CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH

ORIGINAL APPLICATION NO.170/00151-00153/2018

DATED THIS THE 28TH DAY OF FEBRUARY, 2019

HON'BLE DR.K.B.SURESH, MEMBER (J)

HON'BLE SHRI C V SANKAR, MEMBER (A)

1. Charles Furtado
S/o Camil Furtado,
Aged about 63 years,
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2. Yusuf U
S/o Aboobakker U,
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3. Ramesh Achary P.
S/o Thimmaya Achary P
Aged about 67 years,
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Residing at:
No. V-25/7,
Thenkila House,
Puttur (D.K.) – 574 201 …. Applicants

(By Advocate Shri P. Kamalesan)

Vs.

1. Union of India,
Represented by its Secretary,
Department of Post,

Dak Bhavan,
New Delhi – 110 001.

2. Chief Post Master General,
Karnataka Circle,
Bengaluru – 560 001.

3. Post Master General,
S.K. Region,
Bengaluru – 560 001

4. Superintendent of Post Offices,
Puttur Division,
Puttur – 574 201 …. Respondents

(By Shri S. Sugumaran, Counsel for the Respondents)

ORDER

DR. K.B. SURESH, MEMBER (J):

This matter had been considered by us earlier and which had been approved by the Hon'ble High Court at Bengaluru. But thereafter a development was brought to the notice of the Hon'ble High Court in pursuance to one of our orders. The matter related to, originally the promotion granted to a GDS employee who was not in the stream of the departmental post and hence we held that his promotion as a Postman will not be treated as promotion as it was purely a selection. It was also stipulated at that time by both the parties that the promotion or posting from Postman to Postal Assistant was on the basis of a selection and apparently on this basis the Tribunal had passed an order in O.A. No. 382/2011 dated 22.05.2012 at Jodhpur which we hereby quote:

"ORDER

These three cases of three individual applicants came to be heard together and reserved for orders together, and , therefore, are being disposed of through a common order, since the cases of the applicants and the pleadings are similar in nature for the purposes of

discussion of the facts of their cases and arriving at the findings. For the sake of convenience, the facts of the case in OA No. 382/2011 Bhanwar Lal Regar can be discussed first, in detail as the leading case.

2. The applicant of OA No. 382/2011 was initially appointed as an Extra Departmental Agent (EDA in short) in the Postal Department, which is categorized as a civil post, but not a Government employment. Therefore, he became a Group – D employee of the respondent Postal Department on 15.01.1978, and entered substantive appointment with the government from that date. Very soon, he qualified in the selection and was appointed as a Postman on 19.08.1978.

3. Thereafter, the applicant appeared in the examination for selection for the post of Postal Assistant, which is conducted by the respondent department on a centralized basis, and he was declared selected. He proceeded for training, and after training he was posted as a Postal Assistant/Clerk w.e.f. 15.01.1990. The respondent/Postal Department was not operating the Assured Career Progression Scheme earlier, but had a parallel Scheme for granting financial upgradation in the nature of the Time Bound Promotion (TBOP in short) on completion of 16 years of continuous service in a post and grade of pay without any promotion, and later another Scheme of Biennial Cadre Review (BCR, in short) was introduced by the respondent department for those who had completed 26 years of service without any promotion or with only one promotion, to be granted the second financial upgradation. Thereafter, after the 6th Central Pay Commission when the Modified Assured Career Progression Scheme was introduced by the Government, (MACP Scheme, in short) the respondent department adopted the MACP Scheme for employees for grant of financial upgradations in the case of stagnation without promotions for 10/20/30 years.

4. The applicant Shri Bhanwar Lal Regar was granted his first financial up gradation under TBOP Scheme w.e.f. 05.02.2006, 16 years after the date of his joining as a Postal Assistant. Thereafter, the applicant was granted another second financial upgradation under the MACP Scheme through the order dated 31.03.2010 (Annexure A-2) on completion of 20 years of his service as on 15.02.2010 from the date 16.02.2010. however, the applicant is aggrieved that on 05.05.2011, he was issued with a show cause notice stating that the second MACP financial upgradation benefit had been granted to him erroneously, to which he replied on 26.05.2011, but through order dated 10.08.2011, impugned at Annexure A-1, the benefit of second MACP granted to him was withdrawn by the respondents by stating as follows:-

DEPARTMENT OF POSTS INDIA
O/O The Supdt of Post Offices Churu Dn., Churu-331001

Memo No. B2-91(B),
Dated at Churu the 10.08.2011

1. *xxxx xxxx xxxx xxxx*
2. *I have gone through the relevant record, ruling and*

representation, said Shri Bhanwar Lal Regar Promoted from Group D to Postman cadre on 19.08.78 and got second promotion as Postal Asstt. On 15.01.1990 and thereafter, on completion of 16 years of service, the official was upgraded under TBOP on 5.2.2006, as such the official has already availed three financial upgradation from his entry grade, Hence, the official is not entitled for further financial upgradation in accordance with Directorate New Delhi letter No. 4-7/MACPS/2009/PC dated 18-10-2010.

3. Therefore, IInd MACP granted to him in pay band Rs 5200-20200 with grade pay Rs 4200 vide this office memo No. B2-91 (B) dated 31.3.2010 was irregular and hereby ordered to be withdrawn".

