

REPORTABLE

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP (C) No. 617 of 2009

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Reserved on : April 16, 2009
Pronounced on : July 03, 2009

National Highways Authority of India

. . . Petitioner

through :

Mr. B. Datta, Addl. Solicitor
General with Mr. Jos Chiramel,
Advocate

VERSUS

Rajesh Gupta & Ors.

. . . Respondents

through :

Mr. Nidhesh Gupta, Sr. Adv.
with Mr. Vikram Saini, Advocate

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Rajesh Gupta, respondent No.1 in this writ petition, was the applicant in OA No. 572/2008, whereby he had challenged the promotions made by the National Highway Authority of India (for short 'NHAI'), to the post of Deputy General Manager (Finance and Accounts). He was also considered, but was not recommended for promotion, whereas respondent Nos. 2 to 8 got promotion on the recommendation of the Selection Committee. Though he challenged the selection process on various grounds, fundamental objection

raised by him was that the Selection Committee was improperly constituted as provisions of Regulation 11(3) of the NHAI (Recruitment, Seniority and Promotion) Regulations, 1996 (hereinafter referred to as 'Regulations') were not adhered to while constituting the Selection Committee for the aforesaid post, which falls in the category of Group-A post. The Tribunal has accepted his challenge and vide judgment dated 29.9.2008 set aside the recommendation of the Selection Committee and consequently the appointments made pursuant thereto are held as null and void. As the petitioner/NHAI feels aggrieved by that judgment, the present writ petition is preferred impugning the same.

2. Facts, in brief, which had given rise to the filing of the aforesaid OA by the respondent No.1 need to be recapitulated in the first instance.
3. The respondent No.1 joined NHAI as Manager (Finance & Accounts) in the year 1999. It was an open selection based on the recommendation of the Selection Committee in its meeting held on 12.3.1999 and 13.3.1999, which considered the candidature of all those who applied for the said post pursuant to advertisement dated 19.11.1998.
4. In the year 2004, advertisement was issued by the NHAI for various posts, including DGM (Finance & Accounts) to be filled by way of promotion/direct recruitment/deputation. Respondent No.1, with four years' service as Manager (Finance & Accounts), was also eligible for consideration to the aforesaid post by way of promotion. He,

thus, applied for this post. Total number of applications received were 37, which were scrutinized by the Selection Committee. Thereafter, Selection Committee held its meeting on 3.9.2004 to consider the candidature of those applicants. It recommended the panel of four candidates who had secured 80% marks or above, for appointment to the said post of DGM (F&A). Respondent No.1 was not in the said panel as he had secured only 72% marks and was placed at S.No. 6 in the list. The respondent No.1 made representation dated 16.11.2004 seeking review of his non-selection, which was turned down by the Competent Authority vide letter dated 25.1.2005. In the meantime, the Central Vigilance Commission, vide its letter dated 27.12.2004, advised NHAI to initiate penalty proceedings against the respondent No.1 with regard to excess payment to one M/s. Frank Advertisers. Show-cause notice was issued to the respondent No.1 and after eliciting his reply, as it was not found satisfactory, minor penalty of reprimand was imposed upon him by the Disciplinary Authority vide orders dated 23/24.06.2005. Another show-cause notice was issued thereafter, which resulted in warning letter dated 12.9.2005 advising him to be more careful in the discharge of his duties.

5. Two more posts of DGM (F&A) were advertised on 28.9.2005. Ten candidates were found eligible for consideration, including the respondent No.1 who had also applied for this post. The Selection Committee, which held its meeting on 21.11.2006 to consider those candidates, recommended three candidates for appointment who

had obtained 75% marks or more. Name of the respondent No.1 was at S.No. 4 as he had obtained only 50 marks out of 100. He made representation dated 2.1.2007 for reviewing his non-selection, which was turned down vide letter dated 24.1.2007 on the ground that Selection Committee(s) had not recommended him for promotion.

6. On 25.11.2006, another advertisement was issued for various posts, including two posts of DGM (F&A) on deputation basis and were filled up. He represented against this advertisement vide representation dated 24.2.2007 questioning the mode of selection on deputation basis. This representation was also turned down on 5.6.2007. Thereafter Selection Committee meeting was held on 8.6.2007 and two candidates for appointment on deputation basis were recommended.
7. Few months thereafter, i.e. on 19.2.2008, the respondent No.1 approached the Tribunal and filed OA under Section 19 of the Administrative Tribunal Act, 1985 which has been allowed vide impugned judgment dated 29.9.2008, as already noted above. The Tribunal has quashed and set aside the selections as per the recommendations of the Selection Committees dated 3.9.2004, 21.11.2006 and 8.6.2007 on the ground that the Selection Committees were not properly constituted.

8. DGM (F&A) is Group-A post and the Selection Committee to be constituted for such post is regulated by Regulation 11(3) of the Regulations, 1996 which reads as under :-

“In the case of selection of candidates to a Group “A” post, the Chairman shall be Presiding Officer thereof and the Member (Admn.), the Director General (Road Development) or the Assistant Director General nominated by him and another Member of the Authority nominated by the Chairman shall be its members.”

9. As per the aforesaid provision, apart from the Chairman as Presiding Officer, the Selection Committee is to consist of the following members :-

- (i) Member (Administration)
- (ii) Director General (Road Development) or Assistant Director General nominated by him
- (iii) Member of the NHAI nominated by the Chairman.

However, in the Selection Committees, Chief Engineer was included as a representative of the Director General (Road Development).

10. The grievance of the respondent No.1 was that the Chief Engineer could not have been included on the ground that DG (RD) could nominate an Assistant Director General only. Respondent No.1 had also laid challenge to the proceedings of the Selection Committee held on 21.11.2006 on the ground that Mr. P. Sudheer Kumar, CCA had also signed those minutes though he was not eligible to be on the Committee Panel as per Rules and there was no verification provided by the NHAI as to in what capacity he was co-opted in the

Selection Committee contrary to the statutory regulations. Another irregularity/illegality which, according to the respondent No.1, cropped in was that one Dr. Satyanarayan Dash, who was Member (Finance) has signed the minutes dated 21.11.2006 though he was not actually present at the Selection Committee meeting. Further, General Manager (Finance), who was one of the members of the Selection Committee, had not signed those minutes.

11. The Selection was also challenged on various other grounds which are noted by the learned Tribunal. However, we find from the judgment that main focus of the Tribunal remained on the issue as to whether the Selection Committee was properly constituted or not and the proceedings of the Selection Committees are primarily quashed on this ground on finding them to be improperly constituted.
12. Mr. B. Datta, learned Additional Solicitor General of India, appearing for NHAI, made a scathing criticism of the impugned judgment on the ground that various aspects argued by the petitioner justifying the proceedings of the Selection Committee were not properly appreciated in their true perspective and a very myopic approach was adopted by the Tribunal while dealing with the entire matter. His submission in respect of the following grounds on which selections are set aside are taken note of as under, while dealing with the same simultaneously :-
 - (i) Selection Committee not constituted as per Regulation 11(3).

(ii) Dr. Dash, Member, was not present in the Selection Committee meeting held on 21.11.2006 and instead it was attended by the General Manager (Finance).

13. Submission of Mr. Datta was that following defence was raised by the NHAI before the Tribunal :-

- (i) The Chief Engineer who was the nominee of DG (RD) was of the Joint Secretary level, much above DGM (Finance);
- (ii) There was no post of DG (RD) in the year 2004 and the post of ADG (RD) was unavailable; and
- (iii) Dr. Dash was actually present and he has appended his signatures to the minutes.

His argued that the Tribunal's finding against the constitution of the Selection Committee is not legal or valid, as (a) there was no DG (RD) in the year 2004, (b) there was no post of Assistant DG (RD), and (c) the Chief Engineer was much higher in grade than Assistant DG (RD), which contentions of the petitioner, though referred to in the judgment, have not been considered by the Tribunal. Further, DG (RD) is an officer of the Central Government and NHAI is bound by the directions of the Central Government under Section 33 of the NHAI Act and as per Section 8(c) of the NHAI Act, even if there was any irregularity, which is otherwise denied, provided that the action is *bona fide* and without affecting the merits of the case, cannot be challenged. He submitted that it is also noteworthy that as per Regulation 12(2), the Selection

Committee is only a recommending body, and as per Regulation 11(3) the Chairman of NHAI who is the appointing authority being the Chairperson of the Selection Committee, the Committee cannot be above the Chairman. In any case, the constitution of the Committee was in uniform manner including in the case of the initial appointment of the respondent No.1 as Manager (Finance & Accounts) and he cannot have a grievance in this regard, as he is not prejudicially affected.

14. From the aforesaid argument of learned counsel for the NHAI, it is clear that there is an acceptance of the fact that the Selection Committee was not constituted in accordance with the requirements stipulated in Regulation 11(3) of the Regulations. In fact, even in para 5 of the impugned judgment it was conceded before the Tribunal also that so far as constitution of the Selection Committee is concerned, that was not as per the aforesaid regulations. However, NHAI is trying to provide the justification for not doing so.
15. As noted above, as per Regulation 11(3), one of the Members in the Selection Committee should have been DG (RD) or ADG nominated by him. NHAI claims that there was no DG (RD) in the year 2004. This, according to the respondent No.1, is a false stand taken as it is factually incorrect that the post of DG (RD) was lying vacant in the year 2004. In respect of this, Mr. Nidhesh Gupta, learned senior counsel appearing for the respondent No.1 drew our attention to the following office orders :-

- (a) Office Order No. 5/2004 dated 30.1.2004 as per which one Shri Indu Prakash, Chief Engineer, was appointed as DG (RD) and Special Secretary in the Ministry of Road Transport and Highways on ad-hoc basis for a period of three months.
- (b) Order dated 20.10.2004, which is a relieving order of Shri Indu Prakash, Chief Engineer, in the Ministry of Shipping, Road Transport and Highways because of his *“currently officiating as DG (RD) and Special Secretary on ad-hoc basis”*.
- (c) Office Order No. 87/2004 dated 29.12.2004 whereby Shri Indu Prakash, while working as Member (Technical) in NHAI was given additional charge of the post of DG (RD) till 26.1.2005 or until further orders, whichever event occurs earlier.

16. Learned counsel for the petitioner NHAI could not controvert the veracity of the aforesaid office orders which show that Mr. Indu Prakash came as DG (RD) on deputation to NHAI in January 2004 and remained in this capacity in the entire year, at least. Therefore, when DG (RD) was available, the justification for including another Chief Engineer is not tenable. The justification that NHAI is bound by the directions of the Central Government under Section 33 of the NHAI Act is of no consequence as it was the duty of the NHAI to point out to the Central Government that nomination of the Chief Engineer was not in accordance with Regulation 11(3). Section 33 stipulates that the NHAI *“shall in the discharge of its functions and duties under this Act, be bound by such directions on questions of*

policy....”. It is only in matters concerning the policy that the NHAI is bound and not on other matters. In any case, the petitioner is bound to follow statutory provisions. Further, matters concerning recruitment etc. are provided in self contained Regulations of 1996. It was urged that the proceedings of the petitioner will not be invalidated on account of the Selection Committee not being properly constituted. Reliance was placed on Section 8(c). The said proposition is incorrect since Section 8(c) of the Act provides that any irregularity in the procedure adopted by the petitioner which does not affect the merits of the case, will not be invalidated for the said reason. It is submitted that the said provision concerns the petitioner. The Authority is defined in Section 3(3). The merits of the case have also been affected. Therefore, the said Section 8 does not help the case of the petitioner as it has no application at all.

17. Merely because the Selection Committee is a recommendatory body and the Chairman is the appointment authority, would not offer a valid explanation for not constituting the said recommendatory body, i.e. the Selection Committee in accordance with the statutory rules. Likewise, the NHAI cannot plead estoppel on the ground that similar Selection Committee was constituted when the respondent No.1 was appointed as Manager (Finance & Accounts). The inclusion of Chief Engineer as the representative of DG (RD) and Special Secretary to the Minister of State, Road Transport and Highways was also sought to be justified on the ground that the Chief Engineer was of Joint Secretary level and, thus, higher in rank than DGM (F&A). It

was also pointed out that the post of DG (RD) had been lying vacant and there was no incumbent upon the said post and, therefore, the Director General or his nominee could not be taken in the Selection Committee because of their non-availability. The Tribunal, however, did not buy this argument and rejected the same in the following manner :-

“4. It is note worthy that our attention has not been drawn to any material on record in support of the contention that authorization by DG (RD) of a senior officer other than ADG (RD) is provided for by the statutory regulations in that regard. Nor is it the respondents case that the regulations envisage inclusion on the Selection Committee of the other persons as well, outside the provisions of regulation 11(3).

