

**CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH, BENGALURU**

ORIGINAL APPLICATION NO.170/000480/2017

DATED THIS THE 08TH DAY OF FEBRUARY, 2019

**HON'BLE DR.K.B.SURESH
HON'BLE SHRI C.V. SANKAR**

**...MEMBER(J)
...MEMBER(A)**

1. Venkatesh B. Joshi,
Aged about 63 years,
S/o Bhim Bhat Joshi,
Retired Sorting Assistant,
HRO RMS 'HB' Division,
Hubli-580 020.
Residing at No.11, Sai Layout,
B/H Khadi Gramodyog,
Bengeri, Hubli-58 0 023.

2. Lachamappa Ramappa Dasar,
Aged about 66 years,
S/o Ramappa Dasar,
Retired SPM,
Belur P.O.,
Bagalkot District,
Residing at Banashri Nilaya,
Shivajinagar,
Yalakki Shettar Colony,
Dharwad-580 004.

..Applicants.

(By Advocate Shri P. Kamalesan)

Vs.

1. Union of India
Through Secretary,
Department of Posts,
Dak Bhavan,
New Delhi – 110 001.
2. Chief Post Master General,
Karnataka Circle,
Bangalore.
3. Post Master General ,
N.K. Region,

Dharwad-580 001.

4. Superintendent of Post Offices,
RMS HB Division,
Hubli-580 029.

5. Superintendent of Post offices,
Bagalkot Division,
Bagalkot-587 101. ...Respondents

(By Standing Counsel Shri N. Amaresh for Respondents)

O R D E R (ORAL)

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

Heard. Apparently the matter is covered by our earlier order in OA.No.361/2014 dated 09.10.2015 which we quote:

O R D E R
(PER HON'BLE SHRI PRASANNA KUMAR PRADHAN, MEMBER (ADMN.))

The applicant has filed the OA seeking the following relief:

- i. *To quash the order No.b1/CAT/OA No.32/2013/Dlgs/2014 dated at Gulbarga the 20.01.2014, issued by the respondent No.3, Annexure-A10,*
- ii. *Direct the respondents to continue the benefit of 2nd financial upgradation under the MACP scheme to the applicant with effect from 13.09.2009 in accordance with the Memo No.b1/ACP/Dlgs/10 dated at Gulbarga the 02.08.2010, Annexure-A5, with consequential benefits and*
- iii. *Grant such other relief deemed fit, having regard to the facts and circumstances of the case.*

2. The applicant has joined the respondents' organisation as 'Messenger' in April, 1983. Thereafter he was appointed to the cadre of Postman by an order dated 15.09.1987(Annexure-A2) on passing the relevant examination. Thereafter, he appeared for LGO's examination held on 18.12.1988 and became successful based on which he was appointed as a Postal Assistant vide order dated 23.03.1989(Annexure-A3). Vide order dated 13.09.2005, i.e., on completion of 16 years of regular service in the cadre of Postal

Assistant, he was extended the benefit of financial upgradation under TBOP w.e.f. 13.08.2005 vide Annexure-A4. Thereafter pursuant to the 6th Central Pay Commission recommendation, the MACP scheme was introduced to grant 3 financial upgradations at intervals of 10,20 and 30 years of continuous regular service if no promotion has been earned during the intervening periods. Thereafter vide order dated 02.08.2010(Annexure-A5) the applicant was granted the benefit of second financial upgradation under MACP w.e.f. 13.09.2009. Thereafter an audit was conducted by the Internal Check Inspection Party in March 2012 but opined that the applicant was not entitled for the second financial upgradation under MACP as he had already received promotions three times earlier. Based on the opinion of the auditors, the Postmaster, Yadagiri passed an order dated 16.06.2012 (Annexure-A6) stopping the MACP benefits given to the applicant and directed to recover of payment on the excess amount. Thereafter the applicant approached this Tribunal in OA.No.32/2013 challenging the order of withdrawal of MACP benefit and consequent recovery. This Tribunal vide order dated 04.11.2013 quashed the impugned order and directed the competent authority to pass a reasoned and considered order after giving an opportunity to the applicant for having being heard(Annexure-A7). Thereafter the applicant was issued with a show cause notice by the respondent No.3 on 26.12.2013 asking him to explain as to why MACP benefit should not be withdrawn and excess payment should not be recovered. The applicant submitted his reply on 02.01.2014(Annexure-A9) justifying his entitlement for 2nd financial upgradation under MACP. However, the respondents vide an order dated 20.01.2014(Annexure-A10) held that the applicant had earned 3 promotions in his service and as such he is not eligible for MACP benefit which was granted to him w.e.f. 12.08.2009. It also held that the excess paid amount is required to be recovered. Therefore the applicant has approached this Tribunal once again seeking the relief as sought for.

