

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.579/2004.

Tuesday this the 6th day of September, 2005.

CORAM:

**HON'BLE MR. K. V. SACHIDANANDAN, JUDICIAL MEMBER
HON'BLE MR. N. RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

Leena Mathew, D/o Sri. C.C.Mathew,
GDS BPM, Nellippara B.O.,
Thaliparamba Sub Division,
Kannur Division, residing at
Nellippara, Kannur. Applicant

(By O.V.Radhakrishnan, Sr. Advocate)

VS.

1. Postmaster, Head Post Office,
Thaliparamba-670 141.
2. Superintendent of Post Offices,
Kannur Division, Kannur-670 001.
3. Chief Postmaster General, Kerala Circle,
Thiruvananthapuram.
4. Union of India, represented by its Secretary,
Ministry of Communications, New Delhi. Respondents

(By Advocate Shri TPM Ibrahim Khan, SCGSC)

The application having been heard on 30.8.2005, the Tribunal on 5.9.2005 delivered the following:

ORDER

HON'BLE MR. K. V. SACHIDANANDAN, JUDICIAL MEMBER

The applicant is presently working as Gramin Dak Sevak Branch Post Master (GDS BPM for short) in Nellippara B.O., Thaliparamba sub Division, Kannur Division. She was initially appointed as Extra Departmental Branch Postmaster (EDBPM for short) on a provisional basis against the vacancy arose consequent on the putting-off duty of a regular incumbent, Smt. Rosamma James, pending finalisation of disciplinary proceedings as per Memo dated 12.2.1987(A1). After exhausting all channels Smt. Rosamma James has been dismissed/removed from service. The applicant is governed by ED Agents(Conduct and Service) Rules 1964 and in supersession of the same GDS(Conduct and Employment) Rules came into existence w.e.f. 24.4.2001. The nomenclature of EDBPM has been changed to GDS BPM and she is continuing as BPM

ever since 12.2.1987 without any break for over a period of 16 years. As per the rules, after the completion of three years' continuous service, an employee is ceased to be a provisional ED Agent and therefore, she acquired the status of a regular ED Agent and she is not liable to be terminated under Rule 6 of the ED Agents (Conduct & Service) Rules. Her name was included in the Gradation List of Extra Departmental Agents under Kannur Postal Division as on 1.1.1991(A2) at Sl. No.383. The Gradation List was updated and another Gradation List of ED Agents was finalised on 1.7.1994(A3) and in that list the applicant was placed at Sl.No.389. She was granted service benefits admissible to regular EDBPM including P.L., Ex-gratia and entitlement on future TRCA. According to the Recruitment Rules to the post of Postman/Mail Guards 1989, 50% of the vacancies earmarked for filling up amongst ED Agents are to be filled up from among ED Agents who have put in three years regular service. The applicant having five years of regular service, was allowed to appear for the examination for promotion to the post of Postman conducted on 15.10.1995 as evidenced by Memo dated 28.9.1995(A4). She was again allowed to appear for the same examination vide A-5 dated 27.9.1996 and she did not come out successful. Annexure A-6 dated 30.9.1998 is a special circular issued by the 3rd respondent wherein Smt.Rosamma James, the regular incumbent at Sl.No.7 under the Northern Region, has been removed from service. The applicant had also applied and allowed for appearing for the examination held in 30.10.1998 for filling up the unfilled quota of Lower Grade Officials(Postal Assistants) which is evidenced by letter dated 16.10.1998 (A7). Annexure A8 is another Seniority List of EDA's of Kannur Division wherein she was placed at Sl.No.331. The applicant submitted a representation dated 22.2.2002(A9) requesting for a declaration to treat her as a regular incumbent. She was served with a memo dated 8.7.2003(A-10) stating that she is not entitled to PL ex-gratia and future entitlement on TRCA, since her appointment to the post was on provisional basis, and there is an over-payment of Rs. 40,125/- which was to be recovered from the salary for the period from 6.2.1987 to 30.6.2003 in instalment of Rs.530/- p.m. and her basic allowance was also reduced to Rs.1600/- p.m. The applicant again submitted a representation dated 11.7.2003(A11) and on receipt of the said representation, the 2nd respondent instructed the 1st respondent to stop the recovery and future proceedings. But the 1st respondent reduced the TRCA of the applicant to the minimum without giving any notice to the applicant. Aggrieved, the applicant submitted a representation dated 5.8.2003(A12) to the 2nd respondent requesting to restore her original pay, which is not yet disposed of. Aggrieved by the inaction on the part of the respondents the applicant has filed this O.A. seeking the following main reliefs:

- i. to call for the records leading to Annexure A-10 memo dated 8.7.2003 and A-15 memo dated 22.6.2004 of the 1st respondent and to set aside the same;
- ii. to declare that the amount of Rs.40,125/- shown in Annexures A-10 and A-15 as

the alleged over payment towards PL ex-gratia and future enhancement on TRCA are not legally recoverable from the applicant and deduction, if any, made from the TRCA admissible to the applicant is patently illegal and unauthorised;

- iii. to issue appropriate direction or order, directing the respondents to issue necessary orders regularising the services of the applicant in the post of GDS BPM, Nellipara BO with effect from the date of her initial appointment on provisional basis and to grant her full service benefits;
- iv. to issue appropriate direction or order, directing the respondents to restore the TRCA, the applicant has been drawing before the date of Annexure A-10.
- v. To issue appropriate direction or order, directing the respondents to re-imburse the applicant the amounts, if any, recovered from the TRCA payable to her in implementation of Annexure A-10 and A-15.

