

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI**

OA NO.2168/2011
with
OA No.2486/2013
OA No.3538/2012

Reserved on: 28.04.2016
Pronounced on: 15.07.2016

**HON'BLE SHRI JUSTICE PERMOD KOHLI, CHAIRMAN
HON'BLE SHRI V. AJAY KUMAR, MEMBER (J)
HON'BLE DR. BIRENDRA KUMAR SINHA, MEMBER (A)**

OA No.2168/2011

1. Kamal Kishore S/o Yad Ram,
R/o WZ-1002, Gali No.16,
Sadh Nagar, Palam, New Delhi.
2. Ms. Sarita Devi W/o Kamal Kishore,
R/o WZ-1002, Gali No.16,
Sadh Nagar, Palam, New Delhi.
3. Bhim Singh S/o Daulat Ram,
R/o 11/106, Najafgarh Road,
Bahadurgarh, Delhi.
4. Raj Kumar S/o Sunder Lal Yadav,
R/o B-2/58, 2nd Floor, Sector-16, Rohini,
Delhi-110089.
5. Shiv Ram Meena S/o Ramji Lal,
R/o RZ- 20A, 211/212, Gali No.2,
West Sagarpur, New Delhi.
6. Balvinder Singh S/o Bur Singh,
R/o C-57A, Chanakya Place,
Part-1, New Delhi-110059.
7. Dharam Raj Meena
R/o H/No.31A, D-Block,
Kutub Vihar, Phase-1,
New Delhi.

... Applicants

Versus

- 1. Government of NCT of Delhi through Chief Secretary, New Secretriat, IP Estate, New Delhi.
- 2. Commissioner, Municipal Corporation Delhi, Town Hall, Chandni Chowk, Delhi.
- 3. Director, Education Department, Municipal Corporation of Delhi, Nigam Bhawan, Kashmere Gate, Delhi.
- 4. Director, Directorate of Education, Old Secretariat, Delhi.

... Respondents

OA No.2486/2013

Taranjeet Kaur,
TGT, Social Science,
SKV No.3, Mandawali.
New Delhi.

... Applicant

Versus

- 1. Government of NCT, Delhi through the Chief Secretary, at New Secretariat, I.T.O., New Delhi.
- 2. Director of Education, Government of NCT, Delhi, Establishment-III Branch, at Old Secretariat, Delhi.
- 3. South Delhi Municipal Corporation Through the Commissioner at Civic Centre, S.P. Marg, New Delhi.

... Respondents

OA No.3538/2012

1. Yogesh, TGT Hindi,
Govt. Boys Secondary School,
Phase-I, Nangloi, Delhi-41.
 2. Nirma Rani, TGT Math,
B.N.N.G. Sarvodaya Kanya Vidyalaya,
Khera Kalan, Delhi.
- ... Applicants

Versus

1. Government of NCT, Delhi
through the Chief Secretary,
New Secretariat, ITO, Delhi.
 2. Director of Education,
Government of NCT, Delhi,
Establishment-III Branch,
Old Secretariat, Delhi.
 3. North Delhi Municipal Corporation
through the Commissioner,
Civic Centre, S.P. Marg, New Delhi.
 4. South Delhi Municipal Corporation
through the Commissioner,
Civic Centre, S.P. Marg, New Delhi.
- ... Respondents

By Advocates: Shri Rajnit Sharma, for Applicants in all the OAs.
Shri Vijay Kumar Pandita for Government of NCT
of Delhi in all the OAs; Shri R. K. Jain for Shri Arun
Bhardwaj, Adv., for MCD in OA Nos.2168/2011
& 3538/2012; Ms. Anupama Bansal for MCD in
OA No.2486/2013.

ORDER

Shri Justice Permod Kohli, Chairman

This Full Bench has been constituted pursuant to reference made by a Division Bench of the Central Administrative Tribunal

comprising Hon'ble Mr. G. George Parackal, Member (J) and Hon'ble Mr. Shekhar Aggarwal, Member (A) vide order dated 29.10.2014, passed in OA No. 2168/2011 and connected OA Nos. 3538/2012, and 3542/2012. Although no specific question has been formulated to be answered by the larger Bench, however, the Hon'ble Division Bench disagreed with the findings recorded by a Division Bench of the Tribunal in OA No. 1657/2006- **Ram Kumar Tyagi and others v GNCTD and others**, in view of the dictum of the judgment of the Hon'ble Apex Court in case of **R.L. Bansal and others Vs Union of India and others** [1992 (Supp2) SCC 318] and **A. K. Bhatnagar v Union of India** [(1991) 1 SCC 54]. The relevant part of the order of reference reads as under:

