

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 491 / 2008

Friday, this the 28th day of August, 2009.

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HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

HON'BLE Ms. K GEORGE JOSEPH, ADMINISTRATIVE MEMBER

S.Nakulan,
Part Time Contingent Employee,
Kayamkulam H.O., Kayamkulam.Applicant

(By Advocate Mr Vishnu S Chempazhanthiyil)

v.

1. The Postmaster,
Kayamkulam H.O.
Kayamkulam-690 502.
2. The Superintendent of Post Offices,
Mavelikkara Division,
Mavelikkara.
3. Union of India represented by the
Chief Postmaster General,
Kerala Circle,
Thiruvananthapuram.Respondents

(By Advocate Mrs Aysha Youseff, ACGSC)

This application having been finally heard on 7.8.2009, the Tribunal on 28.8.2009 delivered the following:

ORDER

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

The applicant in this O.A has been working as a Part Time Contingent Employee with effect from 1.5.2001. During the course of his engagement, the post of Gramin Dak Sevak Mail Packer (GDS MP for short) Chowkidar, Kayamkulam became vacant and he was appointed to that post as a stop gap

arrangement, vide Annexure A-1 letter dated 28.5.2007. The engagement was for 3 months from 1.6.2007 to 28.8.2007 or till the regular appointment was made, whichever was earlier. Thereafter, the 1st respondent viz, the Postmaster, Kayamkulam H.O issued the Annexure A-7 notification dated 8.7.2008 inviting application to the post of GDS MP, Chowkidar. The age limit for the aforesaid post was between 18 to 65 years and the minimum educational qualification required was 8th Standard with preference to SSLC or equivalent examinations. The applicant has also applied for the aforesaid post on 5.8.2008 and the process of recruitment was on.

2. Before any appointment was made, pursuant to the aforesaid Annexure A-7 notification, the applicant has filed this O.A seeking the following reliefs:

- “(i) Direct the 1st and 2nd respondents to consider the applicant for appointment to the post of GDSMP Chowkidar, Kayamkulam HO in preference to open market candidates.
- (ii) Declare that the applicant is entitled to the benefit of Annexure A-2 and direct the respondents to take action accordingly.
- (iii) Direct the 1st respondent to consider and pass orders on Annexure A-8 and A-9 representation in the light of Annexure A-3, A-4 and A-5.
- (iv) Direct the respondents to proceed with Annexure A-7 only after considering the claim of the applicant under Annexure A-2 in tune with the direction in Annexure A-3, A-4 and A-5.
- (v) Direct the 2nd respondent to fill up the Group'D' vacancies in the 25% quota available to the casual labourers forthwith.
- (vi) Any other further relief or order as this Tribunal may deem fit and proper to meet the ends of justice.”

3. As regards the applicant's prayer (i) to (v) above are concerned, his basic contention is that the Part Time contingent employees are entitled for preferential treatment in the matter of regular appointments of Gramin Dak Sevaks.

3.1 The Annexure A-2 D.G, Posts letter No.17-14/88-EDC & Trg dated 6.6.1988, referred to in the aforesaid 2nd relief is re-produced as under:

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"Sub: Preference to casual labourers in the matter of appointment as ED Agents

According to the prevalent Recruitment Rules governing the cadre of Group'D', the order of preference among various segments of eligible employees is as under:

- a) Non-test category
- b) ED Employees
- c) Casual labourers
- d) Part time casual labourers.

2. Since the number of vacancies of Group'D' is limited and the number of ED employees eligible for recruitment as Group'D' is comparatively large, the casual labourers and part time casual labourers hardly get any chance of their being absorbed as Group'D'. Thus majority of casual labourers with long service are left out without any prospect of their getting absorbed in Group'D' cadre.

3. Keeping the above in view, a suggestion has been put forth that casual labourers, both full and part time should be given preference for recruitment as Extra Departmental Agents, in case they are willing, with a view of afford the casual labourers a chance for ultimate absorption as Group'D'.

4. The suggestion has been examined in detail and it has been decided that casual labourers, whether full time or part time, who are willing to be appointed to ED vacancies may be given preference in the matter of recruitment to ED posts, provided they fulfil all the conditions and have put in a minimum service of one year. For this purpose, a service of 240 days in a year may be reckoned as one year's service. It should be ensured that nominations are called for from Employment Exchange to fill up the vacancies of casual labourers so that ultimately the casual labourers who are considered for ED vacancies have initially been sponsored by Employment Exchange."

