

IN THE HIGH COURT OF JUDICATURE AT MADRAS

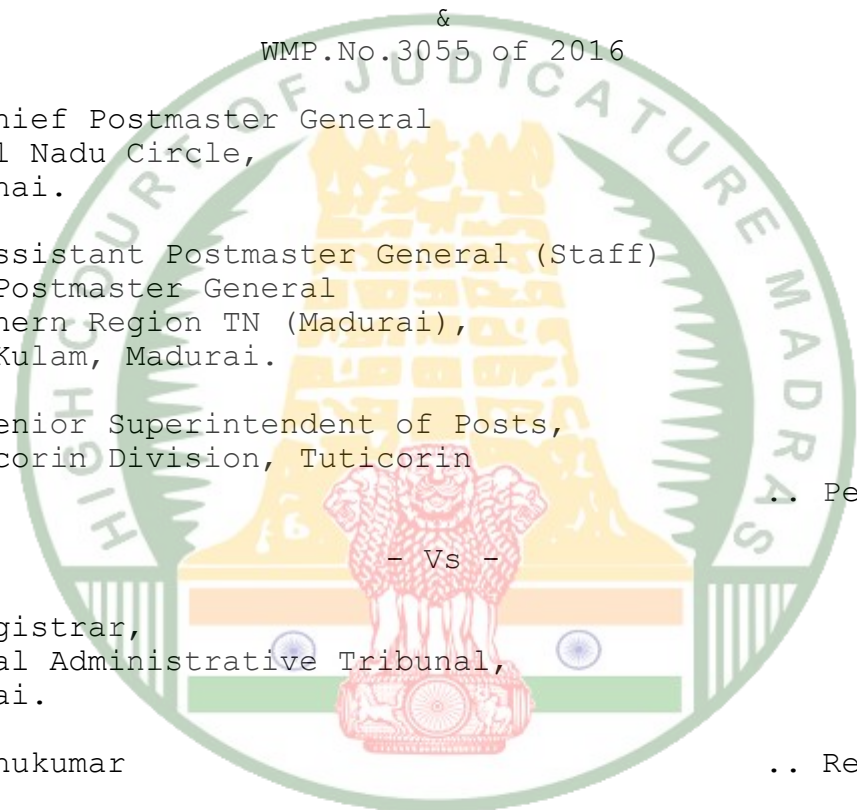
DATED : 05.02.2016

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
&
THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

Writ Petition No. 19765 of 2015
& M.P.No.1 of 2015

&
WMP.No.3055 of 2016

- 
1. The Chief Postmaster General
Tamil Nadu Circle,
Chennai.
2. The Assistant Postmaster General (Staff)
O/o Postmaster General
Southern Region TN (Madurai),
B.P.Kulam, Madurai.
3. The Senior Superintendent of Posts,
Tuticorin Division, Tuticorin
- .. Petitioners
- Vs -
1. The Registrar,
Central Administrative Tribunal,
Chennai.
2. G.Muthukumar
- .. Respondents

PETITION under Article 226 of The Constitution of India
praying for the issuance of Writ of Certiorari to call for the
records from the file of the 1st respondent made in R.A. No.50 of
2013 in O.A.No.378 of 2012 dated 02.07.2014 and quash the same

For Petitioners : Mr.Su.Srinivasan
For Respondents : Ms.Dhakshayani Reddy for
Mr.K.H.Ravikumar - R2

O R D E R

(Order of the Court was made by R.SUDHAKAR,J.)

Challenging the order passed by the Tribunal dated
02.07.2014 made in R.A.No.50 of 2013 in O.A.No.378 of 2012
allowing the Review Application, the petitioners have filed the
present Writ Petition.

2. The brief facts of the case are as follows:

The second respondent/applicant was selected and appointed as Postal Assistant under the quota reserved for scheduled castes and joined the services during 1995. During the year 2011, a charge memo was issued as against the second respondent/applicant for the alleged misconduct that took place during 2007, which culminated into a final order dated 28.03.2011 of the third petitioner imposing a punishment of stoppage of increment for three months without cumulative effect. On an appeal filed against the said order, the same was modified on 10.10.2011 by the Directorate of Postal Services to that of censure. While so, the department had conducted a test for the post of Post Master Grade I during the year 2011. Since the second respondent/applicant was fully eligible, he had submitted his application and the third petitioner had forwarded the said application. The third petitioner gave permission to the second respondent/applicant to write the examination. Accordingly, he appeared for the examination and the result was declared on 30.06.2011. In the said examination, the second respondent had secured 182/400 and the cut-off mark for the second respondent's category viz., SC is 154. However, his name was not shown in the select list and was wrongly considered in the general list. Hence, the second respondent had made a representation to rectify the said mistake and to publish the result. But however, the second petitioner by order dated 19.03.2012, informed the second respondent that his name was not recommended by the Circle Office to take up the examination, since he did not fulfill the eligibility criteria and as such, the question of declaring the result did not arise.

3. Challenging the said order, the second respondent has filed Original Application before the Central Administrative Tribunal seeking to quash the impugned order dated 19.03.2012 and for a direction to the respondents therein to select and promote him for the post of Postmaster Grade I based on his cut off mark in the qualifying exam in SC category by publishing the results with due regards to his seniority and with all consequential benefits.

4. The Tribunal, after hearing both sides, dismissed the Original Application holding that the respondents therein are adopting an uniform policy by prescribing the eligibility criteria in respect of the candidates throughout the country and in the absence of any illegality on prescribing such criteria by the department, the second respondent could not agitate the said issue for non-consideration of his application.

5. Subsequent to the dismissal of the Original Application, the second respondent herein, relying upon CCS (CCA) Rules, 1965 and pleading that the punishment was modified that of Censure on 10.10.2011, sought for review of the order passed originally.

6. The Tribunal, by order dated 02.07.2014, relying upon CCS (CCA) Rules, 1965, issued by the Government of India, wherein it is stated that Censure should not be a bar to sit for a departmental/promotional examination or for promotion, allowed the Review Application, thereby directed the petitioners herein to promote the second respondent as Postmaster Grade I under the SC category in any one of the existing vacancies or by creating a supernumerary post. Aggrieved by the same, the petitioners have filed the present Writ Petition.

7. Learned Standing Counsel appearing for the petitioners submitted that the second respondent was not eligible to appear for the examination on account of currency of punishment. He further submitted that the name of the second respondent has not been recommended for examination and his name was brought under statement - II, i.e., officials having adverse entries in confidential records. However, the second respondent using the email ID of the Postmaster, Thiruchendur Post Office, obtained the hall ticket to write the examination. He further submitted that in terms of the Instructions of the Directorate dated 07.03.2011, wherein, it is stated that the person, who is undergoing punishment is not eligible to write the promotional examination, the second respondent is not eligible to appear for the examination. Hence, the order of the Tribunal has to be set aside.

8. Per contra, learned counsel appearing for the second respondent submitted that as per Rule 11(10) of CCS (CCA) Rules, 1965, the Director General P & T orders of the Personnel and Training Department has clarified that the official might be admitted to the examination, even though he may be under suspension or disciplinary proceedings, if he satisfies all other conditions prescribed for admission. However, the said official be promoted only after the disciplinary proceedings are over and is completely exonerated and only based on such clarification, the third petitioner has permitted the second respondent to write the examination. She further submitted that the Government of India, Ministry of Communications and IT, Department of Posts has sent a communication dated 10.10.2015 to all the Chief Postmasters General reiterating Rule 11 of CCS (CCA) Rules, 1965. Therefore, she submitted that the Instructions of the Directorate dated 07.03.2011 cannot be held against the second respondent and it is not valid. Hence, she submitted that the second respondent is eligible to be considered for promotion.

9. Heard the learned Standing Counsel appearing for the petitioners and the learned counsel appearing for the second respondent and perused the materials placed before this Court.

10. The only point canvassed by the learned Standing Counsel appearing for the petitioners is that in terms of the Instructions of the Directorate dated 07.03.2011, which is

stated in paragraph 3 of the order of the Tribunal, the second respondent is not eligible to appear for the examination.

11. Before going into the merits of the case, it is relevant to look into the provision, which read as follows:

"(7) Promotion of employees on whom any penalty has been imposed -

The Staff Side of the National Council, at its meeting held on 27th and the 28th January, 1971 raised the following points:-

(i) 'Censure' should not be a bar to eligibility to sit for a departmental/promotional examination or for promotion;

(ii) Where the responsibility of an employee for any loss is indirect, he should not be debarred from being considered for promotion during the period of recovery of the loss; and

(iii) A distinction should be made between stoppage of increments and reduction to a lower stage of the pay scale and in the former type of cases, the employees should not be debarred from being considered for promotion.