5. The applicant is before us on the ground that the impugned orders have been passed without application of mind, and appreciation of correct factual and legal aspects of the matter. He has submitted that the respondents had correctly considered earlier his entry grade to the department as Postal Assistant, and had granted him financial upgradation under TBOP Scheme on completion 16 years of service as Postal Assistant, and second MACP on completion of 20 years of service as Postal Assistant. He has submitted that though he had been initially appointed as an EDA and later selected from Group-D to Postman, but since the selection for postman was through a process of selection, it cannot be counted to be a case of promotion or financial upgradation. He has submitted that the respondents could not have counted his service from entry into service as Group-D for either TBOP or MACP, and suddenly counting his appointment from Group-D to Postman, and selection from Postman cadre to Postal Assistant cadre, as financial upgradation/promotion wrong on the part of the respondents.

6. In support of his contention, the applicant had cited the of one Shri Remeshwar Lal mali, who was earlier appointed as EDA, and then later appeared in the examination for selection for the post of Group-D and then later appeared in the examination for selection for the post of Postman, Thereafter, the respondents had first granted him financial upgradation by counting his initial appointment to the post of Postman. But, later, in his case also, the MACP granted to him was withdrawn, and pension was not fixed accordingly, but the employee concerned had approached this Tribunal in OA No. 55/2011. Later when in his case the respondents modified his pension order through order dated 08.06.2011 produced by the applicant herein at Annexure A-9 of the OA, the said OA was sought to be withdrawn, and was dismissed as withdrawn on 06.09.2011. The applicant herein, therefore, sought to be treated on the principle of enquiry and parity though in the case of the said Shri Rameshwar Lal mali, there was no judicial determination of his entitlement. In the result, the applicant had prayed for the impugned order dated 10.08.2011 to be set aside, and for being conferred the grade pay of Rs 4200/- instead of Rs 2800/- as presently granted, with

all consequential benefits and had prayed for any other directions under the facts and circumstances of the case, apart from costs.

7. The respondents had in their reply written statement filed on 22.12.2011 stoutly defended their actions, and had submitted that his selection from Group D to Postman was his first promotion, and when the applicant further qualified his LGOs examination, he had got his second promotion as Postal Assistant and therefore, TBOP benefit could have been granted to him only on completion of 16 years of Government service, in the Postal Assistants cadre. But since he had already availed three promotions/upgradations from the grade of his entry into service, he was not entitled for the same, and the applicant was erroneously granted second MACP benefit in the Pay Band of Rs 5200-20200 + Grade Pay of Rs 4200/- w.e.f. 16.02.2010 through Annexure A-2, when was held to be irregular as per DG New Delhi, letter dated 21.09.2010 and as per the directions of CPMG, Rajasthan Circle dated 20.10.2010 conveyed by the PMG Rajasthan (W), Region, Jodhpur through his letter dated 25.10.2010. It was submitted that since a show cause notice was issued to the applicant, and his reply was considered there is nothing wrong in the order at Annexure A-2 dated 31.03.2010 wrongly passed earlier having been withdrawn. It was further submitted that since he has already availed three promotions/financial upgradations, therefore, the applicant is not entitled for further financial upgradations. It was further submitted that TBOP/BCR Scheme is a separate Scheme for the purpose of granting financial upgrdations, which has no relevance with the new MACP Scheme, and since the MACP befit was wrongly granted, only that had been withdrawn, while the TBOP Scheme earlier granted to the applicant has not been withdrawn. It is therefore, prayed that the OA is liable to be dismissed.

8. The applicant filed a rejoinder dated 30.01.2012, more or less reiterating his contentions as raised in the OA, and stating that any selection and appointment, which clearly states that it is a recruitment, cannot be called a promotion, and, therefore, his selection both to the post of Postman, and later to the post of Postal Assistant, were not promotions, but were rather recruitments. It was reiterated that selection and promotion are two different things and promotion can only be in a line of promotional hierarchy, and not to an ex-cadre post, like in the case of the applicant being selected as a Postal Assistant. It was submitted that the respondents have themselves clarified through Annexure A-6 dated 25.04.2011 that when an official joined Group-D post and later he was declared successful in Postman examination in which he had appeared after fulfilling the eligibility condition of Gramin Dak Sevak and thereafter he was allowed to join in the Postman cadre as a direct recruit, he has to be held to have joined the Postman cadre under the direct recruitment quota on regular basis and as such the regular service for the purpose TBOPs commences from the date of joining in Postman cadre on direct recruitment basis. This clarification Annexure A-6 was issued by the Govt of India, Ministry of

Communications & IT, Department of Posts. Pay Commission Cell through letter No. 4-7/MACPS/2009/PCC and had amply clarified that the selection from Group-D to Postman is not a promotion.

