr.S.S.Pandey, Advocate with
Mr.H.S.Tiwari, Advocate

versus

UNION OF INDIA & ORS. Respondents
Represented by: Mr.Arjun Mitra, Advocate for R-1 to
R-3

W.P.(C) 563/2015

HAV RAVINDRA SINGH Petitioner
Represented by: Mr.S.S.Pandey, Advocate with
Mr.H.S.Tiwari, Advocate

versus

UNION OF INDIA & ORS. Respondents
Represented by: Mr.Arjun Mitra, Advocate for R-1 to
R-3

W.P.(C) 565/2015

HAV CHAVHAN HEMANAND KRISHNA Petitioner
Represented by: Mr.S.S.Pandey, Advocate with
Mr.H.S.Tiwari, Advocate

versus

UNION OF INDIA & ORS Respondents

Represented by: Mr.Arjun Mitra, Advocate for R-1 to R-3

W.P.(C) 566/2015

HAV RAKESH SAINI Petitioner

Represented by: Mr.S.S.Pandey, Advocate with
Mr.H.S.Tiwari, Advocate

versus

UNION OF INDIA & ORS Respondents

Represented by: Mr.Arjun Mitra, Advocate for R-1 to R-3

W.P.(C) 568/2015

HAV BIMAL CHANDRA MANDAL Petitioner

Represented by: Mr.S.S.Pandey, Advocate with
Mr.H.S.Tiwari, Advocate

versus

UNION OF INDIA & ORS Respondents

Represented by: Mr.Arjun Mitra, Advocate for R-1 to R-3

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The above captioned writ petitions lay a challenge to the judgment dated December 11, 2014 disposing of a batch of Original Applications filed by the writ petitioners and a few others before the Armed Forces Tribunal.

2. The Original Applications which have resulted in the impugned decision being passed were third in the series of Original Applications filed before the Armed Forces Tribunal. The first set of Original Applications, filed before the Principal Bench of the Armed Forces Tribunal at New Delhi were decided on March 19, 2012 and the second set were decided by the Kolkata Bench of the Armed Forces Tribunal on February 22, 2013.

3. The origin of the dispute is that the personnel enrolled in the Indian Army had an option to join the Military Engineering Service (MES), provided of course they were eligible for the cadre posts in the Military Engineering Service. Under the said option available personnel enrolled in the Indian Army opted for and on permission being granted joined Military Engineering Service. There being less promotional avenues in the Military Engineering Service vis-à-vis the promotional avenues in the Indian Army, there was a murmur of protest by those who had shifted to the Military Engineering Service and considering the stagnation of the personnel in the Military Engineering Service the Government of India took a policy decision on January 01, 2009 declaring merging of cadre, whereby persons who had joined the service in the MES from the combatant units of the Indian Army were required to be repatriated back to the combatant units of the Indian Army. The said policy decision created a serious anomaly since the persons who had joined the Military Engineering Service did not earn promotion while their batch mates as also their juniors who remained in the Indian Army earned promotions. Thus, upon repatriation, pursuant to the merger order, the personnel who had joined the MES Cadre were required to serve not only under their batch mates but also under their juniors in the combatant units.

4. Aggrieved by the above policy decision of the Government, a batch of Original Applications were filed by the aggrieved personnel of the MES Cadre before the Principal Bench of the Armed Forces Tribunal, lead matter being Havaldar Pratap Chander Sahu. Another set were filed before the Kolkata Bench of the Armed Forces Tribunal, lead matter being Sub. (BS) S.K.Shaw.

5. The decision dated February 19, 2012 by the Principal Bench of the Armed Forces Tribunal at New Delhi and the decision dated February 22, 2013 by the Kolkata Bench of the Armed Forces Tribunal upheld the policy decision of merger of cadres, but with a rider, that the personnel who were absorbed in the MES Cadre but reverted back to the Indian Army cannot be made to serve under their juniors. Therefore, it was directed that before repatriation, if the personnel were otherwise eligible for promotion in the MES Cadre, they should be promoted before merger, and if not eligible, then they should be given an opportunity to acquire the qualification so that they may get a promotion. In the case of Sub. (BS) S.K.Shah, the Kolkata Bench further held that the seniority of the MES personnel has to be protected in the merged cadre.

