

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

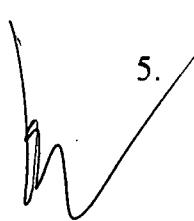
Original Application No. 620 of 2003

Friday...., this the **2nd** day of July, 2006.

C O R A M :

**HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE MR. N. RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

1. All India Postal Extra Departmental Employees Union (AIPEDU),
Aluva Division, represented by its Secretary,
M.J. George, S/o. Late M.P. Jacob,
GDS MC, Yordhanapuram, Kalady SO,
Residing at Menachery House, Mattoor,
Kalady P.O.
2. M.Y. Nalinakumari,
D/o. late A.N. Krishnan Nair,
GDS BPM, Nayathode BO,
Angamali SO,
Residing at Mappallil House,
Nayathode, Angamali.
3. C.K. Omana Antharjanam,
D/o. late C.K. Kesavan Elayath,
GDS MD, Nayathode BO,
Angamali SO,
Residing at Vazhuthanappillil Illom,
Edathala P.O.
4. P.D. Pathrose,
S/o. Late P.P. Devassy,
GDS MD, Kodanad BO,
Koovappally SO,
Residing at Pallasseril House,
Kodanad P.O.
5. N.P. Varghese,
S/o. Mr. C. Paily,



GDS MD, Vaikara BO,
 Asamanoor SO,
 Residing at Niravath House,
 Koozhoor, Ayrapuram P.O.,
 Aluva.

6. P.K. Remesan,
 S/o. Mr. R. Kesavan Nair,
 GDS MD-I, Thrikkalathur P.O.,
 Residing at Naduvelil House,
 Thrikkalathur. Applicants.

(By Advocate Mr. O.V. Radhakrishnan, Senior)

1. Director General of Posts,
 Dak Bhawan, New Delhi.
2. Chief Postmaster General,
 Kerala Circle, Thiruvananthapuram.
3. Postmaster General,
 Central Region, Kochi.
4. Senior Superintendent of Post Offices,
 Aluva Division, Aluva : 683 101.
5. Union of India represented by its
 Secretary, Ministry of Communications,
 New Delhi Respondents.

(By Advocate Mr. TPM Ibrahim Khan, SCGSC)

The application having been heard on 27.6.06, this Tribunal on
 7.7.06.. delivered the following :

O R D E R
HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER



The following legal issues are involved in this case:-

(a) Whether the stipulation in an administrative order that approval of the Director of Post Offices would be required for diverting the unfilled vacancies under promotional quota to GDS Merit Quota would be legally held valid when the Statutory Rules do not contemplate the same.

(b) When the above stipulation has, by an order of this Tribunal, been held invalid and when the said order, when taken in appeal by the Respondents has been stayed, is there any legal bar in relying upon the said order and follow the same.

(c) Whether the applicants are entitled to be deemed to have been appointed with effect from the date their counterparts under the Promotional Quota were promoted to the post?

2. The capsulated facts of the case with terse sufficiency, as culled out from the OA are as under:-

(a) The applicants 2 to 6 are presently working as Gramin Dak Sevaks under Aluva Postal Division. The recruitment to the cadre of Postman is governed by the Posts and Telegraphs (Postman/Mail Guards/Head Mail Guards) Recruitment Rules, 1989 (hereinafter referred to as Recruitment Rules, 1989). Column 11 of the Schedule annexed to the Rules relates to method of Recruitment which is extracted hereunder:

(1) 50% by promotion failing which by ED Agents on the basis of their merit.

(2) 50% by ED Agents of the recruiting Division or unit in the following manner, namely :



- (i) 25% from among ED Agents on the basis of their seniority in service and subject to their passing the Departmental examination, failing which by ED Agents on the basis of merit in the Departmental examination.
- (ii) 25% from amongst ED Agents on the basis of their merit in the Departmental examination.
- (3) If the vacancies remained unfilled by EDAs of the recruiting Division, such vacancies may be filled by the EDAs of the Postal Division falling in the zone of Regional Directors.
- (4) If the vacancies unfilled by EDAs remain unfilled by the EDAs of the recruiting units, such vacancies may be filled by EDAs of the Postal Divisions located at the same station. Vacancies remaining unfilled will be thrown open to EDAs in the Region.
- (5) Any vacancy remaining unfilled may be filled up by direct recruitment through the nominees of the Employment Exchange."

