

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

Judgment reserved on: 14.10.2014

Judgment delivered on: 11.11.2014

%

W.P.(C) 3923/2012

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. P.P. Khurana, Senior Advocate
with Mr. Mukesh Kumar, Advocate

versus

A.S. DIVYENDER

..... Respondent

Through: Mr. S.K. Gupta, Advocate.

W.P.(C) 3924/2012

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. P.P. Khurana, Senior Advocate
with Mr. Mukesh Kumar, Advocate

versus

SH. G.S.V.S. PRABHAKAR RAO

..... Respondent

Through: Mr. S.K. Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J.

1. The present Writ Petitions have been preferred by National Highways Authority Of India (NHAI/ petitioner authority) under Article 226 of the Constitution of India to assail the common order dated 06.03.2012 passed in OA No. 3280/2011 & OA No. 3281/2011 by Central Administrative Tribunal, Principal Bench, Delhi (CAT/ Tribunal), whereby the Tribunal allowed the applications of the respondents with a direction to the petitioner authority to consider the absorption of the respondents on the post of Manager (F&A), and further directed that if, in that consideration, they are given regular appointment, the petitioner authority shall also consider them for the next higher post of DGM(F&A).

2. Before considering the pleas and contentions of the learned Counsel for the parties, the relevant facts in the two petitions may be taken note of:

W.P.(C) 3924/2012

3. In 1987, the respondent Mr. G.S.V.S. Prabhakar Rao joined Cement Corporation of India (CCI) as an Accountant. Thereafter, in 1996, the respondent was promoted to the post of Accounts Officer.

4. In 2001, the petitioner authority published an advertisement for recruitment to the post of Accounts Officer on deputation basis, which *inter-alia* stipulated that the candidates initially appointed on deputation basis will be considered on absorption later on in accordance with policies and their requirement.

5. The respondent applied for the aforesaid post and on being found suitable, he was offered the aforesaid post. The respondent got relieved from his parent department/ CCI on 02.07.2001. On 11.07.2001, the respondent joined the petitioner authority.

6. In February, 2002, the Chairman-CCI, vide letter dated 05.02.2002, requested the petitioner authority to consider absorption of the employees of CCI, who were on deputation with petitioner authority, in view of the fact that CCI was declared a sick PSE.

7. Subsequently, the respondent was recruited to the post of Senior Accounts Officer, through an open advertisement, on deputation w.e.f. 29.07.2002. In August, 2002, the petitioner authority invited applications for the post of Manager (F&A) on deputation/ absorption basis through an open advertisement. The respondent applied for the aforesaid post and was recruited for the post of Manager (F&A) on deputation w.e.f. 07.03.2003.

8. In June, 2003, CCI – the respondent's parent organization, circulated a Voluntary Retirement Scheme (VRS) vide letter dated 10.02.2003. The respondent opted for the aforesaid scheme and, consequently, he was relieved from his parent organization. This communication was sent to CCI through the petitioner NHAI. The respondent, in this communication, also referred to his earlier communication and requested that he absorbed in the NHAI.

9. In October, 2003, the petitioner authority appointed the respondent as Manager (F&A) on contract basis, vide letter dated 07.10.2003 w.e.f. 17.07.2003 for a period of two years. The respondent submitted a

representation dated 14.08.2005 to the Chairman, NHAI, for his absorption as Manager (F&A). However, instead of considering the respondent for absorption, the petitioner authority extended the contract for a further period of two years vide letter dated 30.12.2006.

10. Subsequently, in December, 2006, petitioner authority invited applications for the post of Deputy General Manager (F&A) on deputation, for which the respondent applied. The respondent also made several representations dated 30.12.2006, 21.04.2007 and 31.05.2007 for being considered for the post of Deputy General Manager (F&A). However, he was informed vide letter dated 12.06.2007 that he was not eligible for consideration on the aforesaid post.

11. In February, 2008, the petitioner authority invited objections from the affected officials regarding amendments to the regulations to facilitate absorption and direct recruitment. The respondent filed his objections vide letter dated 22.02.2008. However, no decision was taken.

12. On 25.07.2008, the respondent again submitted his application as an internal candidate for the post of Deputy General Manager (F&A) and also made a representation for considering him for promotion. In December, 2008, he again applied for the aforesaid post by direct recruitment through lateral entry and also represented for the same, but to no avail.

W.P.(C) 3923/2012

13. In 1988, the respondent Mr. A.S. Divyender joined Pyrites, Phosphates & Chemicals Ltd. (PPCL). He was promoted to the post of

Accounts Officer and thereafter as Assistant Manager in the year 1992 and 1995 respectively.

14. On 03.01.2001, the petitioner authority advertised for vacancies for the post of Manager (F&A). The respondent was recruited and appointed to the aforesaid post in the petitioner authority on deputation basis vide order dated 06.08.2001.

