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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 05.08.2014**

+ W.P.(C) 4131/2014

UNION OF INDIA AND ORS Petitioner

Versus

SHAKEEL AHMAD BURNEY Respondent

Through: Mr R.V. Sinha and Mr R.N. Singh,
Adv. for the petitioner.

Mr S.K. Gupta, Mr Vikram Singh and Mr Shoib
Shakeel, Adv. for respondent.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The petitioner-Union of India challenges an order of the Central Administrative Tribunal (CAT) dated 21.12.2012 in which the respondent-applicants' claim for retention of the Modified Assured Career Progression (MACP) Scheme benefits, in terms of the Central Government's Circular of 28.06.2011, and the proposal to withhold/withdraw it, was considered.

2. The brief facts of the case are that the respondent-applicant was initially a Group 'D' employee who was subsequently appointed as Postal Assistant; the petitioner applied the Time Bound One Promotion (TBOP) Scheme and the Biennial Cadre Review (BCR)

which enabled the respondent-applicant to avail of financial upgradation. The third, financial upgradation, on account of MACP Scheme was granted, but subsequently sought to be withdrawn, on the basis that mobility from Group 'D' to Postal Assistant was on account of promotion. The respondent-applicant contended that this mobility or upgradation was done on account of direct recruitment and not on promotion and that as a result, he was entitled to the MACP benefit of third upgradation.

3. The CAT, in its order, considered the argument and was influenced by its Jodhpur Bench decision in *Bhanwar Lal Regar v. Union of India & Others* in OA No. 382 of 2011. It further noticed the decision of the Supreme Court in *Director General, Rice Research Institute, Cuttack & anr v Khetra Mohan Das*, 1994 (5) SLR 728, which examined the meaning and scope of the expression "promotion". Further decisions such as *State of Rajasthan v. Fatehchand Soni*, (1996) 1 SCC 562 and other judgments were also taken into consideration. On the basis of the judgments cited, the CAT partly allowed the respondent's application and directed as follow:-

"20. Therefore, the OA is only partly allowed, and it is held that while the respondents were wrong in counting the applicant's selection as a Postal Assistant through LDCE in the year 1976 as promotion/financial upgradation, they would be free to once again examine the case of the applicant, and in case any extra financial benefits, not admissible to him, have been granted to him, for the less than three months' period from 05.07.2011,

the date of his substantive norm-based promotion to the LSG Cadre, to the date of his superannuation on 30.09.2011, the same may be recovered from his retiral benefits, after giving him a due notice in this regard. Therefore, the OA is only partly allowed, as above, but there shall be no order as to costs.”

4. The petitioner-Union of India is aggrieved by the impugned order to the extent it holds that movement from Group ‘D’ post to the post of Postal Assistant is direct recruitment; it is argued that such movement is in fact, a “promotion”. It is contended that the order of Jodhpur Bench in ***Bhanwar Lal Regar*** (*supra*), has been stayed by the Jodhpur Bench of the Rajasthan High Court. He also stressed that the judgment in ***Bhanwar Lal Regar*** (*supra*) itself has been differed from by the CAT in another Bench’s decision.

5. Learned counsel highlighted that in terms of the Rule, a clear distinction had been made between recruitment of outsiders and those within the department. Learned counsel relied upon Rules for Recruitment to the Clerical Service in Post Office in the Indian Posts and Telegraphs Department, especially Rule 3, 4 and 5 (which are produced at page 157 of the paper book), and urged that these Rules clearly indicate that a differential treatment is accorded to the departmental candidates and outsider candidates. This distinction has to be kept in mind while determining whether entry to the cadre of Postal Assistant was by way of promotion or direct recruitment. Great stress was laid on the fact that the eligibility condition for departmental candidates and outside candidates stipulated different

age limits, which indicates that both are not part of the same category and that departmental candidates are, in fact, to be promoted to the cadre of Postal Assistant.

6. Learned counsel for the respondent submitted that a look at the rules would clarify that apart from departmental candidates and direct recruits being part of the common pool eligible for the recruitment, no other criterion of promotion such as that of seniority or selection, has been carved out. It is submitted that both the categories have to compete through an examination and then even though eligibility threshold in terms of age limit for departmental candidates is 30 years (as against 23 years for direct recruits), that alone would not be a relevant factor. Counsel urged that, taking these into consideration, the conclusion of the CAT that entry to the cadre of Postal Assistant, was by way of direct recruitment should not be interfered with.

7. To the extent they are relevant, the Rules are extracted below:

3-Recruitment-Recruitment will be by a competitive examination which will be open to-(a) Departmental officials of all classes below the clerical cadre in the post offices hereafter called departmental candidates, and

(b) Outside candidates.

4-Conditions for departmental candidates: A departmental candidate should have put in not less than five years unblemished service followed by confirmation. He must submit his application in the prescribed form in due time to the Head of Circle through his immediate superior. It will be at the discretion of the Head of the

Circle whose decision will be final, to permit the applicant to appear for the examination.

5. Conditions for outside candidates- *The following conditions will apply to outside candidates:*

- (a) *A candidate must be-*
- (i) *a citizen of India, or*
 - (ii) *a subject of Sikkim, or*
 - (iii) *a person who has migrated from Pakistan with the intention of permanently settling in India, or*
 - (iv) *a subject of Nepal or of a Portuguese or French possession in India, and if he comes under category (iii) or (iv), must be a person in whose favour a certificate of eligibility has been given by the Government of India. A candidate in whose case such a certificate is necessary, may however, be admitted to the examination and he may also be provisionally appointed subject to the necessary certificate being even tally given to him by the Government.*
- (b) *He must not be less than 18 years of age and not more than 23 years of age on the date of commencement of examination referred to in rule 3.*

Exception-I- *In regard to Muslims, other Minority Communities and scheduled Classes (Depressed Classes) the upper age limit is 22 years.*

Exception-II-*Departmental candidates referred to in rule 3(a) above who are not over 30 years of age, are permitted to appear at the examination as outside candidates, if they fulfil all other conditions prescribed for outside candidates. They will not in that case be allowed to compete for the 50 per cent of the vacancies reserved for departmental candidates.*

(c) *He must have passed at least the Matriculation examination of a recognized university, or one of the equivalent examinations detailed in Appendix No. 3*

(d) *He must apply in prescribed form.*

(e) *Female candidates can appear for the competitive examination on the same conditions as male candidates 5-A candidates who are permitted to appear for the examination will receive from the Head of Circle a written order which should be produced before the Supervisor in charge at the time of examination.*

5-B Candidates, both departmental and outsiders, must a fee of Rs. 4 which will be refunded if they are not allowed to sit at the examinations.”

8. 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.

9. For the above reasons, no interference is called for with the impugned order of CAT.

The petition is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

**AUGUST 05, 2014
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