5. The learned counsel for the respondents has described the background in which selections were being held in NHAI, which has an important mandate for development of the infrastructure facility in the country and good progress on the task of 4/6 laning of Highways is expected from it, being in the public eye. Many selections have taken place over time and in view of the need to uphold standards, certain practices have come to be followed in keeping with propriety and good faith to discharge the work and responsibilities entrusted to NHAI in furtherance of its objectives. It is, however, fairly conceded that it may not be possible to successfully defend the constitution of the Selection Committees under challenge in the light of the regulations referred to.”

18. In para 7, this legal position is supported with the aid of two judgments of the Supreme Court in the cases of *Sardara Singh and Ors. v. State of Punjab & Ors.*, AIR 1991 SC 2248 and *Ashok Kumar Sankar v. Union of India & Ors.*, (2007) 4 SCC 54.

It is, thus, clear that the Selection Committee was not constituted in accordance with Regulation 11(3) of the Regulations.

19. Another argument of the respondent No.1 before the Tribunal was that Regulations lay down an eligibility requirement of experience of

at least 12 years service in a responsible position in the Finance/Accounts Department related to major infrastructural project of the Government of India or a Government undertaking or an autonomous body or a commercial organization of repute, for the post of DGM (F&A). However, 3 out of 4 candidates who were selected by the Selection Committee on 3.9.2004 did not meet this requirement. The petitioner had countered this argument on the ground that the aforesaid requirement was relaxed even in the case of the respondent No.1 himself when he was inducted in NHAI as Manager (F&A). This has been followed keeping in view of non-availability of candidates over the years with such experience of major infrastructural projects. The Tribunal refused to accept this kind of justification put forthwith by the NHAI on the premise that the requirements of statutory rules and regulations spelling out eligibility conditions for recruitment could not be overcome in this manner. It was found that Regulation 6(1) of the Regulations, which contains provisions for relaxation limits the power only to relax upper age limit and there was no other power of relaxation in general or specific especially in respect of the eligibility conditions of experience. Taking note of the principle laid down in the case of *Secretary, A.P. Public Service Commission v. B. Swapna & Ors.*, (2005) 4 SCC 154 and *Shainda Hasan v. State of Uttar Pradesh & Ors.*, (1990) 3 SCC 48, the Tribunal pointed out that the Selection Committee was not justified in relaxing the qualifications and

experience in favour of a candidate without reserving that right to itself in the advertisement.

20. Insofar as this finding of the Tribunal that the Selection Committee had no power to relax the eligibility condition *qua* experience, Mr. Datta submitted that considering the mandate of NHAI for development of infrastructure, certain practices have come to be followed in keeping with propriety and good faith in discharge of the work of NHAI and even in the case of respondent No.1 when he applied for the post of Manager (Finance & Accounts) such criterion was relaxed keeping in mind non-availability over the years of candidates with such experience of major infrastructural projects. He argued that the Tribunal's finding against the relaxation of experience in infrastructure related work is also not legal or valid, as in the absence of such relaxation there would not have been eligible candidates for the post and, therefore, there was uniform relaxation in all cases. There was similar relaxation in the case of respondent No.1 as well at the initial appointment of respondent No.1 as Manager (Finance & Accounts) and having taken advantage of the same, he cannot set a different set of standards for other candidates so as to gain unfair advantage in the matter of selection to the promotion post, and he is not prejudicially affected, whereas only a person who had the requisite infrastructural experience could be aggrieved by such relaxation and not respondent No.1 who did not have the same.

21. Again, it is accepted that the selected candidates did not fulfil the prescribed qualification, namely, 12 years of experience in major infrastructural projects. This is an essential qualification, as is clear from the relevant provision in the regulation which provides following educational and other qualifications for the post of DGM and reads as under :-

**“Educational Qualification
Essential :**

- (i) Degree of a recognized University,
 - (ii) Professional qualification such as :-
 - (a) Final exam of the Institute of Chartered Accountants of India or
 - (b) Final exam of the Institute of Cost and Works Accountant of India
- OR
- (c) Degree in Business Management with Finance as the major subject
- OR
- (iii) Member of any organized Accounts Service of the Central Government.

