

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

**OA No. 562 of 2015
MA No. 1033 of 2019**

Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)

Nila Prasd Tanty, aged about 38 years, S/o Late Mhesh Prasad Tanty, of village Jalda 'A' Block, PO-Jalda C Block, Rourkela-769043, PS-Raghunathpalli, Dist.-Sundergarh at present removed from the post of GDS Rourkela-Khuntaigaon Line, under Sundergarh Division.

.....Applicant

VERSUS

1. Union of India represented through its Secretary-cum-Director General (Posts), Dak Bhawan, New Delhi-110001.
2. Postmaster General, Sambalpur Region, At/PO-Samblpur-768001, Dist.-Sambalpur.
3. Senior Supdt. of Post Offices, Sundergarh Division, At/PO-Sundergarh-770001.
4. Inspector of Posts, Rourkela West Sub Division, Rourkela-769012.
5. Satyabrat Pradhan aged about 24 years, S/o Prafulla Kumar Pradhan presently working as GDS Mail Carrier, Rourkela-Khuntagaon Line, At/PO-Rourkela-2, Dist.-Sundergarh

.....Respondents

For the applicant : Mr.T.Rath, counsel

For the respondents: Mr.G.R.Verma, counsel

Heard & reserved on : 11.2.2020 Order on : 13.05.2020

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

The OA has been filed seeking the following reliefs as in para 8 of the OA:

- “(a) To quash the orders contained in Annexure-A/8 & A/9.
- (b) That the Respondents may please be directed to issue regular appointment order to the applicant by ignoring artificial breaks in terms of the judgment of the Hon’ble Apex Court in the case of Sri Rabinarayan Mohapatra –vs- State of Orissa & Ors. AIR 1991 SC 1286.
- (c) Call for the file dealing with the engagement of Respondent No.4 and quash such order, if any, engaging the Respondent No.4 on daily wage basis.
- (d) And pass an appropriate orders as may be deemed fit and proper in the facts and circumstances of the case and allow the OA with cost.”

2. The applicant had filed OA No. 204/15 being aggrieved by the fact that his representation dated 1.1.2015 (Annexure-A/5) has not been considered by the respondents. That OA was disposed of vide order dated 22.4.2015 (Annexure-A/7) directing the respondents to dispose of his representation and till then, no coercive action against the applicant will be taken. It is alleged in the OA (para 4.12) that the respondent No. 4 disengaged the applicant (Annexure-A/8) and engaged another person in his place. The applicant filed this OA after rejection of his representation vide order dated 21.7.2015 (Annexure-A/9), which is impugned in this OA.

3. This Tribunal considered the prayer for interim relief and vide order dated 3.12.2015, the following interim order was passed:-

“Law is well settled that a casual hand cannot be replaced by another causal hand. Keeping in mind the said dicta, I direct the Respondents that if the post is still existing then the applicant may be re-engaged until further orders.”

Respondents, vide the MA No. 120/16, informed that the applicant has been re-engaged in the post on 23.1.2016. They have also filed the MA No. 1033/19 to vacate the said interim order and the MA was considered alongwith the OA and both are being disposed of by this order.

4. Regarding the facts, the applicant in his representation dated 1.1.2015 (A/5) has stated as under:-

“With due respect and humble submissions, I Sri N.P.Tanty, GDS Mail Carrier, Rourkela-Khutgaon line beg to lay before you the following few lines for kind consideration and favourable orders.

1. That I was working as Driver, Rourkela MMS since 2007 on daily wages basis.
2. That I was appointed in the vacant post of GDS Mail Carrier Rourkela-Khutgaon Lines with effect from 22.07.2011 to till date.
3. That due to provisional appointment, I have been paid in the minimum TRCA and deprived from other service benefits of GDS like increment and leave etc.
4. That I have approached the IPOs west Sub Division, Rourkela several times for my regular appointment order, but he did not issue such regular appointment order so far.

Under the above circumstances, I pray you honour to kindly issue order to the IPOs for my regular appointment in the aforesaid post at an early date and obliged.”

