

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A No. 173/2011

Friday, this the 11th day of November, 2011.

CORAM

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

**Juni.M, GDS BPM,
Channankara.P.O.
Kaniyampuram-695 315.Applicant**

(By Advocate Mr Vishnu S Chempazhanthiyil)

v.

- 1. Assistant Superintendent of Post Offices,
North Sub Division, Chalai,
Thiruvananthapuram-695 036.**
- 2. The Senior Superintendent of Post Offices,
Thiruvananthapuram North Division,
Thiruvananthapuram-695 001.**
- 3. Union of India represented by the
Chief Postmaster General,
Kerala Circle,
Thiruvananthapuram-695 033.**
- 4. Smt Rejitha, GDS BPM,
Channankara.P.O.
Kaniyampuram-695 315.Respondents**

(By Advocate Mr Sunil Jacob Jose, SCGSC for R.1 to 3)

This application having been finally heard on 11.11.2011, the Tribunal on the same day delivered the following:

ORDER

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

The applicant entered the services of the respondents as a substituted from 15-11-1999 in the capacity of GDS BPM, Channankara when the incumbent to the said post (none other than the spouse of the applicant) was posted as Postman on extra cost basis. The said spouse got the post of

postman on permanent basis from 05-11-2009 and the applicant continued in the post of GDS BPM Channankara without interruption. She has been drawing the TRCA and two inspections have taken place after November, 2009. Sometimes in February, 2011, the first respondent brought a fresh hand and directed the applicant to hand over charge and when the applicant protested on the ground that her continuance in the said post since November, 1999 cannot be interfered with, and in this regard she had had preferred Annexure A-2 representation dated 26-02-2011, which while not having been disposed of, respondents insisted her handing over charge. No written order, however, was issued. As the applicant was directed to hand over charge to a mail overseer, a departmental official, the applicant Against the oral order of the first respondent, the applicant has filed this OA claiming the following reliefs:-


- (a) For a direction to the respondents to permit the applicant to continue as GDS BPM Channankara till she is replaced by a regularly selected employee to the said post;
- (b) For a direction to the respondents not to disengage the applicant other than by a regularly selected hand; and
- (c) For a direction to the 2nd respondent to consider and pass orders on Annexure A-2 and till such decision is arrived at she be not disturbed from the existing posting.

2. The OA was to be amended in view of the fact that the respondents had engaged yet another individual as GDS BPM Channankara and thus, the applicant had filed MA No. 269 of 2011 which was allowed on 11-04-2011 and notice to the newly impleaded respondent was issued. However, there has been no representation from the side of the said newly impleaded respondent.

 3. Official Respondents have contested the O.A. They had contended that

though initially the applicant was engaged as a substituted, after the regular promotion of the regular incumbent, there is no question of substitutes and her continuance beyond November, 2009 was not as per the rules. When this engagement was noticed, the applicant was directed to hand over the charge of the office to the Mail Overseer, a departmental Official. Accordingly, the applicant was shifted from the post of BPM after giving the charge to the mail overseer on 09-03-2011. Again, the respondents contended that since October, 2009 there have been at least four individuals who had functioned as GDS BPM in the said post office and as such, no accrued right has been crystallized by the applicant to cling on to the said post. Reliance was placed upon the decision in the case of *Umadevi* (2006) 4 SCC 1 as well by the respondents. The fact of the third respondent having been engaged has not been disputed in the reply.

4. Counsel for the applicant argued that be it by way of substitute or otherwise, the applicant has been carrying out the duties as GDS BPM since 1999 save for a few spells, when some one else had to function as stated in para 5 of the reply. However, for a substantial period from 1999 till March, 2011 it is the applicant who had been holding the post. The respondents have conducted two inspections from 2009 onwards and the applicant had been paid the TRCA by the respondents and as such, there is an implied approval of the applicant to continue as GDS BPM, when the regular incumbent had been promoted as postman on regular basis. Relinquishment of charge in favour of the Mail Overseer was made by the applicant as the said official is a departmental staff and not an outsider. As long as the said official was discharging the duties of GDS BPM there would be no violation of any rules. However, in the event of the said Mail Overseer not functioning as GDS BPM, the applicant should have been asked to hold the post as otherwise, it would



amount to an ad hoc being substituted by another ad hoc which is impermissible.

5. Counsel for the respondents submitted that the engagement of the applicant as GDS BPM upto November, 2009 was in the capacity of a substitute as a regular incumbent was posted there. Thereafter, her engagement was without any specific authority nor was her engagement as per any established rules or regulations. As such, the applicant has not established any accrued right. The counsel relied upon the decision in the case of Umadevi (*supra*).

