CENTRAL ADMINISTRATIVE TRIBUNAL

MADRAS BENCH

OA/310/000 76/2018

Dated Wednesday, the 11th day of March, 2020

PRESENT

Hon'ble Mr.T.Jacob, Member (A)

N.Mahalingam,
S/o Narayanan,
No.AJ10/137,
Sankaran kudiyiruppu,
Santhankulam – 628 704 ....Applicant

(By Advocate M/S S.Ramaswamyrajarajan)

Vs

1. Union of India,
Rep by The Chief Postmaster General,
Tamil Nadu Circle,
Chennai – 600 002.

2. The superintendent of Post Offices,
Tuticorin Division,
Tuticorin – 628 001. ....Respondents

(By Advocate Mr.K.Rajendran)

ORDER

(Pronounced by Hon'ble Mr. T. Jacob, Member (A))

The applicant has filed this OA under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

> "i. To direct the respondent to bring the applicant under Old Pension Scheme taking into account the year of vacancy to the Postman Cadre i.e., vacancy year 2002, to grant retirement / pensionary benefits and
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> ii. To direct the respondents to refund the entire amount which was deducted from his pay and allowances towards the pension contribution under New Pension Scheme and
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> iii. To pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case with costs."

2. The brief facts of the case as submitted by the applicant are as follows:

The applicant while working as Extra Departmental Branch Postmaster, (now GDS MD/MC), was appointed as Postman on coming out successful in the Departmental Examination in the year 2004 for the vacancy of the year 2002 and consequently he was brought under New Pension Scheme taking into account the date of actual appointment instead of the year of vacancy that arose in 2002. Aggrieved on that, he made representation to the 2nd respondent requesting to bring him under Old Pension Scheme taking into account the year of vacancy i.e. 2002 as the delay was caused by the Department to conduct the examination in an appropriate time. But, the 2nd respondent had passed the impugned order rejecting the request of the applicant. Aggrieved by the above, the applicant has filed this OA seeking the

above reliefs, inter-alia, on the following grounds:-

"i. The respondents ought to have considered the case of the applicant under Old Pension Scheme taking into account the year of vacancy i.e., 2002 because, he had appeared in the Departmental Examination conducted for the promotion to the cadre of Postman to fill up the vacancies arisen in the year 2002 and the applicant was promoted from the post of EDBPM (GDSBPM) to the cadre of Postman on coming out as successful candidate under 25% quota on merit basis.

ii. The Department ought to have initiated the recruitment process to the vacancies caused for the cadre of Postman in the year 2002. But, the respondents had delayed the recruitment process for their own convenience, without any justified reason. Due to the inaction of the respondents in filling up the vacancies arisen in the year 2002, the applicant was brought under the New Pension Scheme depriving him to get benefit under Old Pension Scheme. If the respondents had filled up the vacancies arisen in the cadre of Postman in an appropriate time i.e., in the year 2002 itself, the applicant would have come under Old Pension Scheme. Thus taking advantage of their own fault to deny the benefit under Old Pension is illegal and arbitrary."

3. The respondents have filed a detailed reply statement in which it is stated that the applicant was engaged as Gramin Dak Sevak (GDS Branch Postmaster, Sankarankudiyiruppu BO in account with Satankulam SO) on 01.04.1976. He was selected as Postman from among the GDS on merit basis for unfilled departmental vacancies of the Postman Examination held on 04.04.2004 for the vacancy year 2002 with effect from 24.07.2004. He has been declared as qualified in the LGO examination for promotion to the cadre of PA/SA for the year 2008 held on 27.12.2008 and joined as Postal Assistant on 21.06.2009. New Pension Scheme was introduced by the Government of India with effect from 01.01.2004 which is applicable to all new entrants to the Central Government Service except Armed Forces joining Government service on or after 01.01.2004. Since, the applicant was recruited as Postman on 24.07.2004 (after 01.01.2004), he was brought under the above New Pension Scheme. 10% of his emoluments from his basic pay + dearness allowance are being recovered every month towards contribution for New Pension Scheme. The GDS are holders of civil posts and are not regular Government Servants. They are separate cadre outside the Government service, existing only in the Department of Posts and formed with the primary objective of providing postal services in the remote villages of the country. It may also be added that right from the formation of the system of GDS, appointment of GDS as Group D/ Postman is being treated as direct recruitment and not on promotion. This is because, promotion exists only from like cadres and GDS being outside the Government service cannot form a