“As held by the Apex Court in its judgment in the case of R.L. Bansal and others Vs Union of India and others, 1992 (Supp2) SCC 318, “Rules made under the proviso to Article 309 of the Constitution being legislative in character cannot be struck down merely because the Court thinks that they are unreasonable, and that they can be struck down only on the grounds upon which, a legislative measure can be struck down”. Again, as held by the Apex Court in its judgment in case of A.K. Bhatnagar Vs Union of India, 1991 (1) SCC 54 , “the Rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does not create problem and dislocation.” The Government of India, Department Government of India, Department of Personnel and Training, OM No.20011/5/90-Estt (D) dated the 4th November, 1992 (Supra) has also directed that only in those cases where the Recruitment Rules do not prescribe any probation, an officer promoted on regular basis (after following the prescribed procedure) will have all the benefits that a person confirmed in that grade would have. Further according to the said OM “where probation is prescribed, the appointing authority, will on completion of the prescribed period of probation assess the work and conduct of the officer himself and in case the conclusion is that the officer is fit to hold the higher

grade, he will pass an order declaring that the person concerned has successfully completed the probation. If the appointing authority considers that the work of the officer has not been satisfactory or needs to be watched for some more time, he may revert him to the post or grade from which he was promoted or extend the period of probation, as the case may be,” However, the said OM makes it clear that no confirmation on promotion before an official is declared to have completed the probation satisfactory is required.

In the above facts and circumstances, we are unable to agree with the findings of the co-ordinate Bench of this Tribunal in OA No. 1657/2006 - Ram Kumar Tyagi and others Vs GNCTD and others. We, therefore, direct the Registry to place these cases before Hon’ble Chairman for appropriate orders to place these OAs before a Larger Bench to decide the question of law raised in these OAs.”

Earlier OA No. 216 /2011 titled ***Kamal Kishore and another v Govt of NCT of Delhi and another*** was dismissed by the Tribunal vide its order dated 14-12-2011, in view of the earlier judgment of the Tribunal in OA No. 1657/2003 - ***Ram Kumar Tyagi and others v GNCTD and others*** as also OM No. GE-1(230)E-000/07/2025-2029 dated 24-08-2008. It appears that OA No. 3538/12 and OA No. 3542/12 were also decided by the Tribunal. A review petition R.A. No. 44/2013 was filed in all these three OAs referred hereinabove. This review was allowed vide order dated 21.02.2014 and judgment dated 14.12.2011 was set aside. Thereafter the OAs have been referred to the Full Bench vide reference order mentioned hereinabove. Since the petitions were referred to larger Bench and no specific issue was framed to be answered by the Reference Court, We propose to decide the petitions as such.

2. The facts and legal issues in all the petitions being similar, these petitions are being disposed of by this common order. Brief facts are noticed from OA No. 2168/2011. The applicants were

appointed as Assistant Teachers in Municipal Corporation of Delhi (MCD, for short) in the year 2001. At the relevant time there was one single Municipal Corporation for whole of Delhi. They were placed on probation and on successful completion of the probation period, the applicants were confirmed as Assistant Teachers (Primary). The applicants became eligible for promotion to the post of Trained Graduate Teacher (TGT for short) in the respective discipline, under the Government of NCT of Delhi. They were entitled to be considered for promotion as Principle in the Schools of MCD. The applicants were promoted to the post of TGT vide order dated 19-5-2010 in MCD Delhi. It is alleged that the applicants were made to understand that their channel of promotion in their own department, i.e., MCD will remain open despite their promotion as TGT in NCT of Delhi and within one year from the date of joining on the promotional post they can come back to the parent department i.e. MCD in terms of OM dated 14.11.1967. It is further case of the applicants that while promoting them as TGT, no option was secured by them and their lien in the parent department remained intact. According to the applicants they were informed in November, 2010 that their lien could not be maintained in their parent department. It is further stated that some of the similarly situated teachers who were promoted as TGT in Government of NCT of Delhi were allowed to join back in MCD within one year. The applicants accordingly made representation seeking their repatriation. Receiving no response they filed OA No. 367/2011 before this Tribunal. This OA was disposed of with a direction to the respondents to decide the claim of the applicants within a period of one month from the date of the receipt of the order. The claim of the applicants came to be rejected vide impugned order dated 03.03.2011.

3. Vide the impugned order representation of the applicants has been rejected on the following grounds:-

“6. And whereas, the promotion cum appointment of Asstt. Teachers of MCD is done in Directorate of Education as per the provisions of R.Rs and promotion is made against a regular pos without any condition of period of probation. The proviso of Para (e) of FR-13, states that no lien of a Govt servant shall be retained where a a Government servant proceeded on immediate absorption basis to a post or service outside his service cadre/post in the Government from the date of absorption.

7. And whereas, since long this Directorate has been suffering from paucity of teachers. Non-availability of eligible teachers, refused of promotion by GNCT of Delhi back to MCD, leads to a situation where hundreds of posts remain vacant. In such situation, it is impossible to import education in effective manners to all children which ultimately frustrates the goal and object under the Constitution of India.

