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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 6537/2016, CM No. 26795/2016**
MANI KUMAR RINKESH AND ANR

..... Petitioners

Through: Mr. Rajat Aneja, Adv. with Ms.
Rashmi Verma, Adv.

versus

UNION OF INDIA & ORS

..... Respondent

Through: Mr. Rakesh Kumar, CGSC with Ms.
Rajul Jain, GP for R-1/UOI
Mr. Sanjoy Ghose, ASC with Mr.
Rhishabh Jetley, Adv. for GNCTD
Mr. Ankur Chhibber, Adv. for R-3

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
ORDER
% **19.04.2017**

1. The present petition has been filed by the petitioners with the following prayers:-

*“It is, therefore, most respectfully prayed that this Hon’ble may be pleased to issue a Writ in the nature of **CERTIORARI** and/or any other appropriate Writ/Order/Direction of like nature for quashing the letter/Order dated 09.10.2015 issued by the Respondent No.1 rejecting the representations of the Petitioners for repatriation to their parent department i.e Respondent No.3; and to further issue a Writ in the nature of **MANDAMUS** and/or any other appropriate Writ/Order/Direction of like nature thereby commanding the*

Respondent No.2 and 3 to grant lien to the post held by the Petitioners and to accord their No-Objection to the Respondent No.1 for their repatriation, in the light of the facts and grounds stated hereinabove. Any other relief or order(s) that this Hon'ble Court may deem fit and proper in the facts and the circumstances of the present case may also be passed in favour of the Petitioners."

2. It is averredd and contended by Mr. Rajat Aneja, learned counsel for the petitioners that petitioners 1 and 2 were appointed as Lower Division Clerks with respondent No.3, District & Sessions Judge, Tis Hazari Courts, Delhi. On August 12, 2009, the respondent No.1 Ministry of Communication and Information Technology came with an advertisement inviting applications for appointment on permanent absorption basis of Group-C Non-Gazetted as one time measure. The petitioners applied against the said advertisement. On May 20, 2011 respondent No.1 issued appointment letters to the petitioners thereby appointing them on Permanent Absorption Basis and one of the conditions of appointment was pertaining to undergoing probation for a period of two years from the date of their respective joining. Accordingly, on June 10, 2011 petitioners tendered their technical resignation to the respondent No.3 which resignations were duly accepted and petitioners were relieved of their duties to enable them to join the posts of LDC with respondent No.1 in the office of Comptroller of

Communication Accounts Bihar Circle, Patna. On May 18, 2012, the petitioner made an application to the respondent No.3 through proper channel i.e routed through the office of respondent No.1 Bihar Circle seeking lien from the respondent No.3. On May 24, 2012, the petitioners wrote further letters to respondent No.3 reiterating their request for grant of lien, which was followed by a further representations dated August 10, 2012 and October 8, 2012.

3. The respondent No.1 vide its letter dated January 23, 2013 wrote to the petitioners calling upon them to confirm whether the petitioners would want to retain the lien in their parent department. On February 1, 2013, petitioners sent a response to the respondent that since the period of two years probation has yet not been completed, the consent sought by the respondent No.1 was pre-mature. In any case, it is the submission of Mr. Aneja that on April 9, 2013, the respondent No.3 eventually issued a letter declining the request for grant of lien on the post of LDCs held by the petitioners. Even though, a representation was made by the petitioners on May 1, 2013 seeking review of order dated April 9, 2013, the petitioners filed writ petitions before this Court, which were numbered as W.P.(C) 3940/2013 and W.P.(C) No.4360/2013. The said writ petitions were

disposed of on July 10, 2013 and July 12, 2013 respectively directing the respondent No.3 to pass a speaking order within a period of six weeks from the date of the said orders. The respondent No.3 vide its communication dated August 27, 2013 rejected the request of the petitioners. This resulted in the petitioners filing W.P.(C) No.6171/2013 calling upon the respondent No.3 to pass a detailed and speaking order. The respondent No.3 issued a rejection letter on October 8, 2013. On the filing of the writ petition by the petitioners on December 5, 2014, the same was transferred to the Central Administrative Tribunal. The Central Administrative Tribunal on July 3, 2015 directed the petitioners to make a fresh representation to the respondent No.1 who was to pass appropriate, reasoned and speaking order thereon within eight weeks there from.

4. The respondent No.1 issued letter dated October 9, 2015 rejecting the representations of the petitioners for the repatriation from DoT. Mr. Aneja states, the present petition has been filed challenging the order dated October 9, 2015 and also a direction to respondents 2 and 3 to grant a lien to the post held by the petitioners and to accord their no objection to the respondent No.1 for their repatriation. Mr. Aneja would state that the case of the petitioners is covered by the judgment of the Division Bench of this

Court in identical facts, the writ petition being ***W.P.(C) No. 2360/2015 Department of Telecommunications vs. Satya Prakash and Ors*** wherein, this Court has upheld the order of the Central Administrative Tribunal dated December 17, 2013 in OA No. 1872/2012 whereby, the Ministry of Defence was directed to grant a lien to the applicants (in the OA) on the post of Upper Division Clerks, which they were holding prior to their joining the new assignment.