15. Subsequently, the respondent's parent organization/ PPCL decided for closure of the unit. Vide letter dated 03.03.2003, PPCL wrote to the petitioner that:

“The Government of India has decided to close down two units of the company and offer Voluntary Separation Scheme (VSS) to the employees of these units and other employees of Head Office and Marketing Division, related to its activities. We propose to call back Sri Divyendar in our organization for relieving under VSS.

In view of the above, we would request you to kindly take an early decision about absorption of Shri Divyendar in your organization, failing which he may be reverted back, to enable us to release him under VSS.”

However, the petitioner did not relieve the respondent for his being sent back to his parent organization.

16. The respondent opted under the Voluntary Separation Scheme (VSS) and was relieved from his parent organization w.e.f. 26.03.2003. The respondent claimed that, at the relevant time, the petitioner had not implemented a scheme for absorption. As the respondent was no longer a deputationist, the petitioner authority engaged him on contractual basis

while maintaining continuity. Thereafter, the petitioner authority periodically extended the contract of the respondent.

17. The petitioner authority invited applications for the post of Deputy General Manager (F&A) on deputation. The respondent submitted his application as an internal candidate, which was forwarded by Project Director vide letter dated 21.10.2005. Further, the respondent made several representations dated 20.10.2005, 09.01.2007, 20.08.2008 and 02.01.2009.

18. In February, 2008, the petitioner authority invited objections from the affected officials regarding amendments to the regulations to facilitate absorption and direct recruitment. The respondent filed his objections vide letter dated 20.02.2008. The respondent, inter alia, stated:

“1. I was recruited and subsequently join NHAI as Manager (F&A) initially on deputation basis w.e.f 01.08.2001. My parent organization was M/s. Pyrites Phosphates and Chemicals Ltd. (PPCL), a Govt. of India undertaking.

Further, the Employment Notification against which I had applied for and been selected, has categorically stipulated the condition that Candidates initially appointed on deputation basis can be considered for absorption later on in accordance with the policy of the Authority.

2. Subsequently my parent organization decided for closure of my unit and I was served notice under Voluntary Separation Scheme (VSS). Under the compelling circumstances, I had no other option but to seek VSS and subsequently I was relieved from my Parent organization w.e.f. 26.01.2003. (Copy of letters ref. 1 and 2 as above enclosed).

3. Since Absorption Policy was not in place in NHAI at that moment, pending request for absorption by my parent organization and self, the management of NHAI was kind enough to appoint me on Long terms Contract w.e.f 27.01.2003 and thus maintained my continuity in service.

In view of the above, I humbly request that my case, where I have put in continuous service w.e.f. date of appointment on deputation onwards to date, be included, for the amendment in regulation to facilitate absorption”

However, no decision was taken by the petitioner on the said representation of the respondent.

19. Thereafter, the respondents moved separate applications before the Tribunal to seek a direction to the petitioner to consider their cases for absorption on the post of Manager (F&A) from the date of their initial appointment, and a declaration that they are eligible to be considered for the post of Deputy General Manager (F&A), if necessary, with age relaxation. The applications of the respondents were allowed by the common impugned order. The CAT allowed the OAs primarily relying upon its earlier decision in the case of **G. Suresh v. NHAI** in T.A. No.04/2007. The relevant discussion in the CATs order is as follows:

“4. We would have gone into all the minute details of the case, but there would be no need to do so as we find the present case to be covered in favour of the applicant by a decision of this Tribunal in the matter of G. Suresh Versus NHAI in TA No.04/2007.

5. Mr. V. K. Rao, learned Senior Counsel representing the respondents-NHAI would, however, contend that there is basic distinction between the case in hand and the one subject matter of decision by this Tribunal in TA referred to above. In that regard, it is urged by him that NHAI had promised the applicant in TA

No.04/2007 by a writing in that regard that he would be considered for absorption, and it is in view of the said promise extended to him that the Tribunal had returned the finding in his favour on the ground of equitable estoppel and legitimate expectation. Indeed, in the present case there is no specific promise extended in writing to the applicant, as was done in the case of applicant in TA No.04/2007, but the facts of this case would reveal that there was indeed a written as well as implied promise to the applicant that he would be considered for absorption on the post on which he was appointed on deputation basis. In that regard, the very advertisement under which the applicant applied and was taken on job, may be referred to. Copy of the same has been annexed with the OA as Annexure A-1 (page 33 of the paper book), relevant part whereof reads as follows:-

“Note (4) : Candidates initially appointed on deputation basis may be considered for absorption later on. In accordance with the policy and requirements of NHAI.”

