CENTRAL ADMINISTRATIVE TRIBUNAL

BANGALORE BENCH

ORIGINAL APPLICATION NO.170/00040/2019

DATED THIS THE 29TH DAY OF AUGUST, 2019

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

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

Sri.M.Shantha Raju,
S/o Late Madaiah,
Aged:62 years,
Retired P.M Grade II,
Lakshmipuram S.O,
Mysore-570 004.
Residing at:
No.470 Vivekandanagar,
T.Narasipur-571124. ….. Applicant

(By Advocate Shri P. Kamalesan)

Vs.

1. Union of India,
Represented by Secretary,
Department of Post,
Dak Bhavan,
New Delhi-110 001.

2. Chief Post Master General,
Karnataka Circle,

Bangalore-560 001.

3. Post master General,
S.K.Region,
Bangalore-560 001.

4. Senior Superintendent of
Post Offices,
Mysore Postal Division,
Mysore 570 020 ….Respondents

(By Shri V.N. Holla, Counsel for the Respondents)

O R D E R (ORAL)

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

The matter seems to be covered by the judgment of the Hon'ble High Court of Karnataka at Dharwad in WP No. 102322/2018 vide order dated 27.11.2018 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 o f sixteen years and Biennial Cadre Review Scheme (BCRS) on completion o f twenty six years in the Postal Assistant cadre , she would be entitled to 3r d 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 o f 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 14 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.*
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> *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."

2. Therefore, we are in respectful agreement with the views expressed by the Hon'ble High Court. Therefore, the OA is dismissed. No order as to costs.

(C.V. SANKAR)
MEMBER (A)

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

/ksk/

Annexures referred to by the applicant in OA No. 170/00040/2019

Annexure A1	Copy of the letter dated 31.7.1982
Annexure A2	Copy of the Extract from Service Register
Annexure A3	Copy of the letter dated 10.8.2009
Annexure A4	Copy of the relevant extract of service register book
Annexure A5	Copy of the memo dated 21.03.0217
Annexure A6	Copy of the representation
Annexure A7	Copy of the order in OA No. 3756/2011 dated 03.11.2015

Annexure A8 Copy of the Hon'ble Madras High Court order dated 04.02.2015 in WP No. 30629/2014

Annexure A9 Copy of the Hon'ble Apex court order dated 16.08.2016 in SLP No. 4848/2016

Annexure A10 Copy of the MACP scheme

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