9. He further submitted that similar selection for the post of Postal Assistant by appearing at the relevant examination cannot also be called to be a promotion. Therefore, it was reiterated by him that it cannot be held that he had received three promotions, because appointment to an ex-cadre post cannot be considered as promotion, when it is not that one can claim promotion to that post in the hierarchical line of promotion to that post from the earlier post, and the department does not permit promotion from Group-D to Postman, and from Postman to Postal Assistant, and from Postal assistant to Inspector of Posts, by way of promotion itself. It was further reiterated that any selection, recruitment appointment or absorption in an ex-cadre post has to be treated as a separate entry into a fresh grade for the purpose or ACP/MACP/financial upgradations, and also for TBOP/BCR financial benefits. It was submitted that the respondents cannot be allowed to approbate and reprobate at the same time when they have themselves admitted that appointment from Group-D to Postman and from Postman to Postal Assistant, was done through a process of selection. In the result, it was prayed that the OA be allowed and the impugned order Annexure A-1 be quashed. In support of his contention, the applicant had cited the letter dated 18.10.2010 issued by the Pay Commission Cell of the Department of Posts, Ministry of Communication & IT, clarifying the doubt regarding eligibility of MACP Scheme benefits as follows:-

Sl. No.	*Point on which clarification sought*	*Status position*
1.	*Eligibility of MACPs to a direct recruited Postal Assistant conferred with TBOP.* *It has been represented that in some Circles the directly recruited Postal Assistants who were accorded financial upgradation under one time bound promotion scheme on completion of 16 years of satisfactory service are not being given the 2nd MACPs on the ground that the officials have not completed 10 years of*	*Attention is drawn to Para No 28 of Annexure-1 to this office OM dated 18.09.2009. It is stated that a directly recruited Postal Assistant who got one financial upgradation under TBOP Scheme after rendering 16 years of service before 01.09.2008, will become eligible to 2nd MACP on completion of 20 years of continuous service from date of entry in Government service or 10 years in TBOP grade pay or scale or combination of both, whichever is earlier. However, financial upgradation under MACPS cannot be conferred from the date prior to 01.09.2008 and such 2nd financial upgradation for the above referred category of officials*

	service TBOP Scale/grade with grade pay of Rs 2800.	*has to be given from 01.09.2008. They will also become eligible for 3rd MACP on completion of 30 years of service or after rendering 10 years service in 2nd MACP, whichever is earlier.*

OA. 353/2011

10. The applicant of this OA Hardeva Ram Dhaka was similarly placed as the applicant of the above cited OA No. 382/2011, only the relevant dates being different in his case. He was recruited and appointed as Group-D employee and designated as MTS w.e.f. 5.10.1978, thereafter he qualified in the departmental Postman examination, and was appointed as a Postman on 9.12.1979. Subsequently, he further qualified in LGOs examination, and was appointed as Postal Assistant w.e.f. 29.8.1983, and on completion of 16 years of service in the Postal Assistant cadre, under TBOP Scheme, he had been granted his first financial upgradation on 3.9.1999. In his case also, a similar order dated 10.08.2011 was passed by the Superintendent of Post Offices, Churu. Respondent No 4 withdrawing the second MACP benefit granted to him in his case earlier through the same OM dated 31.03.2010 (Annexure A2), which was produced by the applicant of the earlier OA also. All other facts and submissions being in parallel, they need be re-produced here in order to avoid repetition.

11. The respondents had also filed an exactly similarly worded reply written statement, denying any wrong doing and stoutly defending their actions and praying for the OA to be dismissed. The rejoinder filed by the applicant also was similar to that filed by the applicant in OA No. 382/2011 and need not be discussed again for the sake of brevity. The applicant had also filed MA No. 19/2012 on 01.02.2012 praying that the DOP&T, and Senior Accounts Officer are necessary parties, seeking to implead them as Respondents 5 & 6 in the OA, but that MA was not allowed, and the case was heard on merits, straightaway, with the existing array of respondents. Therefore, MA No 19/2012 is rejected.

OA. 354/2011

12. The applicant of this OA Chauthmal Pareek has also made exactly the same prayer as the applicants of OAs No. 382/2011 and 353/2011, only the relevant dates being different in his case. He was also recruited and appointed as Group-D employee w.e.f. 13.06.1979, and after qualifying in the departmental Postman examination, he was appointed as a Postman on 12.10.1982. Thereafter he appeared and qualified in LGOs examination and was appointed as Postal Assistant w.e.f. 24.08.1983, and on completion of 16 years of service in the Postal Assistant cadre, under the TBOP Scheme, he had been granted his first financial upgradation on 27.8.1999. Under the MACP Scheme, through the same order dated 31.3.2010, annexed in the earlier two OAs also, he was also granted the second MACP benefit on completion of 20 years of service in the Postal Assistant cadre. But through an exactly

similarly worded order, after giving him a show cause notice, in his case also through order dated 10.08.2011, the second MACP benefit granted to him also had been withdrawn.

13. The respondents had also filed an exactly similarly worded reply written statement, taking exactly the similar grounds, and had prayed for the OA to be dismissed.

14. The applicant had thereafter filed a rejoinder on 01.02.2012, which was also similar worded as in the earlier two OAs, and need not be discussed again for the sake of brevity. The applicant of this OA had also filed MA No. 20/2012 on 01.02.2012, praying that the DOP&T and Senior Accounts Officer are necessary parties, and had sought to implead them as Respondents 5 & 6 in the OA, but that MA was not considered before the case came to be heard for final hearing, and that MA No. 20/2012 is, therefore, rejected.