8. And whereas, the Hon’ble CAT has also appreciated the above noted rule position in the matter of Ram Kumar Tyagi and others Vs GNCTD and others in OA NO. 1657/2006. This matter was disposed off in the favour of deptt. “It is an establish law that unless one is confirmed in new service, he/ she still holds a lien in the former post. However, government employee once promoted and confirmed loses lien on the earlier post as is held by the High Court of Himachal Pradesh in case of Satya Devi Chauhan Vs Vidhan Sabha and Another”

9. And whereas, in addition to this, Hon’ble High Court has issued the directions from time to time not only to MCD but also on the Govt of NCT of Delhi to fill up the vacant post of the teachers. In keeping view of all these facts and circumstances this Directorate has decided not allow repatriation and on circular dated 24.1.2008 has been issued in this regard.”

4. Learned counsel appearing for the applicants raised following issues for consideration:

- (a) With the appointment of the applicants as Asstt Teachers in MCD their lien is created against the post of Assistant Teacher;
- (b) Since the promotion of the applicants as TGT was on probation for a period of two years, their lien on the post of Asstt Teacher remained intact under fundamental Rule 30, till they are confirmed on completion of probation and are entitled to repatriation before the completion of probation.
- (c) That the applicants had two channels of promotion as TGT in NCT of Delhi and as Principal in MCD Schools. No option was given to the applicants while making promotion to the post of TGT in NCT of Delhi and thus, they are entitled to seek repatriation.

5. We have heard the learned counsel for the parties at length and perused the record as also the written submissions filed by the parties.

6. Admittedly the applicants’ initial appointment was as Asstt Teachers in MCD run schools. On their appointment, through the process of selection and their joining the post they acquired lien on the post of Asstt Teacher held by them. Post of TGT is a promotional post in the Directorate of Education, Government of NCT of Delhi. One of the feeding category for promotion to this post is Asstt Teacher in MCD with requisite regular service. The relevant Recruitment Rules are re-produced as under:-

9. Whether age and qualifications (Educational prescribed for direct recruits will apply in the case of promotes.	Age- No Educational Qualification- Yes
10. Period of probation if any	Two years
11. Method of recruitment whether by direct rectt. or by promotion or by deputation/ transfer and percentage of the vacancies to be filled by various methods.	1. By promotion from Assistant Teacher of MCD & Dte of Edn. having a minimum of five years regular service as Assistant Teacher in proportion to the actual strength of

	both the cadres as on the 31 st March of the year in which recruitment is made by direct recruitment – 70%.
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Referring to para 10 of the Recruitment Rules, it is contended that period of probation of two years is prescribed for promotion to the post of TGT and thus till the completion of probation period or confirmation on the promotional post, the applicants’ lien on their substantive post of Assistant Teachers remains on intact and they are entitled to seek repatriation on the post of Asstt Teacher as they retained the lien thereon. It is further contended on behalf of the applicants that while no option was given to the applicants either to seek promotion as TGT in the NCT of Delhi or as Principal in the MCD Schools, which is also a normal channel of promotion for the Assistant Teachers. The applicants’ further submission is that the respondents has issued a circular dated 11-03-2010 where under if an employee refuses regular promotion he will be disentitled for promotion as TGT in NCT of Delhi and thus under the threat of losing promotion even in NCT, the applicants had no occasion to refuse promotion. Circular dated 11-03-2010 contains the following stipulation:

“11. No entitlement for ACP who refuses promotion as per cut-off date.”

7. In support of the applicants’ contention that it was imperative for the respondents to give option to the applicants either to seek promotion as TGT in NCT of Delhi or as Principal in MCD Schools. The applicants have referred to the judgment of the High Court of Himachal Pradesh dated 5-7-2012 passed in CWP No. 1545 of 2011-B – **Vinod Kumar and Others v State of Himachal Pradesh and others**. In this case the question that fell for consideration was whether a TGT working in the Department of Education in the Government of Himachal Pradesh who was

promoted as Lecturer in the Higher Secondary School (now Senior Secondary School) can be considered to be eligible for the post of Head Master/Head Mistress in the High Schools. It was held that where there are two avenues of promotion, the person in the feeder category must be asked to exercise his option as to for which promotional category he wants to be considered for promotion. The said judgment attained finality in dismissal of SLP filed against the judgment.

