

CENTRAL ADMINISTRATIVE TRIBUNAL
LUCKNOW BENCH, LUCKNOW

ORIGINAL APPLICATION NO. 497/2012

ORDER RESERVED ON: 04/02/2014

ORDER PRONOUNCED ON: ^{16th} J. Chandra / April / 2014

CORAM :

**HON'BLE MS. JAYATI CHANDRA, ADMINISTRATIVE MEMBER
HON'BLE MR. M. NAGARAJAN, JUDICIAL MEMBER**

Mukul Saxena, aged about 49 years, S/o Sri SMS Saxena, R/o 121 Balaganj Railway Cooperative Colony, Jal Nigam Road, Balaganj, Lucknow, working as Manager (Technical), National Highway Authority of India at Lucknow.

....Applicant.

By Advocate: Sri A. Moin and Sri S.M.S. Saxena.

VERSUS

Union of India through

1. Secretary, Ministry of Road Transport and Highways, Transport Bhawan, Parliament Street, New Delhi.
2. National Highways Authority of India, G-5 & 6, Sector 10 Dwarka, New Delhi through its Chairman.
3. Regional Office / National Highways Authority of India, Gomtinagar, Lucknow.

....Respondents.

By Advocate: Sri S.P. Singh.

ORDER

Per: Shri M. Nagarajan, Member (J)

1. The applicant is working on the post of Manager (Technical) on deputation in the National Highways Authority of India (hereinafter referred to as NHAI).

IT IS SO—

2. The grievance of the applicant in this O.A. is as to his non-absorption in the NHAI in the post of Manager (Technical) by the respondents. His claim is that in pursuance of the National Highways Authority of India (Recruitment, Seniority and Promotion) (Third Amendment) Regulations, 2009, he is entitled for absorption in NHAI.

3. In support of the grievances and claim, the brief facts as stated by the applicant, are that on 13.07.2004 while he was working as Assistant Engineer in the Rajasthan Public Works Department, he was sent on deputation to NHAI on the higher post of Manager (Technical), which is equivalent to the post of Executive Engineer in the pay scale of Rs. 10000-15000 and he is presently working on the same post in the Pay Band-2 with Grade Pay of Rs. 6600/-.

4. In exercise of powers under Section 35 read with Section 9 of National Highways Authority of India Act, 1988, the Recruitment Regulations were notified on 11.03.1996 known as National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996. The said Regulations were amended more than once. By a notification dated 23rd October, 2009, an amendment was brought to the said Regulations called as "The National Highways Authority of India (Recruitment, Seniority and Promotion) Third Amendment Regulations, 2009" (Annexure A-3). The Regulation No. 13 of the said Regulations 2009 provides for absorption and the same reads as -

"13. Absorption: (1) Only those officers / employees shall be considered for permanent absorption who fulfill the prescribed qualifications and eligibility criteria for the post at the time of appointment on deputation.

(2) The officers serving on deputation may be considered for absorption at the level of General Manager and below.

(3) Appointment by absorption, direct recruitment and direct recruitment through lateral entry, including existing cadre of NHAI officers / employees, does not exceed 50% of the sanctioned posts at the level of General Manager and below at any point of time and the absorption, direct recruitment and direct recruitment through lateral entry shall be undertaken in a phased manner enhancing the recruitment from 25% to 50% in the coming recruitment years.

(4) The process of recruitment for increasing the permanent cadre strength shall be in the order of promotion, absorption and lateral entry, i.e. if eligible candidates are not available for promotion, absorption will be undertaken and once the eligible candidates for absorption are exhausted, lateral entry shall be undertaken. While increasing the permanent cadre strength, the feeder cadres may be enhanced first and higher cadres subsequently, so that career progression opportunities are not blocked for the lower cadres.

(5) The criteria for absorption shall be as follows:

- (a) Need for retention of the officer in the Authority.
- (b) At least two years continuous service on deputation basis in the Authority for the posts at the level of General Manager and below.
- (c) Willingness of the officer.
- (d) Consent of the cadre controlling authority in parent department.
- (e) Observance of statutory reservations as prescribed in the roster points.
- (f) Performance and achievements of the officer during his tenure in the Authority.