Experience

At least 12 years service in a responsible position in the finance/accounts Deptt. related to major infrastructural project of the Govt. of India or a Govt. Undertaking or an Autonomous Body or a Commercial Organisation of repute.

Desirable

Should be well versed with the Financial Rules and Accounting procedures to be followed for major projects in particular; approval of tenders, processing of contractor's claims and other contractual matters.”

22. Qualifications are classified in two categories, namely, essential and desirable. Insofar as experience of 12 years of service is concerned, it is an essential qualification. The provision for relaxation, on which

reliance is placed is Regulation 6 of the Regulations and reads as under :-

“6. Relaxation – (1) The upper age limit specified in column 6 of the Schedule may be relaxed, in the case of officers and employees by the Chairman upto a maximum of three years, where the minimum experience specified in column 7 of the said Schedule is 10 years or more and upto a maximum of two years where the minimum experience specified in column 7 is 5 to 9 years.”

This permits giving relaxation in the upper age limit under certain circumstances. Thus, there is no provision empowering any of the authorities in NHAI, including the Selection Committee, to relax the essential conditions of qualifications and experience. Once we proceed on this factual premise, legal consequence which would follow is that the Selection Committee cannot relax such essential qualifications and, therefore, consideration of cases of those candidates who did not fulfil this qualification was bad in law. Some of the judgments noted by the Tribunal in this behalf have already been mentioned. We may reproduce the relevant portions :-

(a) *Secy., A.P. Public Service Comn. v. B. Swapna & Ors.*, (2005) 4 SCC 154

“15. Another aspect which this Court has highlighted is scope for relaxation of norms. Although the Court must look with respect upon the performance of duties by experts in the respective fields, it cannot abdicate its functions of ushering in a society based on rule of law. Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated. In *P.K. Ramachandra Iyer v. Union of India*, (1984) 2 SCC 141, this Court held that once it is established that there is no power to relax essential qualification, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised.”

(b) *Shainda Hasan v. State of U.P. & Ors.*,

“5. The High Court has rightly held the relaxation granted by the Selection Committee to be arbitrary. In the absence of statutory rules providing power of relaxation, the advertisement must indicate that the Selection Committee/appointing authority has the power to relax the qualifications. Regarding “working knowledge of Urdu” we do not agree with the High Court that the said qualification is unjust. The college being a Muslim minority institution prescribing the said qualification for the post of Principal, is in conformity with the object of establishing the institution.

(c) *Sukhdev Singh & Ors. v. Bhagatram Sardar Singh & Anr.*,
(1975) 1 SCC 421

“23. The noticeable feature in that these statutory bodies have no free hand in framing the conditions and terms of service of their employees. These statutory bodies are bound to apply the terms and conditions as laid down the regulations. The statutory bodies are not free to make such terms as they think fit and proper. Regulations prescribe the terms of appointment, conditions of service and procedure for dismissing employees. These regulations in the statutes are described as "status fetters on freedom of contract". The Oil and Natural Gas Commission Act in Section 12 specifically enacts that the terms and conditions of the employees may be such as may be provided by regulations. There is a legal compulsion on the Commission to comply with the regulations. Any breach of such compliance would be a breach of the regulations which are statutory provisions. In other statutes under consideration, viz., the Life Insurance Corporation Act and the Industrial Finance Corporation Act though there is no specific provision comparable to Section 12 of the 1959 Act the terms and conditions of employment and conditions of service are provided for by regulations. These regulations are not only binding on the authorities but also on the public.”

23. In the wake of this legal position, justification given for relaxation in experience would not be of any help to the petitioner. Even if we accept that in the absence of such relaxation there would not have been eligible candidates for the post and, therefore, action of the NHAI in giving relaxation of uniform basis in all cases was *bona fide*, such a *bona fide* action would not validate an illegal action. Law mandates that when a particular procedure is prescribed, executive

authority is bound to act as per the said procedure or not at all. If NHAI is facing difficulty in getting the candidates as per the qualifications prescribed in the Rule, appropriate course of action is to either amend the eligibility conditions or introduce specific provision empowering the competent authority to relax the existing conditions. Such administrative difficulties cannot be a ground to ignore the statutory rules. So long as they exist, they have to be followed. It is misconceived on the part of the petitioner to contend that the respondent No.1 is not prejudicially affected. In fact, for the post of DGM (F&A) four years of experience as Manager (F&A) is required, which the respondent No.1 fulfilled and his averment that he was the only eligible candidate could not be refuted by the petitioner.