3.2 The applicant has relied upon the Annexure A-3, Annexure A-4 and A-5 earlier order of this Tribunal in O.A.534/2003 - **P.G.Girija v. The Sub Divisional Inspector of Post Offices, Palai** dated 27.8.2003. The applicant in O.A.571/2001 - **K.S.Anitha v. Sub Post Master, Kecheri Post Office & others** dated 4.9.2001 and O.A.3/2005 - **Lathakumari.K v. Assistant Superintendent of Post Offices, Thiruvananthapuram East Sub Division & others** dated 10.6.2005 respectively. was appointed as Part Time Sweeper in the Arunapuram Sub Post Office with effect from 1.6.1995. When the vacancies of GDSMD had arisen in Velliappally Post Office he submitted his application on 10.6.2003 seeking preference in the matter of appointment in terms of the aforesaid letter



of the DG, Posts. According to the respondents therein, the applicant was not entitled for any preference on the ground that his appointment as Part Time Sweeper was not made through the Employment Exchange and therefore, he should be considered only as an outsider candidate. Relying upon its earlier orders in O.A.818/2000 and 936/2001, this Tribunal held that the aforesaid contention of the respondents was not tenable. Accordingly, the Tribunal directed the respondents to consider the request of the applicant therein for appointment to the post of GDSMD, Velliappally giving preference to her, despite the fact that her appointment as a part time Sweeper was not through Employment Exchange. The operative part of the said order is as under:

"3. We have heard the learned counsel on either side and have perused the material on record. The contention of the respondents that the applicant is not entitled to any preference as per A-3 notice because her name was not sponsored for appointment as part time Sweeper is no more tenable in view of the orders of this Tribunal in O.A.Nos.818/2000 and 936/2001. Under identical circumstances, this Tribunal held that as the applicants in those cases had been permitted to continue as part time casual labour for a long time and had been appointed by the competent authority, the fact that their names were not sponsored by the employment exchange could not be held out to be a valid reason for denying them the benefit of the long service for preference for appointment to ED posts. We find that there is no reason to differ from the view taken. It is a fact that the applicant has been working continuously from 1.6.95 onwards till date. If the appointment was irregular and the service would not give any benefit to the applicant, the respondents should have resorted to a process of selection through employment exchange and made appointment to the post of part time sweeper. They did not do that but allowed the applicant to continue for more than 7 years. In these circumstances, we find no justification for not considering the applicant for appointment by giving preference in terms of A-3, inspite of repeated instructions contained in A-4.

4. In the light of what is stated above, we allow the application and direct the first respondent to consider the request of the applicant for appointment to the post of GDS MD, Velliapally, giving preference to her in terms of A-3 & A-4 despite the fact that the applicant's appointment as a part time Sweeper was not routed through Employment Exchange."

In both the aforesaid orders O.A.571/2001 and O.A.3/2005 (supra) also, this Tribunal held that the contention of the respondents that the concerned

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applicants cannot be given regular appointment because they have not been sponsored by the Employment Exchange cannot be accepted. While holding so this Tribunal has also relied upon the judgment of the Apex Court in **Excise Superintendent, Malkapatnam, Krishna District, A.P v. K.B.N.Visweshwara Rao & others** [(1996) 6 SCC 216] wherein it was held that restriction of the selection of the candidates sponsored only through the Employment Exchange was not proper.

4. As regards the applicant's prayer (v) above seeking a direction to the 2nd respondent to fill up the Group'D' vacancies in the 25% quota available to the casual labourers forthwith is concerned, his submission is that the casual labourers like him are entitled for being appointed in Group'D' vacancies to the extent of 25% of vacancies but the 2nd respondent is not taking any steps to fill the quota available to them on the ground that the Screening Committee has not approved the filling up of vacancy inspite of the fact that the said issue was already settled by this Tribunal in a series of order like O.A.No.115/2004 which has been confirmed by the Hon'ble High Court of Kerala in W.P.(C) No.22818/2006.

5. Respondents have resisted the present O.A on the ground that the selection of the post of GDSMD is mainly on the basis of marks scored in SSLC Examination and the candidate who has scored the highest marks is only normally selected subject to his satisfying other conditions such as knowledge of cycling etc. They have also submitted that the applicant has never been appointed as a Contingent Sweeper on regular basis. Her engagement as Part time Sweeper was purely a temporary arrangement and she was not sponsored by the Employment Exchange. Her further engagement as GDSMD was on stop gap arrangement wherein it was made clear that the same will not count towards

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her regular service as GDS. They have also submitted that no preference to contingent employees who have not been engaged through Employment Exchange can be given. In this regard, they have relied upon the judgment of the Apex Court in **Secretary A.P. Public Service Commission v. Y.V.V.R.Srinivasalu** [2003 SCC (L&S) 681] wherein it was held as under:

"The 'preference' envisaged in the rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through Public Service Commission, on the basis of merit performance but also would work great hardship and injustice to those who possess the required minimum educational qualification with which they are entitled to compete with those possessing additional qualification too, and demonstrate their superiority, merit wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when anyone or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-a-vis others in the matter of actual selection."