3. In this OA, the applicant has further referred to a decision of the Jodhpur Bench of this Tribunal in the case of Bhanwar Lal Regar Vs. Union of India & others[OA.No.353/2011 and connected matters (disposed of on 22.06.2012)], wherein it has been held that any advancement in career which is based on a process of selection especially undertaken for that purpose cannot be called as promotion. As such, the recruitment of the applicant to the post of 'Postal Assistant' based on selection on being successful in the examination conducted for the purpose, cannot be termed as promotion from the post of 'Postman'. It is submitted that no procedural formalities for promotion were observed when he was appointed to the post of Postal Assistant. In particular, no DPC meeting was held to consider him for promotion and no assessment of his performance as per the service records was considered; but only the marks secured in the concerned examination. As such, the appointment to the post of Postal Assistant was by way of direct recruitment. It is further submitted that appointment to the cadre of Postal Assistant can be by way of direct recruitment only through a competitive examination, even though 50% of these posts are reserved for internal candidates. Further, once the candidates are appointed to the post of Postal Assistants from whatever may be the source, there can be no further distinction in the cadre of

Postal Assistants for the benefit of future financial upgradations, if the view taken by the respondents is accepted then it will lead to an anomalous situation in the sense that the candidates recruited from outside source will have opportunities of 3 financial upgradations under MACP; whereas the candidates recruited from internal source will have no such opportunities as it is deemed that they were 'promoted' to the cadre of Postal Assistants. As such, the view taken by the respondents are in conflict with the decision of the Hon'ble Supreme Court in the case of State of Mysore Vs M.H.Krishna Murthy and others [(1972)7 SLR 832]. It is submitted that the service of the applicant in the cadre of Postal Assistant has been considered for the financial upgradation under the TBOP scheme on the ground the Postal Assistant is the basic grade and accordingly he was given TBOP benefit with effect from 13.08.2005 in terms of the order dated 13.09.2005. If that is so, there is no rationale to consider his service in the post of Postman as the basic grade for the purpose of financial upgradation under the MACP scheme.

4. Therefore on completion of 20 years of service the applicant was rightly given the benefit of 2nd financial upgradation w.e.f. 13.09.2009 vide order dated 02.08.2010. The opinion of the auditors which is without any rationale and which is the basis for denial of the benefit of 2nd MACP already granted by the respondents earlier cannot be sustained. The services of the applicant in the cadre of Postal Assistant has to be taken as basic grade for extending the benefit under the MACP scheme. Therefore he is entitled to the relief as sought for.

5. The respondents have filed the reply statement wherein they have submitted that the applicant was initially appointed as Group-D on 12.05.1983 and was promoted to the cadre of Postman on 12.10.1987 and got second promotion as a Postal Assistant on 30.07.1989. He was granted financial upgradation under TBOP scheme on completion of 16 years of service in Postal Assistant cadre on 13.08.2005. As per the MACP scheme which came into effect w.e.f. 01.09.2008, the applicant was granted 3rd MACP on 12.08.2009 as recommended by the DPC. However the internal check inspection party during the course of internal check inspection, pointed out that the MACP-III upgradation granted to the applicant was irregular as the applicant had already earned three promotions i.e. 1st promotion from Gr.D to Postman, second promotion from Postman to Postal Assistant and TBOP upgradation in Postal Assistant cadre and as such he is not eligible for 3rd MACP. The copies of the objection memos were supplied to the applicant by the Postmaster, Yadgiri HO. Excess paid pay and allowances for the period from 12.08.2009 to 29.02.2012 was worked out and excess payment to the extent of Rs.17500/- was already recovered from July 2012 to July 2013. Following the order of this Tribunal in OA.No.32/2013, a show cause notice was issued by the SSPO, Gulbarga to the applicant vide letter dated 26.12.13 inviting objections, if any, on the internal audit inspection report. In response to the same, the applicant submitted a reply vide his letter dated 02.01.2014. Hence, the whole issue was re-examined by the competent authority. In fact the applicant had not added any new parts in the shape of objection in reply to the show cause notice issued to him excepting to add that he is entitled to the benefits of 2nd financial upgradations under MACPs