2. As regards the first point, under existing instructions, every person eligible for promotion and in the field of choice has to be considered for promotion. The fact of the imposition of the minor penalty of censure on a Government servant does not by itself stand against the consideration of such person for promotion, as his fitness for the promotion has to be judged, in the case of promotion by seniority, on the basis of an overall assessment of his service record, and in the case of promotion by selection on merit, on the basis of his merit categorisation which is again based upon an overall assessment of his service record. So far as the eligibility of a Government servant who has been awarded the penalty of censure, to appear at a departmental/promotional examination is concerned, the same principles would apply, viz. that he cannot, merely because of the penalty of censure, be debarred from appearing at such an examination. In case, however, the rules of such an examination lay down that only those eligible persons can be allowed to appear at the examination who are considered to be fit for the purpose, the fitness of an eligible candidate, who has been awarded the penalty of censure, to appear at the examination has to be considered on the basis of an overall assessment of his service record and not merely on the basis of the penalty of censure.

3. As regards the other two points mentioned in paragraph 1 above, while it is not possible to lay down any hard and fast rules in this regard, and it is for the competent authority to take a decision in each case having regard to its facts and circumstances, it is considered necessary to reiterate the existing instructions on the subject. Recovery from the pay of a Government servant of the whole or part of any pecuniary loss caused by him to Government by negligence or breach of orders, or withholding of increments of pay, are also minor penalties laid down in rule 11 of the CCS (CCA) Rules. As in the case of promotion of a Government servant, who has been awarded the penalty of censure, the penalty of recovery from his pay of the loss caused by him to Government or of withholding his increment(s) does not stand in the way of his consideration for promotion though in the latter case promotion is not given effect to during the currency of the penalty. While, therefore, the fact of the imposition of such a penalty does not by itself debar the Government servant concerned from being considered for promotion, it is also taken into account by the Departmental Promotion Committee, or the competent authority, as the case may be, in the overall assessment of his service record for judging his suitability or otherwise for promotion or his fitness for admission to a departmental/promotional examination (where fitness of the candidates is a condition precedent to such admission).

[Cabinet Sectt. (Department of Personnel) OM No. 21/5/70-Ests.(A) dated the 15th May, 1971]"

(emphasis supplied)

12. Subsequent to the above, the Government of India, Ministry of Communications and IT, Department of Posts (DE) Section addressed a letter to All Chief Postmasters General dated 10.10.2015, wherein it is stated as follows:

"Sub: Non-permitting of officials in departmental examinations who are awarded with punishment of censure or against whom disciplinary proceedings are pending/contemplated- regarding.
Sir/Madam,

It has been brought to the notice of the Directorate that in all the notifications for recruitment, Circles categorically mention that applications of the officials against whom any disciplinary proceedings are pending/contemplated or those who have been issued with penalty of "Censure" should not be accepted.

2. In this regard, after examination of the issue, I am directed to say that both these conditions need to be set out in the light of GoI decisions no.7 and 10 given below Rule 11 of CCS (CCA) Rules 1965.

3. Copies of the said GoI decisions are enclosed for reference.

4. Circles are requested to act accordingly while issuing notification for the Limited Departmental Competitive Examinations and while considering the eligibility of the candidates to be permitted to take up the examination."

13. It is seen that the second respondent has approached the competent authority while undergoing punishment of stoppage of increment and sought permission to write the examination. The Senior Superintendent of Post Offices, Tuticorin Division, Tuticorin has granted permission vide Memorandum dated 09.06.2011, which reads as follows:

" Department of Posts, India
Senior Superintendent of Post Offices,
Tuticorin Division, Tuticorin
628 008.

Memo No.B2/PM/GR I dated at Tuticorin
628 008 the 09.06.2011.

The following officials are permitted to take up Limited Departmental Competitive Examination for promotion to the cadre of Postmaster Grade I, 2011 to be held on 12.06.2011. The officials should be relieved in time on application.