8. It is accordingly contended that since no option was ever secured from the applicants while they were considered for promotion, they continued to have right to seek other available avenue of promotion viz., Principal in MCD Schools by seeking repatriation from the post of TGT in NCT of Delhi to the post of Asstt Teacher in MCD. Applicants have also relied upon latest circular No. D/ADE/Admn/Edn./HQ/2014/949 dated 14-02-2014, issued by the Director, Education, GNCTD. The relevant extract of this circular reads as under:-

“1. A Municipal Teacher who obtains the qualifications as required for promotion to the post of TGT/TGT(MIL) shall have to exercise an option on acquiring of the said qualification whether he/she opts for TGT promotion in GNCTD schools and if selected will have to join Directorate of Education, GNCTD or he/she does not opt for TGT promotion in GNCT schools and wants to continue to serve in North Delhi Municipal Corporation (NDMC).

2. Names of only those Municipal Teachers who have opted for TGT promotion to GNCTD Schools will be forwarded to the Directorate of Education GNCTD and if they are selected they shall have to join GNCTD Schools and their non joining will be treated as refusal of TGT promotion.”

Undoubtedly this Circular speaks of option to seek promotion as TGT in NCT of Delhi Schools. It is pertinent to note that the promotion of the applicants was made in the year 2010, whereas this circular has been notified only on 14.02.2014 and it has no retrospective implication.

9. The claim of the applicants is refuted by the respondents. Mr. Vijay Pandita, learned counsel appearing for the NCT of Delhi has submitted that in the year 2010 Directorate of Education, Government of NCT of Delhi sought particulars of Assistant Teachers working in MCD, a feeder category for promotion to the post of TGT on the basis of seniority against the available post. On holding DPC as per seniority the eligible Assistant Teachers were promoted. All such promotes willfully joined the post of TGT in Directorate of Education, Government of NCT of Delhi on substantive basis. They were relieved from the department of MCD. According to Mr. Pandita, there was no compulsion for any of the promotes to join the promotional post. He has further explained that the post of TGT is a promotional post and there is no period of probation fixed for confirmation as TGT under the Recruitment Rules. Referring to DOPT O.M No. 28020/1/2010-Estt (c) dated 21-07-2014, it is mentioned that where the promotion is from one grade to another but within the same group of posts e.g. from Group 'C' to Group 'C', no period of probation is prescribed. However, promotion from one group to another e.g. Group 'B' to Group 'A', two years or the period of probation prescribed for the direct recruitment to the post, if any is prescribed. The relevant extract is re-produced as under:-

“PERIOD OF PROBATION.

3. The period of probation is prescribed for different posts/ services in Central Government on the following lines:

S.No	Method of Appointment	Period of Probation
PROMOTION		
1.	Promotion from one grade to another but within the same group of posts e.g. from Group 'C' to Group 'C'.	No probation
2.	Promotion from one Group to another e.g. Group 'B' to Group 'A'.	2 years or the period of probation prescribed for the direct recruitment to the post, if any.

His further contention is that since the promotion from Assistant Teacher to TGT is within the same Group, no period of probation is prescribed. He has also referred to directions issued by the Hon’ble High Court of Delhi dated 18.12.2004 in a writ petition No. 15307/04 – **Shambu Dayal v Directorate of Education**, whereby the respondents were directed to maintain zero vacancy position.

10. Mr. Pandita further referred to Circular No. DE-1(230)/E-000/07 2025-2029 dated 24.01.2008. In this Circular reference has been made to various requisites for repatriation to MCD of the Teachers promoted to the post of TGT. Relevant extract of the Circular is re-produced hereunder:-

“xxx xxx xxx

The promotion cum appointment of Asstt Teachers of MCD is done in Dte of Education as per the provisions of R.Rs and promotion is made against a regular post without any condition of period of probation. The provision of para (e) of FR-13, states that no lien of a Government servant shall be retained where a government servant has proceeded on immediate absorption basis to a post or service outside her service/cadre/post in the government from the date of absorption.

The Hon’ble CAT in its order dated 28th April 2007 in OA No. 1657/06 in case of Ram Kumar Tyagi & others Vs GNCTD & others, while dismissing the petition of the applicant for repatriation to MCD, has ordered that it is an

established law that unless one is confirmed in new service he/she still holds a lien in the former post. However, government employee once promoted and confirmed, loses lien on the earlier post, as is held by the High Court of Himachal Pradesh in case of *Satya Devi Chauhan Vs H.P. Vidhan Sabha and another*.

Thus having been appointed on a permanent post, which does not entail a specific order of confirmation, the lien of the applicant stands terminated as soon as the promotes join the higher post. The letter of relieving by the MCD where, lien for one year is provided does not hold good, as this letter is contrary to FR 12 as well as the decision of the Court.

In view of the above, all the DDEs are directed to reject such type of requests at their own level and in no case such matter should be forwarded to the Head Quarter.

This issues with the prior approval of Competent Authority.”

From the perusal of the above circular, it appears that the Circular has been issued on the basis of the findings of the Central Administrative Tribunal in a judgment dated 28-04-2007, passed in OA No. 1657/06 in case of ***Ram Kumar Tyagi & ors v GNCTD & ors***.