The Recruitment Rules under which the applicant came to be appointed by way of deputation would also support the case of the applicant. The method as regards appointment etc. to the post of Manager (F&A), in Column No.5 , is as follows:-

“By deputation/transfer from candidates already on the panel of Under Secretary in the Government of India or from officers under Central/State Government Department or autonomous body or Public Sector Undertaking holding analogous post ; or a post next below or equivalent thereto dealing with Accounts work for at least five years and possessing the necessary qualifications stipulated in Col.7.”

6. *Once, the very advertisement under which the applicant applied and was selected and appointed, in unequivocal terms stated that the candidates initially appointed on deputation basis may be considered for absorption later on, and once the Recruitment Rules themselves provide one of the modes of appointment on deputation, it cannot be said that there may be any material difference in the*

facts of the present case and the one decided by the Tribunal in TA No.04/2007.

7. Mr. Rao would also contend that in the present case the applicant took voluntary retirement from his parent department, and, therefore, his appointment was converted from deputation to one on contractual basis, and the applicant would not even challenge such a conversion. We find that the position was exactly the same in TA No.04/2007, and this point has been dealt with by the Tribunal, and the contention raised on that behalf have been negated.

8. Both these Original Applications are allowed with a direction to the respondents to consider the absorption of the applicants on the post of Manager (F&A) and, if in that consideration, they are given regular appointment, the respondents shall also consider them for the next higher post of DGM(F&A).”

20. Aggrieved by the aforesaid order, the petitioner authority has preferred the present petitions.

21. Learned counsel for the petitioner submits that the respondents had already availed the benefit of VRS from the parent employers, and had ceased to be deputationists and were, accordingly, appointed on contract basis. As the respondents were no more on deputation, they are not entitled to be considered for recruitment on deputation basis. In such circumstances, it is not open to them to seek absorption, as a matter of right, in the petitioner organization.

22. The petitioner further submits that after having accepted the terms and conditions under the contract – whereunder appointment is for a specified period of two/ three years, the respondents are estopped from claiming their permanent absorption, as a right. Further, it is argued that no assurance was

ever given by the petitioner authority with regard to absorption of the respondents.

23. Learned Counsel for the petitioner also urges that the case of **G. S. Suresh** (supra) – which the respondents have placed reliance on, is not applicable in the present case as there was no specific promise extended in writing – as was done in the case of **G.S. Suresh** (supra). He further places reliance on **Md. Ashif vs. State of Bihar**, (2010) 5 SCC 475 and **Satya Prakash vs. State of Bihar**, (2010) 4SCC 179.

24. On the other hand, learned counsel for the respondents submits that the initial advertisement through which they got recruited, as deputationists, to the post of Manager (F&A) provided for absorption. Further, the recruitment rules, under which the respondents were appointed by way of deputation, provides for recruitment by way of absorption of deputationists in the petitioner authority.

25. Learned counsel for the respondents further urges that the claim of the respondents is similar to that of **G.S. Suresh** on which the Tribunal has placed reliance. Learned counsel submits that this Court should not exercise its jurisdiction in the present cases, as there is no illegality in the impugned order of the CAT.

26. Having heard learned counsel for the parties and perused the materials on record, this Court is of the opinion that there is no merit in the present petitions and the impugned orders do not call for interference.

27. From the extract of the impugned order, it is evident that deputation/transfer is one of the methods of recruitment by the petitioner authority and, therefore, the appointment of the respondents deputationists by transfer would be considered to be in accordance with the statutory regulations. Further, the advertisement in response to which the respondents applied clearly stated that the candidates initially appointed on deputation basis may be considered for absorption later on. The germane portion of the advertisement has been extracted in the quotation from the tribunal's order itself. The petitioners, therefore, cannot be heard to say that absorption of deputationist is not a prescribed method of recruitment under the Rules. If that were so, even ***G.S. Suresh*** (supra) could not have been absorbed.

28. From the above advertisement, it is clear that the respondents were held out a representation that they would be considered for absorption/transfer in the petitioner authority upon their joining as deputationists.

29. The parent organizations of the respondents had addressed letters to the petitioner with regard to absorption of the respondents in the petitioner authority, due to the reason that- CCI was declared a sick PSE, and PPCL had decided to close the unit. Thus, in the circumstances prevalent, the respondents had no option, but to accept the VRS. At the same time, when VRS was accepted by the respondent (in WP 3924/12), he also requested the petitioner authority that his application regarding absorption – which was pending for consideration with the petitioner authority, be looked into. In his letter dated 10.06.2003, he specifically stated that he took the decision of

taking voluntary retirement in view of the fact that his parent organization was a sinking ship. The relevant portion of the letter reads as follows:

*“I have received vide the above referred letter a Circular No.[Not Legible]/7(8)/2003/7954 dtd.2.6.2003 issued by M/s. Cement Corporation of India Ltd., New Delhi regarding Voluntary Retirement Scheme. Under the circumstances stated in the above said circular I have left with no other alternative except to seek VRS. Accordingly I am submitting herewith the VRS application **unconditionally** and request you to kindly forward the same to M/s. Cement Corporation of India Ltd., New Delhi.*