5.1 As far as the prayer of the applicant to direct the 2nd respondent to fill up Group'D' vacancies in the 25% quota available to casual labourers is concerned, they have submitted that since the applicant is not a GDS, he is not entitled for such relief.

6. We have heard the learned counsel on both sides. No doubt, going by the principles of precedents the applicant's case is covered by the earlier orders of this Tribunal relied upon by the applicant's counsel viz, O.A.818/2000, O.A.936/2001, O.A.571/2001 and 3/2005 (supra). The precedent value of orders of the coordinate Bench is there only if it is in conformity with the judgments of Apex Court which has laid down the law on the subject under Article 141 of the Constitution which says that "*the law declared by the Supreme Court shall be binding on all Courts within the territory of India*". Consequently,



once the Supreme Court has laid down the law on any particular aspect, any order of the executive contrary to the said law deemed to be non-est. The scenario in the matter of regularisation or giving preference to the casual labourers, contingent employees etc. has also undergone substantial change with the land mark judgment of the Constitution Bench of Apex Court in **Secretary, State of Karnataka and others v. Umadevi & others** [(2006) 4 SCC 1]. In the said judgment, the Apex Court considered different facets of the issue relating to regularisation of service of ad hoc/temporary/daily-wage employees and unequivocally ruled that such appointees are not entitled to claim regularisation of service as of right. After taking cognizance of large scale irregularities committed in appointment at the lower rungs of the services and notice several earlier decisions, the Constitution Bench observed:

"4... The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for

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the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

5. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench."

7. The Apex Court in its judgment in **Official Liquidator v. Dayanand and others** [(2008) 10 SCC 1] considered the view different from Umadevi (supra) taken by a Division bench of the same Court in **U.P. State Electricity Board v. Pooran Chandra Pandey & others** [2007(12) Scale 304] and held that the comments and observations made therein should be read as obiter and the same should not be treated as binding precedent.

8. The observation of the Division Bench of the Hon'ble Supreme Court in **Pooran Chandra Pandey's** case (supra) was as under:

16. We are constrained to refer to the above decisions and principles contained therein because we find that often Uma Devis case (supra) is being applied by Courts mechanically as if it were a Euclids formula without seeing the facts of a particular case. As observed by this Court in Bhavnagar University (supra) and Bharat Petroleum Corporation Ltd. (supra), a little difference in facts or even one additional fact may make a lot of difference in the precedential value of a decision. Hence, in our opinion, Uma Devis case (supra) cannot be applied mechanically without seeing the facts of a particular case, as a little difference in facts can make Uma Devis case (supra) inapplicable to the facts of that case.

17. In the present case the writ petitioners (respondents herein) only wish that they should not be discriminated against vis-à-vis the original employees of the Electricity Board since they have been taken over by the Electricity Board in the same manner and position. Thus, the writ petitioners have to be deemed to have been appointed in the



service of the Electricity Board from the date of their original appointments in the Society. Since they were all appointed in the society before 4.5.1990 they cannot be denied the benefit of the decision of the Electricity Board dated 28.11.1996 permitting regularization of the employees of the Electricity Board who were working from before 4.5.1990. To take a contrary view would violate Article 14 of the Constitution. We have to read Uma Devis case (supra) in conformity with Article 14 of the Constitution, and we cannot read it in a manner which will make it in conflict with Article 14. The Constitution is the supreme law of the land, and any judgment, not even of the Supreme Court, can violate the Constitution. "

9. While treating the aforesaid observation as obiter, the Apex Court held in **Official Liquidator v. Dayanand and others** case (supra) held as under:

"There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by the Supreme Court without any tangible reason. Likewise, there have been instances in which smaller Benches of the Supreme Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system. (Para 78).

It is distressing to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Disrespect to this constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. (Para 90)

Predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judicial will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed. (Para 90)

In our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance

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with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law. (Para 91)

By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in Secretary, State of Karnataka vs. Uma Devi (supra) is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed by different two-Judges Benches for declining to entertain the claim of regularization of service made by ad hoc/temporary/ daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees. However, in U.P. SEB vs. Pooran Chand Pandey [2007 (11) SCC 92] on which a two-Judges Bench has attempted to dilute the Constitution Bench judgment by suggesting that the said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution and that the same is in conflict with the judgment of the seven-Judges Bench in Maneka Gandhi vs. Union of India [1978 (1) SCC 248]. The observations in paras 16 and 18 of Pooran Chandra Pandey case, especially the observation that "Maneka Gandhi case is a decision of a seven Judge Bench, whereas Umadevi (3) case is a decision of a five Judge Bench of the Supreme Court. It is well settled that a smaller Court", were not called for. The two judge Bench had no occasion to make any adverse comment on the binding character of the Constitution Bench judgment in State of Karnataka v. Umadevi(3). It is deemed proper to clarify that the comments and observations made by the two Judge Bench in Pooran Chandra Pandey should be read as obiter and the same should neither be treated as binding by the High court, tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench in State of Karnataka v. Umadevi(3)."