w.e.f. 12.08.2009 to 31.07.2013. Thereafter, after considering the matter in detail, a reasoned and considered order was passed ordering that the applicant has not brought any new objection on the IAIR in his reply to the show cause notice and the fact remains unchanged that he has earned three promotions in his service as noticed by IAIR and he is not eligible for MACP III w.e.f. 12.08.2009 and excess paid pay and allowances has to be recovered besides regularizing pay as per IAIR. Thereafter, from Jan 2014 to March 2014 further amount of Rs.7500/- has been recovered.

6. The respondents further submitted that the decision of CAT Jodhpur Bench cannot be applied to all. The selection of applicant to the post of Postal Assistant is considered as promotion only and for MACP, the service rendered by the applicant in the cadre of Postal Assistant alone can not be considered for giving the benefit under MACP. Further the MACP scheme entitles only 3 financial upgradations in the entire career. The applicant was actually promoted to the Postal Assistant from Postman cadre and this has to be considered as promotion. The decision of the Hon'ble Supreme Court in the case of State of Mysore Vs M.H.Krishna Murthy and others does not applicable to the present case. They have also referred to the judgment of the Hon'ble Supreme Court in CA No.5899/2012 between Chandi Prasad Uniyal and Ors vs State of Uttarakhand & Ors for effecting the recovery of the excess paid amount which was given wrongly. Therefore, they submitted that there is no merit in the OA which is liable to be dismissed.

7. Heard the Learned Counsel for the parties.

8. The Learned Counsel for the applicant reiterated the points highlighted in the OA and submitted that the appointment of the applicant as Postman and later as Postal Assistant are based on selection in the examination and cannot be considered as promotions. He also referred to the judgment of Jodhpur Bench of this Tribunal to support his arguments. He submitted that the order of the Jodhpur Bench of the Tribunal was also upheld by the Hon'ble High Court of Rajasthan by an order dated 10.08.2015 in WP.No.11336/2012. The Learned Counsel subsequently produced a copy of the said order. Therefore, he submitted that the grant of TBOP earlier on completion of 16 years of service in the cadre of Postal Assistant and the grant of MACP benefit has also prove the fact. Therefore, he submitted that the subsequent action to withdraw the MACP benefit is entirely arbitrary and cannot be sustainable. The appointment of the applicant as Postal Assistant should be considered as direct recruitment and all benefits due to him taking the Postal Assistant as basic cadre should be granted as has already been done earlier but now sought to be negated. Therefore, he urged that the relief prayed for in the OA should be granted to the applicant.

9. Per contra the Learned Counsel for the respondents reiterated the submission made in the reply and submitted that the applicant who was initially appointed as Group-D got three promotions i.e. first to the cadre of Postman and next to the cadre of Postal Assistant and then upgradation under TBOP. He highlighted that the applicant's selection as Postal Assistant was based on a LGO examination which was meant only for the departmental candidates and it cannot be considered as a direct recruitment. On completion of 16 years of service in that cadre, he was entitled to the TBOP but he is not entitled to any further benefit either by way of promotion or through financial upgradation. Therefore the MACP benefit wrongly granted to him earlier was withdrawn by way of rectification pursuant to the observation of the audit while examining the documents. The action taken by

the respondents in this regard is clearly in accordance with the rules and there is nothing irregularity. Therefore the OA has no merit and no relief is admissible to the applicant.

