

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

O.A.NO.4705 OF 2015

New Delhi, this the 26th day of April, 2016

CORAM:

**HON'BLE SHRI SUDHIR KUMAR, ADMINISTRATIVE MEMBER
AND
HON'BLE SHRI RAJ VIR SHARMA, JUDICIAL MEMBER**

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1. Sh.Sanjay Kumar Arora,
aged about 50 years,
son of Sh.R.L.Arora,
R/o 50/7, Urban Estate,
Gurgaon (HR),
Working as Manager (Tech)

2. Sh.B.M.Sharma,
aged about 49 years,
s/o late Dr.S.S.Sharma,
R/o Flat No.154, Evergreen Apartment,
Sector 7, Dwarka, New Delhi
Working as Manager (Tech)

3. Sh.Hemendra Singh,
aged about 46 years,
s/o late Charan Singh,
R/o A-494, Siddarth Nagar,
Near Jawahar Circle, Jaipur
Working as Manager (Tech) Applicants

(Advocate for applicants: Mr.S.K.Gupta)

Vs.

Union of India through

1. Secretary,
Ministry of Road, Transport and Highways,

1, Parliament Street, Transport Bhawan,
New Delhi

2. National Highways Authority of India,
through its Chairman,
G-5 & 6, Sector 10, Dwarka,
New Delhi 110075

3. Chief Engineer,
Public Works Department,
State of Rajasthan,
Jacob Road, Jaipur,
Rajasthan Respondents

(Advocate for respondent no.2- Mr.V.P.Oriel)

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ORDER

Per RAJ VIR SHARMA, MEMBER(J):

The applicants have filed this O.A. seeking the following reliefs:

- ö(i) quash and set aside the impugned circular dated 16.10.2015 (Annexure A/1) (Colly) qua the applicants;
- (ii) direct the respondent no.2 to consider the cases of the applicants on merits for the purposes of absorption and thereupon, issue offer of appointment on absorption basis and adopt the same criteria as in case of others regarding operation of sub-regulation 5(d) of Regulation 14 as amended on 24.08.2012;
- (iii) May also pass any further order(s), direction(s) as be deemed just and proper to meet the ends of justice.ö

2. Respondent no. 2 has filed its counter reply opposing the O.A.

The applicants have also filed their rejoinder reply refuting the stand taken by the respondent no.2.

2.1 Respondent nos.1 and 3 have neither appeared nor filed counter reply to the O.A.

3. We have carefully perused the records, and have heard Mr.S.K.Gupta, the learned counsel appearing for the applicants, and Mr.V.P.Oriel, the learned counsel appearing for respondent no. 2.

4. The brief facts of the case, which are not disputed by either side, are as follows:

4.1 While serving as Assistant Engineers(Civil) under the Chief Engineer, Public Works Department, Government of Rajasthan (respondent no.3), the applicants were selected and appointed to the post of Manager (Technical) on deputation basis by respondent no.2-National Highways Authority of India (NHAI) initially for a period of three years. Accordingly, the applicants joined NHAI as Managers (Tech.) on 28.4.2009, 7.6.2010, and 9.6.2010 respectively. Respondent no.2-NHAI extended the periods of deputation of the applicants from time to time.

4.2 Respondent no.2-NHAI, by its O.M. dated 19.11.2014 (Annexure A/9), invited applications from the officers of the rank of Manager (Tech.), who were on deputation and willing to get absorbed in NHAI, for considering them for absorption in NHAI. In response thereto, the applicants and others submitted their applications.

4.3 Pending consideration of their applications for absorption, respondent no.2-NHAI extended the periods of deputation of applicant no.1

for the 7th year up to 27.4.2016, applicant no.2 for the 6th year up to 6.6.2016, and applicant no.3 for the 6th year up to 8.6.2016.

4.4 Respondent no.2-NHAI requested the Chief Engineer, Public Works Department, Government of Rajasthan (respondent no.3) to accord consent to the permanent absorption of the applicants in NHAI. That is to say, respondent no.3 was required to issue öNo Objection Certificateö in respect of each of them, stating that öthere is no objection to relieve the officer for permanent absorption in NHAI in case of his selection to the post of Manager (Tech.).ö.