Column 12 relates to promotion which reads as under:

"Column 12 - In cases of promotion -

- "(i) Promotion from Group 'D' officials who have put in three years of regular and satisfactory service on the closing date for receipt of applications through a Departmental examination.
- (ii) EDAs through a departmental examination.
- (iii) Direct recruitment through a Departmental examination."

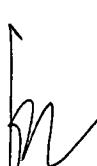
Thus, ED Agents are entitled to be promoted against the vacancies which remain unfilled under 50% by promotion for want of qualified Group 'D' officials.

(b)



(c) Respondents circulated a letter dated 5.7.2002 regarding examination for promotions / recruitment to the cadre of Postman/Mail Guard to be held on 29.9.2002. According to the same, examination for recruitment to the cadre of Postman/Mail Guard for the years 2000 and 2001 was to be held on 29.9.2002 and the examination would be common for GDS and Departmental officials. The applicants 2 to 6 applied for taking the above examination before the last date fixed for receipt of application namely, 19.7.02. The vacany position for promotion to the cadre of Postman was notified and the departmental quota was 10.

(d) Examination for recruitment to the cadre of Postman was held on 29.9.2002 and applicants 2 to 6 appeared. However, the above examination was cancelled by the 2nd respondent as per letter dated 4.10.2002 and the examination was scheduled to be held on 24th November, 2002. The applicants 2 to 6 appeared for the examination slated for 24.11.2002 and all of them faired well in the above examination. The result of the examination was published for promotion to the cadre of Postman vide Memo dated 10.1.2003. Only one Group 'D' candidate (SC) , Chennamangalam is declared to have passed the examination under Departmental quota. Ten unreserved vacancies were shown under Departmental quota. Therefore, there are nine unreserved vacancies under departmental quota remained unfilled for want of qualified Group 'D' officials. According to the Recruitment Rules and notification dated 5.7.02 the unfilled vacancies will be added to the GDS merit quota and that quota will be increased to that extent. However, the GDS candidates were shown to have been passed in the examination for promotion to the cadre of Postman even though common examination was conducted for Group 'D' and GDS candidates.



(e) The applicants 2 to 6 have been communicated the marks secured by them. All of them have secured more than 45% marks fixed as qualifying standard in the examination for OC candidates. The applicants 2 to 6 thereupon submitted individual representations to the 4th respondent to promote them to the cadre of Postman against the nine unfilled vacancies under departmental quota which are to be added to the GDS merit quota. The applicants have been individually served with a memo dated 8.4.2003 of the 4th respondent informing that the subject matter is under consideration of the 3rd respondent.

(f) In order dated 1.11.02 (A/4), one of the charges notified is that decision regarding adding of the unfilled departmental quota vacancies to GDS merit quota would be taken only when approved by the Directorate. The above change notified is contrary to the Recruitment Rules. Therefore, the action of the respondents in not decalring the applicants 2 to 6 as passed in the examination held on 24.11.2002 inspite of their securing more marks than the qualifying marks fixed in Annexure A/2 and inspite of the existence of the unfilled vacancies under Departmental quota for want of qualified officials and denying them their due promotion to the cadre of Postman is patently illegal, arbitrary and discriminatory.

(g) Two Gramin Dak Sevaks who appeared for the examination held on 24.11.2002 for promotion to the cadre of Postman under Ernakulam Division filed O.A. Nos. 141/2003 and 193/2003 before this Tribunal. The above Original Applications were heard together and a common order has been passed disposing the O.As with the following directions:



"1. A-4 in so far as it does not reflect consideration of the

unfilled vacancies arising out of the departmental quota to be added to the merit quota is illegal and unsustainable and hence is set aside to that extent.

2. Respondents are directed to rework the results by adding the unfilled vacancies relatable to departmental quota to the G.D.S. merit quota, review the selection on the basis of the performance of the candidates including the applicants herein and pass appropriate orders after taking into account the actual vacancy position on the basis of a proper application of the existing rules in that regard as early as possible and, at any rate, within a period of four months from the date of receipt of a copy of the order. There is no order as to costs."

This Tribunal has categorically found that the respondents had no alternative under the existing rules but to add the 13 vacancies remained unfilled for want of qualified lower grade officials to the GDS merit quota and to make promotions in the order of merit.