2. The respondents have filed a reply statement contending that Smt Rosamma James while working as GDS BPM, Nellipara had committed Criminal Offences and Alakode Police had registered a case against her. She was put off duty with effect from 16.1.1987. The judicial First Class Magistrate, Kannur sentenced her to rigorous imprisonment. Consequent on her conviction she was dismissed from service with effect from 24.9.1997. The Additional Session Judge, Thalassery in Criminal Appeal No.119 of 1996 set aside the conviction and acquitted her of all charges as per the judgement dated 11.10.2002. The department has challenged the judgement of the Sessions Judge in Criminal Revision Petition No.1357 of 2004 which was rejected on account of delay. Aggrieved that, the department has taken steps to file SLP, in the meantime Smt.Rosamma James filed O.A.669/2004 before this Tribunal seeking reinstatement and by order dated 14.9.2004 this Tribunal directed the respondents to dispose of the representation submitted by her and the same was disposed of by the respondents on 24.12.2004. The applicant was provisionally appointed as BPM Nellipara with effect from 12.2.1987. Even though provisional appointees are not entitled to get bonus and increments, due to oversight, she was paid Bonus and allowed increments. The applicant was also placed in the GDS seniority list and permitted to appear the examination for promotion to the cadre of Postman. When the above mistake was detected, recovery proceedings were initiated. The Productivity Linked Bonus is applicable only to the regular employees of the Department. As per item No.10 of the clarificatory letter dated 5.3.1999 of the DG Posts, the provisional appointees are to be paid only at the minimum of the Time Related Continuity Allowance and the provisional appointees are not entitled to get bonus or increments. The resultant overpayment of Rs.40125/- is sought to be recovered. The instructions to the 1st respondent to stop recovery was only a temporary one and after examination of the case in detail, the respondent was directed to recover the overpayment. Therefore, there is no case for the applicant and the O.A. is to be dismissed.

3. We have heard Shri O.V.Radhakrishnan, Sr. Advocate, appearing for the applicant

and Shri TPM Ibrahim Khan, SCGSC appearing for the respondents. Counsel for the parties took us through various pleadings, evidence and material placed on record. Counsel for the applicant argued that, the applicant was appointed to the post by a due process of selection (Employment Exchange) and she was permitted to continue for a long period of sixteen years and granted all the benefits as that of a regular employee and without any rhyme or reason or even a notice the benefits are sought to be withdrawn, which is illegal and against natural justice and per-se void.

4. Learned counsel for the respondents on the other hand persuasively argued that it can only be construed as a mistake/oversight on the part of the respondents which they have corrected at this point of time and the applicant has no vested right for claiming the benefit, and therefore the O.A. is liable to be dismissed.

5. We have given due consideration to the arguments advanced by the counsel for the parties. From Annexure A-1 dated 12.2.1987 it is very clear that, the applicant has been appointed in place of Smt. Rosamma James. Due to putting off duty of Smt. Rosamma James and pending finalisation of disciplinary proceedings against her, a need has arisen to engage a person to look after the work of BPM, Nellipara and the appointing authority has decided to make provisional appointment to the said post. Further, the said order reveals that the applicant was governed by the ED Agents(Conduct and Service) Rules, 1964 and all other rules and orders applicable to ED Agents." It is also stated in that order that "the applicant was offered the provisional appointment to the post of BPM Nellipara. She should clearly understand that, if ever it is decided to take Smt.Rosamma James back into service the provisional appointment will be terminated without notice." It is an admitted case of the respondents that the applicant was provisionally appointed and she was paid bonus and allowed increments and she was also placed in the seniority list of GDS and permitted to take examination for promotion to the cadre of Postman. When the mistake was detected the recovery proceedings were initiated.

6. Annexure A3(2) is the Gradation List of EDAs as on 1.7.1994 which clearly indicates that the applicant has been treated as a regular employee. Annexures A5 and A-13 are the documents produced by the applicant to show that she was permitted to appear for the examination to the post of Postman which is meant for regular employees only. Only in Annexure A-8(2) Seniority List of EDAs dated 1.7.1999 issued by the respondents, it is seen that, the applicant was appointed on provisional basis, otherwise it is born out from all the records that the applicant has been treated as a regular employee. Even assuming that she was working on provisional basis, it is argued that the matter may be considered as per the letter issued by the DG(Posts) dated 21.10.2002, the relevant paragraph 12 of which is reproduced as under:

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"12. The extant provisions provide for a provisional appointee to be placed on a waiting list for being considered for a regular appointment, after he or she has completed three years of continuous employment. To avoid prolongation of such provisional appointments, approval of the next higher authority should be taken in respect of all provisional appointments exceeding 180 days, and where the period exceeds one year, express approval of the head of the region/Circle, as the case may be, would be necessary. Where the regular incumbent is not reinstated, immediate action must be taken to regularise a regularly selected provisional appointee against the said post without resorting to fresh recruitment."

