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

Reserved on: 02.02.2016
Pronounced on: 30.05. 2016

\+   **WP(C) 2360/2015**

DEPARTMENT OF TELECOMMUNICATIONS
..... Petitioner
Through: Ms. Monika Arora, Adv.

Versus

SATYA PRAKASH & ORS.
.... Respondents
Through: Dr. Ashwani Bhardwaj, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

WP(C) 2360/2015 CM Nos.4241-42/2015

1. The Secretary, Department of Telecommunications, impugns the order dated 17th December, 2013 passed by the Principal Bench of Central Administrative Tribunal, New Delhi (the Tribunal) in OA No.1872/2012, whereby Ministry of Defence has been directed to grant lien to the original applicants, on the post of Upper Division Clerks (UDC), which they were holding, prior to their joining the new assignment with the petitioner.

2. The original applicants, nine in number, are respondents before us and are referred to as the respondents or as respondent Nos. 1 to 9. The Ministry of Defence, who were also respondents in the original application, have not

filed the present writ petition and we perceive that they have accepted the said decision. The Secretary, Ministry of Defence and Department of Personnel and Training have been impleaded as proforma respondents.

3. The Department of Telecommunications, by way of circular dated 12th August, 2009, had invited applications for filling up vacant Group –C posts of Lower Division Clerk, Junior Accountant and Senior Accountant. Respondent Nos.1 to 9, who were working in the Ministry of Defence as UDC, had applied and were appointed as Junior Accountants. The sole question in this petition is whether this appointment of the nine respondents as Junior Accountant statedly on permanent absorption basis in the Ministry of Telecommunications, had resulted in loss of their lien in the post of UDC. The Department of Telecommunications is of the view that respondents No.1 to 9 were permanently absorbed and have lost their lien on the post of UDC in the Ministry of Defence. Respondent Nos. 1 to 9 profess and claim to the contrary.

4. The appointment letter dated 3rd September, 2010 issued by the Ministry of Telecommunications appointing the nine respondents as Junior Accountants reads:

"Government of India
Ministry of Communication & IT
Department of Telecommunications,
Office of the Pr. Controller of Communication Accounts
DTO Building, Near Fire Station, Prasad Nagar,
New Delhi – 110005

Dated 03.09.2010

Sub - Appointment on Permanent Absorption Basis of Sr. Acctt., Jr. Acctt., & LDC, in the CCA offices of the

Department of Telecommunication (DoT) as a One time Measure- Regarding.

(i)The appointing authority is pleased to offer appointment to Shri Satya Prakash to the grade of Jt. Accountant (all non-gazetted) in the Controller Communication Accounts offices of the Department of Telecommunication.

(ii)The candidate shall report to the Pr. Controller of Communication Accounts, Delhi Region, DTO Building, Prasad Nagar, New Delhi – 110 005 office and will submit an undertaking as per Annexure to the affect that she/ he accepts this offer unconditionally.

(iii)The offer of appointment is subject to the condition that no disciplinary/ vigilance case of the types referred to in the Department of Personnel and Training OM No. 22011/4/91 Estt.(A) dated 14.09.1992 and OM No. 11012/11/2007-Estt.(A) dated 14.12.2007 is pending against the officer or some punishment like stoppage of increment etc. is in currency.

(iv)The inter se seniority of the officers who accept and report to the CCAS of the respective circles would be finalised in due course.

In respect of reserved category candidates i.e. SC/ST candidates, the offer of appointment is subject to verification of their caste status. After due verification, necessary entries would invariably be made in the Service Books of the officers concerned in terms of instructions contained in DOP&T's OM No. 36011/16.80-Estt(SCT) dated 27.2.81; No. 42012/8/87-Estt.(SCT) dated 14.10.87 and OM No. 36012/36(22)/89-Estt. (SCT) dated 16.06.89

(v)The officer would be on probation for a period of two years from the date of joining.

(vi)The offer of appointment is subject to the outcome of pending court case(s), if any.

> *2. Candidates may accept the offer and joint within 30 days of issue of this letter. The appointment shall be deemed to be effective from the date of assumption of charge...."*

5. Respondents no.1 to 9 had accepted the offer of appointment in the aforesaid letter and tendered technical resignation from the post of UDC held by them in the Ministry of Defence. The Ministry of Defence, by their communication dated 28th September, 2010, accorded their approval to the 'technical resignation without lien' on account of the respondents' appointment as Junior Accountants on 'permanent absorption basis' with the Department of Telecommunications.