5. The impugned speaking order dated 21.7.2015 (A/9) states as under:-

“Two number of GDS working in this Mail line on alternate day carrying mails from Rourkela to Bonaigarh via Lathikata, Lahunipara mails of Gurundia Line being exchanged at Narendra Bus Stop and mails of Kalta and Koira Line being exchanged at Lahunipara sub Post Office. The work load of GDS exceeds more than 8 hours per day from 7.00 AM morning to 6.00 PM evening. Combination of duty with other GDS was not feasible as the work load more than 8 hours. Further no surplus GDS available in this unit for redeployment against vacant GDS post of GDSTMP Rourkela-Khutgaon Line. Under such compelling circumstances provisional appointment was made against the said post by offering the same to Sri Nila Prasad Tanty.

In fact the applicant Sri Nila Prasad Tanty has neither performed the duty GDSTMP Rourkela-Khutgaon Line nor driver, Rourkela MMS Van for a

continuous period, before completion of 90 days of provisional engagement period he has been relieved from the post.

1. That his representation dated 01.01.2015 addressed to this office, which he claims to have sent to this office, has not been received at this office, which he claims to have sent to this office, has not been received at this office at any point of time prior to his filling case before the Hon'ble Tribunal.
2. Elaborate instructions for making provisional arrangements were issued vide Directorate letter No.17-115/2001-GDS dated 21 Oct 2002 which was reiterated vide Directorate letter No.17-103/2007-GDS dated 06 Jan 2012 as under :-

"In case of provisional arrangements, such appointments should be resorted to in case where the GDS is unable, quite unexpectedly, to undertake his duties due to his own actions (unauthorized absence, fraud, misappropriation, etc.) due to circumstances beyond his control like sudden illness/accident/death or because the Department does not want him/her to continue (due to reasons of misconduct/dismissal/removal/put off duty, etc.). In other cases, action should be taken well in advance to fill up the post of on regular basis."

In the instant case, the incumbent promoted on 20.04.2011 it was inevitable to engage a person against the post to discharge the work of the said post as discussed above.

No recruitment formalities have been adopted while engaging the applicant in the said post. For regular engagement "Open Notification" for wide publicity and requisition to the Local Employment Exchange for recruitment is essential. Moreover, the applicant was made to understand that "provisional appointment will be terminated when regular appointment is made and he shall have no claim for appointment to any post."

The inspector of Posts, Rourkela West Sub division also mentioned in the said memo that he "reserves the right to terminate the provisional appointment at any time before the period mentioned in the para-1" of his memo on every occasion.

In his representation which is annexed as Annexure A/3 in the O.A. No.260/204 of 2015 Sri Nila Prasad Tanty has submitted that he has been working as Driver, Rourkela MMS Van since 2007 on daily wages basis and he has been appointed as GDSTMP Rourkela-Khuntgaon Line since 22.07.2011 and continuing in the said post till date. That he has been paid minimum TRCA and deprived of the maximum TRCA due to provisional appointment. That he has approached the Inspector of Posts, Rourkela West Sub division several times for regular appointment order but he did not issue such regular appointment order so far. In view of the discussions made above paras the applicant is not entitled for regular absorption in the said post for the reasons no recruitment procedure has been adopted by the subdivisional head; the subdivisional head has issued provisional memo from time to time resorting to break after 89 days of every such arrangement; that the subdivisional head has duly mentioned the condition that he reserves the right to terminate the provisional appointment at any time before the period mentioned in the para-1 of the provisional memo without notice and without assigning any reason. His engagement as GDSTMP Rourkela-Khuntgaon Line as provisional basis is not approved by the competent authority. His name was also not sponsored by the local employment exchange. He has not rendered approved and continuous service. In the said premises the claim of Sri Nila Prasad Tanty for regular appointment (Absorption) in the said post is not tenable and thus the representation dated 01.01.2015 of Sri Nila Prasad Tanty is disposed of."

