

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 260 of 2013

Wednesday, this the 14th day of August, 2013

CORAM:

**HON'BLE Dr. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE Mr. K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

Nagarajan. S alias Kannan,
Gramin Dak Sevak Mai Packer,
Thirumala P.O,
Thiruvananthapuram : 695 006,
Residing at Muthiyoor Villa,
Arayalloor, Thirumala,
Thiruvananthapuram : 695 006

.... Applicant.

(By Advocate Mr. Vishnu S. Chempazhanthiyil)

v e r s u s

1. The Assistant Superintendent of Post Offices,
Thiruvananthapuram East Sub Division,
Thiruvananthapuram : 695 020
2. The Superintendent of Post Offices,
Thiruvananthapuram South Postal Division,
Thiruvananthapuram : 695 036
3. Union of India, represented by
The Chief Postmaster General,
KeralaCircle, Thiruvananthapuram : 695 033 Respondents.

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

This application having been heard on 06.08.2013, the Tribunal on
14-08-13 delivered the following:

ORDER

HON'BLE Mr. K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

The applicant claims that he has completed 03 years as Gramin Dak
Sevak Mail Packer (GDSMP), Thirumala. Hence, he is eligible for alternative



engagement as provided for, in Annexure A-1 letter dated 18.05.1979. As the respondents are proceeding with the selection to the post of GDSMP, Thirumala, and as he satisfies the conditions for alternative engagement, it is only just and fair that he is considered for continuance in the same place itself. He has filed this O.A for the following reliefs :

- (i) Direct the respondents to extend the benefit of Annexure A-1 to the applicant;
- (ii) Direct the respondents to permit the applicant to continue as GDSMP, Thirumala;
- (iii) Any other further relief or order as this Hon'ble Tribunal may deem fit and proper to meet the ends of justice;
- (iv) Award the cost of these proceedings.

2. The applicant contended that he has completed 03 years as GDSMP, Thirumala. Therefore, he is to be given the benefit of Annexure A-1 letter. He relies on the orders annexed at Annexures A-5, A-6 and A-7 in support of his contention.

3. In the reply statement, the respondents submitted that the applicant was in the first phase only a nominee substitute of Shri Velayudhan Pillai, the original incumbent of the post of GDSMP, Thirumala, until his promotion to the cadre of Postman on 04.02.2010. He worked as substitute of the regular incumbent intermittently since 2007. A nominated substitute cannot claim regular appointment to the post nor can he stake claim to continue in the post till a regular appointment is made, as held by this Tribunal in O.A. No. 398/2010. It may be true that the applicant has been engaged over various spells during the period from 2007 to 2010. But such intermittent engagements do not crystallize any right in him to claim the status of a

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provisional appointee. O.A. No. 684/2009 was dismissed by this Tribunal holding that only in such a case where the provisional appointee continues for more than three years, he is entitled for alternate appointment. Consequent upon appointment of the regular incumbent of the post of GDSMP, Thirumala, as Postman, action was initiated for filling up the post and the applicant was engaged to work in the said post on stop gap basis intermittently.

4. We have heard Mr. Vishnu S. Chempazhanthiyil, learned counsel for the applicant and Mr. Sunil Jacob Jose, learned SCGSC appearing for the respondents and perused the records.

5. As admitted by the respondents, the applicant had been intermittently engaged as a nominated substitute of the regular incumbent of the post of GDSMP during the period from 2007 to 2010. A nominated substitute cannot claim regular appointment as per the order of this Tribunal in O.A. No. 398/2010. This holds good as far as the first phase of the engagement of the applicant is concerned. But in the second phase starting with the promotion of the original incumbent of the post of GDSMP, Thirumala, to the cadre of Postman on 04.02.2010, as per the statement of the respondents, the applicant was engaged to work in the said post on stop gap basis intermittently. In the second phase, the applicant is not a nominee substitute but he is directly engaged by the respondents. This Tribunal, in O.A. No. 673/2010, after finding that the appointment of the applicant therein was in respect of a post which could be filled up on regular or provisional basis, held as under:

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"13. True, the respondents have contended that the appointment is only one of stop gap arrangement. What is the nature of Stop gap arrangement has been examined by the Constitution Bench in the case of Rudra Kumar Sain vs Union of India (2000) 8 SCC 25, wherein the Apex Court has, inter alia held as under:-

16. The three terms "ad hoc", "stopgap" and "fortuitous" are in frequent use in service jurisprudence. In the absence of definition of these terms in the Rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters. The meaning given to the expression "fortuitous" in Stroud's Judicial Dictionary is "accident or fortuitous casualty". This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. But an appointment made either under Rule 16 or 17 of the Recruitment Rules, after due consultation with the High Court and the appointee possesses the prescribed qualification for such appointment provided in Rule 7 and continues as such for a fairly long period, then the same cannot be held to be "fortuitous". In Black's Law Dictionary, the expression "fortuitous" means "occurring by chance", "a fortuitous event may be highly unfortunate". It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression "ad hoc" in Black's Law Dictionary, means "something which is formed for a particular purpose". The expression "stopgap" as per Oxford Dictionary, means "a temporary way of dealing with a problem or satisfying a need".