6. In November, 2010, the Air Force Head Quarters had advertised 532 additional posts of Assistant in the Grade Pay of Rs.4600/-. Respondents No.1 to 9, who were then working as Junior Accountants in the Ministry of Telecommunications in the Grade Pay of Rs.2800/-, made a representation to the Ministry of Defence seeking an affirmation that they continued to hold their lien on the post of UDC and were accordingly eligible for selection to the post of Assistant. Their claim was predicated on Fundamental Rules (FR) No.13 and 14A, as their appointment as Junior Accountants in the Department of Telecommunications was on probation for a period of two years and they would hence retain their lien on the post of UDC in the Ministry of Defence. In other words, they relied on the contradictions in the appointment letter dated 3rd September, 2010 issued by the Ministry of Telecommunications, which spoke of "permanent absorption without lien" and no right to revert to the parent department, yet imposed a stipulation that the respondents would remain on probation for two years. The respondents submit that other employees appointed on identical terms in the Ministry of

Telecommunications were allowed to retain lien in their prior posts in the parent department.

7. When respondent nos.1 to 9 did not receive a positive response and affirmation on their lien in the cadre of UDCs in the Ministry of Defence, they filed the aforesaid OA claiming that they were entitled to retain their lien in the parent department, as long as they were on probation.

8. The Ministry of Defence in paragraph 5 of the reply before the Tribunal had stated as under:

> *"5. That subsequently, cadre restructuring took place, in Nov 2010 in AFHQ i.e. Cadre to which these applicants belonged to earlier. As a result, 532 additional posts of Assistant, which is in Pay-Band 2, Grade Pay Rs 4600/- were created. The applicants were absorbed in DoT in the post carrying Grade Pay of Rs 2800/- in Pay Band-1, and it would have been more beneficial if they had remained in AFHQ. Later, the applicants started representing for grant of lien. In all these representations, it has been contended that they will be on probation for a period of two years and in case they are not granted lien by this office they will be left without lien which is against the Govt. Instructions. It was further brought out that few individuals who had joined along with them were granted lien by some other Ministries/Departments."*

9. The aforesaid reply would show the Ministry of Defence's ambivalent stand.

10. After examining the aforesaid factual position and elucidating upon legal principles the Tribunal has held as under:

> *10. It is thus apparent that by putting the condition of probation in the appointment letter issued by the DOT, an error was committed and because of this error, the appointment of the applicants by the DOT cannot be*

deemed to have done on immediate permanent absorption basis. Moreover, we have also observed that there are certain conditions made in para G. of para-II of the proforma for making the applications for appointment, which makes clear that the selection was not made on immediate permanent absorption basis and that the discretion still lay with the DOT and such discretion could only be applied subsequently.

11. In view of the foregoing discussion, we are of the view that the appointment of the applicants by the DOT could not be deemed to be an appointment on permanent absorption basis. In that acse, proviso (i) to F.R. 13 would not be applicable because this proviso provides that no lien shall be retained of a Govt. servant if he immediately proceeded on permanent absorption basis to a post of service outside his service/ cadre/ post in the Government. The applicants cannot be treated to have been appointed on immediate permanent absorption basis as aforenoted. The provisions of the said proviso (i) would not be, therefore, applicable. In that event the provisions in FRR 14-A would be applicable which reads as under:

> "F.R. 14-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.

In the present case, therefore, the applicants cannot be left without lien on a regular post. Accordingly, they would be entitled to maintain lien on the post held by them in the Ministry of Defence when they were appointed as Junior Accountant in the DOT on 30.09.2010.

12. In result, the OA is allowed. The decision of the respondents in not extending the lien of the *applicants on the earlier post they were holding cannot be sustained and is accordingly quashed and set aside. The respondents are directed to grant lien to the applicants on the post of UDC which they were holding prior to joining the new assignment with the DOT. The respondents shall take necessary consequential action within a period of three months from the date of receipt of a copy of this order. No costs.*

11. In order to decide the controversy, we would like to refer to FR 13 and 14 A, which for the sake of convenience are reproduced below:

> *"F.R. 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.]"*

> *"F.R. 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."*

12. FR 13 states that a Government servant who has acquired lien on a post would retain the lien even when he is on foreign service or holding a temporary post or officiating in another post. The government servant would also hold the lien on the previous post during the time of joining on transfer to another post. Clauses (a) to (e) of FR 13, when read with the proviso, mean that the government servant would continue to hold his lien on the substantive post held by him till he is absorbed in another post or service on a permanent basis. The proviso stipulates that the government servant shall not retain his lien if he has proceeded on immediate absorption basis to a post in a foreign service or outside his service cadre. The use of the word 'immediate' is significant. It connotes that the absorption should be instantaneous and complete. The proviso pertinently stipulates that the lien shall break and is not retained from the date of absorption. Once the absorption is complete, the employee so absorbed cannot be reverted or claim lien on the post held earlier. Clause (ii) of the proviso stipulates that continuation in foreign service on deputation beyond the maximum limit admissible under the government orders from time to time will also break the lien. This clause is not applicable in the present case.