15. Heard the cases in detail. I have given my anxious consideration to the facts of the cases.

16. It is obvious that appointment from the civil post of EDA to a regular Government employment as Group-D is a fresh appointment, and that has not been disputed by the respondents either. Thereafter when, as Group-D employees, these three applicants faced a process of selection, and were appointed as Postmen such selection cannot be called a promotion, as it was not done in the course of natural progression through seniority. Any advancement in career which is based on a process of selection especially undertaken for that purpose cannot be called as a promotion. A promotion has to be in higher category in the same cadre, or service, or through a prescribed avenue of promotion, but without an element of a process of selection, through tests or examinations etc.

17. The meaning of the word "promotion" was considered by the Hon'ble Apex Court in the case of ***Director General, Rice Research Institute, Cuttack & anr v Khetra Mohan Das****, 1994 (5) SLR 728 and it was held as follows:-*

> *"A promotion is different from fitment by way of rationalization and initial adjustment. Promotion, as is generally understood, means; the appointment of a person of any category or grade of a service or a class of service to a higher category or Grade of such service or class. In C.C.Padmanabhan v. Director of Public Instructions, 1980 (Supp) SC 668: (AIR 1981 SC 64)) this Court observed that "Promotion" as understood in ordinary parlance and also as a term frequently used in cases involving service laws means that a person already holding a position would have a promotion if he is appointed to another post which satisfies either of the two conditions namely that the new post is in a higher category of the same service or that the new post carries higher grade in the same service or class."*

18. Further, in the case of State of Rajasthan v. Fatehchand Soni, (1996) 1 SSC 562, at p.567: 1995 (7) Scale 168: 1995 (9) JT 523: 1996 SC (L&S) 340: 1996 (1) SLR 1.), The Hon'ble Apex Court findings can

be paraphrased and summarized as follows:-

> *"In the literal sense the word "promote" means "to advise to a higher position grade, or honour". So also "promotion" means "advancement or preferment in honour, dignity, rank, or grade". (See Webster's Comprehensive Dictionary, International Edn. P. 1009) 'Promotion' thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression 'promotion' has been understood in the wider sense and it has been held that 'promotion can be either to a higher pay scale or to a higher post".*

19. In a similar manner, while being Postmen, the three applicants in these three OAs faced the Limited Departmental Competitive Examination (LDCE, in short) and qualified to become Postal Assistants, their joining as Postal Assistants was not in the nature of promotion in their earlier existing service or cadre, but was a career advancement through a process of selection. Therefore for the purpose of grant of TBOP/BCR financial upgradations earlier, and MACP financial upgradation now, the only dates which are relevant to be taken into account for the purpose of counting the periods of their stagnation is the period spent by the applicants as Postal Assistant. In that sense, the clarification issued by the Pay Commission Cell of the department of Posts, Ministry of Commissions & IT on 25.04.2011 through file No. 4-7/MACPS/2009/-PCC, as cited in para 8 above, is correct. The only problem with that clarification is that it stopped at the point of clarifying that when the GDS first joined in a Group-D post, and was later declared as successful in the Postman examination, the regular service for the purpose of MACP would be deemed to commence from the date of his joining as a Postman in the main cadre on direct recruit basis. But it is obvious that the corollary would follow, and when the postman appears at the LDCE and gets selected to a new Cadre as a Postal Assistant, then it is start of a new innings for him, and for the purpose of counting his stagnation, if any, the date of his joining as Postal Assistant alone would be relevant, and his previous career advancements cannot be called to be promotions within the definition of the word 'promotion', as is required for the grant of TBOP/BCR benefit consideration, and for consideration for eligibility for financial upgradation on account of stagnation under the MACP Scheme.

20. It is therefore, clear that Para-2 of the impugned order in all these three OAs at Annexure A-1 dated 10.08.2011, passed by the Supdt, of post Offices, Churu Division, Churu was incorrect, and the eligibility of these three applicants for the grant of TBOP/BCR benefits earlier, and MACP benefit thereafter, has to be counted only from the date they were substantively appointed as Postal Assistants. Therefore, the impugned Annexure A-1 dated 10.08.2011 in all the three OAs are set aside, and the grant of MACP benefit correctly granted to the three applicants earlier through the order dated 31.03.2010 is upheld. The applicants shall be accordingly entitled to all the arrears, with interest at the GPF rate of interest being payable on the arrears of the financial

upgradation benefits admissible to the applicants, correctly granted earlier on 31.03.2010.

21. The three OAs are allowed in terms of the above directions, and the two MAs have already been rejected, in paras 11 and 14 above, but there shall be no order as to costs.

22. Let a copy of this order be placed in OA No. 353/2011 and OA No. 354/2011."

2. This matter went up to the Hon'ble High Court of Rajasthan in D.B. Civil Writ Petition No. 11336/2012 and all other connected cases dated 10.08.2015 which affirmed the order of the Tribunal which was taken up in SLP to the Hon'ble Supreme Court and the Hon'ble Supreme Court having dismissed the SLP, had become final.

3. But later on the department found out one other element in it which was not available to us at the point when we disposed off the matter. But when it was challenged in review in WP No. 102322/2018, the Hon'ble High Court felt that because of the procedure involved in the selection that some positions were earmarked for departmental candidates only and the Limited Departmental Competitive Examination was focused on these people alone, the element of selection was not present but an element of promotion was present. These rules were not produced before us at that point of time by the department but were produced before the Hon'ble High Court.