10. We have considered the facts of the case and also the averments made by the parties.

11. It is an admitted fact that the applicant was initially appointed to Group 'D' post in 1983. Then he was appointed to the cadre of Postman in 1987 and thereafter based on LGO's examination in which he has appeared in 1988, he was appointed as Postal Assistant w.e.f. 23.03.1989. He was given TBOP benefit on completion of 16 years of service in the cadre of Postal Assistant in August 2005. Considering the qualifying service in the cadre of Postal Assistant, he was also granted 2nd financial upgradation under MACP w.e.f. 13.09.2009. But subsequently the respondents held the view that his appointment from Group-D to Postman and Postman to Postal Assistant are to be considered as promotions. Since he also got TBOP benefit, he is not entitled to any further MACP benefits and hence the benefit already granted under MACP was then withdrawn. The issue to be considered here is as to whether the contention of the respondents that the appointment to the post of Postman from Group-D post and subsequent appointment to the Postal Assistant based on the LGO's examination will be considered as promotion or the appointment to the Postal Assistant will be considered as a fresh appointment in the basic cadre. The Ld.Counsel for the applicant has referred to a judgment of the Jodhpur Bench of this Tribunal which was upheld by the Hon'ble High Court of Rajasthan and also another order passed by the Hon'ble High Court of Delhi in support of his contention. It appears from the record that the judgment passed by the Jodhpur Bench of this Tribunal on 22.05.2012 in OA.No.382/2011 along with OA.No.353/2011 and OA.No.354/2011 are almost of identical nature. In those cases also, the applicants were appointed first as Group-D staff and then as Postman and then as Postal Assistants based on their selection in the LGO's examination. They also got TBOP on completion of 16 years of service in the cadre of Postal Assistant. They were also initially granted 2nd financial upgradation under MACP on completion of 20 years of service as Postal Assistant and which was subsequently sought to be withdrawn on similar grounds that their appointment from Group-D to Postman and from Postman to Postal Assistant should be considered as promotion. The Jodhpur Bench of the Tribunal in its order dated 22.05.2012 in the aforesaid OAs held as follows:

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) SCC 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) SCC 562, at p.567: 1995(7) Scale 168: 1995(9) JT 523: 1996 SCC (L&S) 340: 1996 91) 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 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 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.

12. The Hon'ble High Court of Rajasthan in Civil Writ Petition No.11336/2012 while upholding the order of the Tribunal held as follows:

"Having considered the argument advanced we do not find any merit with the same. Learned counsel appearing on behalf of the appellant on asking again and again failed to point out any provision for promotion to the post of Postman/Sorting Assistant. On the other hand, from perusal of the orders of appointment to the post of Postal Assistant/Sorting Assistant, it is apparent that the respondent original applicants faced an examination, may that be a limited competitive examination, i.e. nothing but direct recruitment. Their joining as Postal Assistant was not at all in the nature of promotion, hence their services for the grant of benefits under modified assured career progression has to be counted only from the date they were appointed as Postal Assistants/Sorting Assistants. The services rendered by them on earlier post prior to their appointment as Postal Assistants/Sorting Assistants are absolutely inconsequential for the purpose of grant of modified assured career progression. At the cost of repetition it shall be appropriate to mention that the petitioners failed to point out any provision for appointment to the post of Postal Assistant/Sorting Assistant by way of promotion and to point out any order of appointment making appointment of the original applicants on the post concerned by way of promotion.

The writ petitions, thus, are having no merit, hence dismissed. The orders passed by the Central Administrative Tribunal, Jodhpur Bench, Jodhpur in respective original applications stand affirmed.

13. Similar matter was also considered by the Hon'ble High Court of Delhi in W.P.(C) 4131/2014 in the case of Union of India and Ors Vs. Shakeel Ahmad Burney. While upholding the order of the Principal Bench of this Tribunal the Hon'ble High Court of Delhi in its order dated 05.08.2014 in the aforesaid W.P. observed as follows:

"There is no magic in the use of the expression "Promotion" or "Direct Recruitment"; whether, in fact, the mode of entry to the service is through direct recruitment or promotion would certainly be dependent on facts of each case and the structure of the Rules. If one analyzes Rule 3, it would be apparent that recruitment is through "a competitive examination which will be open" to both departmental candidates and outside candidates. During the course of submissions, the Union of India has emphasized that syllabus for departmental candidates was prescribed in 1964; even this fact nowhere indicates that a differential treatment is accorded to direct recruits who are drawn from the open market. The absence of any clearly stipulated and defined feeder post for promotion by way of seniority, or any other known method like seniority-cum-merit, selection etc., the mode prescribed in Rule 3 (a) (i.e., departmental candidates also having to qualify in the competitive examination, along with outsiders) in this Court's opinion clinches the matter. To that effect, the CAT's decision that the entry of departmental candidates to the cadre of Postal Assistant is by way of direct recruitment is unexceptionable. We consequently affirm the findings of the CAT in the impugned order.