13. However, Fundamental Rule 13 is not to be read in isolation but in harmony with Fundamental Rule 14A. The latter Rule, while accepting the primacy of FR 13, states that except as provided in FR 13 and clause (d) of FR 14-A, a Government Servant's lien on a post should be terminated under no circumstances if it leaves him without a lien on a regular post. Clause (d) is categorical and states that the government servant's lien on the post shall be terminated on acquiring lien on another post, whether under the Central Government or the State Government, outside the cadre in which he was borne.

14. On the aspect of retention of lien in the parent department in the case of a government servant employed in another department, O.M. No. 60/37/63-Ests. (A), dated 14th July, 1967, is relevant and reads:-

No.60/37/63-Ests(A)
GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS.
...

New Delhi-1, the 14th July, 1967.
23rd Asodha,1889.

OFFICE MEMORANDUM

Subject: Forwarding of applications of Government servants working in a Department/Office of the Central Government to posts in other Central Government Departments/Offices - Question regarding the retention of lion in the parent department.

The undersigned is directed to refer to the Office Memoranda noted in the margin which lay down the circumstances under which applications of Government *servants working in Central Government Department Office for pouts in other Central Government Departments/Offices / Public Sector and autonomous socio- Government Organisations/private firms may be forwarded. The procedure to be followed (in the Matter of retention of lien, restrictions on pay and leave ' salary and pension contributions) in respect of Government servants who apply for posts in the public sector undertakings/ autonomous semi-Government organisations has boon laid down in this Ministry's Office Memorandum No.70/62/62 Ests(A), dated the - 22nd January, 1966. The Question as to what procedure should be followed in respect of Government servants working in a particular Department /office who apply in response to advertisements or circulars inviting applications for posts in other Central Government Departments/ Offices has been under consideration for some time past. It has boon decided that the following procedure should be followed in respect of such Government servants:-*

(1) The applications may be forwarded in accordance with the instructions contained in the office Memoranda noted in the margin irrespective of whether the post applied for in the other Department/Office is permanent or temporary.

(2) In the case of permanent Government servants, their lien may be retained in the parent department/Office for a period of two years. They should either revert to the parent department/office within that period or resign from the parent department, office at the end of that period. An undertaking to abide by those conditions may be taken from them at the time of forwarding the applications to other Departments/ Offices.

(3) In the case of quasi-permanent Government servants who wish to revert to the parent department/Office within a period of two years, they may be taken back in the parent Department/Office, provided

the posts held by them prior to their joining the new department/office continue to exist. In any case, at the end of two years from the date of release from the parent department/office, they will have to resign from the parent department/office, if reversion does not take place. An undertaking to abide by those conditions may to taken from them at the time of forwarding the applications.

(4) As for temporary employees, they should as matter of rule, be asked to resign from the parent department/ office at the time of release from the parent department/office. An undertaking to the effect that they will resign from the parent department /office in the event of their selection and appointment to the post applied for, may be taken from them at the time of forwarding the applications.

(5) In exceptional cases where it would take some time for the other Department/ office to confirm such Government servants duo to the delay in converting temporary posts into permanent ones, or due to some other administrative reasons, the permanent Government servants may be permitted to retain their lien in the parent department/office for one more year. While granting such permission, a fresh undertaking similar to the one indicated in sub-para (2) above may be taken from the permanent Government Servants by the parent department / office. A similar treatment may be accorded to the quasi-permanent employees on their giving an undertaking similar to the one indicated in sub-para (3) above.

(6) During the period of two years referred to in clause (2) end (3) above, the pay of the officer in the ex-cadre post will be fixed in the pay scale of that post and will be subject to the limits prescribed in Ministry of Finance Office Memorandum No.F.10(24)- E111/60, dated the 9th March, 1964 in cases where the minimum of the scale of pay of the new post is substantially in excess of his grade pay in the parent department and such other orders as may be issued by them from time to

time (and subject also, in the case of members' of CSS/CSSS/CSCS, to such orders as have been issued by the MHA). No deputation allowance will be admissible in any case.