4. Seeing these rules, the Hon'ble High Court passed the following order which we quote:

"O R D E R

This writ petition is listed for orders. However, with consent of learned counsel for Union of India and Postal Department and learned counsel for the respondent it is heard finally.

2. Petitioners-Union of India and Postal Department have

assailed order dated 22.11.2017 passed in O.A. No.170/00898/2016, a copy of which is at Annexure-A. By the said order, the Central Administrative Tribunal (hereinafter referred to, as "the Tribunal" for the sake of convenience) has allowed the original application by holding that the appointment of the applicant to the post of Postal Assistant based on the Limited Departmental Competitive Examination cannot be considered to be a promotion but a case of direct recruitment. That since the applicant has got two financial upgradations one under Time Bound One Promotion (TBOP) on completion of sixteen years and Biennial Cadre Review Scheme (BCRS) on completion of twenty six years in the Postal Assistant cadre , she would be entitled to 3rd Modified Assured Career Progression Scheme (hereinafter referred to as "MACP-III", for the sake of convenience) benefits on completion of thirty years of service as a Postal Assistant with effect from 01.09.2008 or a later date. Accordingly, a direction was issued to the petitioners herein to issue necessary orders granting the applicants the 3rd financial upgradation under MACP-III on completion of thirty years of service as Postal Assistant or with effect from 01.09.2008 or from the applicable date, within a period o f two months from the date of receipt of a copy of the said order. A further direction was issued to the petitioners herein to release all the consequential benefits within the said period.

3. The respondent herein was appointed as Departmental Staff Vender (DSV)/Postman(Post Woman) on selection with effect from 25.10.1973. Thereafter, she appeared for the Limited Departmental Competitive Examination (hereinafter referred to as "departmental test", for the sake of convenience) and was appointed as Postal Assistant on 25.03.1978. The department extended financial upgradation (TBOP) on completion of 16 years of her service with effect from 27.03.1994 and thereafter she was extended the benefits under BCRS on completion of 26 years of service. Subsequently, Government of India introduced Modified Assured Career Progression Scheme (MACP) to the Central Government employees with effect from 01.09.2008. As per the said scheme, every employee would be eligible for three financial upgradations after completion of 10/20/30 years of service. The petitioner Department adopted the same by replacing the TBOP/BCR scheme with effect from 01.09.2008.

4. When the matter stood thus, respondent made a representation on 09.01.2016 for grant of MACP-III on completion of 30 years of service in Postal Assistant cadre by contending that denial of the same had caused financial loss and injustice to her. It was contended that the Tribunal at Jodhpur and other Tribunals had granted such reliefs. Since the same was not extended to her, she approached the Tribunal seeking relief of extension of MACP-III benefits to her also. The same was resisted by the petitioners herein. It was contended that the respondent had appeared in the departmental test and had been promoted as a Postal Assistant and thereafter, she had been accorded benefits under the TBOP scheme and BCRS and grant of further benefits under MACP would not arise. However, the Tribunal by the

impugned order has issued the aforesaid direction. Being aggrieved, the Union of India and Postal Department have assailed the same before this Court.

5. We have heard learned counsel for the petitioners and learned counsel for the respondent and perused the material available on record.

6. During the course of his submission, petitioners' counsel drew our attention to Indian Posts and Telegraphs (Time Scale Clerks and Sorters) Recruitment Rules, 1971 and contended that under the said Rules, filling up of the post of Postal Assistant is by a two fold method : (a) 50% of the vacancies to be filled by direct recruitment and (b) 50% by promotion through a test. That in the instant case, respondent had been promoted as a Postal Assistant on her appearing in the departmental test and qualifying in the same. Therefore, her appointment as a Postal Assistant cannot be construed to be direct recruitment but by way of promotion. That post of Postal Assistant is filled up by direct recruitment in respect of those persons who are not in the Postal Department to an extent of 50%. But as far as employees in the Postal Department are concerned, the said post is filled up by promotion through a departmental test insofar as 50% of the vacancies are concerned. Since the respondent herein qualified in the departmental test, she was promoted to the said post. In the circumstances, the Tribunal was not right in construing the same as direct recruitment and thereby excluding the same for the purpose of consideration of the case of the respondent under MACP-III. It was contended that if the appointment of the respondent as Postal Assistant is by way of promotion, and the same is not a direct recruitment, then the same would be a crucial fact to be taken into consideration while ascertaining as to whether the respondent is entitled to benefits under MACP-III. That since the respondent has been promoted to the post of Postal Assistant on clearing the departmental test and has been extended the benefits under TBOP Scheme as well as under BCRS, she cannot once again be extended the benefits under MACP-III. In this regard, learned counsel for the petitioners placed reliance on a recent order of a co-ordinate Bench of this Court passed in W.P. No.57935/2017 in the case of ***The Union of India and others V/s. M.G. Shivalingappa (Shivalingappa),*** *disposed off on 02.08.2018, wherein it has been held that the appointment to the post of a Sorting Assistant or a Postal Assistant is a case of departmental promotion and hence, the said order may be applied to the instant case and the writ petition may be allowed.*

