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

+ **W.P.(C) 9227/2014**

Date of decision: 5th April, 2016

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through Mr. Ravi Sikri, Sr. Advocate with
Mr. Mukesh Kumar, Ms. Gunjan Sinha and
Mr. Deepak Yadav, Advocates.
Mr. Adarh Kumar, DGM (HR) and Mr. Anil
Kumar, Manager (HR).

versus

SANJEEV KUMAR SHARMA & ORS. Respondents
Through Ms. Jyoti Singh, Sr. Advocate
with Mr. S.K. Gupta and Ms. Tinu Bajwa,
Advocates for R-1 to 4.
Mr. Arun Bhardwaj, CGSC for UOI.
Mr. Rajiv Manglik, Advocate for R-15 & 21.
Mr. Rakesh Munjal, Sr. Advocate with Mr.
Mohd. Ehraz Zafar and Mr. Mohd. Atif,
Advocates for R-6, 8, 11 & 19.
Ms. Monika Arora, Advocate for R-28.

W.P.(C) 4/2015

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through Mr. Ravi Sikri, Sr. Advocate with
Mr. Mukesh Kumar, Ms. Gunjan Sinha and
Mr. Deepak Yadav, Advocates.
Mr. Adarh Kumar, DGM (HR) and Mr. Anil
Kumar, Manager (HR).

versus

B.S. SALUNKE & ORS. Respondents

Through Ms. Jyoti Singh, Sr. Advocate with Mr. S.K. Gupta and Ms. Tinu Bajwa, Advocates for R-1 to 4.

Mr. Rakesh Munjal, Sr. Advocate with Mr. Mohd. Ehraz Zafar and Mr. Mohd. Atif, Advocates for R-6, 8, 11 & 19.

Mr. Arun Bhardwaj, CGSC for UOI.

Mr. Rajiv Manglik, Advocate for R-32 & 38.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J. (ORAL)

As similar issues arise for consideration in the aforementioned writ petitions, they are being disposed of by this common judgment and order.

2. The petitioner, National Highways Authority of India (NHAI, for short), has impugned a common order dated 11th November, 2014 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi (Tribunal, for short), whereby OA Nos.3696/2014 and 3762/2014 along with connected applications have been disposed of with a direction that NHAI would consider the private respondents for promotion to the post of Deputy General Manager (Technical) in the light of the observations and finding recorded. Further, result of promotion of the applicants as well as the private respondents in the two OAs, shall be declared together.

3. For the purpose of record, we note that the private respondents to the OAs have not objected to or filed any writ petition challenging the impugned order of the Tribunal. The challenge made is by the NHAI.

4. For the purpose of convenience, we have referred to the applicants in OA Nos.3696/2014 and 3762/2014 before the Tribunal as ‘applicants’ as some of the respondents to the present writ petition are private respondents, who were the contesting respondents in the two OAs. They have been referred to as ‘private respondents’.

5. The applicants were appointed on deputation as Manager (Technical) in the years between 2004 to 2008. This appointment on deputation was in accordance with and as per the National Highway Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996. The relevant recruitment regulations for appointment to the post of Manager (Technical), reads as under:-

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1	2	3	4	5
Manager (Technical)	9 (nine)	Group A/B	3000-4500	Transfer on deputation/promotion/ direct recruitment

6	7	8
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40 years	Educational Qualification Essential (i) Degree in Civil Engineering from a reputed Institution of Technology or a recognized University. Desirable Post Graduate Degree in Civil Engineering in the field's to Highway Engineering and/or Post Graduate Degree in Management/MBA from an institute of repute Experience Should have put in at least 3 years of service in a responsible senior position in a Govt. Deptt./Public Sector Undertaking/Commercial Organisation of repute and should be working in a analogous post or the post next below or equivalent for at least 3 years.	By deputation/transfer from candidates already on the panel of Under Secy. In the Govt. of India and possessing the Educational qualifications stipulated in Col.7 or from candidates holding analogous post in a Central/State Govt. Deptt./Autonomous Body/Public Sector Undertaking or with 3 years regular service in the scale of Rs.2200-4000 or 6 years in the scale of Rs.2000-3500. Period of Deputation Not more than 3 years but may be extended with the approval of Central Govt.
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Desirable Should be well versed in the field of Highway/Bridge Engineering dealing with Planning, Pre-qualification or Consultants And Contractors; Financial Appraisal of Projects; Detailed Designing, Techno-Financial reviews; Evaluation of Tenders Contract Management; Monitoring Liaison with major construction agencies/Govt., Bodies; Performance Appraisal of Major Highways/Bridge Projects.		