6. A fact needs to be noted by us to throw clarity on the reasoning of the aforementioned two views taken by the Principal Bench and the Kolkata Bench of the Armed Forces Tribunal. The same was that the personnel in the MES who had joined the cadre after having worked in the Indian Army had not only become eligible for promotion and there were promotional posts available, but were not promoted in the MES because the Government was contemplating the policy decision to effect the merger. The grievance of these persons was that had they been promoted in the year when

promotional posts were available, on merger, they would have joined service in the Indian Army not at the post held by them but at the promoted post.

7. The said decisions of the two Benches of the Armed Forces Tribunal have since attained finality because the Government of India did not challenge the said decisions and the impugned decision would reveal that the learned Additional Solicitor General, who appeared before the Armed Forces Tribunal, Principal Bench at Delhi fairly conceded that the Union of India was following the directions issued by the two Benches of the Tribunal.

8. The problem seems to have arisen again because while implementing the decisions of the two Benches of the Tribunal, the Union of India directed certain personnel to report to the combatant units without they being promoted to the rank in which their batch mates and juniors were working in the combatant units. The claim of the personnel before the Authorities was that before repatriating them to the Indian Army, their cases for promotion in the Military Engineering Service be considered with retrospective dates when promotional posts were available and the personnel had attained eligibility to be considered for promotion.

9. Aggrieved by the omission of the authorities to do the needful, the applicants before the Tribunal filed Original Applications praying that they should not be transferred to the combatant units till they were granted promotions to bring them at par with their juniors. In other words, the applicants before the Tribunal wanted effectively a postponement of the policy of merger till they were given promotions to such ranks so as to bring them at par with their batch mates and needless to state, their juniors.

10. Observing as under in paragraph 31 of the impugned order:-

“31. Yet it is not the end of the matter. It has been pointed by the learned counsel for the petitioners that the petitioner of OA 273/2014, OA 275, OA 276, OA 277, OA 279 and OA 280/2014 already completed their eligibility criteria for promotion when they were in the MES in the year 2011 itself. Only because of the policy of the Government and according to the learned counsel for the Union of India, because of the stay order passed by the Kolkatta Bench of the Tribunal, the entire policy of the Government came to a stand-still and because of that reason these petitioners who, otherwise could have been considered for further promotion in the rank of Hav, their matters were not considered. If these petitioners cases would have been considered, they would have got the promotion to the rank of HAV while they were in the MES and they would have got the rank of Hav also in their parent department upon merger.”

the Tribunal has disposed of the Original Applications issuing directions in paragraphs 34 and 35 as under:-

“34. We are making it clear that the petitioners be given opportunity for obtaining the ACRs. We are further making it clear that, if any of the petitioners has already acquired the ACRs for a particular period, then the other required ACRs may be completed within a period which according to the respondents can be just after the 90th day of physical service for any one ACR. The complete exercise can be done within a period of seven months, (Seven recommended as a cushion for leave absence, conduct of DPC, etc. since each CR is 90 days physical service) including allowing the petitioners to earn the (two), special ACRs of requisite period. The respondents are also directed to facilitate the test of Junior Leader Proficiency Test (JLPT) where applicable. The process should be completed within a period of seven months for those petitioners lacking two ACRs (The period will commence from the date of reporting of the individual to the Unit). For those petitioners lacking three ACRs, the outline calculations given in para 28 preceding, would apply (with the additional cushion of 30 days

to cater for leave absence, conduct of DPC etc, since each ACR is 90 days physical service). The interim orders passed in these matters stand vacated. The petitioners shall without any delay report to the Combatant Units of the Army and in all cases in a maximum period of three weeks from the date of this order. It is also made clear if any promotion order has already been given and any person has already undertaken the movement from the MES to their parent unit, their orders are not being touched and they shall remain as it is.

35. Consequently, for the reasons mentioned above the OA's No.273/2014, OAs 275 to 277 of 2014 and OA 280/2014 are partly allowed. Other all OAs are dismissed. No order as to cost."

11. A perusal of the observations made by the Tribunal in paragraph 31 and the final directions issued in paragraphs 34 and 35 would evince that partial relief has been granted to the applicants before the Tribunal, inasmuch as the Tribunal has held that such applicants who had completed the eligibility criteria for promotion when they were working in the Military Engineering Service (MES) in the year 2011 would be considered for promotion as of the said year i.e. 2011, and those who were found eligible to be promoted would be granted promotion before being placed in the merged cadre. The relief which has been denied is that they will not be kept in the MES Cadre till they are further promoted to the ranks to which the persons junior to them, but who continued to serve under the Indian Army, or their batch mates were promoted. We note that the relief granted earlier to other similarly placed applicants, of not being made to serve under their batch mates or juniors has been maintained.