7. Per contra, learned counsel for the respondent, at the outset, submitted that the order passed by the Bengaluru Bench of this Court referred to by learned counsel for the petitioners is one which was passed without hearing the respondent therein and therefore cannot be construed to be applicable to the present case. He drew our attention to the order passed by the Jodhpur Bench of Rajasthan High Court, wherein it has been held that filling up of the post of Postal Assistant or

Sorting Assistant on qualifying in the Limited Departmental Competitive Examination is a direct recruitment and not in the nature of promotion; that the order of the Jodhpur Bench of Rajashtan High Court in the case ***of Union of India and others V/s. Bhanwar Lal Regar (Bhanwar Lal Regar),*** *made by a Division Bench, in Civil Writ Petition No.11336/2012 and connected matters, disposed off on 10.08.2015, was assailed by the Union of India and others before the Hon'ble Supreme Court. The Hon'ble Supreme Court by its order dated 10.08.2018 passed in SLP (Civil) Dairy No.23260/2018 dismissed the said Special Leave Petition and hence, the order of the Rajasthan High Court which has received approval by the Hon'ble Supreme Court may be followed in the instant case. He further drew our attention to an order dated 04.02.2015 passed by a Division Bench of Judicature of Madras High Court in the case of* ***Union of India and others V/s. D. Shivakumar and another (D. Shivakumar),*** *wherein the benefits under MACP-III was extended by approving the order of the Tribunal at Chennai. That the Special Leave Petition filed against the said order was dismissed by the Hon'ble Supreme Court on 16.08.2018 keeping the question of law open.*

8. He further submitted that a review petition was filed against the said order and the Hon'ble Supreme Court has dismissed the said review petition also. Therefore, learned counsel for the respondent contended that there is no merit in this writ petition and the same may be dismissed.

9. Having heard learned counsel for the respective parties, we find that the controversy in this writ petition is in a very narrow compass.

10. Learned counsel for the petitioners has contended that if the appointment of respondent as a Postal Assistant is construed to be a case of promotion, then the respondent would not be entitled to the benefits under MACP-III, while the contention of learned counsel for respondent is that the said appointment is in the nature of a direct recruitment and not a promotion therefore, the same cannot be taken note of or reckoned for the purpose of extension of benefits under MACP-III. In the circumstances, the first bone of contention between the respective parties would have to be determined.

11. It is not in dispute that the respondent was appointed as a Post Woman in the petitioners' department and thereafter she was appointed as a Postal Assistant on 25.03.1978 after appearing in a departmental exam and qualifying in the same.

12. Learned counsel for the petitioners has drawn our attention to the Rules. Under the said Rules, it is noted that the appointment to the post of Sorting Assistant/Postal Assistant is in the following manner:

(A) 50% by direct recruitment

(B) 50% by promotion through a test

The same is clearly mentioned in the Schedule to the Rules. On reading of the same, it becomes clear that filling up of the post of Postal Assistant or Sorting Assistant or any other equivalent post is from two sources, namely from direct recruitment (50%) and promotion through a departmental test (50%). Thus, the said posts are filled up in a two-fold

manner in equal proportion i.e., 50% each.

13. It is not in dispute that when the respondent appeared for the departmental test, she was already working in the department as a Post Woman and being an employee of the Postal Department was eligible to appear for the departmental test. On qualifying in the said test, she was promoted as Postal Assistant. Therefore, her appointment as a Postal Assistant was clearly by way of promotion and not by way of direct recruitment. Appointment to 50% of the vacancies by direct recruitment would only be to those persons who are not in the department, i.e., outsiders who would apply for the said posts. But as far as employees of the department are concerned, they could only be appointed to the said posts by way of promotion on being qualified in the departmental test. In the circumstances, the appointment of the respondent as Postal Assistant was by way of promotion and not by way of direct recruitment. The same has been held so, by a co-ordinate Bench of this Court in its latest order dated 02.08.2018 in the case of ***Shivalingappa****. At paragraph Nos.5 and 6, it is observed as under:*

> *"5. In that regard, at the outset what is necessary to be taken note is the actual purport of the designation of the respondent as Postal Assistant/Sorting Assistant so as to arrive at a conclusion whether the same could be considered as a promotion that has intervened and elevated the position to a different grade so that the continuity in the same post cannot be contended and the financial up-gradation through MACP be claimed. To that extent, the Rules for recruitment as at Annexure-R4 would disclose that in respect of the Clerks and Sorters, the promotional avenue is 50% by direct recruitment and the remaining is by promotion through a test. If in that background the respondent who is promoted as SortingAssistant through the order dated 21.05.1982(Annexure-A2) is taken note, it is seen that the persons as named therein are the departmental promotees who are promoted to assume the post as Sorting Assistant and the name of the respondent is found at Sl.No.6. If that be the position, the change from the Group-D post to which the petitioner was appointed on 28.11.1979 and to the Sorting Assistant on 24.05.1982 will have to be considered as promotion. If that be the position, the stagnation for which the financial upgradation is provided under the MACP Scheme cannot be applied when a promotion has been granted to the employee concerned. Thereafter when the respondent was in the promoted post as per the scheme that was in vogue at that point in time, the TBOP has been granted on 28.05.1998 when he had qualified for the same after putting in 16 years in the said position. Subsequently, on 01.07.2008 the next BCR financial up-gradation has been granted.*
>
> *6. On these aspects when there is no serious dispute and the respondent has been granted one promotion and two financial upgradations, the case of the respondent being*

considered once over again for grant of MACP in the manner as directed by the CAT would not arise in the instant case. In that view, the order directing the petitioners to treat the case of the respondent as appointment with effect from the date on which he was promoted and thereafter grant the benefit of MACP Scheme would not be justified. Accordingly, the order dated 21.08.2017 impugned at Annexure-A to this petition is set aside.