6. The applicant has urged the following ground in favour of his claim for regular appointment:-

"That the applicant was appointed provisionally for more than 7 (Seven) years continuously and entitled to regular appointment in terms of the order contained D.G.(Posts) letter No 43-4/77-Pen dated 18.05.1979 under **Annexure A/6. Therefore, the present order of termination from service passed vide Annexure A/8 having been**

passed in violation of the aforesaid order of the Govt. is liable to be quashed by this Hon'ble Tribunal."

7. In the Counter, the above ground has been opposed by stating as under (para 24):-

"24. That in reply to averments made by the applicant in para – 5.4 of the O.A., it is humbly submitted that the applicant himself has submitted the guidelines for provisional appointment annexed at Annexure – A/6 of the O.A. wherein the Memo for provisional appointment has been prescribed vide D.G.P.& T letter No. 43-4/77-Pen dated 18.05.1979 in which it has been mentioned in para-3 that the appointing authority reserves the right to terminate provisional engagement at any time before completion of the term the period mentioned in para-1. The provisional engagement memo was issued to applicant by Respondent No.4 accordingly. Hence the perception of the applicant that the memo is illegal is not correct. In the instant case the applicant has not been engaged for a continuous period and thus his plea that he was worked continuously for a period exceeding three years is not acceptable."

8. Heard learned counsel for the applicant who submitted that the applicant was working as GDS for more than 3 years except for one day breaks in between the periods and that as per the judgment of Hon'ble Apex Court in the case of Rabi Narayan Moahapatra vs. State of Orissa and Others (1991) 2 SCC 599, one day breaks are to be ignored and the engagement is to be treated as continuous. Then it was submitted that the applicant wants the benefit of the circular dated 18.5.1979 (Annexure-A/6 of the OA). He also argued that the respondents' action to replace the applicant by another provisional GDS is not permissible under law. He also submitted that as stated in para 4(8) of the OA, he has been engaged for more than three years. A written note of submissions has also been filed by learned counsel for the applicant.

9. Heard learned counsel for the respondents who argued that the circular at Annexure-A/6 is not applicable to the applicant who has not worked continuously. It was also submitted that as per the circular at Annexure-R/2, revised procedure for selection of GDS has been issued and the applicant has never applied in response to the advertisement and he is also not a matriculate which is the minimum qualification required for the post of GDS. A written note of submissions has also been filed by the respondents' counsel, stating that the applicant has not worked for about 335 days as driver between 2011 and 2015 as per the documents furnished by the applicant in the OA.

10. With due regard to the submissions as well as the pleadings by both the parties, only issue to be decided is whether the circular at Annexure-A/6 of the DG, Posts will be applicable to the applicant. The paragraph 2 of this circular dated 18.5.1979 (A/6) states as under:-

"Efforts should be made to give alternative employment to ED Agents who are appointed provisionally and subsequently discharged from service due to administrative reasons, if at the time of discharge they had put in not less than three years' continuous approved service. In such cases, their names

should be included in the waiting list of ED Agents discharged from service, prescribed in D.G.P. & T., Letter No.43-4/77-Pen., dated 23.2.1979.”

11. The applicant claims in para 4.1 of the OA that he was engaged from 2007 as a driver on daily wage basis and such contention has not been specifically denied. It is stated in Counter that the applicant was first engaged as GDSMP, Rourkela-Khuntgaon initially for a period of 89 days on 22.7.2011 till 18.10.2011 and that the applicant was never engaged for a continuous period as claimed in the OA. It is clear that the applicant has worked as GDSMP, Khuntgaon or driver since 22.7.2011, except for some breaks for the periods as would be seen from the copy of the orders at Annexure-A/3). The respondents have submitted that the applicant has worked for about 335 days as driver from the documents furnished in the OA. Although the respondents have claimed that the applicant was not continuously engaged as GDS for more than three years, but the details of his engagement with the break periods have not been furnished.