11. His further contention is that when the applicants were promoted vide order dated 03.02.2010 (Annexure A-2) to the post of TGT their lien was not retained against the post of Asstt Teacher as the promotion was against the substantive vacancy and on substantive basis.

12. Respondent Nos. 2 & 3 in support of their counter affidavit made following specific averments under the Caption ‘Brief Facts’:-

“4. That the Directorate of Education, GNCTD forwards requisition to the MCD every year and

applications are invited from the eligible ASSISTANT Teacher for promotion to the post of TGT.

5. That the applicants also applied to the post of TGT and filled up the application form and went for documents of verification to the Directorate of Education, GNCTD.

6. The Directorate of Education, GNCTD after conducting DPC, found applicants eligible, therefore, they were considered for promotion. Accordingly, after getting the names in the promotional list, the applicants applied for NOC and were relieved from the services of respondents MCD.

9. That if the applicants had not applied, other teacher junior to them would have been promoted.”

He has also referred to additional affidavit dated 28-05-2014. In para 3 of the affidavit, it is stated that under the Recruitment Rules for the post of TGT probation of two years is provided in case of candidates appointed by direct recruitment and not for promotional post. Reference is made to Annexure R-5, i.e., Amended Recruitment Rules dated 27.02.1997. From the perusal of the Recruitment Rules, it appears that the Original Recruitment Rules, referred to above stand substituted and no period of probation is prescribed for Asstt Teachers promoted to the post of TGT.

13. Ms. Anupama Bansal, learned counsel appearing for respondent No. 3 in OA No. 2486/13 has referred to specific averments made in the counter affidavit. Para 4 of the counter affidavit reads as under:

“4. That after receiving requisition from the Directorate of Education, Govt of NCT of Delhi, names of Teachers are called from eligible teachers. Accordingly MCD issues a circular calling the names

of the interested teachers. The eligible primary teachers were are interested to serve in Directorate of Education, Govt of NCT of Delhi as TGT by way of promotion fill up prescribed form which is sent to the Directorate of Education, GNCTD alongwith the relevant documents/ certificates for necessary consideration. The applicant also voluntary submitted the application which was sent by the respondents to Delhi Government, consequently the applicant was considered fit for promotion as TGT in Delhi Govt. It is submitted that there is no provision for keeping lien of teachers who are given promotion as TGT because the said post is a regular/permanent post in Directorate of Education, GNCTD. Since the applicant herself opted for promotion to Delhi Government, as such the present application is nothing but an abuse of process of law and this is not maintainable which fall/occur, due to promotion of Primary Teacher to the post of TGT. For this reason also the claim of the applicant for repatriation is not maintainable.”

Ms. Anupama Bansal, also referred to Annexure A-8. This is a letter dated 28-05-2013 written by Ms Taranjeet Kour Teacher, applicant in OA No. 2486/13, seeking her repatriation back to MCD. In this letter she has specifically admitted for having applied to the post of TGT but seeks repatriation due to domestic circumstances.

14. Respondents have also placed on record copy of letter dated 12-04-2013 by same Ms Taranjeet Kour, applicant in OA No. 2486/13. In this letter seeking repatriation she also admitted for the promotion to the post of TGT. Even from Annexure A-5 i.e. Office Order dated 4-4-2013, whereby Taranjeet Kour was relieved from the post of Asstt Teacher on her promotion to TGT, her lien to the post of Asstt Teacher was not retained.

15. In rebuttal, learned counsel for the applicants has referred to Annexure A-11 to OA No. 2486/13 where-under various

orders have been placed on record to indicate that TGT appointed/promoted have been confirmed as TGT after two years on the recommendation of DPC.

16. The sheet-anchor of the applicants' arguments that while promoting them to the post of TGT they were not provided any option to choose between two promotional avenues viz TGT in NCT of Delhi or Principal in MCD Schools. According to the applicants they were forced to accept promotion to the post of TGT in view of the stipulation as contained in para 11 of the Circular dated 11-03-2010 (Annexure A-13) in OA No. 2166/13. This submission stands belied from the specific averments made in paras 4,5 & 6 of the counter affidavit of respondent Nos 2 & 3 in OA No. 2168 and para No.4 in OA No. 2486 to the effect that the applicants applied for promotion to the post of TGT and after their selection even asked for NOC. This specific averments have not been denied in any manner whatsoever in the rejoinder filed by the applicants. Thus, the principal argument of the applicants that they were not given an option has been obliterated. By making application for promotion as TGT, the applicants deemed to have opted for promotion of TGT notwithstanding that they are given any option or not. If out of the two promotional avenues, they voluntarily and willfully applied for one of the promotional avenue they have definitely exercised the option for this promotional avenue, out of the two.