The petition is accordingly disposed of."

Therefore, by following the said order, we could allow these petitions by setting aside the order passed by the Tribunal in favour of the respondent, but, the controversy does not end here.

14. Learned counsel for the respondent has drawn our attention to two orders of the Hon'ble Supreme Court referred to above, one arising from the Jodhpur Bench of Rajasthan High Court and the other arising from the Madras High Court. With reference to those orders, learned counsel for the respondent contended that when the Hon'ble Supreme Court has approved the orders passed by the Jodhpur Bench of Rajasthan High Court and the Division Bench of the Madras High Court, both holding that the said appointment of the postal employees as Postal Assistant or Sorting Assistant to be direct recruitment, the Division Bench of this Court could not have held it to be in the nature of promotion. He contended that having regard to the dismissal of the Special Leave Petition, the Hon'ble Supreme Court has given its imprimatur to the orders of Jodhpur Bench Rajasthan High Court and the order of the Division Bench of the Madras Court and hence, the said orders may be followed and relief may be granted to the respondent herein by dismissing the writ petitions.

*15. Learned counsel for the respondent has also brought to our notice an order passed by a Co-ordinate Bench of Kalaburagi Bench of this Court in W.P. No.200807/2016 in the case of **The Union of India and others V/s. Shri. Basanna Naik (Basanna Naik)** disposed off on 20.09.2016. He contended that in the said order also it has been held that the appointment of the respondent as a Postal Assistant is not by way of promotion but by way of direct recruitment. He submitted that the said order may be followed in the instant case.*

*16. Before going into the orders passed by the said Courts, it would be useful to refer to a judgment of the Hon'ble Supreme Court in the case of **Kunhayammed and others V/s. State of Kerala and another,** reported in **AIR 2000 SC 2587 (Kunhayammed).** In the said judgment, the Hon'ble Supreme Court was considering the doctrine of merger in the context under Article 136 read with Article 141 of the Constitution of India and also in the context of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. At paragraph 43 of the said judgment, the Hon'ble Supreme Court has summed up its conclusion with regard to exercise of jurisdiction under Article 136 of the Constitution. While referring to an order refusing the special leave to appeal, may be, by a non-speaking order or a speaking order, it has been held that in either case it does not attract the doctrine of merger. An order refusing special*

leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. The Hon'ble Supreme Court further held that if the order refusing leave to appeal is a speaking order which gives reasons for refusing the grant of leave, then the order has two implications: firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution; secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or Authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, Tribunal or Authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties. The Hon'ble Supreme Court went on to hold that once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked, the order passed in appeal would attract the doctrine of merger, the said order may be of reversal, modification or mere affirmation.

17. In the circumstances, it is held that the dismissal of the Special Leave Petitions arising from the Jodhpur Bench of Rajasthan High Court and the Division Bench of Madras Court would not imply that it becomes the law of the land in the context of Article 141 of the Constitution particularly when the question of law has been left open by the Hon'ble Supreme Court vis-à-vis the controversy in this case. In the circumstances, there is no substance in the contention of learned counsel for the respondent that in view of the dismissal of the Special Leave Petition by the Hon'ble Supreme Court vis-à-vis the order of the Jodhpur Bench of Rajasthan High Court and the Division Bench of Madras High Court, the same ought to be applied in the present case, rather than the order of Division Bench of Principal Bench of Karnataka High Court dated 02.08.2018.

18. There is another reason as to why the order of the Jodhpur Bench of the Rajasthan High Court and the order of Division Bench of the Madras High Court cannot be applied ipso facto to the facts of the present case. In those orders reference has not been made to the Schedule to the Rules as in the instant case, which is extracted above. The mode of filling up of post of Postal Assistant or Sorting Assistant under the Rules was not brought to the notice of the said Benches. In fact, in the order of the Jodhpur Bench of the Rajasthan High Court, there is a specific observation regarding counsel for the appellant therein i.e., Union of India and the Postal Department, being repeatedly asked to place on record the provision for promotion to the post of Postal Assistant or Sorting Assistant. It has been observed that, no such provision was placed for perusal of the Court. In those circumstances, it was inferred that appointment pursuant to a departmental test i.e.,

'Limited Competitive Examination' is nothing but, 'direct recruitment'. That the appointment made was in the nature of a direct recruitment and not a promotion which inference is contrary to the Rules. In the circumstances, by construing the said appointment to be one of direct recruitment and not promotion, a direction was issued to the Union of India as well as to the Postal Department to extend the benefits under MACP-III to the respondent therein. Similarly, in the judgment of the Division Bench of the Madras High Court, there is no reference to the Rules as well as to the Schedule under the Rules. In the circumstances, in paragraph 9 of the said judgment, it has been construed that the appointment of the respondent therein as a Postal Assistant was not by way of promotion and hence, similar directions were issued in favour of the employees. But in the instant case, our attention has been drawn to the Schedule to the Rules under which the nature of appointment has been clearly prescribed. Admittedly, in the instant case, the respondent was appointed to the post of Postal Assistant on being qualified in the departmental test while she was already working as a Post Woman in the department. Hence, it is clearly a case of promotion.