2. These instructions are applicable to the employees in all the Departments/Offices of the Government of India (excluding the Ministry of Railways and Civilians in Defence Services). The members of the Central Secretariat Service/Central Secretariat Stenographers service/ Central Secretariat Clerical Service will al so be governed by these instructions in supersession of the practice hitherto followed in respect of them.

3. In so far as persons serving in the Indian Audit and Accounts Department are concerned, these instructions are issued in consultation with the Comptroller and Auditor General of India."

15. O.M.No.28015/2/80-Estt.(C) dated 22nd July, 1980 is illustrative and relevant for the present decision and reads:-

O.M. No.28015/2/80-Estt(C)
Government of India/Bharat Sarkar
Ministry of Home Affairs/Grih Mantralaya
Department of Personnel and Administrative Reforms
(Karmik Aur Prashasnik Sudhar Vibhag)

New Delhi-110001 Dt. 22 July, 1980

OFFICE MEMORANDUM

Subject:-Forwarding of applications of Government servants working in a Department/Office of the Central Govt. Question regarding the retention of lien in the parent Department.

The undersigned is directed to refer to the Ministry of Home Affairs Office Memorandum No.60/37/63-Estt(A) dated the 14th July, 1967 on the subject mentioned above *and to say that a question has been raised as to whether in the case of temporary Government servant who apply for post occurring in the same Department/Office which is to be filled on the basis of direct recruitment an undertaking to the affect that in the event of his selection to the post he will resign from the post held by hi, is to be obtained or not. It is further clarified that the instructions contained in the Ministry of Home Affairs Office Memorandum under reference will apply in all such cases i.e. if a quasi-permanent Government servant applied for a post, occurring whether in other dept. Or the same Department recruitment to which is made on direct recruitment basis he will be allowed to come back to his post held by him earlier within a period of 2 years provided the post exists. In the case of temporary Government servant, he should invariably be asked to resign from the post held by him at the time of release from that post in the event of his selection and appointment to the post applied for. An undertaking to his effect may be taken from him at the time of forwarding his application.*

(B.S NIM)

Deputy Secretary to the Government of India"

16. A reading of O.M. dated 14th July, 1967 and more particularly paragraph 2 which is unequivocal that a permanent government servant would retain lien in his parent department / office for a period of two years and should either revert to the parent department/ office or resign from the parent department at the end of this period. An undertaking to abide by these conditions has to be taken at the time of forwarding the application to other departments / offices. O.M. dated 23rd July, 1980 stipulates that when a government servant applies for a post in another department or the same department, recruitment to which is made on a direct recruitment basis, he

shall be allowed to come back to the post held by him earlier within two years, provided that the post still exists. An undertaking to this effect has to be taken from the government servant while forwarding his application. The said stipulations would apply when a government employee joins foreign service and is subsequently permanently absorbed in the said service.

17. Dealing with Fundamental Rule 14A, O.M.No.F.4(3)-E.IV/A/63 dated 1st October, 1963 and 2(1)-E-IV (A)/73 dated 22nd April, 1974 has been issued, which reads as under:

No.F.4(3)-E.IV/A/63
Government of India

Ministry of Finance

Department of Expenditure

New Delhi, the 1st October, 1963

OFFICE MEMORANDUM

Subject:-Termination of lien of permanent Government servants on foreign service in the event of their permanent absorption under the foreign employer.

The undersigned is directed to invite a reference to rule 14-A(a) or the Fundamental Rules, which provides that a Government servant's lien on a post may in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

A question has been raised as to what procedure should be followed for terminating the lien of a permanent Government servant who is transferred on *foreign service and is subsequently absorbed in the service of the foreign employer.*

2. It is hereby clarified that F.R.14-A applies only so long as a Government servant remains in Government service. Obtaining of consent of the Government servant to the termination of lien is necessary in certain circumstances where the Government servant is to be confirmed in another post under Government. Such consent is not necessary in cases where the Government servant ceases, to be in Government employ. The proper course in such cases, where it is proposed to absorb him in non-government service in public interest, would be to ask the Government servant concerned to resign his appointment under the Government with effect from the date of such permanent absorption and the lien will stand automatically terminated with the cessation of Government service.

Such resignation from Government service will be without prejudice in the entitlement of the Government servants to the retirement benefits admissible under this Ministry's Office Memorandum No.F.2(33)-EVA/60 dated the 10th November, 1960 (copy enclosed), provided the transfer to the public sector undertakings or Government or Semi Government Corporations is in the public interest.