17. As regards the second contention that the applicants' promotion as TGT was only on probation for a period of two years and prior to their confirmation they applied for their repatriation as their lien continued against the post of Asstt Teacher in MCD. Rules 12-A, 13 and 14-A of the Fundamental Rules deal with the question and read as under:-

“12-A. Unless in any case it is otherwise provided in these rules, a Government servant on acquiring a lien on a post will cease to hold the lien previously acquired on any other post.”

“13. A Government servant who has acquired lien on a post retains the lien on that post;

- (a) while performing the duties of that post;
- (b) while on foreign service, or holding a temporary post, or officiating in another post.
- (c) during joining time on transfer to another post, unless he is transferred along with his title to a post on lower pay, in which case his lien is transferred to the new post from the date on which he is relieved of his duties in the earlier post;
- (d) while on leave; and
- (e) while under suspension

Provided that no lien of a Government servant shall be retained:

- (i) Where a Government servant has proceeded on immediate absorption basis to a post or service outside his service/ cadre/ post in the Government from the date of absorption; and
- (ii) On foreign service/ deputation beyond the maximum limit admissible under the orders of the Government issued from time to time.”

“14-A. (a) Except as provided in Rule 13 and Clause (d) of this rule, a Government servant’s lien on a post may in no circumstances be terminated, if the result will be to leave him without a lien upon a regular post.

(d) A Government servant’s lien on a post shall stand terminated on his acquiring a lien on another post (whether under the Central Government or State Government) outside the cadre on which he is borne.”

The Fundamental Rule 12-A, provides that a Government servant on acquiring a lien on a post cease to hold the lien previously acquired on any other post. The expression “on acquiring a lien” obviously means on appointment on a post. Rule do not suggest whether the appointment is temporary or permanent, thus all kinds of appointments create a lien unless otherwise indicated in terms of appointment or under the rules governing such appointment. Fundamental Rule 13 provides that a Government servant who has acquired a lien on a post retains the lien on that post under conditions enumerated in clauses (a) to (e). Thus the natural corollary would be if a government servant is not performing the duties on that post and is not holding the post under the conditions stipulated in clauses (a) to (e), he would not acquire lien on the said post. Fundamental Rule 14-A clearly suggests that except as prescribed under Rule 13 and clause (d) of this Rule, a Government servant’s lien on a post cannot be terminated if the consequence would be to leave him without a lien upon a regular post. Clause (d) of this Rule, however, provides that on appointment of a Government servant on another post, whether under the Central Government or State Government outside the cadre on which he is borne, his/her lien on the post earlier held shall stand terminated. Thus, the conjoint reading of the above Fundamental Rules would mean a government servant on substantive appointment against a post acquires lien against the said post and on his/her appointment on another post he/she acquires lien on the post to which he/she is appointed substantively and lien on the original post stands terminated. Interpreting the Fundamental Rules, particularly Rule 14-A (d), the Hon’ble Supreme Court in ***Dr. S. K. Kacker v All India Institute of Medical Sciences*** [(1996) 10 SCC 734] held as under:

“9. The contention of Shri Jaitley is that since the appointment to the post of Director is on temporary basis, the appellant cannot be allowed to leave his lien in the permanent post held as Professor and Head of the ENT Department. We do not find that his contention is justified. Here is a case where, when the government servant is either on deputation or on leave or on any other assignment, during the absence of his service on the post, he cannot be allowed to leave without lien upon the permanent post. On his appointment as Director which is a permanent post and a tenure post, he cannot continue to hold his parent post, namely, he cannot hold two posts, viz. of Director as well as of Professor and Head of the ENT Department, simultaneously. In this behalf, clause (d) of FR 14-A is relevant; it reads as under:

“A government servant's lien on a post shall stand terminated on his acquiring a lien on a permanent post (whether under the Central Government or a State Government) outside the cadre on which he is borne.”

10. It would indicate that on appointment to a permanent post, be it under the central Government or the State Government, outside the cadre on which he is borne, his lien on the previous permanent post stands terminated on his acquiring a lien in a permanent post. The post of Director is not in the same cadre as the post of Professor in the AIIMS. The post of Director is the Head of the AIIMS and it is independent of all the Departments. The Director is enjoined to supervise not only the administrative work of the AIIMS, but also its management for and on behalf of the Institute Body. Therefore, on his appointment to the permanent post as a Director, he lost his lien on the post as a Professor and Head of the ENT Department. Resultantly, when the tenure of the appellant had expired on/by efflux of time or in case any of the eventualities mentioned in Regulation 30-A had happened, he cannot revert to the post of Professor and Head of the Department.”