(g) *The Officer should be less than 56 years of age as on 1st day of January of the year in which the officer is being considered for absorption.*

(h) *Vigilance clearance from the Authority and parent department. The officer should not have been awarded any punishment under any departmental enquiry.*

(6) *Absorption of officers is to be decided by the Selection Committee, as prescribed in the NHAI (Recruitment, Seniority and Promotion) Regulations, 1996 (as amended from time to time).*

(7) *The power to relax any of the provisions of these guidelines will remain with the Authority."*

5. The said Regulations, 2009 was further amended by a notification dated 24th August, 2012 called The National Highways Authority of India (Recruitment, Seniority and Promotion) Third Amendment Regulations, 2012 (Annexure A-9). The relevant portion of the same reads as -

"3. In sub-regulation (5) of the regulation 13 of the National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996 (hereinafter referred to as the principal regulations), for the clauses (b), (d), (g) and (h), the following clauses shall be substituted, namely: -

"(b) At least two years of continuous service on deputation basis in the Authority in the post for which the officer seeks absorption.

(d) Consent of the cadre controlling authority in the parent department.

Provided that this condition may be dispensed-with in case of officers or employees whose resignation / voluntary retirement has been accepted by the parent department.

(g) The officer should be less than 55 years of age as on 1st day of January of the year in which the officer is being considered for absorption and should have at least 5 years of residual service as

per age for superannuation prescribed in Regulation 10 of the NHAI (Recruitment, Seniority and Promotion) Regulations, 1996, as amended from time to time.

(h) For officers who are already on deputation, vigilance clearance from Vigilance Division of NHAI will be required."

6. In pursuance of the Regulations, 2009 (Annexure A-3), a memorandum dated 28.11.2009 (Annexure A-4) was issued notifying applications from eligible candidates as per rules for permanent absorption in the NHAI. The applicant having fulfilled all the eligibility criteria prescribed in the Regulations and in pursuance of the memorandum dated 28.11.2009, submitted an application dated 17.12.2009 for absorption, which was forwarded by the competent authority on 24.12.2009. In pursuance of the said notification dated 28.11.2009 through a provisional list of eligible candidates for appointment to the post of Manager (Technical) on absorption basis was declared by the NHAI and interviews was also fixed on the same date in which his name finds place at Sl. No. 77. Though the interview was conducted, however, the result was not declared. In view of the non-declaration of the results, the applicant approached the Principal Bench of the Tribunal in OA No. 3160/2009 and the Principal Bench of the Tribunal by order dated 25.03.2010 directed the respondents to declare the result of the interview held on 15.03.2010. As against the order of the Tribunal dated 25.03.2010 in the said OA No. 3160/2009, the respondents preferred a Writ Petition No. 3822/2012 on the file of Hon'ble Delhi High Court and the Hon'ble

Delhi High Court recording the submissions of the respondents disposed of the Writ Petition by the order dated 12.09.2012.

7. The applicant further submitted that a new guideline dated 21.09.2012 was issued by the Chairman of NHAI indicating that the candidates, who had 10 years remaining residual service, shall be considered for absorption and that independent assessment should be done by the Regional Officers and the CGM (T) (Procurement) concerned at Headquarter with that particular State should also give his assessment of the Officer based on the records available with him and the said reports received from the Officers be seen by the concerned Members who are supervising the projects in those States and that the records so prepared should be put up before the Selection Committee consisting of 3 CGMs which will be nominated by the Chairman after scrutiny of work is completed. Under the said guideline dated 21.09.2012, the Chairman directed the Selection Committee to go through the records and in case of candidates who were found to be 'outstanding', the selection process was directed to be completed straightway, while in respect of candidates found deficient, the Committee could reject their application for absorption. By order dated 29.08.2012 (Annexure A-11), it was indicated that those who had applied for absorption need not apply again. The respondent no. 2 by order dated 23.11.2012 declared the result of 69 officers selecting them for absorption as Manager (Technical). The said selection list dated 23.11.2012 (Annexure A-12) comprises not only the persons who had applied in pursuance of the earlier notification dated