(h) During the pendency of the above Original Application, the 4th respondent has issued a Memo dated 29.12.2003 declaring that the applicants have passed the examination for promotion to the cadre of Postman held on 24.11.2002 and that their selection is for the unfilled vacancies of Departmental quota which is added to GDS merit quota. The 4th respondent issued another Memo bearing the same date of 29.12.2003 directing the applicants 2 to 6 and 3 others to undergo a course of training for a period of ten days from 1.1.2004 to 10.1.2004. After successful completion of the training, the applicants 2 to 6 have been appointed as Temporary Postman in the scale of pay of Rs. 3050-75-3950-80-4590 plus allowances and posted as Temporary Postman. The applicants 2 to 6 joined the post on 12.1.04. In the orders appointing the applicants 2 to 6, there is a clear recital that they will be on probation for a period of two years from the date of



joining the post. It follows, therefore, that the applicants' service and seniority in the post of Postman will be counted only from the respective dates of their joining.

(i) The 'failing which' clause contained in Clause 11 of the Schedule to the Recruitment Rules, 1989 is preemptory and the appointing authority is legally bound to appoint ED Agents on the basis of their merit in the Departmental examination to the post of Postman simultaneously with that of the departmental hands who qualified in the same departmental test. Any delay in the matter of promoting the ED Agents qualified in the examination against the unfilled vacancies for promotion would result in invidious discrimination.

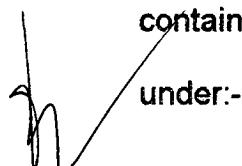
(j) The lone candidate who qualified for promotion under Departmental quota is one Shri M.V. Rajan, appointed as Temporary Postman in the scale of pay of Rs. 3050-75-3950-80-4590 plus allowances as per order dated 30.1.2003. One Shri P.R. Radhakrishnan Nair declared to have passed the examination of promotion under merit quota as per Annexure A5, has also been appointed as Temporary Postman as per order dated 30.1.2003. The respondents committed a wrong in unduly delaying the appointment of the applicants to the post of Postman and the applicants 2 to 6 cannot be allowed to visit any adverse consequences on account of the delay in appointing them as Postman and the wrong done to the applicants 2 to 6 must be remedied by granting them appointment as Postman retrospectively from the date of appointment of the Departmental hand as Postman. A classification has been made in the matter of Pension Scheme by introducing a new Pension Scheme for those appointed on or after 1.1.2004. The new Pension Scheme has been notified by the Ministry of Finance, Department of Economic Affairs (ECB & PR

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Division) Resolution dated 10.10.2003. According to the new Pension Scheme, the existing system of defined benefit of pension system is replaced by the new system which is available on a voluntary basis. The new Pension Scheme is disadvantageous when compared to the old pension system and in case the applicants 2 to 6 are not given retrospective dates of appointment to the cadre of Postman with effect from the date of their entitlement, the applicants 2 to 6 will be governed by the new Pension Scheme. In that event, the departmental hand and those who are included under merit quota and the applicants 2 to 6 who also got qualified in the self-same examination would be divided into two classes without any reasonable basis and the applicants 2 to 6 are thereby subjected to hostile discrimination.

(k) The applicants 2 to 6 have sought for the reliefs that they should be declared as qualified in the departmental examination for promotion to the cadre of Postman and that they are eligible and entitled to be promoted to the cadre of Postman against the vacancies remaining unfilled for want of qualified hands and to issue an appropriate direction to the respondents to appoint the applicants 2 to 6 as Postman in the scale of Rs. 3050-75-3950-80-4590 with retrospective effect from 30.1.2003, the date on which the departmental candidates and Extra Departmental Agents under merit quota declared to have passed the examination, are appointed as Temporary Postman.

3. The respondents have resisted the OA and their contentions as contained in the Reply statement as well as Additional Reply statement are as under:-

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(a) Nine vacancies of Departmental quota to be added to GDS merit quota remained unfilled as it is to be approved by Directorate. Therefore, the vacant posts were not transferred to merit quota. As regards the order of this Tribunal, the same has been taken up before the Hon'ble High Court of Kerala in two separate writ petitions {W.P. (C) No. 30696/03 & W.P. (C)No. 30547/03} and the Hon'ble High Court stayed the operation of the same. The said Writ Petitions are pending before the Hon'ble High Court. As such, the applicants cannot claim any relief on the basis of the said orders.

4. Arguments were heard and documents perused. The counsel for the applicant argued that what is not contemplated in the statutory provisions cannot be imposed by administrative orders, as the same would amount to amend the Recruitment Rules by way of an administrative instructions. Again, as regards the earlier decision the counsel for the applicant has argued that notwithstanding the fact that the said order has been stayed, there is no legal bar in following the same as a precedent. To substantiate his contentions, the learned counsel for the applicant cited a number of authorities as itemized below:-

- (i) AIR 1969 SC 634
- (ii) 1984 (2) SLR 731
- (iii) AIR 1987 SC 1676
- (iv) AIR 1992 SC 1439
- (v) AIR 1993 SC 1145
- (vi) AIR 1994 SC 1808
- (vii) 2001 (5) SCC 482



(viii) 2002 (10) SCC 396
(ix) 2003 (7) SCC 238

5. The learned counsel for the respondents submitted that in implementing the administrative instructions, and in particular provisions to the effect that specific approval of the Director of Postal Services is essential for diversion of the unfilled vacancies under promotion quota to the GDS Direct Recruitment Quota, there is no violation or deviation from the Recruitment Rules as the said condition is one of the procedures to be adopted in carrying out the terms of the Recruitment Rules.

6. First the contention of the applicant as regards to the legal position that administrative instructions cannot overrule or over-reach the statutory provisions and the contentions of the counsel for the respondents that in the instant case there is no such over-ruling. It is trite law that statutory regulations are superior to administrative orders. In a conflict between these two, former alone would prevail. Administrative Instructions are only to supplement the Rules and not supplant. In the case of *J & K Public Service Commission v. Narinder Mohan (Dr)*, (1994) 2 SCC 630 the Apex Court has held:

"It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but only supplement the law."



Supplementing also should be that it goes in tandem with the Rule and should not introduce something which is not catered for in the Rules. Thus, the contention of the respondents that for diversion of unfilled vacancies from the promotion quota to Direct Recruit quota (for GDS) is untenable.

7. Next is the aspect of retrospective promotion. The contention of the applicant is that had the department been acting strictly on the basis of the Recruitment Rules, the unfilled vacancies would have been diverted to direct recruit and these would have been filled up along with the other Direct Recruit Vacancies. Delay on the part of the Respondents has resulted in the corresponding and telescopic delay in appointment and this has caused irreparable loss to the applicant. The loss includes exclusion of the applicant from the earlier pension scheme and application of the later pension scheme. In other words, the applicant is to suffer no fault of his. A party cannot be made to suffer for no fault of his, vide *Bhoop v. Matadin Bhardwaj*, (1991) 2 SCC 128, wherein the Apex Court has held, "*The learned Single Judge in the High Court rightly held that a party cannot be made to suffer for no fault of her own.*" Similarly, as to the impermissibility of delay on the part of the respondents in recoiling against the employees, the Apex Court in the case of *Nirmal Chandra Bhattacharjee v. Union of India*, 1991 Supp (2) SCC 363 held, "*The mistake or delay on the part of the department should not be permitted to recoil on the appellants.*"



8. Of course, the applicant has relied upon the decision in the case of *A.K. Soumini v. State Bank of Travancore, (2003) 7 SCC 238* for notional promotion, but the same is not applicable to the facts of the case as could be seen from the very decision wherein the delay in promotion is on the ground of pendency of the case in the Court:-

"9. So far as the case on hand is concerned, the appellant was denied promotion in terms of the promotion policy under which it was necessary for a candidate to secure at least minimum eligibility marks of 6 1/2 at the interview and the learned Single Judge allowed the claim only on the ground that such prescription of minimum marks was not valid. Though, the Division Bench also affirmed the same, this Court overruled the said decision and upheld such prescription. But taking into account the pendency of the appeal in this Court for a considerable time, and on account of which the appellant also did not appear in the subsequent tests, benefit to promote her was not denied."

Other citations support the case of the applicants.

9. Next is the point relating to relying upon a judgment which is clamped with a stay by a higher Court.

10. The applicant's counsel relied upon the following decision of the Apex Court to hammer home the point that just because a case is pending before a higher Court, review of the earlier order cannot be refused and similarly he has relied upon the decision of the Hon'ble High Court of Punjab and Haryana in support of his case that stay of a particular order would not bar the court below

to follow the decision (under stay) in an identical case:-

(a) *Kapoor Chand v. Ganesh Dutt*, 1993 Supp (4) SCC 432, at page 432 :