18. It is admitted case of the parties that TGT posts were regular, permanent and against clear vacancies. The applicants

applied for the post. They were selected and appointed. Their appointment was on substantive basis and thus on their substantive appointment against the post of TGT they acquired lien on the post of TGT and resultantly their lien against the post of Assistant Teacher stand terminated in terms of Fundamental Rule 13, notwithstanding the fact whether the applicants are confirmed or not. At the first place, it is not clear as to whether there is a two years period of probation to the post of TGT or not. The original Recruitment Rules do indicate that there is a probation for promotion as TGT, which is two years as indicated in the Recruitment Rules. Subsequent amendment in the year 1997 was made vide Notification dated 27th February, 1997, whereby the rule for direct recruitment and promotion to the post of TGT stands substituted do not indicate any period of probation for the promotion to the post of TGT. Even the Notification dated 21.07.2014 indicates that where the promotion is from within the same group for no period of probation is required. Posts of Asstt Teacher and TGT both fall within the Group 'B', and in terms of the clarificatory OM no period of probation is prescribed for promotion from the post of Asstt Teacher to TGT. This is however, relevant to notice that the clarificatory Notification cannot override the substantive rule enacted under proviso to Article 309 of the Constitution of India. Recruitment Rules would prevail. This is the spirit of the two judgments noticed by the reference Bench in the order of reference i.e. ***R.L. Bansal & another v Union of India and another*** [1992 (Supp 2) SCC 318] and ***A. K. Bhatnagar v Union of India*** [(1991) 1 SCC 54]. There does not seem to be any conflict between these judgments and the judgment of the Tribunal in ***Ram Kumar Tayagi & another v GNCTD and others***, referred to by the reference Court. However, the moot question whether there is automatic or deemed confirmation of a government servant if he is

appointed on probation and the period of probation has run out without any order of confirmation or discharge as the case may be. Where a government servant on probation needs to be confirmed by passing a declaratory order to grant him substantive appointment to the post, or otherwise depends upon the conditions of appointment and the rules governing appointment on promotion and related/ ancillary conditions. In order to understand the issue in its right perspective, we may refer to Recruitment Rules, referred to hereinabove. The only stipulation regarding probation, the period of probation is two years or so. Rule does not envisage a formal order of confirmation or expiry of period of probation nor does it provide any other condition which a government servant needs to fulfill for confirmation on successful completion of the period. The rule also does not indicate as corresponding condition for discharge or reversion in the event no order for confirmation is passed by the competent authority. Thus, rule has to be understood and interpreted in a simple and un-ambiguous language noticed hereinabove.

19. According to our understanding there can be the following situations to deal with a Government servant on probation:-

(1) If rule for promotion/ appointment on probation contains a specific stipulation of declaration or an order of confirmation on completion of the probation, undoubtedly such declaration or confirmative is imperative to accord the status of permanency to the employee against the post;

(2) If the rule require any further qualification to be acquired by the government servant during probation, definitely the government servant cannot be said to be confirmed unless such qualification is acquired during the period of probation.

(3) If rule contains a period of extension in probation without any limit, the government servant cannot be deemed to have been confirmed, even after the initial period of probation and his period of probation shall be deemed to be extended unless he is confirmed on the post;

(4) Where the rule prescribed a fixed period of probation and do not contain any stipulation for its extension or passing of any other declaratory order, under such a situation government servant would be deemed to have been confirmed on successful completion of the period of probation.

The issue has been considered by the Hon'ble Supreme Court in innumerable cases. One of the authoritative pronouncement is a Constitution Bench judgment in ***State of Punjab v Dharam Singh*** [1968 (3) SCR 1]. In the said case the Fundamental Rule fell for consideration of the Hon'ble Supreme Court-

"6 (1) Members of the service, officiating or to be promoted against permanent posts, shall be on probation in the first instance for one year.

(2) Officiating service shall be reckoned as period spent on probation, but no member who has officiated in any appointment for one year shall be entitled to be confirmed unless he is appointed against a permanent vacancy.

(3) On the completion of the period of probation the authority competent to make appointment may confirm the member in his appointment or if his work or conduct during the period of probation has been in his opinion unsatisfactory he may dispense with his services or may extend his period of probation by such period as he may deem fit or revert him to his former post, if he was promoted from some lower post.

Provided that the total period of probation including extensions, if any, shall not exceed three years”.

The employees in the said case, Dharam Singh and Des Raj, were appointed on officiating basis against permanent post. They completed one year's initial probation and two years' extended probation period i.e. total three years, the maximum probation period prescribed under rules. They continued to hold the post even after the period of probation was over without any formal order of their confirmation. Their services were terminated under the conditions of appointment. The orders were challenged by them before the Hon'ble High Court of Punjab & Haryana. The High Court allowed the writ petitions and set aside the orders of termination holding that on completion of probation period even no order for confirmation has been passed, they are deemed to be confirmed in their appointments. In appeal the Hon'ble Supreme Court held as under:

“5. In the present case Rule 6(3) forbids extension of the period of probation beyond three years, Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a

probationer by implication. The reason is that such an implication is negative by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

"9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the service of the respondents if their work and conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until some times in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfill any other condition before confirmation. There was no compelling reason for dispensing with their services and reemploying them as temporary employees on October 1, 1960 and the High Court rightly refused to draw the inference that they were so discharged from services and reemployed. In these circumstances the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6 (3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services

(Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed as the Constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court.”