4.5 As respondent no.3 did not respond to the letters of the NHAI and the representations of the applicants to issue the NOCs for permanent absorption of the applicants as Managers (Tech.) in NHAI, the applicants requested the respondent no.2-NHAI to consider their cases for absorption on merits.

4.6 But, instead of considering the cases of the applicants for absorption on merits, respondent no.2-NHAI, by its circular dated 16.10.2015 (Annexure A/1), decided to stop the ongoing recruitment process for the post of Manager (Tech.) on absorption basis, and not to consider such candidates, who were initially found eligible by the Screening Committee, and in whose cases NOCs could not be received from the parent Department even after lapse of considerable time.

4.7 Hence, the applicants have filed the present O.A. seeking the reliefs as aforesaid.

5. In the above backdrop, the applicants have contended that as per the proviso to Clause (d) of sub-regulation (5) of Regulation 13 of the National Highways Authority of India (Recruitment, Seniority and Promotion) Regulation, 1996, the condition of consent of the cadre controlling authority in parent Department could be dispensed with in case of officers or employees whose resignation/voluntary retirement has been accepted by the parent Department. Therefore, when no consent/NOC was received from their parent Department, respondent no.2-NHAI, instead of stopping the ongoing recruitment process for the post of Manager (Tech.) in respect of them and other similarly placed officers, ought to have considered their cases for permanent absorption and taken appropriate decision. In the event of their being found suitable for permanent absorption, respondent no.2-NHAI ought to have issued the offers of appointment on absorption basis in their favour, and given an opportunity to them to tender resignation or seek voluntary retirement from service under the parent Department with effect from the date of their permanent absorption as Managers (Tech.) in NHAI. The applicants have also contended that respondent no.2-NHAI has followed the very same procedure in the cases of other officers, namely, S/Shri B.L.Meena, Manoj Saxena, and O.P.Bhatia. Thus, it has been submitted by the applicants that they being similarly placed as S/Shri B.L.Meena, Manoj Saxena, and O.P.Bhatia, respondent no.2-NHAI's denial to consider their cases for permanent absorption amounts to invidious discrimination against them.

6. *Per contra*, respondent no.2-NHAI has contended that when clause (d) of sub-regulation (5) of Regulation 13 of the National Highways Authority of India (Recruitment, Seniority and Promotion) Regulation, 1996, stipulates the criterion of consent of the cadre controlling authority in parent Department, the proviso to clause (d), *ibid*, cannot be used to nullify the mandatory criterion contained in clause (d). In the absence of NOCs from their parent Department, the applicants' cases for permanent absorption could not have been considered. It has also been contended by respondent no.2-NHAI that the applicants are not similarly placed as S/Shri B.L.Meena and Manoj Saxena who belonged to Finance Cadre, and were permanently absorbed prior to the issuance of the impugned circular dated 16.10.2015, *ibid*. The applicants are also not similarly placed as Shri O.P.Bhatia, who was permanently absorbed as D.G.M.(Technical) much before the issuance of the impugned circular dated 16.10.2015, *ibid*. It has further been contended by respondent no.2-NHAI that the applicants have no absolute right to be absorbed in NHAI. In support of their contentions, respondent no.2-NHAI has placed reliance on the decisions in *S.Sundaram Pillai, etc. Vs. V.R.Pattabiraman, etc.*, AIR 1985 SC 582; *Rameshwar Prasad Vs. Managing Director, U.P., Rajkiya Nirman Nigam Ltd. & others*, (1999) 8 SCC 381; and *Union of India Vs. V.Ramkrishnan & Ors.*, (2005) 8 SCC 394; the decision of the Hon'ble High Court of Delhi in *National Highways Authority of India Vs. Ashok Kumar Gupta*, W.P. (C) No.8412 of 2014,

decided on 3.12.2014; and the decision of the Tribunal in *K.Pradeep Kumar Vs. Union of India and others*, OA No.3203 of 2015, decided on 22.12.2015.