7. In the said letter it has been mandated that, in such circumstances where a provisional employee happened to be continuing for three years, it is to be presumed that she has been regularised and exceeding 180 days the approval of the next higher authority should be taken and in case of the period exceeds one year, express approval of the head of the region/Circle is necessary. When a regular incumbent is not reinstated, a regularly selected provisional appointee should be regularised against that post without resorting to fresh recruitment.

8. Learned counsel for the applicant also submitted that the applicant is a regularly selected provisional appointee. Though this fact has been disputed by the respondents in their reply statement. having continued for over 16 years, it has to be taken that the department has treated the applicant as a regular employee. In this regard, Rule 6 of the ED Agents (Conduct & Service) Rules and Rule 8 of the GDS(Conduct & Employment) Rules are more relevant as per which the applicant has to be given regularisation. On going through these rules one could find that, since the applicant has been working for 3 years continuously, and the regular incumbent not being reinstated and the applicant being a regularly selected provisional appointee, she can be accommodated against the said post without resorting to fresh recruitment. Having allowed the applicant to continue in the post without any break for over 16 years, she is entitled to regularisation.

9. Learned counsel for the applicant also contended that, the Postmaster, who issued A-10 and A-15 impugned orders, is not competent to issue such orders, since he is not the appointing authority and only the appointing authority can issue such orders. We are not very much convinced about the arguments advanced by the counsel of the applicant on this point, because, ED Agents' Rules are separate in nature, and there is no stipulation in the said rules that, the said authority should pass such an order. Moreover, the 1st respondent who is the Pay Drawing and Disbursing Officer of the applicant, according to our view, is competent to pass such orders, since it is the duty of the Pay Drawing and Disbursing Officer to see whether the recovery, if any, has done properly. As far as the authenticity, authority and the competency of the issuing officer is

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concerned, we are not in full agreement with the arguments of the applicant's counsel. But, for other grounds these impugned orders cannot be sustained.

10. In support of his arguments on various points, learned counsel for the applicant has also cited the following decisions of the Apex Court.

In Baleswar Das Vs. State of UP (AIR 1981 SC 40), the Court has held that, "It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfills the necessary conditions for regular appointment."

In Sahib Ram Vs. State of Haryana ((1995) Supp (1) SCC 18), the Court has held that, "The amounts sought to be recovered are 'property' within the meaning of article 300A of the Constitution and are not liable to be recovered without authority of law.

In Bhagwati Prasad Vs. Delhi State Mineral Development Corporation (1990) 1 SCC 361) the Hon'ble Supreme Court has held that "The petitioners have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duty and is a sure guide to assess the suitability."

In Gujarat Agricultural University Vs. Rathod Lalbhu Bechar (2001) 3 SCC 574) the Hon'ble Supreme Court has held that, "If work is taken by the employer continuously from the daily-wage workers for a long number of years without considering their regularisation for its financial gain as against employees' legitimate claim has been held by this Court repeatedly as an unfair labour practice."

In the case of Sub Divisional Inspector, Posts, Vaikom Vs. Theyyamma Joseph reported in 1996) 8 SCC 489, the Hon'ble Supreme Court has upheld the decision of this Hon'ble Tribunal to re-instate the ED Agent whose period of service exceed three years. "

11. It is also profitable to quote the decisions reported in Union of India Vs Rekha Majhi (AIR (2000 SC 1562) and State of Haryana Vs. Haryana Civil Secretariat Personal Staff Association (JT 2002 (5) SC 189) wherein it has been held that if no mis-representation is made by an employee and continuing the benefit, no recovery could be effected.

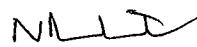
12. In the conspectus of facts and circumstances, we are of the view that, the fixing of TRCA at the minimum level denying increments that the applicant has earned over 16 years is not justified. The impugned orders A-10 and A-15 are not issued in the true spirit of law and therefore, these are liable to be quashed and set aside. We do so accordingly. Respondents are directed to pass orders regularising the services of the applicant forthwith and restore the benefits which she was enjoying prior to the issuance of impugned orders and refund the amount, if any already recovered from the applicant. The entire exercise shall be completed within a period of two months from the date of

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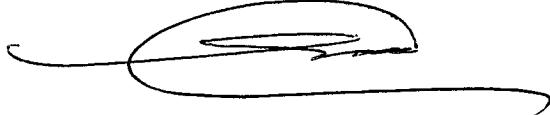
receipt of a copy of this order.

13. O.A. is allowed as above. In the circumstances no order as to costs.

Dated the 6th day of September, 2005.



N.RAMAKRISHNAN
ADMINISTRATIVE MEMBER


K.V.SACHIDANANDAN
JUDICIAL MEMBER

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