19. Our attention has also been drawn to an earlier order of the Tribunal in O.A. No.1259/2014, wherein, it has been held that when a certain percentage of posts is earmarked exclusively for departmental candidates, it implies that it is a case of promotion as opposed to recruitment from open market insofar as the percentage earmarked for direct recruitment. In the said Original Application filed by ***Sri. Krishnaiah*** *after considering as to whether the applicant therein was entitled to the benefits under MACP-III, the Tribunal on considering the judgment of the Jodhpur Bench of Rajasthan High Court in the case of* ***Bhanawar Lal Regar*** *held that the relevant rules to the schedule was not brought to the notice of the Jodhpur Bench of High Court of Rajasthan had it been done so, its decision would have been otherwise.*

20. In the circumstances, in the instant case, we are persuaded to follow the order of the Co-ordinate Bench of this Court in the case of Sri. M.G. Shivalingappa and to hold that respondent herein is not entitled to the benefits under MACP-III Scheme.

21. For the aforesaid reasons, we are also not inclined to follow the order passed by the Co-ordinate Bench of Kalaburgi Bench of this Court in the case of ***Basanna Naik*** *as the said order has also been passed following the order of the Jodhpur Bench, Rajasthan High Court as well as the order passed by Delhi High Court in W.P. No.(C) 4131/2014 in the case of* ***Union of India and others V/s. Shakeel Ahmad Burney,*** *disposed off on 05.08.2014 (29.09.2017). In fact, reference has been made to the order passed by the Delhi High Court in W.P. No.(C)4131/2014 dated 05.08.2014 in the case of* ***Krishnaiah*** *as well as to the order passed in R.P. No.441/2014 by the Delhi High Court in respect of which reference has been made in the case of* ***Krishnaiah*** *and held that the said orders have been made without reference to the recruitment rules and by placing reliance on the order of the Jodhpur Bench of the Rajasthan High Court in D.B. Civil Writ Petition*

No.11366/2012. We have also assigned the reasons as to why despite the Special Leave Petition arising out of the orders passed by the Jodhpur Bench of Rajasthan High Court and the Division Bench of Madras High Court having been dismissed can nevertheless not be made applicable to the present case. The question of law was kept open by the Hon'ble Supreme Court while dismissing the Special Leave Petition arising out of the order of the Division Bench of the Madras High Court.

22. Accordingly, writ petition is allowed. The impugned order dated 22.11.2017 passed in O.A. No.170/00898/2016 is quashed.

Parties to bear their respective costs."

5. Therefore, without any doubt, since a specific stream had been made for the promotion of these people and applicants and others like him had obtained the promotion only through this, the element of selection involved in it is only to eliminate non-competent among them but still it will be a promotion. Therefore, the OA lacks merit.

6. The OA is dismissed. No order as to costs.

(C V SANKAR)
MEMBER (A)

(DR.K.B.SURESH)
MEMBER (J)

/ksk/

Annexures referred in O.A. No. 170/00151-00153/2018

Annexure-A1: Copy of the representation dated 11.07.2017
Annexure-A2: Copy of the SPO letter dated 20.07.2017
Annexure-A3: Copy of the representation of applicant No. 2 dated 10.07.2017
Annexure-A4: Copy of the SPO letter dated 20.07.2017
Annexure-A5: Copy of the representation of applicant No. 3 dated 04.08.2017
Annexure-A6: Copy of the SPO letter dated 23.11.2017
Annexure-A7: Copy of the Hon'ble, Central Administrative Tribunal, Jodhpur order dated 22.05.2012 in OA No. 382/2011
Annexure-A8: Copy of the Hon'ble High Court of Rajasthan at Jodhpur order dated 10.08.2015 in WP No. 11336/2012
Annexure-A9: Copy of the Hon'ble Central Administrative Tribunal, Bangalore order dated 09.10.2015 in OA No. 361/2014
Annexure-A10: Copy of the Hon'ble High Court of Karnataka order dated 20.09.2016 in WP No. 200807/2016
Annexure-A11: Copy of the Hon'ble Central Administrative Tribunal, Madras order dated 14.03.2013 in OA No. 1088/2011
Annexure-A12: Copy of the Hon'ble High Court, Madras order dated 04.02.2015 in WP No. 30629/2014
Annexure-A13: Copy of the Hon'ble Apex Court order dated 16.08.2016 in SLP No. 4848/2016
Annexure-A14: Copy of the Hon'ble Apex Court order dated 13.09.2017 in Review SLP No. 1939/2017
Annexure-A15: Copy of the SSPO, Chennai letter dated 22.03.2017

Annexures with reply statement

Annexure-R1: Copy of the OM dated 18.09.2009
Annexure-R2: Copy of the Corrigendum dated 20.05.2010
Annexure-R3: Copy of the circular dated 18.10.2010
Annexure-R4: Copy of the Recruitment Rules – Appendix 9

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