12. To appreciate the directions issued by the Tribunal, it would be necessary to note certain facts, as has been done by the Tribunal. In the

Indian Army as well the Military Engineering Service, the lowest rank is that of a Sepoy. The promotional avenues are : Naik : Havaldar : Naib Subedar : Subedar : Subedar Major.

13. Enrolled in the Indian Army as a Sepoy and earning promotion to the post of Naik and above, when the Government of India permitted personnel of the Indian Army to opt for service under the Military Engineering Service, some having earned promotion to the post of Naik and some to the post of Havaldar, they opted for and were absorbed under the Military Engineering Service. Due to the non-availability of promotional posts, these persons stagnated in the Military Engineering Service. Their brethren and even juniors who remained in the Indian Army, due to availability of promotional posts stole a march over them. When the decision was taken to merge the cadre of the Military Engineering Service those who had joined the service after having served the Indian Army, with the cadre in the Indian Army, faced the problem of being required to work and report to either their batch mates or persons junior to them.

14. It was in this background that the two earlier Benches of the Tribunal took the view which we have already expounded above and the batch of Original Applications with which we are concerned were decided by the Principal Bench of the Tribunal at Delhi on December 11, 2014 giving directions in paragraphs 34 and 35 of the decision, with observation made in paragraph 31.

15. The grievance of the writ petitioners before us, who were the applicants before the Tribunal, is that in spite of the two decisions of the Tribunal dated March 19, 2012 and February 22, 2013 mandating the Union of India not to post any petitioner under their batch mates or their juniors,

without considering them to earn promotions till they attained the rank of their batch mates or their juniors, they could not be repatriated under the policy of merger and thus the direction was to retain them in the MES till they earned promotion to attain parity in rank with their batch mates or juniors.

16. It was contended by the petitioners that some of them had already completed the requisite period of service when they were in the MES so as to earn promotion to the rank of Havaldar in the year 2011 i.e. even before the implementation of the Government's merger policy. These persons had not been given the rank of Havaldar because of the issuance of the policy decision and for no fault of their. They highlighted that these persons had been considered for being promoted in the year 2013 and had been given promotion to the rank of Havaldar in the year 2013. They urged that if the promotion is given retrospective effect, their qualifying service to earn further promotion would have to be reckoned accordingly. They urged that they could not be put to a disadvantageous position because of the Government decision to keep in hold promotions pending implementation of the merger policy.

17. It was further argued by the petitioners that even otherwise, also in view of the earlier two decisions of the Tribunal, the respondents were bound to ensure that the petitioners should not be sent back to the combatant units where they would have to serve under their juniors. They thus pleaded that they should be permitted to continue to serve in the MES till they acquired ranks equal to their counterparts who had continued to serve in the Indian Army.

18. The said contention of the petitioners was vehemently opposed by the learned counsel appearing for the Union of India on the ground that the eligible and suitable candidates have already been given promotion pursuant to the two earlier decisions of the Tribunal. It was further urged that all personnel who had acquired the eligibility criteria for further promotions have been promoted by giving notional seniority from the date their juniors had been promoted. But it was highlighted that those who have not fulfilled the said eligibility conditions for promotions to further ranks would be required to complete the said eligibility and an assurance was given that on fulfilling the same even they would be promoted with retrospective effect i.e. from the date when persons junior to them were promoted. It was highlighted that the two earlier decisions of the Tribunal relied upon by the petitioners did not declare a right to continue in the MES till promotions were earned to the rank equivalent to the one held by their batch mates or juniors who had continued to serve in the Indian Army. It was highlighted that the department would ensure that nobody was posted at a place where he would be required to report to a batch mate or a junior.

19. The same contentions have been advanced before us by the respective learned counsel for the parties.

20. To appreciate the submissions of the learned counsel for the parties it would be necessary to quote the relevant paras of the decision of the Tribunal dated March 19, 2012 in Hav.Pratap Chandra Sahu's case. They read as under:-

"11. Now coming to the next question raised by learned counsel for the petitioner that as a result of repatriation of these employees/petitioners who were working in the MES when they are going back to their parent cadre then it is going

to create a lot of disturbance in the existing status of the parent department. It is submitted that some people while working in the MES were not promoted while the juniors to them in their parent unit were promotion. When these employees working in the MES go back to their parent unit, they will be placed below to their juniors and this action will seriously affect their further right of promotion and will create great hardships to the petitioners.