Appointment to the post of Manager (Technical) as per the regulation could be by way of transfer on deputation, promotion or direct recruitment. The essential educational qualification was a degree in Civil Engineering from a reputed institution of technology or recognized

university. Experience as required was at least three years of service in a responsible senior position in a government department/public sector undertaking/commercial organisation of repute and the candidate should have worked in an analogous post or the post next below or equivalent for at least three years. The term “analogous post or the post next below or equivalent” stands expounded and explained in column No.8 of the Regulation. Appointment could be made by deputation/transfer from candidates already on the panel of Under Secretary in the Government of India and possessing educational qualification stipulated in column No.7. Candidates holding analogous post in Central/State Government Departments/Autonomous Bodies/Public Sector Undertakings or candidates with three years regular service in the pay-scale of Rs.2200-4000 or 6 years in the pay-scale of Rs.2000-3500 were also eligible for appointment as Manager (Technical). The pay-scales mentioned above were the pay-scales prescribed by the Fourth Pay Commission. The replacement pay-scales as per the Fifth Pay Commission would be Rs.8000-13500 and Rs.6500-10500, respectively. As per the Sixth Pay Commission, the equivalent would be Grade Pay of Rs. 5400 and Grade Pay of Rs.6600 in Pay Band-3, respectively.

6. After appointment on deputation, the applicants were absorbed on different dates in the NHAI. As these dates are not in dispute, we need

not refer and burden this judgment by reproducing these details. We would, to avoid prolixity, refer to the legal position and decide the contention raised.

7. A dispute arose when the private respondents were being considered for promotion to the post of Deputy General Manager (Technical), but the applicants were declared ineligible on the ground that their experience at the post of Manager (Technical) would be counted from the date of absorption and not from the date of appointment on deputation in the NHAI. This meant that the period when the applicants had worked on deputation was excluded and not counted as regular service in the NHAI. Another reason expounded by the NHAI was that the applicants were not in the post carrying a Grade Pay of Rs.6600 in their parent department before they had come on deputation and held the post of Manager (Technical) in the NHAI on deputation.

8. The recruitment regulations with regard to appointment at the post of Deputy General Manager (Technical) as amended and applicable from 23rd October, 2009, read as under:-

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Name of post	No. of post	Classification of post	Pay Band and Grade Pay/Pay Scale (in Rs.)	Method of recruitment
1	2	3	4	5
Deputy General Manager (Technical)	On the basis of requirement	Group A	PB-3 (Rs.15600-39100) with Grade Pay Rs.7600	Promotion/ Deputation/Direct Recruitment