feeder cadre as far as Postman and other cadres are concerned. The Department of Posts, MTS Recruitment Rules clarify that Gramin Dak Sevaks are holders of Civil Posts, but they are outside the regular civil service due to which their appointment will be by direct recruitment even when selection is on basis of selection-cum-seniority. It also prescribes that on failing recruitment from Gramin Dak Sevaks, the earmarked vacancies will be filled up by direct recruitment from open market. Similar provisions are existing in the Postman and Mail Guard Recruitment Rules. Therefore, the GDS service would have no consideration towards regular service and their appointment in regular service could be the criterion for determining their placement in CCS (Pension) Rules/ New Pension Scheme. The GDS cannot be said to be the feeder cadre for Postman/ Group D in view of provisions of Recruitment Rules. Hence the respondents pray for dismissal of the OA.

4. Learned counsel for the respondents relied on the following citations in support of his submissions:-

i) The Hon'ble Supreme Court in Civil Appeal No. 91 of 2015 in the case of Y. Najithamol & Ors vs. Soumya S.D. & Ors

ii) O.A. NO.180/00324/2016 dated 29.10.2018 Ernakulam Bench of the Tribunal in the case of P.K. Jayasimhan & Anr. Vs. UOI & Ors;

5. When the matter came up for hearing, learned counsel for the respondents invited our attention to the latest decision of the Hon'ble Supreme Court in ***Union of India & Ors. v. Gandiba Behera in Civil Appeal No. 8497/2019 (arising out of SLP(C) No. 13042/2014) dated 08.11.2019*** and stated that the said decision squarely

covers the point in dispute.

6. On perusal of the pleadings and various records, it could be seen that the main point to be considered is whether the appointment of the applicant as Postman can be antedated taking into account the year of vacancy to the Postman Cadre i.e. vacancy year 2002 to grant retirement/pensionary benefits. I have gone through the decision of the Hon'ble Apex Court in ***Union of India & Ors. v. Gandiba Behera's*** case. The Hon'ble Apex court while dealing with a similar issue as to whether services rendered by the employees in the Postal Department in the capacity of Gramin Dak Sevak (GDS) ought to be computed or not for the purpose of calculation of the qualifying service of their pension after they got selected in regular post in the said department, has answered the point in para-15. For better appreciation and easy understanting of the case, relevant portions of the said order are extracted hereunder:-

> " 15. The case of **D.S. Nakara** (supra) has been relied upon on behalf of the respondents in support of their contention that there cannot be any artificial discrimination between two groups of pensioners. But the factual context of the case of **D.S. Nakara** (supra) is different. The discrimination which was challenged in that case related to two sets of retired Armed Forces personnel who were categorised on the basis of their dates of retirement and one set had better terms of pension. The decisions in the cases of **P.K.Rajamma** (supra) and **Chet Ram** (supra) are for the proposition that the respondents held civil posts as GDS and were government servants. But again ratio of these authorities cannot be applied to combine the services rendered by GDSs in posts guided by an altogether different service rule with their

services in regular employment. The other authority on which reliance has been placed on behalf of the respondents is a judgment of this Court delivered on 23rd August, 2017 in the case of **Habib Khan v. State of Uttarakhand and Others[2018(1)SLR 724(SC)]**. That case arose out of a similar dispute involving a work-charged employee of the State of Uttarakhand who wanted his service in that capacity counted for computing the qualifying service in regular post on the question of grant of pension. This judgment was also delivered by a two-Judge Bench of which Hon'ble Justice Ranjan Gogoi, before His Lordship assumed the post of Chief Justice of India, was a member. The aforesaid decision followed an earlier judgment of this Court delivered in the case of **Punjab State Electricity Board and Another v. Nakara Singh and Another [(2010) 4 SCC317]**. The latter case arose out of similar claims of work charged employees who were engaged in the Irrigation and Power Department of the State of Punjab. The relevant provision of the Punjab Civil Services Rules allowed temporary or officiating service under the State Government without interruption followed by confirmation in the same or another post to be counted in full as qualifying service but excluded the period of service in work charged establishment. The aforesaid Rule was struck down by the Full-Bench of the Punjab and Haryana High Court. The decision of this Court in the case of **Nakara Singh** (supra) was however founded on two circulars which permitted counting the period of service rendered by a work charged employee in the Central Government or the State Government for the purpose of computing pensionary benefits as an employee of the Punjab State Electricity Board. The respondents in these