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28.11.2009 inviting application for absorption but also the order dated 29.08.2012. In the select list dated 23.11.2012 (Annexure A/12), the name of the applicant does not find place. Consequently, he met the Chief General Manager (Administration) at New Delhi in the first week of November, 2012 who informed him that the Selections / Appointments would be made solely on the basis of the confidential record entries and as a result of which the applicant requested to show his confidential record and the respondents have shown his confidential record. According to the applicant, the position of the confidential record during the tenure he was/is working at NHAI is as follows –

Year	Grading of Reporting Authority	Grading of Reviewing Authority
2004-05	8	8
2005-06	9	9
2006-07	9	9
2007-08	9	9
2008-09	7	7
2009-10	9	9
2010-11	9	9
2011-12	9	9 (from 4.11 to 10.11.11) 7 (from 11.11. to 03.12.11 by the present Reviewing Authority)

8. It is further submitted by the applicant that except for the year 2008-09, he has been graded as 'Outstanding' but for part of the year 2011-12 for the period from 11.11 to 03.12.11 his grading has been downgraded by the Reviewing Authority from 9 i.e. (Outstanding) to 7 i.e. (Very Good). The applicant having learnt that he was not absorbed on the ground that the Reviewing Authority has downgraded his grading from 'Outstanding' to 'Very Good' and in view of the fact that the said down grading was not communicated to him, he made a representation dated 08.11.2012

to the Chairman, NHAI, New Delhi (Annexure A-1) [wrongly typed as date 08.11.2011] with a request to expunge the said downgrading i.e. from 'Outstanding' to 'Very Good' and consequently to hold a review DPC and the DPC be directed to consider his claim for absorption on the post of Manager (Technical) and he be empanelled in the panel of Manager (Technical) with effect from the dates when juniors were empanelled and promote with consequential benefits. But there is no response to the said representation dated 08.11.2012 (Annexure A-1). Thus, being aggrieved as to the action of the respondents denying him absorption in NHAI, the applicant presented this Original Application seeking a direction to the respondents to absorb him in the post of Manager (Technical) in the NHAI as per rules without taking into consideration downgraded entries in his service record for the part of the year 2011-12 with effect from the date the persons similarly situated were absorbed on 23.11.2012 and for the consequential reliefs.

9. The respondents have filed their reply contenting that the applicant is not entitled for absorption on the post of Manager (Technical) in the NHAI. The specific defence of the respondents for not absorbing the applicant in NHAI in the post of Manager (Technical) is that the applicant did not fulfill the eligibility criteria prescribed under sub clause (f) of para 5 of NHAI (Recruitment, Seniority and Promotion) 3rd Amendment Regulation, 2009 dated 23.10.2009. In the reply, the respondents have stated that not only ACRs were taken into consideration for selection to the post of

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Manager (Technical) on absorption basis, but also their assessment / remarks made in the assessment were taken into consideration by the selection committee. In the process, the selection committee found certain observations made by his Reviewing Officer and the observations / remarks made by the Reviewing Officer is produced by them at Annexure No. CA-3 letter dated 01.10.2012 and the same reads as -

"(xi) Sh. Mukul Saxena: He is dealing with NH-28 and NH-56 Lucknow Sultanpur section. He is slow officer and takes least interest in the work. I have observed that he has not taken much interest in the Lucknow-Muzaffarpur (Package-I), left out work, removal of defects in Package 1,2,3 of NH-28 (LMNHP) despite of Instruction from RO.

I grade him average / good officer and do not recommend his absorption in NHAI."

10. It is further stated by the respondents that adjudging suitability of the post, it is the primary responsibility of the respondents concerned to consider all the relevant factors concerned and as such in the process of considering the claim of the applicant for absorption, it is found that as per Annexure CA-3, the Regional Officer has not only made certain remarks against the applicant but also did not recommend his case for absorption in the post of Manager (Technical) in NHAI. The respondents further specifically contended that the remarks given by the controlling Regional Officer that the applicant is slow officer and take least interest in the work cannot be construed automatically as a good officer assessing the suitability of the applicant during the selection process made by the selection committee and as such the non-selection of the applicant for absorption in the post of Manager (Technical) cannot be faulted upon.

11. Heard Sri A. Moin, learned counsel for the applicant and Sri S.P. Singh, learned counsel for the respondents. Perused the pleadings and the documents annexed to the pleadings of both the parties.