1. Sri.M.K.Sahul Hameed, OA, Divisional Office.

2. Sri.P.Thirugnana Sambandham, ME, Divisional Office

3. Sri.v.Prema, OA, Divisional Office.

4.Sri.S.Suresh Kumar, SPM, Panicka Nadar Kudiyiruppu SO

5. Sri.A.Chinnadurai, PA, Melur Tuticorin SO.

6. Sri.M.Perumpadaian, PA, Tuticorin HO Offg SPM, Tuticorin Courts.

7. Smt.S.Arockia Valarmathy, PA, New Colony SO.

8. Sri.J.Dhanaraj, OA, Divisional Office.

9. Sri.M.Nataraja Moorthy, PA, Satankulam SO

10.Sri.R.Maharajan, Treasurer, Srivaikuntam HO

11.Sri.G.Muthu Kumar, Accountant, Tiruchendur HO. "

(emphasis supplied)

14. It is relevant to note that the permission granted by the Senior Superintendent of Post Offices has not been rejected by the higher authority. At this juncture, learned Standing Counsel appearing for the petitioners relied upon paragraph 15 of the reply affidavit filed by them in the Original Application filed before Tribunal, wherein it is stated as follows:

"As regard the averments contained in Ground 5 (C) of the application it is submitted that the applicant was awarded with the punishment of postponing one increment falling due on 01.07.2011 for three months without cumulative effect vide the memo No.F14/2009-10 dated 28.03.2011 of the 3rd respondent.

Hence the application of the applicant was brought under the category of officials "Recommended with adverse entry" and his application No.107655 was forwarded to Postmaster General, Southern Region, Madurai vide lr.No.B2/PM GR I/2011 dated 10.05.2011 of the 3rd respondent under statement III i.e., the category of officials having adverse entries in CRs but recommended along with the CRs. As per instructions in Directorate letter No.137-8/2009-SPB dated 07.03.2011, the following category of officials are not eligible to be permitted for appearing in the examination:-

- i. If any disciplinary action is pending or contemplated against applicant
- ii. If any punishment is current
- iii. If, there is any adverse entry in the APAR/ACR in the last 5 years.

Hence, the applicant's candidature was not recommended by the Postmaster General, Southern Region, Madurai and his name was brought under the statement II (Officials having adverse entries in CRs and not recommended) by mentioning that his punishment is current. In the meantime, the applicant was also permitted to take up the above exam along with the other eligible candidates by the 3rd respondent in Memo No.B2/PM GR 1 dated 09.06.2011, without knowing the facts of non-recommendations in the routine way. But M/s.CMC Limited, has not issued the hall-permit, as the application kit was not received by them with recommendations. However the applicant illegally gained access to the examination hall by sending an e-Mail to M/s. CMC, New Delhi in the helpdesk in the id examenquiry2011@gmail.com using the e-Mail id pmtiruchendur@gmail.com of the Postmaster, Tiruchendur HO and appeared in the examination without admissibility. The stoppage of increment without cumulative effect for three months has been modified by the appellant authority as a

censure only on 10.10.2011 by that time the PM Grade I examination was held on 12.06.2011 and results were published on 30.06.2011. The act of respondent is justified by principles of natural justice."

15. There are two components in the counter affidavit, viz., the second respondent was permitted to write the examination; however, without reference to Directorate's letter dated 07.03.2011, which we referred to above. In the above factual scenario, it is evident that Rule 7 of CCS(CCA) Rules, particularly Paragraph 3, clearly provides that the Authority can exercise the power to grant permission to persons suffering from punishment to write promotional examination, however, the benefit would not arise, if the punishment is subsisting.

16. Admittedly, the second respondent was permitted to write the examination and the letter dated 07.03.2011 runs contrary to the decision of the Government of India. When the second respondent was permitted to write the examination, which was not challenged by the petitioners, it is not now open to them to challenge the order passed by the Tribunal. Further, when Rule 7 of CCS(CCA) Rules provides that the employee be considered for promotion and he cannot be debarred from appearing for examination on the ground of penalty, the petitioners should not deny the benefit that would accrue to the employee. When the Rule clearly stipulates that "Censure" should not be a bar to sit for a departmental/promotional examination or for promotion and the second respondent was permitted to sit for examination, which was not rejected by the higher authority, the Tribunal has rightly set aside the impugned order on the basis of Rule 7 of CCS(CCA) Rules.

17. As regards the contention of the learned Standing Counsel appearing for the petitioners that the punishment was modified to that of Censure at a later date and on the date of examination, the second respondent was undergoing punishment of stoppage of increment, hence, not entitled for promotion, it is a settled principle of law that when once the appeal of the second respondent was entertained, based on the principle of doctrine of merger, we have to construe that the second respondent was awarded with the punishment of censure.

18. It is trite that when an Appellate Authority passes an order, the order of the Lower Authority merges with the order of the Appellate Authority and even if and subject to any modification that may be made in the appellate order, the order of the Appellate Authority supersedes the order of the Lower Authority. The doctrine of merger takes place irrespective of the fact whether the Appellate Authority confirms or modifies the order passed by the Lower Authority. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed

against. The doctrine of merger postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

19. As rightly relied on by the Tribunal, the Apex Court, while dealing with doctrine of merger in the case of Kunhayammed and Others V. State of Kerala and another reported in (2000) 6 SCC 359 held as follows:

"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way -- whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below."

