

CENTRAL ADMINISTRATIVE TRIBUNAL  
ERNAKULAM BENCH

OA No.154/2011

*Thursday*..... this the *7<sup>th</sup>* day of February 2013.

CORAM

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER  
HON'BLE Ms. K.NOORJEHAN, ADMINISTRATIVE MEMBER

Nirmala. K., age 39 years  
D/o Velappu  
GDS BPM, Ayiroor P.O., Kallatt  
Veliancode, Ponnani Taluk  
Malappuram District. Applicant

[By advocate: Mr.K.K.Mohammed Ravuf)

Versus

1. The Union of India  
represented by Ministry of Communications  
New Delhi.
2. The Sub Divisional Inspector  
Ponnani Sub Division, Ponnani  
Malappuram.
3. The Superintendent of Post Offices  
Tirur Division, Malappuram.
4. Chief Post Master General  
Kerala Circle, Thiruvananthapuram
5. Post Master General  
Northern Region  
Calicut
6. Sheeba P.K  
W/o K.V.Sunil Kumar  
Kaippada House  
Perumpadappa P.O.  
Malappuram Dist. Respondents

[By advocate: Mr.M.K.Aboobacker, ACGSC)  
(Mr. M. R. Hariraj for R6)

This Original Application having been heard on 4<sup>th</sup> February 2013, this Tribunal on .....<sup>7<sup>th</sup></sup>.....February 2013 delivered the following:

O R D E R

HON'BLE DR.K.B.S.RAJAN, JUDICIAL MEMBER

Certain crucial dates are required to have a hang of this case. The applicant was appointed as a substitute GDSBPM, Ayirur from 15-09-2003 to 30-11-2003 in the place of the regular incumbent. The regular incumbent relinquished her charge on retirement on 31-12-2003 and the applicant was permitted to function as GDSBPM w.e.f. 01-04-2004 onwards. She had been performing her duties as such till 03-10-2006. By Annexure A-4 order dated 20-10-2006, the SPM, Ayirur was directed by the Inspector of Posts, Ponani Sub Division to change the substitute working in the vacant post of BPM immediately. The applicant had to hand over charge on 23-10-2006 vide Annexure A-5. Another individual was appointed thereafter vide Annexure A-7 charge report dated 27-09-2006. On 20-09-2006 Annexure A-1 notification was issued by the respondents for appointment to the post of GDSBPM, Ayirur. This was challenged before the Tribunal in OA No. 848 of 2006 and the Tribunal, vide order dated 22-06-2009, rejected the claim of the applicant as the department had stated that by a subsequent notification, the respondents were planning to fill up the post of GDSBPM, Ayirur on regular basis. When the applicant challenged the said order of the Tribunal before the High Court in WPC No. 29232 of 2009, the High Court was pleased to restore the status quo ante on the date of 16-10-2009. However, before service of the copy of the order dated 16-10-2009, respondents had appointed Respondent No. 6 as

GDSBPM Ayirur in pursuance of the notification dated 20-09-2006. Thus, an Interlocutory petition was filed and the High Court had directed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents before the High Court to be present in the court with all the records pertaining to the selection and training of GDS BPM, Ayirur, on 28-10-2009. The position having been clarified that the appointment of private respondents despite stay order was not deliberate as the certified copy was not received, the respondents were directed to appoint the applicant against the then existing vacancy at Marancherry immediately and the arrangement had been made subject to the outcome of the Writ Petition No. 29232 of 2006. The said order having been complied with, the respondents were directed to continue the arrangements further orders. Again, it was made clear in the judgment of the High Court of Kerala that the applicant shall be considered if a clear vacancy of GDS BPM arises at Ayirur, the applicant would be considered. Annexure A-13 refers. Writ Petition No. 29232 of 2009 was allowed by judgment dated 30-08-2010 whereby the initial notification dated 20-09-2006 for provisional appointment to the post of GDSBPM, Ayirur was vacated but the respondents were given liberty to fill up the post on regular basis and the applicant can also make application raising her claim of experience, if a person with experience is entitled to appointment without undergoing any selection process, as per the rules. The fact that the applicant has been holding the post on provisional basis has been authenticated in the judgment. With the above judgment having been pronounced, the respondents issued the Annexure A-15 impugned order dated 28-01-2011 stating that as the Writ Petition has been