12. The facts are not in dispute. The controversy is as to fulfillment of the eligibility criteria prescribed under Regulation 13 of the said Regulations 2009. The specific stand of the respondents for not absorbing the applicant in NHAI is that he did not fulfill the eligibility criteria prescribed under sub-clause (f) of para (5) of Regulation 13 reads as -

"(f) Performance and achievements of the officer during his tenure in the Authority."

Sub-clause (5) of Regulation 13 provides for the criteria for absorption whereas sub-clause (6) of Regulation 13 prescribes the Authority to take a decision for absorption of officers in the NHAI and the manner in which such Authority has to take such decision. The said sub-clause (6) reads as -

"(6) Absorption of officers is to be decided by the Selection Committee, as prescribed in the NHAI (Recruitment, Seniority and Promotion) Regulations, 1996."

A plain reading of the aforesaid sub-clause (6) of Regulation 13 reveals that the Selection Committee is the competent authority to take a decision as to whether a particular officer who is on deputation is entitled to be absorbed and or not in NHAI. The decision that is required to be taken by the Selection Committee is regulated under the said sub-clause (6) of Regulation 13. The wordings occurred in the said sub-clause (6) i.e. *"as prescribed in*

the NHAI" makes it crystal clear that the Selection Committee has to take a decision as to the absorption of an officer only by taking into account the eligibility criteria prescribed in the Regulation and not any other criteria. Admittedly, the applicant fulfills all the other eligibility criteria prescribed under sub-clause (5) of Regulation 13 except the eligibility criteria under sub-clause (5) (f) of the said Regulation 13. As already observed, the eligibility criteria prescribed under said sub-clause (5) (f) is the performance and achievements of the officer during his tenure in the Authority.

In view of the provisions contained in sub-clause (6) of Regulation 13, the Selection Committee is required to take a decision only by looking into the performance and achievement of the officer during his tenure in the Authority and not any other factor since the mandate sub-clause (6) of Regulation 13 upon the Selection Committee is to take a decision 'as prescribed in the NHAI Regulations, 1996.

13. Keeping in mind the above position, and upon hearing the learned counsel for the parties, the points that arise for our consideration are -

POINTS FOR CONSIDERATION -

- (i) Whether the procedure adopted by the Selection Committee to take a decision for absorption of officers is in accordance with the NHAI Regulation 1996?

- (ii) Whether the assessment of Selection Committee in respect of the applicant is a fair assessment?

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(iii) Whether the Selection Committee can take into account the recommendation made by the Regional Officer?

(iv) For the purpose of taking a decision as to the absorption of an officer in NHAI, whether the Selection Committee is required to follow only the eligibility criteria prescribed under the said Regulations 1996 or the guidelines of the Chairman of NHAI dated 21.09.2012 (Annexure A/10).

POINT NO. (i)

14. The National Highways Authority of India Act, 1988 is an Act of Parliament providing for the constitution of an Authority for the development, maintenance and management of national highways and for matters connected therewith or incidental thereto. Section 2 of the said Act deals with 'Definitions'. Section 2 (a) of the said Act defines the term "Authority", the same reads as -

"(a) "Authority" means the National Highways Authority of India constituted under section 3.

Section 2 (b) of the said Act defines the term "Chairman", which reads as -

"(b) "Chairman" means the Chairman of the Authority."

Section 3 of the said Act provides for 'Constitution of the Authority', and the Authority shall consist of -

"(i) a Chairman;

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(ii) not more than five full-time members and

(iii) not more than four part-time members, to be appointed by the Central Government by notification in the Official Gazette."

Section 9 of the said Act provides for 'appointment of officers, consultants and other employees of the Authority, and the same reads as -

"(1) For the purpose of discharging its functions, the Authority shall appoint such number of officers and other employees as it may consider necessary on such terms and conditions as may be laid down by the regulations.

(2) The Authority may appointment, from time to time, any person as adviser or consultant as it may consider necessary, on such terms and conditions as may be laid down by the regulations."