14. As already held in the above mentioned orders of co-ordinate Benches of this Tribunal which were also upheld by the Hon'ble High Court, it is clearly apparent that the appointment of the applicant to the post of Postal Assistant based on the LGO's examination cannot be considered as a promotion. Therefore, the applicant would be entitled to the 2nd MACP benefit as was initially granted to him by the respondents since he was already granted one financial benefit under TBOP. Therefore, we hold that the applicant is entitled to the 2nd financial upgradation under MACP as was earlier granted to him by the respondents w.e.f. 13.09.2009 vide memo dated 02.08.2010(Annexure-A5). Therefore, the withdrawal of MACP benefit, by a subsequent order as well as the order dated 20.01.2014 issued by the respondent No.3 at Annexure-A10 rejecting the contention of the applicant are not sustainable and are therefore quashed. The respondents are directed to issue necessary order restoring the benefits of 2nd financial upgradation under MACP which was granted to the applicant w.e.f.13.09.2009 and also immediately refund him the amount already recovered from his pay as excess amount paid. This should be done within a period of two(2) months from the date of receipt of copy of this order.

15. The OA is accordingly, allowed in terms of the above direction. No order as to costs.

2. Thereafter the matter want up to the Hon'ble High Court wherein, by which our order was set aside in W.P. No. 102139/2018 dated 27.11.2018, which we quote:

“THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE ORDER PASSED BY THE CENTRAL ADMINISTRATIVE TRIBUNAL, BENGALUDU BENCH PASSED IN ORIGINAL APPLICATION NO.170/00891/2016 DATED 22ND NOVEMBER, 2017, COPY AS PER ANNEXURE- “A” AND DISMISS THE O.A. BY ALLOWING THE PRESENT WRIT PETITION AND ETC.,

THIS WRIT PETITIOON COMING ON FOR FINAL HEARING THIS DAY, NAGARATHNA J., MADE THE FOLLOWING:

ORDER

Petitioners-Union of India and Postal Department have assailed order dated 22.11.2017 passed in OA.No.170/00891/2016, 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, he 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 of 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.

2. The respondent herein was appointed as Grameen Dak Sevak (Branch Post Master) [GDS (BPM)] in the Postal Department and was appointed as Postman on selection with effect from 13.07.1977. Thereafter, he 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 07.06.1983. The department extended financial upgradation (TBOP) on completion of 16 years of his service with effect from 01.03.1996 and thereafter he 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 petition Department adopted the same by replacing the TBOP/BCR scheme with effect from 01.09.2008.

3. When the matter stood thus, respondents made a representation on 14.02.2016 for grant of MACP-III on completion of thirty years of service in Postal Assistant cadre by contending that denial of the same had caused financial loss and injustice to him. It was contended that the Tribunal at Jodhpur and other Tribunals had granted such reliefs. Since the same was not extended to him, he approached the Tribunal seeking relief of extension of MACP-III benefits to him 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, he 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 sailed the same before this Court.

4. We have heard learned counsel for the petitioners and learned

counsel for the respondents and perused the material available on record.

5. 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 his appearing in the departmental test and qualifying in the same. Therefore, his 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, he was promoted to the 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 considering 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, he 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.

6. Per contra, learned counsel for the respondents, at the outset, submitted that the order passed by the Bengaluru Bench of this Court referred to by learned counsel for the petitioner 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 Rajasthan 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.

7. 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 contend that there is no merit in this writ petition and the same may be dismissed.

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

9. Learned counsel for the petitioner 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 respondents 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.

10. It is not in dispute that the respondent was appointed as a Postman in the petitioner's department and thereafter he was appointed as a Postal Assistant on 07.06.1983 after appearing in a departmental exam and qualifying in the same.

11. 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.

12. It is not in dispute that when the respondent appeared for the departmental test, he was already working in the department as a Postman and being an employee of the Postal Department was eligible to appear for the departmental test. On qualifying in the said test, he was promoted as Postal Assistant. Therefore, his 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 Sorting Assistant 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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 he was already working as a Postman in the department. Hence, it is clearly a case of promotion.

18. 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.

19. 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.

20. 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.

21. Accordingly, writ petition is allowed. The impugned order dated 22.11.2017 passed in O.A. No.170/00891/2016 is quashed.

Parties to bear their respective costs.”