12. We realize that the persons who were working in the MES when they go back to their unit, they should get their due place in that unit without affecting their seniority or promotion. It is likely that persons in their parent unit got promotion and when persons working in the MES go back to their parent unit, they will be placed below to their juniors who got promotion while working in parent unit. This will be discriminatory and violation of Articles 14 and 16 of the Constitution of India. The person junior in his cadre is promoted and person who has been sent out of cadre in the public interest and when he is reverted back, he is placed below to his junior. This will cause a great hardship to him and this will be unfair to the person, therefore, we directed learned counsel for the respondents to seek instructions that when these persons are being repatriated to their parent unit, they must be given their dues and they should not be placed below to their juniors and create a discrimination in their parent cadre. In case a person who is junior is promoted, then the person who is being repatriated from the MES to his parent unit should also be promoted in case he is eligible for promotion and if not then he may be given opportunity to acquire that qualification so as to get his promotion.

13. Learned counsel for the respondents after seeking instructions submitted that the authority will take proper care of the persons who are being repatriated to their parent cadre and if they are otherwise qualified then they will be considered for promotion from the date persons junior to them have been promoted. In case, they are not eligible then they will be promoted after acquiring necessary qualification and their

seniority of unit will be maintained vis-à-vis their juniors. He also submitted that seniority of these people who are being repatriated will be looked into and they will be placed accordingly. In case any person junior to these persons is being promoted to a higher rank then the case of these persons will be considered vis-à-vis such junior person and if they are found suitable then they will be given their due promotion and their seniority will be restored.

14. We hope and trust that all these aspects will be examined by the Government and thereafter all the personnel who are repatriated to their parent department will be restored back to their original seniority and they will be given their due. In case, if one is required to pass certain eligibility test for the promotion then he will be given that opportunity. This whole exercise will be undertaken and completed within a period of six months from the date of this order. It is also observed that in case these persons who are being repatriated from the MES to their parent cadre are lacking a regimental report then the report obtained by them while working the MES will be taken into consideration because they are working in the MES as a combatant.”

21. In the above mentioned decision, though the Tribunal has protected the right of the personnel, to the extent that they would not be directed to serve under their juniors, but in the same paragraph it has been held : *‘the persons who is being repatriated from the MES to Parent Unit should also be promoted in case he is eligible for promotion and if he is not then he may be given opportunity to acquire that qualification so as to get his promotion’.*

22. Thus, it is clear that the said decision has not held that the personnel have to be given the opportunity to be promoted by retaining them in the Military Engineering Service.

23. It is relevant to note that to earn promotion from the post of Havaldar to Naib Subedar 5 years' service record has to be considered, meaning thereby one has to work at least for 5 years as a Havaldar. It is permissible to consider two ACRs in the rank of Naik. In other words, it is permissible for a Havaldar to be considered for promotion to the post of Naib Subedar if 3 years' service is rendered. The other eligibility norms such as clearing pre promotional cadre courses has to be met. Thus, to earn further promotions, the petitioners are required to fulfill various criteria and eligibility as laid down in the Rules and for that purpose, the Tribunal, in paras 28 and 30 has directed the respondents to make sure that the eligibility for promotion of the personnel be completed immediately, and if found suitable, they should be promoted to the ranks to which persons junior to them have been promoted with effect from the date the juniors were promoted. Moreover, the said criteria required for further promotion, can be acquired by the petitioners in about 270 days as has been clarified by the Armed Forces Tribunal in para 28 of its judgment. Therefore, on completing the said eligibility, the petitioners will be promoted to the rank to which persons junior to them have already been promoted and their promotion would be from back date, and thus the question of keeping the petitioners in the MES till they acquire the said eligibility does not arise. Moreover, even if for the sake of argument the submission of the learned counsel for the petitioners is accepted, then it will be a never ending process since once the petitioners were to fulfill the criteria for further promotion, they would have to be promoted in the MES and this would become a never ending process because there may be a situation where the batch mates or juniors who

continued to remain in the Indian Army would earn promotion in the meanwhile.

24. As far as certain petitioners who had already completed their eligibility criteria for promotion when they were in the MES in the year 2011, it has already been directed by the Tribunal in para 31 of the impugned judgment that such of them who are found eligible to be promoted would be first promoted before merger is effected and the promotion would be notionally with effect from the year 2011.

25. There is accordingly no merit in the writ petitions which are dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JANUARY 21, 2015

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