Section 34 of the said Act confers power upon the Central Government to make rules for carrying out the provisions of the said Act. Section 35 of the said Act confers power upon the Authority to make regulations and the relevant portion of the same reads as -

"(1) The Authority may, by notification in the Official Gazette, make regulations not inconsistent with this Act and the rules made thereunder to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely -

(a) The times and places of the meetings of the Authority and the procedure to be followed for the transaction of business at such meetings;

(b) The terms and conditions of service method of recruitment and the remuneration of officers and other employees appointed by the Authority;

(c)

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Section 25 of the said Act provides for 'delegation of powers', which reads as -

"(1) The Authority may, by general or special order in writing, delegate to the Chairman or any other member or to any officer of the Authority, subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions under this Act (except its powers under section 35) as it may deem necessary."

A reading of Section 25 of the said Act makes it crystal clear that the power of the Authority to make Regulations cannot be delegated by the Authority either to the Chairman or any other member.

The National Highways Authority of India (NHAI) (hereinafter referred to as the 'Authority') in exercise of the powers conferred by Section 35, read with Section 9, of the said Act, made a regulation called 'The National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996. Regulation No. 13 of the said Regulations, 1996 provides for absorption. Sub clause (5) of Regulation 13 prescribes the eligibility criteria for absorption. Sub clause (6) of Regulation 13 prescribes the Authority to take a decision for absorption of officers. As per Regulation 13 (6), the decision for absorption of the officers is to be taken by the Selection Committee and such a selection by the Selection Committee shall be as prescribed in the NHAI (Recruitment, Seniority and Promotion), Regulations, 1996 (as amended from time to time).

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The only reason assigned by the respondents for denying absorption of the applicant in NHAI is that he did not fulfill the eligibility criteria prescribed under para 5(f) of Regulation 13. Sub clause (f) of para 5 of Regulation 13 reads as –

"Performance and achievements of the officer during his tenure in the Authority."

15. It is an admitted fact that the Selection Committee assessed the performance of the applicant by following the guidelines/directions issued by the Chairman in his order dated 21.09.2012 (Annexure A/10). The relevant portion of the same reads as –

"No. NHAI/11041/08/2010-HR.I/
NATIONAL HIGHWAYS AUTHORITY OF INDIA
Chairman's Secretariat

NHAI has initiated the process of absorption on regular basis. The candidates who have worked as Manager (Tech.) for two years as on 1.1.2012 are being considered for absorption and only those candidates who have 10 years remaining residual service shall be considered for absorption.

.....

Independent assessment should be done by the Regional Officers and the CGM (T) (Procurement) concerned at HQ with that particular State should also give his assessment of the officer based on the records available with him. In case of Managers working in the Head office, independent assessment report must be given by both the GM and CGM under whom the concerned Manager is functioning.

The reports received from these officers may be seen by the concerned Members who are supervising the projects in those

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States where the officer is working or who are supervising the work in the Head Office. The record prepared in the above fashion should be put up before the Selection Committee consisting of the three CGMs which will be nominated by me after the scrutiny work is completed. The Selection Committee may go through the records and in case of candidates who are found to be 'outstanding', the selection process can be completed straightway. Similarly, in the case of those candidates who are found to be clearly deficient, the Committee can give clear finding for rejecting their application for absorption. In those cases where there is a doubt, the Committee can keep the officers in wait-list and get further verification done on the quality of work done by such officers."

16. As already noted, the power to make Regulations exclusively lies upon the Authority. The said Regulations 1996 is made by the Authority. Section 35 of the Act provides the power of the Authority to make regulations. Sub-section (b)(2) of Section 35 deals with the terms and conditions of service, method of recruitment and the remuneration of officers and other employees appointed by the Authority. Section 9 of the said Act confers power upon the Authority for making appointment of such number of officers and other employees on such terms and conditions as may be laid down by the regulations. Absorption is a well recognized method of recruitment. The eligibility criteria for absorption is provided under sub-regulation (5) of Regulation 13. Section 25 of the said Act, while conferring power upon the Authority to delegate its powers either to the Chairman or any of its Members specifically excludes the powers of the Authority under Section 35 i.e. Power of the Authority to make Regulations. It has already been observed that the Selection Committee has assessed the suitability of the applicant for absorption in NHAI in the post of Manager (Tech.) as

directed by the Chairman in his order dated 21.09.2012 (Annexure A/10).