Age limit (in respect of direct recruit only)	Educational and other qualifications required	In case of Promotion/Deputation/Direct Recruitment
6	7	8
45 years	<u>Educational Qualification</u> (a) <u>Essential:</u> Degree in Civil Engineering from a reputed institution of Technology or a Recognized University/Institute. <u>Desirable:</u> Post Graduate Degree in Civil Engineering in the field (s) relating to Highway Engineering and/or Post Graduate Degree in Management/MBA from an recognized University/Institute. <u>Experience</u> A.(i) Officers holding analogous post or with 3 years regular service in the scale of PB-3 (Rs.15600-39100/-) with GP-Rs.6600/- (CDA pattern) in a Central Government Department/Autonomous Body/Public Sector Undertaking and having educational qualifications stipulated above. OR (ii) (a) Officers or State Government Departments/Organizations/State PWDs holding analogous post, or with 3 years regular service in the scale of PB-3 (Rs.15600-39100/-) with GP-Rs.6600 or equivalent in the State Government Departments (CDA pattern) or should be holding post as Executive Engineer [irrespective of year (s) of regular service] (b) with a minimum 15 years service at the level of AE/AEE and (c) having the educational qualifications stipulated above.	By promotion from candidates holding the post of Manager (Technical) on a regular basis for a period of at least 4 years and possessing the educational qualifications and experience stipulated as per col.7. OR By deputation/direct recruitment from candidates having the educational qualifications stipulated in col.7 and holding analogous posts in a Central/State Govt. Deptt./Autonomous Body/Public Sector Undertaking or with 3 years regular service in the scale of PB-3 (Rs.15600-39100) with Grade Pay Rs.6600 (in CDA pattern) and possessing educational qualifications and experience as per col.7 or equivalent in that organization. <u>Period of deputation</u> Not more than 4 years but may be extended or curtailed with the approval of Competent Authority.

	AND B. Should have put in at least 9 years service in responsible senior position (gazetted) in a Government Department/Public Sector Undertaking with at least 8 years experience in Highways/Roads/Bridges during his/her career C. Desirable: Should be well versed in the field of planning, pre-qualification of consultants and contractors; financial appraisal of projects; detailed designing, techno-financial reviews; evaluation of tenders, contracts management, monitoring, liaison with major construction agencies/Govt. Bodies; performance appraisal of major highways/bridge projects.	
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As per the aforesaid recruitment regulations, selection/appointment to the post of Deputy General Manager (Technical) can be by way of promotion, deputation or direct recruitment. The essential educational qualification prescribed was a degree in Civil Engineering from a reputed institution of technology or a recognized university/institute. This requirement was identical to the essential educational qualification prescribed for recruitment to the post of Manager (Technical). With

regard to essential experience, it has been prescribed that the officer should be holding an analogous post or have three years of regular service in Grade Pay of Rs.6600 (CDA pattern) in the pay-band PB-3 (Rs.15600-39100) in a Central Government Department/Autonomous Body/Public Sector Undertaking. The term used in the Regulation is “regular service” in the stipulated Grade Pay of Rs.6600 (CDA pattern) in Pay Band-3. For appointment by promotion as per column 8, candidates should have held the post of Manager (Technical) on a regular basis for a period of at least four years, in addition to the educational qualifications and experience stipulated in column 7. The short issue and question relates to counting of the period to be included and treated as a part of regular service i.e. whether service rendered by an employee at the post of Manager (Technical) when on deputation and before absorption can be counted.

9. It is an accepted position that whether on deputation or after absorption, the applicants when posted as Manager (Technical) were in PB-3 (Rs.15600-39100) with a Grade Pay of Rs.6600. It is not the case of the NHAH that his requirement or eligibility condition is not fulfilled or satisfied by the applicants. Their contention is that the applicants when on deputation were not on regular service at the post of the Manager (Technical). This contention is predicated on the plea that the

period during which the applicants were on deputation, they held a lien in their parent department.

10. The submission, in our opinion, is without merit and has been rightly rejected by the Tribunal. We have quoted the recruitment regulations with regard to appointment to the post of Manager (Technical). One of the modes of appointment is by transfer on deputation. This mode was applied and adopted by the NHAI when they had inducted the applicants as Manager (Technical). The applicants were appointed as Manager (Technical) after a proper selection process. There was no break and the appointment on deputation was followed by absorption without any time gap. The pay-scale did not undergo any revision, change or upgradation. Nature of duties performed etc. did not change. The Regulation quoted above is not expressly or impliedly to the contrary. It is not stipulated that the deputation period would not be counted as “regular service”. The experience stipulated in clause A.(i) would relate to appointment/recruitment by way of deputation or direct recruitment.