appeals also cannot be held to be work-charged employees. The said category of employees, i.e. work-charged employees are engaged against specific work and their pay and allowances are chargeable to such work. But the scope of respondents' work as GDS was part-time in nature. They had the liberty to engage themselves in other vocations, though the work they involved in carried an element of permanency. The fact that they were engaged as GDSs which constituted civil posts cannot by implication treat their service having whole-time characteristic to be an extension of their service rendered in the capacity of GDSs. The subsequent service was guided by different service Rules having different employment characteristics. The selection of an employee in regular post cannot also be pre-dated because of delay on the part of the authorities in holding the selection process. We do not agree with the view of the High Court on this count in judgments which form subject of appeal in Civil Appeal No. 5008 of 2016, SLP(C)No.16767 of 2016, Civil Appeal No. 8379 of 2016 and Civil Appeal No.10801 of 2016. Service tenure of an employee in a particular post cannot be artificially extended in that manner in the absence of any specific legal provision.

16. In the case of **Union of India & Ors. v the Registrar & Anr.**(supra), a plea similar to that made by the GDSs for computation of service in that capacity was specifically rejected. There is no specific Rule or even administrative circular specifying computation of service period rendered as GDS to fill up the gap in the qualifying service requirement of the respondents in this set of appeals. The only circular on which the respondents laid stress on was the 1991 circular which was considered in the case of **Union of India &Ors. v. Registrar &**

Anr. (supra). As the post of GDS did not constitute full-time employment, the benefits of the said circular cannot aid the respondents. Thus, there being a clear cut finding on similarly placed employees, we do not think we can apply the ratio of the judgment delivered in the case of **Habib Khan** (supra) in support of the respondents' plea. An unreported judgment of Karnataka High Court delivered on 17th June, 2011 in the case of **W.P. No.81699/2011 Union of India and Others Vs. Dattappa** has also been cited on behalf of the respondents. This judgment went in favour of counting the period of service as extra-departmental Agent for qualifying service in relation to pension and the Division Bench of the Karnataka High Court proceeded on the basis that for all intents and purpose, the employment was continuous in nature and it was not as if it was from one service to another. But, this view has not been accepted by this Court in the case of **Union of India & Ors.Vs. Registrar &Anr.**(supra).

17. It is also the respondents' case that under Clause 49(3)of the 1972 Rules, if they had served more than 9 years and 3 months in regular employment, they would be entitled to have additional period computed for the purpose of qualifying service. Said Rule 49(3)specifies:-

"In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half year and reckoned as qualifying service."

Arguments were advanced that if within a period of one year an employee had served more than six months, then the total employment term ought to be computed as twice the period of one half year in two tranches and one year ought to be added to the service. But on a plain reading of the said Rule, in our view

such an interpretation cannot be given. The Rule contemplates one time benefit in case of service of more than 3 months in fraction of a year.

18. Rule 88 of the1972 Rules empowers the concerned ministry or the department to relax the operation of any Rule to prevent undue hardship in a particular case. This provision as embodied in Rule 88, provides:-

"88. Power to relax.

Where any Ministry or Department of the Government is satisfied that the operation of these rules, causes undue hardship in any particular case, that Ministry or Department, as the case may be, may, by order for reasons to be recorded in writing, dispense with or relax the requirements of that rule to such extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that no such order shall be made except with the concurrence of the Department of Pension & Pensioner's Welfare."

Exercise of power under the said Rules however comes within the decision making domain of the executive. The appellants' case has been that if such power to relax is exercised in each case of marginal shortfall in qualifying service, that would constitute an endless exercise.

19. Having regard to the provisions of the aforesaid Rules relating to qualifying service requirement, in our opinion the services rendered by the respondents as GDS or other Extra-Departmental Agents cannot be factored in for computing their qualifying services in regular posts under the postal department.

on the question of grant of pension. But we also find many of the respondents are missing pension on account of marginal shortfall in their regular service tenure. This should deserve sympathetic consideration for grant of pension. But we cannot trace our power or jurisdiction to any legal principle which could permit us to fill up the shortfall by importing into their service tenure, the period of work they rendered as GDS or its variants. At the same time, we also find that in the case of **Union of India & Ors. v. The Registrar & Anr.** (supra), though the incumbent therein (being respondent no.2) had completed nine years and two months of service, the Union of India had passed orders granting him regular pension. This Court in the order passed on 24th November 2015 had protected his pension though the appeal of Union of India was allowed.