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20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous." (emphasis supplied)

14. Keeping in view the above dictum of the Apex Court and the earlier order in OA No. 471 of 2009 and 170 of 2009, if the case of the applicant is viewed, the applicant fulfilling the requisite qualifications and having worked for a substantial period of over six years (Six years period is considered as 'a long period' vide judgment in the case of Pritpal Singh vs Union of India (2000) 17 SCC 687), his appointment cannot be treated as "stopgap". Thus, the applicant has made out a case."

The post of GDSMP, Thirumala, which is vacant for more than 03 years, could have been filled up on regular or provisional basis. Had the

respondents succeeded in doing so, the question of engagement of the applicant for more than 03 years would not have arisen. Stop gap arrangement or a appointment on provisional basis is a temporary way of dealing with the problem of vacancy of GDSMP, Thirumala, in the instant case. If the respondents engaged the applicant instead of appointing him or any other person on provisional basis as per rules, the onus is on them. Failure on the part of the respondents to discharge their responsibility as per rules cannot deprive the beneficiary of the benefit that would have accrued to him, had the respondents followed the rules.

6. In O.A. No. 592/2012, this Tribunal held as under :

"7. The respondents may have a valid contention that the applicant was not appointed as a provisional hand after a due process of selection. That does not explain why a clear vacancy which arose as a result of the demise of the regular incumbent in May 2006 was not filled up for six long years. To aggravate matters, the applicant and another person, were engaged for alternative month from may 2006 onwards, till date, even after publication of Annexure A-I notification on 08.06.12. The Hon'ble High Court of Kerala dealing with an identical issue in W.P No.17727/2004 made the following observation.

14. We do not think that a restricted view as above is necessary since it was on the basis of orders of the competent authority that the petitioner had been able to continue as a provisional employee. There is no challenge about the orders passed by the Tribunal, in the matter of grant of admissible allowance and certain other allowances. The only question is as to the manner in which the Department has to proceed with the regular filling up of the post concerned. The procedure is that notification is to be made, persons are to be sponsored by the District Employment Exchange. But before that a termination is to be made. The moment the termination is made, the petitioner becomes entitled to be included in the priority list, and this insulates him with protection that he has a priority to be accommodated to the posts against any other open market candidates. In the present case it is asserted that there are no other claimants.

15. Although normally, for filling up the post of GDSM Carrier (formerly GDMC) such a procedure was to be followed, we are of the view that the petitioner will be entitled to the benefits of the regulations, by virtue of his continued and long service."

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8. In the light of what is stated above, we declare that the applicant is eligible for preference in the matter of appointment as GDSMP Uchakada despite the fact that the applicant's engagement was not routed through employment exchange. The O.A is allowed. No order as to costs."

7. In the light of the above decision of this Tribunal, even if the applicant is not appointed as a provisional hand after due process of selection and even if he is engaged in a regular post on stop gap basis, if he has put in not less than three years of engagement at the time of discharge, he is entitled to the benefit of Annexure A-1 letter dated 18.05.1979. The relevant portion of the said letter is reproduced as under:

"2. Efforts should be made to give alternative employment to the ED Agents who are appointed provisionally and subsequently discharged from service due to administrative reasons, if at the time of discharge they have put in not less than three years' service. In such cases their names should be included in the waiting list of EDAs discharged from service, prescribed in D.G. P&T Letter No. 43/4/77-Pen., dated the 23.2.1979."

8. The applicant contended that he has completed 03 years as GDSMP, Thirumala. The respondents have no case that he has not completed 03 years of engagement to discharge the functions of GDSMP, Thirumala. This O.A. was filed on 26.03.2013. As per the submission of the respondents, the post of GDSMP fell vacant on 04.02.2010 when the regular incumbent was promoted as Postman. For more than 03 years, a regular post was vacant. If filling up the post of GDSMP, Thirumala, involves termination of the engagement of the applicant and if he has put in not less than 03 years of engagement discharging the functions of GDSMP, Thirumala, at the time of discharge, he is entitled to the benefit of Annexure A-1 letter. From the pleadings and the records made available to us, we have no reason to

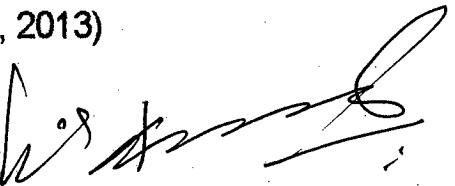


believe that his engagement against the post of GDSMP, Thirumala, is of less than 03 years. Continuity of engagement cannot be broken by artificial breaks; Hence, the applicant is eligible for the benefit of Annexure A-1 letter and the O.A is allowed as under.

9. The respondents are directed to register the name of the applicant in the waiting list of ED Agents upon his discharge from engagement to carry out the function of GDSMP, Thirumala and grant him all consequential benefits arising therefrom. No costs.

(Dated, the 14th August, 2013)


(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER


(Dr. K B S RAJAN)
JUDICIAL MEMBER

CVR.