3. Now therefore the applicant submits that there is distinction, even though the factual position may be almost similar. The distinction is that in this particular case, the interregnum period between Group ‘D’ and Postman, must be ignored according to Circular issued by Ministry of Communications & IT No.4-7/MACPs/2009/-PCC dated 25.04.2011, which we quote:

No.4-7/ MACPS/2009/-PCC
 GOVERNMENT OF INDIA
 MINISTRY OF COMMUNICATIONS &IT
 DEPARTMENT OF POSTS
 PAY COMMISSION CELL

DATED:25-04-2011

TO
 Director of Accounts (Postal)
 A. P Circle, Hyderabad- 500001

Sub: – MACP to the Group, D, and Postmen in Department of Posts

Please refer to your letter No. 618/IF Sn/PM-II/MACP to Gr.D/Postman dated 03 Nov 2010.

2 .In this context, the doubts raised by your office are clarified as under;

SL No	Doubts	Clarification
1	Whether to consider the appointment to Gr.D cadre as entry grade and to Postmen cadre as one promotion. Whether the appointment to the cadre of	In accordance with Para-9 of Annexure-1 of MACPS dated 18.9.2009, regular service for the purpose of MACPS commences from the date joining of a post in direct entry grade on a regular basis. In the present

2	<p>Postmen Post as entry grade ignoring the Gr.D post held prior to the appointment as the official wrote the Postman examination from Gr. "D" cadre directly. If so, it may also be please clarify whether the services rendered in Gr.D post may be counts for MACP and Pension benefits.</p>	<p>case before us, the official was selected based on seniority in GDS and joined the Group 'D' post and later, he was declared successful in Postman exam, in which he had appeared fulfilling the eligibility condition of Gramin Dak Sevaks and thereafter he was allowed to join in Postman cadre as direct recruit. Accordingly, the official has joined in Postman cadre under the direct recruitment quota on regular basis & as such the regular service for the purpose of MACPs commences from the date of joining the Postman cadre as direct recruit basis. The issue is clarified accordingly.</p>
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3. This issues with the competent authority.

(Surendra Kumar)
Assistant Director General(GDS/PCC)

Copy to: For Information and necessary action on similar issues if any.

1. All Head of Circles.

2. All Directors of Accounts (Postal) except AP Circle.

4. This seems the buttress of the consideration taken by the department in WP.No.3062/14 of the Hon'ble High Court of Madras reported in CDJ 2015 MHC 4401 in the case of Union of India vs. D. Sivakumar & anr., in para 7, the respondents seems to have informed the High Court that this interregnum period is to be ignored. Since that is the consistent stand of the department, therefore the

applicant will be eligible to be counted for the grant of MACP for the period which he had served as Group 'D' before being promoted to the level of Postman. This benefit shall also be conferred on the applicant within 2 months next. OA. Allowed. No costs.

5. It is made clear that the Mailguard and Postman are synonymous. It is also clarified that the order confines only to the 1st applicant. The 2nd applicant has passed away unfortunately. The LRs have not got themselves impleaded and the OA has now become abated.

(C.V. SANKAR)
MEMBER(A)

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

vmr

Annexures referred to by the Applicant in OA No.170/00480/2017

1. Annexure A1 : Copy of representation of applicant No.1 dated 7.8.2017.
2. Annexure A2 : Copy of reply from Respondent No.4 dated 7.8.2017.
3. Annexure A3 : Copy of the reply from Supdt. Of Post Offices, Bagalkot Division vide letter dated 16.5..2017 in respect of Applicant No.2.
4. Annexure A4 : Copy of Hon'ble CAT, Bangaloreorder dated 9.10.2015 in OA.No.361/2014.
5. Annexure A5 : Copy of Hon'ble High Court of Karnataka, Kalburgi Bench order dated 20.9.2016 in WP.No.200807/16.
6. Annexure A6 : Copy of Hon'ble High Court of Madras order in WP.No.306209/14 dated 4.2.2015.
7. Annexure A7 : Copy of the Hon'ble Apex Court order in SLP.No. (CC)No.14848/16 dated 16.8.2016.

Annexures referred to by the respondents in the Reply

1. Annexure R1: Copy of Appendix-9, Rules for recruitment to the post of Time Scale Clerks and Sorters in the Indian Posts and Telegraphs Department.