12. Applicant's counsel cited the judgment in the case of Rabi Narayan Mohapatra (supra) in which the petitioner was engaged as a teacher for 89 days and extended after one day break. The disputes in that case related to the entitlement for salary for the summer vacation period during which there was break in the engagement of the petitioner and for the benefit of the Orissa Aided Educational Institution (Appointment of Teachers Validation) Act, 1989 by which the irregular appointment of some of the teachers was validated. With that factual background, it was held that the petitioner will be entitled for the benefit of the regular appointment as per the aforesaid Act and also for the salary during the summer vacation ignoring the break periods in his engagement. Clearly, the cited case is factually distinguishable.

13. The applicant has also cited the judgment in the case of Kartik Chandra Panda (supra) in which it was held by Hon'ble Orissa High Court that an ad hoc/temporary employee should not be replaced by another temporary/ad hoc employee by referring to the judgment of Hon'ble Apex Court in the case of State of Haryana and others vs. Piara Singh and others AIR 1992 SC 2130 and the order of disengagement of the petitioner was quashed.

14. Respondents' counsel has cited the judgment in the case of Upendra Singh vs. State of Bihar and others (2018) 3 SCC 680 in which the regularization of service of the appellant as regular employee of the University was not allowed after the college under which he was working, became a constituent college of the University and the grounds cited for not allowing the claim were that he was not appointed through selection committee through advertisement as per the rules. The case of the appellant was not accepted by

Hon'ble Apex Court in that case after applying the ratio of the judgment in the case of State of Karnataka vs. Umadevi since the initial appointment was not as per the rules. The cited judgment will not be helpful for the respondents in view of the circular dated 18.05.1979(Annexure-A/6) under which the provisionally appointed GDSs are entitled to some benefits.

15. Learned counsel for the respondents has cited the judgment of Hon'ble High Court in the case of Kadambini Samantaray & others vs. State of Orissa & others in which the petitioners were found to be not having the minimum eligibility conditions stipulated in the advertisement for walk in interview for which it was held that their engagement was illegal and the writ petitions were dismissed. When the applicant was engaged provisionally as GDS, he was not selected on the basis of any advertisement specifying the eligibility conditions. He was appointed as a GDS provisionally due to available work load as stated in the impugned order dated 21.7.2015 (A/9) and nothing has been stated in the aforesaid impugned order about the minimum eligibility condition for engagement of the applicant as GDS. Hence, the cited judgment will not be helpful for the respondents.

16. Regarding continuous engagement, the respondents have shown that the applicant was not engaged continuously as a driver. But about his engagement as a GDS, it has been simply stated in the impugned order dated 21.7.2015 (A/9) that the applicant "has not rendered approved and continuous service," without furnishing any details in support of such contentions. Hence, from the facts and circumstances on record, the applicant has worked as GDS for continuously from 2011 till 22.4.2015 when he was disengaged by the respondent No. 4. Even if the period the applicant has worked as GDS by virtue of the interim order dated 3.12.2015 of this Tribunal passed in this OA is ignored, then also the applicant has completed three years of engagement as GDS and this period is to be treated as continuous but for the breaks in between two periods, which are to be ignored since no details of such break periods have been furnished by the respondents in their pleadings. Hence, we are unable to agree with the contentions of the respondents that the applicant was not engaged continuously for more than three years as GDS. As a result, the applicant will be entitled for consideration as per the provisions of the circular dated 18.5.1979 (Annexure-A/6 of the OA), which was not done by the respondents before passing the order dated 21.7.2015 (A/9). Hence, the said order is not sustainable under law.

17. In the circumstances, the impugned order dated 21.7.2015 (Annexure-A/9 of the OA) is set aside with a direction to the respondent No.3/competent authority to re-consider the applicant's case in accordance with the circular

dated 18.5.1979 (Annexure-A/6 of the OA) and communicate his decision to the applicant through a speaking order within three months from the date of receipt of a copy of this order and till then, the status quo of the applicant's engagement as a GDS will be maintained.

18. The OA is allowed as above. No order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath