

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.537/04

Wednesday, this the *17*. day of *August*, 2005

C O R A M :

**HON'BLE MRS.SATHI NAIR, VICE CHAIRMAN
HON'BLE MR.K.V.SACHIDANANDAN, JUDICIAL MEMBER**

A.Vasanthakumar,
S/o.late M.Gopalan,
Officiating Group D, Head Post Office, Thalassery.
Residing at Achath House, Palayad P.O.

...Applicant

(By Advocate Mr.K.S.Bahuleyan)

Versus

1. Union of India represented by Director General (Posts),
Government of India, Ministry of Communications,
Department of Posts, New Delhi.
2. Postmaster General,
Northern Region, Calicut.
3. Superintendent of Post Offices,
Thalassery Division, Thalassery – 670 102.

...Respondents

(By Advocate Mr.T.P.M.Ibrahim Khan,SCGSC)

ORDER

HON'BLE MR.K.V.SACHIDANANDAN, JUDICIAL MEMBER

The application has been filed by the applicant praying inter-alia to direct the Postmaster General, Northern Region, Calicut, to accord sanction for filling up of 1/3rd vacancy of Group D post for the year 2002 in Thalassery Postal Division. The following main reliefs are sought :-

1. To direct the Postmaster General, Northern Region, Calicut to take immediate action to accord sanction for filling up of the 1/3rd vacancy of Group D posts for the year 2002 in Thalassery Postal Division.

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2. To declare that the applicant will be treated as within the age limit in case of further delay in filling up of the vacancies of Group D in Thalassery Postal Division.

3. To grant such other reliefs which this Hon'ble Tribunal deems fit and necessary in the circumstances of the case.

2. The averment in the OA is that the applicant is working as officiating Group D in Thalassery Head Post Office who commenced his service as ED Mail Carrier, Melur on 1.10.1977. His date of birth is 29.11.1954. His name figures at serial no.37 at the gradation list of GDS of Thalassery Postal Division as on 1.1.2001 (Annexure A-1). GDS up to 36 i.e. K.Velayudhan already been recruited to Group D post. The applicant is the next GDS to be recruited. As per Annexure A-2 dated 28.8.1990 the Director General Posts issued a letter stating that the selection will be on the basis of seniority subject to satisfactory service and on such selection the candidate should be put on panel and be allotted immediately to the Sub division/Recruiting unit towards the vacancies. According to the instructions EDS who are above the age of 50 years (55 years in the case of SC/ST communities) will not be eligible for the appointment as Group D. The crucial date for determining age will be 1st July of the year in which the recruitment is made. The applicant belongs to OBC and as such for him the age limit will be 50 years. The applicant will complete 50 years of age on 28.11.2004 and any delay in recruitment will make him over aged. He made representation no reply received and took the matter through the union and it is said that the non filling of the vacancy is due to awaiting of approval (Annexure A-3). Further delay in making appointment to the post Group D will make the applicant age barred.

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3. The respondents have filed a detailed reply statement contending that applicant whose date of birth is 29.11.1954 has been working as EDMC since 1.10.1977. Now he is working as Group D at Thalassery Head Post Office in short term vacancy on daily wages basis. He was not appointed in Group D cadre and there were seniors to him and the selection is subject to availability of vacancies. As per DG letter dated 4.7.2001 direct recruitment would be limited to 1/3rd of direct recruitment arising in a year subject to further limit of 1% of total sanction strength (Annexure R-1(A)). The vacancy in Group D cadre in Thalassery Division in year 2002 was 3. One vacancy could be filled if it did not exceed 1% of the total sanction strength which being 34, 1% of sanction strength is 0.34 which is less than 1. As such there is no vacant post for the year 2002. The copy of the letter (Annexure R-1(B)) of the Chief Postmaster General, Kerala Circle will prove the same. C.N.Valasarajan GDS BPM is the senior most GDS eligible for the recruitment to the Group D cadre now. He had declined the appointment as Group D in the previous recruitment. Next eligible candidate K.Velayudhan was selected and given appointment last time. The next candidate to be considered is C.N.Valasarajan who declined promotion which doesn't debar him from being considered again.

4. The applicant has filed a rejoinder reiterating his contentions in the OA and further averred that there is clearly a functional need to fill up the vacancy and one vacancy could have been on operational consideration taking into account the fact that the applicant having attained the age of 50 years will not get any further opportunity to get into Group D cadre.



5. The respondents have filed an additional reply statement and further contended that the applicant is not the senior most GDS in Thalassery Division. He was third in position. The vacancy arose in 2002 do not come under the category of functional need post.

6. We have heard Shri.K.S.Bahuleyan, counsel for the applicant and Shri.T.P.M.Ibrahim Khan,SCGSC counsel for the respondents. We have given due consideration to the materials, evidence and arguments. Counsel for the applicant submitted that the conduct of the respondents in delaying the regular promotion to Group D from among eligible ED Agents on the basis of seniority indefinitely despite the existence of regular vacancies is patently illegal, arbitrary, discriminatory. Had the promotion was made at the right time the applicant would have earned more than minimum qualifying service for pension. Counsel for the respondents, on the other hand, persuasively argued that by virtue of the decision of the Apex Court the department decided not to consider GDS for promotion post who have crossed 50 years of age. The said rule is still prevailing despite the fact that new Recruitment Rules has already been introduced. The age restriction imposed on appointment of ED Agents, the method of selection, the legal points on the subject has been elaborately argued by either side. The same Bench of the Tribunal in O.A.901/03 had elaborately discussed this issue in a larger perspective and the relevant portion of the judgment is quoted below :-

7. The grievance of the applicant is that though he is holding the post in Group D he is not being considered for the post of Postman. In Annexure A-5 amendment Rules,



1989 issued under notification dated 24.2.1989 in item II in Column 9 of the Schedule for the entries "100% Direct Recruitment" shall be substituted by the following :-

By means of an interview from amongst the categories specified and in the order indicated below. Recruitment from the next category is to be made only when no qualified person is available in the higher category.

Extra Departmental agents of the Recruiting Division or Unit in which vacancies are announced.

Casual Labourers (full time or part time) of the Recruiting Division or Unit.

Extra Departmental agents of the neighboring Division or Unit.

Nominees of the Employment Exchange.

Note 2 thereunder provides that Extra Departmental Staff may be considered against the vacancies for direct Recruitment in subordinate offices, subject to such conditions and such manner as may be decided by the DG (P&T) from time to time.

8. Vide Annexure A-6 dated 28.8.1990 issued by DG Posts EDAs who are above the age of 50 years (55 years in the case of SC/ST communities) will not be eligible for appointment as Group D. The crucial date of determining age will be 1st July of the year in which the recruitment is made. Annexure A-6 letter dated 28.8.1990 in so far as it introduced upper age limit of 50 years for ED Agents for appointment as Gr.D was struck down by this Tribunal to the extent of prescribing upper age limit by order dated 6.3.1996 in O.A.155/95. The order has not been challenged in any higher forum and the same has become final conclusive and binding on the respondents. Thereafter certain ED agents filed OA 239/98 and OA 449/98 for directing the respondents to fill up the vacancies of Gr.D posts by ED agents. The above original applications were disposed of by a common order dated 26.8.1998. The operative portion of which is as follows :-

In O.A.239/98 the applicant has prayed that a direction may be issued to the 1st respondent to promote the applicant to any of the existing or arising vacancies in Group D in Aluva Division on the basis of his running seniority from the date of his entitlement with all consequential benefits. Learned counsel of the applicant argued that the delay in filling up the vacancy and considering the applicant for

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appointment on Group D, had resulted in irreparable injury to the applicant inasmuch as effect from the date on which the vacancy arose. We are of the view that this aspect also should receive the attention of the respondents. If for the mere reason of inaction on the part of the respondents in filling up the vacancies, any ED Agent like the applicant has suffered any prejudice in the matter of length of service or eligibility for pension, the respondents have to take remedial steps in that behalf. In the result, we dispose of both these applications, directing the respondents to fill up the existing vacancies in Group D in the Kerala Circle including the Aluva Division without any delay and without waiting for the amendment of the Recruitment Rules, treating that any ED Agent who is below the age of 60 years is entitled to be considered for appointment in the absence of prescribed maximum age limit. We also direct that the respondents shall take remedial steps if any of the ED Agents in the Kerala Circle has suffered any loss by reason of the lapse on the part of the respondents in filling up the post of Group D in the Kerala Circle. There is no order as to costs.

9. The above order of this Tribunal was taken before the Hon'ble High Court of Kerala in O.P.25172/98 which was disposed of by judgment dated 30.3.2000. The operative portion of which is as follows :-

In view of the aforesaid limited nature of the controversy, we feel that so long as the rules which are stated to be pending consideration for amendment have not come into force, executive power can be exercised as provided in law. In the absence of statutory rules, administrative orders can govern the field. To avoid inconvenience to all concerned, the employer may consider taking action under the executive power in the matter of appointment. This exercise can be undertaken so long as the rules sought to be amended are not brought into operation.

10. On going through the said judgment the Court has reiterated the dictum that in the absence of statutory rules, administrative orders can govern the field. Subsequently the department has also issued Annexure A-9 order dated 20.7.2000 declaring that EDAs who are above the age of 50 years (55 years in case of SC/ST) will not be eligible for appointment as Group D as laid down in office letter dated 28.8.1990. But in order dated 14.6.2002 in O.A.130/02 this Court directed the respondents to consider the case of the applicant one K.K.Gopalakrishnan for appointment to Group D vacancies on the basis of his seniority irrespective of the fact that he has crossed the age of 50 years and to give him

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appointment as Group D if he is found suitable by the Departmental Promotion Committee. This Court observed that the Hon'ble High Court did not interfere with the directions contained in the order of the Tribunal in O.A.Nos.239/98 and 449/98 to consider all ED Agents who have not crossed the age of 60 years for appointment to Group D posts existing in Kerala Circle. The prescription of upper age limit of 50 years in the impugned orders are therefore unsustainable in law. This order was not appealed and the department has accepted the findings and relief granted. Ministry of Communications, Department of Posts, vide Annexure R-11 dated 20.1.2002 has promulgated the Revised Recruitment Rules for the Group D posts in Circle, Administrative and Subordinate offices. These rules are effective from 23.1.2002 the date of publication of the notification in the Gazette of India. The detail notification prescribe different aspect of selection. In the said notification also no prescribed age limit is specified or stipulated. Annexure R-11(3) also does not prescribed the age limit. But, on the other hand, Annexure R-11 (5) of the Recruitment Rules prescribed the age limit of 18-25 for direct recruits and it is borne out of record that no direct recruitment to these posts is available. Therefore it is clear that none of the administrative orders or executive instructions or even the subsequent Recruitment Rules prescribed age limit or age restrictions of 50 years for such selection. Counsel for the respondents argued that in Annexure R-11(17) there is a note stating : Gramin Dak Sevaks may be considered against the vacancies for direct recruitment in Subordinate Offices subject to such conditions and in such manner as may be decided by the Department from time to time and further argued that it need not reflect in Recruitment Rules but the Department is at liberty to issue such conditions and in such manner as may decided by the Department. Till date such instructions are not forthcoming. It is conspicuously absent. While accepting the proposition of the Hon'ble High Court in O.P.25172/98 that in the absence of statutory rules, administrative orders can govern the field we are yet to find such instructions or orders. If the intention of the Department is to put age restriction for such recruitment at least it should have been reflected in the Recruitment Rules. Learned counsel also brought to our notice Civil Appeal Nos.1638-1640 of 1996 in the case of Senior Superintendent of P.O., Cochin Vs. E.J.Andrew & Ors. (Annexure R-8) where the Hon'ble Supreme Court has held that :-

"ORDER

Heard the learned counsel for the parties.

In the Recruitment Rules, it is always open to the concerned authority to fix the age limit for

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recruitment as well as for examination. Hence, we make it clear that we are not approving the reasoning of the Tribunal. However, considering the facts of the present case, subsequent amendment in the Rules and the fact that after the Central Administrative Tribunal, Ernakulam Bench (for short "the Tribunal") passed the order, the Department has issued the administrative order in conformity with the order passed by the Tribunal, these appeals are not required to be decided. Hence, these appeals stand disposed of, accordingly."

7. In the light of what is stated above and since the issued involved in this case is identical the same finding is applicable in this case as well. Since the Department has not issued any executive order/administrative instructions to prescribe age limit the applicant could be considered despite the fact that he has crossed 50 years. Further the specific plea that only 1% of the total sanction strength of Group D in the circle and 1/3rd of the total vacancies could only be considered for such selection and no justification to allot a vacancy to fill up 34 in Thalassery Division was highlighted by the respondents and Office Memorandum dated 16.5.2001, was quoted. We have carefully gone through the memorandum and are of the view that this pertains to direct recruitment (only) and doesn't apply in the given case. The office memorandum make it abundantly clear that direct recruitment would be limited to 1/3rd of the direct recruitment vacancies arising in the year, subject to a further ceiling that this doesn't exceed 1% of the total sanction strength for the Department. Therefore, this memorandum/rule cannot be applied in this case.

8. In the result, we declare that the applicant is entitled to be considered for promotion to Group D post subject to the vacancies

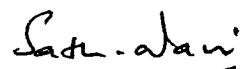


available in 2002 or in the subsequent vacancies on the basis of seniority irrespective of the fact that he has crossed 50 years. Admittedly Shri.C.N.Valsarajan the senior most in the seniority list as on 1.1.2001 declined the appointment on personal reasons in the previous recruitment and the next eligible candidate K.Veludhan was given appointment. The applicant being serial no.34 (next in queue) he could have had the next chance against the said vacancy of the year 2002 but Valsarajan will have a preferential claim since his declining the post doesn't debar him from being considered again. Therefore, the respondents are directed to give notice to the said Valsarajan forthwith and in case he further declines, the applicant shall be considered if he is found suitable by the Department Promotion Committee. The appropriate orders may be passed within a period of three months from the date of receipt of a copy of this order. The OA is disposed of as above. In the circumstances no order as to costs.

(Dated the 17. day of August, 2005)



K.V.SACHIDANANDAN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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