17. The recruitment to the posts in the Authority is regulated by the Regulations called 'The National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996. The said Regulations is made by the Authority in exercise of the powers conferred by Section 35, read with Section 9, of the said Act, 1988. The Regulation of recruitment and conditions of service is, thus, a field occupied by the Regulation made by the Authority. After the commencement of the said Regulations, 1996, it is not permissible to regulate or provide for the matters covered by the regulations for the Chairman or any of the Members of the Authority. After the commencement of the Regulations, 1996, the Chairman cannot provide anything for filling up the posts in the Authority by way of absorption.

18. It is settled law that once Statutory Rules have been made, the appointment shall be only in accordance with the Rules. This being settled position of law; we observe that there is no power for the Chairman under any of the provisions of the Act to prescribe the eligibility criteria for appointment of officer by way of absorption in NHAI in the instant case for absorption.

19. The Constitution Bench of the Hon'ble Supreme Court in **Anjum M.H. Ghaswala** [AIR 2001 SC 3868 : 2001 AIR SCW 4318] reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then

the said authority has to exercise it only in the manner provided in the statute itself. In view of this position, the task of the Selection Committee in taking a decision of an officer for absorption into NHAI shall be only well within the four corners of the eligibility criteria prescribed under sub-regulation 13(5) of the Regulations and cannot be on the basis of any other consideration.

20. Admittedly, the Selection Committee has assessed the applicant with reference to the recommendation made by the Regional Officer as directed by the Chairman in his order dated 21.09.2012 (Annexure A/10). Hence, our answer to the Point No. (i) is that the procedure adopted by the Selection Committee to take a decision for absorption of officers is not in accordance with the eligibility criteria prescribed under the NHAI Regulations, 1996.

POINT NO. (ii)

21. Normally, a Tribunal shall not enter into the question of correctness of assessment made by the Selection Committee. It is a settled position of law that unless there is a strong case for applying the Wednesbury doctrine or there are mala fides, Courts and Tribunals cannot interfere with the assessment made by a Selection Committee in regard to merit. But in rare cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if

there is illegality attached to the decision, then the powers of judicial review of this Tribunal are not foreclosed. From the catena of the judgment of the Hon'ble Supreme Court the principles laid down relating to the important issues of "fairness" in the matter of consideration of an officer for promotion under Article 16 and as to the manner in which 'adverse remarks" can be taken into consideration; can be summarized, sum of which are as follows: -

- "(1) Under Article 16 of the Constitution, right to be "considered" for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence.*
- (2) Courts will not interfere with assessment made by the Departmental Promotion Committees unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury principles or it was mala fides.*
- (3) Attachment of weight to the adverse remarks depends upon certain sound principles of fairness.*

22. On the basis of the above principle, we have to consider whether the Selection Committee applied the correct legal principle of "fairness". We have also to apply Wednesbury rule and consider whether relevant facts were not considered and irrelevant facts were considered.

23. We shall now proceed with our reasons as to why the consideration by the Selection Committee which met on 25.10.2012 is not 'fair' and why it is liable to be set aside on Wednesbury principle.

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Firstly, the assessment starts from the year 2004-05, when he came on deputation to NHAI from Rajasthan Public Works Department. Barring the year 2008-09, the applicant has been graded as "outstanding" but for part of the year 2011-12 where the applicant has been downgraded by the Reviewing Authority from '9' i.e. "Outstanding" to '7' i.e. "Very Good". In the ACRs/APRs of all the said years commending from 2004-05 till the year 2011-12, in the relevant column relating to fitness for promotion, it is recorded as "Fit". A perusal of APR for the year 2011-12, the overall rating given by the Reporting Officer is '9', which came to be downgraded by the Reviewing Officer as '7' in a scale of 1 to 10 points. The Reviewing Officer while downgrading the overall rating of the applicant from '9' to '7' has not assigned any reason for such downgrading. Thus, due importance was not given by the Selection Committee for the "Outstanding" grading of the applicant recorded in the APR. Secondly, the Selection Committee did not give any due importance to the assessment made by the earlier Selection Committee when his candidature was considered in response to a memorandum dated 28.11.2009 and he was provisionally selected for absorption showing his name at Sl. No. 77 in the select list dated 15.03.2010 (Annexure A/6). Thirdly, the Selection Committee in its meeting held on 25.10.2012 had taken a decision by relying upon the fact that the Regional Officer has not recommended his case for absorption. Fourthly, the criteria that has been adopted by the Selection Committee is not as prescribed under sub-clause (5) of Regulation 13. On the other hand, the criteria adopted by the Selection Committee is the guidelines