6.1 In *S.Sundaram Pillai, etc. Vs. V.R.Pattabiraman, etc.*(supra), while interpreting the term “wilful default” appearing in the proviso to Section 10(2) of the Tamil Nadu Buildings (Lease and Rent Control Act, 1960) coupled with the Explanation which seeks to explain the intent of the proviso, the Hon’ble Supreme Court has held that a consensus of the meaning of the words “wilful default” appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom. Taking for instance a case where a tenant commits default after default despite oral demands or reminders and fails to pay the rent without any just or lawful cause, it cannot be said that he is not guilty of wilful default because such a course of conduct manifestly amounts to wilful default as contemplated either by the said Act or other State Acts which are in *pari materia*. A proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment. While interpreting a proviso, care must be taken that it is used to remove special cases from the general enactment and provide for them separately. In short, generally speaking, a proviso is

intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself. Thus, a proviso may serve four different purposes, viz., (1) qualifying or excepting certain provisions from the main enactment; (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable; (3) it may be an embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provisions.

6.2 In *Rameshwar Prasad Vs. Managing Director, U.P.Rajakiya Nirman Nigam Limited & others* (supra), the appellant-deputationist challenged the orders passed by the Hon'ble High Court dismissing the writ petitions filed by him. The writ petitions were filed by him assailing the decisions of the borrowing department rejecting his application for absorption, and repatriating him to the parent department. Considering the facts and circumstances of the case, the Hon'ble Supreme Court has observed that whether a deputationist should be absorbed in service or not is a policy matter, but at the same time, once the policy is accepted and rules are framed for such absorption, before rejecting the application of a

deputationist, there must be justifiable reasons. The power of absorption, no doubt, is discretionary but is coupled with the duty not to act arbitrarily, or at whim or caprice of any individual. The Hon'ble Supreme Court held that when the application made by the appellant for permanent absorption was in accordance with the rules/policy framed by the borrowing department, and when the competent authority of the borrowing department found the performance of the appellant as excellent during the period of probation and allowed him to continue on deputation without deputation allowance, the appellant stood absorbed. Accordingly, the Hon'ble Supreme Court quashed and set aside the impugned orders passed by the Hon'ble High Court, and the order issued by the borrowing department relieving the appellant from the post. The Hon'ble Supreme Court also directed the respondent-borrowing department to pass order absorbing the appellant with effect from appropriate date in accordance with rules.

6.3 In *Union of India through Government of Pondicherry and another Vs. V.Ramakrishnan & others* (supra), the first respondent was appointed on deputation as Chief Engineer of the Public Works Department, Government of Pondicherry, on short term deputation/temporary basis pending selection of the regular incumbent by the Union Public Service Commission(UPSC) with effect from 1.7.2004. He was repatriated to his parent Department on 14.2.2005 and relieved of his duties on the same day. Questioning the same, the first respondent filed O.A. before the Central Administrative Tribunal. The Tribunal allowed his O.A. The writ petitions

filed by the Government of Pondicherry, and Mr.R.Sundar Raju, who was holding the current charge of the Chief Engineer, against the Tribunal's order, were dismissed by the Hon'ble High Court, holding that as the first respondent was sent on deputation pending selection of the regular incumbent by the UPSC, till such regular selection was made, he had a right to hold the said post, and that so long the draft rules were not approved by the competent authority, viz., UPSC, S.Sundar Raju was ineligible to be appointed as Chief Engineer. Dismissing the appeals and upholding the orders passed by the Tribunal and the Hon'ble High Court, the Hon'ble Supreme Court observed that the authorities concerned must see that the selection process in accordance with the law might be completed as expeditiously as possible.

6.4 In *National Highways Authority of India Vs. Ashok Kumar Gupta* (supra), the respondent, who was a permanent officer of PWD, Rajasthan, joined the NHAI as Manager (Tech.) on deputation. While so continuing, the respondent was appointed as DGM (Tech.) by the NHAI for a period of four years. His deputation was further extended. In response to the circular dated 1.11.2012, he applied for permanent absorption. His application was considered, but on the basis of the perceived poor record of the respondent, the NHAI refused to accept his request for permanent absorption. Being aggrieved thereby, he filed O.A. before the Central Administrative Tribunal. The Tribunal directed the NHAI to reconsider his case. His case was reconsidered, but the NHAI again declined his request.