"15. This petition has been filed for grant of special leave to appeal against the order dated December 14, 1990 whereby the review petition filed by the petitioners for review of the judgment dated July 23, 1987, has been dismissed by a learned Judge of the High Court on the ground that since special leave petition has been filed before this Court against the main judgment, the review petition was not maintainable because the order of the High Court would merge automatically in the order of this Court. This special leave petition has become infructuous since the said judgment of the High Court dated July 23, 1987 has been set aside by us. We, however, wish to indicate that the High Court was not right in dismissing the review petition on the ground that in view of special leave petition having been filed against the judgment sought to be reviewed, the review petition was no longer maintainable because the judgment of the High Court would merge in the order of this Court. The question regarding merger of the judgment under review in the order of this Court would have arisen only after this Court had considered the special leave petition on merits and had passed an order on the matters dealt with in the judgment of the High Court dated July 23, 1987. Till such an order was passed by this Court, it was competent for the High Court to review its judgment dated July 23, 1987 and the review petition could not be dismissed as not maintainable merely because special leave petition had been filed against the said judgment before this Court and was pending. The special leave petition is dismissed with the aforesaid observations."

(b) (1984) 2 SLR 731 - *Roshan Jagdish Lal Duggal and others vs the Punjab State Electricity Board, Patiala and others*, wherein at para 11, the High Court has held:

"The observations reproduced in the Limine Order dismissing CWP No. 5911 of 1983 cannot be pressed to canvass the proposition that an order of the High Court ceases to be a binding precedent after it is assailed in appeal and its future operation suspended. The admission of an appeal against the order of the High Court and the suspension of its operation during the pendency of the appeal does not have the effect of rendering it non-est till the disposal of the appeal nor has it been so held in the order dated February 14, 1983, dismissing CWP No. 5911 of 1983 in limine, wherein the castigation of a few members of the



Haryana Public Service Commission in another writ was not allowed to be utilized because this finding was sub judice before the Supreme Court. It is thus obvious that the ratio of Sukhdev Raj Sharma's case (supra) shall continue to be a binding precedent irrespective that an appeal therefrom is pending in the Supreme Court and its future operation suspended till its disposal."

11. In a more effective term, the Apex Court has echoed the above legal proposition in the case of **Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.**, (1992) 3 SCC 1 in the following words:

"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending."

12. Thus, the contention of the applicant that a mere stay of operation of the earlier order dated 5th June 2003 in OA No. 141/2003 and 193/2003 does not bar the applicant from citing as a precedent nor could the stay prevent this Tribunal from following the precedent has merit. Of course, if at a later point of time, the stay is made absolute by the High Court, the decision thereof shall bind



that case also which has relied upon the earlier judgment as a precedent.

13. In OA 141/2003, what was precisely held as illegal and as such set aside by the Tribunal is the very same clause "*Regarding unfilled departmental quota vacancies to be added to Gramin Dak Sevak Merit quota decision will be taken only when approved by the Directorate*".

14. If, in accordance with the above decision of the Apex Court, the above order of the Tribunal, though under the clutches of stay, can certainly be relied upon by the applicant and the same can be followed. Once the above stipulation goes, then the act on the part of the respondents in not considering the case of the applicant along with other merit candidates of GDS becomes illegal as delay in appointment of the applicant telescopically resulted in various losses, such as seniority, and also put them to loss of other benefits. In order to render justice, all that could be done is to deem the applicants as having been appointed from the same date the merit candidate in the GDS had been appointed but restrict the benefit only to notional appointment and notional fixation of pay and allowances so that their appointment would be advanced and the old pension scheme would be applicable to them.

15. In the end, the OA succeeds. It is declared that the applicants 2 to 6 are deemed to have been appointed as postman w.e.f. 30-01-2003 and their pay be fixed notionally in the scale of Rs 3050 - 4590 while actual pay would be from



the date they have assumed their charges. Their seniority shall also be accordingly fixed (of course, junior to those already appointed against the merit quota). The consequential relief viz., fixation of pay at higher stage on the date they have assumed the charges, payment of arrears of pay and allowances arising therefrom and annual increments, entitlement to pension as per the rules prevalent as on 30-01-2003 would all accrue. Respondents shall accordingly pass suitable orders for fixation of pay and allowances and make available the arrears of pay and allowances to the applicants 2 to 6 within a period of four months from the date of communication of this order.

16. Under the above circumstances, there shall be no orders as to costs.

(Dated, the 7th July, 2006)

N. Ramakrishnan

N. RAMAKRISHNAN
ADMINISTRATIVE MEMBER



K.B.S. RAJAN
JUDICIAL MEMBER

cvr.