3. In all cases where a Government servant is to be absorbed permanently by the foreign employer under his organisation, it would be incumbent on him to consult the parent employer before issuing orders absorbing the Government servant permanently in his service. The orders of permanent absorption should be issued only after the resignation of the Government servant has been accepted by the Government and with effect from the date of such acceptance.

4. In so far as persons serving in the Indian Audit and Accounts Department are concerned, these orders have been issued in consultation with the Comptroller and Auditor General.

Sd/- (R.S. Ganpati)
Deputy Secretary to the Government of India"

18. The said O.M. specifically deals with the procedure to be followed when a permanent government servant, like the respondents herein, is to be absorbed by a foreign employer which in this case would be the Department of Telecommunications. The last paragraph of this O.M. is relevant for it states that in all cases, where a government servant was to be absorbed permanently by the foreign employer, it would be incumbent upon them to consult the parent department before issuing the order absorbing the government servant in service. Orders of permanent absorption should be issued only after the resignation of the government servant was accepted by the parent department / employer.

19. We have noticed the facts of the present case and the inherent contradiction in the appointment letter dated 3rd September, 2010 by which respondents No.1 to 9 were statedly appointed on permanent absorption with immediate effect as Junior Accountant; and the stipulation that the respondent would be on a probation period of two years with the Department of Telecommunications. The nine respondents were to be on probation and only on successful completion of the probation period, would they have acquired a lien on the post of Junior Accountant. This condition relating to the probation period contradicts the plea and contention that the said respondents were absorbed on a permanent basis. A permanent absorption

stipulation cannot co-exist with a stipulation that the absorption would take place only on successful completion of the probation period.

20. The petitioners accept and admit the aforesaid position and the stipulation of probation. However, they claim that the condition relating to the two years probation period was a clerical mistake. They rely on their letter dated 18th February, 2013, which, it was submitted, was by way of clarification and withdrew and cancelled the probation period clause. The said contention has to be rejected for this letter was issued only after Respondents No.1 to 9 had already approached the Tribunal and the OA was pending. This letter was issued 15 months after the appointment of Respondent No.1 to 9. The petitioners had therefore belatedly issued a self serving clarification and unilaterally deleted the condition relating to the probation. This letter would not determine the facts of this case. The respondents No.1 to 9 had already staked their claim and requested both the petitioner(s) and the Ministry of Defence to retain their lien on the post as UDC in the Ministry of Defence.

21. Respondents Nos.1 to 9 have asserted and it is an accepted position that a similar dispute had arisen in the case of one Jatinder Kumar, who had identically applied and joined the Ministry of Telecommunications. He was an employee of the Department of Personnel and Training and in his case, as noticed by the Tribunal in the impugned order, the Department of Personnel and Training, after examining the factual matrix and the legal position, opined that Jatinder Kumar would continue to hold his lien till he was permanently absorbed. The DoP&T had clarified that the fault was on account of incorporation of the condition of probation period in the letter of

appointment. There was a contradiction for in case of permanent absorption, probation period could not have been stipulated and in case there was a probation period, there would be no permanent absorption. In view of the appointment letter, the Department of Personnel and Training had opined that it was not a case of permanent absorption. The Tribunal has quoted the opinion expressed by the Department of Personnel and Training, which reads:-

> *"the fault lies in the appointment condition of the borrowing Department where the probation period was erroneously provided in the case of permanent absorption or vice-versa. In case of absorption to another post in the Govt. the persons appointed are not put on probation and in fact they are considered transferred to the new post along with their lien. Appointment does not seem to be a case of permanent absorption."* *(emphasis provided)*

22. The respondent nos.1 to 9 have pointed out that other employees similarly situated were allowed to retain lien in the parent department and have been repatriated. It is interesting to note that the Deputy Controller (Administration) of the Department of Telecommunications had written letter dated 15th January, 2013 enclosing therewith the applications of the nine respondents working as Junior Accountants for grant of lien along with the NOC for repatriation to the parent department. The letter records that this communication was issued with the approval of the competent authority. The letter clearly reflects that at that time the petitioners were not objecting to the stand of respondent No.1 to 9. The Ministry of Defence had responded vide

letter dated 15th February, 2015 stating that the nine respondents had already filed the OA in question, which was pending before the Tribunal. Since the matter was sub judice, no action was required to be taken on the representation. It may be relevant to note here that after the impugned order was passed, the Department of Telecommunications had issued repatriation order dated 18th May, 2015 and the nine respondents have been absorbed and also promoted in the Ministry of Defence.

23. In view of above, we do not find any merit in the present writ petition and the same is dismissed.

NAJMI WAZIRI, J

SANJIV KHANNA, J

MAY 30, 2016
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