In ***State of Gujarat v Akhilesh C. Bhargav*** [(1987) 4 SCC 482] the Hon’ble Supreme Court was considering the Indian Police Service (Probation) Rules, 1954. Sub-rules (1) and (3) of rule 3 prescribed maximum period of probation. The officer continued in service much beyond the period of probation without any order of confirmation, as no such order was required. Relying upon the Constitution Bench judgment in ***State of Punjab v Dharam Singh*** (supra), the Hon’ble Supreme Court held as under:

“8. We are of the view that the rules read with instructions create a situation as arose for consideration by this Court in the case of *State of Punjab v. Dharam Singh* (1968) 3 SCR 1: (AIR 1968 SC 1210). The Constitution Bench of this Court in that case interpreted the Punjab Educational Service (Provincialised Cadre) Class III Rules and found that there was a maximum limit of three years beyond which the period of probation could not be extended. When an officer appointed initially on probation was found to be continuing in service beyond three years without a written order of confirmation, this Court held that it tantamounts to confirmation. In view of what we have stated above we are in agreement with the High Court about the combined effect of the rules and instructions. We hold that the respondent stood confirmed in the cadre on the relevant date when he was discharged. For a confirmed officer in the cadre, the Probation Rules did not apply and therefore, proceedings in accordance with law, were necessary to terminate service. That exactly was the ratio of the decision in *Moti Ram Deka v. General Manager, N.E.F. Railways, Maligaon, Pandu* (1964) 5 SCR 683: (AIR 1964 SC 600). On the analysis indicated above, the net

result, therefore, is that the respondent No. 1 had become a confirmed officer of the Gujarat I.P.S. cadre and under Rule 12 (bb) of the Probation Rules his services could not be brought to an end by the impugned order of discharge.”

In ***Dayaram Dayal Vs State of M.P. and another*** [(1997) 7 SCC 443], the Hon’ble Supreme Court while interpreting a similar rule as in the present case and relying upon Constitution bench judgment in Dharam Singh’s case and various other judgments opined as under:-

“13. It is therefore, clear that the present case is one where the rule has prescribed an initial period of probation and then for the extension of probation subject to a maximum and therefore, the case squarely falls within the second line of case namely Dharam Singh’s case (AIR 1968 SC 1210) and the provision for a maximum is an indication of an intention not to treat the officer as being under probation after the expiry of the maximum period of probation. It is also significant that in the case before us the effect of the rule fixing a maximum period of probation is not whittled down by any other provision in the rules such as the one contained in Samsher Singh’s case (AIR 1974 SC 2192) or in Ashok Kumar Mishra’s case (1991 AIR SCW 1241). Though a plea was raised that termination of service could be effected by serving one month’s notice or paying salary in lieu thereof, there is no such provision in the order of appointment nor was any rule relied upon for supporting such a contention.”

The present case clearly falls within the purview of category (4) noticed by us hereinabove and the law laid down by the Hon’ble Apex Court in ***Dharam Singh’s*** case (Supra).

20. In the original recruitment rules period of probation is prescribed. However, in the amendment carried out in 1997 no period of probation is prescribed for promotion and thus the

argument of the applicants that till they are confirmed on completion of two years period of probation they continued to have lien on the post of Asstt Teacher, falls on the ground. Assuming for the sake of argument that there is a period of probation of two years as per the original recruitment rules, admittedly two years period is over. The applicants are continuing to hold the post of TGT. Under such circumstances they are deemed to have been confirmed unless by any order they are either repatriated or terminated. The legal position in this regard is debated by the learned counsel for the parties.

21. There is another reason that the applicants cannot be permitted to argue that they were on probation and have a right of repatriation. The applicants applied for their promotion to the post of TGT without any reservation for repatriation. They were not on deputation for a fixed period so as to empower them to seek repatriation on expiry of deputation. Their appointment was also not dependent upon their will and choice to continue on the promotional post. If they are un-willing to serve on the promotional post, they were/are at liberty to resign or seek voluntary retirement if permissible under rules, but in no case they can ask for their repatriation/reversion to the lower post. Such a situation is not envisaged by any rule. The contention of the applicants to repatriate them to the lower post is not sustainable in law.

22. We do not find any valid reason to accede to the prayer made by the applicants. These petitions accordingly fail and are dismissed, without any order as to costs.

(Dr. B. K. Sinha)
Member (A)

/as/

(V. Ajay Kumar)
Member (J)

(Justice Permod Kohli)
Chairman