6. Arguments were heard and documents perused. Admittedly, the entire service of the applicant as GDS BPM has to be bifurcated as (a) upto the date when the regular incumbent had been promoted and posted as Postman and (b) after such regular promotion of the regular incumbent. The character of the engagement of the applicant as BPM during the period covered by (a) above is nothing but a substitute and the same cannot confer any vested or accrued right to the applicant to claim any benefit out of the same for future appointment. However, when the regular incumbent had been promoted on regular basis as a postman, respondents ought to have considered filling up the post either on provisional basis or on regular basis. Two inspections were stated to have been conducted by the higher authorities and the fact that the applicant had been functioning as GDS BPM had been duly recorded. In addition, it is the respondents who had been disbursing the TRCA every month to the applicant. Under these circumstances, if the respondents turn around to state that the engagement of the applicant was without any formal appointment order, the same would amount to the respondents taking advantage of their own mistake. This is not permissible. (See the decision in the following cases of the Apex

 Court:

(a) **A.K. Lakshmipathy v. Rai Saheb Pannalal H. Lahoti Charitable Trust, (2010) 1 SCC 287** wherein the Apex Court has held as under:-

"they cannot be allowed to take advantage of their own mistake and conveniently pass on the blame to the respondents."

(b) **Rekha Mukherjee v. Ashis Kumar Das, (2005) 3 SCC 427 :**

wherein the Apex Court has held:

"36. The respondents herein cannot take advantage of their own mistake."

7. It is therefore, to be presumed that there is an implied approval for the engagement of the applicant as GDS BPM from November, 2009. That there were four more individuals who had functioned as such for short spells is inconsequential as the same should be deemed to be engagement of a substitute by the applicant herself. It is not the case of the respondents that in such cases there have been any formal order of engagement. Such an implied approval would not give any concession to the applicant save that her appointment on ad hoc basis could well be continued upto the date regular appointment is made. That far and no further. It is exactly this sort of relief that the applicant claims. It is not her case that she should be treated as regularly appointed and should continue for all times to come. Her claim is that once the mail overseer had vacated the seat of GDS BPM on account of retirement, then the applicant ought to have been offered as she had been holding the post prior to handing over the charge to the mail overseer. Engagement of the Mail Overseer as GDS BPM was valid as long as he continued to function as Mail Overseer. Once he superannuates, his engagement as GDS BPM become co-terminal. Had the respondents, after the retirement of the said Mail overseer, engaged some other serving departmental official to function in the capacity of

GDS BPM in addition to his own, the applicant had no claim. But what had happened is that an outsider, respondent No. 3 came to be engaged. In other words, the respondents indirectly brought in a fresh hand by providing for the departmental official to function for a short spell. "The principle is that what is directly forbidden cannot be indirectly achieved" is the law laid down by the Constitution Bench of the Apex Court in the case of *Indira Nehru Gandhi vs Raj Narain* (1975) Supp SCC 1.

8. The Apex Court in the case of *State of Haryana vs Piara Singh* gave various conclusions/decisions from para 45 to 50 which inter alia include the following:-

"46. Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

49. If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

50. The proper course would be that each State prepares a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy and if a scheme is already framed, the same may be made consistent with our observations herein so as to reduce avoidable litigation in this behalf. If and when such person is regularised he should be placed immediately below the last regularly appointed employee in that category, class or service, as the case may be."

9. In the case of *Secretary, State of Karnataka vs Umadevi*(3) (2006) 4 SCC 1, the Apex Court has held as under:-

"With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised in the earlier part of the decision. "

10. The above goes to show that the decision by the Apex Court as in para 46 that an ad hoc cannot be replaced by another ad hoc has not been

overruled by the Apex Court.

11. In view of the above, the applicant has made out a case in her favour to the extent that her continuance as GDS BPM should not be disturbed till such time the vacancy is notified for appointment in accordance with the procedure laid down in the rules/regulations either for provisional appointment or regular appointment. It is accordingly ordered. Respondents are directed to permit the applicant to function as GDS BPM, Channankara until appointment as stated above, duly notified for selection, is made. This order shall be complied with, within a period of three weeks from the date of communication of this order. The OA is disposed of. No cost.


K NOORJEHAN
ADMINISTRATIVE MEMBER


Dr K.B.S. RAJAN
JUDICIAL MEMBER

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