11. On the issue and meaning of the expression “regular service”, we would like to refer to the ratio in ***K. Madhavan and Another Vs. Union of India and Others***, (1987) 4 SCC 566. Elucidating on the question of deputation and transfer, the Supreme Court opined that there was not much difference between the two. Deputation may be regarded as a

transfer from one government department to another. Pertinently, it was held that it would be against all rules of service jurisprudence if a government servant holding a particular post is transferred to the same or an equivalent post in another government department and the period of his service in the post before transfer, is not taken into consideration for seniority in the transferred post. We are not directly concerned as such with the second aspect in the present case, but the reasoning and ratio would support and affirm our view. It would be irrational and incongruous to hold that the period spent on the post of Manager (Technical) while on deputation would be treated and regarded as irregular or nonest service and which cannot be counted for the purpose of regular service under column 8 of the recruitment regulation for appointment to the post of Deputy General Manager (Technical). Any other interpretation, in the absence of a contrary regulation/rule, would be unfair and unjust. The deputationist would be at a disadvantage in comparison to the candidates appointed to the post of Manager (Technical) on subsequent dates by way of direct recruitment or promotion. For direct recruits, the period spent on probation is also counted as experience on the post regularly held.

12. Learned counsel for the petitioner has referred to and relied upon the OM dated 27th March, 2011, issued by the Department of Personnel

and Training. The said OM is as follows:-

“Sub: Seniority of persons absorbed after being on deputation.

The undersigned is directed to say that according to our O.M. No. 20020/7/80-Estt.D dated May 29, 1986 (copy enclosed) in the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for “transfer on deputation/transfer”, his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from

- the date he has been holding the post on deputation,

or

- the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, whichever is later.

2. The Supreme Court has in its judgment dated December 14, 1999 in the case of Shri. S.I. Rooplal & Others Vs. Lt. Governor through Chief Secretary, Delhi, JT 1999 (9)SC 597 has held that the words “whichever is later” occurring in the Office Memorandum dated May 29, 1986 and mentioned above are violative of Articles 14 and 16 of the Constitution and, hence, those words have been quashed from that Memorandum. The implications of the above ruling of the Supreme Court have been examined and it has been decided to substitute the term “whichever is later” occurring in the Office Memorandum dated May 29, 1986 by the term “whichever is earlier”.

3. It is also clarified that for the purpose of determining the equivalent grade in the parent department mentioned in the Office Memorandum dated May 29, 1986, the criteria contained in this Department Office Memorandum No. 14017/27/75- Estt.D)(Pt.) dated March 7, 1984 (copy enclosed), which lays down the criteria for determining analogous posts, may be followed.

4. These instructions shall take effect from the December 14, 1999 which is the date of the judgment of the Supreme Court referred to above.

5. In so far as personnel serving in Indian Audit and Accounts Departments are concerned, these instructions are issued in consultation with the Comptroller and Auditor General of India. However, these orders (in keeping with paragraph 4 of the Office Memorandum dated May 29, 1986 as referred to above) will not be applicable to transfers within the Indian Audit and Accounts Department which are governed by orders issued by the C&AG from time to time.

6. The above instructions may be brought to the notice of all concerned for information, guidance and necessary action.”

The heading of the said OM itself would indicate that it deals with seniority of persons absorbed after being on deputation. It makes reference to the decision in *S.I. Rooplal & Others Vs. Lt. Governor through Chief Secretary, Delhi*, JT 1999 (9)SC 597, wherein the earlier OM dated 29th May, 1986 was partially set aside and declared ultra vires. It is in view of the said overruling by the Supreme Court that OM dated 27th March, 2011 was issued. The said OM prescribes that when recruitment rules provide for transfer on deputation/transfer, the seniority of the person who is absorbed would normally be counted from the date of absorption. However, in case the said person on the date of absorption was holding the same or equivalent grade on a regular basis in the parent department, such regular service in the parent department shall also be taken into account for fixing his seniority. Paragraph 1 of the said OM quotes from the OM dated 29th May, 1986, which was partly struck down in *S.I. Rooplal* (supra). The OM in paragraph 3 states and clarifies that for determining the