20. For the reasons we have already discussed, we are of the opinion that the judgments under appeal cannot be sustained. There is no provision under the law on the basis of which any period of the service rendered by the respondents in the capacity of GDS could be added to their regular tenure in the postal department for the purpose of fulfilling the period of qualifying service on the question of grant of pension.

21. We are also of the opinion that the authorities ought to consider their cases for exercising the power to relax the mandatory requirement of qualifying service under the 1972 Rules if they find the conditions contained in Rule 88 stand fulfilled in any of these cases. We do not accept the stand of the appellants that just because that exercise would be prolonged, recourse to Rule 88 ought not to be taken. The said Rules is not number specific, and if undue hardship is caused to a large

number of employees, all of their cases ought to be considered. If in the cases of any of the respondents' pension order has already been issued, the same shall not be disturbed, as has been directed in the case of **Union of India & Ors. v Registrar & Anr.** (supra). We, accordingly allow these appeals and set aside the judgments under appeal, subject to the following conditions:-

(I) In the event the Central Government or the postal department has already issued any order for pension to any of the respondents, then such pension should not be disturbed. In issuing this direction, we are following the course which was directed to be adopted by this Court in the case of **Union of India&Ors. v. Registrar &Anr.**(supra).

(ii) In respect of the other respondents, who have not been issued any order for pension, the concerned ministry may consider as to whether the minimum qualifying service Rule can be relaxed in their cases in terms of Rule 88 of the 1972 Rules.

22. Interim orders passed in these appeals, if any, shall stand dissolved. All connected applications shall stand disposed of.

23. There shall be no order as to costs."

7. The issue for consideration is whether any appointment to a vacancy caused in an earlier point of time should date back to the date of occurrence of vacancy.

8. Rules do not specify the same. Thus, what is to be seen is whether there is any court ruling in this regard. When statutory rule provided that appointments shall be on annual basis promotional exercise must be completed apart from the fact that it would the rule that existed at the relevant point of time that should be followed, the appointment may also be from the year of vacancy. The Apex Court in the case of

Rajasthan State Sports Council vs Uma Dadhich (2019) 4 SCC 316 has held as under:-

> **6.** The judgment in *Y.V. Rangaiah* v. *J. Sreenivasa Rao*(1983) 3 SCC 284 dealt with a situation where the rules required that the promotional exercise must be completed within the relevant year.

9. Where there is no legal compulsion, date of occurrence of the vacancy is inconsequential. The Apex Court has in the case of Union of India vs N.C. Murali (2017) 13 SCC 575 has held as under:-

> **16.** The learned counsel appearing for the appellants also placed reliance on the judgment of this Court in *Nirmal Chandra Sinha* v. *Union of India*. Para 7 of the judgment reads as follows: (SCC p. 31)
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> "7. It has been held in a series of decisions of this Court that a promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post vide *Union of India* v. *K.K. Vadera*, *State of Uttaranchal* v. *Dinesh Kumar Sharma*, *K.V. Subba Rao* v. *State of A.P.*, *Sanjay K. Sinha (2)* v. *State of Bihar*, etc."
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> **17.** In view of the law laid down in the abovementioned cases, it is clear that unless there is specific rule entitling the applicants to receive promotion from the date of occurrence of vacancy, the right of promotion does not crystallise on the date of occurrence of vacancy and the promotion is to be extended on the date when it is actually effected.

Thus, in the case, though the vacancy would have arisen in 2002, since the recruitment process took place only in 2004 after the introduction of new Pension Scheme, the Pension Rules, 1972 have no application. No malafide could also be levelled against the respondents on their not filling up the post in 2002 or 2003 since it was not expected that there would be drastic change in the Pension Rules.

10. In view of the above, as the point of law on which the relief sought seems to be settled finally by the Hon'ble Supreme Court, I do not find any scope for interference by this Tribunal. In the circumstances the OA is liable to be dismissed and is accordingly dismissed. No costs.