20. In the light of the above, even though the second respondent was inflicted with the punishment of stoppage of increment, on appeal, the same was modified into one of Censure; hence, it can, at best, be construed that the second respondent was imposed with a punishment of Censure only. Since Rule 7 of CCS(CCA) Rules, 1965 clearly provides that Censure should not be a bar to sit for departmental/promotional examination, the Tribunal has rightly set aside the order passed by the petitioners. The contention of the learned Standing Counsel appearing for the petitioners that as per the letter of the Directorate dated 07.03.2011, the second respondent is not entitled to sit for examination does not hold good, because it is a settled law that the circular or instruction issued by the Department cannot override the Statutory Rules.

21. Accordingly, we do not find any reason to interfere with the order passed in the Review Application by the Tribunal. This Writ Petition stands dismissed. No costs. Consequently, M.P.No.1 of 2015 is also dismissed and WMP No.3885 of 2016 is closed.

Sd/-
Assistant Registrar(V)

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Sub Assistant Registrar

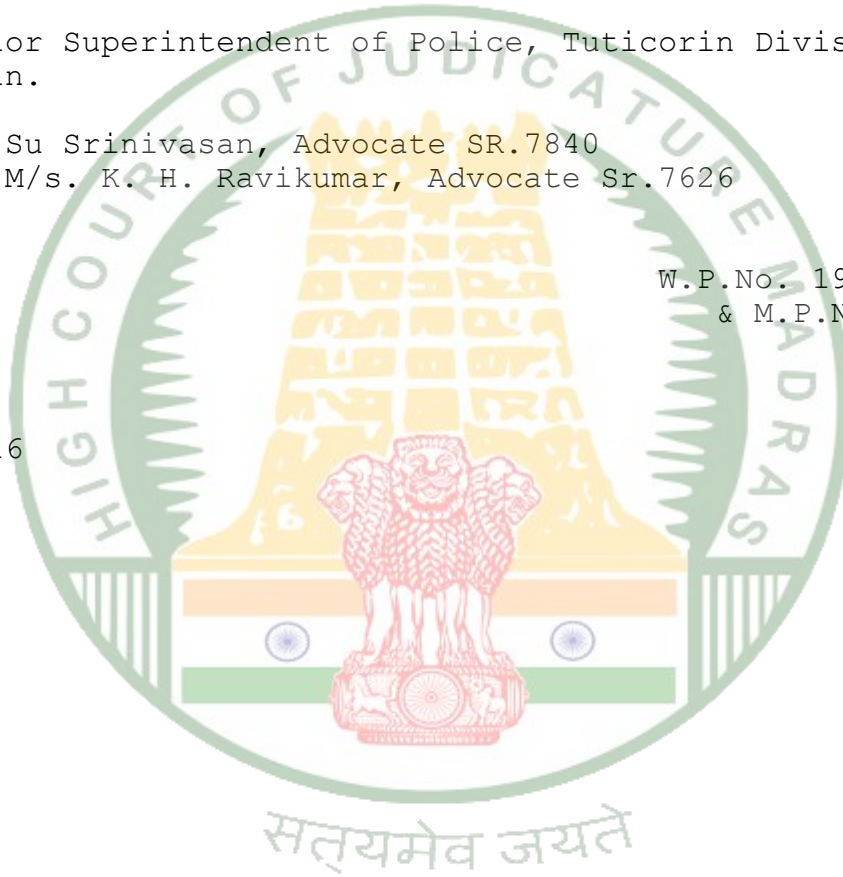
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To

1. The Registrar,
Central Administrative Tribunal,
Chennai.
 2. The Chief Postmaster General Tamil Nadu Circle, Chennai.
 3. The Assistant Postmaster General, (Staff)
O/o. Postmaster General, Southern Region
Tamil Nadu (Madurai) B.P. Kulam, Madurai.
 4. The Senior Superintendent of Police, Tuticorin Division,
Tuticorin.
- + 1 cc Mr. Su Srinivasan, Advocate SR.7840
+ 1 cc to M/s. K. H. Ravikumar, Advocate Sr.7626

W.P.No. 19765 of 2015
& M.P.No.1 of 2015

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