equivalent grade in the parent department mentioned in the OM dated 29th May, 1986, the criteria contained in OM dated 7th March, 1984 should be applied. The said OM, according to us, deals with the question of *inter se* seniority as has been rightly held by the Tribunal. The subject matter or the question addressed and answered in the OM was different. Stray observations, when the issue and question raised and answered was quite different, should not be taken out of context and propounded as the ratio on a divergent issue. This OM does not deal with and answer the present question. Significantly, in ***SI Rooplal*** (supra), the Supreme Court had relied on ***K. Madhavan*** (supra). Inter se seniority and experience eligibility are two separate and distinct aspects.

13. The OM dated 27th March, 2011 as held and elucidated, does not deal with the situation in question. The OM is not relevant for determining whether or not a candidate meets the requirements stipulated in column 8 of the recruitment regulations for promotion to the post of Deputy General Manager (Technical) or similar situation. The contention of the NHAI, relying on the OM dated 27th March, 2011, is rejected.

14. The Tribunal in the impugned order has rightly held that methods of computation of seniority may differ according to the manner in which continuous service for the purpose of seniority is to be counted. Regulation 15(3) of NHAI Regulations notified on 11th March, 1996 had

stipulated that the seniority of a person initially appointed on deputation and subsequently absorbed in the NHAI would be reckoned from the date of their initial appointment. It was further stipulated that if two or more persons get absorbed on the same date, their *inter se* seniority shall be determined with reference to their seniority level in their parent cadre. The aforesaid regulation, therefore, treated the date of initial appointment on deputation as the relevant date for computation of seniority *inter se* the persons appointed on deputation and then subsequently absorbed. Regulation 15(3) of the NHAI Regulations was amended on 24th August, 2012 and it was stipulated that seniority of officers and employees of the NHAI shall be determined on the basis of the instructions and guidelines issued by the Central Government (Department of Personnel & Training), from time to time. Regulation No. 22 was also inserted and is to the effect that in regard to matters not specifically covered by the Regulations made under Section 35 of the Act or general, or special orders made or issued thereunder, service conditions of the officers and employees of the NHAI shall be governed by the rules applicable to the employees of the Central Government in general and instructions issued by the Central Government from time to time.

15. The applicants in the present case were absorbed after amendment

to NHAI Regulation 15(3) with effect from 24th August, 2012. The absorption letter placed on record states that the *inter se* seniority will be determined as per the DoPT instructions/guidelines in this regard. As far as the recruitment regulations in question are concerned, they specifically stipulate and provide that candidates holding the post of Manager (Technical) on a regular basis for a period of four years would be eligible for consideration and promotion as Deputy General Manager (Technical). The said regulation does not specify whether the period spent on deputation is to be treated as regular service or not. They are silent. In the said situation, general principles applicable to service jurisprudence would apply. If we accept the contention of the NHAI, then the period which the applicants had spent on deputation as Manager (Technical), right from 2004 till October, 2012, will have to be erased and ignored for the purpose of qualifying service for promotion to the post of Deputy General Manager (Technical). The service rendered after October, 2012, would be counted and taken into consideration. We cannot countenance and accept any such stance and be oblivious to unjust and palpably unfair and arbitrary consequences.

16. In ***K. Madhavan and Another*** case (supra), the Supreme Court had examined the expression 'on a regular basis' used the applicable rules. This expression, it was observed, had created some ambiguity in

the eligibility clause giving rise to the controversy. It was held that there could not be any doubt that when a person was appointed to a post against a permanent vacancy on probation, his appointment was on a regular basis, but when a person was appointed to a post on a purely temporary or ad hoc basis, the appointment was not on a regular basis. Referring to the expression ‘on a regular basis’, the Supreme Court held that the said expression cannot be interpreted to mean, service rendered as on absorption in the CBI as SP. The general principle was that in the absence of any specific provision to the contrary, the length of service from the date of appointment to a post should be taken into consideration for the purpose of seniority in that post or eligibility for the higher post. Paragraph 10 of the judgment in **K. Madhavan** (supra) reads:-