24. Regulation 12(2) of the Regulations provides two channels for appointment to the post of DGM (F&A), namely, promotion channel and deputation channel. It, however appears that requirements of these two separate channels was not followed by the Selection Committee.
25. The aforesaid discussion leads us to the conclusion that the findings of the Tribunal that the Selection Committee was not constituted properly and that it had no power to relax the conditions are in order and call for no interference.
26. At this stage, we may deal with two other submissions of Mr. Datta challenging the *locus standi* of the respondent No.1 to file the OA.

His first objection to the maintainability of the said OA was that the respondent No.1 having participated in the selection process was precluded from challenging the same. However, this principle is applicable in those circumstances where the concerned candidate is made aware of the selection procedure and thereafter he participates in the same with full knowledge. In the instant case, the respondent No.1 could not have known about the constitution of the Selection Committee before hand and he states that he came to know only after he participated in the selection process/interview. It was submitted by Mr. Nidesh Gupta that the respondent No.1 was at most made aware that the Selection Committee was not properly constituted; that the persons selected did not have the necessary qualifications; that the panel, as required under the Regulations, would not be prepared by the Selection Committee; that the Selection Committee will introduce the new minimum cut off during the course of the interview itself. It is also pointed out that the respondent No.1, on coming to know of these illegalities, had even represented against the same. This contention, therefore, of the NHAI deserves rejection.

27. An argument *in terrorem* was advanced by the learned ASG, namely the impugned order would set aside large number of appointments. It was rightly pointed out by the leaned counsel for the respondent No.1 that the instant case was only concerned with the selection to the post of DGM (F&A). Moreover, most of the concerned persons who came on deputation by those selections have already left NHAI,

as per the admission of NHA in writ petition itself (Ground – W). Only three persons, namely, respondent Nos. 2, 5 & 7, are going to be affected. Significantly, they have not even approached the Court challenging the judgment of the Tribunal and, thus, it appears that they have accepted the judgment. Furthermore, when their appointments are found to be illegal as they did not even fulfil the requisite qualifications, these have to be treated as *non est*, as held in the following cases:

- (a) ***Secy., State of Karnataka & Ors. v. Umadevi & Ors.***
(2006) 4 SCC 1

“43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any

right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.”

(b) ***Binod Kr. Gupta & Ors. v. Ram Ashray Mahoto & Ors.***, (2005) 4 SCC 209

“13. The “advertisement” was no “advertisement” as required by the High Court. Without adequate notice no fair opportunity was given to others who might have applied. Apart from this, it does not appear from the records that there was any selection procedure followed at all. There is no explanation why the Selection Committee had been bypassed nor any acceptable reason why the persons who had applied as far back as in 1986 were ignored. This singular lack of transparency supports the finding of the High Court that the appointments were not made bona fide. The District Judge, who was ultimately responsible for the appointment of Class IV staff violated all norms in making the appointments. It is regrettable that the instructions of the High Court were disregarded with impunity and a procedure evolved for appointment which cannot be said to be in any way fair or above board. The submission of the appellants that they had been validly appointed is in the circumstances unacceptable. Nor can be accede to their prayer to continue in service. No doubt, at the time of issuance of the notice on the special leave petition, this Court had restrained the termination of services of the appellants. However, having regard to the facts of the case as have emerged, we are of the opinion that this Court cannot be called upon to sustain such an obvious disregard of the law and principles of conduct according to which every judge and anyone connected with the judicial system are required to function. If we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment. The High Court has been more than generous in allowing the appellants to participate in any fresh selection procedure as may be held and in granting a relaxation of the age limit.”

28. The present case is an eye opener for the NHAI which has to put its

house in order by following the procedure as laid down in the

Regulations or else is supposed to take remedial measures to cater to the ground realities. In any case, once illegalities are found in the selection process, it is difficult to validate the same. We, thus, are not inclined to interfere with the impugned judgment of the Tribunal.

29. Finding no merit in this petition, we dismiss the same with costs quantified at Rs. 10,000/-.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

July 03, 2009
nsk