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prescribed by the Chairman in his order dated 21.09.2012 (Annexure A/10). Fifthly, the benchmark of "Outstanding" followed by the Selection Committee for the purpose of taking a decision is not benchmark specifically spell out under the Regulations. Sixthly, even the downgrading of '7' by the Reviewing Officer is "Very Good". Seventhly, at an earlier point of time i.e. the General Manager & Project Director, Project Implementation Unit, Lucknow by his letter dated 24.12.2009 (Annexure A/5), strongly recommended the case of the applicant for absorption. Eighthly, in the absence of a specific benchmark in the regulations, the relevant factors which are required to be taken into account by the Selection Committee is whether an officer who is working on deputation is (i) free of vigilance clearance, (ii) any warning is issued and (iii) any investigation is pending on receipt of a complaint against an officer. It is an admitted fact that the applicant does not fall in any case of the above four circumstances. Thus, the assessment of Selection Committee in respect of the applicant was not a fair assessment and is in the breach of the Wednesbury principle.

POINT NO. (iii)

24. In view of the discussions made hereinabove for the Point Nos. (i) & (ii), we hold that the Selection Committee cannot take into account the recommendations of the Regional Officer for the purpose of assessing the suitability of the applicant for absorption into NHAi since such a requirement falls outside the requirement of the Regulations.

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POINT NO. (iv)

25. In view of the discussions made hereinabove for the Point Nos. (i) & (ii) and also in view of the fact that Section 25 of the said Act specifically excludes the Authority to delegate its powers either to the Chairman or any other member or to any officer of the Authority in respect of the power under Section 35 of the said Act, we hold that the Selection Committee is required to follow the eligibility criteria prescribed under the said Regulations, 1996 and not the order of the Chairman of NHAI dated 21.09.2012 (Annexure A/10).

26. Learned counsel for the applicant by placing reliance upon the judgments of the Hon'ble Supreme Court in the case of (i) Dev Dutt vs. Union of India & Ors. [2008 (8) SCC 725], (ii) Abhijit Ghosh Dastidar vs. Union of India & Ors. [2009 (16) SCC 146] and (iii) Sukhdev Singh vs. Union of India & Ors. [2013 (4) SCT 127 SC, argued that though the benchmark "Outstanding" is required for being considered for absorption, admittedly, the entry of downgrading from '9' to '7' by the Reviewing Officer was not communicated to the applicant as he was having '9' in the previous years. We find force in the argument of the learned counsel for the applicant. In view of principles laid down by the Hon'ble Supreme Court in the said three cases, in our opinion, non-communication of the entries of ACR/APR of the applicant for the year 2011-12 has civil consequence as it has affected his right to get absorption in the NHAI. Hence, non-communication of the said downgrading

ACR/APR is arbitrary and is violative of the constitutional provisions. Therefore, the entries '7' in the ACR/APR and the non-recommendation of the candidature of the applicant by the Regional Officer should not have been taken into consideration by the Selection Committee for the applicant being considered for absorption in NHAI in the post of Manager (Tech.)

27. We, therefore, come to conclusion that there is merit in the claim of the applicant that he is entitled to be absorbed in NHAI in the post of Manager (Tech.). Accordingly, the Original Application succeeds and is allowed. We direct the respondents to hold a review Selection Committee meeting to revive the decision of the Selection Committee held on 25.10.2012 and consider the case of the applicant for absorption in the post of Manager (Tech.) in NHAI afresh in the light of the observations made and the findings given hereinabove. This exercise shall be completed within a period of two months from the date of receipt of a copy of this order. Under the circumstances, there shall be no order as to costs.

M. Nagarajan
(M. NAGARAJAN)
JUDICIAL MEMBER

J. Chandra
(MS. JAYATI CHANDRA)
ADMINISTRATIVE MEMBER

Kumawat