The applicant again approached the Tribunal, by filing another O.A. The Tribunal again directed the NHAI to reconsider his case. Being aggrieved by the Tribunal's decision, the NHAI filed the writ petition. Allowing the writ petition, and setting aside the Tribunal's order, the Hon'ble High Court held that the choice of the public employer – whether, or not, to absorb the individual is entirely based upon its discretion and its perception about the utility, competency and efficiency of the deputationists. Barring procedural failure in regard to the fair consideration of the request for absorption – which necessarily has to manifest from the records – the subject would be hardly one for judicial review. If courts or Tribunals were to intervene routinely in such matter – as the Tribunal unfortunately did not once but twice over in the present case, the efficiency and functioning of public organization would seriously be undermined. A direction of the kind that the Tribunal gave in the impugned order amounts to needlessly interfering with the discretion which otherwise needs to be exercised judiciously after taking into consideration all relevant factors. The manner in which the Tribunal went about intervening repeatedly in the matter is rather unfortunate.

6.5 In *K.Pradeep Kumar Vs. Union of India and others*(supra), the applicant, who was a Constable in the CRPF, joined IB on deputation and even got promotion to the rank of JIO, which corresponded to the rank of Head Constable in CRPF. Though he applied for permanent absorption, his parent department refused to grant concurrence for his absorption in the borrowing department on the ground that he had already received proforma

promotion during his deputation tenure. He was also communicated adverse remarks in his APAR. At the intervention of the Tribunal and the Hon'ble High Court, the borrowing department considered his request for permanent absorption, but rejected the same. The respondent-borrowing department issued an order dated 28.8.2014 declaring that he was unfit for absorption. Pursuant to the order of the Tribunal, the borrowing department issued order upgrading his APAR, and his integrity was certified. Therefore, he filed the O.A. for quashing the order dated 28.8.2014 issued by the borrowing department, and for a direction to the borrowing department to permanently absorb him. On a perusal of the materials available on record, the Tribunal found that he was repatriated to his parent cadre on 10.8.2015 and was relieved of his duties with effect from 14.8.2015. Accordingly, he joined his parent department. Therefore, the Tribunal held that the applicant had a right to be considered for permanent absorption in the borrowing department only as long as he was a deputationist with them. As the applicant joined his parent cadre, and was no longer a deputationist but an employee of his parent department, no right for absorption in the borrowing department subsisted in his case. Accordingly, the Tribunal declined to grant him the reliefs sought for by him, and dismissed the O.A.

7. After having given our anxious consideration to the facts and circumstances of the case, and the rival contentions, we have found no substance in the contentions of the respondent-NHAI. We have also found

that none of the decisions relied on by the respondent-NHAI supports its contentions.

8. Regulation 13 of the National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1995, as it stood after coming into force of the National Highways Authority of India (Recruitment, Seniority and Promotion) Third Amendment Regulations, 2012, reads thus:

ð13. **Absorption:** (1) Only those officers/employees shall be considered for permanent absorption who fulfil 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 in the post for which the officer seeks absorption.
- (c) Willingness of the officer.
- (d) Consent of the cadre controlling authority in 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.

- (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 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) 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.”**

9. Although clause (d) of sub-regulation (5) of Regulation 13, *ibid*, stipulates the criterion of consent of the cadre controlling authority in the parent department, yet under the proviso to clause (d), *ibid*, such criterion or condition may be dispensed with in case of officers or employees whose resignation/voluntary retirement has been accepted by the parent department. The object of clause (d), *ibid*, being that the request of an officer continuing with the NHAI on deputation can be considered for permanent absorption only with the consent of his parent department, we do not see substantial force in the contention of the respondent-NHAI that applying the said proviso would nullify or set at naught the real object of

clause (d), *ibid*. In our considered view, the request of such an officer for permanent absorption can be considered and appropriate decision taken by the respondent-NHAI at the relevant point of time. If the concerned officer is found suitable, the offer of his appointment on absorption basis could be subject to his parent department giving consent to the same or accepting the resignation/voluntary retirement of the said officer.

10. Furthermore, under sub-regulation (7) of Regulation 13, *ibid*, the respondent-NHAI has the power to relax any of the provisions of the guidelines contained in Regulation 13. Thus, it is clear that the criterion of clause (d) of sub-regulation (5) of Regulation 13, *ibid*, can also be relaxed by the respondent-NHAI in exercise of its power under sub-regulation (7), *ibid*. Therefore, we do not find any substance in the contention of the respondent-NHAI that in the absence of the parent department's consent, the cases of the applicants could not have been considered for permanent absorption, and there is no infirmity in the impugned decision stopping the ongoing recruitment process for the post of Manager (Tech.) on absorption basis.