5. On the other hand, Mr. Ankur Chhibber, learned counsel appearing for the respondent No.3 would submit that the petitioners have not challenged the letter issued by the respondent No.3 dated April 9, 2013 declining the request of the petitioners for grant of lien on the post of LDCs in the office of the respondent No.3. That apart, he states that the appointment of the petitioners was on permanent absorption basis and the appointment letter could not have had the stipulation of probation of two years. Prescribing such a stipulation was a mistake and the petitioners cannot take advantage of the same. That apart, it is his submission that such a stipulation has been removed from the terms of appointment.

6. Mr. Rakesh Kumar, learned counsel appearing for the respondent No.1 would make similar submissions. That apart, it is his submission that

the judgment of the Division Bench of this Court upholding the order of the Central Administrative Tribunal would not be applicable in the facts of this case, inasmuch as in the said case the appointment of the respondents therein was from one department of the Central Government (Ministry of Defence) to the another (Department of Telecommunications), which is not the case herein, inasmuch as the petitioners herein, while working under the District & Sessions Judge, Tis Hazari Courts, Delhi were appointed to the posts under the Ministry of Telecommunications.

7. Having heard the learned counsel for the parties, there is no dispute, when the terms of appointment were issued to the petitioners on May 20, 2011, the same clearly stipulated that the officer would be on probation for a period of two years from the date of joining. No doubt, it is the stand of the respondent No.1, that as soon as the matter came to the notice of the Department, the probation clause was rectified vide order February 18, 2013 stating all the officials absorbed under one time absorption process deemed to be the permanent employees of DoT from the date of appointment in the Department of Telecom. But before such corrective measure could be taken by the respondent No.1, the petitioners have expressed their intention of seeking retention of their lien, inasmuch as the first representation was

made by the petitioners was on May 18, 2012 followed by letters dated May 24, 2012 and August 10, 2012.

8. Having noted the submissions made by the learned counsel for the respondents, suffice to state, similar submissions made in the ***W.P.(C) No. 2360/2015 Department of Telecommunications vs. Satya Prakash and Ors.*** were considered by this Court, inasmuch as in para 5 of the judgment, the Division Bench noted as under:-

“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.”

9. That apart, the plea that the condition relating to two years probation period was a clerical mistake, the Division Bench holds as under:-

“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.”

10. On merit, the Division Bench has in paras 11 to 18 held as under:-

“11. In order to decide the controversy, we would like to refer to FR 13 and 14A, 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 lien 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 posts 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 been 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 been 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 be 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 also 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 effect 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.

11. Insofar as the plea of Mr. Chhibber that the petitioners have not

challenged the rejection of their request for retaining the lien by the respondent No.3 is concerned, suffice to state, the request of the petitioners for retention of their lien by the respondent No.3 was rejected vide letter dated April 9, 2013. Pursuant thereto, the petitioners have filed a writ petitions being W.P.(C) No. 3940/2013 and W.P.(C) No. 4630/2013, which were disposed of on July 10, 2013 and July 12, 2013 directing the respondent No.3 to pass a detailed and speaking order within six weeks. Even the order passed subsequent thereto on August 27, 2013 was the subject-matter of W.P.(C) No. 6171/2013, which was also disposed of, directing the respondent No.3 to pass a detailed and speaking order. Accordingly, the respondent No.3 issued rejection letter dated October 8, 2013 which was challenged in W.P.(C) No. 125/2014 which writ petition was transferred to the Central Administrative Tribunal and the TA being 1/2015 finally disposed of on July 3, 2015 permitting the petitioners to make fresh representation raising all grounds and directing the Department of Telecommunications to pass a speaking order. It is the order dated October 9, 2015 passed by the respondent No.1, which has been challenged in this writ petition with an additional prayer against respondents 2 and 3. The facts reveal, that the petitioners have been challenging the orders issued

either by respondent No.3 or respondent No.1 from time to time. It cannot be said that the petitioners at any point of time given up their claim for retention of their lien under respondent No.3. The plea of Mr.Chhibber is rejected.

12. The case of the petitioners is covered by the judgment of the Division Bench in *Department of Telecommunications vs. Satya Prakash and Ors (supra)*. The present petition is allowed. The order dated October 9, 2015 of the respondent No.1 is set aside. The respondent No.3 shall grant lien to the petitioners on the post held by them under it and accord no objection to the respondent No.1 for their repatriation. No costs.

CM No. 26795/2016

As I have allowed the writ petition, the present application is dismissed as infructuous.

V. KAMESWAR RAO, J

APRIL 19, 2017/ak