[Emphasis supplied]

10. As far as the submission of the applicant that the 2nd respondent is not taking any steps to fill up the Group'D' post earmarked for the casual labourers to the extent of 25% of the vacancies is concerned, it has already been made clear by this Tribunal in O.A.3/2005 that the prior approval of the Screening Committee was not required to fill up the post in Group'D'. The relevant part of the said order is as under:

"7. Therefore the contention of the respondents that the applicant had not been sponsored by Employment exchange cannot hold good. Further, in (1996) 6 SCC 216, Excise Superintendent, Malkapatnam, Krishna District, A.P, the Apex Court has held that, restricting the selection only to the candidates sponsored by the Employment Exchange, was not proper. In the circumstance, the applicant has made out a case and therefore we are of the view that the relief has to be granted to the applicant. The contention of the applicant that vide

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Annexure A-5 notification the respondents are attempting to fill up the said vacancy on provisional basis, on going through the said notification, we find that though appointment is on provisional basis it is likely to be regularised. In the circumstances, we are of the view that it is a fit case where direction be given to the respondents to consider the applicant for an appointment to the post of GDS BPM Ambalathara.

8. In the light of the above submissions, the application is allowed. Respondents are directed to consider the applicant for an appointment to the post of GDS BPM Ambalatha and give her the benefit contained in the letter of Director General of Posts. It is made clear that selection through open market could only be resorted to, if the applicant is found unsuitable for such appointment. With the above direction the O.A is allowed. In the circumstances, no order as to costs."

The aforesaid order has also upheld by the Hon'ble High Court in W.P./(C)

No.33732/2005 as under:

"The challenge is on Ext.P4 order passed by the Central Administrative Tribunal, Ernakulam bench. The issue pertains to the request made by the applicant for permitting her to participate in the selection and appointment to the post of Gramin Dak Sevak Branch Postmaster, Ambalathara. The main contention of the writ petitioner is that the appointment of the applicant is not through employment exchange. But the fact remains that she has gained sufficient experience working for long on a casual basis. Going by the departmental instruction, such casual labourers are to be given preference in the matter of recruitment. It is for the department to ensure that the appointments even on casual basis are not made through the back door. Having appointed people like the applicant and such applicants having gained experience as casual labourers they cannot be prevented from participating in the selection and appointment. It is seen that the Tribunal as well as this court has consistently taken the stand as above, and the directions have been implemented also. We do not find any merit in this writ petition and it is accordingly dismissed."

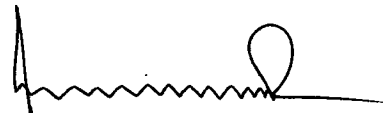
11. In the above facts and circumstances of the case, we do not consider that there is any merit in the contention of the applicant that he should be given preference for appointment in terms of the Annexure A-2 DG, Posts letter dated 6.6.1988. Moreover, the applicant himself has applied for the post of GDS MP Chowkidar, Kayamkulam in response to the Annexure A-7 notification dated 8.7.2008. The selection process was also on its way. However, the same has to be stopped in view of the interim order of this Tribunal dated 25.8.2009 to



keep the said Annexure A-7 notification in abeyance. We, therefore, withdraw the aforesaid interim order and permit the respondents to go ahead with the selection in accordance with the recruitment rules. The applicant's application for the aforesaid post shall also be considered along with other applications without affording him any preferential treatment. Consequently, the O.A is dismissed with regard to the reliefs 1 to 4 prayed for by the applicant. As regards the 5th prayer is concerned, we direct the respondents that they shall take necessary steps to fill up the Group'D' vacancies earmarked for the casual labourers under the 25% quota if they have not done so, so far, without waiting for any prior approval of the Screening Committee as already held by this Tribunal in O.A.3/2005 (supra) and as upheld by the Hon'ble High Court in W.P. (C) No.33732/2005 (supra) within a period of four months from the date of receipt of a copy of this order. If the applicant is eligible as per rules, for such promotion, he shall also be considered. There shall be no order as to costs.



K GEORGE JOSEPH
ADMINISTRATIVE MEMBER



GEORGE PARACKEN
JUDICIAL MEMBER

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