“10. The 1975 Rules which are relevant for the purpose do not explain what is meant by the expression “on a regular basis”. The expression has created some ambiguity in the eligibility clause giving rise to this controversy. There can be no doubt that when a person is appointed to a post against a permanent vacancy on probation, his appointment is on a regular basis, but when a person is appointed to a post on a purely temporary or on an ad hoc basis, the appointment is not on a regular basis. The expression “on a regular basis” in the 1975 Rules cannot, in our opinion, be interpreted to mean as on absorption in the CBI as SP. The general principle is that in the absence of any specific provision to the contrary, the length of service from the date of appointment to a post should be taken into consideration for the purpose of either seniority in that post or eligibility for the higher post. As no explanation has been given in the 1975 Rules of the said

expression, we do not think it desirable to deviate from the established principle of computing the length of service for the purpose of seniority or eligibility for the higher post from the date of appointment. In our view, therefore, the expression “on a regular basis” would mean the appointment to the post on a regular basis in contradistinction to appointment on ad hoc or stopgap or purely temporary basis. Respondent 5, in our opinion, satisfied the eligibility test of the 1975 Rules for consideration for the post of DIG. But, it is not disputed by the parties that the petitioners and Respondent 5 have, by the lapse of time during the pendency of this litigation, become eligible for appointment to the posts of DIG. Indeed, they are holding the posts of DIG, may be on ad hoc basis, under the interim orders of this Court and there is no chance of their being reverted to the next lower post of SP. The question, therefore, boils down to the seniority of the petitioners, vis-à-vis Respondent 5 in the post of DIG. That again will depend upon the decision on the question as to the seniority of the petitioners and Respondent 5 in the post of SP.”

(emphasis supplied)

17. In the present case, we are not dealing with the question of seniority but are only concerned with the question as to whether the applicants fulfilled the eligibility requirement for being considered for promotion to the post of Deputy General Manager (Technical). For the aforesaid reasons, we uphold the finding of the Tribunal which accepted the contention of the applicants.

18. However, there is an aspect which requires clarification. The learned counsel for the parties accept that in the two OAs, the applicants had prayed that a seniority list of the employees holding the post of Manager (Technical) should be drawn in accordance with the Regulations and law. The Tribunal has not given any such direction. Possibly, the reason

was that there were substantial number of vacant posts in the post of Deputy General Manager (Technical). Even if we accept the possible reason, it is necessary that the petitioner (i.e. NHAI) should draw and frame a seniority list as per law. This would avoid challenges and ensure transparency. It would possibly curtail disputes in future and would clarify the situation to employees of the NHAI from different sources. Delay in such matters causes suspicion and uncertainty. It results in different categories trying to influence and get favourable opinions.

19. We accordingly direct the petitioner to formulate a seniority list for the post of Manager (Technical) as well as the Deputy General Manager (Technical). We have issued directions for formulation of a seniority list for the post of Deputy General Manager (Technical) for the reason that many of the applicants as well as private respondents have been promoted to the said post. We hope and expect that a seniority list for the aforesaid posts will be prepared within a period of six weeks from the date a copy of this order is received.

20. Before we conclude, we must refer to C.M. No.7307/2016 filed by the direct recruits, who were appointed to the post of Manager (Technical) in September, 2014. They were not impleaded and were not parties to the two OAs. It is obvious that they never thought it necessary to be impleaded as parties. We have not allowed the said application but

liberty was given to the counsel for the applicants to address arguments before us. We have heard the leaned counsel appearing for the applicants in C.M. No.7306/2016, who had nothing further to add and has reiterated the arguments advanced by the counsel for the NHAI.

The writ petition is disposed of. No costs.

SANJIV KHANNA, J.

NAJMI WAZIRI, J.

APRIL 05, 2016
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