disposed of by the High Court vacating Annexure A-1 Notification for provisional appointment to the post of BPM, Ayirur, the continuance of the applicant in the post of GDSMD, Marancherry has resultantly become null and void. Thus, her engagement in the said post stood terminated on completion of one month from the date of receipt of the notice. The applicant had challenged the aforesaid order at Annexure A-1 and interim order of stay of the impugned order was passed by the Tribunal. The applicant continues on the basis of the same.

2. The following is the relief sought by the applicant through this O.A.

1. *To quash Anneure A-15 memo No.GL/24(P) dated 28.1.2011 at Ponnani*
2. *To declare that the applicant is eligible to continue in the post of Gramin Dak Sevak Branch Post Master in Ayiroor Post Office as a regular employee by regularization on the strength of her service and in the light of Annexure A-14 judgment.*
3. *To direct the the respondents to select and appoint the applicant as the GDSBNPM, Ayiroor Post Office pursuant to Annexure A-2 notification.*
4. *To grant such other and further reliefs as this Hon'ble Tribunal deem fit and proper in the facts and circumstances of the case*

3. Notice was issued to the Private respondent as well who has been represented by her counsel.

4. Respondents have contested the O.A. They have in their counter stated as to how after the dismissal of the OA No. 848 of 2006, the respondents had proceeded with the process of appointment and that how the private respondent came to be appointed w.e.f. 19-10-2009. Further they have stated that it was by virtue of the aforesaid appointment of the private respondent as GDSBPM, Ayirur that the applicant had been given an alternative posting as GDSMD at Marancherry. The private respondent filed Review application before the High

Court which was, however, dismissed. Yet another review petition filed was also dismissed. The said private respondent who had secured more marks was selected and appointed. The applicant also participated in the selection but could not be selected in view of the lower merits.

5. The applicant filed his rejoinder stating that the selection was to have been made on the basis of experience and from that point of view, his experience is far more than that of the private respondent and hence, the applicant alone could have been selected.

6. Counsel for the applicant argued that once an individual has been appointed on provisional basis, he secures certain rights for being appointed on regular basis as held by the High Court of Kerala in the case of one Jayachandran Nair vs Union of India and others (WP(C) No. 17727 of 2004, decided on 01-03-2005. In the said judgment, the High Court considered the provisions of D.G. P& T's order dated 18-05-1979 by which it was provided that efforts should be made to give alternate employment to ED Agents who are appointed provisionally and subsequently discharged from service due to administrative reasons if at any time of discharge they had put in not less than three years of service. In such cases, their names should be included in the waiting list of ED Agents discharged from service, prescribed in the D.G. P & T letter dated 23-02-1979. In that case, the High Court further stated that as long as one had continued in the post on provisional basis even on the strength of interim orders of the Court/Tribunal, the individual crystallizes his right for regular appointment.

7. Counsel for the respondents submitted that the initial induction of the applicant was as a substitute and by 01-01-2004 on the basis of the retirement of the regular incumbent the applicant continued in that post. His appointment was not by adopting the prescribed procedure of calling for applications from open market, filtration and selection of the most meritorious one. Thus, there

was a procedural lacuna in the appointment of the applicant on provisional basis. Again, the applicant was posted as GDSBPM, Ayirur and it was under certain fortuitous circumstance that the applicant was entertained and posted as GDSMD, Marancherry. The counsel submitted that the claim of the applicant for appointment as GDS MD or as GDSBPM is not within the provisions of any rule or regulation.