*In this connection, I would like to bring the following few lines for your kind notice and consideration. **Earlier I have submitted an application seeking absorption in National Highways Authority of India which is still pending. I understood that the absorption in NHAI takes some more time and hence, all such time, I request you to kindly continue my services in NHAI in the post of Manager (F&A) duly protecting the pay and allowances presently drawing to the post on contract basis.**”*

(emphasis supplied)

30. Similarly, the respondent in W.P.(C.) No.3923/2012 had, on 20.02.2008, disclosed the background in which he had opted for VRS and had sought absorption in the petitioner organization. Pertinently, in both the cases, the petitioner did not expressly turn down the respondents request for absorption after due consideration. It is equally pertinent to note that the services of the respondents were continued throughout on contract basis for nearly a decade before they approached the CAT – which shows that there was nothing adverse against the respondents for them not to be even considered for absorption.

31. The respondents started serving as Manager (F&A) in 2001 and continue to serve in that position till date. They are subjected to rules and regulations of a permanent employee of the petitioner. Further, in the circumstances prevailing, the respondents were in no position to bargain with the petitioner authority to absorb them and not just appoint them on contract basis, once VRS from the parent organization had taken effect.

32. Though, the case of **G.S. Suresh** is slightly distinguishable on facts – in that, in the present cases no written assurance of permanent absorption had been made to the respondents by the petitioner authority – like in the case of **G.S. Suresh**, yet we are of the view that the ratio of that decision was rightly applied by the Tribunal to the present cases. This is so because the initial advertisement – in response to which the respondents had applied, itself held out that the deputationists may be considered for absorption. Moreover, the petitioner cannot act arbitrarily or whimsically by not even considering the respondents cases for absorption. As in the case of **G.S. Suresh**, the respondents too had sought absorption prior to their obtaining VRS from their parent organization under compelling circumstances.

33. In our view, there was an implied assurance given by the petitioner authority regarding consideration of the respondents for absorption, as they were not relieved to return to their parent organization, at the time of circulation of VRS by the respective parent organizations. Pertinently, the respondents joined the petitioner authority way back in 2001, and have been in service for over more than 10 years and are still continuing. The petitioner authority had even considered the case of one employee, Mr. G.S. Suresh for absorption, which clearly shows that the petitioner authority had a policy for

absorption of those employees who were on deputation. Thus, the petitioner authority cannot act in a whimsical and arbitrary manner i.e. absorb one employee, while not even consider the cases of others for similar treatment.

34. In *Satya Prakash* (supra), the Supreme Court drew a distinction between the daily wagers on the one hand, and those appointed irregularly on temporary basis on the other hand. It was held one time relaxation in para 53 of *State of Karnataka v. Umadevi* (3), 2006 (4) SCC 1 itself drew the said distinction between temporary employees on the one hand and daily wagers on the other hand. One time relaxation in para 53 was granted in favour of irregularly appointed employees and not in the case of daily wagers – whose cases were dealt with in para 55 and 8 of *Umadevi* (3) (supra), and no relaxation was granted in the case of daily wagers. They were only allowed to compete in the recruitment process and had given them age relaxation. The Supreme Court also drew a distinction between “irregular appointment” and “illegal appointment”, and has explained that an irregular appointment is an appointment where procedure and selection process were not followed, but non compliance did not go to the root of the selection process.

35. We cannot appreciate as to how this decision advances the case of the petitioner. It is not the petitioners case that the respondents were illegally appointed on deputation basis. The transfer/absorption of the respondents, if it actually granted, would not fall in the category of illegal appointment, since that is a permitted method of recruitment under the recruitment rules itself.

36. ***Mohd. Ashif*** (supra) was a case where the Supreme Court held that the initial appointment (absorption/regularization) itself was illegal. In those circumstances, the Supreme Court rejected the reliance placed by the appellants on ***Uma Devi (3)*** (supra). In the light of the discussion contained in the preceding paragraphs, we are of the view even this decision has no application to the facts of the present case.

37. Therefore, the above cases do not apply in the facts and circumstances of the present case as the issue in hand is not related to those cases on which reliance has been placed.

38. In the light of the aforesaid discussion, the absorption of the respondents is permissible as per the statutory regulations as well as the advertisement against which the respondents applied in the petitioner authority. Therefore, this Court is of the opinion that the Tribunal correctly directed the petitioner authority to consider the cases of the respondents for absorption/transfer in their organization, and also the promotion to the post of Deputy General Manager (F&A).

39. Consequently, we find no merit in the present petition and dismiss the same, leaving the parties to bear their respective costs.

VIPIN SANGHI, J

S. RAVINDRA BHAT, J

NOVEMBER 11, 2014