11. Admittedly, the respondent-NHAI considered the cases of two other deputationists S/Shri B.L.Meena and Manoj Saxena, and, after finding them suitable for permanent absorption, issued the offers of appointment/absorption, even in the absence of NOC/consent of the cadre controlling authority in the parent department. Their permanent absorption was subject to the submission of the consent of the cadre controlling authority in the parent department and/or acceptance of their

resignation/voluntary retirement by the parent department. When, in the absence of consent/NOC of the cadre controlling authority in the parent department, the cases of S/Shri B.L.Meena and Manoj Saxena were considered, and offers of appointment/permanent absorption were issued to them by the respondent-NHAI under Regulation 13, *ibid*, with the rider that they should submit the consent of the cadre controlling authority in the parent cadre or the acceptance of their resignation/voluntary retirement by the parent department, we are not inclined to accept the contention of the respondent-NHAI that as the said S/Shri B.L.Meena and Manoj Saxena belonged to the Finance Cadre, and as their cases were considered and offers of appointment/permanent absorption were issued in their favour before issuance of the impugned circular dated 16.10.2015, the applicants are not similarly placed as the said S/Shri B.L.Meena and Manoj Saxena and are, thus, not entitled to be considered for permanent absorption in the absence of consent/NOC of the cadre controlling authority in the parent department. This apart, the case of one Sh.O.P.Bhatia, who was continuing as DGM (Tech.) on deputation basis, was also considered by the respondent-NHAI in the absence of consent/NOC of the cadre controlling authority in the parent department, and offer of appointment on absorption basis was issued to him by the respondent-NHAI, with the rider that his absorption in NHAI was subject to submission of consent of the cadre controlling authority in the parent department and/or acceptance of his resignation/voluntary retirement by the parent department. Copy of the offer of appointment on absorption

issued by the respondent-NHAI to Sh.O.P.Bhatia, DGM (Tech.) has been filed by the applicants along with their rejoinder reply. The respondent-NHAI has not rebutted the fact of consideration and permanent absorption of Sh.O.P.Bhatia, DGM (Tech.) even in the absence of consent/NOC of the cadre controlling authority in the parent department. Thus, it is found that the respondent-NHAI, in exercise of its power under sub-regulation (7) of Regulation 13, *ibid*, has taken a decision to consider the cases of deputationists for permanent absorption even in the absence of consent/NOC of the cadre controlling authority in the parent department, and also to issue offers of appointment on absorption basis in favour of the officers, who are found suitable for permanent absorption, with the rider that they should submit the consent/NOC of the cadre controlling authority of the parent department and/or the acceptance of their resignation/voluntary retirement by the parent department under the proviso to clause (d) of sub-regulation (5) of Regulation 13, *ibid*. In the above view of the matter, we have found much force in the contention of the applicants that the denial of consideration of their cases for permanent absorption solely on the ground of non-receipt of consent/NOC of the cadre controlling authority in the parent department amounts to invidious discrimination against them, and that the impugned circular dated 16.10.2015 stopping the ongoing recruitment process for the post of Manger (Tech.), being arbitrary and illegal, is unsustainable and liable to be quashed.

12. In the light of what has been discussed above, we quash and set aside the impugned circular dated 16.10.2015, and direct the respondent-NHAI to consider the cases of the applicants, along with other similarly placed officers, for permanent absorption, and to issue offers of appointment on absorption basis in their favour on the same terms and conditions as stipulated in the offers of appointment on absorption basis issued to S/Shri B.L.Meena, Manoj Saxena and O.P.Bhatia (referred to in the preceding paragraph), in the event of their being found suitable for permanent absorption. The whole exercise shall be completed by the respondent-NHAI within one month from today.

12.1 Accordingly, MA No.477 of 2016 filed by applicant no.1- Sanjay Kumar Arora for staying the operation of the order dated 29.1.2016 (Annexure MA-1) is allowed. The respondent-NHAI is directed not to repatriate applicant no.1- Shri Sanjay Kumar Arora to his parent department until his case for permanent absorption is considered and appropriate decision taken by respondent-NHAI in accordance with the direction now issued by the Tribunal.

13. Resultantly, the O.A. is allowed to the extent indicated above. No costs.

(RAJ VIR SHARMA)
JUDICIAL MEMBER

(SUDHIR KUMAR)
ADMINISTRATIVE MEMBER