8. Arguments were heard and documents perused. The admitted fact is that the applicant continued to function as GDSBPM, Ayirur from 2004 to 2006. This was without the intervention of the Court. Again, had not the private respondent appointed on provisional basis, the applicant would have continued as GDSBPM of that post office and since, despite an interim order, the applicant could not be so allowed to continue in the said post, the respondents had accommodated him as GDS Marancherry, of course under the court's order. The consequential benefit of interim order cannot be reaped only if ultimately the individual loses his case in the Court. In this regard in the case of Kalabharati Advertising vs Hemant Vimalnath Narichania (2010) 9 SCC 437, the legal position relating to the effect of stay order on the final disposal of the litigation has been stated as under:-

**15. No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court.**  
 [Vide A.R. Sircar (Dr.) v. State of U.P., Shiv Shankar v. U.P.



*SRTC, Arya Nagar Inter College v. Sree Kumar Tiwary, GTC Industries Ltd. v. Union of India and Jaipur Municipal Corp. v. C.L. Mishra.]*

9. In the instant case, if the writ petition filed by the applicant stood dismissed, then perhaps the benefit he obtained due to a stay order could not be continued. Since the writ petition had been allowed in this case, the stay order merges into the final order and thus, his continuance in the post he held as GDS becomes fully within his legal right and also justified.

10. The applicant claims that she should be posted as GDS BPM, Ayirur. That may not be possible as Respondent No. 6 has a better claim by virtue of her merit. Though the applicant may have a little more experience, yet, it is only other things being equal or comparable that better experience could have been considered. The experience gained by the private respondent is no less. In fact, as BPM, her experience from 2006 till date is more than that of the applicant, whose experience as BPM is only for three years. The engagement of the private respondent is on regular basis and as such, her appointment is fully secured. The case of the applicant for regularization can thus, be considered only for the post of GDSMD, Marancherry which the applicant is at present holding.

11. In so far as the consequential benefits or crystallization of right for being considered for regular appointment, the applicant relied upon the decision of the High Court of Kerala in WP(C) No. 17727 of 2004 dated 1<sup>st</sup> March, 2005. The said judgment discusses the effect of the order dated 18-05-1979. Para 16 to 18 thereof reads as under:-

16. "The post needs to be filled up, on a regular basis, with a rider that the petitioner is entitled to priority, as a purposive interpretation of the order warrants. In other words, in so far as the petitioner has been in service for more than three years, as a provisional hand, it has to be presumed that he will be entitled to the benefits arising from the circulars. If there are no other claimants, in such list maintained by the Department, petitioner is to be given automatic priority for claiming appointment to the above said post. Therefore it may not be necessary that a full process of selection is carried

out. The documents made available indicate that the petitioner had been continuing for almost seven years in the post and no others have any superior claim. He is to be considered as an approved candidate for all purposes.

17. In the said circumstances, we direct that expeditious steps are to be taken so as to see that the benefit of the regularization is granted to the petitioner, without delay. The regularization should be deemed as to have become operative from 25.12.2000. It may not be possible for the petitioner however to claim seniority, as rights of others are involved. Therefore for the purpose of seniority, date relevant will be the date of order of the regularization and such proceedings are to be issued within two months from today.

18. As regards the claim for bonus, sufficient materials have not been placed before this court. Because of the direction for regularizing him, as above made, the petitioner will have the right to claim the benefit of bonus and other monetary entitlements as might be admissible. It will be appropriate that such claims are dealt with expeditiously. The order of the Tribunal therefore will stand set aside. Writ Petition is disposed of on the above terms."

12. In the instant case, the continuance of the applicant as GDS (be it BPM or MD) has been since 2004 and the High Court has stamped his engagement as provisional. If the case of a retrenched GDS who had put in three years of service on provisional basis could gain the benefit of regularization, needless to mention that those who have put in more than 3 years on provisional basis and are still continuing to so function have a better claim. As such, following the judgment in the above said Writ petition, this OA is allowed to the extent that the respondent shall consider the regularization of the applicant against the post of GDS MD Marancherry, without any need to notify that vacancy.

13. This order shall be complied with, within a period of three months from the date of communication of the same. No orders as to costs.

  
K. NOORJEHAN  
ADMINISTRATIVE MEMBER

  
Dr K.B.S.RAJAN  
JUDICIAL MEMBER